Re Vitug

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

JULIUS CAESAR PHILIP VITUG

2009 IIROC 17

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District Council)

Heard: February 23, 25 and 26, 2009
Decision: March 31, 2009
(28 paras.)

Hearing Panel:
Paul M. Moore, Q.C, Chair
F. Michael Walsh
Guenther Kleberg

Appearances:
Natalija Popovic & Tamara Brooks, for the Association
Alistair Crawley & Jocelyn Loosemore, for the Respondent

DECISION AND REASONS ON THE MERITS

Principal persons and companies

Respondent

1. Julius Caesar Philip Vitug is the respondent.
2. His aunt and client was EB.
3. His father-in-law and client was DT.
4. He has been a registrant for more than eleven years.
5. He was the registered representative for EB and DT at TDW and, after he left TDW, at Blackmont, during the relevant period.
6. He was the trusted advisor of DT, especially with respect to the investment in special warrants of Fareport.

EB

7. EB is Erlinda Belen, the aunt and a client of the respondent.

8. She had a brokerage account at TDW and another brokerage account at SSCC.

9. She had a bank account at TD bank.

DT

10. DT is Danny Tsongas, the father-in-law and a client of the respondent.

11. He had a brokerage account at TDW and another brokerage account at SSCC.

SSCC

12. SSCC is Standard Securities Capital Corporation, a brokerage firm at which EB and DT each had an account.

TDW

13. TDW is TD Waterhouse Canada Inc. (and its predecessor, TD Evergreen), a brokerage firm associated with but separate from The Toronto-Dominion Bank (TD Bank).

Blackmont

14. Blackmont is Blackmont Capital Inc. (formerly First Associates Investment Inc.), a brokerage firm.

AD

15. AD is Andy DeFrancesco.

16. He was a life-long friend of the respondent and knew EB well.

17. He was the head of the corporate finance department at SSCC during the relevant period.

18. He had full trading authorization over EB's account at SSCC. The registered representative for EB at SSCC, Mark Marcello, never met with or spoke to her.

19. He was also the respondent's client at TDW and at Blackmont.

Mint, Marcova, and LELP

20. Mint is Mint Inc., a company for which AD did corporate finance work.

21. Marcova is Marcova Consulting Advisor Limited.

22. LECP is Lower East Partners Inc., a company that was a client of the respondent and of which AD was a 1/3 owner.

23. These companies were relevant to transactions in EB's accounts.

BG and BGCG

24. BG is Bobby Genevese.

25. BGCG is BG's company and is called BG Capital Group.

26. BGCG was a corporate underwriting client of SSCC.

27. BGCG was the respondent's client during the period in question.

Spectrum

28. Spectrum is Spectrum Sciences and Software Holdings Corp., a company whose shares had been underwritten by SSCC.

29. Shares of Spectrum were relevant to transactions in EB's accounts.

Fareport

30. Fareport is Fareport Capital Inc., a company whose shares were underwritten in a private placement by SSCC.

31. Special warrants of Fareport were relevant to transactions in DT's account.

The allegation

32. By Notice of Hearing dated September 3, 2008, staff of the Investment Industry Regulatory Organization of Canada (IIROC) alleged that:

> In or about April 2003 to August 2005, the respondent engaged in business conduct or practice which is unbecoming or detrimental to the public interest in that he had an undisclosed financial interest and undisclosed financial dealings in accounts, including accounts held at another member firm, of two of his clients, in violation of IDA By-law 29.1.

Preliminary motion

33. At the beginning of the hearing, the respondent brought a motion for an order staying the proceeding against the respondent on the basis that it constituted an abuse of process; or in the alternative, an order excluding transcript evidence of the respondent in interviews with staff on April 11, 2006 and July 21, 2006.

34. We denied the motion.

Reasons for denying the motion

35. The respondent submitted that the process was an abuse of process because it was the third proceeding that the respondent had to respond to in relation to the same investigation of staff, commenced over three and a half years ago.

