

INVESTMENT DEALERS ASSOCIATION OF CANADA

IN THE MATTER OF:

**THE BY-LAWS OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA**

AND

JEFFREY BRADFORD KASMAN AND CLINTON ANDERSON

DECISION AND REASONS ON PENALTY

**OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA**

Hearing: February 6, 2008

Panel:

Paul M. Moore, Q.C, Chair
Guenther W.K. Kleberg

Association Counsel:
Ricardo Codina

Respondents' Counsel:
Alistair Crawley

February 19, 2008

INVESTMENT DEALERS ASSOCIATION OF CANADA

IN THE MATTER OF:

**THE BY-LAWS OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA**

AND

JEFFREY BRADFORD KASMAN AND CLINTON ANDERSON

**DECISION AND REASONS ON PENALTY OF THE ONTARIO DISTRICT COUNCIL
OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA**

Hearing on the Merits

- [1] We rendered our decision and reasons on the merits in this matter on November 13, 2007.
- [2] On February 6, 2008 we held a hearing into appropriate sanctions.

Sanctions Requested by Association Counsel

- [3] Counsel for the Association requested the following sanctions against the respondents:
- (a) a suspension for a period of two to five years;
 - (b) a fine against each of the respondents of between \$40,000 and \$60,000;
 - (c) a costs award, on a joint and several basis, against the respondents for \$60,000 (out of total costs calculated at approximately \$123,000);
 - (d) a condition attached to the approval by the Association of the respondents that for a period of two years they not be permitted to deal in securities listed on the Pink Sheets or on the OTC Bulletin Board markets;
 - (e) a condition attached to the approval of the respondents that they be subject to strict supervision for a period of two years;
 - (f) a requirement that, before being readmitted to the industry, the respondents rewrite the Conduct and Procedures Handbook (CPH) examination; and
 - (g) a requirement that, before being readmitted to the industry, the respondents take two additional courses:
 - (i) one dealing with the consequences of non-compliance; and
 - (ii) one dealing with ethics.

Position of the Respondents

[4] Counsel for the respondents submitted that this case was different from all the precedents examined at the hearing.

[5] Specifically, counsel for the respondents submitted that no suspension was appropriate; and that a fine of \$15,000, approximately equaling the respondents' share of the commissions earned on the trades in issue, was appropriate.

[6] Counsel for the respondents argued that the respondents had incurred their own substantial legal costs in this matter and that a costs award should be viewed as a penalty. In this case no costs award was appropriate.

[7] In particular, counsel for the respondents stressed that there had been full cooperation by the respondents and that the only reason there had been a hearing on the merits, rather than a full agreement on the facts, or indeed a settlement agreement, was to enable a panel to assess all factors relevant for determining appropriate sanctions. The respondents should not be penalized because they determined that it would be helpful and advantageous for a panel to have live witnesses and to hear evidence.

Additional Evidence

[8] In addition to evidence at the hearing on the merits, we heard from two witnesses at the penalty hearing.

[9] Carolyn Kelly who is Vice President and Branch Manager of Research Capital, the present employer of the respondents, testified as to the current level of supervision of the respondents, and as to their current practice and conduct in the business.

[10] The respondent, Mr. Anderson, testified as to the impact various sanctions would have on the respondents' business and as to the earnings of the respondents.

Decision and Order as to Sanctions

[11] After carefully considering the submissions of counsel and reviewing the precedents put forward by them, we determined that the following sanctions are appropriate, and order that:

- (a) Each of the respondents shall be suspended from approval for a period of two months.
- (b) Each of the respondents shall pay a fine of \$25,000.
- (c) The respondents shall pay \$40,000 on a joint and several basis, on account of costs.
- (d) The respondents shall rewrite and pass the CPH examination within one year from the date of this decision.

Reasons

[12] The conduct of the respondents in this case was unacceptable. Their dereliction of duty was inexcusable. They did not just misperform their "know your client" and "due diligence" obligations, they failed utterly to perform them at all.

[13] The respondents' conduct facilitated the market manipulation. Market manipulation is extremely detrimental to the reputation and integrity of the capital markets even where there is no evidence of direct harm to anyone.

[14] Although there were many extenuating circumstance which justify lighter sanctions than the investment industry would otherwise expect where market manipulation has been facilitated by approved persons, there still needs to be significant consequences to the respondents.

Precedents

[15] Unlike in many of the cases referred to us, the respondents did not act dishonestly, or deceitfully, or with any willful participation in the wrongdoing of others.

[16] In the case of *Toban (Re)* [2007] I.D.A.C.D. No. 9 Bulletin No. 3615, longer periods were involved, a finding of deceit was made and the criminal past of the clients involved was known to the respondent.

[17] In the case of *Boulieris (Re)* 2004 L NONOSC 56 (also reported at (2004), 27 OSCB 1597), there was willful conduct on the part of the respondent.

[18] In the case of *Freedman (Re)* [2005] I.D.A.C.D. No. 37 Bulletin No.3457, a branch manager was involved. Longer periods of time were involved. The transactions that were facilitated were substantially larger than the trading involved in the case before us.

