THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

CASE NUMBER: FAIS 02522/12-13/ WC 1

In the matter between:

DEON VICUS SMIT **Complainant**

and

HUIS VAN ORANJE FINANSIËLE DIENSTE BPK **First Respondent**

STEPHANUS JOHANNES VAN DER WALT **Second Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, (ACT 37 OF 2002), (the Act)

A. THE PARTIES

[1] Complainant is Mr Deon Vicus Smit, an adult male pensioner whose particulars are on file with the Office.

[2] First respondent is Huis van Oranje Finansiële Dienste Bpk, a public company duly incorporated in terms of South African Law, registration number 1995/006025/06, with its principal place of business at 1421 Collins Avenue, Moregloed, Pretoria. First respondent was authorised as a financial services provider in terms of the FAIS Act, with license number 687, which lapsed on 11 July 2011.

[3] Second respondent is Stephanus Johannes van der Walt, an adult male representative of first respondent in terms of the FAIS Act. The regulator's records

indicate second respondent's address as Unit 5, Ground Floor, 11 Marco Polo Street, Highveld, Centurion.

[4] At all material times second respondent rendered financial services to complainant.

[5] I refer to first and second respondents as respondent. Where appropriate I specify.

B. FACTUAL BACKGROUND

[6] On 1 September 2008 complainant entered into an agreement with Blaauwberg Beach Hotel (BBH), described as a "loan agreement with the option to purchase[1]" shares in Grey Haven Riches 9 Ltd[2]. The agreement stipulated that complainant agreed to loan an amount of R100 000 to Midnight Storm Investments 386 (Pty) Ltd (Midnight Storm); the latter would in turn contract with Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape[3] (described as a company that specialises in construction and building), to develop the hotel.

[7] The loan, according to the agreement, entitled complainant to an irrevocable right to own shares in in Grey Haven Riches 9 Ltd, (Grey Haven 9). After completion of the development of BBH, Grey Haven Riches, would assume ownership of the entire shareholding in BBH.

[8] In terms of the agreement, Midnight Storm was entitled to use the funds raised from the public in whatever way it deemed fit, in the course of the development of the hotel.

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1 Translated from Afrikaans

2 Registration number 2007/022968/06

3 Registration number 1997/004873/07

[9] Complainant would receive 19% interest per annum on the investment, according to the papers.

[10] Supporting documents have been provided by complainant to demonstrate that during May 2009, the aforementioned agreement was converted into an agreement to purchase debentures in the amount of R100 000.

[11] During October 2009, complainant concluded a second agreement with Grey Haven Riches 11 Limited (Grey Haven 11), a public company with registration number 2007/025464/06, for the purchase of debentures in the amount of R100 000, in Blaauwberg Beach Hotel, Erf 19390[4], bringing complainant's total investment in Realcor to R200 000.

About Realcor

[12] Realcor was an authorised financial services provider registered with the Financial Services Board, under license number 31351. Realcor used various subsidiary companies for purposes of obtaining funding from the public for its development projects, which included Grey Haven Riches 9 Ltd, Grey Haven Riches 11 Ltd, and Iprobrite Ltd (hereinafter, collectively referred to as "Realcor").

[13] Midnight Storm Investments 386 Limited[5] ("MSI"), was a public company which owned the immovable property on which the hotel was being constructed.

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[4] Noted in the deeds office of Cape Town as Erf 19390, Milnerton

[5] Registration number 2007/01927/06

[14] Realcor subsidiaries raised money by issuing the investing public with one (1) and five (5) year debentures and various classes of shares[6]. In this way Realcor was able to raise substantial amounts of money from the public, funds which were mainly earmarked for the construction of the hotel.

[15] The debentures and shares were marketed as attractive on the basis that investors would receive monthly interest payments and dividends, before and after the construction of the hotel. The target market was mainly the elderly or adult persons making provision for post-retirement income. Whilst an ordinary bank savings account would fetch a single digit interest per annum at the time, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it was not clear how this return was to be achieved.

[16] Meanwhile the investment was marketed as safe and guaranteed, with minimal risk of loss of capital as the investment was in "property" such as the hotel.

