IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: **FAIS 06055/11-12 WC 1**

In the matter between:-

STEPHANUS LOURENS GERBER **Complainant**

and

GIDEON JOHANNES SMIT **1st Respondent**

HENDRIK CHRISTOFFEL LAMPRECHT **2nd Respondent**

JOHANNES JACOB VAN ZYL **3rd Respondent**

DURANT VAN ZYL **4th Respondent**

HERMAN BESTER **5th Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] During March 2008 complainant made an investment of R500 000,00 in an entity known as Copper Sunset Trading 239 Ltd, (registration number 2006/0411414/06), (hereinafter referred to as the Company or simply Sunset

Trading). The investment, a property syndication type, was promoted by Bluezone Property Investments (Pty) Ltd, (Bluezone).

[2] The first respondent is a licensed financial services provider. The significance of the license is that first respondent in his own license was neither authorised to sell nor give advice in respect of unlisted shares and debentures, which are categorised as 1.8 and 1.10 respectively in terms of the FAIS Act.

[3] The first respondent marketed the Bluezone investment as a representative of Bluezone in terms of Section 13 of the FAIS Act. At the time the first respondent rendered advice, Bluezone itself did not have category 1.10 license that was necessary to market this type of product. Bluezone nevertheless appointed brokers in terms of section 13 to market their product in violation of the provisions of the FAIS Act.

[4] In his complaint, complainant states that he was looking for a secure investment to fund his retirement income. First respondent advised him to invest in Bluezone, which complainant heeded. The investment was concluded in March 2008.

[5] Complainant started receiving income from the investment in April 2008 until March 2009 when the income suddenly stopped. Despite several promises by the first respondent to have his income restored, complainant has received no such income.

[6] Following the final winding up of Bluezone and some of its related companies having been placed under judicial management (now called business rescue under the new Companies Act, 71 of 2008), complainant is of the view that he has lost his total investment.

[7] At the heart of this complaint is the claim that the first respondent, in violation of the General Code, (the Code)[1] failed to appropriately advise complainant. Complainant further claims that through his own investigations, he found that the investment was "way too risky" for his circumstances, which first respondent as his adviser had access to.

B. THE PARTIES

[8] Complainant is Stephanus Lourens Gerber, a male retiree, aged 62 at the time of rendering the financial service, of Kuilsrivier, Western Cape Province. Complainant is assisted by his son Leonard Gerber in lodging of the present complaint.

[9] First respondent is Gideon Johannes Smit, a male of adult age and a licensed financial services provider whose known address is 16 Hoofstraat, Malmesbury, Western Cape.

[10] At all material times hereto, first respondent acted as a representative of Bluezone in terms of section 13 of the FAIS Act.

[1] General Code of Conduct for Authorised Financial Services Providers and representatives.

[11] Second respondent is Hendrik Christoffel Lamprecht, (HCL), an adult male who at all material times hereto was a Managing Director of Bluezone. It is in his capacity as a director of Bluezone at the time the financial service was rendered that second respondent is cited in this matter. Second respondent's address is 76 Jollify Ring, Mooikloof Estates, Pretoria.

[12] Third respondent is Jacob Johannes van Zyl, an adult male who at all times material hereto was a Director, Key Individual, and Head of Commercial Legal Division of Bluezone (Pty) Ltd. Third respondent resides at 16 Raytonridge Road, Rayton, Bloemfontein.

[13] Fourth respondent is Durant van Zyl (DvZ), an adult male who at all times material hereto was a Director of Bluezone. Fourth respondent's address is 9 Carletta Street, Paarl, Western Cape.

[14] Fifth respondent is Herman Bester (HB), an adult male, who at all times material hereto, was a Director of Bluezone. Fifth respondent's address is 24 Pinotage Street, Bellville, Western Cape. Third to fifth respondents are cited in this matter as directors of Bluezone at the time the financial service was rendered to complainant.

C. ISSUES

[15] The issues arising in this determination are:

15.1 Whether as a representative of Bluezone, the first respondent, rendered financial services negligently, and/or in contravention of the FAIS Act and the General Code;

15.2 If the first respondent rendered financial services in violation of the FAIS Act and the General Code, whether such violation caused complainant the financial damage complained of;

15.3 What are the consequences for the roles played by the second to fifth respondents (as licensed financial services providers, product providers and principals) in terms of section 13 of the FAIS Act?

15.4 What are the consequences of any breach of the law by the second to fifth respondents?

D. COMPLAINANT'S VERSION

[16] In 2007, complainant and his wife decided to sell their family home. They used part of the proceeds of the sale to fund a secure and regular income.

[17] Complainant felt he had very little knowledge about the type of investment he needed as a result of which he contacted the first respondent, whom he believed at the time to be a properly licensed financial adviser.

[18] First respondent confirmed (orally) that he was an expert when it comes to investments.

[19] In July 2007, first respondent visited complainant at his residential home to discuss investment options. One of the options presented to him was an investment with Liberty Life and the other was with Bluezone. There is no complaint regarding the Liberty Life investment.

[20] Complainant says he recalls warning first respondent about the purpose of the investment, which was to provide income for his and his wife's retirement. To this, first respondent is said to have responded, '*al wil oom Faan miskien in iets met meer risiko belê, sal ek nie vir oom toelaat om dit doen nie'*, which when loosely translated means, 'Even If you want to invest in something with more risk, I will not allow it uncle Faan'. One million rand was subsequently split into two with one half being invested in a Liberty investment and the other half in a Bluezone investment.

[21] On 11 March 2008 first respondent, once again, visited complainant and presented him with an impressive prospectus from Bluezone[2]. Among these papers was also the Property Syndication Investment Document.

[22] Following first respondent's advice, complainant purchased 500 shares at one rand (R1) each and debentures for R999 each.

[23] Complainant was advised by first respondent that the Company, Sunset Trading, held 100% shareholding in Mystic Blue Trading 161, (Mystic Blue) and that the latter **owned** the property known as Prospect Close. Prospect Close is a commercial property that is situated along the R21/R24 route, in Gauteng.

[24] Complainant states that he handed over his chequebook to first respondent in order to complete the cheque for R500 000 which was made payable to Honey and Partners, after which complainant signed it.

[2] There is in fact no prospectus that was issued in connection with this investment. The Property Syndication Investment Document is the only document carrying details of the investment.

[25] On 24 March 2008 complainant received a letter confirming his investment together with shares and debenture certificates from Herman Bester (fifth respondent).

[26] In April 2008 complainant received income of R1 562 which was followed by a full monthly amount of R3 958 in May and in the succeeding months.

[27] Payment of income continued until March 2009 when it suddenly stopped. Complainant says he confronted first respondent telephonically and demanded an explanation about the stoppage of income. First respondent's explanation was that Bluezone had frozen the monthly income as a result of a minor technicality. He accordingly informed the complainant that he need not worry as the problem would soon be sorted out.

[28] Complainant says he started withdrawing from his savings to make up for the failure of Bluezone with the assurance that he would soon receive a full refund.

[29] About seven months from the time complainant's income stopped, he received a letter from Bluezone informing him that Bluezone had received an offer from a JSE listed company to purchase the Company, (Sunset Trading). He was informed by first respondent that the JSE listed company was in fact Bonatla Property Holdings, (Bonatla). The letter also confirmed that the financial regulator, the Financial Services Board (the FSB) had decided to withdraw some parts of Bluezone's license. According to complainant, from the tone of

the letter, he thought he had nothing to worry about. The letter had been signed by (HCL) (the second respondent), and the managing director of Bluezone.

[30] With complainant's savings diminishing, complainant became anxious and decided to sell some of his assets to fund his day to day expenses.

[31] First respondent wanted a power of attorney from complainant to vote on his behalf in favour of the deal[3]. He said it would speed up the release of his monthly income payments. As will become clear later in this determination, Bluezone's defaulting on the payment promised to investors was an early indication that the entity had financial problems.

[32] There is no indication that first respondent had explained why a 'minor technicality' would require a vote from investors to restore income payable to them, nor did he explain why it was taking as long as seven months to fix a 'minor error' on the part of Bluezone.

[33] In March 2010, four months after Bluezone had been provisionally liquidated, complainant was informed by first respondent that Bluezone had been wrongly liquidated due to 'a miscalculation by auditors'. First respondent expressed his shock over Bluezone's liquidation. He blamed the liquidation for the delay in payments to investors. He again informed complainant that this was 'a mere technicality' which would soon be resolved.

[3] The deal is the proposed sale of the Company to Bonatla.

[34] Bluezone was nevertheless finally liquidated in February 2011.

[35] First respondent also informed complainant that he and his fellow brokers had formed a forum to fight the liquidators.

[36] According to first respondent, the Bluezone group including the Company were in a healthy and solvent state. He again assured complainant that he need not worry because the problem would soon be resolved. This was now a full year since complainant's income had stopped.

[37] During December 2010, complainant received a payment of R2 096 from Bonatla which was repeated in February up to, and including, May 2011. In September 2011 an amount of R1 413 was paid by Bonatla, followed by R1 R574 in October. Since then, no further income has been paid to complainant.

[38] In the meantime, the continued financial stress brought by the loss of income caused complainant a great deal of discomfort and anxiety to the point where in October 2010, he suffered a stroke.

[39] Complainant says he later learnt through his own investigations that:

i. In November 2009 Bluezone and some of its related companies were placed under judicial management with some of its related companies being finally wound up;

ii. The Company he had invested in (Sunset Trading) was insolvent;

iii. In September 2010 provisional judicial managers had held a meeting in which they explained to investors the position of Bluezone;

iv. That first respondent had in fact been paid commission of 6 % of his initial investment which was never disclosed to him.

v. First respondent profited about R30 000 from him, which left him feeling alarmed, cheated and defrauded, all of which made him conclude that first respondent may have deliberately coaxed him into making the investment into Bluezone so that he could profit.

[40] Given the information he had discovered, complainant says he felt he no longer wanted to be associated with Bluezone. He asked his son to write to Bonatla to ask for the withdrawal of his investment.

[41] One Robin Rainer from Bonatla however, advised complainant that it would not be possible for him to withdraw his investment.

[42] Complainant concludes that his investment of R500 000 appears to be practically worthless, this after having received a derisory R59 000 as income from 2009 to 2011. Having discovered most of the problems associated with Bluezone through his own research, complainant (on 11 July 2011) lodged a formal complaint to the first respondent.

