

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, as amended**

- and -

**IN THE MATTER OF AN APPLICATION TO CONSIDER THE SETTLEMENT
AGREEMENT**

RE: MARK EDWARD VALENTINE

Hearing: Thursday, December 23, 2004

Ontario Securities Commission Panel:

Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
Paul K. Bates	-	Commissioner
Wendell S. Wigle, Q.C.	-	Commissioner

Counsel:	Kelly McKinnon	-	For Staff of the
	Alexandra Clark		Ontario Securities Commission
	Jeffrey Kehoe	-	For the Investment Dealers
	Vito Pedone		Association of Canada
	E. Greenspan	-	For Mark Edward Valentine
	Jane Kelly		

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the hearing. The transcript has been edited, supplemented and approved by the chair of the panel for the purpose of providing a public record of the panel's decision in the matter.

ORAL REASONS FOR DECISION

VICE-CHAIR MOORE:

1. DECISION

[1] The proceeding this morning is a hearing into a settlement agreement in the matter of Mark Edward Valentine pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c.S.5, as amended.

[2] The panel has considered the settlement agreement and the submissions of staff and the agreed statement of fact. We have determined that the settlement agreement is in accordance with the public interest, and therefore we approve it.

2. OVERVIEW

[3] The detailed facts in support of the proposed sanctions set out in the settlement agreement are also set out in the settlement agreement. In summary, Valentine was the chair, a director, and the largest shareholder of Thompson Kernaghan & Co. (Thompson Kernaghan), an investment dealer headquartered in Toronto. Valentine was also a registered representative with the Investment Dealers Association (IDA). In addition to these roles, Valentine was the directing mind of four private investment funds housed within Thompson Kernaghan's offices. The investors in these funds were primarily individual retail clients of Thompson Kernaghan. On Wednesday, March 10, 2004 in the United States District Court for the Southern District of Florida, Valentine pleaded guilty to one count of securities fraud contrary to Section 78(b) and 78(ff) of Title 15 of the United States Criminal Code. Valentine agrees that his conduct was contrary to the public interest and Ontario securities law for the reasons set out in the agreed statement of facts in the settlement agreement.

3. AGREED FACTS AND ADMISSION

[4] Briefly, there were three sets of transactions referred to. The first was the Chell Corporation transactions. Valentine created a culture of conflict of interest and noncompliance at Thompson Kernaghan and breached Ontario securities law in respect of the Chell Corporation transactions. He did this by playing multiple roles as the president of the investment fund's general partners, as the registered representative of the fund's trading accounts, as the chairman and controlling shareholder of Thompson Kernaghan, and as a trader in Chell Corporation shares on his own behalf in his pro and inventory accounts at Thompson Kernaghan.

[5] In addition, he failed to deal fairly, honestly, and in good faith with his clients contrary to Section 2.1(2) of Ontario Securities Commission Rule 31-505. And I'm referring to the statements in the agreed statement of facts.

[6] In addition, Valentine breached his fiduciary and contractual duties that he owed to the unit-holders of the funds. Valentine failed to maintain the books and records necessary to record properly the business transactions and financial affairs which he carried out in the course of the Chell Corporation transactions contrary to Section 19(1) of the Act and Section 113(1) of Ontario Regulation 1015.

[7] The second group of transactions is referred to as the IKAR transactions. Valentine created a culture of conflict of interest and noncompliance at Thompson Kernaghan and breached Ontario securities law in respect of the IKAR transactions by,

- (a) playing multiple roles as the president of the fund's general partners, as the registered representative of the fund's trading account, as the chairman and controlling shareholder of Thompson Kernaghan, as the registered representative of Hammock's trading account, and as a beneficial owner of Hammock which was an investor and trader in which Valentine had an interest;
- (b) failing to deal fairly, honestly, and in good faith with his clients contrary to section 2.1(2) of Ontario Securities Commission Rule 31-505; and
- (c) breaching the fiduciary and contractual duties that Valentine owed to the unit-holders of the funds.

[8] In agreeing that one of the companies would reimburse any losses suffered by Hammock in its sale of shares of a company called Jaws, Valentine made representations that the company would refund Hammock a portion of the purchase price of a security contrary to section 38(1) of the Act. Valentine failed to maintain the books and records necessary to record properly the business transactions and financial affairs which he carried out in the course of the IKAR transactions contrary to section 19(1) of the Act and section 113(1) of Ontario Regulation 1015.

[9] There was other conduct reflected in the agreed statement of facts. Valentine failed to ensure that the terms of a loan with Trilon were properly disclosed to the IDA as required by IDA Bylaw 17. This failure had the effect of hiding the poor financial circumstances of Thompson Kernaghan from the IDA. Neither Valentine nor the general partners of the funds are registered as investment counsel portfolio managers but nevertheless acted as advisors to the funds in the Chell Corporation and IKAR transactions as detailed in the agreed statement of facts contrary to section 25 of the Act. Valentine failed to designate the Hammock account as a pro account contrary to IDA Policy No. 2, Section 2 C 4.