[17] Pursuant to concerns and allegations raised by members of the public that Realcor was obtaining money from the public unlawfully, the South African Reserve Bank (hereinafter, the "Reserve Bank"), on 21 April 2008, conducted an inspection of Realcor's affairs through PricewaterhouseCoopers ("PwC") in terms of Section 12 of the South African Reserve Bank Act[7].

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6 The capital structure involved a combination of a share and a debenture/loan and conversion of debentures into shares. Whilst a debenture earns interest, a shareholder is entitled to a dividend provided they are declared and there is profit available for distribution.

7 Act No 90 of 1989

[18] Through the inspection, the Reserve Bank found that Realcor had conducted the business of a bank without being registered or authorised to operate as such. Realcor was thereafter placed under supervision and on or about 28 August 2008, the Reserve Bank appointed PwC as managers of Realcor. The Reserve Bank further prohibited Realcor from obtaining further deposits from the public, and took steps, by appointing PwC, to ensure that investors' money was repaid.

[19] The application for liquidation of MSI proceeded on 16 August 2012 and during May 2013 the hotel was sold for R50 million, dashing any hopes of investors to recoup their investments.

C. THE COMPLAINT

[20] Complainant states that following advertisements on "Radio Pretoria" about Realcor, he contacted second respondent telephonically. Second respondent advised complainant that it was a good investment and that it would pay 19% interest per annum. Complainant further indicated that he never got to meet second respondent personally; their discussions were conducted telephonically, whereafter second respondent would e-mail complainant the necessary forms to complete. At no time was complainant advised of the risks inherent in the investment.

[21] Complainant stated that interest payments first decreased during April 2010, by October 2010, payments had completely ceased. Complainant claims he contacted respondent on several occasions for assistance to no avail. To this day, complainant's capital remains unpaid.

[22] From the foregoing factual background, complainant is aggrieved by the conduct of respondent. The basis of complainant's claim against respondent is the latter's failure to render financial services in line with the FAIS Act and the General Code, which includes respondent's failure to appropriately advise complainant and disclose the risk involved with the Realcor investment.

D. RELIEF SOUGHT

[23] Complainant seeks payment of the invested amount of R200 000.

E. RESPONDENT'S RESPONSE

[24] During August 2012, the complaint was referred to respondent to resolve it with complainant, in terms of Rule 6 (b) of the Rules on Proceedings of this Office. Respondent duly responded during November 2012. In his brief response, respondent merely indicated that complainant made one investment with them during September 2009 and provided some supporting documentation. Complainant has however submitted proof of two investments with Realcor, which he concluded following advice provided by respondent. Both sets of documents appear to have been signed by second respondent. Respondent was provided an opportunity to clarify the question whether complainant made one or two investments with them; he failed. I am therefore proceeding on the basis of the documentation before me, which confirms two investments.

[25] On 14 July 2016, a notice in terms of section 27 (4) was issued to respondent advising that the Office had accepted the matter for investigation and further informing respondent to provide all documents and or recordings that would support their case, so the Office can begin with its investigation. The notice further

indicated to respondent that in the event the complaint was upheld; they could face liability. No further response was received.

F. DETERMINATION

[26] The issues for determination are:

26.1 whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. Specifically, the question is whether complainant was appropriately advised, as demanded by the Code;

26.2 in the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of; and

26.3 the amount of the damage or financial prejudice.

G. LEGISLATIVE FRAMEWORK

[27] I deem it necessary to first isolate the legislative framework relevant to this matter:

27.1 Sections 13 (2) (b); 16 (1) and (2) of the FAIS Act;

27.2 The General Code of Conduct for Authorised Financial Services Providers and Representatives, in particular, Sections 2, 8 (1) (a) to (c); 8 (2); 8 (4) (a); and 7; and;

27.3 Government Notice 459 (published by means of Government Gazette 28690 of 2006), ("the Notice").

Whether the complaint is directed at the appropriate party

[28] The essence of complainant's complaint, is respondent's failure to appropriately advise him about the inherent risks in the investment.

[29] Respondent acted as an authorised representative of Realcor Cape. This much is confirmed by the contract signed between complainant and respondent[8]. As to whether respondent may be held liable for the financial services rendered whilst acting in his capacity as representative of Realcor, attention should be given to the definition of a representative[9]. The definition of a representative assumes that a person acting as a representative has to exercise the relevant final judgment, decision making and deliberate action inherent in the rendering of a financial service to a client[10].