[43] On 18 July 2011, first respondent responded and refused to take responsibility for his actions. In his own words to this office, complainant says, '*Mr Smit appears to have washed his hands off (sic) any blame in respect of the predicament that I now find myself in*'.

[44] Complainant asserts that he found first respondent's conduct bitterly disappointing. Complainant asserts that he trusted the first respondent particularly because first respondent presented himself as being highly experienced and a qualified FSP who met the necessary licensing requirements.

[45] Complainant says first respondent in his correspondence failed to explain why he failed to save his investment from becoming worthless, and why he continued to deceive him for such a long time, when he appears to have been either directly or indirectly involved in breaking the law.

[46] Following the complaint lodged by complainant to first respondent, first respondent's lawyers wrote to complainant on 23rd September 2011 requesting time to consider the complaint and first respondent's position.

[47] On 20 October 2011 first respondent responded stating that the matter did not warrant any further comment from him and that complainant should proceed as he saw fit.

[48] Lamenting first respondent's actions, complainant says in his complaint, '*As a result of what appears to be a complete lack of remorse for what I am led to believe has been his deliberate deceitful actions to fraudulently enrich himself to my detriment as his trusting client, I feel I have no other option than to take formal steps against Mr Smit, starting with my complaint to the FAIS Ombud.*' Copied as is from the complaint.

E. COMPLAINT

[49] Complainant's complaint may be summarised as follows:

i. Following first respondent's advice, complainant invested R500 000 of his retirement funds into a Bluezone property syndication scheme known as Sunset Trading. The investment was to provide a secure source of income for complainant and his wife's retirement;

ii. Complainant alleges that first respondent's advice was in violation of the General Code of Conduct, (the Code) because the high risk Sunset Trading investment was not suitable for his circumstances;

iii. First respondent failed to properly advise complainant in that he failed to disclose the risk inherent in the Sunset investment

iv. First respondent failed to disclose costs attributed to the investment in violation of the provisions of the Code;

v. First respondent violated the Code in that he failed to act in complainant's interests as the Code demands of all providers when rendering financial services to a client.

vi. First respondent failed to act with due skill, care and diligence.

F. THE FINANCIAL PRODUCT

[50] The offering by Bluezone is contained in a document titled, 'Prospect Close – Property Syndication Investment Document', (the syndication document). The offer was not issued through a prospectus. The document makes it clear that the offer is not an offer to the public as contemplated in section 144 of the Companies Act 61 of 1973 (the Companies Act). I will return to this issue and

determine whether or not the provisions of the Companies Act were violated by second to fifth respondents in this regard.

[51] According to the Bluezone disclosure documents, the purpose of the offer is noted as:

i. To enable the Company to purchase the entire issued share capital in the Property Company[4] from Bluezone Property Investments (Proprietary) Limited, (Bluezone);

ii. To enable the Company to advance an unsecured loan to the Property Company equal to R34 588 846, 61;

iii. To enable the Company to advance an unsecured loan to the Property Company to pay the amounts referred to in paragraph 14 of the syndication document to the Promoter;

iv. To create an opportunity for shareholders to participate in the Company's investment in the Property company and its immovable property.

[52] The following is noteworthy about the parties involved in the investment. The information comes directly from the syndication document: (see diagram A below).

[53] **Diagram A**

[4] The property company is described in the syndication document as Mystic Blue Trading 511 (Pty) Ltd, (registration number) 2007/017056/07.

Name of company	Directors	Role in the offering
Copper Sunset 239 Ltd 2006/011414/06, referred to in the syndication document simply as 'the Company'	Hendrik Christoffel Lamprecht HCL, managing director; Durandt van Zyl, (DvZ); and Herman Bester, (HB).	The Company through which the funding was raised.
Bluezone Property Management Company (Pty) Ltd,2007/01756/07, referred to in the syndication document as the 'management company'	HCL, DvZ and HB	Property managers responsible for the management of the immovable property on behalf of the property company.
Mystic Blue Trading 511 (Pty) Ltd 2007/01756/07	HCL, DvZ, and HB	The property company
Mystic Blue Trading 161 2005/029458/07	HCL, HCL Family trust with HCL being the trustee,	The seller
Bluezone Property Investments, (Pty) Ltd, Bluezone 2005/008631/07	HCL; Jacob Johannes van Zyl, (JJ vZ); DvZ, and HB and the HCL Family Trust and the Wico Trust with the trustee being DvZ.	The promoter

G. REFERRAL OF THE COMPLAINT TO FIRST RESPONDENT'S RESPONSE

Rule 6 (c) of the Rules on proceedings of the Office of the Ombud for financial services providers, (the Rules)

[54] This complaint was first lodged by complainant directly to first respondent on the 11th of July 2011 in compliance with Rule 5 (d) of the Rules. Following several exchanges of correspondence between the two parties, the matter remained unresolved.

[55] According to the first respondent's last response to complainant, the complaint did not warrant any further comment from him. Complainant was advised to proceed as he saw fit. In my view, such cavalier attitude as displayed by the first respondent marks a violation of the Rules. In particular, Rule 6(b)[5] which obliges first respondent to inform complainant that he may refer the complaint to this Office, if the complainant so wished, and that the complainant should do so within six months from date of their last correspondence. Notwithstanding complainant's efforts to have the matter resolved with the first respondent, the parties were unable to reach any settlement.

[56] Following the referral in terms of Rule 6 (c), and after it became clear that the matter was not going to be resolved informally, first respondent was advised in terms section 27 (4) of the FAIS Act that the matter had since been accepted for formal investigation. First respondent was further invited to furnish a full response to the complaint, which he did on 12 May 2012. The essence of the respondent's defence is summarised below:

[57] He discussed various products with complainant setting out the pros and cons of such products and product categories.

[5] Rule 6(b) provides : If within six weeks of receipt of a complaint the respondent has been unable to resolve the complaint to the satisfaction of the complainant, the respondent must inform the complainant that:

(i) The complaint may be referred to the Ombud if the complainant wishes to pursued the matter, and;

(ii) The complainant should do so within six months of receipt of such notification.

[58] Due account was taken of complainant's tendency for risk-taking, income tax needs and the protection of capital.

[59] He provided honest, expert and fair advice. He applied the necessary care and expertise to best serve the interests of complainant and his family; he addressed his financial needs so as to uphold the integrity of and the public's confidence in the financial services sector.

[60] The proposals and suggestions made and the products recommended (and for which contracts were concluded), were aimed at enabling complainant to reach a well-considered decision, based on all the essentially relevant information, including liquidity of the investment.

[61] Complainant was already, at the initial consultation, informed on the products and provided with additional reading material. In this regard first respondent adds a long list of what he did during the rendering of financial services to complainant.

[62] He also claims that it may have appeared (from complainant's complaint) that he wished to exonerate himself and pretend that he is the expert who took the lead throughout.

[63] He disputes complainant's assertions that he said he could not lose any of his capital and states that this shows complainant's denial of his own role in bringing about the investment. First respondent further refers this office to certain

documents that were marked “DS8” and “DS1” respectively, and which were signed by complainant on 11 March 2008.

ANALYSIS: FIRST RESPONDENT’S DEFENCE

[64] The complainant was known to the first respondent as a brother in law of one of first respondent’s clients. There appears to be a dispute about the dates of the complainant and first respondent’s initial meeting in that, according to the first respondent, their first meeting was actually held on 11 February 2008 and not in July 2007 as stated by complainant. However, nothing turns on this dispute. It is not in dispute that there was a meeting, which by the first respondent’s own admittance, lasted for just over one and half hours.

[65] In this meeting, first respondent states that the complainant explained his financial needs to him. It became clear that complainant was selling his home and that he expected to have R4 million rand available.

(i) Initial mandatory disclosures[6]

[66] First respondent states that he went into great lengths during the first meeting to discuss with complainant, ‘his modus operandi, vision and compensation.’ He took the trouble to ascertain complainant’s financial position and expectations.

[6] The Code, in Part III and IV, makes provision for disclosures on product suppliers. For example, clause 4 (1) requires details regarding the full particulars of the product supplier and states that where such information has been provided orally, must be confirmed in writing within 30days. Such details include the name, physical location and postal and telephonic details of the supplier and the contractual relationship with the product supplier if any; names and contact details of compliance and complaints department of the product supplier. Part IV requires that the provider discloses physical and postal including telephonic details of such provider including details of the legal and contractual status of such provider.

He provided complainant with a disclosure document containing his details and other contact information and a copy of the syndication document.

[67] He asserts that:

a) Complainant was aware of the legislation and regulations as well as the commission structures that applied to different types of policies.

b) Complainant also expressed himself positively of first respondent's background, competence and knowledge.

c) Complainant left the meeting on the 11th February 2008 with much information and many proposals, quotations and disclosures.

[68] First respondent states that he had specifically requested complainant to acquaint himself with the syndication documents and that he was of the view that complainant understood the workings and composition of this type of product. He also thought that complainant understood the advantages of even a fraction higher than the normal interest rates along with capital growth.

[69] First respondent asserts that he had fully acquainted himself with the contents of the document and was able to respond to all relevant questions. He explained the structure of the product but whenever too much detail was furnished, complainant indicated he was well acquainted with the class of product involved as well as the composition and practical operation.

[70] During the meeting, first respondent claims to have dealt with other investments which involved less risk and earned enough to meet complainant's obligations. The possibility of a Liberty Multi Access endowment was also discussed and in

the context of that discussion, a comprehensive disclosure document of the Bluezone property syndication, (the syndication document) was furnished and explained to the complainant.

[71] First respondent submits that the syndication document is very comprehensive and complied with requirements of Regulation 459 of 2006[7].

[72] At this stage, I pause to mention that the notice in terms of section 27 (4) of the FAIS Act, referred to above in paragraph 56 of this determination, communicated two very important matters to the first respondent. First, it informed the respondent that this Office had accepted the complaint for investigation. Secondly, it called upon the first respondent to furnish his version of events together with all records in support of that version.

[73] It is necessary to point out that apart from the exegesis furnished by first respondent thus far, there is no contemporaneous record provided to this Office to support the claim that there was a discussion with complainant about other products with less risk, which would have produced sufficient return to meet complainant's obligations[8]. This marks a violation of the Code on the part of the first respondent.

[7] This is in fact Notice 459 of 2006 which was issued through Government Gazette 28690, in terms of the Unfair Business Practices Act, a means of investor protection when dealing with property syndication investment. The Notice contains minimum disclosures that must be made to clients so that they are in a position to make informed decisions prior to investing in property syndication.

