3.1.2 Dimitrios Boulieris v. Staff of the IDA and the OSC

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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, JENNINGS AND SWINTON JJ.

BETWEEN:

DIMITRIOS BOULIERIS Appellant **- and -**	)	*Darryl T. Mann*, for the Appellant
STAFF OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA and THE ONTARIO SECURITIES COMMISSION Respondents	)	*Ricardo Codina* and *Elsa Renzella*, for the Investment Dealers Association *Kate G. Wooton*, for the Ontario Securities Commission
	)	**HEARD at Toronto:** April 15, 2005

SWINTON J.:

[1] The Appellant, Dimitrios Boulieris, appeals from a decision of the Ontario Securities Commission ("the Commission") dated January 28, 2004, which set aside one part of a decision of the Ontario District Council of the Investment Dealers Association ("IDA") on the merits of a disciplinary complaint and substituted a new penalty for that imposed by the District Council.

[2] The issue in this appeal is whether the Commission showed the proper deference to the decisions of the District Council, both on the merits and in the determination of the appropriate penalty.

Factual Background

[3] Between July, 1998 and July, 1999, the Appellant was a registered representative employed with First Delta Securities ("First Delta"), formerly a member firm of the IDA. In or about November, 1998, the Appellant was introduced to Bernie Guam, a representative of First Union Kreditenstalt S.A. ("First Union") by Harold Arviv and his work colleague, Larry Skolnik. Both Mr. Arviv and Mr. Skolnik had been clients of the Appellant when he was with another brokerage firm. At the November meeting, the Appellant was told that First Union would be recommending stock to offshore investors, and that First Union would refer clients to the Appellant.

[4] In the course of his employment, the Appellant opened accounts at First Delta for two corporations, Gideon Trading Ltd. and Venture Capital Group Inc. Mr. Arviv was the beneficial owner of Gideon and had trading authority over this account, and he had influence over the Venture account, over which his wife had trading authority. Those corporations held a large equity position in First Florida Communications Inc. ("First Florida"), a telecommunications company incorporated in Florida, whose shares were traded on the U.S. Over-the Counter Bulletin Board ("OTC BB"). In January, 1999, these two corporate accounts at First Delta held 1,078,600 First Florida shares, representing approximately 93.7% of First Florida's free trading shares.

[5] Before the first referral from First Union, the Appellant was told by Mr. Arviv that "they" were going to generate buying for First Florida. Mr. Arviv also said that "they were trying to make it tight and hopefully dry up the supply and just get demand for the stock." He also told the Appellant that First Florida could not issue any stock without his permission, because he was providing all of the financing for First Florida.

[6] The Appellant also opened an account for First Union at First Delta, although First Union did not trade in that account. First Union represented itself to investors as an asset management company located in Switzerland. However, evidence at the hearing of the District Council showed that First Union was operating out of offices in Toronto. When police and Commission

staff searched those offices in the process of executing a search warrant, they found sales scripts among the documents seized that were used in the promotion of First Florida shares to offshore investors.

[7] First Union was not registered as a dealer pursuant to s. 25 of the Ontario *Securities Act*¸ R.S.O. 1990, c. S.5. Therefore, it was not permitted to solicit clients for the sale of securities in Ontario.

[8] From late January to March, 1999, First Union faxed various trade confirmations to the Appellant relating to the purchase of First Florida shares by the referrals. The confirmations stated that the purchase order was referred by First Union "through the courtesy of First Delta Securities Inc." and included the purchaser's name and address, the number of First Florida shares to be purchased, the purchase price, and a First Delta account number that had been assigned to each referral prior to any account being opened at First Delta.

[9] The Appellant admitted in a statement dated February 23, 2000 that he knew First Union was promoting First Florida shares. At pp. 56-57 of that statement, one finds the following exchange:

> **Mr. D. Cope** And you knew that First Union was promoting First Florida.
>
> **Mr. D. Boulieris** Right. After that, after that – at the beginning, I didn't know, but after once I started to see all the orders, then I knew that they were buying the First Florida. Right?

