Case Name:

Investment Dealers Assn. (Re)

IN THE MATTER OF The Securities Act, R.S.B.C. 1996, c. 418
AND IN THE MATTER OF The Investment Dealers Association
and Ian Scott-Mancrieff

2001 LNBCSC 5

[2001] B.C.S.C.D. No. 49

2001 BCSECCOM 49

British Columbia Securities Commission

A.R. Salvail-Lopez and J.L. Brockman

Heard: December 20, 2000.
Decision: January 10, 2001.

Appearing:

R. Malcolm Mcewan, Himself.

For The Investment Dealers Association, Mary Clare T.

Baillie.

For Ian Scott-Moncrieff, himself.

For Commission Staff J.A. (Sasha) Angus

DECISION OF THE COMMISSION

Introduction

1 R. Malcolm McEwan applied to the Commission on September 25, 2000, under section 28(1) of the Securities Act, R.S.B.C. 1996, c. 418, for a hearing and review of a Settlement Agreement entered into on August 30, 2000, between the Investment Dealers Association and Ian Scott-Moncrieff, who had been a salesperson registered under the Act. In the Settlement Agreement, Scott-Moncrieff admitted contravening certain regulatory requirements in connection with two accounts that had been maintained with him by McEwan.

2 Section 28(1) of the Act provides as follows:

> "28 (1) The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body or

> of an exchange may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (5) applies."

3 On December 20, 2000, we heard submissions from McEwan, Scott-Moncrieff, the IDA and Commission staff as to whether McEwan is "directly affected" by the Settlement Agreement for the purposes of section 28(1) of the Act.

Background

4 In 1991, Scott-Moncrieff was employed as a salesperson with Midland Walwyn Capital Inc. (now Merrill Lynch Canada Inc.), a member of the IDA. McEwan opened an account with Scott-Moncrieff in June 1991 and a second account in April 1997. The Settlement Agreement states that, because McEwan travelled a great deal and did not have a telephone, McEwan allowed Scott-Moncrieff to use his discretion with respect to trades in both accounts. The Settlement Agreement also states that, between June 1991 and December 1997, approximately 732 trades were executed in the two accounts, most of which involved the exercise of discretion by Scott-Moncrieff as to price, timing, quantity or a combination of those factors. Finally, the Settlement Agreement states that the first account yielded an overall profit of $49,648.99 while the second account sustained a loss of $71,141.57.

5 Staff of the IDA conducted an investigation into the conduct of Scott-Moncrieff in connection with the McEwan accounts. McEwan was interviewed during the investigation.

6 On March 14, 2000, McEwan filed a writ of summons in the Supreme Court of British Columbia against the IDA. His claim is set out as follows:

> "This writ is issued to preserve the plaintiff's rights of fiduciary recourse in the knowledge that the plaintiff's complaint received by the defendant was found to have merit, and the defendants have been less than forthcoming to render a finding against their errant members.
>
> Damages claimed are $20,000.00 for straight forward supervisory errors, resulting costs to date of $5,652.30, and resulting losses to date of $43,638.20.
>
> Valuable considerations are available for promptness to deliver a responsible finding or appropriate settlement."

7 On August 30, 2000, IDA staff signed the Settlement Agreement with Scott-Moncrieff. In the agreement, Scott-Moncrieff admitted to having committed the following contraventions:

> "1. Between June 1991 and December 1997, inclusive, Ian Scott-Moncrieff exercised discretion in effecting trades in the accounts of his client, R. Malcolm McEwan, in respect of which accounts R. Malcolm McEwan had not given his written authorization for the exercise of discretion, and the Member firm had not accepted the accounts as discretionary accounts, contrary to Regulation 1300.4.
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> Between April 1997 and December 1997, inclusive, Ian Scott-Moncrieff failed to ensure that the new account application form for account number 78M026E [the second account] documented the essential facts relating to the investment objectives of his client, R. Malcolm McEwan, thereby failing to comply with section 36 of the Securities Regulation (B.C. Reg. 270/86) and subsequently section 39 of the Securities Rules (B.C. Reg. 194/97), and engaging in business conduct or a practice which is unbecoming a registered representative or detrimental to the public interest, contrary to By-law 29.1."
>
> In the Settlement Agreement, Scott-Moncrieff consented to the imposition of the following penalties:
>
> "(a) A fine in the amount of $15,000.00, payable to the Association within one (1) month of the effective date of this Settlement Agreement;

(b) As a condition of his re-approval in any capacity with a Member of the Association, re-writing and passing the examination based on the Conduct and Practices Handbook for Securities Industry Professionals administered by the Canadian Securities Institute; and

(c) A prohibition on his re-approval in any capacity with a Member of the Association until such time as the fine and costs herein are paid in full."

The Settlement Agreement specified costs in the amount of $6500.00. Both the fine and the costs have been paid.

8 The Settlement Agreement was reviewed and accepted by a three person panel of the Pacific District Council of the IDA on August 30, 2000. The panel issued one page reasons for their decision the next day, which read, in part, as follows:

> "The admissions by the Respondent disclose offences involving the use of discretion without properly documenting the authority or having the approval of the member firm, and a failure to update the client file following a change in the client's investment objectives. The admissions are outlined in the Settlement Agreement. A single client with 2 accounts was involved. One account was open for approximately 6 1/2 years, the second less than 9 months. A trading profit of almost $50,000 was realized in the first account and a loss in excess of $70,000 occurred in the second account. We were advised that restitution, to the knowledge of the Staff, has not been made. The Respondent left the industry in October 1999 and has not since applied for registration in any capacity.
>
> This matter does not involve unauthorized trading; instead, it involves a lack of documentation of trading authority that had, in fact, been delivered verbally to the Respondent. Similarly, it does not involve trades that were unsuitable for the client's stated objectives; instead, it involves a change in those stated objectives and a failure on the part of the Respondent to document that change in objectives. It is important for industry members to remember that clients' objectives do change, and those changes are required to be properly documented.
>
> In all the circumstances, the panel felt that the penalties, costs and conditions outlined in the Settlement Agreement fell within established precedent and accordingly accepted the Settlement Agreement. As usual, we thank the staff for their assistance in this matter."