[30] In *Moore versus Black*[11], the Appeal Board stated as follows:

"In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:

1. acts on behalf of the provider;

2. Subject to the provider concerned taking responsibility for these acts.

Apart from these two (2) qualifications, a representative acts as if it were a provider.

…The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility

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8 See "Adviesrekord van 'n onderlinge ooreenkoms"

9 According to Section 1 of the FAIS Act 37 of 2002, a 'representative 'means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial service provider, in terms of conditions of employment or any mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in subsidiary or subordinate capacity…

10 Nell v Jordaan FAIS 05505-12/13 GP 1

11 In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[31] The question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal[12]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely with the financial services provider. In dismissing the argument, the Board concluded, *'the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.*'

[32] Section 13(2)(b) of the Act[13] states:

"An authorised financial services provider must take such steps as may be reasonable in the circumstances to ***ensure that representatives comply with any applicable code of conduct*** *as well as with other applicable laws on conduct of business*." (My emphasis).

It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct.

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12 Decision handed down on 14 November 2014, paragraphs 18 to 23

13 Financial Advisory and Intermediary Services Act 37 of 2002

The complaint is thus directed against the correct parties, one of whom is respondent.

Whether complainant was appropriately advised as required by the Code

[33] Respondent was invited to demonstrate that he had conducted due diligence on Realcor, prior to advising complainant. No such evidence was presented and, as will become apparent, respondent conducted no due diligence whatsoever on Realcor.

[34] Had respondent conducted due diligence, he would have learnt of the 2008 inspection by the Reserve Bank. The outcome of which, pointed to Realcor's illegal conduct of running the business of a bank without a license. Respondent would have realised there and then that Realcor was not an investment and directed his client elsewhere.

[35] Respondent had a duty to familiarise himself with the regulatory environment around property syndications. In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made by respondent in order to appropriately advise complainant, one has to refer to the statutory disclosures contained in the Government Notice 459 published in Government Gazette 28690 in 2006, hereinafter referred to as 'the Notice'.

[36] The Notice contains minimum mandatory disclosures, which must be made by promoters of property syndicates. The disclosures must form part of the disclosure document or prospectus, which must be issued by the promoter. By extension, any provider who recommends this type of investment to clients, must be aware of

the Notice and is obliged to deal with the disclosures when advising their client. The aim, as set out in the Gazette, is to protect the public. Some of the most pertinent provisions of Notice 459 are highlighted below:

a) Section 1 (a) states as follows:

"Underlying principles regarding the disclosure document:

Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision".

b) Section 1 (b) states that:

"Investors shall be informed in writing that:

(i) public property syndication is a long-term investment, usually not less than five years;

(ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;

(iii) it is not the function of the promoter to find a buyer should the investor wish to sell his shares and that it is the investor's responsibility to find his own buyer."

c) Section 2 (a) requires that investors be informed that funds received from them prior to transfer will be held in an attorney's trust account. But more importantly, section 2 (b) states as follows:

"Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or

underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."

[37] Information available to this Office points to investors' funds being paid directly into the account of Purple Rain Properties 15 (Pty) Ltd, trading as Realcor, in contravention of section 2 (b) of the Notice. Investors were invited to pay money into the account of Realcor[14]. I could not find a single reference to the Notice in respondent's response. It appears to me that respondent was not even aware of the existence of the Notice. Had respondent been aware of the Notice, he would have realised that Realcor's prospectus undermined its provisions. The aforesaid is further confirmation that respondent had not conducted any due diligence on Realcor.

[38] Section 3 (c) of the notice states:

"The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase thereof and he/she shall state that this was done and that he/she is satisfied with the results thereof."

[39] One can easily conclude from respondent's incomplete response that he had not satisfied himself on whether the promoter of this syndication had complied with the provisions of section 3 (c) of the Notice.

[14] See in this regard clause 5.10 of the Iprobite prospectus which indicates that money is payable as set out in the application form.

[40] It is clear from the prospectus that there were no financial statements available, since the company was a start-up. What was available, was nothing more than a set of management accounts for a respective period. The management accounts dealt with the issuance of debentures, shares and related costs. It is not clear how the management accounts alone would have assisted respondent in concluding that the investment was sound.