[10] In his statement dated March 22, 2001, he said (at p. 14):

> **Mr. E. Varela** Okay. What's the significance of First Florida Communication with respect to First Union Kreditenstalt?
>
> **Mr. D. Boulieris** With respect to First Union Kreditenstalt and First Florida?
>
> **Mr. E. Varela** Mm-hmm.
>
> **Mr. D. Boulieris** First Union Kreditenstalt to my understanding was a – was recommending the stock.

He went on to say, when asked about Mr. Arviv's involvement in First Union, that Mr. Arviv "was going to send referrals to me" from around the world and under the banner of First Union. At p. 15, he stated that he didn't know Mr. Arviv's involvement in First Union, but at the first meeting, there were a lot of people there, and "I thought that they were going to provide the investor relations and refer their clients to me".

[11] The Appellant also admitted that he had sent unassigned First Delta account numbers to Mr. Arviv by fax, and he acknowledged that First Union probably obtained the numbers from Mr. Arviv.

[12] As a result of various confirmations sent by First Union, 19 trading accounts were opened at First Delta. The Appellant was the registered representative for all 19 accounts. Over a five month period from January to May, 1999, he executed 44 purchase orders in these accounts. All were on an unsolicited basis and on the terms set out in the confirmations from First Union. However, they occurred only after the Appellant spoke to the client, account documentation required by First Delta had been filled out, and money had been deposited in the client's account. Evidence at the hearing also indicated that on 21 occasions, the referrals bought First Florida shares at prices that were not within the market price range reported on the OTC BB for the day of the purchase, although the Appellant said in his statements that he purchased at market price.

[13] There was evidence before the District Council with respect to the manipulation of the market in First Florida shares between January and June, 1999. The Varela Report, which was in evidence, discussed the trading volume and price of First Florida shares during the period of market manipulation.

[14] There was substantial evidence before the District Council to establish that First Florida shares were the subject of a market manipulation carried out by four accounts at First Delta ("the control group accounts"). The Appellant was the registered representative for all of these accounts, and the evidence showed that they were controlled by Mr. Arviv or his associates. The control group also had accounts at other brokerages.

[15] All but one of the 44 purchases executed for referral accounts at First Delta were matched trades with the known control group accounts, either at First Delta or at the other brokerages. Of the 44 purchases, 21 of the trades were crossed in house with the four known control group accounts at First Delta.

[16] Following a five day hearing before the District Council, the Appellant was found guilty of one count of misconduct, namely "trading for a client who had advised the Respondent that he was attempting to manipulate the market price of a security". However, the District Council concluded that the Appellant had not engaged in conduct unbecoming or detrimental to

the public interest by "knowingly acting as an agent or facilitator for a company engaged in soliciting for the purpose of selling securities while not registered to do so with the Ontario Securities Commission" (Count 1(a)). Its reasons are as follows:

> In the absence of any evidence from clients or any evidence as to the manner in which the orders were solicited, we were unable to find that the Respondent knowingly acting [*sic*] as an agent or facilitator for a company engaged in soliciting for the purpose of selling securities while not registered to do so with the Ontario Securities Commission.

The District Council also concluded that the other counts in the notice of hearing had not been proved.

[17] After a hearing on penalty, the District Council determined that a suspension would normally be ordered, but the Appellant had already served, in effect, a one year suspension, as he had not been given approval to transfer his licence. It also took into account the fact that at the time of the events leading to the allegations, he had only been registered for less than one year. As well, he had not been found to have been part of a market manipulation. Therefore, the District Council ordered that the Appellant successfully re-write the examination based on the *Conduct and Practices Handbook for Securities Industry Professionals* prior to his approval to work in a registered capacity; that he pay costs of $5,000; and that he be subject to strict supervision for two years if employed with a member of the IDA.