[8] In terms of Part II section 3 (2) (a) of the General Code of Conduct, a provider must have appropriate procedures and systems in place to:-

a) Record such verbal and written communications relating to a financial service rendered to a client as are contemplated in the Act, this Code and any other Code drafted in terms of section 15 of the Act;
b) Store and retrieve such records and any other material documentation relating to the client or financial service rendered to the client; and
c) Keep such records and documentation safe from destruction.

[74] In fact, first respondent's version in this regard suggests that complainant did not follow his advice with regard to the product choice to address his needs, which in terms of the Code ought to have been dealt with in terms of Part VII, section 8 (4) (b)[9] of the Code. There is also no record evidencing first respondent's compliance with this section of the Code.

(ii) Due Diligence

[75] First respondent then goes on to state that at the time he met with complainant, he had already conducted extensive research and was aware that the building '***owned by the proposed entity – Bluezone*** *(my emphasis) – 'was already leased out to the extent of 97 %;*

– there were no mortgages on the property;

– and the lease contracts were all long-term'.

[76] In first respondent's opinion, and with the information at his disposal, the monthly income promised in the syndication document would be reasonably certain.

[77] In simple terms, according to first respondent's assessment, the investment was viable.

[9] The section provides that where a client elects to conclude a transaction that differs from that recommended by the provider, or otherwise elects not to follow the advice furnished, or elects to receive more limited information or advice than the provider is able to provide, the provider must alert the client as soon as reasonable possible of the clear existence of any risk to the client, and must advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances.

[78] First respondent however, is not frank with this Office about the extensive research he conducted and on which he bases his conclusion. He did not find it necessary to assist this Office with details of his so called 'extensive research'.

[79] Clearly, first respondent could not have read the syndication document as his claim about there being no mortgage registered on the property is not in harmony with the very syndication document he claims to have read.

[80] A superficial reading of the syndication document reveals that there was in fact a mortgage bond registered on the property in favour of Standard Bank, in the amount of R20 368 500. Such mortgage bond was registered in 2006 and was to be settled and cancelled on date of registration of transfer to the Property Company, (I deal with the significance of the existence of the mortgage loan below.)

[81] With regard to compliance with the provisions of section 8 (1) of the FAIS Act, first respondent states that he had followed various courses and had been accredited (by Bluezone during July 2007) to sell their products under their license. This assertion warrants further comment.

[82] It is apposite to mention that the financial product in question is classified as unlisted shares and debentures in terms of the FAIS Act. Bluezone was only granted license to render financial services in respect of this product during November 2008. Thus, in March 2008 when the financial service was rendered to complainant, Bluezone did not have the necessary license and could therefore not accredit any other person to render financial services in this

regard. This simply means, when first respondent rendered the financial service to complainant, he was acting illegally.

[83] The claim that first respondent had fully acquainted himself with the investment and was able to answer also merits comment. He did not know for example, that Bluezone had no license to sell the investment he sold to complainant.

[84] Importantly, had first respondent fully acquainted himself with the contents of the syndication document he would have noticed the apparent conflict of interest and would have in all probability advised complainant against investing in Bluezone. The conflict of interest is evidenced in the following:-

[85] The immovable property that is the subject matter of the syndication was owned by Mystic Blue Trading 161 (Pty) Ltd, registration number 2005/029458/07. The directors of Mystic Blue at the time were HCL and his family trust, with HCL being the trustee representing the trust;

[86] HCL in turn featured in all the companies of the Bluezone group, including being a director and chief executive of the promoter, Bluezone. Indeed, HCL was the dominant spirit behind the group;

[87] HCL was a director of the proposed purchaser, Mystic Blue 511, also referred to as the property company in the syndication document (see diagram A.);

[88] The sale agreement between the purchaser and the seller was certainly not an arms-length one and for this reason investors were exposed to a much higher degree of risk including the risk of deceit and fraud;

[89] HCL also was the director and chief executive officer of the promoter, Bluezone which vouched for Bluezone's carrying out of the mandatory due diligence;

[90] HCL was also a director of the property management company, which was meant to provide management services to the Company. In reality what this meant was that a slice of whatever income the property company generated had to go to the management company, once again for the benefit of the same people.

[91] HCL also vouched that Bluezone had satisfied itself of the soundness of the investment[10]. It is in fact apposite to quote the statement made by HCL in paragraph 31.14 of the syndication document:

> '*I Hendrik Christoffel Lamprecht in my capacity as Chief Executive Officer of the Promoter, by signing this Syndication Document confirm on behalf of the Promoter that a proper legal and commercial due diligence on the Immovable Property was conducted prior to the Sale Agreement relating to the acquisition of the Immovable Property became unconditional and that the Promoter is satisfied with the results of the said due diligence and that the Immovable Property and the tenants are of such a nature that it is*

[10] Page 29 paragraph 31.14 of the syndication document

reasonable to believe that they create a sound investment opportunity. - Signed by Hendrick Christoffel Lamprecht.'

[92] The conflict of interest is glaring. Conspicuous as this is, first respondent could not pick up that HCL was actually selling himself and his fellow directors the very property he owns, using of course, the investors' monies.

[93] HCL then vouches for the soundness of the acquisition by the Company in order to free himself and his family trust from the bondages of the mortgage loan.

[94] In paragraph 35.5.7.6 of the syndication document, the **board of directors** of the Company makes statements about having adopted a comprehensive risk management strategy and an undertaking to continually monitor the operational and financial aspects of the property company. This is now to delude investors into believing that there is in fact a board of directors. The same document states clearly in paragraph 5.2 that the board of directors is constituted by the current directors of the Company and that such board will endure for a period of **twelve months** (own emphasis) after which, more directors **may** (my emphasis) be appointed but, the number of directors may not exceed six directors. The promoter reserves the right to nominate three directors.

[95] The simple interpretation of this is that after investors had paid their funds into the Company, the directors would be left to account to themselves for a period of twelve months or possibly longer. Predictably, investors were lied to while directors played fast and loose with their money and when the trough ran dry, the directors of the promoter who are substantially the same people as the

directors of the Company, sought refuge in the law by way of liquidation. In a way, the law would still provide refuge for the directors. Indeed, the Company was taken over by Bonatla, following an offer of R15 million by the latter. The collapse of the scheme was as a result of combination of a number of things which were easily identifiable right from the start, and in what follows, I proceed to spell these out:-

[96] First, the flagrant disregard for the law on the part of all the respondents.

i. I start with first respondent. He could not care whether Bluezone had a license to market this product at all. It comes as no surprise that first respondent never disclosed this material and fundamental aspect of the transaction to complainant. All that mattered to him was that he had to sell Bluezone's product and this is evident in his failure to make enquiries with the regulator.

ii. First respondent's version supports the conclusion that he had no appreciation for the complex structure of the product, he nevertheless went ahead and advised the complainant to invest notwithstanding that complainant's risk profile and circumstances were unsuited to this type of product. He could not reconcile his interest in the lucrative commission with the interests of his client, even though the Code obliges him to and mandates him to treat his client fairly under such circumstances.

iii. He overlooked the lack of accountability which was evident from the document and can still not explain what he saw in complainant's circumstances that warranted the use of such a high risk product.

iv. Even though the promises of extraordinarily high returns and the numbers in the property syndication document take one to the logical conclusion that the offering was nothing but a sham which was bound to collapse, he overlooked that and recommended the investment to the complainant.

v. On his own version he never queried the directors' decision not to issue the offer by way of a prospectus.

vi. At the time he sold this financial product to complainant, the financial world was abuzz with news regarding the failure of one of the group's products, the Spitskop Villages, which involved the same directors. In this regard, it is public record that Bluedot, the company that was involved in Spitskop Villages was in trouble as early as November 2007. This, notwithstanding first respondent steamed ahead having concluded that the product was sustainable because of some analysis that he had done.

vii. First respondent has neither mentioned nor provided any record that such a material fact was ever drawn to the complainant's attention.

viii. The directors of Bluezone knew that they were not licensed to sell this product. They nevertheless went ahead and illegally appointed representatives in terms of section 13 of the FAIS Act. All it required was

someone such as the first respondent; who had no appreciation for the complex nature of the product, no appreciation of the opaque transactions that were likely to take place and no appreciation of what good governance entailed, to invite the unsuspecting investors to invest.

Disclosure of Risk as a material term of the contract

[97] Then first respondent makes the startling remark that the rate offered by Bluezone was **astronomically higher** than what could be earned in the moneymarket. He states that Bluezone offered about 1 to 2 points above the prime rate.

[98] What first respondent is saying is that the investment had a very high degree of risk. There is no evidence this risk was disclosed to complainant. There is also no record clearly stating why this particular product was considered suitable to address complainant's needs for a secure income.

[99] First respondent then goes on to state that during the month of March 2008, complainant invested R1 million rand. He confirmed his decision that R500 000 be placed with Liberty and R500 000 with Bluezone. He confirms that it was clear that complainant wanted to '**venture**' (my emphasis) some of his money with a view to earning higher interest and capital gains. It is illogical that a pensioner who is interested in income would venture into a territory which is made up of start up companies with an exceptionally high degree of risk of failure.

[100] The suggestion here is that complainant being fully aware of the risk he had to accept elected to enter the venture capital market with his retirement funds. On a preponderance of probabilities, first respondent's version must be rejected.

[101] In any event if there was ever such a request from the complainant, it ought to have been recorded in terms of Part II section3 (2) (a) of the Code[11], which it was not.

[102] Inexplicably, first respondent did not raise the issue of complainant's purported desire to enter into the venture capital market anywhere in his responses to the complainant when he wanted to know why his income had stopped. Instead, complainant was fed with excuses about minor technicalities and Bluezone being wrongly liquidated as opposed to direct communication about what is now supposedly complainant's choices of entering the venture capital market. The probabilities simply are not in favour of first respondent's version in this regard.

[103] First respondent further refers this Office to pages 31 to 33 of the syndication document and uses same to buttress his claim that he disclosed risk to the complainant. A perusal of the pages 31 to 33 takes one to paragraph 35.5.3.1 which states:

[104] '***Default on monies invested***'

[11] See footnote 8 supra.

'***There is always a risk that the Company may default on its obligations or produce insufficient profits to make any payments of returns or capital or other amounts due to investors***. (own emphasis)

[105] The first respondent has failed to furnish any record to this Office identifying the need that required such a high risk investment. No record supports the conclusion that first respondent disclosed that complainant could lose his entire capital; and certainly no record shows any other investment that was considered.

