APPEAL T0 THE COMMISSION

IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c.S-42.2

AND
IN THE MATTER OF

WADE DOUGLAS MacBA1N ("MacBain"), KARL EDWARD NEUFELD ("Neufeld") AND FREDERICK HENRY SMITH ("Smith") (collectively the “Appellants”)
AND
THE INVESTMENT DEALERS ASSOCIATION OF CANADA (the “IDA”)

DECISION

Hearing Held: January 17, 2006

Before: David Wild
Arthur Wakabayashi
W. F. Ready, Q.C. (Chairperson)

Appearances: Counsel for the Appellants, Messrs Thompson and Stack

Counsel for the IDA, Ms. Brooks and Mr. Blair

Decision dated: February 6, 2006

The IDA launched disciplinary proceedings against the Appellants by way of individual Notices of Hearing dated October 26, 2004, alleging breaches by the Appellants of the bylaws, rules and policies of the IDA.

In response, and prior to the hearing, the Appellants launched a number of individual motions for a stay of the disciplinary proceedings on the following grounds:

1. MacBain and Neufeld were no longer approved persons of the IDA and could not be regulated by it.
2. The IDA had no authority to prosecute and adjudicate breaches by the Appellants of the securities legislation of the Northwest Territories and British Columbia.
3. There had been unreasonable delay in the investigation or prosecution of the charges listed in the Notices of Hearing relative to the Appellants.

At the hearing of this appeal, it was confirmed by Counsel for the IDA that the complaints referred to in number (2) above had been withdrawn.

All of the foregoing motions were dismissed by the IDA Hearing Panel.

From these dismissals, the Appellants launched appeals to the IDA Appeal Panel. The IDA Appeal Panel in effect dismissed them by holding that the stays requested should not then be decided but that the jurisdictional objections raised could be considered during the disciplinary hearing.

From these dismissals by the IDA Appeal Panel, the Appellants launched appeals to the Saskatchewan Financial Services Commission.

The authority of the Commission under section 21 of the Act to hear appeals from self-regulating authorities such as the IDA was not questioned by either the Appellants or the IDA.

However, what was brought into question is whether or not the Commission has jurisdiction to hear these appeals. It is clear from the authorities that if an appeal is from an interlocutory order it will, generally speaking, not be heard by way of appeal until the adjudication is complete. On the other hand an appeal from a final order will be heard.

The order of the IDA Appeal Panel relative to the stay applications is, we conclude, a final order. If the stay is not granted the disciplinary matter will go forward. If the stay is granted the proceedings will thereby be stopped and ended.

It was argued by Counsel for the IDA that this appeal is premature.

In *Oates v. Royal Newfoundland Constabulary (2003) 231D.L.R. (4th) 648,* Mr. Justice Rowe wrote: "The Appellant takes the position the courts should not be dealing with this matter at this time. Rather, the adjudication should continue to completion and, if necessary, the appeal process provided by the Act should then be used to decide these issues. In general, I agree that tribunals should be permitted to get on with their work, uninterrupted by the courts, with recourse to appeal or review procedures at the end of the tribunal process. However, this is a situation where a party has taken the position that the tribunal hearing the matter was without jurisdiction ab initio. In such a situation it is settled law that the party can have recourse to the courts to adjudicate this issue, without having to proceed through hearings before the tribunal and then challenge the tribunal's jurisdiction, whether under any appeal procedure that may be provided for the tribunal or by way of judicial review….".

It is our opinion that the appeal as to jurisdiction of the IDA to proceed is an appeal from a final order. It is not premature and we have jurisdiction to hear it.

Does the IDA have jurisdiction to regulate MacBain and Neufeld, who are no longer approved persons?

MacBain ceased to be an approved person effective August 4, 2000. Neufeld ceased to be an approved person effective February 28, 2001.

Bylaw 20 of the IDA describes its hearing and enforcement processes.

