Re Van Benthem & Petriccione

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

PAUL VAN BENTHEM AND ANTHONY PETRICCIONE

2008 IIROC 14

Investment Dealers Association of Canada
Hearing Panel (Ontario District)

Heard: October 6, 2008 in Toronto, ON
Decision: October 10, 2008
(20 paras.)

Hearing Panel:
Mr. Frederick Webber (chair), Mr. Norm Fraser and Mr. Duncan Webb

Appearances:
Ms Natalija Popovic, Enforcement Counsel
Mr. Michael Magonet and Mr. Daniel Bernstein, Respondents' Counsel

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DECISION

I. Purpose of this Hearing

1. This hearing was held pursuant to a Notice of Motion by staff of the Investment Industry Regulatory Organization of Canada ("IIROC"). The IIROC motion was for:

   (a) An Order adjourning the hearing in this matter sine die; and

   (b) An Order adjourning all other dates fixed by the Hearing Panel in its decision dated June 4.2008, sine die.

2. At the start of this hearing, the Hearing Panel was advised that the Respondents had brought a Cross-Motion pursuant to a Notice dated August 14, 2008. Notwithstanding that the documentation in support of this Cross-Motion had not been made available to the Hearing Panel prior to this hearing, the Respondents' Cross-Motion Record and Brief of Authorities were provided to us at the hearing which then proceeded to deal with the Motion and Cross-Motion. The Respondents' Cross-Motion was for:

   (a) An Order quashing the matter against the Respondents;

   (b) An Order directing IIROC to immediately remove from IIROC's website all references to the matter against the Respondents and the allegations made therein, other than to report the quashing of the matter;

   (c) Costs of the Cross-Motion

II. Background

3. IIROC commenced disciplinary proceedings against the Respondents by Notice of Hearing and Particulars dated April 18, 2008. On June 4 2008, the Panel ordered that the hearing in this matter would commence on April 13, 2009, and further ordered a series of deadlines for further steps in the proceeding.

4. On July 15, 2008, the Ontario Divisional Court held that the Investment Dealers Association (now IIROC) did not have jurisdiction over former registrants in its decision in Taub (Appellant) v. Investment Dealers Association and Ontario Securities Commission (Respondents), (herein referred to as "Taub"). IIROC has sought leave to appeal the Taub decision by Notice of Motion for Leave to Appeal to the Court of Appeal dated July 29, 2008.

5. The Respondents are both former registrants of IIROC.

III. Issue

6. The issue for the Panel was whether the Panel should grant the Order requested by IIROC or some other Order pursuant to its powers under IIROC Rule 20, or whether the Panel was bound by the Taub decision and therefore bound to grant the Respondents' motion.

IV. Conclusion and Reasons

7. After carefully considering detailed submissions by IIROC counsel and by counsel for both Respondents and after reviewing the cases referred to by all counsel, the Panel concluded that it was bound by the Taub decision and therefore that IIROC did not have jurisdiction over the Respondents.

8. Counsel for IIROC submitted that this Panel has jurisdiction to grant an adjournment sine die as requested in the IIROC Notice of Motion. She stated that if the Respondents' cross-motion is granted, the IIROC disciplinary process would be thwarted, the Respondents would derive the benefit of not having the matter heard on the merits, and that the Respondents would suffer no ill effects if the adjournment were granted.

9. Counsel for IIROC cited three principles in support of the IIROC motion:

    1. The public interest;
    2. Consistency among decisions, and
    3. The Panel has jurisdiction under IIROC Rule 20.

10. On the issue of the public interest, counsel for IIROC submitted that this proceeding involved serious allegations against the Respondents and involved many clients, and that it was therefore in the public interest that it be brought to a conclusion after a full hearing; quashing the proceeding at this early stage would thwart the public interest, but granting the requested adjournment would not do so and would do no harm to the Respondents.

11. Counsel for IIROC next referred to the decisions of five other hearing panels that have issued stays or adjournments after the Taub decision, and argued that this Panel must grant the requested adjournment in order to be consistent with those decisions which are contained in the Brief of Authorities and Additional Brief of Authorities filed by counsel for IIROC. These were either B.C. cases which were adjourned on consent following Collias, referred to below, or were Ontario cases which were adjourned on consent without jurisdiction being argued.

12. In further support of her motion, IIROC counsel referred to the case of The IDA and John Anastasious Collias, decided by a hearing panel in British Columbia on July 31, 2008. The facts and issue in Collias are essentially the same as in this case. In Collias, the Respondent, relying on Taub, requested a declaration that the IDA had no jurisdiction over him and an order that the Notice of Hearing be set aside; IIROC counsel responded that the panel in Collias was bound by a decision of the British Columbia Securities Commission in Charles K. Dass v. Investment Dealers Association of Canada

which decided that the jurisdiction of the IDA did extend to former members. The panel in Collias stated:

> " It is common ground between counsel that the issue of jurisdiction of the IDA (and now IIROC) in respect of former members is the subject of several decisions based on legislation in different Provinces of Canada that is not identical and that the judicial and administrative bodies articulating decisions on this point have come to diametrically opposite conclusions. Certainly, there appears no way to align Taub with Dass. Counsel advised the panel that the Dass decision has been appealed to the British Columbia Court of Appeal. The appeal was argued on May 14, 2008 and a decision of that court is pending."