[106] This brings me to the risk analysis prepared by the first respondent on 11 March 2008. This document is aimed at indicating the kind of volatility the complainant prefers. According to the risk analysis, complainant indicated :-

i. he prefers shares in older established companies;

ii. his aim for taking the investment was to receive income; and

iii. he prefers steady growth.

This is clearly indicative of a client who wants a more stable investment and clearly not a venture capital type of risk taker as alluded to by first respondent.

[107] When asked what return he would expect on an investment of R100 000[12], complainant simply responded he would accept any amount between R100 000 and R120 000. The statement is of itself meaningless and contributes nothing

[12] No period is included in the question, which renders the question useless.

to an understanding of complainant's risk profile, much less, complainant's supposed penchant for risk.

[108] It is generally accepted that investment in equities refers to a basket of shares from listed entities. Informed investors will specify when they want to invest in private equity and are fully aware of the implications. For this reason, private equity investors will have proper diversification strategies to manage the risk they are exposed to. No information has been furnished by the first respondent to this Office indicating that complainant is in fact a sophisticated investor.

[109] This is no indication of a client that wants high returns. This also undermines the claim that complainant wanted to enter the venture capital space. On a preponderance of probabilities, it is reasonable to conclude that when complainant signed the application form to invest in Bluezone, he was not aware that he was investing in high risk investment. This would mark a violation of the Code by first respondent.

[110] Notwithstanding any score that was obtained in the risk analysis, had first respondent been acting in the best interests of his client, there is no way he would have come to the conclusion that the (high risk) Bluezone investment was suitable for complainant's circumstances.

[111] Nowhere in the risk analysis did complainant indicate he could tolerate losing his capital. The only reasonable conclusion to be drawn from these facts is that regardless of the results of the risk analysis, first respondent was intent on selling the Bluezone investment because of the attraction of high commission

of R30 000 without any application of skill, diligence or regard to the letter of the law.

[112] It is highly improbable that the 62 year old complainant, having been placed with all the facts, would have chosen an investment in which he stood to lose his capital. This objective evidence supports complainant's statement that he has very little understanding of financial products and that he relied on what he thought was the expertise of first respondent. To complainant's misfortune, he relied on first respondent, who (instead) recklessly advised him to put his money in Bluezone.

[113] First respondent has repeatedly made the point that he left the syndication document for quite some time with the complainant after explaining it. From this, he concludes that complainant understood the mechanics of the product. Indeed, he refers to instances where complainant interrupted at every turn when he sought to explain further, stating that he understood the product. There are three problems with this statement. First, the objective evidence shows that first respondent himself had no idea what he sold complainant. What little he may have explained to complainant is nothing more than a classic example of the blind leading the blind. Secondly, the Code demands that information provided to a client by a provider be explained in plain language so as to avoid uncertainty or confusion[13]. The Code also requires that a provider must take reasonable steps to make sure that the client understands the advice and that the client is in a position to make an informed decision.[14] That being so, dumping a ninety

[13] Part II section 3 (1) (ii)
[14] Part VII section 8 (2).

page convoluted document, which the provider himself can hardly read, cannot assist the first respondent to satisfy the Code in so far as Part II section 3 (1) (a) (ii) and Part VII section 8 (2) are concerned.

(iii) Suitability of advice

[114] First respondent draws this Office's attention to the fact that complainant confirmed that the Code had been complied with and that the necessary financial needs assessment had been carried out.

[115] First respondent further refers this Office to the bottom of page 95 of the syndication document where complainant confirmed –"**Single need investment only**" (own emphasis). He also repeats the point that, complainant scored 30 on his risk profile analysis, which places him in the middle of moderate and a few points away from being moderate aggressive.

[116] There is no record furnished to this office which indicates that first respondent had taken the time to seek from the complainant appropriate and available information regarding his financial situation, financial product experience and objectives to enable first respondent to provide him with appropriate advice[15]. There is also no record indicating that first respondent conducted an analysis of such information for the purpose of providing the advice[16]. A copy of the Prospect Close Application form completed during the rendering of the financial service however, has been made available. Under the paragraph 'FAIS REQUIREMENTS', this statement appears:

[15] Part VII section 8 (1) (a) of the Code.
[16] Part VII section 8 (1) (b) of the Code.

'*The Applicant hereby confirms that the business introducer, involved in this transaction, has done the necessary financial needs analysis (FNA) required in terms of Section 8 (4) of the Code of Conduct published in terms of section 15 of the FAIS Act (Act 37 of 2002)'*.

[117] There are two options to choose from, a 'yes' and a 'no'. Complainant selected 'yes'. At the bottom of the same page however, complainant signs to a statement that says,

'*The reason why the Applicant has elected not to have an FNA*[17] *done is, "**Single need, investment only**.*"'(own emphasis).

[118] The two mutually exclusive statements support the conclusion that first respondent was simply following a tick box approach and had no interest in understanding what complainant's financial position was. Clearly, the fact that complainant signed this part of the application form simply means no information was sought from him to carry out the needs analysis and that he did not understand what he was signing for. It was not explained to him.

[119] A perusal of the Prospect Close Application form shows that the complainant agreed that he had perused and made himself familiar with the content and meaning of the syndication document and accepted all the terms and conditions contained in the document and its various annexures as binding upon him. The first respondent remains adamant that the complainant was familiar with the workings of the investment. Quite the contrary, the objective evidence tells a

[17] FNA means Financial Needs Analysis

different story. I have already indicated that first respondent himself could not have been familiar with the syndication documents. Had he properly understood the import of the property syndication documents, he would have advised the complainant that his circumstances were unsuitable to this type of investment. If the complainant had insisted on placing his investment in the property syndication despite the better advice of his broker, then this should have been recorded in the record of advice. Differently put, where the broker has pointed out the dangers of investing in a particular financial product, such advice must be recorded as is required by the Code. In those circumstances, one cannot fault the financial adviser. However, for the financial adviser to escape liability, there must be some form of objective evidence in the form of the record of advice indicating that the client was forewarned, and that despite that warning he or she insisted on investing in that risky product. In those instances in which the client has failed to furnish the financial adviser with sufficient information, the financial adviser must show that there was compliance with the provisions of section 8 (4) (b) of the Code.

[120] First respondent denies complainant's assertion that he required assistance with translating the documents from English to Afrikaans. To the contrary, he maintains, complainant understood the operation of the investment and the meanings. Once again, in my view, nothing turns on this dispute. At any rate, it would have sufficed if the first respondent had explained the material terms contained in the document. This information would have been recorded in the record of advice. I use the words 'record of advice' loosely to denote any piece of objective evidence indicating that certain material things were explained to

the client. Such record of advice could be in the form of contemporaneous notes kept by the financial adviser, forms, audio recordings or anything else evidencing compliance with the Code. In the present matter, other than the bare assertions made later in the day after the horse had bolted, the first respondent could furnish no evidence indicating that he had properly advised the complainant in accordance with the requirements of the Code.

(iv) Disclosure of costs as a material term of the contract

[121] I turn to deal with whether first respondent disclosed to the complainant the issue of payable costs. First respondent's version is that during the meeting of 11 March, he once again mentioned that his commission would be 6 %, as specified in paragraph 12 page 18 of the syndication document.

[122] The Code requires that providers disclose costs[18] in a manner that enables the client to make an informed decision. The paragraph first respondent is relying on is far different from the statement he makes. In fact, the record of the verbal exchanges demanded by section Part II section 3 (2) (a) of the Code would be useful to first respondent now. An examination of the specific paragraph 12.3 states that commission, marketing costs and expenses relating to the marketing of units offered in terms of the disclosure document will be paid out by the Promoter as referred to in paragraph 14 of the disclosure document, which

[18] Part II section 3 (1) (vii) , a provider must as regards all amounts, sums, values chares, fees, remuneration or monetary obligations mentioned or referred to therein an payable to the product supplier or the provider, be reflected in specific monetary terms: provided that there any such amount , sum, value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described.

expenses will not exceed 10.5 % in total of the capital raised under this syndication document.

[123] The maximum commission, marketing costs and related expenses according to the paragraph 12.3 **may** (own emphasis) comprise of the following:

i. 6 % to external accredited introductory brokers of Bluezone Property Investments (Proprietary) Limited;

ii. 4.5% to internal staff and franchisees of Bluezone Property Investments (Proprietary) Limited on the following basis:

iii. 3.5% to individual internal administrative, marketing, management and sales staff members employed on a commission earning basis;

iv. 1 % payable to the relevant geographically located franchise entity.

[124] The Prospect Application form, on the other hand, in paragraph 15, states:

> '*investors' attention is drawn to the fact that on payment of the subscription amount for the units to the attorneys, after the expiry of the 5 (five) day cooling off period and acceptance by the Company of the relevant application, an amount equal to 10.5% of the invested amount will be released to the Promoter to be utilised by it for payment in terms of paragraph 14.2 of the Syndication Document. Units to the value of full investment amount will however, be issued to investors because the Promoter will eventually pay all expenses referred to in paragraph 14 of the Syndication Documents*.'

[125] Part II section 3 (1) (vii), requires that all amounts/monetary obligations be reflected in 'specific monetary terms provided that any such amount, sum,

value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described'. Now in this instance the percentages were clearly determinable and should have been disclosed in rand value.

[126] No rocket science is required to conclude that first respondent did not disclose costs.

[127] First respondent's reference to the disclosure document is a dire attempt to support the claim that the disclosure of costs was made. If anything, the disclosure document when read with the application form simply points to the fact that the costs attendant to the investment far exceed 6 %. Again this undermines the fact that first respondent read the syndication document. At worst for the first respondent, if he had read the syndication document and the application form and indeed informed complainant that the costs were 6 %, then first respondent deliberately misled complainant.

H. RESPONSE FROM THE SECOND AND THIRD RESPONDENTS

The complaint has prescribed

[128] Before I go to the merits of the second and the third respondents' defence, a point in *limine* must be dealt with. In this regard, it is apt to also include the fourth and fifth respondents as they too raised the same defence. I will later deal with the merits of the defence of the fourth and fifth respondents in detail.

[129] All four respondents have pointed to this Office that the complaint is time barred. They contend that the advice was furnished more than three years before the

complainant lodged his complaint and that therefore the Ombud is precluded from investigating the complaint.