[18] Pursuant to s. 21.7 of the *Securities Act,* the IDA applied for a hearing and review by the Commission with respect to the dismissal of Count 1(a) and the penalty imposed. The grounds for review, as set out in the reasons of the Commission, are:

1. In dismissing Count 1(a) of the notice of Hearing and particulars initiating the proceedings, District Council erred in principle in that they misapprehended what the allegations were in Count 1(a), and how they could be proven. Association staff argues that District Council overlooked evidence that the Respondent had facilitated the business of First Union Kreditenstalt S.A. ("First Union");

2. District Council erred by imposing a penalty that was unfit and inappropriate in light of the Respondent's participation in market manipulation;

3. District Council erred by not ordering the disgorgement of commissions received by the Respondent; and

4. District Council fettered its discretion in not imposing a fine on the Respondent.

[19] Pursuant to ss. 21.7(2) and 8, the Commission may, on a hearing and review, "confirm the decision under review or make such other decision as the Commission considers proper". After reviewing the submissions of both parties and the statutory framework, the Commission discussed its role, noting that it is free to substitute its judgment for that of the District Council. However, it went on to state that, in practice, it accords deference to the factual determinations made by self-regulatory organizations ("SRO's") like the IDA and takes a restrained approach on review (at paras. 26, 31). Therefore, it interferes with the decision of a self-regulatory organization only on the following grounds:

1. the SRO has proceeded on an incorrect principle;

2. the SRO has erred in law;

3. the SRO has overlooked material evidence;

4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or

5. the SRO's perception of the public interest conflicts with that of the Commission's.

The Commission also correctly stated that proof of the charges against an individual must be on the basis of clear, convincing and cogent evidence (at para. 34).

[20] In the section of its reasons headed "Analysis", the Commission observed that the District Council had determined that there had been market manipulation. The panel then said, "The issue before the District Council was not whether the [Appellant] participated in the market manipulation but whether the [Appellant] facilitated the process". The Commission stated that there was "clear and cogent evidence of the [Appellant's] direct role in the trading". While the Commission acknowledged that he did not act as "a mere conduit", they set out a number of facts that they considered significant (at para. 37 of the reasons):

> There was clear and cogent evidence of the [Appellant's] role in the trading. He was a necessary party to permit the market manipulation. Granted, the [Appellant] did not act as a mere conduit. But the fact that the [Appellant] talked to the referred persons, or that they became his clients, does not change or sanitize the facts: the [Appellant] knew that Arviv intended to manipulate the stock, that Arviv or entities working with him, such as First Union, had solicited the

> referrals, and that the trades executed by the [Appellant] were in accordance with the solicitations. Confirmations that referrals instructed or permitted the [Appellant] to turn into orders after he talked with them would not have appeared without someone soliciting the referrals.

[21] According to the Commission, First Union, which was not registered as a dealer in Ontario, sought the Appellant's assistance to execute purchases to be made by the individuals whom it referred. The confirmations from First Union included a First Delta account number from those account numbers that had been sent by the Appellant to Mr. Arviv. The Appellant had acknowledged that First Union probably obtained these unassigned numbers from Mr. Arviv.

[22] The Commission also reviewed the facts of the purchases, including that fact that the purchases were on the same terms set out in the confirmations received by the Appellant from First Union. On 21 occasions, the clients purchased at a price outside the market range for the day of the purchase. In the Commission's opinion, it was not necessary to understand how referred persons were solicited by First Union, nor how the Appellant dealt with the clients, as the District Council had said.

[23] The Commission went on to describe the trading in the control group accounts at First Delta and other firms. Finally, it characterized the Appellant's conduct as "wilful and egregious", stating that he wilfully facilitated a market manipulation. Then, under the heading "The Decision", it said, "In dismissing Count 1(a), District Council misapprehended the essential business and operational elements necessary to prove that count".

[24] Having come to this conclusion, the Commission then imposed a harsher penalty, given its conclusion that the District Council had misapprehended the public interest. Specifically, it ordered:

1. a fine of $128,504.55, which was made up of $42,834.85, the portion of commissions received by the Appellant for the purchase of First Union shares in the applicable period, and $85,669.70, two times the benefit that he received.

2. suspension until October 1, 2008 (being equivalent to a period of seven years commencing October 1, 2001).