13. The panel in Collias determined that a temporary stay of proceedings was the appropriate decision, following the test with respect to when a stay is appropriate articulated in Moore v. British Columbia (Securities Commission) [1996] B.C.J. No.651, relying on Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd, [1987] 1S.C.R. 110 and RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C. R. 311. The test involved three parts:

    1. Whether there was a serious question to be tried;
    2. Whether the applicant would suffer irreparable harm if the application was refused; and
    3. Which party would suffer the greater harm from the granting or refusal of the stay.

14. This panel was urged by IIROC counsel to follow Collias and grant the adjournment requested by IIROC rather than determining that this Panel was bound by Taub. Counsel for IIROC then discussed the principle of stare decisis and referred to the case of R. v. Vu [2004] BCCA 230 which stated:

> "…the rule of stare decisis is based on hierarchy. Lower courts are bound to follow decisions rendered by the courts that have the power to reverse them. Since an appellate court out of province has no such power, their decisions have no binding force within this province."

15. Counsel for IIROC stated that an administrative body such as IIROC, and consequently this Panel, was not bound by stare decisis in the same manner as courts as stated in Vu, and that this Panel should follow Collias. Counsel for IIROC also referred to the dissent of Carnwath J. in the Taub case who reviewed the statutory scheme applicable to the Ontario Securities Commission and IIROC and concluded that the IDA(now IIROC0) retained jurisdiction over former registrants. This Panel was urged to grant the IIROC motion based on the dissenting opinion in Taub.

16. Counsel for IIROC next referred this Panel to the two decisions of Joyal J. in Kwan Lihuen(Applicant) v. Her Majesty the Queen, as represented by the Canadian Security Intelligence Service, the Director of Canadian Security Intelligence Service (Respondents). In that case Joyal J. decided that maintenance of the status quo was in order pending the outcome of a Supreme Court of Canada decision in another on the same issue, and urged this panel to apply the same principle in this case, pending the outcome of the Taub case.

17. Finally, counsel for IIROC cited the broad authority given to this Panel by IIROC Rule 20 to make decisions and urged this Panel to use that broad authority to grant the adjournment requested.

18. Both counsel for the Respondents placed their submissions squarely and firmly on the principle of stare decisis and cited several cases to this Panel which are contained in their Brief of authorities. All of these cases are essentially to the same effect regarding the statement of the principle of stare decisis. The quotation from the Vu case (above) adequately summarizes the principle and it is not necessary to quote further from these cases. Respondents' counsel argued that this Panel is bound by Taub because it is a decision of an Ontario court of superior jurisdiction to this Panel and in the decision-making hierarchy this Panel is bound by it. The Dass case was decided by a court in British Columbia and is not binding on this Panel. Although Taub and Dass came to the opposite conclusions, this Panel cannot choose to follow Dass even if it thinks it is a better decision; this Panel is bound by Taub. Furthermore both

Respondents' counsel argued that the ultimate decision in Taub as it proceeds through the court system is irrelevant to the decision that this Panel is being asked to make at this time. This Panel, in deciding the issues before it today, is bound by the Taub decision as it stands at this time.

19. This Panel agrees with the position taken by the Respondents. We are bound by Taub as it now stands. It is not open to this Panel to consider whether Taub was correctly decided, speculate on whether it may be overturned, prefer the dissenting opinion or choose to follow Dass. The law binding on this Panel in this hearing is Taub as currently decided, meaning that IIROC does not have jurisdiction over former registrants, and therefore the arguments made by IIROC counsel cannot be considered by this Panel. However, that conclusion does not mean that the proceedings against these Respondents is necessarily finished forever. The decision by this Panel does not dismiss this case; this Panel is not deciding, independently, that IIROC has no jurisdiction over former registrants; Taub has decided that and this Panel is simply deciding that it is bound by Taub. Because Taub deals with the jurisdiction of IIROC to bring disciplinary proceedings against former registrants, it means that these proceeding are now considered void, ab initio. However, if Taub is reversed, or if another binding court decision decides that IIROC does have jurisdiction over former registrants, that decision would mean that these proceedings would then be considered valid, ab initio, subject only to what may be stated in those decisions. If allowed by such a case, it would then be open to IIROC to continue these proceedings.

V. Decision

20. It is the decision of this Panel that:

(a) It is bound by the Taub decision as it now stands and therefore IIROC does not have jurisdiction to continue these proceedings;

(b) These proceedings are quashed, unless and until Taub is reversed or another binding court decision decides that IIROC has jurisdiction over former registrants;

(c) IIROC staff is directed to immediately remove from IIROC's website all references to the proceedings against these Respondents and the allegations made therein, other than to report this decision; and

(d) No costs are awarded in this motion and cross-motion.

Dated as of the 6th day of October, 2008.

Fred Webber- Chairman
Norm Fraser-Member
Duncan Webb- Member