[130] The jurisdiction provision relating to prescription is to be found in section 27 (3) of the FAIS Act (a) (i) which provides:

> *'(i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.*
>
> *(ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complaint became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.*'

[131] The assertion that prescription started to run from the date that the financial service was rendered is incorrect. Complainant was not aware that he had been poorly advised, the consequence of which was that he could suffer financial damage. It was only when his income stopped in 2009 that complainant became aware that something had gone wrong. Even then, he brought this problem to the first respondent's attention who counselled that as far as he was concerned, and this is not denied by first respondent, it was a minor problem that would soon be sorted out. Even at that stage, he did not have the necessary facts to even know where and what the nature of the problem was, let alone the fact that he knew that he had an enforceable claim.

[132] In the *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2006] SCA 97 (RSA); [2007]1 All SA 309 (SCA) (8 September 2006), the Supreme Court of Appeal had occasion to pronounce on the test for the requisite knowledge that triggers prescription. In that connection, the court had the following to state:

> '*The question thus is whether the plaintiff had 'knowledge' of 'the facts from which' the debt arose before 15 January 1996 (or, if a different period applies to the province, before 15 January 1997). It is well established that the defendants bear the burden of proving when the plaintiff acquired (or should be deemed to have acquired) the knowledge in question……..*
> *'Hartzenberg J concentrated on Rabie's state of mind, and 'whether the conduct of the defendants was convincing enough to dissuade a prospective plaintiff from instituting action'. He found that Rabie had no more than a suspicion that fraud had been committed, without any 'witness to substantiate' it. He found that the stand taken under oath by the province's officials 'was so convincingly and emphatically contradictory' to any suggestion of fraud that the delay could not be faulted. Far from concluding that Rabie could reasonably have acquired knowledge earlier, Hartzenberg J found he had done all in his power to acquire such knowledge, but his vigorous efforts had proved fruitless.'*

[133] In paragraph 17, the court went further and stated:

> '*This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to*

institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights,[19] *nor until the creditor has evidence that would enable it to prove a case 'comfortably'.*[20]

The essence of the complaint is that first respondent rendered financial services in violation of the Code in that he failed to appropriately advise complainant as fully set out in the preceding paragraphs of this determination. The record furnished by the complainant to this Office points to the lengths to which the complainant had to go to in order to finally realise that it is in fact the first respondent's inappropriate advice that occasioned the circumstances in which he found himself. Later, I will deal at some length with the culpability of the second and third respondents. For present purposes though, it merits mentioning that the second and third respondents cannot take advantage of complainant's lack of appreciation of what went wrong as he was entirely dependent on his financial adviser, the first respondent, to bring these matters to his attention. In any event, the second and third respondents were the authors

[19]*Van Staden v Fourie* 1989 (3) SA 200 (A) 216B-F). The court held per EM Grosskopf JA (in the context of a statutory provision permitting recovery of moneys paid) that running of prescription is not postponed 'until the creditor has established the full extent of his rights' (*tot dat die skuldeiser die volle omvang van sy regte uitgevind het nie*). It followed that prescription started running when the creditor knew the facts the statute postulated for recovery, even though the creditor only later learned what requirements the statute posed and what rights he acquired when the payee failed to fulfil those requirements.

[20]*Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) paras 11 and 13. The plaintiff alleged that the bank had negligently paid out a treasury requisition (skatkisorder) contrary to its instructions. The plaintiff knew that the requisition had been paid out, in conflict with its instructions, and not to the payee it specified or in terms of its endorsement. What the plaintiff did not know was into whose account payment had in fact been made. It asked the drawee bank for those details, and instituted action after receiving them. But that was more than three years after it knew of the erroneous payment. Schutz JA held (para 8), adopting the minority judgment of Harms JA in *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) 212-213, that the plaintiff had knowledge of the basic facts to bring its claim – admittedly a scant claim, but a valid claim nevertheless. A 'merely speculative possibility' that facts might later emerge that would lead to the failure of the claim – such being extremely unlikely – afforded no reason not to institute its action (para 14).

of the complainant's misfortune as they were directors of Bluezone. Complainant was unaware that he had been ill advised.

[134] At worst, prescription would have started running from March 2009 when the Company defaulted in payment of his monthly income. Even at that point, he lacked information to formulate a complaint.

[135] It was HCL (the second respondent) himself who wrote to complainant in November 2009 advising that Bluezone had received an offer from a JSE listed company. As complainant stated, the letter was drafted in such a manner that he did not appreciate the woeful financial position the company was in. At that point, it must have been clear to the directors of Bluezone that the scheme was in trouble and was headed for liquidation. Instead of being candid about the situation, the directors of Bluezone concealed the truth from investors.

[136] First respondent's role in further confusing complainant cannot be gainsaid. Whether it was deliberate or borne out of ignorance, the fact remains, first respondent totally misled complainant about what the real problem was. First respondent's claims to the complainant that Bluezone had been wrongly placed under liquidation served to further confound the problem. It was only after a period of about two years from the date of default by the Company that complainant lodged the present complaint. It was only at that stage that he became aware that he had been inappropriately advised and lodged a complaint. I therefore find that there is no merit to the defence of prescription.

[137] At this stage, it seems convenient to deal with the salient points of the lengthy response furnished by the second and third respondents:

Failure to comply with Rules 5 (c), (d) and (g) of the Rules on Proceedings of the FAIS Ombud (the rules)

[138] In their first submission dated 13 August 2012, second and third respondents raised non- compliance with Rules 5 (c), (d) and (g) of the Rules on Proceedings of the FAIS Ombud (Rules). They argued that the non- compliance precludes the Ombud from investigating the complaint[21]. Starting with compliance with Rule 5 (d), there is no disputing that complainant endeavoured to resolve the dispute with first respondent. However, complainant did not refer the complaint to Bluezone. There was simply no way complainant would have known that he ought to have referred the complaint to Bluezone. In my view, complainant did what any reasonable person would have done in the circumstances. He went to the first respondent and raised his concerns. It was in any event first respondent's responsibility to refer the complaint to Bluezone. They were after all, responsible for first respondent's actions in terms of section 13 of the FAIS Act. What compounded matters was the fact that first respondent never alerted the complainant to the fact that he should endeavour to raise his concerns with Bluezone. Instead, complainant was fed with excuses that sought to absolve

[21]Rule 5 (c) provides that the complainant has six months after receipt of the final response from respondent or after such response was due to submit the complaint to the Ombud. 5 (d) states that on submitting a complaint to the to the Ombud the complainant must satisfy the Ombud that he endeavoured to resolve the complaint with the respondent, and must produce the final response if any of the respondent as well as the complainants reasons for disagreeing with the final response. Rule 5 (g) provides that the complainant must be advised by the Ombud of the response of the respondent to the extent necessary to react to such response and to decide whether the complaint should be proceeded with, and must thereafter within two weeks advise the Ombud of such reaction and decision.

Bluezone of all liability, and instead ascribed that entity's defaulting in the payment of income to what the first respondent referred to as some 'minor technicalities and legalities'.

[139] In a way, second and third respondents' charge against complainant represents the quintessential case that illustrates the practical difficulties investors must face when it comes to dealing with property syndication products sold through "section 13 representatives". They simply do not know who to turn to when the investment scheme goes bust. Investors, especially pensioners, find the entire process completely bewildering.

[140] With regard to Rules 5 (c) and (g) there is no room for the kind of interpretation the respondents seek to introduce here. This Office referred the complaint to all the respondents and were afforded an opportunity to resolve the matter directly with the complainant. There is therefore no merit to the respondents' submissions that there has been non-compliance with rule 5 (c).

No complaint in terms of section 27 of the FAIS Act has been lodged against the respondents.

[141] Second and third respondents also contend that they are only interested parties and cannot be seen as respondents because no complaint has been made against them. In that regard, they suggest that the complaint is only against the first respondent. The respondents further submit that they have not been cited by the complainant as parties to the complaint and that therefore the Ombud has no jurisdiction to entertain the matter. This submission proceeds upon an

erroneous premise that the Ombud is merely a passive umpire who takes no active participation in the inquisitorial investigation of the complaint. This flies in the face of several provisions of the FAIS Act. In that regard, the provisions of Section 20 (3) of the FAIS Act are instructive and provide as follows:

> *"(3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –*
>
> *(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and*
>
> *(b)the provisions of this Act."*

[142] It is clear from the provisions of section 20(3) of the FAIS Act that the Ombud must entertain the real complaint. In a word, the Ombud has to deal with the substance of the complaint and not merely its form. The substance clearly points to the conclusion that second and third respondents had to be involved in the complaint, and were accordingly afforded the opportunity to respond to the case made by the complainant as the providers who had appointed the first respondent as representative in terms of section 13 of the FAIS Act.

[143] Complainants who submit their cases to the Ombud are normally lay people who often have no training in the law. The legislature in creating the Office of the Ombud intended to create a dispute resolution body that deals with disputes unencumbered by the technicalities that obtain in the court processes.

[144] The complainant cannot be expected to draft his/her complaint as a lawyer drafting pleadings. To equate the complaint submitted by the complainant to a pleading is to misconstrue the purpose of the creation of the Office of the FAIS Ombud as a dispute resolution body. The FAIS Act makes it clear that the Ombud investigates and determines complaints. The investigation takes an inquisitorial approach in terms of which the Ombud must take an active participation in the identification of the issues between the parties. In the present matter, the respondents' defence is untenable simply because investors such as the complainant had no way of knowing that respondents were answerable to their complaints.

[145] It must be added that this is exactly what Bluezone wanted to achieve by hiring representatives in terms of section 13 of the FAIS Act. They wanted to place themselves as far as possible from the reach of the complainants. The legal nexus is however clear as the first respondent acted as a representative of Bluezone in terms of section 13 of the FAIS Act.

Failure to provide sufficient particulars to enable second the third respondents to respond in terms of section 27 (4)

[146] The respondents also charge that the Ombud has failed to comply with the provisions of section 27(4) of the FAIS Act. In that regard, the respondents allege that they have not been provided with such particulars as would enable them to respond to the allegations presented against them. There is no merit to this submission. Incidentally, in paragraph 25 of their response, the respondents make the following telling submission:

'*The complainant states in Section D of the Complaint Registration form that:*

"I would like the immediate repayment of my R500 000 originally invested on 11 March 2008, plus the immediate payment of interest on R500 000 that would have accumulated since 11 March 2008, had this been placed in a bank account. *And in par 48 of his letter of complaint to the Ombud he states clearly:….seek full and immediate payment by Mr Smith of R500 000,00 which I had originally invested,……*'

[147] Two things emerge from the above-cited passage. First, it is at odds with respondents' argument that they were not placed with the particulars of the complaint. Despite their submission to the contrary, the respondents were indeed served with the complaint, including its accompanying documents, and the notice informing them of the complaint. Importantly, the respondents were requested to furnish this office with their responses. It was for that reason that their attorneys were able to file a comprehensive response on their behalf. Secondly, the respondents contend that the complaint is not directed at them, nor does it seek to hold them personally liable for the complainant's loss. I have already dealt with this with how the incorrectness of this contention in the preceding paragraphs.