9 On September 25, 2000, McEwan sent a letter to the Commission applying for a hearing and review of the Settlement Agreement under section 28(1) of the Act. He described the manner in which he is affected by the agreement and the grounds for his application as follows:

> "The decision affects the applicant in that, the broker, the brokerage, and the regulator have repeatedly and knowingly exploited an induced condition of financial blackmail to dishonestly coerce and imperil the applicant into a specific projectory for restitution, resulting in a prolonged anguish of persistantly being defrauded from other legislated or legal remedies.
>
> The condensed grounds for the application are, the self regulatory organization's handling of this securities matter has been far from responsible, appropriate or sufficient to uphold the public's trust."

10 On December 20, 2000, the Commission heard submissions from McEwan, Scott-Moncrieff, the IDA and Commission staff as to whether McEwan has a right to apply for a hearing and review of the Settlement Agreement under section 28(1) of the Act. On the application of the IDA, we agreed to consider only the issue of whether McEwan is "directly affected" by the Settlement Agreement and, if we determine that McEwan is so affected, to allow the parties to make additional submissions respecting certain other issues, including whether a settlement agreement is "a direction, decision, order or ruling" under section 28(1) of the Act.

11 At the hearing, McEwan submitted four sets of tables that he had prepared describing the activity in his two accounts. He did not submit the documents, such as account statements, from which he derived these numbers. The IDA

advised that McEwan had not provided them with the tables during their investigation or, indeed, until the day of the hearing. No other evidence was submitted.

Analysis

12 The issue before us is whether McEwan is "directly affected" by the Settlement Agreement between the IDA and Scott-Moncrieff. The Commission has issued a number of decisions with respect to this issue, from which we can draw certain basic principles.

13 The first is that the class of persons who can be considered to have been directly affected for the purposes of section 28(1) of the Act should be interpreted narrowly. As the Commission observed in In the Matter of RMS Medical Systems Inc. et al [1999] B.C.S.C. 18 Weekly Summary 62, at page 68:

> "Section 28(1) does not require a person who seeks a hearing and review merely to be "affected" by the decision, but to be "directly affected". By including the word "directly" the legislature must have intended a narrowing of the word "affected" and indeed the authorities have tended to agree."
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> After a review of the case law, the Commission concluded at page 70:
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> "These cases establish that a person directly affected has to be someone who is affected by the terms of the order or decision, not just the incidental effects of the decision. These decisions suggest that this is someone who is a party to the proceedings that lead to the decision or someone to whom the terms of the order or decision relate."

14 The second principle that can be drawn from prior decisions is that the words "directly affected" should be interpreted in light of all the relevant circumstances, including: the nature of the power that was exercised, the decision that was made, the nature of the complaint being made by the person requesting the hearing and review, and the nature of that person's interest in the matter. See: Re Instinet Corporation (1995), 12 C.C.L.S. 23 (Ontario Securities Commission), In the Matter of Bradstone Equity Partners Inc., et al [1998] 23 B.C.S.C. Weekly Summary 15 (British Columbia Securities Commission) and In the Matter of Kevin Patrick O'Neill [1999] B.C.S.C. 18 Weekly Summary 55 (British Columbia Securities Commission).

15 In applying these principles to the case before us, we must recognize that Scott-Moncrieff's actions with respect to McEwan's accounts give rise to interests that are both private and public in nature.

16 McEwan's interest in this matter is a private one; he believes that Scott-Moncrieff's actions caused him to suffer a significant financial loss. The appropriate remedy for such a loss is also private, namely through the arbitration process offered by the IDA or by way of civil proceedings against Scott-Moncrieff in the courts.

17 The interest of the IDA, on the other hand, is public in nature. The role played by the IDA in this regard was recognized by the Supreme Court of Canada in Pezim v. British Columbia (Superintendent of Brokers) [1994] 24 B.C.S.C. Weekly Summary 23, where Iacobucci, J observed at page 65:

> "It is important to note from the outset that the Securities Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation, at p. 1.
>
> Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The British Columbia Securities Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets."

18 The IDA disciplined Scott-Moncrieff in performance of the regulatory function, and in pursuit of the public interest goals, described above in Pezim. In a disciplinary proceeding before a self regulatory organization like the IDA, what is at issue is an alleged contravention of the rules of the organization, not a dispute between a salesperson and his or her client.

19 The only parties to such a disciplinary proceeding are the self regulatory organization itself and the person against whom the allegations are made. Hence, the only parties to the Settlement Agreement in issue are the IDA and Scott-Moncrieff. Though the contraventions that are the subject of the agreement relate to Scott-Moncrieff's handling of McEwan's accounts, McEwan is not himself a party to the agreement. Nor do any of the terms of the agreement relate to him. McEwan's position in this matter is analogous to that of a victim in a criminal trial; a person in this position may well be a witness in the proceedings against the alleged perpetrator, but is not a party to those proceedings. See: R. v. O'Conner [1993] B.C.J. No. 1466 (British Columbia Court of Appeal).

20 After applying the principles drawn from the earlier decisions to the matter before us, we find that McEwan is not directly affected by the Settlement Agreement between the IDA and Scott-Moncrieff and therefore cannot bring an application for a hearing and review under section 28(1) of the Act.

A.R. SALVAIL-LOPEZ
Commissioner
J.L. BROCKMAN
Commissioner

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