Prior to October 2004, bylaw 20.21 of the IDA provided as follows:

> "20.21 For the purposes of bylaws 19 and 20, any member and person who has been approved pursuant to bylaws 4, 7 and 18 shall remain subject to the jurisdiction of the Association notwithstanding that such member has ceased to be a member or that the person is no longer approved under the said bylaws. No proceedings shall be commenced pursuant to bylaw 20.11 against a former member or person who is no long approved unless a notice of hearing and particulars has been served upon such member or person no later than 5 years from the date upon which such member or person ceased to be a member or approved respectively."

In October 2004, a new provision 20.7 of the IDA bylaws was adopted reading as follows:

"1. For the purposes of bylaw 19 and bylaw 20, any member and any approved person shall remain subject to the jurisdiction of the Association for a period of 5 years from the date on which such member or approved person ceased to be a member or an approved person of the association subject to (2);

2. An enforcement hearing under part 10 of this bylaw may be brought against a former approved person who reapplies for approval under part 7 of this bylaw notwithstanding expiry of the time set out in (1);

3. An approved person whose approval is suspended or revoked or a member who is expelled from membership or whose rights or privileges are suspended or terminated shall remain liable to the Association for all amounts owing to the Association."

The new bylaw 20.7 is covered by transitional provisions set forth in section 20.57 as follows:

"1. Subject to subsection (2), any provision of any bylaw, regulation, ruling or policy of the Association in effect immediately prior to the coming into effect of these rules, shall remain in full force and effect until such bylaw, rule, regulation, ruling or policy, has been repealed.

2. In the event of a conflict between this bylaw and the provisions of any bylaw, regulation, ruling or policy of the Association that remains in effect after this bylaw comes into effect, the provisions of this bylaw shall prevail."

In response to any inquiry from this panel, Counsel for the IDA stated that the disciplinary proceedings herein are governed by both bylaw 20.7 and former bylaw 20.21. We do not agree because there is no question bylaw 20.21 and bylaw 20.7 conflict; and that being the case, then by virtue of the provisions of bylaw 20.57 (2), the provisions of 20.7 are to prevail.

Counsel for the IDA stated:

1. That the IDA is a self-regulating organization based on voluntary membership;

2. That it does not derive its authority from provincial legislation;
3. That its jurisdiction over members is derived solely in contract with members agreeing to be bound by the bylaws, rules and regulations of the IDA.

It was held in *Chalmers v. Toronto Stock Exchange (1989), 70 OR. (2nd) 532* that if a self-regulating association does not have statutory authority to regulate its former members any bylaw adopted purporting to so regulate is ultra vires. However it was stated that while domestic tribunals (and the IDA is one of them) cannot make laws of general application it is significant to note that it is not what they regulate but whom they regulate, and that their authority is restricted to those who have voluntarily submitted to that authority.

Since the IDA has no statutory authority to regulate its former members or former approved persons, bylaw 20.7 and even former bylaw 20.21 are ultra vires. Accordingly the IDA has no authority to regulate MacBain and Neufeld thereunder.

Notwithstanding, Counsel for the IDA says that MacBain and Neufeld are bound by the bylaws of the IDA because they have agreed to be so bound.

Is the contract between MacBain and Neufeld and the IDA enforceable by the IDA against them?

At common law contractual terms that provide for the imposition of penalties on a party are not enforceable. The remedial principle in contract law is compensatory, not disciplinary or penal in nature. This is stated succinctly by Chief Justice Laskin in *H.F. Clarke Ltd. V Thermidaire Corp. (1976) 1 S. C. R. 319* as follows: "The primary concern in breach of contract cases (as it is in tort case, albeit in a different context) is compensation, and judicial interference with the enforcement of what the courts regard as penalty clauses is simply a manifestation of a concern for fairness and reasonableness, rising above contractual stipulation, whenever the parties seek to remove from the courts their ordinary authority to determine not only whether there has been a breach but what damages may be recovered as a result thereof."