About Grey Haven Riches 9' and 11's prospectuses

[41] A mere perusal of the prospectuses reveal that respondent ignored the following red flags, which were sufficient to deter any capable financial advisor from investing with Realcor:

41.1 The promoter of the offer, the companies raising funds [*investment companies- Grey Haven Riches 9 and 11*], the builder that was constructing the hotel; and the property- owning company [*where the hotel was to be built*] were essentially controlled by one and the same person. **The question is, what steps did respondent take to satisfy himself that the interests of his client were protected against director misconduct, given the conflict of interest.**

41.2 There are two directors in Grey Haven Riches 11. Similarly, there were two directors in Grey Haven 9[15].The Grey Haven 11 prospectus provides that:

41.2.1 Their terms and and conditions of service will be determined by (the company), **in other words the two directors themselves**, at a general meeting, the date of which is unknown.

[15] Both Grey Haven and 9's prospectuses contain the same arrangements.

41.2.2 The two directors have the power to nominate any person to act as alternative director.

41.2.3 The two may appoint one or more of their body to the position of managing director and decide on remuneration **'<u>as they see fit</u>'**.

41.2.4 Directors' remuneration is to be decided by them at a general meeting but the two directors will decide on the remuneration of the managing director.

41.2.5 The two directors have '**<u>unlimited borrowing powers'</u>**.

41.2.6 The offer is not underwritten.

[42] The following would have set the scene for self help by the directors from investors' funds: Page 14 of the Grey Haven 11 prospectus: **Interest of Directors:**

42.1 The promoter specialises in construction and development of real estate and marketing of financial products. The property holding company has contracted the promoter at a market related fee to:

42.1.1 Develop and construct the Blaauwberg Beach Hotel on the immovable property.

42.1.2 Procure a suitable international operator to manage the hotel.

42.1.3 Administer and manage the business of the investment company after the completion and opening of the Blaauwberg Beach Hotel until date of transfer of shares to the investment company.

42.2 De Ridder, in her capacity as managing director of the promoter is responsible for:

42.2.1 Overall management of the development and construction of the hotel.

42.2.2 Procurement of a suitable operator to manage the hotel.

42.2.3 The administration of the investment of individual shareholders and shareholders of the investment company.

42.2.4 She is entitled to a salary paid by the promoter and also shares in the profits of the investment company.

[43] This was not an investment by any stretch of the imagination, yet respondent advised his client to invest in this cesspit.

[44] The fundamental flaw in respondent's conduct was his decision to promote this product to his clients, even though he knew that he had not carried out any work whatsoever in order to understand the risk inherent therein.

[45] Turning to respondent's duties in terms of the FAIS Act, section 8 (1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

(a) 'Take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) Conduct an analysis, for purposes of the advice, based on the information obtained;

(c) *Identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement;'*

[46] In order to demonstrate compliance with section 8 (1), respondent provided a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms"[16] for only one of the investments. This document states:

'The share class productive investment is considered as a venture capital investment and seeing that unlisted shares are not readily marketable, Realcor Cape and the representative undertakes to assist the shareholders to sell their shares at market related commission should such a need arise.

It is noted that potential fluctuations because of market conditions associated with property and prime lending rate could have a negative impact on the value of the investment portfolio. It is thus not possible to guarantee the investment capital or the target return and Realcor Cape cannot be held responsible for any losses in this regard. It is confirmed that the client understands and accepts the underlying market risks.'

[47] Before I deal with the rest of the advice record, a brief comment is warranted on respondent's notes, (para 46). First respondent describes the product sold as *'a venture capital investment'.* This is notwithstanding that Realcor had been ordered

[16] Translated to mean Record of Advice of an Underlying Agreement

by the Reserve Bank, as far back as 2008, to desist from collecting funds from investors.

[48] Having said this, venture capitalists are wealthy experienced individuals, who agree to support start-up companies, in anticipation of superior returns. They (venture capitalists) are fully cognisant of the high risk involved in the venture capital market. They may choose to support a new company either with capital or managerial experience. The point to stress here is, venture capitalists have the capacity to deal with the high risk involved in this type of investment. At the very least, assuming that Realcor had no challenges with the law in any way, I would expect a provider who advises a client on this type of investment to take steps to satisfy themselves that the investor's profile is suitable to it, as required by section 8 (1). To expect anything less would be undermining the Code. Thus, I find it disturbing that respondent, after luring complainant to this 'safe investment', found it appropriate to hide behind this record. This is nothing short of trickery.

