

Insurance and Professional Negligence Law

Case notes by Clive Madder



Victoria

***Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* [2009] VSC 7:**

In a suit seeking declaratory relief and judicial review in respect of a FICS determination, Justice Kavanagh has decided that, where a retail client makes a complaint to FICS relying on the *Corporations Act, 2001* FICS is not obliged to apply the Victorian proportionate liability scheme as set out in Part IVAA of the *Wrongs Act*.

A financial planner advised a retired farmer and his wife to lend approximately \$65,000 to a company in the Westpoint property group. Westpoint went into liquidation and the clients lost their money. FICS found that the financial planner had failed to make reasonable enquires of the clients' personal circumstances in breach of s 945A of the *Corporations Act* and its predecessor, and that it had also been negligent. It determined that the financial planner should pay \$65,545 plus interest.

Whilst principles of proportionate liability would in all likelihood have significantly limited the amount the financial planner was obliged to pay (by reason of Westpoint's and its directors' responsibility as concurrent wrongdoers for the clients' loss), the Panel found that those principles did not apply (whether pursuant to Part IVAA or any other statutory regime).

FICS is not a court or tribunal created by statute, but a private dispute resolution service approved by ASIC and set up in accordance with section 921A(2) of the *Corporations Act*.¹ Membership of FICS or an alternative scheme is a condition of being granted a financial services licence. It has a Panel as set up under its Rules to hear unresolved disputes between financial planners and retail clients. A member can be expelled from FICS if it does not abide by the Panel's decision, and a Panel decision is enforceable in that sense only. In contrast, a complainant is not so bound, and retains the right to pursue an action in the Courts.

Judicial review

A threshold issue before his Honour was whether FICS was amenable to judicial review.

¹ Other such bodies have included the Insurance Ombudsman and the Banking and Financial Services Ombudsman. FICS operates in a similar manner to those bodies. It is the author's understanding that the Financial Services Ombudsman is now an umbrella service covering the financial planning, banking, and insurance industries.

There is conflicting authority as to whether decisions of FICS are judicially reviewable on administrative law grounds. In *Masu Financial Management Pty Ltd v Financial Complaints Service Ltd (Nos 1 & 2)*² Justice Shaw of the New South Wales Supreme Court held that, whilst FICS was a private body, it was set up for a public purpose. As such its decisions were of an administrative character and judicially reviewable to ensure procedural fairness. In so doing, his Honour applied the reasoning in the English case of *R v Panel on Take-overs and Mergers; Ex parte Datafin Pty Ltd*³. In contrast, in *Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd*,⁴ Justice Finkelstein held that FICS members were bound solely by contract to submit to FICS's rules. FICS argued that, since *Masu* was decided, the Federal Government was no longer responsible for appointing its directors, and therefore Justice Finkelstein's decision in *Deakin* was to be preferred.

Ultimately Justice Kavanagh found that, regardless of whether the case was argued on contractual principles seeking declaratory relief or on administrative law grounds, FICS was under no obligation to apply Part IVAA. Accordingly, whether decisions of FICS as it is presently constituted are judicially reviewable on administrative law grounds is yet to be decided.

Proportionate liability

The substance of Justice Kavanagh's decision turned on the interpretation of Rule 5, which required the Panel to do

'what, in its opinion, is fair in all the circumstances, having regard to [...] any applicable legal rule or judicial authority'.

The financial planner argued that the Victorian proportionate liability regime has so changed the landscape in respect of claims for economic loss that it amounts to a legal norm to which, in applying Rule 5, the Panel was obliged to have regard.

Part IVAA could not be applied procedurally

Justice Kavanagh held that a complaint brought before FICS is not an 'action' in which 'legal liability' is determined.⁵ For example, decisions of the Panel and bodies set up under similar schemes create new rights and obligations rather than declare existing ones.⁶ His Honour noted the extra-judicial comment of Justice Byrne⁷ that proportionate liability did not appear to apply in formal commercial arbitrations, but did not need to decide that issue in this case.

Of itself, the fact that FICS does not rule on legal liability ought not to affect whether or not its Rules require the application of proportionate liability. However, a critical feature of Part IVAA is that, in order that the claim can be apportioned against all 'concurrent wrongdoers', all parties must be present in the forum except in limited

² (2004) 50 ACSR 554

³ [1987] QB 815; [1987] 1 All ER 564

⁴ (2006) 60 ASCR 372

⁵ At [27].

⁶ At [7].

⁷ 'Proportionate Liability: Some Creaking in the Superstructure', presented to the Judicial College of Victoria on 19 May 2006.

circumstances.⁸ This is not possible in respect of complaints to FICS, because the Panel's determinations can only bind its members. Further, entities other than financial planners that may also have been responsible for the claimant's loss cannot be joined. In this instance Westpoint could not have been joined to the matter before the Panel, and would not have been bound by any decision apportioning responsibility to it.

Part IVAA did not apply as a matter of substance

In *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*⁹, Justice Middleton had held that the Federal Court was not bound to apply the Victorian proportionate liability regime to claims brought under the *Corporations Act*. Section 79 of the *Judiciary Act 1903* (Cth) requires courts exercising Federal jurisdiction to apply State laws 'except as otherwise provided by the Constitution or the laws of the Commonwealth'. His Honour held that the *Corporations Act* sets out exclusively those causes of action under its scope that are apportionable (in particular claims under s 1041H for misleading and deceptive conduct); the Federal Court was not bound to apply Part IVAA because the *Corporations Act* 'otherwise provided'.¹⁰

The financial planner argued that FICS was not bound by Justice Middleton's reasoning because s. 79 of the *Judiciary Act* had no application to it (FICS not being a Court exercising Federal jurisdiction). However, Justice Kavanagh held that, as the Federal Court could not have apportioned the clients' claim, nor should FICS.

Concluding remarks

His Honour left open the possibility that FICS had a discretion to have regard to Part IVAA. However, Middleton J's decision in *Dartberg*, which emphasizes the exclusive and limited scope of the proportionate liability regime set out in the *Corporations Act*, suggests otherwise. Indeed, Kavanagh J hinted that to apply Part IVAA to claims made under the *Corporations Act* may be inconsistent with the Commonwealth Constitution.¹¹

Accordingly, parties bringing claims against financial planners and others may consider relying on those non-apportionable civil actions in the *Corporations Act* to which the proportionate liability regime found in that Act does not apply.

Many claims for economic loss or property damage may involve more than one responsible party. Such claims may be apportionable if brought in a Court, but not if brought in a forum where there is no provision for joinder. Whilst Justice Kavanagh did not find that Part IVAA can apply to commercial arbitrations, his reasoning regarding joinder suggests that it cannot.

The decision therefore highlights the importance of a professional negligence claimant choosing both the forum and the cause of action carefully. If the matter can be arbitrated, or brought in a tribunal that does not allow for the joinder of parties, the proportionate liability provisions may be avoided.

⁸ See his Honour's discussion at [48].

⁹ [2007] FCA 1216.

¹⁰ At [33] – [34]; *FICS v Wealthcare* at [43].

¹¹ See Justice Kavanagh's comments at [41].