Re Dass

IN THE MATTER OF:

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

AND

CHARLES KAMAL DASS

2009 IIROC 22

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

Heard: April 6, 2009
Decision: April 20, 2009
(68 paras.)

Hearing Panel:
John Rogers, Chair, Brian Field and Don Teatro

Appearances:
Barbara Lohmann, Enforcement Counsel for the Investment Industry Regulatory Organization of Canada

REASONS FOR DECISION

1. This disciplinary proceeding originally came on for hearing on June 6, 2006 following the issuance of a Notice of Hearing dated May 26, 2006 ("Notice of Hearing"). Prior to the commencement of the hearing, Charles Kamal Dass, (the "Respondent") served notice that he was objecting to the jurisdiction of the Panel. To facilitate the determination of the question of jurisdiction, it was agreed by the parties that the Notice of Hearing should be sealed until this Panel's jurisdiction to discipline the Respondent was determined.

2. In its decision dated July 19, 2006, this Panel determined that it did have the jurisdiction to discipline the Respondent. The Respondent appealed our decision to the British Columbia Securities Commission ("BCSC"). Our decision on jurisdiction was upheld by the BCSC in its decision dated May 11, 2007.

3. The Respondent appealed the decision of the BCSC to the British Columbia Court of Appeal ("BCCA"). In its decision dated October 23, 2008 the BCCA dismissed the Respondent's appeal of the BCSC's decision.

4. Based upon the decision of the BCCA, we have jurisdiction to discipline the Respondent.

5. Therefore, the Notice of Hearing was unsealed and on January 19, 2009 this matter was set for a hearing pursuant to Part 10 of Rule 20 of the Dealer Member Rules (the "Rules") of the Investment Industry

Regulatory Organization of Canada ("IIROC") to determine whether the Respondent has contravened the Rules of IIROC as alleged in the Notice of Hearing.

Application Under Rule 7.2 and Rule 13.5

6. At the time appointed for the commencement of this hearing, the Respondent failed to appear either personally or represented by counsel. IIROC Enforcement Counsel advised us that although the Respondent had received a copy of the Notice of Hearing and a copy of the confirmation memorandum from the National Hearing Coordinator confirming the date, time and place of this hearing, the Respondent had not filed a Response to the Notice of Hearing as required by Rule 7.1(1) of the Rules. Nor in communication with IIROC Enforcement Counsel had the Respondent indicated whether or not he would be present and represented by counsel at this hearing.

7. To ensure that the Respondent was not inadvertently late for the hearing, the hearing adjourned for fifteen minutes.

8. Following this adjournment and with the Respondent still not present, IIROC Enforcement Counsel made an application under Rule 7.2 and Rule 13.5 of the Rules that we proceed in the absence of the Respondent, accept as proven the facts and violations alleged in the Notice of Hearing, immediately hear submissions by IIROC Enforcement Counsel regarding an appropriate penalty for such violations, and impose on the Respondent such penalties as we deem appropriate.

9. In support of her application, IIROC Enforcement Counsel entered as an exhibit the affidavit of Edwin Wang (the "Wang Affidavit"), a Senior Investigator employed by IIROC. In his affidavit, Mr. Wang deposed that:

    1. The Notice of Hearing was originally served on the Respondent and his counsel on May 26, 2006;

    2. In email correspondence with the Respondent commencing on January 14, 2009, the Respondent was made aware of the date, time and place of this hearing;

    3. In email correspondence dated February 2, 2009, IIROC Enforcement Counsel advised the Respondent that the Notice of Hearing would be publicized and reminded the Respondent of his obligation to file a Response to the Notice of Hearing;

    4. On February 20, 2009, IIROC published a notice on its website setting out the date, time and place of this hearing and summarizing the allegations of the violations of the by-laws of the Investment Dealers Association of Canada ("Association") claimed to have been committed by the Respondent; and

    5. On March 30, 2009, the Respondent personally picked up from the IIROC offices in Vancouver a copy of the documents which IIROC Enforcement Staff intends to rely upon at this hearing.

10. It was brought to the attention of IIROC Enforcement Counsel that the original hearing panel seized with this matter included Mr. Ron Merritt. Unfortunately, since the issuance of the hearing panel's decision on July 19, 2006, Mr. Merritt has passed away. In the hearing confirmation memo issued by the National Hearing Coordinator on January 19, 2009, Mr. Brian Field was appointed as a panel member to serve in Mr. Merritt's stead.

11. IIROC Enforcement Counsel advised that IIROC Enforcement Staff consented to the Hearing Panel as presently constituted.

Decision on the IIROC Application

12. Following a brief adjournment, the application made by IIROC Enforcement Counsel was granted and we determined that pursuant to the authority granted us under Rule 7.2 and Rule 13.5 of the Rules that we proceed in the absence of the Respondent, accept as proven the facts and violations alleged in the Notice of Hearing, immediately hear submissions by IIROC Enforcement Counsel regarding an

appropriate penalty for such violations, and impose on the Respondent such penalties as we deem appropriate.

Reasons for Granting the IIROC Application

13. Rule 13.4 provides:

> The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement, unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

14. Following the provisions of Rule 13.4, we accept the Wang Affidavit as proof of the facts contained in it.

15. Rule 13.5 provides:

> Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the Notice of Hearing.
>
> Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Organization regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant to Dealer Member Rule 20.33 and 20.34.

16. In *Janiewicz* [2006] I.A.D.C.D. No. 3, Bulletin No. 3518, February 27, 2006, the hearing panel highlighted the four decisions a hearing panel needs to make when considering an application under Rule 13.5. These decisions might be summarized as being whether or not in the absence of a respondent, the hearing panel should:

    1. proceed with the hearing;
    2. accept as proven the facts alleged in the notice of hearing and find the respondent liable for the violations of the Rules resulting there from;
    3. immediately hear submissions on penalty; and
    4. impose a penalty on the absent respondent.

17. This matter has been going on for almost three years. The Notice of Hearing containing the allegations of violations by the Respondent was originally served on his counsel in May of 2006. As provided for in the Wang Affidavit, there has been continuous communication between IIROC Enforcement Counsel and the Respondent since January of this year. Indeed, a week before the commencement of this hearing the Respondent personally accepted delivery of a copy all materials that Enforcement Staff intended to put before us today. There can be no question that the Respondent was fully aware of the allegations of fact and of violations of the Rules being made against him by IIROC Enforcement Staff.

18. There is no evidence that the Respondent has sought an adjournment of this hearing or that he misunderstood the consequences of him not attending. He has chosen not to comply with Rule 7.1 and to not serve the required Response. He has chosen not to appear at this hearing. The obvious conclusion is that the Respondent has determined to no longer participate in the disciplinary process initiated against him.

19. Rule 13.5 provides for a course of action which a hearing panel may follow when it has come to the conclusion that a respondent has chosen not to participate in the disciplinary process. This Rule authorizes a hearing panel to proceed in the absence of the respondent and to determine a penalty. Without this Rule, a respondent would effectively prevent the disciplinary process from proceeding merely by refusing to attend a hearing. The rules of natural justice require that the Respondent be

notified of the allegations against him and be given an opportunity to appear before us and to defend himself against these allegations. The operative word is "opportunity". In the matter before us, the Respondent is fully aware of the allegations against him and has been given ample opportunity to participate in this hearing and to defend himself against the allegations made by IIROC Enforcement Staff. He has chosen not to make use of this opportunity.

20. Having found that the Respondent has determined not to participate in the disciplinary process, we granted the application by IIROC Enforcement Counsel as we determined that it is a reasonable course of action to proceed with the hearing, to accept as proven the allegations of fact contained in the Notice of Hearing, and to find the Respondent liable for the violations of the Rules as alleged in the Notice of Hearing. As well, in the face of the Respondent's refusal to participate in the disciplinary process, we find no reason not to proceed immediately with submissions on penalty and to determine an appropriate penalty to impose on the Respondent.

21. As was referred to above, the composition of the Hearing Panel has changed from the hearing panel originally seized of this matter. IIROC Enforcement Counsel consents to the changed composition. We have not secured a similar consent from the Respondent.

22. Rule 20.2(1) provides:

> A Panel may make any determination, hold any hearing and make any decision, order, interim order or impose any terms required to implement such order, required or permitted under Rule 20 or under the Corporation Practice and Procedure.

23. From the January 19, 2009 confirmation memo issued by the National Hearing Coordinator, there is no doubt that the Respondent is aware of the change in composition of the Hearing Panel. In choosing not to participate further in the disciplinary process, it is reasonable to imply the consent of the Respondent to the current composition of the Hearing Panel.

24. In our consideration of IIROC Enforcement Counsel's application to proceed under Rules 7.2 and 13.5, we determined that the Hearing Panel is properly constituted to determine liability and impose a penalty on the Respondent.

Summary of Facts

25. The following is a summary of the facts alleged in the Notice of Hearing:

Employment History

1. The Respondent was first licensed on January 21, 2002 as an RR with and employed by Dundee Securities Corporation ("Dundee") at its sub-branch in Port Alberni, British Columbia. He voluntarily left his employment with Dundee on July 21, 2004. The Respondent has not been registered in the securities industry since July 21, 2004 and has no previous disciplinary history.

The GN Loan

2. The Respondent in May and June of 2003 without Dundee's knowledge and consent borrowed a total of approximately $200,000 from GN.
3. GN was a client of the Respondent at Dundee and was a long time friend of the Respondent.
4. The GN loan was unsecured and was repaid by the Respondent in May and June of 2004.

The EK and JK Loan

5. In May of 2004, the Respondent, again without the knowledge or consent of Dundee, borrowed the sum of $211,000 from EK and JK. This loan was secured by a mortgage on the property owned by the Respondent and his wife.

6. This property was the subject of a mortgage application to the mortgage company owned by EK and JK. However, the loan of $211,000 when made was made personally by EK and JK and not by their mortgage company.

7. At the time of the loan, both EK and JK were clients of the Respondent at Dundee.

8. This loan was repaid by the Respondent on September 22, 2004.

The CND Investments Transactions

9. In the first quarter of 2004, the Respondent contacted Dundee about the possibility of Dundee participating in a financing for Micromem Technologies Inc. ("Micromem") and sought Dundee's approval for him to become a director of Micromem. Dundee advised the Respondent that it would not participate in such a financing and would not approve of the Respondent becoming a director of Micromem.

10. In March of 2004, the Respondent solicited the participation of EK and JK in a private placement in Micromem. On March 12, 2004, JK delivered a cheque in the amount of $132,000 payable, on the Respondent's instructions, to CND Investments Inc. ("CND"). EK and JK intended these monies to be used to purchase securities in the Micromem private placement.

11. CND was the Respondent's personal company of which the Respondent was president and a director and the Respondent's wife was the secretary and the only other director. Dundee had no relationship with CND and Dundee was unaware of this transaction.

12. The cheque for $132,000 was deposited into CND's bank account on March 15, 2004. These funds were not used to purchase securities in the Micromem private placement.

13. The Respondent also solicited participation in the Micromem private placement from SK, a friend of JK. On August 11, 2004, SK wrote a cheque in the amount of $132,945 payable to "CND Investments in trust". This cheque was deposited into CND's bank account on August 16, 2004, but none of these funds were used to purchase securities in the Micromem private placement.

14. At the time of this transaction, the Respondent was no longer a registrant in the securities industry, was no longer employed by Dundee, and Dundee was unaware that the transaction was occurring.

15. Following inquiries from EK, JK and SK as to the status of their participation in the Micromem private placement, on October 15, 2004 the Respondent issued cheques to EK and JK and to SK to reimburse them for the monies which were supposed to have been used to purchase securities in the Micromem private placement. Both of these cheques were return for non-sufficient funds.

16. On October 26, 2004, the Respondent had funds wired directly to EK and JK and to SK in the amounts of the NSF cheques issued on October 15, 2004.

17. The Respondent explained to EK and to SK that the reason that Dundee was not involved with the disbursement of the private placement monies was to save the commissions and brokerage fees associated with such an investment.

Obstruction of the Investigation

18. The Respondent was subsequently questioned by his branch manager at Dundee as to the transaction with EK and JK and the Respondent advised his branch manager that although he had accepted EK and JK's cheque, he had not cashed it.

19. Enforcement Staff of the Association commenced an investigation into the Respondent's dealings with EK, JK and SK. The Respondent was aware of this investigation.

20. On January 26, 2005, the Respondent emailed to EK a draft of a letter for EK's signature (the "Draft Letter").

21. The Draft Letter was addressed to Association Enforcement Staff and claimed that:

    a. EK and JK were happy with the service provided by the Respondent while he was an employee of Dundee;

    b. At no time had the Respondent conducted himself in an unprofessional manner; and

    c. EK and JK had never participated in a private placement with the Respondent and that all purchases of stock were completed through their accounts at Dundee.

22. EK refused to sign the Draft Letter.

23. On February 1, 2005, the Respondent telephone EK to warn him that Association Enforcement Staff would be contacting EK and JK about the Association's investigation of the Respondent. In this telephone conversation, the Respondent asked EK to advise Association Enforcement Staff that the monies advanced by EK and JK on March 12, 2004 were actually a personal loan in the form of a mortgage and were not for the Micromem private placement.

24. EK advised the Respondent that Association Enforcement Staff had already spoken with EK and that he had advised them of the actual circumstances surrounding the private placement and the mortgage.

Contraventions

26. The Notice of Hearing contains allegations of the following contraventions:

Count 1

In or about May and June 2003, the Respondent, at all material times a Registered Representative ("RR") employed at Dundee Securities Corporation ("Dundee"), a Member firm, engage in personal financial dealings with his client, GN, without the knowledge or consent of Dundee, contrary to Association By-law 29.1.

Count 2

In or about May 2004, the Respondent, at all material times an RR employed at Dundee, a Member firm, engaged in personal financial dealings with his clients E&J K, without the knowledge or consent of Dundee, contrary to Association By-law 29.1.

Count 3

In or about March 2004, the Respondent, at all material times an RR employed at Dundee, a Member firm, misappropriated monies from his clients, EK and JK without the knowledge or consent of those clients, contrary to Association By-law 29.1.

Count 4

In or about January and February 2005, the Respondent, while still subject to the jurisdiction of the Association pursuant to Association By-law 20.7, attempted to frustrate and/or obstruct the Association's investigation into Counts 1, 2 and/or 3, which involve matters that occurred while the Respondent was an RR employed at Dundee, a Member firm, by asking his former client, EK, to make a misrepresentation to the Association, contrary to Association By-law 29.1 and/or By-law 19.5.

Decision on Liability

27. Based upon the facts set out in the Notice of Hearing, we find that the Respondent has committed the violations of Rule 29.1 (formerly Association By-law 29.1) more particularly detailed in the four counts set out in the Notice of Hearing.

Reasons for Our Decision on Liability

28. The relevant portions of Rule 29.1 states:

> Dealer Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member (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.

29. The Rule violations contained in the four counts for which we have found the Respondent liable may for ease of reference be categorized as undisclosed personal business with a client, misappropriation of funds, and obstruction of an IIROC investigation.

Undisclosed Personal Business with a Client

30. Rule 29.1 requires that a registered representative in business dealings with clients observes high standards of ethics and conduct. These high standards require that the registered representative when dealing with clients act in a professional manner and avoid personal business dealings with his or her clients. This requirement stems from the fact that as a professional, the registered representative must strive to put the interests of the client ahead of his or her own. If the registered representative's personal business dealings are intermeshed with those of his or her clients, such a priority is difficult to achieve. It is for this reason that prior to entering into any business dealings with a client a registered representative is required to first obtain the consent of his or her employer to the intended business dealings.

31. The conflict inherent with a registered representative dealing with a client is brought into sharp focus when it comes to borrowing funds from a client. How can a registered representative be said to be clearly putting a client's interests ahead of his or her own when the registered representative becomes indebted to a client?

32. In the matter at hand, the Respondent borrowed monies from his client, GN. It would appear that it was the pressure on the Respondent to repay this loan that caused him to make the subsequent loan arrangement with EK and JK. Both of these transactions were without the consent of his employer, Dundee.

33. In borrowing money from these clients without the consent of his employer, the Respondent clearly failed in his obligation to observe the high standards required of him by Rule 29.1 and engaged in business conduct detrimental to the public interest.

Misappropriation of Funds

34. When JK and EK provided the Respondent with the cheque for $132,000, it was clear that they intended that these funds were to be used to enable them to participate in the private placement of the Micromem securities as recommended to them by the Respondent. Although the cheque was made payable to CND, the Respondent's personal company, it is clear from the facts before us that JK and EK had no intention of permitting the Respondent to use these funds for his own purposes. Such a dishonest misdirection of funds contrary to the intention of JK and EK clearly constitutes a misappropriation of funds.

35. In using these funds for his own purpose and contrary to his client's instructions, the Respondent clearly failed to observe the high standards of ethics and conduct required of him as a registered representative by Rule 29.1.

36. Obstruction of an IIROC Investigation

37. Rule 19.1 of the Rules provides:

> 19.1. The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Dealer Member, registered representative, investment representative, sales manager, branch manager, assistant or co-branch manager, partner, director or officer, investor or employee of a Dealer Member or any other person approved or seeking approval or under the jurisdiction of the Corporation pursuant to the Rules as he or she considers necessary or desirable in connection with any matter relating to compliance by such person with (i) the Rules or Rulings of the Corporation, (ii) any legislation applicable to such person concerning trading in securities or commodity contracts, including any rulings, policies, regulations or directives of any securities commission, or iii) the by-laws, rules, regulations and policies of any self-regulatory organization. The Dealer Member shall require all employees to comply with Rule 19.

38. Rule 19.1 imposed an obligation upon IIROC Enforcement Staff to investigate suspected violations of IIROC Rules, regulations or policies by registered representatives. To carry out these investigative obligations Rule 19 grants to IIROC Enforcement staff certain investigative powers. These investigative powers are essential for IIROC to effectively carry out its duties.

39. Just as IIROC Enforcement Staff have the responsibility to conduct investigations into such violations, registered representatives have the matching responsibility to cooperate with such investigations and to assist IIROC in carrying out its responsibilities. A failure to cooperate as and when requested to do so has been found to constitute a violation of the Rules. (see for example *Re: Morrison*, January 16, 2009, *Re: Reiffenstein* [2007] I.D.A.C.D. No. 50, December 17, 2007, *Re: Milardovic* [2007] I.D.A.C.D. No. 31, Bulletin No.3665, September 5, 2007, *Re: Bassett* [2005] I.D.A.C.D. No. 26 Bulletin No. 3449, August 11, 2005; and *Re: Steward* [2005] I.D.A.C.D. No. 23, Bulletin No. 3443, July 22, 2005).

40. In the matter at hand, the Respondent commenced his efforts to impede the IIROC investigation in his response to his branch manager at Dundee when asked if he had accepted a cheque from EK and JK for the Micromem private placement. Although admitting that he had received such a cheque, he lied to the branch manager in denying that he had cashed the cheque.

41. When Enforcement Staff became involved in the investigation of the Respondent's conduct, he went beyond not cooperating with Enforcement Staff. He deliberately attempted to obstruct the investigation by encouraging EK to write a letter to Enforcement Staff that clearly misrepresented the Respondent's relationship with his clients JK and EK. In addition, he encouraged EK to lie to Enforcement Staff about the relationship between the Respondent and JK and EK.

42. There is no doubt that the actions of the Respondent in obstructing the investigation of IIROC Enforcement Staff into his activities while licensed as a registered representative is in clear violation of Rule 29.1.

Decision on Penalty

43. IIROC Enforcement Counsel recommended to us penalties consisting of a permanent ban from receiving approval for registration with IIROC in any capacity and a total fine of $300,000 consisting of fines of:

    1. $50,000 for the undisclosed personal business with a client violations,
    2. $100,000 for the misappropriation violation, and

3. $150,000 for the obstruction of the investigation violation.

Permanent Ban from Registration

44. We agree with IIROC Enforcement Counsel that the permanent ban from registration is appropriate. Misappropriation of clients' funds is akin to theft and is an extremely serious offence. In addition, the Respondent's obstructive actions with respect to the investigation of his activities as an employee of Dundee were not as a result of inadvertence or a failure to respond. He set out on a deliberate course of action intended to mislead Enforcement Staff. The Respondent has demonstrated a lack of integrity which clearly renders unacceptable any future involvement by him as a registrant in the investment industry.

Undisclosed Personal Business with a Client

45. The IIROC Disciplinary Sanction Guidelines dated January, 2006 recommend a minimum fine of $10,000 for a violation of the prohibition against engaging in undisclosed personal business with a client. The actions of the Respondent must be considered with that minimum fine as a starting point.

46. In the matter at hand, the Respondent received a personal loan from GN. GN had been a long time friend of the Respondent prior to the Respondent commencing his employment with Dundee. It is more likely that it was this long term friendship rather than the broker/client relationship that led to GN making the loan to the Respondent.

47. In the case of EK and JK, they were in the business of lending money through their mortgage company. Although the loan that was made to the Respondent was made personally by them rather than by their mortgage company, the Respondent and his wife had applied to EK and JK's mortgage company for a mortgage on a property owned by them. This fact situation also suggests that it is more than likely that it was the fact that EK and JK were in the mortgage lending business rather than the broker/client relationship that led to EK and JK making the loan to the Respondent.

48. The evidence before us is that the loan made by GN to the Respondent was outstanding for approximately one year and was repaid in May of 2004 when such repayment was sought by GN. The EK and JK loan was outstanding for approximately four months and was repaid in September 2004.

49. Therefore, in both these transactions, the relationship leading to the loan was not as a result of the broker client relationship. The Respondent and GN were long time friends and EK and JK were in the mortgage lending business. In addition, the clients did not lose any money. These factors, although not in anyway excusing the Respondent's conduct, certainly suggests that a fine closer to the recommended minimum fine is more appropriate than a fine of $50,000. We set the amount of this fine at $20,000 to better reflect the mitigating factors and the fact that the Respondent entered into these loan transactions without having secured the prior approval of his employer.

Misappropriation of Funds

50. For the violation of the Rules relating to the misappropriation of funds, the IIROC Disciplinary Sanction Guidelines dated January, 2006 recommend a minimum fine of $25,000.

51. In *Re: McRea* [2000] I.D.A.C.D. No.1, Bulletin No.2682, January 24, 2000, the disciplinary hearing panel found that Mr. McRea had executed eighteen transactions over a period of two years during the course of which he had misappropriated funds from his employer for his own benefit. The fine was determined to be $100,000.

52. In *Re: McCaffrey* [2003] I.D.A.C.D. No. 18 Bulletin No.3151, May 15, 2003, the disciplinary hearing panel found Mr. McCaffrey liable on nine counts of misappropriating approximately $240,000 from clients over a period of several months. The appropriate fine was determined to be $65,000 for each count for a total fine of $585,000.

53. In *Re: MacKay* [2005] I.D.A.C.D. No. 14, Bulletin No.3418, May 9, 2005, the disciplinary hearing panel found that Mr. MacKay had engaged in the misappropriation of funds from his employer over a period of three years involving twenty transactions totaling $138,373. The fine was determined to be $100,000.

54. In *Re: Hart* [2006] I.D.A.C.D. No. 2, Bulletin No. 3513, February 6, 2006, the disciplinary hearing panel found that Mr. Hart had misappropriated funds in the amount of approximately $800,000 from two client accounts over a period of two years. The fine was determined to be $1.3 million.

55. In *Re: Petriello* [2007] I.D.A.C.D. No. 21, Bulletin No.3645, July 11, 2007, the disciplinary hearing panel found that Mr. Petriello over a two year period had misappropriated $124,000 from one of his clients. The fine was determined to be $150,000.

56. As is evident from the examples above set out, disciplinary councils view the misappropriation of funds, especially client funds, as a very serious violation of the Rules. The fines levied in these decisions are far in excess of the minimum fine of $25,000 recommended by the IIROC Disciplinary Sanction Guidelines.

57. In the evidence before us, the Respondent was engaged in only one instance of misappropriating funds of clients, namely the funds of JK and EK. However, although SK was not a client at the time SK's funds were misappropriated by the Respondent, the fact that the Respondent misappropriated these funds suggests that the Respondent engaged in a pattern of misappropriation to secure funds for his personal use. In addition, his issuance of NSF cheques to JK and EK and to SK suggests very strongly that the Respondent had few scruples in taking desperate steps to delay the inevitable accounting.

58. The only ameliorating fact in the Respondent's actions is that he did within a couple of weeks of issuing the NSF cheques, return to JK and EK and to SK the monies they had advanced towards the Micromem private placement.

59. Therefore, although the Respondent was engaged in only one transaction that involved the misappropriation of client funds, we find that the Respondent's actions with SK and his subsequent issuance of the NSF cheques aggravated the situation and that the recommendation of IIROC Enforcement Counsel for a fine of $100,000 properly reflects the gravity of the Respondent's action in misappropriating client funds.

Obstruction of an IIROC Investigation

60. This aspect of the Respondent's actions we also regard as extremely serious. In both of the other categories of violations of the Rules, there is an argument for ameliorating circumstances. Under this heading there are none. It is clear that right from the initial interview with his branch manager at Dundee to his ongoing dealings with Enforcement Staff the Respondent did everything in his power to impede and obstruct the investigation by IIROC Enforcement Staff. He even attempted to bring his clients into his fabrications by encouraging them to lie on his behalf to Enforcement Staff.

61. The IIROC Disciplinary Sanction Guidelines dated January, 2006 do not even contemplate the type of conduct similar to that taken by the Respondent. The closest the Guidelines come to this pattern of behaviour is a reference to a person under the jurisdiction of IIROC failing to cooperate with an investigation in violation of Rules 19.5 and 19.6. These Rules in general terms require a registrant to grant IIROC Enforcement Staff access to books and records of the registrant and, when requested by IIROC Enforcement Staff, to submit a report in writing, to produce documents for inspection, and to attend and give evidence.

62. The conduct referred to in this Guideline is more a failure to act when requested to do so by IIROC Enforcement Staff rather than a deliberate attempt to obstruct the course of an investigation. Therefore, the minimum recommended fine of $10,000 under this Disciplinary Sanction Guideline bears little

relationship to what should be considered a proper fine for the Respondent's actions in the matter before us.

63. IIROC Enforcement Counsel did not put before us and we have not been able to find a decision of another hearing panel which considered the appropriate amount for a fine where an approved person has been found liable to have deliberately obstructed the investigation of IIROC Enforcement Staff. We consider the actions of the Respondent extremely serious as his actions not only impair the activities of IIROC Enforcement Staff leading to a much greater expenditure of effort and resources than might otherwise have been required, but they also reflect very poorly on the investment industry. The investing public is encouraged to place trust in and to have confidence in registrants under IIROC's jurisdiction. It is bad enough when a registrant misappropriates a client's funds. But this bad situation is made even worse when having become the subject of an investigation, the registrant attempts to compromise his client by encouraging the client to lie to IIROC Enforcement Staff.

64. IIROC Enforcement Counsel has recommended a fine of $150,000. Without in any way wishing to suggest a lessening of our position as to how seriously we view the Respondent's transgressions, we believe that the fine recommended by IIROC Enforcement Counsel is too great and we set this fine at $100,000.

Costs

65. In addition to any penalties we might impose on the Respondent, Rule 20.49(1) grants us the authority to assess Enforcement Staff investigation and prosecution costs incurred by IIROC and the Association in this matter and to make an order against the Respondent for their payment.

66. IIROC Enforcement Counsel entered a bill of costs in this matter detailing some of the costs incurred by IIROC and the Association in the investigation and prosecution of this matter. This bill of costs totals $83,184.00 and includes the costs incurred by IIROC and the Association as a result of the appeals of our original decision that we have the jurisdiction to discipline the Respondent. We believe that the inclusion of these appeal costs are entirely appropriate. Indeed, in our decision of July 19, 2006 in finding against the Respondent, we did not award costs, but stated that the costs would be determined in the final disposition of this matter.

Penalty and Costs

67. In accordance with the provisions of Rule 20.33(2) we impose the following penalties upon the Respondent:

    1. a permanent bar from approval with IIROC; and
    2. a fine in the amount of $220,000.

68. In accordance with the provisions of Rule 20.49(1) we order that the Respondent pay IIROC costs in the amount of $83,184.00.

Dated at Vancouver, British Columbia, this 20th day of April, 2009.

John Rogers, Chair
Brian Field
Don Teatro