

Re Fan

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

THE DEALER MEMBER RULES OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

YUAN JUN FAN

2008 IIROC 30

Investment Industry Regulatory Organization of Canada
on behalf of
Investment Dealers Association of Canada
Hearing Panel (Pacific District)

Heard: October 22, 2008
Decision: November 10, 2008
(37 paras.)

Hearing Panel:

John Rogers, Chair
Brian Field
Don Teatro

Appearances:

Charlene McLaughlin, Enforcement Counsel, for the Investment Industry Regulatory Organization of Canada
The Respondent was not represented by Counsel

DECISION

¶ 1 A hearing panel of the Pacific District Council of the Investment Industry Regulatory Organization of Canada (“IIROC”) was convened on October 22, 2008 in accordance with Rule 15 of the IIROC Dealer Member Rules of Practice and Procedure to review a settlement agreement (“Settlement Agreement”) negotiated between the Enforcement Department of IIROC and Yuan Jun Fan (“Respondent”) in accordance with Rules 20.35 to 20.40 inclusive of Part 10 of the IIROC Dealer Member Rules.

Statement of Facts

¶ 2 The Settlement Agreement contains certain facts agreed upon by IIROC and the Respondent solely for the purpose of the Settlement Agreement. A summary of these facts are set out below.

¶ 3 The Respondent’s Employment History

¶ 4 The Respondent commenced his employment in the investment industry with CIBC World Markets in December of 2005 and joined RBC Dominion Securities (“RBC”) in April of 2006.

¶ 5 The Respondent was dismissed by RBC for cause on February 23, 2007 and is not currently employed in the industry.

¶ 6 The Respondent has no disciplinary history.

Relationship with GL

¶ 7 In August of 2006 the Respondent met GL and shortly thereafter opened accounts for the Respondent at RBC with \$332,886.33 being transferred into these accounts and invested into a money market fund.

¶ 8 At their first meeting, the Respondent and GL discussed the possibility of investing in an anticipated initial public offering (“IPO”) of a company referred to as JASH. The Respondent represented to GL that as Respondent’s former college classmate had become the CEO of JASH that the Respondent would be able to obtain for GL the ability to participate in a private placement JASH shares that was to occur prior to the IPO.

The Agreement

¶ 9 In October 2006, the Respondent prepared a spreadsheet and an agreement (“Agreement”) between himself and GL with respect to the intended purchase of the shares of JASH. The spreadsheet illustrated various profit scenarios for the purchase of approximately 500,000 shares of JASH at different market values.

¶ 10 The relevant terms of the Agreement were:

1. GL would advance \$200,000 USD to purchase 439,925 shares of JASH (“JASH Shares”) in a private placement prior to the JASH IPO;
2. The Respondent would be the beneficial owner of the JASH Shares;
3. None of the JASH Shares would be sold without the prior approval of both the Respondent and GL;
4. Upon the sale of the JASH Shares, GL would receive back his \$200,000 USD investment plus 25% of any profits “proportional to his investment”; and
5. The Respondent was “to be responsible for the safety” of GL’s \$200,000 USD investment.

¶ 11 The Agreement was signed by both the Respondent and GL in the presence of legal counsel with both their signatures notarized.

The Transaction

¶ 12 Purportedly in accordance with the Agreement, \$413,730.08 CAD was withdrawn from GL’s cash account, converted to \$362,444.22 USD, and deposited into GL’s US cash account. Of these monies, \$200,000 USD was supposedly sent by wire transfer (“Wire Transfer”), and the balance was eventually invested in other securities based upon a portfolio plan developed by the Respondent.

¶ 13 The Wire Transfer was sent in accordance with instructions from GL based upon advice supplied to GL by the Respondent. The Wire Transfer did not go through and was returned with the notation “can’t apply” and the sum of \$199,965 USD was returned to GL’s account.

¶ 14 The Respondent subsequently advised GL that the Wire Transfer had not gone through and that the opportunity to invest in the JASH private placement had been lost.

The Respondent’s Motivation

¶ 15 In the Settlement Agreement, the Respondent admits that he created the idea of enabling GL to acquire the JASH shares through a private placement prior to the JASH IPO to impress GL and to keep him as a client. The Respondent also admits to fabricating the instructions which he gave to GL for the source to which the Wire Transfer was directed. As the source to which the Wire Transfer was to be sent was fictional, the Wire Transfer had no chance of going through.

¶ 16 In February of 2007, RBC received a complaint from GL whereby GL told RBC that he and the Respondent had entered into an agreement to share in the profits of the purchase and sale of securities with 25% to GL and 75% to the Respondent. In the complaint, GL alleged mismanagement of his account by the Respondent and requested compensation. RBC paid GL \$8,500 in settlement of this matter.