In the *Chalmers* case it was stated by Mr. Justice Finlayson that the only effective sanction a domestic tribunal can impose on its members is expulsion. So far as MacBain and Neufeld are concerned the IDA cannot now expel them because they are no longer approved persons.

Since the IDA has no authority to regulate former members or former approved persons either under its bylaws or in contract, it has no jurisdiction to regulate MacBain and Neufeld. Accordingly their appeals are allowed and the stays of the disciplinary proceedings against them are granted.

This disposes of the matter so far as MacBain and Neufeld are concerned, and leaves the only matter to be determined to be whether or not the IDA has jurisdiction to discipline Smith. He is still an approved person. He alleges that the IDA has lost jurisdiction so far as he is concerned, because there has been unreasonable delay by the IDA in its investigation or prosecution of the charges against him.

Blencoe v. British Columbia (Human Rights Commission) (2000) 2 S.C.R. 307 is a leading authority. The Supreme Court held that "The determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay."

The case against Smith is that in his capacity as the Ultimate Designated Person, he failed to supervise and control the activities of WDM during the period between October 1995 and June 2, 1999, namely:

1. recommendations by M that were not appropriate for clients and not in keeping with the clients' investment objectives,
2. M's practice of causing clients to update their documented investment objectives and risk tolerance to accord with trades which he had recommended to them and which were not in keeping with their previously documented investment objective and risk tolerance, without determining whether there had been changes in their personal or financial circumstances to justify the updates,
3. contravention by M of the legislation of British Columbia and the Northwest Territories relative to the provision of investment advice and services to clients in those jurisdictions.

Is the case against Smith complex? Counsel for Smith says it is not and points to the IDA's Notice of Hearing wherein it is indicated that the hearing is to be designated on "The Standard Track" and not "The Complex Track". The IDA says the designations of Standard Track or Complex Track only relate to procedural matters, and not substantive matters. The sheer scope of the investigation covering the activities of MacBain over the years from 1995 to 1999 would support the view that the proceedings are complex. (We have assumed that "WDM" and "M" referred to in the Notice of Hearing as to Smith, refer to MacBain.)

The purpose and nature of the proceedings are for the purpose of enforcing a standard of conduct for members of the IDA and for the benefit and protection of the public.

Did Smith contribute to, or waive, the delay? There is no evidence that he did so. In fact it is indicated, and not disputed by the IDA, that he cooperated with it in the investigation.

While the length of the delay is not of itself a determinative factor, it is of note that the investigation commenced on June 3, 2003, and a decision was made to prosecute on August 25, 2003, (some 83 days) with the Notice of Hearing being issued in October, 2004. This does not seem, of itself, to be an inordinate length of time.

Now the question is whether or not Smith was prejudiced by this time period. He says he was because:

1. important evidence is no longer available to him, both oral and documentary;
2. crucial witnesses will be not available to testify or assist him in his defence;
3. there is no power in the IDA to subpoena witnesses;

4. his reputation, career and personal life will be adversely affected by a continuance of the disciplinary hearing.

The concerns expressed in (1) and (2) above may be largely speculative. There is no evidence before this Panel to prove otherwise. It may even be that the loss of evidence complained of, did not occur after the investigation of Smith was commenced, but rather prior thereto, bearing in mind that Matrix Financial Corporation ceased doing business in the year 2000. So far as (3) above is concerned there never was any ability in the IDA to subpoena witnesses, so that nothing is lost in this regard. As to (4) above it may well be that Smith's reputation was irretrievably damaged by the initial scandal relative to Matrix such that the disciplinary hearing would not result in any more significant stigma.

We do not think Smith was prejudiced by the time it took the IDA to launch its proceedings against him. We hold that there was no unreasonable delay.

Accordingly his appeal is disallowed and his requested stay of the disciplinary proceedings against him is not granted.

DATED at Regina, Saskatchewan this 6th day of February, 2006.

"W.F. Ready"
W.F. Ready, Q.C., Chairperson

"David Wild"
David Wild

"Art Wakabayashi"
Art Wakabayashi