

Funds Management & Financial Services Alert

Client fails in claim of negligence against financial planner

August 2013

In brief:

- A client sued her financial planner for damages in respect of financial losses suffered when two investments in Basis Capital funds recommended by her financial planner failed.
- The court held that given the client's risk profile and the reasoning behind the decision to recommend the investments (which included reliance on independent research reports), there was no basis that the recommendations were negligent or wrongful.

In *Jordan v HLB Mann Judd Wealth Management (NSW) Pty Ltd*, a single judge of the Federal Court dismissed an application against a financial planner for negligence and misleading and deceptive conduct relating to recommendations to invest in two Basis Capital funds which ultimately failed.

Facts

The client was an unsophisticated investor who had received approximately \$7 million as part of a matrimonial property settlement. After purchasing a family home with the proceeds, the client intended to invest about \$5.5 million. She engaged HLB Mann Judd Wealth Management (NSW) Pty Ltd (**HLB**) to assist her invest the money.

After undertaking a risk profile assessment, HLB determined the client was between a balanced and growth risk profile. Accordingly, it recommended the following portfolio of investments:

Investment	Amount Invested \$
Australian Equity	
Lonsec Model Income Share Portfolio	800,000
Ausbil Aust Active Equity Fund	200,000
BT Imputation Fund	200,000
IML Australian Share Fund	200,000
EleyGriffiths Group Small Companies Fund	52,500
International Equity	
Credit Suisse International Shares Fund	280,000
Russell Global Opportunities Fund	280,000
PM Capital Absolute Performance Fund	280,000
JB Were Global Small Companies Fund	197,500
Property	
AMP Core Property Fund	207,500
Hedge Funds	
Basis Aust-Rim Opportunity Fund	207,500
HFA Diversified Investments Fund	207,500
Fixed/Floating Interest	
Basis Yield Fund	330,000
Credit Suisse Global Hybrid Income Fund	250,000
Mariner Mortgage Trust	250,000
Cash Management	
Wrap Cash Account	207,500
Total	4,150,000

The Basis Capital investments both failed. Those funds were heavily invested in collateralised debt obligations and were one of the first victims of the global financial crisis.

The client alleged that HLB had breached contractual and tortious duties of care owed by them and that they had engaged in misleading and deceptive conduct or conduct that was likely to mislead and deceive by representing to her in the first statement of advice (SOA) she received that the investment recommendations which they made in that letter were suitable for her having regard to her risk profile when they were not. She also argued that HLB had breached section 945A of the *Corporations Act 2001* (which has since been repealed by the FOFA legislation) by making recommendations without a proper basis for doing so. HLB denied these claims.

The decision

The court found for HLB and dismissed the claim.

The judge described the following proposition as being at the heart of each cause of action: *"No ordinary skilled financial adviser should have recommended to [the client] that she invest \$537,000 out of investments funds of \$5.2-5.5 million in the two Basis Funds."*

In making his decision, Justice Foster made the following points:

- section 945A was not invoked because the client was a wholesale and not retail client;
- the risk profile assessment undertaken by HLB was reasonable;
- substantial evidence was led by HLB about how the investments were selected for the client, including reliance on information provided by research houses about the investments including the Basis funds;
- the Basis funds had performed well up to November 2006: they had delivered stable returns on a monthly basis over a considerable period and both of them were highly regarded in the market place;

- there was no evidence that HLB was aware or ought to have been aware of particular information which should have led it to arrive at a different assessment of the Basis funds and of the future prospects of those funds; and
- as the client had admitted during evidence that she had not read the SOA HLB had prepared for her, it was difficult to argue that she had been misled by the recommendations contained in it.

In addition to dismissing the application, the judge awarded costs against the client and also awarded an indemnity for costs from 24 May 2012, being the date the client rejected a settlement offer from HLB in the sum of \$150,000.

Processes help establish a good defence

Although two of the recommended investments had failed and the client had suffered significant losses as a result, this case vindicated the advice process which the financial planner undertook to determine the portfolio of investments recommended. The case confirms the proposition that merely because a recommended investment fails, the advice provided is not necessarily negligent.

Financial advisers who can demonstrate rigorous investment selection processes and sound reasoning for investment recommendations will stand themselves in good stead in any potential claim for negligence.

Thomsons Lawyers can assist financial services licensees who face claims for misleading and deceptive conduct and negligent advice. Please contact Chris Mee for further information.

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