The Ombud has no powers to pierce the corporate veil

[148] The respondents in their submission also raise the fact that the FAIS Act does not confer any power or jurisdiction on the Ombud to 'pierce the corporate veil.' I deal with the issue of piercing the corporate veil later on in this determination when I consider whether respondents should be held personally liable. At this stage, I deem it necessary to deal with the respondents' further submission that the Ombud does not have the general power to investigate or adjudicate matters that do not form part of the complaint itself. In this connection, they add that the complainant in the complaint form seeks relief only against the first respondent as an agent of Bluezone and LSI Brokers. I disagree. The first respondent was appointed as a representative of Bluezone in terms of section 13 of the FAIS Act. It therefore stands to reason that the actions of the first respondent can justifiably be imputed to Bluezone as the principal. The factual matrix of this matter warrants that those entities and individuals entrusted with the supervision of the first respondent be held liable for his actions. Moreover, the actions of the directors of Bluezone, who were also key individuals in terms of the FAIS Act, clearly precipitated the financial loss that investors such as the complainant suffered. They flouted various provisions of the FAIS Act, and deliberately misled investors such as the complainant about the true state of affairs of Bluezone and its related syndication schemes. There is therefore a clear legal connection between Bluezone, its related entities, its directors and the first respondent. It therefore goes without saying that there is no merit to the respondents' submission.

The Ombud's procedures and resources are not well suited to determining such a complex dispute such as that of attempting to pierce the corporate veil.

[149] Other than the bold statement made by respondents, they proffer neither evidence to show how that the matter is complex nor evidence to show how the Ombud's office is unsuited to determine this matter. The high court has had occasion to deal with the similar submission concerning the jurisdiction of the Ombud. In a recent judgement handed down by his Lordship, Justice Baqwa , in the matter of ***Deeb Raymond Risk and Another v The Ombud for Financial Services Providers and Other*** **(unreported, heard in the North Gauteng High Court under case number 38791/2011)**[22] , his Lordship had the following to say after considering the relevant provisions of the FAIS Act that:

> *'It should be appreciated that upon the enactment of the FAIS Act, the legislature provided that complaints lodged with the Ombud would be dealt with by the Ombud. It however vested the Ombud with power to refer certain complaints to the courts.'*

[150] This power is to be found in section 27 (3) (c) of the FAIS Act and it states:

> *'The Ombud may on reasonable grounds determine that it is more appreciate that the complaint be dealt with by a court or through any other*

[22] Pages 4 to 13.

available dispute resolutions process and decline to entertain the complaint.'

[151] His Lordship further states, the investigative powers of the first respondent are further defined in section 27 (5) (a) of the FAIS Act which provides as follows:

'*The Ombud-*

May, in investigating or determining an officially received complaint, follow and implement any procedure which the Ombud deems appropriate and may allow any party the right to legal representation.'

[152] His Lordship found that the section confers neither a right on the appellant to demand that the Ombud decline to exercise her jurisdiction to deal with complaints, nor does it confer a duty on her to do so. The section clearly confers discretion on the FAIS Ombud. Any other interpretation would be tantamount to stripping the Ombud of her statutory powers in terms of the FAIS Act. And the court in Deeb Risk (above) went further to state that '*Absent a decision by the Ombud to refer the matter to court, she retains jurisdiction'*.

Inadequacy of Bluezone's license to render financial services in respect of the product in question.

[153] Second and third respondents argue that if there was any deficiency with regard to the license of Bluezone, such is a matter for the registrar and Bluezone. There is no merit to this submission. The issue turns on whether Bluezone itself complied with the provisions of the FAIS Act. As illustrated throughout this

determination, there is ample evidence demonstrating that Bluezone failed to do so. The respondents' submissions are a complete *nonsequitur*.

Prejudicial effect on the career and ability to trade of Mr JJ van Zyl as a practising attorney

[154] The second and third respondents argue that the referral of alleged complaint proceedings against them, apparently *mero motu* by this office will have severe and adverse financial consequences, especially for the third respondent. They further argue that it will have a prejudicial effect on the third respondent's 'career and ability to trade. Second and third respondents argue that in the event the office determines the complaint, it would be acting outside the scope of its statutory mandate and powers (ultra vires). In any event, they submit that this Office has no power to determine a complaint against a key individual appointed as such in terms of the FAIS Act. Such a complaint, so charge the respondents, must be dealt with by the registrar.

[155] The second and third respondents' submissions are untenable. They are neither founded in fact nor law. The legal nexus is clear that respondents were directors of Bluezone, a now defunct entity. They appointed representatives in terms of section 13 of the FAIS Act even though they had no authority to sell the product, and this was in violation of their responsibilities as key individuals appointed in terms of the FAIS Act. When the key individuals of Bluezone allowed their 'section 13 representatives' to sell products for which Bluezone itself was not permitted to sell as they had no license, such conduct on their part as key individuals was reckless. The respondents were in breach of their statutory

obligations in terms of the FAIS Act as key individuals. In my view, it cannot avail the respondents to hide behind the corporate veil. The statutory duties imposed by the FAIS Act on key individuals require them to ensure compliance with the FAIS Act. It therefore stands to reason that third respondent along with the rest of the respondents were bound to ensure that there was compliance with provisions of the FAIS Act. That being the case, I am satisfied that the present complaint relates to the respondents' liability as directors of an entity that was licensed to render financial services in terms of the FAIS Act.

Quantum of financial prejudice

[156] Respondents further argue that there was no sufficient material properly placed before to the Ombud to enable it to work out the quantum of financial prejudice. They acknowledge that the property syndication company was placed under judicial management, but contend that such judicial management was suspended and that the building has since been purchased by Bonatla for R15 million rand.

[157] They further submit that shareholders have since received shares in Bonatla for their shares in the property company and that after two years the shareholders will be free to exit by selling those shares. I disagree. The respondents' submission proceeds upon an erroneous position. The point is simply that the complainant purchased a financial instrument in order to receive a regular income. His specific request was for a secure income. That being so, his risk profile indicated that he was not comfortable to take the degree of risk he was exposed to by the Bluezone product. It must also be pointed out that it will take

a miracle for Bonatla's shares to meet the capital amount invested by complainant and other investors.

[158] A total amount of about R34 million was raised from investors. Bonatla purchased the company for R15 million. For respondents to suggest that the shares, in the current economic environment and with the history associated with these entities, are likely to more than double and that investors might be paid out in two years undermines the intelligence of its investors. Complainant has demonstrated to this Office that he invested R500 000. He received a paltry amount of about R59 000 over a period of three years which was paid erratically. There is no contrary evidence to rebut complainant's claims that his investment of R500 000 is now worthless. I am satisfied that the complainant has adequately dealt with the issue of quantum.

Fourth and fifth respondent's response

[159] In their response to this office dated 22 July 2013, to the notice in terms of section 27 (4) of the FAIS Act, the fourth and fifth respondents in essence submitted as follows:-

[160] They were salaried directors of Bluezone and that their involvement in Bluezone was limited to that of employees.

[161] They both resigned from Bluezone on 17 December 2009.

[162] The complaint is directed against first respondent.

[163] The complaint was lodged on 25 November 2011, more than three years after advice was furnished.

[164] Fourth and fifth respondent had certain functions to perform as employees of Bluezone, had nothing to do with product development and were not involved in the legalities of any financial product promoted by Bluezone.

With regard to the question of why Bluezone invited offers for subscription of shares in Copper Sunset Trading to the public without issuing a prospectus, fourth and fifth respondents simply stated that this was not within their knowledge. I proceed to deal with each one of these submissions in detail:

They were salaried directors of Bluezone and that their involvement in Bluezone was limited to that of employees.

[165] This submission is untenable. History shows that they became directors shortly after Bluezone was started by HCL (second respondent). HCL was the sole director. He was followed by the third respondent not long thereafter, Durant Van Zyl (fourth respondent) entered with Van Niekerk and Bester (fifth respondent). They were at all times directors with fiduciary duties towards the Company's and its investors' interests. There is therefore no substance to this leg of their defence.

They both resigned from Bluezone on 17 December 2009.

[166] The conduct complained of covers the period when both respondents were still directors of Bluezone. Their subsequent resignation therefore cannot avail them as a defence.

The complaint is directed against first respondent.

[167] I have already dealt with this when I dealt with second and third respondents' defence. There is no substance to this submission. The Ombud cannot concern itself with form over substance.

The complaint was made on 25 November 2011, more than three years after advice was furnished.

[168] This too has no substance. The complaint is not time barred. Moreover, respondents have not shown that the complainant had knowledge that he had been inappropriately advised from the day of rendering the financial service to him.

Fourth and fifth respondent had certain functions to perform as employees of Bluezone, had nothing to do with product development and neither were they involved in the legalities of any product promoted by Bluezone.

[169] There is no merit to this statement. The issue here is that the respondents were the directors of Bluezone. In that connection, they had fiduciary duties. In addition, they had an obligation in terms of the FAIS Act to exercise supervision over the first respondent who was an appointed “section 13 representative” of Bluezone. There is no evidence that the first respondent, who was not competent to act unsupervised, was ever subjected to any form of supervision as required by the FAIS Act. What is more, section 11 of the Code places an obligation on the financial services provider to put in place systems and mechanisms to ensure that their clients are not exposed to risk, theft or fraud. Again, that responsibility lies with the directors. In the present matter, none of the respondents demonstrated that any systems were put in place for the protection of the investors. On the contrary, the directors failed to disclose to the investors that the Company was in financial difficulties.

[170] With regard to the question of why Bluezone invited offers for subscription of shares in Copper Sunset Trading without a prospectus, respondents simply stated that this was not within their knowledge and as directors and employees of Bluezone they were not responsible for the legalities and developmental aspects of Bluezone.

[171] For reasons already set out in the preceding paragraphs, this too must be dismissed. Respondents as directors of Bluezone must take responsibility for the decisions they took.

