SUPREME COURT OF QUEENSLAND

CITATION:	*McDonald v AMP Financial Planning Pty Limited* [2018] QSC 195
PARTIES:	**LEANNE YVONNE MCDONALD** (plaintiff) **v** **AMP FINANCIAL PLANNING PTY LIMITED ABN 89 051 208 327** (defendant)
FILE NO/S:	BS No 1927 of 2018
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4-8 June; 11 June 2018
JUDGE:	Douglas J
ORDER:	**That the plaintiff's claim be dismissed and the existing injunction be dissolved. Further submissions shall be heard in respect of the form of the order and costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the plaintiff was a financial advisor licensed to provide financial advice and sell the defendant's financial products pursuant to a contract – where the defendant alleged that the plaintiff did not comply with her obligations under the contract – where the defendant was entitled to terminate the contract without notice if the plaintiff breached a material obligation – where the defendant was entitled to terminate the contract by giving not less than 90 days' notice if the plaintiff breached an obligation capable of remedy and did not remedy that breach within 14 days of receiving notice of the breach – where the defendant terminated without notice – whether breach of an obligation

capable of remedy could give rise to an ability to terminate without notice – whether the defendant was entitled to terminate without notice

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – FINANCIAL PRODUCTS – GENERALLY – where the plaintiff was a financial advisor licensed to provide financial advice and sell the defendant's products pursuant to a contract – where the plaintiff's obligations under the *Corporations Act* 2001 (Cth) were incorporated into the contract – where the defendant alleged that the plaintiff did not comply with her obligations under ss 946A, 961B and 961J of the *Corporations Act* 2001 (Cth) – where the defendant terminated the contract without notice – whether the plaintiff complied with her obligations under the *Corporations Act* 2001 (Cth) – whether the plaintiff was entitled to terminate

ESTOPPEL – ESTOPPEL BY CONDUCT – ACT, OMISSION OR ASSUMPTION – REPRESENTATION GENERALLY – GENERALLY – where the plaintiff was a financial advisor licensed to provide financial advice and sell the defendant's financial products pursuant to a contract – where, in accordance with that contract, the plaintiff was audited on a yearly basis – where those audits indicated that the plaintiff was complying with her obligations – where the defendant terminated the contract without notice for breach of obligations – whether the audits represented to the plaintiff that she was complying with her obligations – whether the defendant was estopped from terminating the contract for breach of those obligations

ESTOPPEL – ESTOPPEL BY DEED OR CONVENTION – ESTOPPEL BY CONVENTION – GENERALLY – where the plaintiff was a financial advisor licensed to provide financial advice and sell the defendant's financial products pursuant to a contract – where the defendant alleged that the plaintiff breached her obligations under that contract – where the defendant terminated the contract without notice – where the plaintiff had breached her obligations on previous occasions – where the defendant had not terminated the contract on those previous occasions – whether the defendant was estopped from terminating the contract

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – MANDATORY INJUNCTIONS – TO COMPEL PERFORMANCE – GENERAL PRINCIPLES – where the plaintiff was a financial advisor licensed to provide financial

advice and sell the defendant's financial products pursuant to a contract – where the defendant terminated that contract without notice – where the plaintiff alleged that the defendant was required under the contract to provide 90 days' notice – where the plaintiff sought an injunction restraining the defendant from terminating for 90 days – whether an injunction ought to be granted to enforce the relationship

Corporations Act 2001 (Cth), s 944A, s 946A, s 946AA, s 946B, s 946C, s 947B, s 951C, 961B, s 961C, s 961D, s 961E, s 961G, s 961J
Corporations Regulations 2001, reg 7.7.09, reg 7.7.10AE

Bowstead & Reynolds on Agency, (21st ed, 2018)
Hilliard and Levy, *Planning for the Future of Financial Advice: A Handbook*, LexisNexis (2014)
Meagher, Gummow & Lehane's *Equity Doctrines & Remedies* (5th ed, 2015)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36
Australian Securities and Investments Commission v NSG Services Pty Ltd (2017) 122 ACSR 47; [2017] FCA 345
Batson v De Carvalho (1948) 48 SR (NSW) 417
Burger King Corp v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558; [2001] NSWCA 187
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24
Giacomi v Nashvying Pty Ltd (2008) QConvR 54-684; [2007] QCA 454
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235
Network Ten Pty Limited v Seven Network (Operations) Limited [2014] NSWSC 274
Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd [1989] 2 Qd R 40
Re Zurich Australian Insurance Ltd [1999] 2 Qd R 203; [1998] QSC 209
Shanemist Pty Ltd v Denmac Nominees Pty Ltd [2003] QSC 373
Transport Workers Union of Australia v Qantas Airways Ltd (2012) 199 FCR 190; [2012] FCAFC 10
Tri-Global (Aust) Pty Ltd v Colonial Mutual Life Assurance Society Ltd (1992) ATPR 41-174

	Visscher v Giudice (2009) 239 CLR 361; [2009] HCA 34 *Zintix (Australia) Pty Ltd v Employsure Pty Ltd* [2018] NSWSC 924
COUNSEL:	K Downes QC with B Wacker for the plaintiff P Dunning QC with C Wilkins for the defendant
SOLICITORS:	Tucker & Cowen Solicitors (Brisbane) acting as Town Agents for Clifford Gouldson Lawyers (Toowoomba) for the plaintiff Clayton Utz for the defendant

[1] The plaintiff has been an authorised representative of the defendant, AMP Financial Planning Pty Limited ("AMPFP"), as a financial adviser since 2007. Since 2012 a company called Create Financial Solutions Pty Ltd, majority owned by the plaintiff, and trustee of the Create FS Unit Trust, took over the plaintiff's business and has continued to operate a financial planning and mortgage broking business under the trading name "Create Financial Solutions" ("Create FS") with the plaintiff as an employee.[1] That entity then took on 220 clients of the plaintiff as its clients.[2]

[2] In or about May 2012 Create FS entered into an agreement with AMPFP.[3] The plaintiff is listed as a guarantor of Create FS's obligations under the agreement.[4] Pursuant to cl 4.4 of that agreement the plaintiff is prevented from being appointed as a financial planner for another licensee outside of the AMP group, defined as AMP Limited ("AMP") and each of its related bodies corporate.[5]

[3] On 17 May 2012 the plaintiff also entered into an agreement with AMPFP described as "Authorised Representative Deed of Agreement - Representative Working for a Corporate Practice" ("the AR Agreement"). The defendant alleges in this proceeding that the plaintiff has breached the AR Agreement in a number of respects justifying it in terminating her engagement as an authorised representative and the AR Agreement itself on 5 February 2018 pursuant to a termination notice which the plaintiff challenges. That notice, given by a letter dated 5 February 2018, asserted that there were systemic issues in the plaintiff's advice process.[6]

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1 See Ms McDonald's first affidavit at para 4-7.

2 See Ms McDonald's first affidavit at para 21.

3 See Ms McDonald's first affidavit at para 8.

4 See Ex 2 vol 1 p 85.

5 See Ex 2 vol 1 p 80.

6 See Ms McDonald's first affidavit at para 175; see also Ex 2 vol 2 p 912.

[4] Clause 14.2(c)(ii) and cl 15.3(c) of Master Terms incorporated into the AR Agreement permitted the defendant to revoke the plaintiff's authorisation as a representative and to terminate the AR Agreement immediately by written notice but without any prior notice if she failed to comply with any material obligation under the AR Agreement, her authorisation or the relevant law.[7] Clause 14.2(b) and cl 15.3(a) permitted revocation of the plaintiff's authorisation and termination of the AR Agreement also on 90 days' written notice.[8]

[5] By order dated 13 March 2018 the defendant was restrained until trial from taking any further step to act upon or give effect to the termination of the AR Agreement and the revocation of the plaintiff's authorisations to act as the defendant's representative contained in that letter.

[6] It is apparent from the conduct of the trial that the defendant does not wish to continue to use the plaintiff's services and that the principal object of the proceeding, from the plaintiff's point of view, is to contest any finding that the purported termination of 5 February 2018 was valid under cl 14.2(c)(ii) and cl 15.3(c). The object of that exercise was, it seems, to permit the plaintiff's authorisation to be terminated instead on the giving of 90 days' notice, a period during which she would be able to pursue the possibility of acting as an authorised representative for another similar financial planning body unencumbered by her authorisation from the defendant having been terminated for cause. On no view do the parties contemplate a continuing relationship between them after the resolution of these proceedings.

[7] To deal with the issues that were litigated, which included arguments that the defendant was estopped from relying on its strict legal rights under the AR Agreement, it is necessary to set out some of the history of the dealings between the parties, particularly the nature of the training provided to the plaintiff, how her performance and that of Create FS were audited and the procedures used to terminate her engagement.

Background

The plaintiff's training and experience

[8] By the time of the events associated with this dispute the plaintiff had considerable experience as an authorised representative of AMPFP. It provided many online and other resources to assist her with her continuing professional development.[9] She had no issue with her technical or product knowledge.[10] She had received a number of awards from the defendant for her work.[11] AMPFP characterised those awards, however, as

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7 See Ex 2 vol 1 pp 110,112.

8 Ex 2 vol 1 pp 110, 112.

9 T 1-85/5; Ex 2 vol 14 p 6071.

10 T 1-85/36 - T 1-86/32.

11 T 1-20/25-34.

ones relating to her skill in sales and marketing rather than in respect of compliance with her contractual and statutory obligations.

Auditing by the defendant

[9] The plaintiff's compliance with her contractual and statutory obligations was reviewed by AMPFP's auditors at approximately annual intervals.[12] The audit conducted on 28 October 2016 was preceded by a calendar invitation and email from the auditor stating that:

> "[A]n impartial evaluation of compliance processes is critical for a business to ensure it is meeting its regulatory and licensee requirements. Perhaps more importantly, an effective audit will determine potential underlying issues, or causes of those issues which is a necessary step to prevent reoccurrence and to ultimately providing quality advice to clients …".[13]

[10] That message was repeated the next year for the audit conducted by Mr Ben Gillespie in June 2017.[14] The plaintiff said that she believed that if she continued to maintain her client files in the same manner as those the subject of audits (subject to the correction of any errors identified by the defendant) then she was complying with all regulatory and AMPFP licensee requirements.[15] Because she believed those things she said she did not take any steps to alter her processes and practices in relation to her clients' files other than in the manner identified by the defendant during the audits.[16] She said that on a number of occasions her file notes were described by an auditor as more than satisfactory.[17]

[11] For the normal audits in 2015, 2016 and 2017 Create FS received "B" ratings, said to demonstrate a good level of understanding and application of "quality advice principles overall, with some areas for improvement identified".[18] Ms McDonald believed that any errors identified during the audits were not of a type which could or would result in the termination of the AR Agreement or her authorisation.[19]

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[12] Ms McDonald's first affidavit at para 103.

[13] Ex 2 vol 3 p 984.

[14] Ex 2 vol 3 p 987.

[15] Ms McDonald's first affidavit at para 126.

[16] Ms McDonald's first affidavit at para 127.

[17] See paras 115 of Ms McDonald's first affidavit.

[18] Ex 2 vol 14 pp 5759, 5768, 5777.

[19] Ms McDonald's first affidavit at para 125.

[12] It was not suggested to her by the defendant that she needed time to take further training.[20] Mr Swanson, the partnership manager engaged by the defendant to manage the Create FS business, who was, perhaps, more sympathetic to the plaintiff's position than some other employees of the defendant, agreed that it was plausible, to a point, that the plaintiff had only been doing what she had been coached to do by previous partnership managers.[21] He said: "You know, I mean, the game changed in 2014, you know, and … I don't believe anybody had coached her differently."[22] He went on to say, however, that there was training available for all licensees about the changes that came in in late 2014 and that it was the adviser's responsibility to be on top of the quality advice fundamentals.[23] He also evidently lost sympathy for Ms McDonald when she refused to refund any fees to her clients as part of a proposed remediation process in discussions she had with representatives of the defendant.[24]

[13] Before the normal audit in 2017 the plaintiff had been identified as "high risk" as part of a pilot program for risk based reviews implemented during the first part of 2017 which began to identify people, who had previously received good scores, failing their audits in some circumstances.[25] Mr Gillespie's evidence was that the audit process remained the same but that who was being audited changed.[26] It was not clear from the evidence what particular risks were identified in respect of Ms McDonald at that stage. Generally speaking, however, the change in process looked into things like complaints, issues through the defendant's advice compliance section, previous audit ratings and the time it took for policies to lapse.[27]

Anonymous complaint about Create FS and the "out of cycle" audit

[14] After the audit by Mr Gillespie in June 2017 a decision was taken to conduct an "out of cycle" audit of the plaintiff.[28] That seems to have been precipitated by an email of 27 July 2017 from a Mr Nicholson reporting to the defendant an issue he had come across for one of his clients, who, he believed, had been put into a worse position by Create FS from their existing insurance and superannuation. The client was unnamed and had previously been a client of a since retired adviser engaged by the defendant. The retired adviser's business was sold to Create FS some years before. The client had existing insurance and superannuation but Create FS immediately changed the client's

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[20] Ms McDonald's first affidavit at para 118.