[49] The record of advice deals with three types of products that were considered, namely Realcor Cape, PIC and Sharemax, all three products being property syndications. There is no indication that other investment types were considered. As to why complainant's needs could only be addressed by means of property syndication products, respondent has not explained. The recommendation to invest in Realcor was on the basis that it offered the highest return. This much is noted in the advice record. There is no information evidencing that respondent was concerned with complainant's capacity to absorb high risk. Equally, there is no evidence that respondent was open to consider other types of investments with

less risk than property syndications. Respondent's conduct failed to meet the requirements of section 8 (1) (c).

[50] Even if complainant wanted to invest in Realcor, respondent had a duty to state in no equivocal terms that:

50.1 Realcor had been directed by the Reserve Bank not to collect investor funds, following the inspection;

50.2 information provided in the prospectus was conclusive that investors carried all the risk; and, certain provisions of the prospectus undermined Notice 459;

50.3 the product was high risk and not suitable for complainant; and

50.4 complainant could lose his capital.

Had these statements been made clear, the probabilities that complainant would have gone ahead with the investments are zero.

[51] It appears from this document and the surrounding circumstances of this case that respondent had taken no time to satisfy himself that complainant understood the advice, in violation of section 8 (2). The provision states that a provider must take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision.

[52] I conclude that respondent was completely out of his depth and could not have appropriately apprised complainant of the risks involved, in violation of sections 7 of the Code.

Respondent's record of advice

[53] Respondent provided documents entitled “Adviesrekord ingevolge artikel 8(4) van die Algemene Kode” which translates to the Record of Advice as required in section 8(4) of the Code. This document was allegedly completed at the time the investment was made and is meant to be evidence of compliance with the aforesaid section of the Code.

[54] Before I examine the document further, it might be useful to refer to section 8 (4) (a). The section stipulates that where a client has not provided all the information requested by a provider for the purposes of furnishing advice, the provider must fully inform the client and ensure that the client understands that:

(i) a full analysis could not be undertaken;

(ii) there may be limitations on the appropriateness of the advice provided; and

(iii) the client should take particular care to consider on its own whether the advice is appropriate considering the client’s objectives, financial situation and particular needs.

[55] Part three of the record of advice contains the following question and answer:

Question: Reason as to why needs analysis was not conducted?

Answer: The client did not want to provide all the necessary information, which would have enabled me to conduct a detailed needs analysis.

[56] Part four of the record of advice notes the following information:

Client’s financial information:

- *An analysis of the client’s financial position was not conducted*
- *The client did his own analysis*

Client's risk profile:

- *The client manages his own investment portfolio*

Client's needs and objectives:

- *To earn the highest return on his investments as fast as possible*

[57] On further inspection of this document, it is evident that the above information was already inserted in the document prior to the signature thereof. Certain answers on the form were pre-printed and could not have been a proper response completed in accordance with complainant's circumstances at the time. In fact, second respondent never even met complainant. It is not clear how respondent would have ensured that complainant understood the advice and the risks, if he never took the time to consult with him. The only rational conclusion to be made under these circumstances is that the records do not meet the requirements of section 8 (4) (a).

[58] Respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment. Complainant was a pensioner and relied on the income that was meant to be generated from this investment. His only other resource was an Absa Investment account. This is relevant information relating to complainant's circumstances, which does not appear anywhere in respondent's record of advice.

[59] What the Code contemplates in section 8 (1) is that a provider takes into account necessary and available information for the purpose of conducting an analysis. There is no evidence that respondent carried out an analysis at all, nor did he consider any other investments that may have been suitable to complainant's

circumstances. It seems reasonable to conclude that respondent intended to sell the Realcor investment whether or not complainant's circumstances were suited to it, in violation of section 8 (1) (c) of the Code.

[60] I am persuaded that the content of the advice record was not explained to complainant and that he was unaware of the consequences of affixing his signature to the said record. The paucity of information relating to complainant's circumstances suggests that respondent had no intention of providing appropriate advice. The documents are nothing more than a failed attempt to create the impression that the Code had been adhered to.