[172] Respondents finally stated that they view the notice in terms of section 27 (4) of the FAIS Act as only intended to elicit information from them, that they are not

in their representative or personal capacities an interested party in this matter as the matter does not fall within their knowledge.

[173] There is no merit to this submission. The two were part of a body of directors. Not only are they a party interested in the matter, they are as directors of the now defunct entity, and must therefore take responsibility for the decisions they took.

Respondents' failure to register a prospectus with the registrar of Companies

[174] This brings me to the conduct of second to fifth respondents (the directors) of inviting members to subscribe to the shares and debentures without a prospectus.

[175] The document that was used to solicit investments carries the title, '**PROPERTY SYNDICATION INVESTMENT DOCUMENT, COPPER SUNSET TRADING 239 LIMITED, REGISTRATION NUMBER 2006/011414/06 ERF 925 IRENE EXTENSION 30 TOWNSHIP, REGISTRATION DVISION JR PROVINCE OF GAUTENG, IN EXTENT 1.0930 HECTARES'**

[176] Respondents consistently advertised in their Bluezone disclosure document that the offer to complainant and other consumers who invested in the Company was not an offer to the public.

[177] Chapter VI of the Companies Act 61 of 1973[23] (the Companies Act) deals with offers to the public. In that regard, Chapter VI, section 142 of the Companies Act defines offers to the public as:

> *'any offer to the public and include an offer of shares to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner'*.

[178] Section 143 of the Companies Act carries the following restrictions:

> '(*1) No person shall offer any shares to the public otherwise than in accordance with the provisions of this Act.*
>
> *(2) No person shall offer to the public any shares of any company or body corporate which is not a company or external company within the meaning of this Act or which has not been exempted from the provisions of this subsection by the Registrar by notice in the Gazette.*
>
> *[Sub-s. (2) substituted by s. 6 of Act 64 of 1977.]*
>
> *(3) Any person who contravenes the provisions of subsection (2), and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence*'.

[179] Section 144 of the Companies Act describes in negative terms what is not an offer to the public and it states: An offer of shares in relation to an offer for subscription for or sale of any shares, shall not be construed as an offer to the public-

[23] The new Companies Act had not come into operation at the time the financial services were rendered to complainant.

(a) '*if the offer is made to-*

(i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act 94 of 1990); or……(ii)……(iii)…

(b) if the offer for subscription is of such a nature that the total acquisition cost of the shares for a single addressee acting as principal is at leastR100 000 or such higher amount as the Minister may, by notice in the Gazette, determine in order to counter the effect of inflation;(c)…(g)……..'

[180] Section 145 of the Companies Act provides:

'*No offer for subscription to public without prospectus.(1) No person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of this Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered*'

[181] In the light of the provisions of the Companies Act, in particular section 145, this Office sent a letter to the second to fifth respondents notifying them that the complaint had been accepted for investigation. In paragraph 5 of the notice, respondents were specifically invited to deal with the question as to why Bluezone made an offer to the public for the subscription of shares in Copper Sunset without making use of a valid prospectus. None of the responses received from the directors dealt with this question.

[182] On 11 June 2013 second and third respondents filed their response but simply sidestepped the question. It is worth quoting their response:

'*The explanation with regards to the advice from the attorneys as to why no prospectus was required, is obviously an important part to Mr van Niekerk's reply, and we will have to request same from the offices of Honey Attorneys of Johannesburg Inc, who gave the advice on the structure of Bluezone's products, which, we are instructed was the eventual product handed in with the application forms to Bluezone's FSP license application by Sterling Compliance Services (now Providus, reg nr with FSB CO2)*'.

[183] Fourth to fifth respondents after giving an explanation of their role as directors of Bluezone at the time merely pointed out, through their attorneys, that:

'*there is no way they could answer your question posed in paragraph 5.1 because it is simply not within their scope of knowledge*.'

[184] In the absence of a direct response to the question, it remains for this Office to determine whether the directors of the Company that was licensed as a financial services provider in terms of the FAIS Act and those of the promoter through their conduct, violated the provisions of the Companies Act, in particular, section 145.

[185] Upon perusal of the syndication document one cannot help noticing the following:

(a) The offer opened on 28 January to 30 September 2008, respectively;

(b) The minimum subscription is noted as R100 000 and the statement is made that the offer is not an offer to the public as contemplated in the Companies Act (section 144 of Act 61 of 1973) (own emphasis).

(c) The 'Offer' is defined as an invitation to subscribe for units under this Syndication Document and the resultant participation of Investors in this property syndication investment';

(d) Share is described as 'an ordinary share in the Company with a par value of R1,00 (one rand) in the capital of the Company, irrevocably linked to a Debenture;

(e) Subscription amount is described as 'R1000,00 (one thousand rand) for 1 (one) Unit, with a minimum number of 100 (one hundred)units.

(f) The minimum subscription is defined as the minimum subscription amount necessary to give effect to the purpose of the offer as reflected in paragraph 22.

[186] The principal objective of the Company is set out in page 14 of the document and it is to:

'*raise sufficient capital to purchase the entire shareholding in the Property Company and to advance money in the form of a loan to the Property Company for the purchase and management of the Immovable Property, to pay the amounts payable to the Promoter (including the Promoter's Fee) and to pay the Offer Costs...*'

[187] The purpose of the Offer appears in page 15:

> *"To enable the Company to purchase the entire issued share capital in the Property Company from Bluezone Property Investments (Pty) Ltd, at R1,00 (one rand) per share for a total amount of R100.00 (One hundred rand)*
>
> *(i) Enable the Company to advance an unsecured loan to the Property Company equal to R34 588,846,61.*
>
> *(ii) Create an opportunity for shareholders to participate in the Company's investment in the Property Company and its Immovable Property".*

[188] The difficulty that arises when one peruses the syndication document is that it contains virtually all the hallmarks of a prospectus but, for some reason, second to fifth respondents did not use a prospectus. The aim and purpose of the offer conveys nothing extraordinary and appear to be in line with the conclusion that the offer is in fact one that is open to the public.

[189] I note that there is no definition of the word 'subscription' in the definition section of the syndication document, but that poses no problem at all because the minimum subscription conveys the full intent of raising R1000 per unit from anyone who can pay that amount as long as they can pay for a minimum number of 100 of those units. Similarly, the word 'unit' is not described but it would appear from the document that a unit is nothing other than a combination of a R1.00 share coupled with a debenture of R999.

[190] In a sense, anyone who has R100 000 and was willing to invest in the Bluezone scheme could do so. It would appear from the submissions made by the first respondent that there was in fact nothing extraordinary that qualified the complainant to make the investment other than the fact that he had the requisite minimum amount, and perhaps more.

[191] The question arises as to whether it permissible of second to fifth respondents to offer the shares/debentures without using a prospectus? Put differently, does the inclusion of the line 'this offer is not an offer to the public as contemplated in section 145 of the Companies Act', despite the features of the offer, mean that the offer is not to be construed as an offer to the public? It appears to me that the one way of resolving this is to answer the question, what is an offer to the public?

[192] For a better understanding as to what constitutes an offer to the public, I can do no more than refer to the authorities handed down by our courts. *In Gold Fields Ltd and Another v Harmony Gold Mining Company Limited, Gold Fields Ltd* [2005] 3 ALL SA 114 (SCA) contended that the offer made by the respondents, Harmony was an offer to the public, the court, as per Nugent JA had the following to say:

'[*13] To qualify as an offer to the public it would seem to me that the terms of the offer would at least need to be capable of being offered to and accepted by the public at large. That is not to say that every offer in such terms is necessarily an offer to the public. Nor is it to say that an offer must necessarily*

be made to the public at large in order to qualify (s 142 makes it clear that it might be made to only a section of the public). But an offer that is made to the public would necessarily be in terms that would enable it to be made to and accepted by the public at large, and it could thus be made with indifference to any random section of the public. An offer to sell shares, for example, in return for cash, is capable of being made to the public at large, and might thus be made as much to that section of the public that resides in Bloemfontein as to the section of the public that resides in Upington. [*14] But that will not be so where the offer aims at acquiring specific private property – as in this case – for the terms of such an offer must necessarily be such that it is directed to, and is capable of being accepted by, only the owner of the property. The offer, in its terms, will not be capable of being extended to the public at large, or even to a random section of the public. That the owner of the property might live amongst us in society does not mean that the offer is addressed to him as a 'section of the public'*.

[193] In *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd*[24] where the respondents were at pains to point out that their scheme or associations were not open to members of the public but a restricted circle of individuals and therefore that the associations were not collective investments, the court had this to say:

'*By way of example, in one of the portfolios the members included a tennis association; a primary school and a school for the blind; a church; an optometrist and other businesses; several trusts, both family and charitable;*

[24]Executive Officer: *Financial Services Board v Dynamic Wealth Ltd and Others* (888/10) [2011] ZASCA 193; 2012 (1) SA 453 (SCA); [2012] 1 All SA 135 (SCA) (15 November 2011)

some deceased estates and a number of individuals from various parts of the country and having little other than their investment in that portfolio in common. The answering affidavit said that membership was restricted to persons invited to join through Dynamic Wealth's network of independent financial advisers. However this network was 470 strong and it recruited literally thousands of investors who invested hundreds of millions of Rand through these associations. There can be no doubt that investments were being solicited from members of the public.'

[194] Bluezone on its own version had a large network of more than 400 representatives who were spread country wide to market their scheme. There is indeed nothing that qualified complainant for the subscription of Bluezone units other than the fact that he could afford the minimum subscription, and more. First respondent's version supports this conclusion. The syndication document as a whole conveys no more than an offering of units to anyone who can afford the minimum number of 100 units at R1000, regardless of whence they come and who they might be. Based on the factors already mentioned, the purpose for which the money was raised and the manner in which Bluezone went about raising the funds, there can be no question that the offer was one aimed at and indeed made to the public. The provisions of the Companies Act were therefore violated. In my view, the conduct of the directors of Bluezone merits the attention of the relevant authorities. Their conduct warrants some form of censure, and possibly charges must be laid with the relevant authorities.

[195] Perhaps the question that merits an answer at this point is whether second and third respondents, and here I include fourth and fifth respondents, should be

held personally liable for the transgressions complained of both in respect of the FAIS Act and the Companies Act[25]. Second to third respondents have submitted that although Bluezone might be at risk, the personal liability of the directors is not within the scope of investigation nor jurisdiction of this Office. At common law, it is trite that the company's directors have fiduciary duties to act with care and skill. These duties are imposed for the purpose of keeping directors accountable for their actions, which in turn creates an obligation for directors to act in the interests of the company's shareholders.