[19] In the case of *NG (Re)* decided by the Ontario District Council of the Association on July 27, 2007 (on the merits) and December 20, 2007 (as to penalty) (as yet unpublished), the respondent took orders from an unrelated third party. There was a large uncollectible dollar amount that the employer suffered. That case involved matters that were significantly more serious than the circumstances of the case before us.

[20] In *Faiello (Re)* [2007] I.D.A.C.D. No. 4 Bulletin No. 3605, there was no question of dishonesty. The respondent did not fulfill his gatekeeper role and failed in his "know your client" obligation. However, the sanctions were determined by settlement negotiations and not through a contested hearing. In that case there was a two year suspension, a fine of \$20,000 and a cost award of \$5,000 as well as a requirement that the respondent rewrite the CPH examination.

[21] Based on *NG* and *Faiello*, we determined that some period of suspension was required. However, for all the extenuating circumstances set out below, we believe the appropriate period is two months.

Extenuating Circumstances

- [22] The period of time that manipulation was facilitated in the matter before us was relatively short.
- [23] The respondents did not plan, organize, or participate through personal trading in the manipulation.
- [24] The dollar value of the trading in issue was relatively minor.
- [25] There was no evidence that any third party or the respondents' employer suffered direct harm.
- [26] The respondents received no training and no supervisory support or assistance from their employer at the time.
- [27] The respondents have no prior record of offences.
- [28] We heard no evidence suggesting that the trading in question was not an isolated situation. The respondents have continued to work in the industry since the relevant period and there have been no subsequent incidents that suggest that the respondents have not been model employees and sales representatives since the time of the trading in question.
- [29] The respondents did not hold positions of responsibility over others in the industry.
- [30] The respondents have not been "high" earners in the industry. Indeed, their remuneration has been at lower levels than one might expect from full time participants in the industry.
- [31] The gross value of the commissions earned by the respondents from the trading in question was approximately \$14,000.

Further Analysis

- [32] Mr. Anderson testified that a suspension of more than one month would result in a 75% loss of book to him and Mr. Kasman and suffering by his employer. Association counsel argued that a short suspension would encourage others not to treat the Association's "know your client" and "due diligence" obligations seriously. We disagree with both submissions.
- [33] While we recognize that any suspension of a sales representative in the industry is disruptive, we do not believe that the two month suspension will be unduly devastating to the respondents.
- [34] A two month suspension should not result in the permanent termination of the ability of the respondents to continue in the business. On the other hand, it will amount to more than an unpaid vacation, especially taking into account their economic circumstances.
- [35] The respondents were cooperative and this matter was brought forward in an expeditious manner.

[36] The respondents were entitled to a full hearing to put before the panel live evidence and a full appreciation of the facts to enable us to determine appropriate sanctions in all the circumstances of this case. On the other hand, the Association's costs of \$123,000 are real and reasonable.

[37] A suspension of two months, while appropriate in the unique circumstances of this case, is only appropriate if balanced with meaningful financial sanctions, taking into account the respondents' economic circumstances.

[38] A fine of \$25,000 per person and a costs award of \$40,000 on a joint and several basis (amounting to a financial burden of \$45,000 per respondent), when considered with the substantial legal expenses which, we were advised, the respondents have incurred in defending this matter, will have a meaningful, yet appropriate, financial impact on the respondents.

[39] It is not necessary or appropriate to restrict the activities of the respondents once they have been readmitted to the industry after the suspension.

[40] Trading on the Pink Sheets and the OTC Bulletin Board markets is not illegal. We accept Association counsel's submission that much trading on these markets is susceptible of questionable practices and needs to be scrutinized. Yet there was no evidence that, since the market manipulation in question, the respondents have not been capable of dealing in such markets on a proper basis.

[41] We heard evidence that the respondents' current employer has been supervising trading by the respondents. It is not appropriate that now, five years after the trading in question, a term of strict supervision be imposed.

[42] As a refresher of the conduct and practices expectations for registrants, it is appropriate that the respondents rewrite the CPH examination within the next 12 months as a condition to their continuing approval in the industry.

[43] It is not necessary for the respondents to take courses on the consequence of non-compliance with securities laws or ethics. Based on what the respondents have gone through in the case at hand, and the degree of remorsefulness and regret we know they have, they could teach a course on the consequences of their non-compliance. Ethics was not an issue in this case.

Conclusion

[44] The sanctions, considered together, constitute an appropriate deterrence for the respondents and will send the right message to others in the industry about the importance of fulfilling the "know your client" and "due diligence" obligations, the lack of fulfillment of which in this case facilitated the market manipulation in question.

[45] One might conclude that this case, in the scheme of things, was a small matter. No one was directly harmed. Amounts were small. The trading period was short. The market manipulation was not even noticed at the time. The events occurred in 2003 and did not come to light until 2005.

[46] Nevertheless, the conduct of the respondents fell significantly below that expected of members of the industry. They permitted market manipulation to occur.

[47] It was appropriate that, when the facts were drawn to the Association's attention, the Association took up this matter and pursued it.

DATED at Toronto this 19th day of February, 2008.

Executed on original by:

"Paul M. Moore"

Paul M. Moore, Q.C.

"Guenther W.K. Kleberg"

Guenther W.K. Kleberg