Did respondent's conduct cause complainant's loss?

[61] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. I have already mentioned that based on the outcome of the inspection by the Reserve Bank and the violations of Notice 459, respondent should have never recommended the product to anyone. But for respondent's advice, there would be no investment in Realcor. This makes respondent's advice the primary cause of complainant's loss. The next enquiry deals with legal causation. The question is whether, as a matter of public and legal policy, it is reasonable, to saddle respondent with liability for the consequences of the failure of the investment. In simple terms, can it be said that respondent, in giving advice that was inappropriate in terms of the Act and the Code, should have foreseen the resultant collapse of the investment.

[62] It is easy and convenient to impute loss of investors' money to director mismanagement or other commercial causes. In this case however, complainant's

loss was not caused by management failure or other commercial influences. If respondent had done his work according to the Act and the Code, no investment in Realcor would have been made, bearing in mind complainant's tolerance for risk. On the strength of the outcome of the Reserve Bank's inspection, respondent should have known that this is not an investment but an illegal venture. Had respondent read the prospectus or disclosure document, he would have realised that the directors of Realcor had no intention of conducting themselves within the law; yet another reason to keep his client's money away from Realcor.

[63] Respondent should have inferred from the overall failure to comply with the Notice, on the part of the promoters of the scheme, that this was not an investment. Had respondent been acting within the law, he would have refused to promote an investment he could not understand. He ought to have been aware that he, owing to his lack of understanding of the product, was in no positon to advise a client of the risks involved. In short, the cause of loss was the inappropriate advice provided by respondent. That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP would ignore the Act and Code in providing financial services to their clients and hope that the investment does not fail. Then when the risk materializes and loss occurs they hide behind unforeseeable conduct of the directors. This will fly in the face of public and legal policy and the provisions of the Act and Code.

[64] The reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered be foreseeable: it was sufficient that the general nature of the harm suffered by complainant and the general manner of the harm

occurring was reasonably foreseeable. I refer in this regard to the matter of *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[17] where the Court held that:

"as to the issues of loss and causation, that although the untrue report issued by the respondent had been a factual cause of the appellant's loss, the test to be applied to the question whether the furnishing of the untrue report had been linked sufficiently closely or directly to the loss for legal liability to ensue was a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

[65] Information at this Office's disposal points to the following conclusions:

65.1 Respondent failed to note that Realcor's prospectus undermined the law.

65.2 Respondent failed to conduct due diligence on Realcor. Had he done so, he would have been aware of the outcome of the Reserve Bank's inspection in 2008.

65.3 It is an undisputed fact that respondent, prior to advising complainant, had not carried out any work to acquaint himself with the legal environment in which property syndications operate.

65.4 Respondent had no means to evaluate the financial viability of the business proposal, yet he concluded that the investment was safe.

[17] 1994 (4) SA 747 (AD)

65.5 Respondent failed to advise complainant that by investing in what he described ‘venture capital share’, he was gambling with his investment.

65.6 Had respondent adhered to the Code, he would have realised that complainant’s circumstances were unsuitable to invest in Realcor.

65.7 It was respondent’s insistence on selling this investment to complainant, regardless of the surrounding circumstances, that saw respondent violate his duty to act in the interests of his client and the integrity of the financial services.

[66] I find that, in advising complainant to invest in Realcor, respondent contravened sections 2; 7 (1) and 7 (2); 8 (1) 8 (2); and 9 of the Code. I also find that respondent’s conduct caused complainant’s loss.

H. QUANTUM

[67] Complainant invested an amount of R200 000. There are no prospects of ever recovering the money from the hotel.

[68] Accordingly, an order will be made that respondents pay to complainant an amount of R200 000 plus interest.

I. ORDER

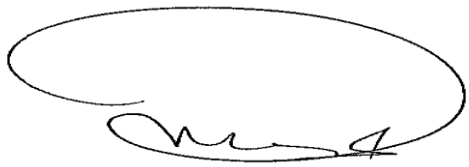
[69] In the premises, I make the following order:

1. The complaint is upheld.

2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R200 000;

3. Interest on the amount of R200 000 at the rate of 10.25%, seven days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 15th DAY OF DECEMBER 2016



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OMBUD FOR FINANCIAL SERVICES PROVIDERS