Contraventions

¶ 17 The Settlement Agreement contains the Respondent's admission for the purpose of this proceeding of the following contraventions of By-law 29.1 of the by-laws of the Investment Dealers Association of Canada ("IDA"):

1. Between August and December 2006, the Respondent, a Registered Representative with the Member, RBC, failed to act in accordance with industry standards of conduct requiring trustworthiness, honesty and fairness in all business dealings with clients in that by false representation and breach of client trust he involved GL in a fabricated securities transaction and thereby exposed the client to financial loss, which conduct is unbecoming a registrant and detrimental to the public interest; and
2. Between August and December 2006, the Respondent, a Registered Representative with the Member, RBC, failed to act in accordance with industry standards of conduct requiring avoidance of personal financial dealings with clients and RBC internal policy relating to private placements in that he involved GL in an off-book securities transaction:
 - a. involving a sharing of profits between the Respondent and GL; and
 - b. the Respondent's guarantee of GL's capital investment, without the knowledge and approval of RBC.

Terms of Settlement

¶ 18 In the Settlement Agreement, the Respondent consents to be subject to the jurisdiction of IIROC and agrees to the following terms of settlement with respect to both of the above contraventions:

Penalties

1. a suspension from approval in any registered capacity for a period of 24 months to run from February 27, 2007 to February 28, 2009;
2. immediate payment of a fine in the amount of \$25,000; and
3. Successful completion of the Conduct and Practices Handbook examination, prior to registration with IIROC; and

Costs

payment towards the costs of the investigation and the prosecution of this matter in the amount of \$5,000.

Decision

¶ 19 The Hearing Panel accepts the Settlement Agreement.

Reasons

¶ 20 For the purpose of this Settlement Hearing, the relevant portions of By-Law 29.1 of the by-laws of the IDA require that registered representatives:

- i. shall observe high standards of ethics and conduct in the transaction of their business,
- ii. shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and
- iii. shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

¶ 21 The Conduct and Practices Handbook (“CPH”) puts these requirements in a more detailed perspective with Standards B and C.

Standards B and C

¶ 22 Standard B is headed “Trustworthiness, Honesty and Fairness” and contains the following four sub-headings:

1. Priority of Client’s Interest;
2. Respect for Client’s Assets;
3. Complete and Accurate Information Relayed to Client.; and
4. Disclosure.

¶ 23 Standard B makes it quite clear that in dealings with a client, a registered representative must display absolute trustworthiness to the client, must ensure that the client’s interest is always prior to that of the registered representative, must use the client’s assets only for the client’s benefit, must provide accurate information to the client, and must disclose all real and potential conflicts of interest to the client.

¶ 24 Standard C is headed “Professionalism” and includes the sub-headings “Client Business” and “Personal Business”. It is clear from this standard that registered representatives must continually strive to put the interests of their clients ahead of their own interests. This means that in dealings with clients, registered representatives should trade only in securities approved for distribution by the Member employers of the registered representatives. It also means that all such trades should be recorded in the normal manner on the books and records of the registered representatives’ Member employers.

¶ 25 In addition, Standard C makes clear that registered representatives should avoid personal financial dealings with clients, including the sharing of a financial interest in the client’s account and guaranteeing a client’s investment.

¶ 26 In the matter at hand, the Respondent agrees in the Settlement Agreement that the RBC policy for the distribution of securities and private placements prohibits any activity in the distribution of securities that is not carried out through RBC and prohibits any participation in a private placement without the prior approval of RBC.

¶ 27 The Respondent was clearly in breach of both the policy of his employer, RBC, and of the provisions of Standards B and C referred to above in the entering into of the Agreement with GL and then in completing the sham Wire Transfer. He misled GL for his own personal gain exhibiting a lack of trustworthiness as required by Standard B. Under the terms of the Agreement purporting to engage in the private placement of the shares of JASH, he attempted to use GL’s assets for his own benefit and agreed to guarantee GL’s investment contrary to both the provisions of Standard C and to the express policy of his employer.

Appropriateness of Penalty

¶ 28 In *Milewski* [1999] I.D.A.C.D. No. 17, Bulletin No. 2605, August 5, 1999, *Clark* [1999] I.D.A.C.D. No. 40, Bulletin No. 2674, December 14, 1999, and more recently in *Watts* [2008] I.D.A.C. D. No 4, May 12, 2008, the test for a hearing panel to use in determining whether or not to accept a settlement agreement has been defined as whether or not the settlement agreement reached between the respondent and IIROC includes a penalty which clearly falls outside a “reasonable range of appropriateness”. If in the opinion of the hearing panel the penalty falls outside this reasonable range, the hearing panel should not accept the settlement agreement. Otherwise it should do so. In making this decision, the hearing panel must be cognizant of the settlement process and not interfere in a negotiated settlement by attempting to substitute its discretion for that of the staff of IIROC.

Guidelines

¶ 29 The Disciplinary Sanction Guidelines (January 2006) (“Guidelines”) of the IDA are of assistance in

making a determination as to whether or not an agreed upon penalty is appropriate.

A. Quasi-Criminal Offences

Guideline 1.1 headed “Fraud” defines fraud as “false representations or other dishonest conduct which deprives the other person of something which is his or of something he might be entitled to”. This guideline lists six considerations a hearing panel should take into account in considering a matter under this heading. These considerations are:

- a. The nature of the circumstances and conduct;
- b. Client knowledge/consent;
- c. Loss to client;
- d. The respondent’s intent;
- e. Whether the respondent intended to obtain a financial benefit from the fraudulent conduct; and
- f. Whether the Respondent concealed the conduct from his employer.

The minimum recommended sanctions are:

- a. A fine of \$25,000;
- b. Suspension for 6 months to 10 years; and
- c. Re-writing the CPH.

B. Undisclosed Personal Business With a Client

Guideline 2.5 refers to undisclosed personal business with a client and includes borrowing from a client without the knowledge or consent of the registered representative’s employer. It also refers to the obligation to act in the client’s best interest and not to allow personal interest to conflict with the client’s interest. The sanctions in this guideline include a minimum fine of \$10,000 and close supervision for 12 to 24 months.

C. Outside Business Activities

Guideline 3.10 refers to outside business activities that are not known to the registered representative’s employer. The sanctions in this guideline include a minimum fine of \$10,000 and a period of suspension in the most egregious cases.

¶ 30 In applying the above guidelines to the matter at hand:

1. It is a serious matter. The Respondent has agreed that he committed a fraudulent act for his personal gain. As well as resulting in his employer having to pay compensation, his act resulted in harm to the reputation of both his employer and to the securities industry;
2. The Respondent concealed his activities with GL from RBC; and
3. The Respondent knew or should have known of the prohibited nature of his activity.

¶ 31 However, the following are mitigating factors in the Respondent’s favour:

1. GL was the only client involved in this matter and GL was a willing participant and consented to its occurrence;
2. This was an isolated incident and the Respondent has not before been disciplined;
3. There is no evidence of the Respondent actually benefiting from the Agreement or that GL was harmed by this transaction;
4. The Respondent has cooperated with IIROC in its investigation of this matter;

5. The Respondent in his presentation before us acknowledged his wrong doing and expressed his remorse; and
6. Following his termination by RBC and pending the resolution of this Settlement Hearing, the Respondent has effectively been barred from working in the investment industry.

¶ 32 The penalty contained in the Settlement Agreement is appropriate when considered in terms of the Guidelines and mitigating factors.

Similar Decisions

¶ 33 In the following decisions matters similar to the matter at hand were considered by hearing panels in determining to accept settlement agreements: *Wall* [2007] I.D.A.C.D. No. 52, November 21, 2007, *Deck* [2007] I.D.A.C.D. No. 19, Bulletin No. 3640, July 5, 2007; *Ritchie* [2005] I.D.A.C. D. No. 32, Bulletin No. 3459, September 7, 2005; *Vinneau* [2002] I.D.A.C.D. No. 48, Bulletin No. 3080, November 28, 2002; and *Norohha* [2002] I.D.A.C.D. No. 52, Bulletin No. 3095, December 23, 2002. Of these decisions, the most recent and most relevant are *Wall*, *Deck* and *Ritchie*.

¶ 34 In *Wall*, the registered representative shared his trading commissions with his client for a period of over 2 years without the knowledge or consent of his employer. The amount paid over this time frame was \$\$216,307.06. The hearing panel accept a penalty consisting of a fine of \$20,000, a period of 12 months of close supervision and the requirement to rewrite the CPH.

¶ 35 In *Deck*, the registered representative without the knowledge of his employer participated in a series of off-book transactions over a three year period, invested together with his clients, loaned a client money, and refused to deliver a client's bank draft to him. The penalty approved in this matter was a fine of \$138,212, a two year suspension, 12 months of strict supervision following re-registration, and re-writing the CPH.

¶ 36 In *Ritchie*, the registered representative engaged in personal financial dealings with a 92 year old client. The penalty approved in this matter was a fine of \$10,000, 12 months of close supervision and re-writing of the CPH. In approving the settlement agreement, the hearing panel noted that the facts were highly unusual in that the registered representative was motivated more by an opportunity to assist a long-standing and aged client and did so, as it turned out, at a significant cost to himself.

¶ 37 These decisions confirm that the penalty agreed to in the Settlement Agreement is appropriate.

Dated at Vancouver, British Columbia, this 10th day of November, 2008.

John Rogers, Chair

Brian Field

Don Teatro

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