The Commission also confirmed the terms of the District Council's order requiring the rewriting of the conduct and practices exam, costs, and strict supervision for two years upon re-employment with an IDA member.

Issues

[25] The Appellant appealed the decision of the Commission pursuant to s. 9 of the *Securities Act*, seeking an order that the Commission's decision be set aside and the decisions of the District Council be restored. He argued that the Commission erred in failing to show the requisite deference to the decisions of the District Council, misapprehended the degree of proof required to be met by the Staff of the IDA, erred in making findings of credibility, and erred in law in substituting its view of the evidence for that of the District Council.

The Standard of Review

[26] The parties are agreed that the standard of review on this appeal is reasonableness (see, for example, *Re Cartaway Resources Corp.*, [2004] S.C.J. No. 22 at paras. 43-51). In applying that standard, the Supreme Court of Canada stated in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

Application of the Standard

[27] As the Commission stated in its reasons, it exercises original jurisdiction (as opposed to a limited appellate function) when exercising its power of review pursuant to s. 21.7(1) of the Act. However, it also correctly stated that, in practice, the Commission affords deference to the factual determinations of an SRO (*Re Shambleau* (2002), 25 O.C.S.B. 1850 at 1852, aff'd (2003), 26 O.C.S.B. 1629 (Ont. Div. Ct.)).

[28] An issue was raised during oral argument of this appeal as to whether the Commission asked itself the wrong question, since it referred in paragraphs 36 and 42 of its reasons to "facilitation" of the process and of the business of First Union without prefacing that word by "knowingly". I note that the Appellant had not raised this as an issue in his factum; rather, the factum focussed on the issue of lack of deference by the Commission.

[29] In my view, when the reasons are read as a whole, it is clear that the Commission was seeking to determine whether the Appellant knowingly facilitated the business of First Union. First, the issues raised by the IDA clearly raised his knowledge. For example, in paragraph 18 of the Commission's reasons, the IDA position was stated as follows:

> Association Staff argued that the evidence illustrated that while the [Appellant] may not have had complete knowledge of what Arviv was doing, he certainly had sufficient knowledge to extract himself from the situation, and his failure to do so was an indication that he was a willing and consenting participant to what Arviv was doing. He did have enough knowledge to know that the manipulation was happening.

As well, the Notice Of Request for Hearing and Review states that District Council "overlooked material evidence" with respect to whether the Appellant had "knowingly" facilitated the activities of First Union.

[30] Moreover, after reviewing the evidence, the Commission concluded that the Appellant had *wilfully* facilitated a market manipulation (at para. 49). Therefore, in my view, it can not be said that the Commission asked itself the wrong question.

[31] The main issue raised by the Appellant was the lack of deference shown by the Commission to the District Council's factual determinations. In particular, he argued that the Commission failed to consider the fact that the Appellant did not simply process the referrals, but spoke with each client before opening the account. He submitted that the Commission unreasonably disregarded the conclusion of the District Council that there was a serious lack of evidence to support the allegations against the Appellant.

[32] However, in its reasons, the Commission confirmed the deferential approach to be used in the review of a decision a self-regulatory organization like the IDA, and it set out the five grounds on which it will intervene. This deferential approach has been affirmed by appellate courts (*Re Lafferty, Harwood & Partners Ltd. and Board of Governors of the Toronto Stock Exchange* (1975), 8 O.R. (2d) 604 (Div. Ct.) at 607). In my view, the Commission applied this approach in this case, and it did not substitute its views on the evidence for those of the District Council. Indeed, the Commission expressly stated at paragraph 32, "The Commission will not substitute its own view of the evidence for that taken by an SRO just because the Commission might have reached a different decision."

[33] The District Council concluded that it could not determine that the Appellant knowingly acted as an agent for an unregistered company engaged in soliciting for the purpose of selling securities in the absence of evidence from clients or evidence as to the manner in which the orders were solicited. In its reasons for decision on the merits, there was no review of the evidence canvassed by the Commission in its reasons with respect to the way in which trades were referred by First Union to the Appellant, nor the terms of the purchases by the clients, nor the pattern of trading activity.

[34] In reviewing a decision of an SRO, the Commission has stated that it will intervene if the SRO has failed to appreciate material evidence. According to the Commission's reasons, the Staff of the IDA argued that the District Council failed to appreciate material evidence. The Commission concluded that the District Council erred in failing to appreciate the "essential business and operational elements necessary to prove the count". Specifically, the Commission concluded that the District Council erred in concluding that it was necessary to understand how referred clients were solicited by First Union or how the Appellant dealt with the clients.

[35] It is regrettable that the Commission did not state explicitly that it was intervening because of the District Council's failure to address material evidence. Nevertheless, on reading the Commission's reasons as a whole, it is evident that the Commission found the District Council misapprehended material evidence. Indeed, the Commission reviewed in detail the evidence which the District Council failed to discuss, including the role played by the Appellant in the trading of First Florida shares and the state of his knowledge. The Commission then concluded that there was clear and cogent evidence showing that the Appellant wilfully facilitated the market manipulation in that he clearly facilitated the business of First Union, a company that he knew was promoting sales of First Florida shares and that was not registered in Ontario.

[36] In my view, the Commission overturned the decision of the District Council with respect to Count 1(a) on the basis that the District Council misapprehended the evidence required to prove that count (see paragraph 54 of the reasons). There was evidence to support the Commission's decision that Count 1(a) had been proven, and, therefore, it can not be said that the Commission's decision was unreasonable.

[37] Moreover, the Commission reached that decision without making findings of credibility, as alleged by the Appellant. He did not testify before the District Council, and it made no findings with respect to his credibility. Nor did the Commission make a finding about his credibility; rather, it characterized his conduct and drew inferences about the nature of his role from the evidence as a whole, much of which was documentary.

[38] In summary, the Commission's conclusion that the District Council erred in dismissing Count 1(a) was not unreasonable, nor did the Commission fail to show appropriate deference to the findings of the District Council.

The Appropriate Penalty

[39] In substituting a new penalty, the Commission was of the view that "the District Council had misapprehended the public interest in having strong sanctions in view of the Respondent's wilful conduct". The Commission was permitted in law to substitute its view for that of the District Council where their respective views on the public interest differed. The courts have held that a high level of deference should be afforded to the Commission when it determines what is in the public interest, especially in relation to sanctions (*Costello v. Ontario (Securities Commission)*, [2004] O.J. No. 2972 (Div. Ct.) at para. 31; *Donnini v. Ontario (Securities Commission)*, [2005] O.J. No. 240 (C.A.) at para. 54.).

[40] The Commission characterized the Appellant's conduct as wilful and egregious, and it concluded that a severe penalty was warranted, despite the Appellant's youth and lack of supervision, for the following reasons (at para. 50):

> Where a registrant has wilfully facilitated a market manipulation, he should face severe consequences, including removal from the marketplace for an appropriate period and disgorgement of moneys received as a consequence of his conduct. Otherwise, confidence in the capital markets will suffer and the market will be at risk of further disreputable conduct, and harm from the registrant.

The Commission also reviewed the sanctions imposed on First Delta and three of its officers and directors before determining the appropriate penalty. The allegations were that they failed to properly supervise the Appellant and failed to have adequate policies and procedures in place. Pursuant to a settlement agreement, First Delta paid a fine of $600,000 and its membership in the IDA was terminated. One of the directors and officers received a fine of $50,000 and a six month suspension, while two others were fined $30,000 and suspended for 30 days.

[41] The Commission concluded that there should be disgorgement of profits and a fine imposed. Disgorgement is a reasonable sanction in order to prevent unjust enrichment and to deprive the wrongdoer of his gains. There was evidence before the District Council which showed the amount of the profits received by the Appellant from the trades in First Florida shares.

[42] The Appellant has not shown that the Commission committed any error in principle, nor can it be said that the punishment does not fit the misconduct. Given the facts, the penalty imposed was not unreasonable.

[43] For these reasons, the appeal is dismissed. If the parties can not agree on costs, they may make brief written submissions within 21 days of the release of this decision.