The first proceeding

36. The first proceeding was commenced by notice of hearing dated January 25, 2007 and alleged that the respondent had engaged in business conduct or practice that was unbecoming or detrimental to the public interest, by failing to respond truthfully to questions posed at interviews by staff during the investigation.

37. The proceeding was dismissed by the Ontario District Council of the Investment Dealers Association of Canada because of a procedural error by staff. It found that staff had failed to give the respondent proper notice of the matters it would be questioning him about. As a consequence, he did not have an opportunity to refresh his mind and prepare for the interviews with respect to the subject matter he was alleged to have given untruthful answers on. The Ontario District Council held that it was inappropriate to proceed against the respondent on the allegation of untruthfulness under the circumstances.

38. It is clear, however, that the allegation from the first proceeding was different from the allegation before us, and that the doctrine of *res judicata* is not applicable.

39. The fact that the notice of hearing in the first proceeding was issued while the investigation that led the proceeding before us was still on-going does not make the issue of the notice of hearing in the matter before us an abuse of process.

40. Respondent's counsel then argued that staff should not be permitted to rely on the transcript evidence in question in making out its allegation against the respondent in the matter before us.

41. We disagreed.

42. However, we did not need to rely on the evidence from the respondent in the transcripts in question in finding that the respondent did have financial interests and financial dealings in EB's and DT's accounts

at SSCC. There was clear and convincing proof based on other cogent evidence that led us to our decision.

The second proceeding

43. Registration staff at the IIROC unilaterally imposed a condition of strict supervision on the respondent's registration on December 12, 2006, without notice to the respondent and without giving him an opportunity to be heard.

44. A review panel ruled on November 22, 2007 that the decision of registration staff to impose conditions was void on the basis that the respondent was not afforded an opportunity to be heard, as required by s.26(3) of the *Securities Act*, R.S.O. 1990 c.S.5 (as amended).

45. We determined that this procedural error on the part of registration staff did not preclude staff from bringing on the matter before us.

Absence of particulars

46. Counsel for the respondent also suggested that staff's abuse of process included a refusal to particularize any dealer member rules on which it would be relying to make out its allegation of conduct unbecoming.

47. Counsel sought assurance from staff that the only allegation the respondent had to meet was a violation of By-Law 29.1 and not an alleged violation of any other rule.

48. In response, staff assured the respondent, and us, that its sole allegation was that the undisclosed financial interest and undisclosed financial dealings in the accounts of EB and DT constitute business conduct or practice unbecoming in violation of IDA By-Law 29.1.

49. Staff observed that it would not be precluded from referring to industry standards, including other rules, in establishing that the respondent's conduct was unbecoming and contrary to the public interest. However, staff submitted, the respondent had all necessary particulars of the events on which staff was basing their case, and full disclosure of the evidence on which staff was claiming that the respondent had an undisclosed financial interest and undisclosed financial dealings in the accounts.

No abuse of process

50. None of the mistakes of staff could be viewed as prejudicial to the respondent's right to a fair hearing or his ability to give full answer and defence to the allegation in the matter before us.

51. Nor would allowing the current proceeding to proceed in any way bring the administration of justice into ill repute.

52. A stay for abuse of process is an extraordinary remedy granted solely in the most exceptional circumstances in the clearest of cases where otherwise the administration of justice would be put in ill repute.

53. Our case is not one of them.

Issues

54. The issues before us are:

1) Did the respondent have an undisclosed financial interest in the account of EB at SSCC?

2) Did the respondent have undisclosed financial dealings in the account?

3) Did the respondent have an undisclosed financial interest in the account of DT at SSCC?

4) Did the respondent have undisclosed financial dealings in that account?

5) If the answers to the four questions are yes, did the facts constitute business conduct or practice

which is unbecoming or detrimental to the public interest in violation of IDA By-Law 29.1?

Standards of evidence and proof

Standard of evidence

55. Because the respondent's ability to continue in the securities industry is potentially at stake in this matter, a finding against the respondent must be founded on clear and convincing proof based on cogent evidence.

56. We applied this standard in making our findings of fact in this matter.

Burden of proof

57. In deciding whether the allegation against the respondent has been proved, staff has the burden of proof.

58. The burden in this case is not the one applicable in criminal matters: it is not that the facts must give rise to a conclusion beyond a reasonable doubt.

59. In our case, the burden is that the facts must give rise to a conclusion against the respondent on a balance of probabilities.

60. We applied this standard in making our decision on the allegation.

Decision

61. We find that the respondent had an undisclosed financial interest and undisclosed financial dealings in the account of EB and in the account of DT at SSCC during the time in question.

62. We find that the respondent, consequently, engaged in business conduct or practice which is unbecoming or detrimental to the public interest in violation of IDA By-law 29.1.

Penalty hearing to be arranged

63. The national hearing coordinator of IIROC will arrange for a hearing in due course to impose appropriate sanctions.

Reasons for decision

64. The following are the reasons for our decision.

Evidence before us

65. Staff submitted in evidence a compendium of seven volumes of documents and adduced additional documents.

66. Staff produced one witness, a member of staff's investigation staff, Mr. Michael Arthur, who testified as to the documents and his investigation.

67. The respondent did not testify or produce witnesses.

68. The respondent introduced in evidence the affidavit of DT. Staff did not cross-examine DT on the affidavit.

69. Staff asked us to draw adverse inferences from the fact that the respondent did not testify.

70. Counsel for the respondent, in turn, asked us to draw adverse inferences from the fact that staff did not subpoena EB to testify, or follow up with more inquiries of the respondent on certain answers he had given staff prior to the hearing.

71. In coming to our decision, we did not draw any adverse inferences from the fact that the respondent chose not to testify or to adduce much evidence, or the fact that staff did not subpoena EB or seek more information from the respondent, or others.

72. We concluded that staff and the respondent were each free to present evidence for their respective case and defence as they each saw fit.

73. We decided the matter on the evidence before us.

Registration history

74. The respondent has been a securities registrant for more than 11 years, holding positions of salesperson, registered representative, trading officer, branch manager and associated portfolio manager.

75. During the relevant period, he was a trading officer, registered representative, associate portfolio manager and branch manager with TDW until mid-October, 2004 and thereafter and up to the present time has been a trading officer, registered representative and associate portfolio manager with Blackmont.

The EB account

76. EB's account at SSCC was opened with the assistance of the respondent. He signed as witness of EB's signature in the NAAF, as well as in a trading authorization giving AD trading authority over EB's account.

77. The signatures of EB in the NAAF and trading authorization forms were not EB's signature. They were completely different in form and handwriting from EB's signature on cheques, her driver's license and other documents we saw.

78. We find that some cheques payable to EB transferring funds from EB's SSCC account to her TD bank account were deposited in the account by the respondent (at the TD bank branch near his office and not at the branch she used near her home).

79. During the material time, the respondent transferred a total of approximately $86,000 to EB's SSCC account.

80. A total of approximately $72,000 was transferred to EB's account by Mint, Marcova and LECP.

81. All of these transfers were completed for no apparent consideration.

82. On January 6, 2004, EB's account at SSCC received 300,000 shares of Spectrum for no apparent consideration, from the account of BGCG.

83. As at June 2005, many of the respondent's other clients held over 3 Million shares of Spectrum.

84. AD stated in an interview with staff that, "those shares were for services rendered from past transactions that I had done with another individual...I would have been the beneficial owner of those shares". AD stated that the other individual was Mr. Bobby Genovese and that the shares were deposited into EB's account, "because in 2000-2001 I had a very messy separation, and five days prior to my divorce proceedings we, we called it off, but everything I had at that point that those shares were deposited into Erlinda's account, everything was in my wife's name, and I elected to, because of the relationship I had with Erlinda, I put those shares into her account for protection purposes for me." AD also stated that it "would have been me or Phil, or someone at SSCC" that gave instructions to receive the shares into the account. However, when the Spectrum shares were sold, AD did not receive any of the proceeds.

85. From March 9, 2004 to April 20, 2004 EB's account sold and purchased Spectrum shares in a series of transactions resulting in proceeds of approximately $700,000 USD.

86. There is no evidence that EB benefited from the proceeds of these transactions.

87. The proceeds from these sales formed the basis for numerous subsequent payments made to the respondent from EB.

88. The respondent received the benefit of those monies into his TD Bank account.

89. Through a series of 13 separate transactions, in excess of $337,000 (Canadian) and $125,000 (U.S.), (for an approximate total in excess of $500,000 (Canadian)) flowed from EB's accounts to the respondent.

90. Through the transfer of funds from EB's SSCC brokerage account into her TD Bank account and ultimately to the respondent, the respondent claims to have received loan repayments and other monies from AD.

91. Neither the respondent nor AD provided particulars of the loan.

92. Neither the respondent nor AD kept records of the loan or repayments.

93. AD was deceptive in his conduct with respect to his wife. (He said he hid his Spectrum shares in EB's SSCC account). He was deceitful to his employer, SSCC, in managing EB's account by placing his own assets in her account.

94. Both the respondent and AD were involved with the SSCC NAAF of EB which contained the false signature of EB.

95. Both the respondent's and AD's conduct in this matter showed they have little regard for the truth.

96. Considering all the facts, we did not believe the respondent's assertion that there was a loan from him to AD and that payments through EB's SSCC account to him were repayments of that loan. The respondent was the beneficial owner of EB's SSCC account and had a financial interest in it.

97. However, even if there were loans that were being repaid, as alleged, and the respondent were not the beneficial owner of the account, the respondent would still have had a financial interest in EB's SSCC account: namely an interest in the Spectrum shares and the proceeds of the sale while they were in EB's SSCC account, pending payout to him.

98. The respondent gave EB a cheque for $1000 on December 25, 2003. This, (possibly together with another $20 from the respondent that was paid into EB's accounts with other funds from the respondent, that was not paid to the respondent or others), is the only amount that was a direct benefit to EB from the respondent over the relevant three year period.

EB's Lifestyle

99. Between 2003 and 2005, EB lived a rather modest lifestyle with no apparent change in her standard of living.

100. EB's banking records and account opening documentation at TDW for the material time depict a standard of living that is starkly different from her account opening profiles at SSCC and Blackmont.

101. EB's monthly banking records reflect a habitually underfunded account with regular overdraft charges that relies heavily on the infusion of a small bimonthly paycheque.

102. At the same time, she is classified as having "excellent" investment knowledge and significant financial resources on the New Account Application Forms ("NAAFs") at SSCC and Blackmont. The representations are not supported by the evidence of EB's daily bank transactions.

103. EB indicated in the TDW NAAF dated May 2001 that she worked as a nurse's aid with an income of between $25,000 to $50,000 and a net worth of between $100,000 to $250,000.

104. EB indicated in the SSCC NAAF dated May 2002 that EB worked at the same employer as a registered nursing assistant; however, her income was shown as $120,000 and her net worth was shown as $800,000.

105. EB continued to be a client of the respondent when he changed firms and went to Blackmont. EB's Blackmont NAAF dated October 2004 indicates that she continued with the same employment but that her net worth was $1 million though her income was shown as $50,000. Staff's investigation found no explanation for the changes to her stated net worth and income over the course of the three NAAFs.

106. Among the regular ongoing day-to-day transactions, a series of very large sums moved through EB's brokerage and bank accounts, but not to her benefit.

107. A review of EB's bank statements and various cheques indicate that during the material time:

108. EB was either ignorant of or complicit in the respondent's financial dealings in her brokerage and bank accounts.

- bi-monthly pay cheques remained the same in the range of $700 to $800;
- rent payments remained the same in the range of $788;
- the bank account was repeatedly in an overdraft position;
- there were repeated NSF or presentment charges incurred in the account;
- ongoing consumer loan repayments were made in the amount of $340 to $360;
- regular payments for utilities and credit card debt were made in the range of $15 to $50; and
- she deposited $1,286.07 that she withdrew from her RSP account.

The DT account

109. DT opened an account and participated in a corporate finance deal at SSCC with a loan of $108,000 from the respondent for the purchase of 900,000 special warrants of Fareport consisting of 900,000 common shares and warrants to purchase 450,000 common shares.

110. This was the only source of funds for investments that DT made through his SSCC account.

111. In his response, the respondent pleaded in relation to the DT account that he "...provided funds of $108,000 for the benefit of DT so that he could purchase Fareport special warrants pursuant to a private placement. This was a loan to DT."

112. DT's evidence established that repayment of the loan to the respondent was contingent on the sale of the Fareport special warrants. If the investment was not profitable, the loan would not have to be repaid.

113. The respondent was involved in opening the account at SSCC. The same void cheque that was used to open DT's account with the respondent at TDW in April 2001 was attached to the account opening documentation at SSCC in September 2003.

114. TDW was not made aware of the loan arrangement.

115. DT sold 900,000 Fareport common shares in a "gypsy swap" arranged by SSCC whereby Fareport issued for cash new restricted special warrants to existing shareholders (including DT), who sold existing freely-tradeable common shares already held by them for cash. Part of the proceeds of the sale of the existing common shares were used to pay for the new special warrants issued.

116. DT made a 100% profit from this sale of the common shares of Fareport.

117. According to AD, the gypsy swap was an orchestrated deal and the respondent was involved with the transaction in that the respondent's clients were at least some of the purchasers of DT's Fareport shares.

118. In fact, approximately 70% of DT's Fareport common shares were sold to clients of the respondent.

119. The respondent, in fact, effectively managed DT's SSCC account. He decided to direct that the proceeds of the sale of the Fareport common shares be reinvested rather than be applied to repay his loan.

120. DT was not in control of this account and indicated that he was not familiar with what was transpiring in his account.

No disclosure

121. The respondent admitted through his counsel that he did not advise TDW or Blackmont of his involvement in the EB and DT accounts at SSCC.

122. Many of the transactions we reviewed involved transfers from EB's bank account to the respondent's bank account. Funds were first transferred from EB's brokerage accounts to her bank account before payment to the respondent or the transfer of funds to the respondent's bank account.

123. There was no reason for the intermediary step of transfers from EB's brokerage accounts to her bank account before payment was made to the respondent. The effect of the intermediary step was that the member firm had no opportunity to monitor the transfers to the respondent.

Disclosure requirements

124. The respondent had originally claimed that the funds received from EB's accounts were gifts to him.

125. The respondent subsequently described the funds received from EB's accounts as repayments of loans made by him to AD.

126. The TDW policy in respect of gifts from clients is as follows:

> Gifts to or from clients should be avoided. An acceptance of a gift from a client may give the appearance of extra compensation or a gratuity of some kind. All forms of compensation must be paid to IAs by the Firm [other than nominal gifts]….If there is any doubt as to the nominal nature of the gifts Compliance must be consulted before the gift is given or accepted. Any other arrangements must received prior approval from National Sales and Compliance.

127. TDW's compliance manual reads, in part:

> IAs cannot lend money to a client or accept a loan from a client. These situations will place the IAs in a conflict of interest situation, and thus must be avoided....By lending money to clients, the IAs may give the appearance of providing the client commission rebates or "kickbacks", or are attempting to persuade the client not to complain about their conduct.

128. The First Associates [now Blackmont] compliance manual reads, in part:

> … without express permission of First Associates, Investment Advisors must not:
> …
>
> - Make personal payments to clients for any account related activity.
> - Share in the profits or losses of a client's account.
> - Enter into any lending/borrowing relationships with a client.
>
> Conflicts of interest arise when an individual's position or responsibilities with First Associates present an opportunity for personal gain apart from the normal rewards of employment...In addition, employees must advise First Associates on a timely basis, of any real, potential, or apparent, conflicts of interest between their private interests or other business or public interests and any official duties or responsibilities they may have as they relate to your employment with First Associates… .
>
> First Associates expects that employees will act with honesty and uphold the highest ethical standards in a manner that will bear the closest public and

> regulatory scrutiny. First Associates employees have a duty and obligation to question any situation that may compromise or violate First Associates' ethical standards of business conduct. Employees should promptly report any suspected impropriety their [sic] immediate Supervisor, Branch Manager or the Compliance Department… .

129. The Conduct and Practices Handbook (CPH) of the industry provides:

> Standards C-Professionalism, It is generally accepted that professionals, by having specialized knowledge need to protect their clients, who usually do not have the same degree of specialized knowledge, and must continually strive to put the interests of their clients ahead of their own. Registrants must also make a continuous effort to maintain a high standard of professional knowledge. Personal Business: All personal business affairs must be conducted in a professional and responsible manner, so as to reflect credit on the individual registrant, the securities firm, and the profession. Personal Financial Dealings with Clients: Registrants should avoid personal financial dealings with clients, including the lending of money to or the borrowing of money from them, paying clients' losses out of personal funds and sharing a financial interest in an account with a client. Any personal financial or business dealings with any clients must be conducted in such a way as to avoid any real or apparent conflict of interest and be disclosed to the firm, in order that the firm may monitor the situation.

Legal Consequences

130. The respondent voluntarily entered into the securities industry knowing it to be highly regulated. By choosing to participate in the securities industry, the respondent agreed to be bound by the rules of the industry and accepted the privileges that attach to that model.

131. The Supreme Court of Canada in *British Columbia Securities Commission v. Branch, [1995] S.C.J No. 32*, stressed the importance of the obligations of those who enter regulated industries:

> ...it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust.

132. The respondent was obligated to conduct his business activities in accordance with industry standards. That obligation necessarily required compliance by the respondent with all applicable industry standards including the Conduct and Practices Handbook and his member firms' policy manuals.

Familial Ties

133. It is no defence to the allegation to rely on the familial relationship of the respondent to EB and DT.

134. From a regulatory point of view, both EB and DT were first and foremost the respondent's brokerage clients; that is the relationship that attracts regulatory attention.

135. Furthermore, significant loans and gifts to or from family members involving a registrant, where they can be connected with securities transactions of family members, can give rise to serious conflicts of interest affecting not only the registrant and his firm, but also other member firms and their clients.

Financial Interest in the accounts

136. The respondent funded the EB and DT accounts at SSCC. He received significant financial gains through activity in the EB account. EB received no significant benefit from her SSCC account.

137. Accordingly, the respondent had an undisclosed financial interest and financial dealings in the account.

138. It is not clear that the respondent was the beneficial owner of DT's SSCC account, because there was no clear and convincing proof that the respondent would have received any profits from the account.

139. However, he provided the assets for the account (the $108,000). He chose the investment. He decided when and how the investment should be realized. It was understood that he would suffer any loss on the investment (the "loan" would be repaid only from the investment).

140. Accordingly, the respondent, at a minimum as a creditor, had an undisclosed financial interest and undisclosed financial dealings in the account.

141. The respondent's dealings in both the EB and DT accounts resulted in a conflict of interest with his other brokerage clients. These are all facts pertinent to the terms of the respondent's employment and registration that were required to be disclosed to his member firm.

142. The very nature of the registered representative relationship to the member firm is founded on trust that relies on full disclosure in accordance with industry standards and member firm policies.

143. Maintaining an undeclared interest in client accounts at another member firm provides a registrant with the ability to benefit financially from his activity and avoid being marked on pro orders when executing trades and to participate in new issues that he would not otherwise be able to purchase.

144. It exposes the industry and the capital markets to great harm and undermines public confidence in the securities industry.

145. The respondent's contraventions are serious in that they go to the fundamental foundation of trust between the registered representative and his employers and the registered representative and his clients.

146. The respondent's conduct demonstrates a clear disregard for industry standards and his employers' policies and procedures.

147. The respondent pleaded that he was unaware of his disclosure obligations. However, he had over 10 years of seniority in the investment industry and has taken over a dozen industry courses including the Conduct and Practices Handbook Course and Branch Managers Course.

By-Law 29.1

148. IDA By-law 29.1 is broad in nature and may capture many violations of industry rules.

149. While not every violation of the rules will result in culpability as conduct unbecoming under By-law 29.1, the respondent's conduct in this matter is captured.

150. In *Andy Hyon Chul Kim Re Kim [2007] I.D.A.C.D. No 54*, Kim had engaged in business conduct or practice unbecoming or detrimental to the public interest, contrary to By-law 29.1, where he had been deceitful by opening accounts at other firms without the member firm's permission. The panel held that maintaining undeclared accounts provides registrants "with the ability to avoid being marked on pro orders when executing trades..."

151. The panel in *Kim* found that the contraventions were serious in that they went to the "fundamental foundation of trust between a registered representative and employer."

152. In *Re Furevick [2007] I.D.A.C.D. No 30*, a hearing panel found there had been a violation of By-law 29.1 where the respondent had failed to disclose that he was the beneficial owner of an account in the name of his client who was also his brother-in-law. Further, Furevick misrepresented to his employer's sales compliance staff that transactions in that account were being directed by the client. In fact, the account really belonged to Furevick who funded and directed all of the trading in the account. The brother-in-law never complained about the operation of the account in his name.

153. Similarly to the respondent, Furevick had been a branch manager and a registered representative of a dealer-member firm at the material time.

154. In *Re Gareau [2005] I.D.A.C.D. No. 25*, a hearing panel dismissed a charge alleging business conduct which is unbecoming or detrimental to the public interest where it failed to establish that the conduct was unethical in the sense that it was directed at an improper purpose. The hearing panel found that By-law 29.1 is focused on matters of personal gain or conflict of interest. The majority of the panel referred to the IDA's Disciplinary Sanction Guidelines pertaining to By-law 29.1 and found that the provisions deal with issues related to quasi-criminal or unethical conduct. In enumerating the relevant guidelines, the panel highlighted those circumstances where the respondent has benefited personally and concealed information as relevant to a finding under By-law 29.1.

155. The respondent's conduct in our case was blameworthy in that the respondent did conceal his involvement in the EB and DT accounts.

156. The respondent acted deceitfully for his own personal benefit.

157. The respondent evaded member firm scrutiny.

158. The respondent's conduct placed him in business circumstances that raised a real or apparent conflict of interest to the detriment of others.

159. The respondent's acts were intentional and his deceit was motivated by personal financial gain.

160. The respondent has been employed and held senior positions within the securities industry for a considerable period of time. By virtue of his seniority we conclude that he must have been aware of compliance requirements and the culture of compliance at his member firms.

161. The respondent had no excuse not to be aware of his obligation to inform his member firms of his involvement in the EB and DT accounts.

162. Common shares of Fareport held in DT's account that were sold in the pre-arranged gypsy swap with the respondent's clients at TDW ultimately resulted in losses to them.

163. With respect to the EB account, the shares of Spectrum were sold. The respondent put his other brokerage clients into over 3 million shares of Spectrum.

164. The respondent received benefits from the sale of the Spectrum shares in EB's account. He was in a real conflict of interest with his other brokerage clients.

Conflict of interest not a new allegation

165. Respondent's counsel, in his closing submission, argued that staff was making a new allegation not set out in the notice of hearing: namely, that the respondent had a conflict of interest.

166. We disagree.

167. Staff was not raising a new allegation in the nature of a charge against the respondent but was arguing that having undisclosed financial interests and undisclosed financial dealings in the two accounts was unbecoming and contrary to the public interest because it was contrary to industry standards of trustworthiness, full disclosure, absence of deceit, and monitoring and controlling conflicts of interest.

168. The fact that the respondent had undisclosed financials interests and undisclosed financial dealings in the two accounts, *ipso facto* meant that he was in a conflict of interest.

169. The respondent did indeed have undisclosed financial interests and undisclosed financial dealings in the accounts. The corollary of that – namely that he was deceitful, in a conflict of interest, personally benefited from his conduct, and was in breach of the policies and rules of his member firms and the CPH – was not required to be set forth as separate counts, or allegations, in the notice of hearing.

DATED at Toronto this 31st day of March, 2009.

Paul M. Moore, Q.C
F. Michael Walsh
Guenther Kleberg