[196] In a previous determination of *Hester Cornelia Bronkhorst versus Pieter Van Der Merwe Makelaars & Finansiele Adviseurs BK and Nicolaas Van Der Merwe*[26], the Ombud had occasion to hold that particular attention needs to be paid to the legislature's intention. In that determination it was emphasised that it is not plausible that the legislature intended that a financial service provider rendering a financial service through a corporate entity should be protected by the proverbial 'corporate veil'. The determination referred to the well-known passage from the decision of the appellate division (as it then was) in *Shipping Corporation of India Ltd v Evdomon Corporation and Another* , which stated as follows:

> *"The corporate veil may be pierced where there is evidence of fraud or dishonesty or other improper conduct in the conduct in the establishment or the use of the company or the conduct of its affairs in this regard it may be*

[25] 61 of 1973.
[26]Case no. FOC 1402/07-08/FS (5) at para 37.

convenient to consider whether the transaction complained about was part of a 'device', 'stratagem', 'cloak' or a 'sham'[27].

[197] Similarly, our courts have consistently held that "*when there is fraud, dishonesty or some other improper conduct, policy dictates that the court engages in a balancing exercise. The court considers the circumstances and the facts of each case to determine whether, in the appropriate case, it is proper to disregard the corporate personality and apportion liability where it belongs*."[28]

[198] Section 28 of the FAIS Act sets the powers of the Ombud when making determinations.

"28. Determinations by Ombud

(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include –

(a) the dismissal of the complaint; or

(b) the upholding of the complaint, wholly or partially, in which case

(i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;

[27] The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A) at para 43 to 44

[28] *Cape Pacific Ltd v Lubner Controllong Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at para 31 and 32

(ii) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;

(iii) The Ombud may make any other order which a Court may make*."(own emphasis)"*

[199] In particular, provisions of section 28(1) (b) (iii) of the FAIS Act are instructive. The submission that the Ombud may not look beyond the proverbial corporate veil is not borne out by section 28(1) (b) (iii) of the FAIS Act. A plain reading of this provision makes it clear that the Ombud is entitled to make any order which a court may make. There is therefore no substance to the submission that only the court may pierce the company's corporate veil. The Ombud may, where circumstances justify it, disregard the corporate veil and hold the directors personally liable. In my view, the facts of the present matter require that I disregard the identity of the members from that of the entity Bluezone and hold the directors liable.

[200] It follows then that section 28(1) (b) (iii) of the FAIS Act empowers the Ombud to make the same ruling as a court, and this must necessarily include piercing the corporate veil. As already mentioned, the position at common law is set out

in the cases of *Salomon v Salomon*[29]**,** *Lategan v Boyes*[30] and *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[31].

[201] It has been enunciated in previous determinations that in most Ponzi schemes, once the scheme has collapsed, the directors hide behind the liquidation process in an attempt to divert attention from the fact that they have mislead shareholders and members of the public. Directors of these failed schemes often evade scrutiny and liability for the schemes demise through these means.

[202] Accordingly, it is worth repeating the words of the Ombud in the *Sydney Perumal Naidoo v Christian Johann Swanepoel, Jacob Johannes van Zyl and Hendrik Christoffel Lamprecht*[32] determination:

> *"The primary purpose of the FAIS Act is to protect the consumer and strengthen the integrity of the financial services industry. It therefore seems to me that the time has come to look beyond the corporate veil that protects the directors of these companies that perpetrate these fraudulent investment schemes.*

[203] A fundamental consequence of appointing a representative in terms of section 13 of the FAIS Act is that the financial services provider, in terms of section 13 (1) (b) (bb) of the FAIS Act, accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing,

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[29] *Salomon v A Salomon & Co Ltd [1897] AC 22.*
[30] *Lategan v Boyes 1980 (4) SA 191 (T).*
[31] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A).*
[32] Case no. FAIS 04214/09/10/NC1 at para 43.

any such contract or mandate. There can be no gainsaying that first respondent rendered financial services to complainant as a representative of Bluezone in terms of section 13 of the FAIS Act. Indeed, nowhere in second and third respondents' response is there any statement to the contrary.

[204] The respondents were directors and key individuals of Bluezone. They are the ones that made a decision to appoint representatives in terms of section 13 of the FAIS Act to market Bluezone's products. The directors knew that Bluezone had responsibility to train the representatives about the product. Equally, Bluezone knew more than anyone the risk inherent in the product. The directors knew that the financial product was nothing but a sham and that it was bound to fail. No sooner than the minimum subscription was attained did the wheels come off Bluezone. Without accountability and oversight, investors' funds could not be accounted for because of the pervasive and deep rooted conflict of interest.

[205] I refer in this regard to the recent decision of *Dulce Vita CC v Adv Chris van Coller and Others*[33] where his Lordship Southwood AJA sounded the following opprobrium to the directors of Bluezone:

> *Despite this conclusion it is clear that the promoters of the scheme, Lamprecht van Zyl, Durandt van Zyl, Van Niekerk and Bester, used a number of legal instruments to induce the gullible and the injudicious to invest large amounts of money in a scheme which, when properly analysed, never had a reasonable prospect f succeeding. It is also clear that some of the promoters abused their*

[33] *Dulce Vita CC v Chris van Coller* (192/12) [2013] SCA 22 March page 16.

positions to pay themselves very large amounts from the funds which Spitskop had received. The evidence indicates that some, if not all, of the promoters, and possibly other, carried on the business of Spitskop recklessly or with intent to defraud the investors and are both civilly and criminally liable in terms of section 424 read with s 44 of the Companies Act 61 of 1973; that the promoters and possibly others, did not comply with the requirements of Notice 459 and therefore committed a criminal offence punishable by a fine not exceeding R200 000 ad or imprisonment for a period not exceeding five years, or both…..'

[206] It does not end there, long before the Spitskop was before court, the same directors indeed struck whilst the iron was still hot by setting in motion the Copper Sunset Trading 239 to once again lure investors as early as 2008. Shortly thereafter, alarm bells started ringing in March 2009 when Bluezone failed to pay investors. Bluezone was finally liquidated in March 2011, leaving behind scores of investors, mostly persons in retirement, who should have never come near this disaster.

[207] In essence, what the respondents are advocating for is that the Ombud should rather concern itself with the form rather than substance. Such conduct would result in the miscarriage of justice. In so far as the claim that the Ombud has no power to pierce the corporate veil is concerned, the FAIS Act in section 28 (1) (iii) provides that the Ombud may make any other order which a Court may make. There is therefore no merit to the respondents' defence.

CAUSATION

[208] It remains fundamental to establish the link between the conduct of the respondents and the loss suffered by the complainant. The complainant's case is, had respondents followed the letter of the law, he would not have invested at all in the Bluezone investment. In other words, had the respondents made the necessary disclosures about the risk that is inherent in the Bluezone investment and had they appropriately advised him applying due skill, care and diligence and acted in his interests as the Code demands, he would not have invested in Bluezone.

[209] He states in his complaint that he discovered through his own investigations that the Bluezone investment was "way too risky" for his circumstances. This is consistent with first respondent's version who also says the investment offered '**astronomically high returns'** (own emphasis). It is also first respondent's version that complainant wanted to '**venture**' (own emphasis) some of his money with a view to earning higher interest and capital gains.

[210] In *Minister of Finance v Gore*, the court pertinently pointed out the following:

> '*In our law the time-honoured way of formulating the question is in the form of the 'but for' test. Can it be said that, but for the wrongful act complained of, the loss concerned would not have ensued?*[34]

[211] On page 25, his Lordship went on to state:

[34] *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2006] SCA 97 (RSA); [2007] 1 All SA 309 (SCA) (8 September 2006).

'*Applying this requires the process of inferential reasoning described by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley*[35]*: What would have happened if the wrongful conduct is mentally eliminated and hypothetically replaced with lawful conduct? A plaintiff who can establish that, in such event, the loss would, on a preponderance of probabilities, not have occurred, recovers his damages in full, because causation is regarded as having been established as a fact. A plaintiff who cannot do so will get nothing. That there is no discount either way stems from the nature of the inferential process: the verdict must go one way or the other even if the scales are tipped only slightly in one direction (see eg Allied Maples Group Ltd v Simmons & Simmons (a firm);* [36]*;Minister van Veiligheid en Sekuriteit v Geldenhuys)* [37].

[212] It is not in dispute that complainant made the investment following first respondent's advice. First respondent in turn was the agent of Bluezone, a now defunct entity which was controlled and directed by second to fifth respondents. There is no question, as demonstrated throughout this determination, that the advice was fundamentally flawed. There is also no question that respondents acted illegally and recklessly. It is this conduct that has led directly to complainant's loss. There was a clear and direct link between the first respondent's conduct, that of the directors and complainant's subsequent and inevitable loss.

[35]1990 (1) SA 680 (A) 700F-H. 26.
[36][1995] 4 All ER 907 (CA) 914c-d.
[37]2004 (1) SA 515 (SCA); paras 41-4.

I. FINDINGS

[213] The following findings are made:

(a) First respondent violated the Code in that he failed to appropriately advise complainant;

(b) The conduct of the first respondent, as a “section 13 representative” of Bluezone is attributable to the second to fifth respondents,

(c) The second to fifth respondents failed to exercise supervision over the first respondent as required in terms of section 13 of the FAIS Act,

(d) The loss suffered by complainant was as a direct result of respondents’ conduct;

(e) All respondents violated the Code in not disclosing the material terms of the Bluezone investment;

(f) All the respondents showed complete disregard of the law in rendering the financial services to complainant;

(g) Second to fifth respondents violated the Companies Act and Notice 459 of the Gazette 28690.

(h) The question is not whether complainant might recover some monies in future out of the investment made in Bluezone, but whether the advice was appropriate, bearing in mind his needs and risk profile. The first respondent gave advice that was inappropriate (as an agent of his principal). The directors of Bluezone must, consequently, be held responsible.

(i) Complainant has demonstrated that he has lost his investment.

J. ORDER

[214] In the result, the following Order is made:

(a) Complainant's complaint is upheld;

(b) Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay complainant the sum of R500 000.00 within SEVEN (7) days from date hereof;

(c) Interest at the legal rate of 15.5 % from seven days from date hereof;

(d) Complainant is to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investment in favour of respondents according to payment.

DATED AT PRETORIA ON THIS THE 17th DAY OF SEPTEMBER 2013.

_____

SYDWELL SHANGISA

DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS