

Re Kasten-Brown

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory
Organization of Canada (IIROC)**

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Mary Louise Kasten-Brown

2011 IIROC 73

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

Hearing: March 2, 2011
Decision: December 5, 2011
(15 paras.)

Hearing Panel:

D. Brian Foster, Q.C. (Chair), Bradley Whyte

Appearances:

Natalija Popovic, Senior Enforcement Counsel for the Investment Industry Regulatory Organization of Canada
Phillip L. Meyers, Counsel for Marie Louise Kasten-Brown

DECISION

I. INTRODUCTION

¶ 1 This Hearing Panel (the "Panel") was constituted to hear a Disciplinary Hearing pursuant to By-law 20, Sections 20.33 and 20.34. Shortly before the Hearing was to commence, the Panel was advised that the matter would proceed as a Settlement Hearing. The Settlement Hearing proceeded pursuant to By-law 20, Section 20.36 on March 2, 2011. A settlement agreement executed by the Respondent (the "Settlement Agreement") was provided to the Panel.

¶ 2 Industry panel member Ms. Kathleen Jost was not able to attend the Settlement Hearing due to illness. Pursuant to the Rules, this Panel had jurisdiction to proceed to hear the Settlement Hearing with two panel members, provided that there was consent of the parties. The parties consented to the matter being heard by two members, comprised of the Chair and Mr. Whyte.

¶ 3 At the conclusion of the Hearing and after hearing submissions and reviewing the terms of the Settlement Agreement the Panel accepted the Settlement Agreement.

¶ 4 Below are the reasons for doing so.

II. THE SETTLEMENT AGREEMENT

¶ 5 The Settlement Agreement is annexed to this Decision. It contains:

- (a) a Statement of the Respondent's admission to the following contraventions of IIROC Rules, Guidelines, IDA By-laws, Regulations or Policies:

From or about January 2005 to March 2006 the Respondent, while a Registered Representative:

- i) failed to use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted contrary to IDA Regulation 1300.1(a) [now IIROC Rule 1300.1(a)];
and
- ii) failed to use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer contrary to IDA Regulation 1300.1(p) [now IIROC Rule 1300.1(p)].

- (b) a Statement of the Facts agreed to between Staff and the Respondent;

- (c) the agreement of Staff and the Respondent to the following terms of settlement:

- (i) a fine of \$23,250.00;
- (ii) disgorgement of \$787.50;
- (iii) rewrite of CPH within six months;
- (iv) six months of close supervision with internal report filings; and
- (v) payment of costs by the Respondent to IIROC in the sum of \$3,000.00.

¶ 6 The powers granted pursuant to 20.36 of the By-laws allow the Panel to either accept the Settlement Agreement or reject the Settlement Agreement. When considering whether to accept or reject a settlement agreement a Hearing Panel should not interfere lightly in a negotiated settlement. As stated in the decision in *Re: Milewski* [1999] I.D.A.C. No. 17:

A District Council considering a Settlement Agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

¶ 7 The Panel is of the unanimous view that rejection of the Settlement Agreement would be inconsistent with the foregoing principles. The Settlement Agreement was therefore accepted.

III. ANALYSIS

¶ 8 The Panel has reviewed the facts agreed to in the Settlement Agreement, and has heard the submissions of counsel. We were referred to the IIROC Dealers Member Disciplinary Sanctions Guidelines. The Guideline 3.1 titled *Improper Sales Practice* and Guideline 3.2 titled *Failure to Know Your Client - Dealer Member Rule 1300.1(a) and (b)* have application. As is stated in Guideline 3.1:

The core of a registered representative's business activity is to make recommendations for his/her clients. Registrants have a basic duty to ensure that the recommendations are suitable, and in accordance with the clients' investment objectives and risk factors. The courts have generally held that a registrant owes a fiduciary duty to the client where the client relies upon the advice and recommendations of the registrant. This fiduciary relationship requires the registrant to act carefully, honestly and in good faith in dealing with the client. Therefore, a registrant who makes unsuitable recommendations has breached

his/her fiduciary duty owed to the client.

¶ 9 Guideline 3.2 dealing with failure to know your client states:

The Know Your Client rule is of paramount importance for the securities industry. All registrants must make diligent and business-like efforts to learn and record the essential financial and personal circumstances, and the investment objectives of each client. Knowing your client is a fundamental ongoing obligation that a registrant is required to meet in order to be able to act in the best interests of his/her clients.

¶ 10 Relevant considerations in this case include:

- (a) the Respondent was working in the capacity of an assistant when she undertook to act as the Registered Representative ("RR") for a number of clients that were formerly clients of another RR at her firm;
- (b) two of the clients (IW and JW) made a complaint to the Alberta Securities Commission ("ASC"). Originally those clients were clients of RC, another RR at Octagon. At that time the Respondent worked as an assistant for RC;
- (c) the Respondent never met with IW or JW prior to the purchase of the security in issue. The Respondent had only very limited telephone conversations with the clients after the investment had already been made;
- (d) the Respondent also purchased the same security in the accounts of six other clients, at least four of which dealt with another person prior to becoming clients of the Respondent; and
- (e) when RC left Octagon, the Respondent was asked by her branch manager to become the RR and to complete the paperwork for the purchase of securities. The Respondent undertook no due diligence to learn about the investment and did not confirm any client account application form information with the clients unless some information was missing or deemed to be incorrect.

¶ 11 As is admitted in the Settlement Agreement, the Respondent failed to know the clients and failed to ensure that the investment was suitable for them. This is a significant failure of one of the most basic duties to ensure that the RR knows his or her client and that recommendations are suitable and in accordance with the clients' investment objectives and risk factors. Knowing your client is a fundamental ongoing obligation.

¶ 12 However, in this case there are mitigating factors as are set out in paragraph 26 of the Settlement Agreement. Among those mitigating factors are that the Respondent had been an RR for 11 years with no disciplinary history, she relied on RC, the branch manager and the compliance department at Octagon and importantly, she did not solicit the purchases in issue. She also received only nominal compensation for the transactions and cooperated with the IIROC investigation. She has agreed to disgorgement of commissions of \$787.50.

¶ 13 There is no evidence that the Respondent's conduct was manipulative or deceptive. If anything, her conduct might be described as a "mistake" resulting in a failure to take as seriously as she should have the responsibilities of an RR as opposed to the lesser responsibilities that she would have had in her former role as an assistant.

IV. CONCLUSION

¶ 14 In light of the foregoing relevant guidelines this Panel has reached the conclusion that the terms of the Settlement Agreement are consistent with the guidelines. This Panel is in agreement that the provisions of the Settlement Agreement relating to sanctions are within a "reasonable range" of appropriateness as is described in the *Re: Milewski* decision. This Panel accepts that the sanctions are significant having regard to all of the circumstances.

¶ 15 These are the reasons for our decision of March 2, 2011 to accept the Settlement Agreement.

DATED at the City of Calgary, in the Province of Alberta, this 5th day of December, 2011

D. Brian Foster, Q.C., Chair

Bradley Whyte, Industry Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent, Mary Louise Kasten-Brown, consent and agree to the settlement of this matter by way of this settlement agreement (“the Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) into the conduct of Ms. Kasten-Brown (“the Respondent”).
3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.
4. The Respondent consents to be subject to the jurisdiction of IIROC.
5. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (“the Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Rules, Guidelines, IDA By-Laws, Regulations or Policies:

From or about January 2005 to March 2006 the Respondent, while a Registered Representative:

- i) failed to use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted contrary to IDA Regulation 1300.1(a) [now IIROC Rule 1300.1 (a)];
and
 - ii) failed to use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer contrary to IDA Regulation 1300.1(p) [now IIROC Rule 1300.1 (p)].
8. Staff and the Respondent agree to the following terms of settlement:
 - a) A fine of \$23,250
 - b) Disgorgement of \$787.50
 - c) Re write of CPH within 6 months
 - d) 6 months of close supervision with internal report filings
 9. The Respondent agrees to pay costs to IIROC in the sum of \$3,000.

III. STATEMENT OF FACTS

(i) *Acknowledgment*

10. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) Factual Background

A. Registration History

11. The Respondent has been an RR at Octagon Capital Corporation [Octagon] [now called Global Maxfin Capital Inc.] from May 31, 2000 to the present. The Respondent acted and continues to act as an assistant to other RRs at the firm; and has a modest book of business of her own.

B. Background

12. The Respondent was working in the capacity of an assistant when she undertook to act as the Registered Representative [RR] for a number of clients who were formerly clients of another RR at her firm. In or about February 2008 Staff of IIROC received a referral from the Alberta Securities Commission [ASC] in relation to a client complaint against the Respondent and a security called Agrimax Ltd. [Agrimax]. No client complaint was made directly to Octagon or the Respondent.

13. Agrimax is a private, Alberta-based company that manufactures agricultural purpose fertilizer. Agrimax has never completed any filings with the ASC and there is no evidence that any of the clients in question received a prospectus, offering memorandum, or any regular financial statements for Agrimax. The value of the Agrimax shares is not currently known.

C. Purchases of Agrimax

i) Clients IW and JW

14. The client complaint to the ASC came from a married couple, IW and JW. They alleged that in or about late 2004 they were counselled to purchase shares in a private company, Agrimax, by KS; an individual who was at that time at an unrelated firm.

15. KS was not a registrant of the IDA at any time and the firm at which he worked is not an IDA or IIROC member. KS passed away in January 2008.

16. IW and JW also alleged that they were advised by KS that in order to invest in the initial private offering of Agrimax they would have to open registered trading/securities accounts. KS facilitated opening RSP accounts for these clients at Octagon.

17. Originally, IW and JW were clients of RC, another RR at Octagon. At this time the Respondent worked as an assistant for RC.

18. In or about mid 2005 RC left Octagon and the Respondent took over the accounts of IW and JW and eventually purchased approximately \$200,000 worth of shares of Agrimax in their accounts through a private placement. This amount constituted 100% of the value in their RSP accounts.

19. IW and JW alleged that KS completed or assisted with completing all of the required forms and documentation, to facilitate the purchase of Agrimax, which were then delivered to Octagon.

20. The Respondent never met with IW and/or JW prior to the purchase of Agrimax. The Respondent had only very limited telephone conversations with these clients after the investment had already been made in Agrimax.

ii) Six Additional Agrimax Clients

21. In addition to IW and JW, the Respondent purchased Agrimax in the accounts of six other clients. At least four of these clients dealt with KS, and or his associate RP, prior to becoming clients of the Respondent.

22. With the exception of one client, CK, there is no evidence that the Respondent met or spoke with these clients about Agrimax prior to making the purchases for them.

23. The details of the Respondent's Agrimax Clients are contained in Schedule "A" to this Settlement Agreement.

24. The Respondent admitted to IIROC, at her interview, as follow:

- when RC left Octagon, she was asked to become the RR and complete the paperwork for the Agrimax Clients by her branch manager;
 - none of the Agrimax Clients were her clients prior to the Agrimax transactions;
 - she did not know anything about the Agrimax private placement and did no research on Agrimax before the purchases;
 - she could not recall if she had ever met the Agrimax Clients face-to-face;
 - most of the client account application forms came to her completed and she did not confirm the information with the clients unless information was missing or deemed to be incorrect in order for the clients to participate in the Agrimax transactions;
 - she processed the opening of the accounts and facilitated the Agrimax share purchases in the clients' registered accounts;
 - the clients' investment objectives had to be shown as "100% higher risk, speculative securities and trading strategies" given that they were investing in Agrimax, since Agrimax was a private placement, it was a high-risk investment.
25. Accordingly, the Respondent failed to know the Agrimax Clients and failed to ensure that the investment was suitable for them.
26. The parties agree that the following mitigating factors are relevant in that the Respondent:
- has been an RR for 11 years and has no discipline history with IIROC;
 - relied upon RC, the branch manager and the compliance department at Octagon;
 - notes that all of the new client accounts were approved by the branch manager and the compliance department;
 - did not solicit the Agrimax purchases;
 - only received nominal compensation for the transactions;
 - co-operated with the IIROC investigation.

IV. TERMS OF SETTLEMENT

27. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.
28. The Settlement Agreement is subject to acceptance by the Hearing Panel.
29. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
30. The Settlement Agreement will be presented to the Hearing Panel at a hearing ("the Settlement Hearing") for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
31. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
32. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
33. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
34. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.

35. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
36. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Calgary, in the Province of Alberta, this 22nd day of February, 2011.

Witness

Mary Kasten-Brown
Respondent

AGREED TO by Staff at the City of Calgary, in the Province of Alberta this 1st day of March, 2011.

Gil Gauthier
Witness

Natalija Popovic
Natalija Popovic
 Enforcement Counsel on behalf of Staff of the Investment
 Industry Regulatory Organization of Canada

ACCEPTED at the City of Calgary, in the Province of Alberta, this 2nd day of March, 2011, by the following Hearing Panel:

Per: Mr. Brian Foster, Panel Chair

Per: Mr. Bradley Whyte, Panel Member

Schedule “A” To Settlement Agreement for Mary Louise Kasten-Brown

	Client	DOB	Income [in 1000s]	Liquid Assets [in \$1000s]	Net Worth [in \$1000s]	Investment Experience *	Agrimax Purchase in \$CDN	% of Liquid Assets	% of Total Net Worth**
1.	IW	1952	---	300	600	Good	71,978	24	12
2.	JW	1954	70 [chef]	300	600	Sophisticated	119,138	40	20
3.	CH	1957	40 [unemployed]	43	393	Limited	38,617	90	10
4.	LS	1944	15 [driver]	---	100	Good	10,000	---	10
5.	CK	1967	90 [analytical specialist]	---	100	Limited	42, 623	---	42
6.	MET	1950	100 [teacher]	400	800	Good	23,000	6	3
7.	JV	1965	60 [IT consultant]	---	350	Good	3,300	---	1
8.	LV	1964	50 [nurse]	---	350	Good	4,300	---	1

* All Clients’ Investment Objectives/Risk Tolerance were the same: 100% higher risk speculative securities and trading strategies.

** All Clients’ purchases of Agrimax represented 100% of their RSP holdings at Octagon.

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