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Avenues for restitution open to investors

Recent changes and court decisions make claims against financial advisers easier, writes **Leigh Adams**.

Financial advisers have been hotly criticised since the crash for leading their clients into financial products, including complicated debt and equity products and even foreign exchange derivatives, in circumstances where their clients had no idea of the types of ventures in which they were participating.

In what circumstances can clients recover if they have been led up the garden path?

Until recently, many claims against financial advisers never got off the ground because, in a rising market, more than six years could pass after getting the faulty advice before the losses were suffered — making the claim out of time before the client realised they even had one.

However, recent changes to the Trade Practices Act and the Australian Securities and Investments Commission Act mean the six-year limitation period no longer applies.

This is because a claim is now only time barred six years after the

loss or damage is suffered. That can be many years after the misleading financial advice was given.

Furthermore, financial advisers often have lengthy retainer contracts typically containing exclusion clauses which state that the client has ultimately relied upon their own skill and judgement.

There have also been some spectacular clauses purporting to indemnify the financial adviser from almost anything.

These are now to no avail. Recent decisions have declared that these no longer absolve the adviser from responsibility for faulty advice.

Moreover, it is often what is not said, rather than what is said, that gets a financial adviser into trouble.

Recent examples include the failure to discuss the nature and extent of the risks involved in the acquisition of foreign currency, shares, debentures and units; the failure to mention the need for continuous management of a portfolio; the failure to mention the degree of expertise required for effective management of a portfolio; and failure to properly (or at all) interpret the accounts of the companies that they have recommended — as opposed to any directly spoken inaccuracies.



Faulty advice can backfire on an adviser.

Photo-illustration: DOROTHY WOODGATE

This failure to speak — silence — can also amount to misleading conduct and has been held to be actionable.

An increasingly popular argument of financial advisers is that the client was the author of their own doom by either making their

own investment choices or by failing to implement protective measures.

This has been used especially where “sophisticated investors” were involved. This group included clients earning more than \$250,000 per year or who have assets exceed-

ing \$2.5 million. However, the recent cases show that even if the representation or advice was only a minor reason for the investment decision or if it just played some part in causing the loss, then a claim is available.

Arguing that a client did not protect themselves and that they should have mitigated their loss (e.g. by selling early in a lengthy falling market) is now unlikely to succeed, as the High Court has recently stated that the advice that caused the chain of events will continue to be the operative cause of the loss or damage unless the client behaves in a way that is manifestly unreasonable.

Another argument that has been popular is that the client “would have acted that way anyway”.

This is hard to prove. In one case, the threshold was that the client had to be shown to be so “transfixed” by the prospect of a low-interest loan that he or she would have obtained the facility in any event.

Taken together, these changes are good news for aggrieved investors.

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