[21] T 5-10/9-33.

[22] T 5-10/10-30.

[23] T 5-10/28 - T 5-11/6.

[24] T 5-17/1-13.

[25] T 5-31/1 - T 5-32/36.

[26] T 5-32/38-44.

[27] T 5-33/29-33.

[28] Ex 17 at p 27-47.

superannuation platform and insurance provider, creating what Mr Nicholson described as "blatant churn with fees and commission received. (considerable – client is in their 50's)".[29]

[15] Officers of the defendant then decided to do a "deep dive" into the potential issue raised by that complaint. Their initial approach was to identify clients over the age of 50 years who had entered into a new insurance arrangement who had ongoing service arrangements in place and were charged fees greater than $5,000 per annum. They then focussed on clients aged 70 and over. Of those clients, 23 had ongoing service arrangements in place with a fee greater than $5,000 per annum. The recommendation was that the "deep dive" address the ongoing service and further advice provided to clients transferred to Create FS from the earlier body called Downs Financial Services.[30]

[16] The audit was then conducted by Ms Sarah Little in the week commencing 25 September 2017 by means of electronic access into the defendant's document management program known as "COIN". It did not involve access to the plaintiff's hard copy documents nor those kept electronically outside of COIN.[31]

[17] On 4 October 2017 the plaintiff met Mr Gillespie, Ms Little as well as Ms Jackson and Mr Swanson. Ms Jackson was one of her employees.[32] The others were employees of the defendant. At that meeting the plaintiff was told that she was required to prepare a record of advice ("ROA") recording that a "hold" recommendation had been given when a review was held with a client and the client's portfolio did not change. I shall explain in more detail later what an ROA is and what should be recorded in it.[33] As will be seen it was a legal requirement under the regulatory system that applied to the giving of financial advice. Ms McDonald said that that was a different approach to the one taken by Mr Gillespie when he had conducted his audit in June 2017.[34]

[18] That issue was contentious, however, as the file notes seen by Mr Gillespie on that audit did not, on his view of them, record the making of a hold recommendation but, rather, did not disclose that any advice was given.[35] Mr Gillespie's view was that, if there had been a review and the adviser had recommended that the client retain the existing portfolio then an ROA would be required.[36] His view was that documents such as the

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[29] See ex BMG4 to the affidavit of Ben Gillespie sworn 21 May 2018 at pp 59-60.

[30] See ex BMG4 to the affidavit of Ben Gillespie at pp 46-47.

[31] See ex 17 pp 27-48.

[32] Ms McDonald's first affidavit at para 150.

[33] See [49] ff below.

[34] Ms McDonald's first affidavit at para 153.

[35] See, eg, ex 2 vol 3 p 1164; T 5-23/16-20.

[36] T 5-24/15-17.

file notes to which I have referred did not require an ROA because, based on the file note, there was nothing that referred to any advice being given by Ms McDonald.[37]

[19] Once Ms McDonald had been told that a hold recommendation did require a record of advice, she went back over these files and created new file notes purporting to record the advice she gave at the time including, for example, recommendations that the client "hold without change".[38] Whether she gave advice at the time was, therefore, contentious.

[20] The defendant's submission in respect of this audit by Ms Little was that it was focussed on whether ongoing financial advice was being provided to clients who were paying for it rather than on the content of the file notes. As the defendant submitted, the plaintiff's use of her review note template to record meetings at which she ought to have been but perhaps was not providing ongoing financial advice, only became known to the defendant after the defendant commenced a targeted investigation into that issue focussing on the plaintiff's elderly clients. The focus of the investigation was not into the issue of whether the plaintiff was correctly documenting hold recommendations but rather into the issue whether the elderly clients were getting the ongoing financial advice for which they were paying.[39] Some of those clients were paying for ongoing financial advice in significant sums, many thousands of dollars per annum in some cases.

Business blueprint program/business plan

[21] During 2017 the plaintiff became aware of a policy developed by AMP Limited ("AMP"), of which the defendant is a subsidiary, relating to the initial assessment of the viability of potential investments by AMP in financial planning businesses. Create FS had been identified as one of the "key prospects for AMP Advice recruitment" in an email of 22 February 2017.[40] Ms McDonald's evidence was that she was also requested to participate in a "business blueprint" program in early July 2017 by Mr Swanson.[41] The defendant had not characterised it as a "business blueprint" program but spoke of developing a business plan with Ms McDonald.[42]

[22] A business plan supplied to her in October suggested to her that a board of directors would be imposed above her and her business partner, Mr Carrie, for the development of detailed marketing plans which, she said, appeared to be intended to displace their position in control of Create FS. It is apparent from the business plan attached to an

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[37] See ex 2 vol 3 p 1164 discussed at T 5-23/36 - T 5-24/17.

[38] Ex 2 vol 3 pp 1162-3.

[39] Mr Gillespie's first affidavit ex BMG-4 at p 80.

[40] Ex 17 pp 2-4.

[41] Ms McDonald's first affidavit at para 136.

[42] Ex 2, vol 3, pp 991-992.

email of 4 October 2017 that the defendant had a concern that the plaintiff was servicing too many clients personally and needed to reallocate clients to other advisers to allow her time to develop and grow the business.[43]

[23] Mr Swanson's evidence was that he had stressed to her that she would be on the board together with people whom she and Mr Carrie chose, such as local community and business people.[44] He said that he did not mention that anybody from AMP would sit on her board.[45] She interpreted the proposal as one by which AMP people would be placed in a position of control over her, however, and made it plain to Mr George on 24 October 2017 that she did not want to adopt the business model proposed as a result of the business blueprint program.[46] She was concerned that the defendant would try to "micromanage" her business.[47]

[24] It was not clear to me that the business plan proposed to Ms McDonald was necessarily intended to have the result that Create FS would become part of the AMP Advice grouping. The evidence of Natalie Isborn made it clear, in any event, that "AMP Advice" was a business model which could be used to refer to a wholly-owned business or one externally owned independently from AMP. In such a case a financial planning practice that chose to use the name would become obliged to do certain things in its branding and business model including, for example, the fitout of the practice's premises.[48]

[25] The plaintiff suspected that, when she rejected this business plan, it was something which influenced the decision to terminate her authorisation. That was rejected by Mr George when cross-examined about the topic. He said that Create FS was her business and it was totally her decision as to the advice and guidance that she may potentially accept or not.[49]

[26] It was urged on me that I should not accept his evidence to that effect. He had said that Create FS had only been considered for the AMP Advice model as a potential practice. He did not believe there was any correlation between an email sent by Ms McDonald on 24 October 2017 rejecting her involvement in an AMP operational business plan and whether Create FS should participate in the AMP Advice model.[50]

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43 Affidavit of Allan McKay, ex AM 13 p 94; ex 2, vol 3, p 1010.

44 T 4-103/43 – T 4-104/20.

45 T 4-104/17.

46 Ex 2, vol 3, p 1022.

47 Frist affidavit of Ms McDonald para 160.

48 See the affidavit of Ms Isborn at para 8.

49 T 4-83/33 – T 4-84/21.

50 Ex 2 vol 3 p 1022 and T 4-83/38-40.

[27] In my view, however, his evidence was credible and made sense in context. Part of the context included the evidence of Ms Isborn who was the head of Practice Equity Investments in the channel performance and growth section of AMP. Create FS had never been viewed by her as a potential part of that strategy. As at July 2017 there were 10 candidates on her list as potential targets for investment. They did not include Create FS nor had it ever been suggested to her by anyone from AMP or the defendant that Create FS might be a suitable practice for AMP to consider investing in. In July 2017 she had another financial planning practice in Toowoomba on her list and she was not interested in seeing AMP take equity in more than one practice in the Toowoomba region at that time.[51]

[28] In the circumstances, I am not satisfied that Ms McDonald's non-acceptance of the business blueprint program was a factor relevant to the decision to terminate her authorisation with the defendant. Nor am I satisfied that the plaintiff has proved that the defendant acted with an extraneous purpose of disrupting her business with a view to making it easier for AMP to purchase it.

[29] Mr George's evidence was that the draft business plan rejected by Ms McDonald had nothing to do with the AMP Advice model.[52] It makes no sense, as was submitted for the defendant, for AMP or the defendant to want to acquire an equity interest in a practice in which there were major compliance issues from the defendant's point of view and in which there may be many clients with claims for economic loss. As was submitted, there was no sensible reason why the defendant would cannibalise a business it wanted to take an interest in by the steps it took in relation to the plaintiff's breaches.

Show cause notice

[30] It will be recalled that Ms Little conducted the audit in the week commencing 25 September 2017. On 25 October 2017 Mr George handed the plaintiff a "show cause" letter asking her 66 questions, attaching a 65 page report and requesting a response by 7 November 2017, nine business days.[53] The plaintiff provided a lengthy response to that letter on 6 November 2017.[54]

[31] The show cause letter related to an investigation completed by the audit team "regarding insurance replacement and ongoing service".[55] The purpose of the letter was to obtain further information from Ms McDonald to enable the defendant to decide whether or not her authorisations should be revoked and the agreement with the defendant terminated. Typical issues raised in respect of 20 identified clients in the letter related

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[51] See the affidavit of Natalie Isborn at paras 20-22.

[52] T 4-81/46 – T 4-82/5.

[53] Ex 2 vol 1 p 224; Ms McDonald's first affidavit at para 166.

[54] Ex 2 vol 1, p 297.

[55] Ex 2 vol 1 p 224.

to review appointments that had been held where the client declined the review. She was asked to explain the "discrepancy" including:

> "a. If review was provided why a Record of Advice File Note was not completed to meet further advice documentation requirements if appointments were held.
>
> b. If a review was not provided, why clients continued paying for ongoing advice yet did not utilise the service."[56]

[32] Other issues raised related to what is known as the "best interests duty" and whether the plaintiff could illustrate how she had placed her client's interests above her own and therefore met the client priority rule.[57]

[33] Further issues raised, for example, related to occasions where "replacement of product was recommended for insurance advice" and the plaintiff was asked to detail why the recommended product was in the client's best interest and why the existing product was unsuitable.[58]

[34] As one of a number of general questions, she was asked to explain why 10 out of 10 "ongoing review files contain the exact file note regarding declined annual reviews, including why each client discussion is identical".[59]

[35] Another significant general question was as follows:

> "Please explain why the practice continues to charge ongoing advice fees without engaging clients regularly for further advice? This has (*sc.* been) demonstrated in multiple instances where clients are paying ongoing advice fees, declining annual reviews each year and continue to invest outside Licensee tolerances for their risk profiles …"[60]

[36] An example was then given of a client over exposed to growth assets by 53% who was well into her 80s and paid $7,300 per annum in fees.

[37] The plaintiff's response was detailed. She said that her clients did not decline reviews and that regular reviews had been held but that her interpretation of a formal review was one which required a full statement of advice or record of advice. Her approach seems to have been that where a review note was completed and no significant client change was required in any advice documents since the original statement of advice, her review

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[56] Ex 2 vol 1 p 225.

[57] Ex 2 vol 1 p 227.

[58] Ex 1 vol 2 p 230.

[59] Ex 2 vol 1 p 231.

[60] Ex 2 vol 1 p 231.

note template was then used.[61] She also emphasised that fees paid by her clients were not just for reviews or advice documents but covered various other services including "the intangible benefits we provide".[62] In respect of the over exposure of the particular elderly client to growth assets, she said that related to a "one off period of time" when her husband had died and she had given money to her children.[63]

[38] On 15 November 2017 during a teleconference with Ms Jessica Innes, Mr Swanson and Ms Jackson, the plaintiff told Ms Innes that she had created records of advice for reviews where that had not previously been done.[64] She also indicated, on her evidence, that she would provide any further information or undertake any further remedial action to satisfy the defendant that she was complying with her obligations.[65]

[39] There were further exchanges between the plaintiff and the defendant's representatives, including an email from Ms Innes on 23 November 2017 in which she said that part of her recommendation to the "Adviser Issues Panel", should she be retained, would be to arrange an "Advice Process Improvement Manager" to attend her office and provide training on how to improve her current processes.[66] The Adviser Issues Panel was a committee in the defendant's organisation tasked with making the decision about what to do in respect of the plaintiff's authorisations as a consequence of the show cause notice and her response to it.[67]

Decision to terminate

[40] Before the Adviser Issues Panel met, Ms Innes compiled an issue assessment document for it which attached the plaintiff's response. It did not attach the 600 pages of documents the plaintiff had provided to Ms Innes to justify her response to the show cause letter.[68] Mr McDonell, one of the panel members, requested two of the annexures to the plaintiff's response to the show cause notice but otherwise relied on an assessment of those annexures undertaken by others.[69]

[41] Ms Innes had provided her investigation report to the panel. In it she referred to the non-provision of ongoing service issues that had been marked as being high risk in eight client files, a further six files where best interest duty issues had been marked as being

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61 Ex 2 vol 1 p 299.

62 Ex 2 vol 1 p 329.

63 Ex 2 vol 1 p 329.

64 T 2-20/11-15.

65 T 2-19/29-32.

66 See Ms Innes's first affidavit, ex JMI-13 at p 168.

67 See Ms Innes's first affidavit at para 31.

68 See Ms Innes's first affidavit, ex JMI-17.

69 Affidavit of Mr McDonell at paras 8 and 12; T 4-66/16.

high risk and one file where she outlined the non-provision of an appropriate advice document, again marked as being high risk.[70]

[42] At its meeting on 25 January 2018 the panel agreed to revoke the applicant's authorisations and terminate the agreements between her and the defendant with immediate effect.[71] At a further meeting of the panel on 8 February 2018 it also resolved that the plaintiff's conduct constituted a serious compliance concern which warranted reporting to the regulator, namely the Australian Securities and Investments Commission ("ASIC").[72]

[43] It was those files which were examined in detail in these proceedings in respect of the amended further and better particulars of the defence contained in ex 1. The particulars identified six named client couples where the allegation was that the plaintiff breached her best interests duty to them by not giving advice which was in their best interests. There were a further 10 cases set out in those particulars where the defendant alleged that, for 10 named clients or couples, the plaintiff failed to comply with the requirements of reg 7.7.09 of the *Corporations Regulations* 2001 and ASIC's *Regulatory Guide 175* by using a review note template to record reviews with and the giving of financial advice to those clients instead of an ROA or a statement of advice ("SOA") pursuant to s 946C of the *Corporations Act* 2001 (Cth) ("the Act") or s 946B as substituted by reg 7.7.10AE.

[44] The defendant also asserts that, in contravention of s 946A of the Act, the plaintiff was required to but failed to give an SOA to four named clients. It will be appropriate now to look at the statutory regime applicable to the plaintiff's position in providing advice.

The statutory context – best interests duty

[45] The best interests duty required to be exercised by the plaintiff is set out in s 961B of the Act. It provides:

> "**961B Provider must act in the best interests of the client**
>
> (1) The provider must act in the best interests of the client in relation to the advice.
>
> (2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

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[70] Affidavit of Jessica Marie Innes sworn 27 February 2018 at para 34.

[71] Affidavit of Ms Innes at para 35.

[72] Affidavit of Ms Innes at para 41.

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);

(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client's relevant circumstances;

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

…"

[46] The plaintiff submitted that s 961B is concerned with the process or procedure involved in providing advice to the client, whereas s 961G is concerned with the content or substance of that advice. Section 961G provides:

> "**961G Resulting advice must be appropriate to the client**
>
> The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client."

[47] Sections 961C, 961D and 961E are also relevant in clarifying when something is reasonably apparent, what is a reasonable investigation and what would reasonably be regarded as in the best interests of the client. Section 961J requires a provider to give priority to the client's interests when giving advice where there is a conflict between the client's interests and those of the provider.

[48] The allegations of breach by the defendant focussed on breaches of s 961B, not s 961G but Mr Dunning QC for the defendant submitted, it seemed to me persuasively, that questions of the appropriateness of advice, in the normal dictionary sense of the word "appropriate", were also relevant to the ascertainment of whether the advice given by the plaintiff was in her clients' best interests pursuant to s 961B.[73] I do not perceive the requirements of s 961B simply as "box-ticking" to reach the "safe harbour" described in s 961B(2) but to require reasonable behaviour by the provider in identifying the matters prescribed in that subsection.[74] As Moshinsky J said in *Australian Securities and Investments Commission v NSG Services Pty Ltd*:[75]

> "[19] In summary form, for a provider to obtain the benefit of the 'safe harbour' provisions, it must prove that it has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client, as disclosed to the adviser through the client's instructions;
>
> (b) identified the reason for the client seeking financial advice, and the client's relevant circumstances;

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[73] See, eg, the discussion in Hilliard and Levy, *Planning for the Future of Financial Advice: A Handbook*, LexisNexis (2014) at 3.7 referred to in the defendant's written submissions at para 60.

[74] See the discussion by Moshinsky J in *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47, 53 at [19]-[21]. See also *Swan & Baker Pty Limited v Marando* [2013] NSWCA 233 at [70], [74].

[75] [2017] FCA 345; (2017) 122 ACSR 47, 53 at [19].

(c) made reasonable inquiries to obtain complete and accurate information where it was 'reasonably apparent' that information about the client's relevant circumstances was incomplete or inaccurate (see s 961C, which defines what is 'reasonably apparent');

(d) declined to provide advice in the event that the adviser did not have the relevant expertise;

(e) conducted a 'reasonable investigation' into the financial products that might meet the needs and objectives of the client, and assessed the information gathered in the investigation (see s 961D, which describes what is a 'reasonable investigation');

(f) based all judgments in advising the client on the client's relevant circumstances; and

(g) taken any other steps that would 'reasonably be regarded as being in the best interests of the client' given their circumstances. Section 961E amplifies the nature of that inquiry by stating that a matter would reasonably be regarded as in the best interests of the client if a person with a reasonable level of expertise in the subject matter of the advice sought, exercising care and objectively assessing the client's circumstances, would have regarded the step as such."

The statutory context – statements and records of advice

[49] The defendant's written submissions usefully summarised the statutory obligations relevant to the provision of advice in this context. Where personal advice is given by an authorised representative (referred to in Division 3 of the Act as a "providing entity"),[76] then an SOA must be provided to the retail client unless the situation is one described by s 946AA relating to small investments or s 946B which deals with other situations where an SOA is not required.[77] Section 947B sets out in some detail the main requirements for the provision of statements and information to be included in an SOA. Section 951C provides that the regulations can exempt or modify how Part 7.7 operates. Part 7.7 includes s 946B.

[50] Regulation 7.7.10AE of the *Corporations Regulations* 2001 modifies s 946B of the Act so that, relevantly, a SOA need not be given for particular advice (*the* ***further advice***) where:

(a) the providing entity has previously given the client a SOA setting out the client's relevant circumstances in relation to the advice (*the* ***previous advice***);

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[76] Section 944A.

[77] Section 944A and s 946A.

(b) the client's relevant circumstances in relation to the further advice (taking into account the client's objectives, financial situation and needs) are not significantly different from the client's relevant circumstances in relation to the previous advice; and

(c) the basis on which the further advice is given is not significantly different from the basis on which the previous advice was given.

[51] As so modified s 946B(3A) of the Act provides:

> "The providing entity must keep a record of the further advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection."

[52] Such a record of the further advice was referred to in these proceedings as an ROA. Most of the criticism of the plaintiff by the defendant in respect of her record keeping related to her failure to keep proper ROAs. Failure to comply with s 946B(3A) is an offence.[78]

[53] Regulation 7.7.09 provides:

> "(1) For subsection 946B(3A) of the Act, a record of advice must set out:
>
> (a) the following:
>
> (i) the advice given to the client by the providing entity;
>
> (ii) if information or a statement required by subsections 947D(2) and (3) is given – the information and statement; or
>
> (b) the following:
>
> (i) brief particulars of the recommendations made and the basis on which the recommendations are made;
>
> (ii) if information under subsection 947D(2) is given – brief particulars of the information;
>
> (iii) if a statement under subsection 947D(3) is given – an acknowledgment that the statement has been given.
>
> (2) The providing entity may keep the record in any form, for example, a tape recording.
>
> (3) The providing entity must keep the record for 7 years after the day on which the further advice is provided."

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[78] Section 1311 and Schedule 3 of the Act (the maximum penalty is 50 penalty units for a natural person).

[54] Since October 2013, ASIC's *Regulatory Guide 175* has stated: [79]

> "The record of advice required by s946B(3A) must comply with either of the following:
>
> (a) it must set out the advice given to the client by the providing entity and any information disclosed to the client under s947D(2) and 947D(3) (reg 7.7.09(1)(a)). We consider that one way of satisfying reg 7.7.09(1)(a) is for the providing entity to keep a full record of the conversation during which the advice was provided (e.g. a recording) in accordance with the relevant legislation; or
>
> (b) it must set out brief particulars of the recommendations made to the client by the providing entity, including the basis on which the recommendations were made and brief particulars of information disclosed to the client under s947D(2) and 947D(3) (reg 7.7.09(1)(b)). We consider that reg 7.7.09(1)(b) will normally be satisfied if the providing entity keeps a record that clearly and unambiguously sets out the advice provided to the client (e.g. that the client buy a certain quantity of a certain listed security) and also includes either:
>
> (i) a summary of the client's relevant circumstances, as ascertained after making the inquiries required by s961B; or
>
> (ii) a clear statement that information about the client's relevant circumstances is set out in a previous record of advice or SOA provided to the client (the record or SOA should be identified by date) – this option is available only if the providing entity has conducted reasonable inquiries that confirm that the client's relevant circumstances, as set out in the previous record of advice or SOA, have not changed."

[55] Before October 2013, from May 2009, RG 175 contained a statement substantially in the same terms as that quoted above.[80] Thus the plaintiff was required to provide SOAs in the situations set out in s 947B and ROAs as required by the modified form of s 946B(3A).

Terms of the AR Agreement

[56] The relevant terms of the AR Agreement were conveniently summarised by the parties in their written submissions. In particular the defendant pointed to the following provisions as uncontroversial.

(a) The AR Agreement incorporated the Master Terms by reference.

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[79] RG 175.196 (October 2013); RG 175.152 (March 2017); and RG 175.172 (November 2017).

[80] RG 175.195 (May 2009); RG 175.202 (April 2011) and RG 175.200 (December 2012).

(b) Clause 1.1 of the AR Agreement defined the "Master Terms" as:

> "The document (in electronic form) entitled 'Authorised Representative – Master Terms' which document sets out the additional terms applying to the Authorisation and includes by reference:
>
> (a) the Compliance Documents;
>
> (b) the Practice Documents; and
>
> (c) the Remuneration Terms & Benefits".

(c) Clause 1.2 of the AR Agreement provided:

> "The following rules of interpretation apply unless the context requires otherwise:
>
> (a) A reference to this Agreement and the Master Terms is a reference to this Agreement and to the Master Terms as amended, varied, added to or replaced from time to time.
>
> (b) Words defined in the Master Terms have the same meaning in this Agreement.
>
> (c) Headings are for convenience only and do not affect interpretation".

[57] It was also said to be uncontroversial that, from June 2015, the Master Terms incorporated by reference in the AR Agreement were those described as Version 1.3. As for the Master Terms, it was uncontroversial that from June 2015:

(a) clause 1.1 defined "Professional Standards" as meaning:

> "The documents, however called, to describe the compliance and professional standards, guidelines and directions, by which AMP Financial Planning will ensure the Representative complies with:
>
> (a) the conditions of the Agreement, the Authorisation and the Relevant Law;
>
> (b) any financial services industry code of practice with which AMP Financial Planning must comply; and deals with
>
> (c) ethics, selling practices and general conduct of representatives,
>
> as Published from time to time by AMP Financial Planning or otherwise Notified by AMP Financial Planning to the Representative from time to time";

(b) clause 1.1 defined "Published" as meaning:

> "Being made available by AMP Financial Planning to the Representative including electronically, in hard copy or on a web site

Notified by AMP Financial Planning to the Representative or by issue of a Publication";

(c) clause 1.1 defined "Relevant Law" as meaning:

"(a) the *Corporations Act 2001* and any other financial services law as defined in that Act;

(a1) the *National Consumer Credit Protection Act 2009,* the *National Credit Code* (being schedule 1 to that Act) and any other 'credit legislation' as defined in that Act;

(a2) the *Australian Securities and Investment Commission Act 2001*, the *Privacy Act 1988* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*;

(b) the policy statements, practice notice or guides issued by ASIC or other requirements of ASIC or any other applicable regulatory or statutory authority or industry representative body;

(c) any other relevant legislation or subordinate legislation which is or comes into force during the term of this Agreement";

(d) clause 1.1 defined "Representative" in such a way that the term was apt to refer to the plaintiff;

(e) clause 2.1A provided that:

"The Representative must act in relation to a Client and provide any Financial Services to that Client pursuant to their Authorisation and as required by the Relevant Law";

(f) clause 2.3(a) provided that:

"The Representative must comply with all Relevant Law…";

(g) clause 2.4(iv)(F) provided that:

"Without in any way limiting clause 2.2, the Representative must notify AMP Financial Planning immediately if they breach in any material respect the Relevant Law or this Agreement";

(h) clause 3.1(a) provided that:

"Without limiting the generality of any other obligations imposed on the Representative by this Agreement, the Representative agrees to comply with or be bound by the Professional Standards";

(i) clause 3.1(b) provided that:

"The Professional Standards may, impose requirements beyond those set out in the Relevant Law";

(j) clause 3.1(c) provided that:

> "From time to time, AMP Financial Planning may change, up-date or issue new provisions of the current Professional Standards or issue new Professional Standards dealing with other issues affecting the Representative. The Representative must comply with, and be bound by, the terms of any changed, up-dated or new Professional Standards";

(k) clause 4.1(a) provided that:

> "The Representative must not engage in any conduct which is or is likely to be misleading or deceptive which AMP Financial Planning reasonably considers is prejudicial to the reputation, business or goodwill of AMP Financial Planning, the AMP Group or the Product Issuers";

(l) clause 4.2 provided that:

> "The Representative must provide the Financial Services to their Clients as agreed with those Clients with due skill and care and to the best of their knowledge and expertise in order to meet the requirements imposed on the Representative by this Agreement and the Relevant Law and must devote sufficient time to the provision of agreed Financial Services to ensure that they are able to comply with this clause"; and

(m) clause 6 provided that:

> "**6.1 The Representative acknowledges that:**
>
> (a) The Practice is managed and controlled independently of AMP Financial Planning and any other member of the AMP Group, and nothing in the Agreement gives rise to carrying on business jointly or as a common enterprise.
>
> (b) Subject to the following provisions of this Clause 6 the Practice is solely responsible for all matters concerning the management and operation of the Practice, including Staff, financial control and administration and premises.
>
> **6.2 Representative responsible for Staff**
>
> The Representative (and not AMP Financial Planning, nor any other member of the AMP Group) is responsible for:
>
> (a) the supervision, remuneration, insurance obligations (including workers' compensation) and statutory entitlements of the Representative's Staff; and
>
> (b) the payment of all costs, charges, liabilities, taxes (including, but not limited to, payroll tax, fringe benefit,

non-cash benefit and capital gains taxes) and expenses incurred or sustained in the conduct of the Practice.

(c) any breaches of this Agreement by any Representative who is Working for the Practice and by any Staff.

6.3 Practice to provide tools of trade to Representative

Where the Representative is Working for the Practice, the Practice is required to supply, or to acquire from AMP Financial Planning on an arm's length basis as required by AMP Financial Planning, the plant and equipment or tools of trade, including without limitation, motor vehicles, mobile telephones, computers, facsimile machines, home office equipment and computer software, necessary for the Representative to perform their duties and provide the Financial Services.

6.4 Sharing offices & staff

The Representative must:

(a) conduct the Practice such that it is clear to the Clients that the Representative acts as an Authorised Representative of AMP Financial Planning; and

(b) not, without the prior written consent of AMP Financial Planning, share an office, staff or other resources with an Authorised Representative of another Australian financial services licensee.

6.5 Staff changes

The Representative must notify AMP Financial Planning immediately of:

(a) any new Staff who:

(i) has been recruited to the Practice; and

(ii) may provide a Financial Service; and

(iii) may need an Authorisation.

(b) any existing Staff who:

(i) has left the Practice; and

(ii) provided a Financial Service.

(c) any Representative Working for the Practice who ceases to be employed or engaged by the Practice.

Where the Representative is Working for the Practice, this clause only applies to the Practice."

[58] Clause 14.2 of the Master Terms relevantly provided:[81]

"(a) Return by Representative

The Representative may return the Authorisation to AMP Financial Planning. Upon return, the Authorisation will be revoked.

(b) *Revocation by AMP Financial Planning by notice*

AMP Financial Planning may revoke the Authorisation of the Representative by giving not less than 90 days' notice in writing to the Representative.

(c) *Revocation by AMP Financial Planning on the happening of certain events*

AMP Financial Planning may revoke the Authorisation of the Representative immediately by written notice to the Representative (but without any prior notice) on the happening of any of the following events:

(i) If any of the events specified in clauses 2.4(iv)(A) to (H) inclusive or clause 15.2 occurs; or

(iA) ….

(ii) **If the Representative fails to comply with any material obligation under this Agreement, the Authorisation or the Relevant Law. For the purposes of this sub-clause(c)(ii), all obligations under this Agreement on the part of the Representative, but for the obligations under clause 6, are material obligations**); or

(iiA) If the Representative repeatedly fails to comply with an obligation under this Agreement, the Authorisation or the Relevant Law which, if capable of remedy, is not remedied within 14 days after AMP Financial Planning has given the Representative notice of the failure; or

(iii) If AMP Financial Planning is of the reasonable opinion that the Representative has, or if AMP Financial Planning reasonably suspects that the Representative has, engaged in or falls within one or more of the following:

(A) …

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[81] Ex 2 vol 1 pp 110-111.

(C) conduct which brings or is likely to bring AMP Financial Planning, the AMP Group or the Product Issuers into disrepute or which is prejudicial to the reputation, business or goodwill of AMP Financial Planning, the AMP Group or the Product Issuers;

(D) …

(iv) …

(d) …". (emphasis added)

[59] Clause 15.3 of the Master Terms provided:

"**AMP Financial Planning may terminate this Agreement:**

(a) by giving not less than 90 days written notice to the Representative; or

(b) immediately if the Representative returns their Authorisation to AMP Financial Planning in accordance with clause 14.2(a); or

(c) immediately by written notice to the Representative (but without any prior notice) on the happening of any of the events listed or described in clause 14.2(c)." (emphasis added)

Construction of the AR Agreement

[60] The plaintiff submits that the proper construction of cl 14.2(c) is that cl 14.2(c)(ii) should be read down so as not to apply to any breach capable of remedy. Where the plaintiff commits a breach which is capable of remedy, the defendant may only revoke the Authorisations pursuant to cl 14.2(c)(iiA), after the plaintiff has failed to remedy the breach within 14 days of being given notice of it. Where the plaintiff commits a breach which is not capable of remedy, the defendant may revoke the Authorisations immediately pursuant to cl 14.2(c)(ii).

[61] The defendant's submission was that the distinction between cll 14.2(c)(ii) and 14.2(c)(iiA) is that the former clause applies where a "**material** obligation" (emphasis added) under the AR Agreement, the authorisation or the "Relevant Law" is breached, in which case the defendant has an immediate right to revoke the plaintiff's authorisation, without an obligation to give prior notice; whereas the latter applies when the breach of an "obligation under the Agreement, the Authorisation or the Relevant Law which, if capable of remedy, is not remedied within 14 days after [the defendant] has given the Representative notice of the failure". The distinction between breach of a material term giving rise to an immediate right to terminate, but of an immaterial term

not, and the contracting parties providing for that, and what is material, in the bargain they record, was argued to be both well known to contract lawyers and sensible.[82]

[62] The plaintiff's submissions developed by invoking the principle that a contract has to be construed as a whole such that no part of it is treated as inoperative. On that basis it was submitted that the plaintiff's construction allowed both cl 14.2(c)(ii) and cl 14.2(c)(iiA) to have effect. It was submitted that, if the plaintiff's construction was not adopted, cl 14.2(c)(iiA) became otiose.

[63] In my view that argument is incorrect. The two relevant subclauses of cl 14.2(c) deal with failure to comply with material obligations and obligations which are not material, namely the obligations under cl 6 which relate, generally speaking, to the management and control of Create FS. The clauses are clearly disjunctive and are intended to apply to different circumstances.

[64] The second submission for the plaintiff was that, where a contract contained general and specific provisions, both would be given effect such that the specific provisions apply to the circumstances which fall within them. In this case my view is that cl 14.2(c)(ii) applies to breaches of material obligations, namely all obligations under the Agreement on the part of the representative but for the obligations under cl 6. The logical conclusion then is that cl 14.2(c)(iiA) applies to obligations of the representative under the agreement which are not material, namely its obligations under cl 6. The two subclauses have different spheres of operation.

[65] The third submission for the plaintiff was that the Court would prefer a construction which avoided consequences which appear to be capricious, unreasonable, inconvenient or unjust.[83] The argument was that if the plaintiff's construction was not adopted the defendant was given an absolute right to revoke the authorisations on any breach by the plaintiff whenever it occurred and regardless of how trivial it was. The result was described as commercially unreasonable, capricious and unjust.

[66] It seems to me, however, to be a conclusion that follows naturally from the structure of the contract that breaches of material obligations will lead to possible immediate revocation of the authorisation while breaches of obligations which are not material may be the subject of the regime for remedying obligations under the Agreement that are capable of remedy. In such a case it is only the repeated failure to comply with such obligations that are not remedied within 14 days that leads to the power to revoke an authorisation immediately.

[67] The defendant's argument was that all the breaches by the plaintiff on which the defendant relied to support its revocation of the authorisations and termination of the

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[82] See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 136-138; [2007] HCA 61 at [47]-[48] per the plurality.

[83] See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109-110.

Agreement were breaches of material obligations. The two subclauses were described as having independent operation, fixing on different events, a description with which I agree.

[68] Mr Dunning QC also submitted that cl 14.2(c)(ii) would be made otiose as it would never have an operation outside cl 14.2(c)(iiA) because the latter subclause would operate to deal with irremediable breaches in the same way the plaintiff contends cl 14.2(c)(ii) should be read down to operate.

[69] He also submitted that, even if that were the correct way to construe cl 14.2(c)(ii) that would not assist the plaintiff for three reasons. The first was that contraventions of s 946A, s 961B or s 961J were not failures to comply with an obligation under a relevant law which were capable of remedy. Nor, he submitted, was a failure to provide ongoing financial advice to a client who was paying for it because, after such contraventions were committed, the contravener could no longer "set things right for the future"[84] or cure the problem so that matters were put right for the future.[85]

[70] The next argument was that the defendant was independently empowered to terminate under cl 14.2(c)(iii)(C) for contraventions of s 946A, s 961B or s 961J, or for the plaintiff's failure to provide ongoing financial advice to clients who were paying significant fees for it, because that conduct would be likely to bring the defendant into disrepute in breach of that subclause.

[71] The third argument for rejecting the plaintiff's construction of these clauses was that, while, arguably, a failure to prepare an ROA when one was required, might perhaps be susceptible of being set right for the future by preparing an ROA for the advice which was given after the event, this did not assist the plaintiff. Put briefly the argument was that the failure to prepare an ROA is an offence which may make it more difficult to set things right for the future. Further, it was submitted, that, as time passed, the ability of an adviser to prepare something which was in truth an ROA must diminish because of the loss of memory over time.

[72] Here the plaintiff did place supplementary file notes on client files in an effort to address the need for an ROA for most of the review appointments to which reference was made in the show cause notice for the eight clients who were supposed to be receiving ongoing financial advice. There was no evidence, however, to support a finding that those supplementary notes were created within 14 days of her having been

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[84] *Batson v De Carvalho* (1948) 48 SR (NSW) 417, 427.

[85] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 249-250 per Lord Reid. And see

also *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 (the relevant paragraphs are omitted in the authorised report); [2001] NSWCA 187 at [119]–[123], [457]-[466]; *Giacomi v Nashvying Pty Ltd* [2007] QCA 454, (2008) QConvR 54-684 at [64]-[75] per Muir JA, with whom McMurdo P and Dutney J agreed; *Transport Workers Union of Australia v Qantas Airways Ltd* (2012) 199 FCR 190, [2012] FCAFC 10 at [6]-[8] per Gray J.

given the show cause notice. They were not included in the response to the "Show Cause" notice and she did not create them until after that response.[86]

[73] All of those arguments which were developed more fully in the written submissions seem to me to be valid but my principal reason for rejecting the approach to the construction of these clauses advanced by the plaintiff is that they are clearly disjunctive and aimed at different issues, breaches of material obligations and breaches of obligations which are not material.

[74] Another issue relating to the proper construction of the AR Agreement and the breach of it was whether the breaches referred to in it could extend to conduct before the entry into the AR Agreement. Because of my view that the breaches relied on by the defendant to terminate the plaintiff's authorisation included breaches after the entry into the agreement it is not necessary for me to resolve this issue.

Alleged breaches of the AR Agreement

[75] The breaches of the AR Agreement alleged by the defendant were particularised in para 3 of the amended further and better particulars of the defence which became ex 1. The pleading in respect of the keeping of ROAs related to 10 identified clients or couples. It was expressed in the alternative such that, if the conclusion is that, in effect, the plaintiff had given "hold" recommendations to those clients and had, therefore, given financial advice, by using her "Review Note Template" to record those reviews, she had failed to comply with the requirements for the creation of an ROA. She had not recorded the advice she had given, thereby breaching reg 7.7.09 of the *Corporations Regulations* and RG 175 and also breaching cll 2.1A, 2.3(a), 3.1(a), 4.1(a) and 4.2 of the Master Terms incorporated into the AR Agreement. Those clauses required adherence to the Relevant Law amongst other things.

[76] The alternative pleading, described as a "binary" allegation by Mr Dunning QC was that, if the plaintiff was not, on the occasions when she used the Review Note Template, recording a review in which she gave financial advice by providing hold recommendations, then she was charging those clients for ongoing financial advice which she was not providing, therefore breaching the same relevant clauses of the Master Terms.

[77] In respect of the provision of advice said not to be in the best interests of the clients, those allegations were particularised in six annexures to the Amended Further and Better Particulars of the Defence, Annexure "A" to Annexure "F". Out of respect for the privacy of those clients, who did not participate in the litigation, I shall refer to them by reference to the particular annexure relevant to the allegation that the plaintiff did not give advice that was in their best interests.

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[86] T 2-98/40-44.

[78] It is also alleged that, in contravention of s 946A of the Act the plaintiff failed to give an SOA on the number of occasions particularised in para 3(f) of the amended further and better particulars of the defence to the four clients referred to there. Those various breaches are also all said to be breaches of cl 2.4(iv)(F) of the Master Terms.

Records of Advice

[79] The reason for the alternative pleadings in respect of the ROAs may be illustrated by reference to two of the many documents tendered in these proceedings. For the reasons I have expressed earlier, I shall anonymise the references in them to the client's name. One is a document that was contained in a file for one of the plaintiff's clients whom she met on 24 October 2016. It was expressed as follows:[87]

> "General/Review Meeting
>
> Date of Meeting/Location/Attendees:
>
> Monday 24th October 2016, [J], and Leanne McDonald
>
> I met with [J] as she had made an appointment to see me for a general update.
>
> I provided and explained our FSCG, Version 1.1 dated 23/09/2016, [J] had no questions.
>
> I then went through and gave [J] an update of existing portfolios.
>
> We discussed the current balance/investment options/beneficiaries/income payment etc.
>
> [J] had no questions and was happy.
>
> We also revisited her ongoing service package and the ongoing cost for this service. [J] was happy with the level of service provided and did not wish to make any changes.
>
> I asked [J] if she would like a formal review of existing strategies/products currently in place. [J] has declined."

[80] That document was in the form of the Review Note Template used by the plaintiff for meetings such as this where, from her point of view, she believed she was not required to make an ROA because, again, from her point of view, she was not providing financial advice. That was in the context where she did not then believe that a recommendation that the client hold without change constituted financial advice.

[81] As I have said earlier,[88] when she was told at the meeting of 4 October 2017 that she was required to prepare an ROA when a "hold" recommendation had been given, she

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[87] Ex 2 vol 3 p 1164.

[88] See [17] above.

prepared a further document on some unspecified date after that audit of 4 October 2017 and placed it in the file as well, disclosing to the defendant's representatives that she had done that.

[82] The additional document in this particular case was much lengthier than the original note and read as follows:[89]

> "Additional ROA File Notes from Audit 4 October 2017
>
> Client Name – [J]
>
> Date of Meeting and Attendees – 24/10/16 ([J] and Leanne present)
>
> As per review, Meeting note the etc. in reference to the areas discussed and **advised** with client being – as per her Portfolio report provided to client at meeting we discussed in full the following
>
> - Opening and closing balance for the reporting period for both her pension and investment portfolio. Discussing in particular; income, fees and change in investment earnings.
> - Asset allocation. **Confirmed Growth allocation for Investment Product was higher than SOA dated 11/02/11. Again, This is not due to any investment advice but due to 2 lump sum withdrawals the client did back in 2013 for $230,000 to give to her children, and the funds were taken at the time form [sic] defensive assets not growth assets. This had overweighted her in Growth. We discussed the Income form [sic] her Growth assets were providing her larger income distributions than defensive assets are and she agreed. The client preferred to retain the current allocation as is without change.** Client mentioned she had a few health issues recently and income payments are important to be maintained and she stated she would prefer not to eat into capital. **I warned [J] that a higher portion of her funds would be invested in higher growth asset classes. Although this should increase the potential for higher long-term returns, growth assets are more likely to experience volatility of investment returns, which she may be uncomfortable with.** [J] acknowledged and understood fully this warning.
> - Asset allocation of Wealth View Pension account I explained allocation remains in line with the 70% from SOA dated 2007 and is inside AMPFP **acceptable variance tolerance level of +/- 15% for their risk profile** as well as the individual asset classes for Australian Fixed Interest and Other.
> - Beneficiary – confirmed no change required

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[89] Ex 2 vol 3 pp 1162-3 (emphasis added).

- Portfolio Valuation – the underlying managed funds and direct shares held. Client confirmed she was receiving regular portfolio statements in the mail.
- Account Performance net of fees
- Asset Performance rate of return
- Benefit Details including taxable/tax free components and preservation details
- Cash Transaction history
- Fee summary breakdown of administration and adviser fees.
- Current pension payment – confirmed no change required
- Also discussed upcoming January Asset limit changes for Govt Centrelink. Client did not seem too concerned, as she will keep concession card which is more important to her given health concerns raised recently.

[J] had no questions and was happy with what was discussed and provided to her at her meeting. **I recommended the client hold without change.** My advice was based on the following:

- That the clients' relevant personal circumstances (ie their objectives, financial situation and needs) have not significantly changed, and confirmed position to current fact find and SOA held on file.
- The client had stated she was happy with the recommendations that were put in place and does not require any changes.
- I, the adviser, agree that the current products and strategy in place still align with the client's original goals and objectives. She still remains in Wealth view platform product and North was discounted to change to, due to the ability to obtain Centrelink health Concession Card as her Wealth view product is not deemed and grandfathered under income test. If changed to a new Pension product it would be Client stated she did not wish to loose [sic] card to due to the many benefits and her prescriptions she gets regularly.

I referred the client back to her original SOA document, for any risks, disadvantages, and overall outcomes of my advice. Client understood.

The client was offered to contact me if her circumstances change, and informed her she can request a review at any time if require further assistance. She thanked and acknowledged. I asked the client would she like a copy of the Record of advice in a formal document format, Client declined."

[83] The original short form was of the type seen by Mr Gillespie when he was doing his audit and it did not alert him to the possibility that advice was given as it said that the client "had no questions and was happy … and did not wish to make any changes." Nor, according to that note, did she want a formal review of the existing strategies and products currently in place.[90]

[84] Ms McDonald's evidence that she was not giving those clients advice is difficult to accept, however, when one looks at the substitute document created later, after 4 October 2017, particularly the passages I have emphasised. That file note does clearly record advice in respect of her funds being overweighted towards growth. She was also warned that a higher portion of her funds would be invested in higher growth asset classes which were more likely to experience volatility of investment returns. That, too, seems to me to constitute financial advice as does the later recommendation that she hold her existing investments without change.

[85] It is difficult for me to be categorical in any conclusion that advice was given because none of the clients was called as a witness in the case. It is also difficult to be sure about the nature of the advice given even with the reconstructed file notes as they too seem likely to have been produced by use of a template and to refer in detail in some cases to events that occurred more than two years before the lengthier file note was created.[91]

[86] A similar template appears to have been used for a meeting with J on 23 January 2017.[92] Again the longer version records significantly more detail than the shorter contemporaneous note. The nature of the detail, relating, for example, to further funds that the client proposed to give to her children, suggests that it was likely that advice was given by the plaintiff during that meeting.

[87] The examples given in reg 7.7.09 referred to earlier and the statement in ASIC's *Regulatory Guide 175* also suggest that the ROA is expected to be made contemporaneously, for example, by being recorded. If advice was given, which I think was probably the case at least in some of these instances, then no proper record of advice was kept.

[88] The deficiencies in the record-keeping are illustrated by the fact that the plaintiff was using templates. The original template in the briefer form quoted earlier was used for other clients.[93] But the longer version quoted earlier was also used as a template for

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[90] Ex 2 vol 3 p 1164.

[91] See ex 2 vol 3 p 1269 and compare it with p 1270 relating to a meeting of 17 August 2015. The brief contemporaneous note does not, for example, refer to a passage in the longer later document in which the plaintiff purported to refer the client back to her original SOA document.

[92] Ex 2 vol 3 pp 1108-9 for the longer form and p 1110 for the shorter form.

[93] Ex 2 vol 4 p 1454.

other clients, illustrated by reference to [J's] name appearing inappropriately in another later file note for another client.[94]

[89] It was urged on me, however, that I should accept Ms McDonald's evidence under cross-examination that she was not giving advice.[95] She conceded in the passage of cross-examination to which I have just referred, however, that a hold recommendation would amount to advice but said that her clients did not ask for any advice at that time. I regard that response as unlikely to be true, and disingenuous. It is both inconsistent with the later fuller file notes that she created and also seems to me to be objectively unlikely when the result of the interview is that things do stay the same.

[90] It also seems improbable that, when a client has come to a meeting with a financial adviser, for which the client is paying, that the adviser would not say at least something to the effect that it was appropriate for a client to continue with her existing arrangements if that was really all that the client wanted. That the adviser would sit mute in the face of such a suggestion by the client seems to be highly unlikely and would amount to an abrogation of her responsibilities. As para 50(c)(vii) of the Defence asserted: "a financial adviser, charging a client an annual fee calculated as a percentage of the client's investment portfolio for providing ongoing financial advice, does not provide ongoing financial advice by seeking and obtaining instructions from the client that the client is 'happy' and, as such, does not need any ongoing financial advice."

[91] When it was pointed out to her in cross-examination that her clients were paying for ongoing financial advice, she qualified her agreement with that fact by saying:

> "Well, not just that, they're paying also for the services, and then we keep on track and give them quarterly updates. We keep a track of their corporate actions, make sure the dividends are still going into their portfolio, franking credits are getting paid back. So, I mean, there's other administration stuff that they're paying for."

[92] That response struck me as evasive, resisting the obvious fact that she had an obligation to advise those who had engaged her services for those purposes. I regarded it, therefore, as more likely that she was giving advice even if it were only a "hold" recommendation and that the exiguous file note kept by her reflected her likely ignorance of the fact that she should have kept a proper ROA or, possibly, laziness on her part in recording what actually happened at these meetings. The use of her template to record meetings in very similar terms across a significant number of clients suggests the latter. When ASIC's guidelines suggest the simple expedient of making an audio recording of the advice given I find it difficult to accept that the short form template that she used provided an accurate record of the advice I conclude she gave.

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[94] Ex 2 vol 4 p 1453. See also ex 2 vol 5 pp 1915-6.

[95] T 2-25/10 – T 2-26/22.

[93] It is worth noting that the plaintiff did not provide supplementary file notes in the longer form, apart from the meetings to which the "Show Cause" notice expressly referred, even where the plaintiff had used the shorter form review note template for other clients.

[94] In that context Mr Dunning QC also submitted that:[96]

> "When the plaintiff responded to the Show Cause Notice on 6 November 2017 she contended, for each of the Eight OFA [ongoing financial advice] Clients, that reviews had taken place; the client had declined a 'formal review'; and described 'formal' as meaning 'our interpretation of a Statement of Advice or Record of Advice'. She also stated, in reference to [J]:
>
> > 'Our understanding is that unless the client agrees to get a further SOA/ROA document, then we cannot force them to receive one. Further, we believe the Review File Note we are using is sufficient based on AMP approval during regular audits. In this case, the client's circumstances or [sic - and] the strategy have not significantly changed since the initial advice was provided.'
>
> That statement evidenced the plaintiff's lack of understanding of when a ROA needed to be prepared and held on file. It also tended to suggest she was giving Hold Recommendations at the many meetings she recorded using the Review Note Template."

[95] I agree with the submission contained in the last sentence that the reasonably probable inference is that the plaintiff was giving "Hold" recommendations at the meetings where she used that shorter form review note template.

[96] It is apparent, also, that I prefer the view of Mr Richards as an expert in this area to that of Mr McMaster about the need to provide an ROA if the meeting results in a hold recommendation. It seems to me probable that at least most of these meetings would have resulted in a hold recommendation which should have been recorded in an ROA. Where circumstances in the world of investments constantly change it is clear at least to me that a "Hold" recommendation given at such a meeting constitutes advice.

[97] Such a failure to make an appropriate ROA constitutes a breach of a material obligation under the AR Agreement. The argument that it was identified simply as of "medium" importance in a document called the defendant's "Issues and Consequences Table – Financial Services"[97] does not seem to me to override the consequences of it being a breach of a material obligation for reasons I develop more fully later.[98]

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[96] Defendant's written submissions at paras 50-51.

[97] See the first affidavit of Ms Innes, ex JMI-6.

[98] In addressing the defendant's "binary" argument that, the plaintiff, if she had not provided advice, had charged clients for ongoing financial advice which she was not providing, Ms Downes QC submitted that there was a third alternative, namely that the plaintiff conducted a review without providing personal advice for which she was entitled to a fee under the agreed arrangements between Create FS and the client.

[99] In that context she referred to Mr McMaster's evidence that it was normal practice to charge clients an ongoing financial advice fee to cover the range of continuing services provided to clients such as portfolio reviews and monitoring of investment portfolios. Consequently she submitted that the plaintiff did not charge clients for services which she was not providing. She also submitted that, even if it were established that the plaintiff did not comply with the obligation to provide ongoing advice for which her clients were paying she should not bear the consequence of termination of the AR Agreement, again because of the application of the "Issues and Consequences Table – Financial Services" which provides that the stated consequence for multiple occurrences of a failure to provide services in accordance with an ongoing financial advice agreement was a formal warning including a formal remediation plan, not a show cause or termination. Again, that does not seem to me to deal with the argument that it also constitutes a breach of a material obligation under the AR Agreement.

[100] My view is, however, that the probabilities are that she was providing financial advice, even if in an attenuated form, by recommending that the clients hold on to their existing investments without change. She did not, however, record the advice properly by not recording it accurately in an ROA. Consequently she was in material breach of the AR Agreement and of her statutory obligations.

Best interests duty

The Annexure "A" clients

[101] These clients were a married couple, each of whom was in employment. They owned their house, subject to a mortgage and the husband also owned an investment property. They asked the plaintiff to review their existing superannuation and insurance arrangements, because they were concerned that they might be over-insured with too many policies.[99] In respect of their superannuation they wanted to have access to direct holdings such as property and shares and would like the ability to invest into properties and borrow within superannuation.[100]

[102] The focus of the defendant's criticism of the advice provided by the plaintiff to these clients was on the establishment of a self-managed superannuation fund ("SMSF"). The plaintiff was told that they wanted such a fund and advised them of the likely increase

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[98] See at [177].

[99] Ex 1 annex 1 p 1.

[100] Ex 6 vol 6 p 2.

in expenses if they created one.[101] The issue that drew the criticism of Mr Richards, the defendant's expert, in particular was whether the plaintiff's statement of advice to them explored the alternative option of borrowing funds outside the SMSF to purchase an investment property in sufficient detail, especially by comparing costs in the SMSF against their current superannuation structure.[102] Mr Richards said, however, in his report that the main determinant was the level of desire these clients had in relation to the use of borrowed funds within superannuation to purchase an investment property. He went on to say:[103]

> "If this particular goal was a very high priority, the advice may have been considered appropriate. This is because if they were very keen to buy a property in the short term, considering their cashflow position they may have been unable to purchase the property outside of super. This is because they would have had to borrow the entire purchase price of $300,000 and their cashflow may have been too tight to comfortably allow for this to occur."

[103] Later he said that another key determinant of whether an SMSF would be suitable depended on the client's desire to be in control of managing their investment portfolio.[104] In this case "personal non-superannuation investments" were "scoped out" of the SOA. Another criticism for the defendant was that no warning was contained in the SOA that by scoping out that issue the plaintiff had therefore not addressed whether the clients might be better off by not setting up an SMSF and instead borrowing personally, outside their superannuation, to purchase a second investment property.[105]

[104] The problem that confronts me in assessing this situation is, again, that there was no evidence from these clients about what seems to be a critical issue, namely how much they wished to use borrowed funds within superannuation to purchase an investment property. If the likelihood is, as on the evidence it seems to have been, that they would not have been able to borrow enough personally to fund such a purchase it may have been obvious both to them and to the plaintiff that there was no point in exploring that possibility. Although I recognise the sense of Mr Richards' opinion that that possibility should have been explored in more detail I am not persuaded that the failure to do that, in these circumstances, amounted to a failure to act in the best interests of the clients.

[105] Another criticism by the defendants in respect of this couple was that the plaintiff failed to provide the female with the information she needed to make an informed decision about whether she should cash in a defined benefits superannuation scheme entitlement

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[101] Ex 6 vol 6 pp 207, 236.

[102] Ex 26 paras 341-343; T 5-102/7-21.

[103] Ex 26 para 339.

[104] Ex 26 para 344.

[105] Ex 26 para 300.

she held by failing to inform her of what the value of that entitlement may be by the time the client reached 55 years old.[106]

[106] No particular submission appears to have been made about that issue for the plaintiff but, in the absence of evidence of what the value of the entitlement may have been by the time she reached 55, it is difficult for me to say conclusively that, in failing to do that, she failed to act in the best interests of the client.

[107] The final criticism by the defendant was that the plaintiff gave advice to the male client to cancel existing trauma cover with a particular insurer on the incorrect premise that he had his superannuation within a fund managed by that insurer when it was not. It was with two other insurance companies.

[108] Again, there was no particular response to that in the plaintiff's submissions. This may, therefore, be an example of an occasion where the plaintiff did fail to act in the best interests of the client based on a mistaken apprehension of the nature of the insurance cover for trauma that he held. One would not say that it was a particularly serious breach of that duty, however, even though it may amount to a material breach of the AR Agreement.

The Annexure "B" clients

[109] This couple gave instructions that they wanted to review their current finances to ensure that they were working well towards their retirement, wanted to ensure they had adequate insurance cover and wanted to tidy up their current products. It was also important to them to receive regular ongoing advice and they indicated that, in the future, they would like to consider establishing a self-managed superannuation fund.[107]

[110] There were four significant criticisms raised by the defendant about the advice given by the plaintiff to this couple. Ms McDonald advised the male to cancel his life insurance and total and permanent disability ("TPD") income protection cover with his existing fund and to replace it with cover from AMP Elevate. That advice was implemented but with an exclusion for right shoulder disabilities. He had an incomplete recovery from shoulder surgery which should have become apparent to the plaintiff once AMP Elevate came back with revised terms containing that exclusion. She did not advise the man to keep his cover, especially for income protection, within his existing fund with the result that the advice she gave to roll over his superannuation from his existing fund to another fund called MyNorth ceased to be appropriate.[108]

[111] That approach stemmed from the report of Mr Richards who was also of the view that the plaintiff could have identified the pre-existing conditions of both members of the

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[106] Ex 26 para 374-375.

[107] Ex 26 vol 14 p 1.

[108] See ex 26 paras 684-686 and 725.

couple before an application for insurance had been made.[109] The plaintiff's usual practice was to do that and she says that she asked them the relevant questions about that issue but they did not mention anything to her.[110] Nonetheless the valid point made for the defendant was that, when AMP Elevate came back with revised terms containing an exclusion for the male's right shoulder disabilities, he should have been advised about it. The man should, in my view, have been told of that proposed exclusion with accompanying advice not to roll over his superannuation.

[112] The second complaint of the defendant was that the plaintiff failed to give sufficient consideration to the investment options of the existing superannuation funds of both members of this couple. Mr Richards' view was their existing fund in QSuper had a "self-invest" option where members could select their own investments including shares listed with the ASX 300. The alternative proposed portfolio also appeared to have a good range of investment options including a range of ASX listed securities. He said, however, that he had not located anything within their file that identified whether the QSuper existing option had been investigated as an option for the female partner.[111]

[113] The plaintiff's evidence was, however, that QSuper would have been more expensive than the platform that was recommended in MyNorth. She also regarded the MyNorth platform as far superior for the management of the couple's investments.[112] In those circumstances, I am not satisfied that the plaintiff did fail to give sufficient consideration to the investment options of this couple's existing superannuation fund.

[114] The third issue raised by the defendant in respect of this couple was that the advice to the female member to roll over most of her superannuation with QSuper to MyNorth was not in her best interests as she would have been better off leaving her superannuation with QSuper.[113] The plaintiff disagreed with Mr Richards' evidence on this point. She pointed out that there was no income protection insurance with QSuper.[114] She also said that QSuper was more expensive than her recommended MyNorth platform and it was submitted for her that the cost effectiveness of the existing superannuation fund was a question of the appropriateness of the advice and not the process of arriving at it.[115] Again, therefore, I am not satisfied that it has been shown conclusively that the advice to the female member of the couple was not in her best interests.

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[109] See ex 26 at para 688.

[110] See ex 2 vol 13 p 5695 at 3(c).

[111] See ex 26 paras at 670-671.

[112] Cf ex 26 para 674 with Ms McDonald's third affidavit ex LM-14 p 153.

[113] See ex 26 at paras 679, 680, 689.

[114] See ex 6 vol 14 at p 1.

[115] See Ms McDonald's third affidavit ex LM-14 at p 153.

[115] The fourth point raised by the defendant in respect of this couple's advice was that the plaintiff failed to advise the woman that the highest ranking and most competitively quoted price for life and TPD cover was from CommInsure.[116] Her evidence about that was that CommInsure had been placed on a "caution/hold" by AMP Research because of concerns about its definitions. That point was made by the plaintiff in her third affidavit.[117] Her evidence was criticised because she does not explain the apparent anomaly between CommInsure being on a "caution/hold" listing by AMP Research and her act of obtaining a quote from it.[118] That might be a legitimate criticism but, again, I am not satisfied on the available evidence that this amounted to a breach of the agreement.

[116] Accordingly, for this couple, I am satisfied that the plaintiff's advice to the male member of the couple to roll over his superannuation was not in his best interests, at least by the time she learnt of the exclusion for his right shoulder disabilities, as she should then have advised the man to keep his cover, especially for income protection, within his existing fund. I regard that as a material breach of the AR Agreement.

The Annexure "C" clients

[117] This couple sought to review their current finances and told the plaintiff they would like to ensure they had adequate insurance in place and to tidy up their current products.[119] The plaintiff provided an SOA which, generally speaking, appeared to be adequate.[120]

[118] The significant problem arose, however, during a review meeting on 15 June 2017 when the female of the couple was informed that an application by her for insurance with MLC had been declined due to the need for a breast scan.[121] She had previously disclosed to the plaintiff that she had had a breast lump, painful breasts or symptoms of a breast lump in the past.[122]

[119] The criticism by Mr Richards related to that client's contemporaneous reduction of her level of cover in an existing trauma policy from $320,882.56 to $200,000 as well as her cancellation of another insurance policy providing death only cover of $974,107.77. Mr Richards' report went on to say:[123]

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[116] See ex 26 at para 681.

[117] See Ms McDonald's third affidavit ex LM-14 at p 153.

[118] Defendant's written submissions at para 97.

[119] See ex 6 vol 11 at p 1.

[120] See ex 6 vol 11 at p 223ff.

[121] See ex 6 in the N file at p 431.

[122] See ex 5 vol 11 at p 401.

[123] See ex 26 at paras 518-519.

> "518. A client whose insurance application has been declined by MLC due a [sic] lump in her breast should not be reducing cover on other existing insurance. In my opinion, McDonald facilitating the cancellation of [J]'s life cover and also the reduction in her Trauma cover was not in [J]'s best interests.
>
> 519. In my opinion, whether [J] actually required the Trauma cover or whether advice on the Trauma cover was scoped out of the initial advice is irrelevant. To cancel and reduce existing insurance cover when a client has informed the adviser that they have a lump in their breast and further scans are required is in my opinion not in the client's best interests."

[120] The plaintiff's response to the request for further and better particulars on this issue said that the client's application was not refused by MLC but deferred until her next mammogram. She goes on to say that the client advised her that she thought she was over-insured and "I agreed because they had very little debt and no dependants".[124] In cross-examination she first said that the client asked her directly to cancel her life insurance and reduce her trauma cover but she later said that the client did not instruct her at all but that they instead instructed her administrative people who came and told her.[125] Later she said that that cancellation had already occurred before she met the client on 15 June 2017.[126] The defendant invited me to find that the plaintiff's evidence about this under cross-examination was inaccurate and that what in fact occurred was that:[127]

> "69. …
>
> (a) as is evidenced by the full chain of emails in Ex. 10, knowing that [J] may have had breast cancer, the plaintiff confirmed her SOA recommendation that the AMP life and life and TPD policies be cancelled by advising that 'your QSuper insurance [for life and TPD of $278,400] remain in place until MLC review the application in Nov/December';
>
> (b) the plaintiff asked her personal assistant, Ms Jackson, to pass on that advice to [J]; which Ms Jackson did on 20 May 2017;
>
> (c) Ms Jackson – though herself having no authority to give financial advice – was concerned about the correctness of the plaintiff's advice to cancel both AMP policies, and advised [J]

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[124] See ex 2 vol 13 p 5700 at para 7.

[125] See T 2-66/20-34.

[126] T 2-68/18-27.

[127] See the defendant's written submissions at para 69-70.

on 29 May 2017 that perhaps she should 'consider retaining the Trauma cover';

(d) Ms Jackson did not gainsay the plaintiff's advice to [J] to cancel her life cover with AMP for $974,000, even though, at the time, she was concerned [J] might be uninsurable;

(e) on 15 June 2017, the day when she met with the plaintiff, [J] signed documents for the cancellation of her life cover with AMP and the reduction of life and trauma cover with AMP;

(f) contrary to what she swore in her affidavit made on 31 May 2018, Ms Jackson did not provide the With Compliments slips containing warnings, a copy of which are Ex. KJ-3 to her affidavit, to [J] before [J] signed the documents on 15 June 2017 for the cancellation of her life cover with AMP and the reduction of life and trauma cover with AMP; as Ms Jackson gave oral evidence she has never met [J];

(g) having regard to Ms Jackson's evidence that there was a practice within the office to do so, it is possible that [J] may have been given the With Compliments slips containing warnings, a copy of which are Ex. KJ-3 to Ms Jackson's third affidavit, before [J] signed the documents on 15 June 2017 for the cancellation of her life cover with AMP and the reduction of life and trauma cover with AMP; but it cannot be put any higher than this as no direct evidence was adduced to prove this fact and no explanation has been given as to why such direct evidence could not readily have been given by the person within Create FS (whoever it is) who is said to have given [J] the warnings on 15 June 2017;

(h) the only direct evidence that [J] received a warning about the risks associated with the cancellation of her life cover with AMP and the reduction of life and trauma cover with AMP is Ms Jackson's evidence that she 'would have' read out the details on the With Compliments slips to [J] over the telephone; and

(i) on 22 June 2017 [J]'s AMP life policy for $974,000 was cancelled and her life and trauma cover under the other policy with AMP was reduced from $320,882 to $200,000.96

70. At that time, [J]'s best interests must have been served by the plaintiff giving her advice, in emphatic terms, to retain all of her existing life and trauma cover. The plaintiff's expert, Mr McMaster, gave evidence consistently with Mr Richards on that issue."

[121] The With Compliments slips referred to in that written submission, which were ex KJ-3 to Ms Jackson's third affidavit, were generic warnings about the risks of being under-

insured. The reference to ex 10 is, in particular, to an email of 20 May 2017 where Ms Jackson advises the woman that, although MLC had declined her cover, the plaintiff had suggested that her QSuper insurance remain in place until MLC reviewed the application in November or December.[128] The defendant argued from that evidence, and it seems to me to be accurate, that the plaintiff had confirmed her recommendation in her SOA that the AMP life and trauma policies be cancelled by giving that advice.

[122] It is also instructive to read the evidence of the plaintiff's expert, Mr McMaster, dealing with this issue where he agreed that any financial adviser would counsel against the cancelling of any existing life policy where there was real doubt that replacement cover could be offered.[129] He also confirmed that if the adviser had been told of the proposed cancellation and there remained any possibility that the cancellation could have been stopped, the adviser should tell the client to do that. It was clear that, by 15 June 2017, it would still have been possible to stop the cancellation of her existing life and trauma cover. This seems to me to be a significant and serious failure to act in the best interests of that client.

[123] There were other complaints by the defendant about the adequacy of the warnings given to this couple in respect of their insurance needs and about the advice to switch their superannuation based on Mr Richards' report. For example, the fees in the MyNorth platform recommended by the plaintiff were significantly greater than those for the existing QSuper fund for the female of the couple. The response to that for the plaintiff was that that client wanted to manage her own portfolio by buying and selling shares directly which QSuper did not permit. She also argued that MyNorth was a superior platform to QSuper with additional features which came at only a small additional cost.

[124] The argument by Mr Richards that the most cost effective option for the male of the couple was his military superannuation was criticised for the plaintiff on the basis that he was no longer a contributing member to military superannuation and could no longer make contributions to that fund. The plaintiff also argued that Mr Richards' complaint was about the appropriateness of the advice given by the plaintiff in respect of superannuation rather than whether she conducted a reasonable investigation into the financial products that might achieve their objectives and needs. On that basis I would be disinclined to place much store on the third, fourth and fifth complaints of the defendant in respect of this couple.

[125] Clearly, however, it is a significant concern that the female client was not counselled strongly against reducing her existing cover. I regard that as a material breach of the AR Agreement.

<u>The Annexure "D" clients</u>

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[128] See Ex 10 at p 6.

[129] See T 3-67/1 - T 3-68/22.

[126] The clients in this category were also a married couple who wished to review and consolidate their current superannuation funds to make them work harder to generate adequate funds for their retirement. They currently held only default options of insurance within their superannuation.

[127] The defendant's criticism focussed in the first instance on the fact that, because the plaintiff had only ever dealt with the couple by telephone, she was unaware that the female had badly injured her back earlier in 2016. When she disclosed that injury to a prospective insurer, AMP Elevate, it responded with revised terms for the TPD cover the woman was seeking which excluded spinal ailments. She then had $300,000 life and TPD cover with another superannuation fund with no exclusions. Mr Richards' view was that the plaintiff should have been aware from the application for cover that the woman made that her back injury was serious.

[128] When cross-examined the plaintiff admitted that she was not aware of the extent of the woman's injury. The plaintiff's own client file would have enabled her to learn that the injury required the woman to have time away from work. She was also awaiting an appointment with a specialist, seeing a therapist and her employer was requiring her to sit down during the day.

[129] There was no evidence in the plaintiff's file note of 12 January 2017 that she ever warned the woman the dangers of cancelling her existing TPD insurance and accepting the replacement TPD insurance with the exclusion for lower back ailments. The file note says that the woman was "aware of the risks". Mr Richards' view was that the plaintiff should have given the woman advice to retain her life and TPD cover within her existing fund so as to retain that cover for $300,000 without exclusions. In failing to give her that advice, Mr Richard's view is that the plaintiff failed to act in the woman's best interests. He also expressed the view that the MyNorth fund was more expensive than her existing fund for administration and management fees.

[130] Mr Richards also said that the advice the plaintiff gave to the man was not in his best interests because the MyNorth fund was considerably more expensive than his existing fund. The insurance in that fund, CBUS, was expensive, but the obvious and appropriate advice would have been to effect a partial rollover of limited funds to another superannuation fund, for example, MyNorth, in order to access cheaper insurance and thereby get the best of both worlds, low fees and cheaper insurance. That was never recommended by the plaintiff.

[131] The third issue raised by the defendant related to the couple's express wish to be able to invest in shares directly while at the same time they were saying that they did not want to have to choose those shares themselves. That was said to go against the superannuation switching advice which the plaintiff gave to the man. CBUS's fund permitted investment in indexed funds which tended to suggest that CBUS was a suitable fund for the man. That was on the basis that somebody who wanted their superannuation invested into shares but did not wish to choose the shares themselves was likely to find an indexed fund an attractive option.

[132] The plaintiff's evidence was that the woman client did not disclose lower back issues but her file does reveal the issues highlighted by Mr Richards.[130] It was also submitted for the plaintiff that that pre-existing condition was not an objective, financial situation or need of the client. That was in reference to the definition of "client's relevant circumstances" in s 961B(2)(c)(ii). I fail to see how that can be a correct argument as it should be a need of a client, in my view, to have insurance cover that addresses the risks of injury or illness from which the client suffers. A risk of injury arising from a lower back condition may affect, for example, her ability to earn income.

[133] The second and third criticisms by the defendant of the advice given to this couple were not directly addressed in the written submissions.

[134] My conclusion in respect of this couple's advice is, therefore, that the plaintiff did not act in their best interests, particularly in respect of the female. That establishes material breaches of the AR Agreement. The issue related to her injury was apparent on the material obtained in the plaintiff's file and should have been addressed directly by her by warning the customer of the dangers of cancelling her existing TPD insurance and accepting the replacement insurance with an exclusion for lower back ailments.

The Annexure "E" clients

[135] The defendant's criticism of the treatment of these clients focussed on the man. He gave instructions that their insurance was too expensive and that he wanted to ensure that he was not over-insured and that his premiums were being paid cost effectively. He also wanted to review his superannuation and did not understand where his superannuation funds were invested.

[136] One factual issue was whether the plaintiff had identified that an issue with the male was his body mass index ("BMI"). Mr Richards said it could have been identified by the plaintiff in the data collection process. The plaintiff's argument is that there was no previous evidence that the male had a high BMI. Mr McMaster had also noted that the client may have been obese or simply overweight and that it was not self-evident as to whether the client's BMI would result in a premium loading.[131] The client had told the plaintiff that his health was good. In the absence of information about what this client looked like, it is difficult for me to conclude that that factual issue should be resolved against the plaintiff. A very muscular heavy-set man may well have a high BMI without the attendant complications arising from obesity.

[137] The main criticism of the plaintiff's advice to this couple by the defendant, however, was that the man was not advised against rolling over his superannuation from his existing fund to AMP Elevate when its proposal came back with revised terms for life insurance, TPD and income protection cover, all of which had a loading of 50% and exclusions. Instead the plaintiff gave the man advice which left most of his

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[130] See ex 6 at pp 403 and 405 of the relevant file.

[131] See T 3-60/35 - T 3-61/15.

superannuation rolled over to the MyNorth fund with a minimal amount retained in the cheaper, existing AMPFS fund so as to maintain his insurance covers within that fund.

[138] The defendant's argument was that that advice was not in his best interests because the MyNorth fund was more expensive. The plaintiff's argument in this context was that the man could not access the full range of investments within his existing fund that the MyNorth platform provided. The defendant's contention was that the original AMPFS fund offered 73 investment choices. Although MyNorth offered investment in over 360 managed funds and the ability to directly purchase securities in ASX listed companies, term deposits and investment in exchange traded funds and exchange traded commodities, those features were irrelevant to the customer. The man wanted to maintain his superannuation so that he could split his superannuation in favour of his partner and pay his insurance premiums. Mr Richard's view was that that was something he could have done perfectly well through the cheaper AMPFS fund.

[139] Another significant criticism by the defendant related to the obtaining of quotations for trauma insurance for the male. The best of the quotes obtained was from CommInsure. The plaintiff's evidence was that she presented a quote from CommInsure to the man on 30 June 2016 which he rejected because his father had, in the past week, been hospitalised for a major heart issue. She said that she warned him that he could have a three month waiting period on certain conditions, including heart conditions, and possible exclusions or loadings to the current cover after it was underwritten. She said that, after she gave that advice, the male did not wish to change his existing insurer for trauma cover from AMP Elevate.

[140] In this instance, the defendant argued persuasively that the plaintiff fabricated her evidence on this point. The file indicates a meeting happening on 30 June 2016 but does not suggest that any of the events described by the plaintiff actually happened then. Exhibit 13 establishes that the client's father was not admitted to hospital until about two weeks after that meeting.

[141] The defendant argued therefore that I should find that the plaintiff failed to provide the higher ranking CommInsure quotation to the man at the meeting on 30 June 2016 and that that was not in his best interests. That too seems to be an appropriate conclusion to draw based on the evidence.

[142] The defendant's criticism about the client's BMI was that the plaintiff failed to warn him that his BMI was likely to attract loadings from the prospective insurer. That facilitated the plaintiff giving him the superannuation switching advice. As I have said, however, I am not persuaded on the evidence available that the plaintiff should have known about the male client's potential problems with his BMI.

[143] A further criticism by the defendant of the plaintiff's advice in this context was that her SOA was misleading because it wrongly stated that the man's existing income protection cover with AMPFS had a benefit period of five years when, in fact, the cover was to age 65. The alternative cover suggested by the SOA indicated that it was the same but, in fact, the man's existing income protection policy provided cover for a

significantly longer period which explained the difference in premiums between what he was currently paying and a quotation which the plaintiff had obtained. The plaintiff's written submissions did not address this issue.

[144] The fifth and final criticism by the defendant of the plaintiff's advice to this couple was that the superannuation switching advice she gave to the man was not in his best interests because the administration and management fees for MyNorth were greater than those with AMPFS. The point made by Mr Richards was that once the fee for ongoing financial advice was included, the difference between what the man was paying with AMPFS and what he would be paying with MyNorth was about $425 per annum. No doubt the plaintiff's case was also that MyNorth provided additional features and benefits which the client wanted and which could not be obtained from his existing fund. In the absence of evidence from the client it is difficult for me to conclude in respect of this issue that the advice given to him was not in his best interests.

[145] It does seem, however, that the failure to draw his attention to the CommInsure trauma cover at the meeting on 30 June 2016, something which I conclude on the balance of probabilities, did not occur, was not in his best interests. The issue in respect of the period of the income protection cover already provided by his AMPFS policy was also one that was not in his best interests.

[146] Particularly, also, the revision of the terms for life, TPD and income protection cover proposed by AMP Elevate which provided a loading of 50% and exclusions seems to me to be one which should have required the plaintiff to advise him not to roll over his superannuation from AMPFS. The features already available in AMPFS seem to have been sufficient to provide the ability the man needed to maintain his superannuation and to split it in favour of the female partner to pay his insurance premiums. Consequently, therefore, it is my view that, again, the plaintiff had failed to act in the best interests of this client and so breached the AR Agreement in a material fashion.

The Annexure "F" clients

[147] This couple wished to review their current superannuation and insurances, were looking at direct investments outside of their home and superannuation with their monthly surplus cash and wished to maximise their superannuation and reduce tax. In the goal section of the initial meeting client file note it was stated that they wanted to establish a self-managed superannuation fund so that they could invest directly into shares and properties. The particular criticism was that there did not appear to be a compelling reason for them to move into an SMSF at that stage as the costs of running such a fund were substantially more than those involved in their current superannuation structure.

[148] The plaintiff points out that the file and the SOA did contain a comparison of superannuation fees. Mr Richards said, however, that the SOA was incorrect in stating that the man's current fee was $2,158 rather than $1,096. The fee in the SMSF would have been just over $6,053 per annum for each client or more than $12,000 for the two of them where, previously, they were paying at most about $1,300.

[149] Accordingly, Mr Richards' evidence was that the advice to create an SMSF prematurely exposed the clients to a high level of expense that was not in their best interests. He said that was especially so because they were advised to invest through the SMSF into the MyNorth fund thereby exposing the SMSF to a level of administration, management and ongoing financial advice fees that they would not otherwise have been exposed to if they had simply rolled their superannuation over into the MyNorth fund.

[150] The plaintiff's response to that argument was that the couple wanted to invest in direct property and that, while it was not necessary to have an SMSF to invest in direct shares, it was necessary to have one to invest in direct property. The plaintiff's argument was that the strategy recommended by the plaintiff to the couple of investing in direct shares in an SMSF pending the identification of an investment property was just as viable an option as going into the MyNorth platform pending identification of an appropriate investment property.

[151] It was submitted that Mr Richards accepted that it was just as viable an option to invest in direct shares in an SMSF pending the identification of an investment property but, on my reading of the transcript, his evidence was that it would have been simpler to invest in direct shares through the personal MyNorth fund and then set up a self-managed superannuation fund later when a property might have been purchased as a direct investment.[132]

[152] In the circumstances, I conclude that it was not in the best interests of those clients to advise them to set up an SMSF at that stage as it did prematurely expose them to a significantly higher level of expense. Again, therefore, I have concluded that this is an example of the plaintiff failing to act in the best interests of those clients and in breach of a material term of the AR Agreement.

Statements of Advice

[153] The defendant's submissions also identified three clients out of the four pleaded who should have been given SOAs and who, it argued, were not. The first client identified in the defendant's written submissions was one who, Mr McMaster agreed, should have been given a statement of advice. The last occasion on which one should have been provided was 14 March 2013. The defendant's argument was that a failure to provide a statement of advice when one was required was a contravention of s 946A of the Act and therefore an offence by reason of s 952C.

[154] The defendant submitted that, even if an SOA may have been required on dates earlier than the plaintiff's entry into the AR Agreement, that did not take her far because the date identified of 14 March 2013 was after the entry into the AR Agreement. It was also submitted that the temporal limits of the obligations of a representative under cl 2.1A were not set by reference to when the AR Agreement was made. As I have already said it is not necessary for me to resolve that legal argument because,

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[132] See T 5-111/4-26.

admittedly, some of the SOAs should have been provided after the entry into that agreement.

[155] The client identified by Mr Richards should have been given an SOA when her portfolio was reviewed after 2013. At that stage her asset allocation did not accord with the most recent SOA given to her on 11 February 2011. It had a target of 40% growth assets. In 2013 $230,000 had been withdrawn from defensive assets in the client's portfolio to give to her children so that her asset allocation did not accord with the target of 40% of growth assets in her most recent SOA. The plaintiff sought to justify an asset allocation of 70% growth assets at the time of the reviews based on an earlier superseded SOA of 11 October 2007. In those circumstances, it was argued by Mr Richards that a further SOA should have been given. That was also the submission in respect of the third client identified by Mr Richards in this category whose asset allocation was said to be overweight in growth assets when compared with the 40% recommendation contained in an earlier SOA. That should have required a further SOA to have been given, something that the plaintiff failed to recognise in her file note of the relevant review meeting.

[156] The plaintiff's response in respect of these clients included, in respect of the first one identified in the defendant's written submissions, the one where Mr McMaster agreed that an SOA should have been given, was that it constituted a single, trivial oversight arising from a change in her employment status from being unemployed to being employed. The argument was that it could not be relied on to justify the termination of the AR Agreement.

[157] The response in respect of the second client identified in the defendant's written submissions related to Mr Richards' assertion that her portfolio was outside its recommended levels. One submission for the plaintiff in respect of that was that the defendant had not established that the plaintiff was obliged to give this lady an SOA at the time because the defendant had not proved that the plaintiff gave advice to the lady on 18 October 2013 so that no SOA was required.

[158] Having regard to the views I have formed about the reliability of the plaintiff as a witness, which I shall deal with presently, and my conclusion on the probabilities in respect of the earlier issues about whether she was providing advice when she asserted that clients wished there to be no change to their portfolios, I am disinclined to believe the plaintiff's assertions. Even though the client's files record the signing of a "No Advice Acknowledgment" form in this case, I am not satisfied that that was actually what happened. It seems to me that she should have been given an SOA in circumstances where her portfolio was outside its recommended levels.

[159] The third of the clients in this category where the defendant submitted that an SOA should have been provided to the client was in a similar situation where the client's portfolio appeared to be outside its recommended levels. The submission was, again, that the plaintiff did not provide personal advice to that client requiring an SOA. For similar reasons I am of the view that she should have given an SOA to this particular client earlier than she may have done on 19 May 2017 and particularly on or about 18

December 2013. The failure to advise when the client's portfolio did not align with the 40% growth asset allocation recommended in an earlier SOA of 2 December 2011 required, in my view, an SOA to be given on the later occasions identified by the defendant.[133]

[160] Accordingly, in my view, these are also occasions when the plaintiff contravened s 946A by failure to give an SOA when one was required and materially breached the AR Agreement.

The plaintiff's credibility

[161] There were some general criticisms made by the defendant of the plaintiff's evidence about the advice she gave to the six pairs of clients where the defendant argued she had breached the best interests duty owed to them. I have mentioned the issue as to whether she gave advice to one client about the results of a mammogram and whether she should cancel her existing life cover where I have concluded that she did give advice, at least through Ms Jackson, but did not advise her to maintain her existing cover.

[162] A further criticism was that her claim that, for each of this group of clients, she had researched and explained to them the performance of their current superannuation funds over the last few years was difficult to accept because of the lack of evidence of client files to indicate that any analysis was undertaken. In the absence of evidence from those clients it is difficult for me to reach that conclusion but the absence of evidence on the file is more consistent with a failure to analyse their performance or give advice based on it than with the conclusion that she did.

[163] It also appears likely that she did not meet the man whose father was hospitalised sometime after 30 June 2016 on that date. She may well have recreated her story about the events involving those clients.

[164] There was also some suspicion associated with tables she created for a number of clients about her performance of her best interest duty. It was apparent amongst some of the information on her files that information had been cut and pasted from one document into other clients' documents.[134]

[165] In the circumstances, I did have difficulty in accepting the plaintiff as a reliable witness. Her use of templates on her files to copy information inaccurately from one client file to another was sloppy. Similarly, her attempts to recreate what she may have said to clients sometimes years after the meeting in question were unreliable. I am referring particularly to the times when she originally recorded that the clients wished to make no change to their investments and then created longer records indicating she had advised them. Her ability to record the actual events must have been significantly reduced with

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[133] See the defendant's written submissions at para 129.

[134] See in particular the submissions at paras 114-118 dealing with the category F clients.

the passage of time. These events make it very difficult to accept her as a reliable witness.

Estoppel by representation

[166] The plaintiff's case is that the defendant's auditors represented to her that she had "demonstrated a good level of understanding and application of quality advice principles overall, with some areas for improvement identified".[135]

[167] The defendant interpreted that allegation as an assertion that the defendant's auditors represented to her that the use of the review note template was satisfactory, compliant and met both the requirements of the defendant and all requirements under the Act. The defendant submitted that the plaintiff had failed to discharge her onus of proving both that the auditors had occasion to inspect and actually looked at files which contained the review note template for audits before 28 October 2016. The defendant admitted that that had occurred in audits on 28 October 2016 and 1 June 2017.[136]

[168] The defendant pointed out that the plaintiff knew which client files had been audited and had possession of them and that it would have been straightforward for her to prove the alleged representation. She could have identified a client file as being one of the files audited in a particular audit. She could also have exhibited or tendered a review note template on a client file which had been audited. The plaintiff did not lead evidence of that nature with the consequence, the defendant says, that she has failed to make out her case, namely that the representation, on which she alleges she relied to her detriment, was ever made to her before 28 October 2016. She had used that template to record her meetings with clients on many occasions before that date.

[169] I have already found that the likelihood is that she was giving oral recommendations when she used that template which constituted financial advice and that she did not comply with the requirements of RG 175 by recording the giving of a "hold" recommendation when she used that template. As the defendant also submits, both Mr McMaster and the plaintiff agreed in cross-examination that, if the file notes created after 5 October 2017 accurately recorded the events set out in them, an ROA was required.[137]

[170] In this context the defendant, therefore, argued that there was no evidence on which to find that the defendant played a part in any assumption of the plaintiff when she was complying with her obligation under s 946A, s 961B and s 961J of the Act. Consequently, it submitted that the plaintiff's estoppel case could not succeed in respect of the clients where she was alleged to have failed her best interests duty to them or the three clients who should have been given but were not given an SOA.

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[135] Statement of Claim para 13.

[136] See the Defence para 79(b).

[137] See T 3-38/3-11 and T 2-5/47-43.

[171] It was pointed out for the defendant that the plaintiff's awards were for sales and marketing and that the defendant provided ample opportunities for her to learn about her obligations in respect of compliance. The defendant also submitted that, even if it had been proved that an auditor looked at a file containing the review note template before 28 October 2016, the template does not in itself suggest by way of a hold recommendation or otherwise that financial advice was given. That was both Mr McMaster's evidence and Mr Gillespie's.[138]

[172] The defendant's case was that it was only after it specifically targeted the issue of whether ongoing financial advice was being provided to clients who were paying for it that the pattern or trend clearly emerged that the plaintiff was using the review note template to record meetings at which she should have been but perhaps was not providing ongoing financial advice. That only became visible to the defendant after it commenced a targeted investigation into that issue, focussing on the plaintiff's elderly clients.

[173] Accordingly, the defendant submitted, and it seems to me to be a correct submission, that it cannot be said that Mr Gillespie or any previous auditor made a clear, unambiguous and unequivocal representation that the review note template was a satisfactory note in which to record the giving of a hold recommendation.

[174] Accordingly it could not be said that the defendant, by its auditors, represented to the plaintiff that she was complying with her obligations under the AR Agreement and the Act. Mr Gillespie also explained that there were limitations on what an auditor could reasonably be expected to uncover in audits because they were carried out in the past.[139] As with almost all audits they are based on a limited investigation and should not be construed to be an assertion that the plaintiff had a good level of compliance capable of founding an estoppel against an argument that she had failed in her compliance.

[175] I have found that she has failed to comply with her obligations under the AR Agreement and I am not persuaded at all that the defendant is estopped now from raising that argument because of the actions of its auditors when faced with the review note template, itself an inadequate document which failed to record appropriately the content of the meetings between the plaintiff and her clients.

Estoppel by convention

[176] Nor could it be said that a failure to terminate the plaintiff for earlier possible breaches of the best interests duty precluded the defendant from relying on these breaches. There was no conduct by it representing such a proposition to the plaintiff nor any conduct that could lead to such a conclusion from, for example, an estoppel by convention. Even if it were Ms McDonald's assumption it was not shown to be shared by the defendant. That there may have been isolated earlier instances where remedial action

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[138] T 3-48/15-20 and T 5-23.

[139] See Mr Gillespie's first affidavit at paras 12-14.

was proposed for possible breaches of the best interests duty instead of termination does not mean that the parties were freed from the operation of the contractual terms or that those terms had been varied to preclude the defendant from relying on them in an appropriate case.[140]

[177] Nor does the "Issues and Consequences Table – Financial Services" description of the potential treatment of issues that may arise in the relationship prevent recourse to termination. That was made explicit in the document itself.[141] Non-termination for an earlier breach of the best interests duty is explicable by reference to some other equally plausible assumption, namely that not every breach will result necessarily in termination. That should not equate to an implied agreement or conventional estoppel that no breach or breaches will justify termination or that breaches of the type established here will not justify termination.

Misleading and deceptive conduct

[178] For similar reasons as I have just expressed, my conclusion is that the defendant did not represent to the plaintiff misleadingly that she was complying with her obligations under the AR Agreement and the *Corporations Act*. Therefore, her case under the *Australian Corporations Law* also fails.

Conclusion

[179] It is my view that the defendant was justified in giving notice to the plaintiff and in terminating her engagement with it under the AR Agreement and in revoking her authorisation. My analysis of the evidence dealing with the breaches alleged by the defendant justifies the conclusion that she did indeed contravene that agreement in serious respects, committing material breaches of it on a significant number of occasions. The consequence is that no further injunction should issue to restrain the defendant from taking any steps to act on or give effect to the termination of the AR Agreement and the revocation of the authorisations pursuant to the termination notice. The existing interlocutory injunction should be dissolved.

[180] Had I been of a different view, it would have been necessary for me to consider whether an injunction should have been maintained beyond the interlocutory injunction that was granted in this case. The general principle that equitable remedies do not lie to compel the maintenance of a personal relationship against the will of one of the parties to it,

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[140] See, eg, *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40, 44-46; *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, 224; [1998] QSC 209 at [104]; *Shanemist Pty Ltd v Denmac Nominees Pty Ltd* [2003] QSC 373 at [36]-[39].

[141] See the first affidavit of Ms Innes, ex JMI-6 at pp 54-56; see also ex JMI2 att pp 13, 19 and 21 which specifically refer to termination as a possible consequence.

save in exceptional cases, would dictate the appropriate result.[142] That general principle applies to agency relationships.[143] Perhaps there is more flexibility when it is an employee seeking to maintain the relationship rather than the employer.[144] In circumstances such as these, although interlocutory relief may sometimes be indicated, any decision to maintain the relationship between the parties would create significant problems for the defendant in holding out the plaintiff as its trusted representative. There would also be the normal difficulties of supervision of the relationship by the Court in circumstances where, in any event, the defendant may revoke the plaintiff's authorisation by giving not less than 90 days' notice in writing to her.[145] There is no good reason to give the Court's endorsement to the continuance of the existing relationship between the parties.

Order

[181] Accordingly, I dismiss the plaintiff's claim and dissolve the existing injunction. I shall hear the parties as to the form of the order and costs.

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[142] Meagher, Gummow & Lehane's *Equity Doctrines & Remedies*, (5th ed, 2015) at [20-055]. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428; [1995] HCA 24 at [24] and *Visscher v Giudice* (2009) 239 CLR 361, 380; [2009] HCA 34 at [54].

[143] *Bowstead & Reynolds on Agency*, (21st ed, 2018) at [7-045]-[7-046] and *Tri-Global (Aust) Pty Ltd v Colonial Mutual Life Assurance Society Ltd* (1992) ATPR 41-174 at 40,382.

[144] See *Network Ten Pty Limited v Seven Network (Operations) Limited* [2014] NSWSC 274 at [13] and *Zintix (Australia) Pty Ltd v Employsure Pty Ltd* [2018] NSWSC 924 at [117].

[145] See cl 14.2(b) of the Master Terms of the AR Agreement.