4. THE PROPOSED SANCTIONS

[10] Valentine agrees that it is in the public interest for the Commission to make the order set out in the agreed statement of facts. The terms of settlement are as follows:

[11] The Commission will make an order:

- (a) terminating Valentine's registration under Ontario securities law, subject to certain exceptions,
- (b) declaring that the exemptions contained in Ontario securities law do not apply to him and requiring him to cease trade in securities for a period of 15 years commencing from the date of the order, subject to certain exemptions, provided that after five years Valentine may trade in the securities specified below through an account held solely in his name if,
 - (i) the securities are securities referred to in clause 1 of subsection (35)(2) of the Act; or,
 - (ii) in the case of securities other than those referred to in paragraph 1 above, one, the securities are listed and posted for trading on the Toronto Stock Exchange or the New York Stock Exchange or their successor exchanges, and,
 - (iii) Valentine does not own directly or indirectly through another person or company or through any person or company acting on his behalf more than 1 percent of the outstanding securities of the class or series of the class in question.
- (c) requiring Valentine to resign all positions that he holds as director or officer of an issuer,
- (d) permanently prohibiting Valentine from becoming a director or officer of any issuer, and,
- (e) requiring Valentine to pay the sum of \$100,000 towards the cost of staff's investigation into the matters set out in the amended statement of allegations dated January 29, 2004.

[12] Valentine undertakes that he will consent to an order made by any provincial or territorial securities regulatory authority in Canada containing any or all of the prohibitions set out in the above paragraphs. These prohibitions may be modified to reflect the provisions of the relevant provincial or territorial securities law. Valentine undertakes to never reapply for registration or recognition of any kind under Ontario securities law or any other Canadian securities legislation. Valentine undertakes to never seek membership in or approval in any capacity from the IDA.

[13] Taken together, these sanctions and undertakings provide strong protective measures to the capital markets both of Ontario and of Canada as a whole. The Commission has previously recognized that registrants, and particularly those enjoying senior positions within the securities industry, must adhere to the highest standards of conduct. In considering the case of *Re Donnini* (2002), 25 O.S.C.B. 6225 at 6251 (Ont. Securities Comm.), sanctions var'd [2003] O.J. No. 3541 (Ont. Div. Ct.), rev'd 2005 Carswell Ont. 258 (C.A.) (*Donnini*), the Commission endorsed the proposition that "our capital markets, and the public who invest in them, must depend on those in a position of trust, such as registrants holding senior positions in a firm, performing their duties in good faith, with honesty and integrity."

[14] It is the responsibility of the Commission to make it clear that the consequences will be serious for those who depart from the standard. See also: *Re Bonham* (2002), 25 O.S.C.B. 5741 (Ont. Securities Comm.). The Commission has imposed some of its most serious sanctions in cases where market participants have breached fiduciary duties or duties of good faith owed to individual investors. See: *Donnini* and *Re Harper* (2004), 27 O.S.C.B. 3937 (Ont. Securities

Comm.) (*Harper*). In *Harper*, for example, the Commission considered the actions of a director and officer of an issuer who had engaged in insider trading of the issuer's shares. In that case, a cease-trade order and a director and officer ban were imposed for a period of 15 years. In so doing, the Commission specifically cited the breach of duties owed to investors as an aggravating factor. In addition, the Commission has recognized that a criminal conviction involving fraud or breach of trust can signal that a respondent may be an active threat to the capital markets. In the Commission's words: "an admission of criminal guilt in a securities-related matter calls for a vigorous package of preventative sanctions." See: *Re First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603 (Ont. Securities Comm.) (*First Federal*) citing *Re Banks* (2003), 26 O.S.C.B. 3377 at 3387 (Ont. Securities Comm.).

[15] In light of these principles, a comprehensive package of proposed orders and undertakings is included in the settlement agreement. Where a respondent's misconduct has been facilitated or permitted by their role as registrant, at a minimum, a lengthy suspension of that registration is required. See: *Donnini*. In the present case, it is proposed that Valentine's registration under Ontario securities law be terminated. He has undertaken never to seek re-registration in Ontario and never to seek any form of membership in or recognition from the IDA. In addition, he has undertaken to never seek registration or recognition in any other Canadian province or territory. These measures ensure that Valentine will never assume another licensed position or supervisory role within the Canadian securities industry.

[16] He should never have the opportunity to repeat the type of misconduct described in the settlement agreement as that conduct was largely accomplished through his status as a registrant. Where a respondent has breached Ontario securities law through actions taken as a director and/or officer of an issuer, it is appropriate to consider sanctions which prohibit the assumption of these roles in the future. See: *First Federal and Harper*.

[17] In the case before us, the agreed facts reveal that Valentine employed several corporate vehicles and several executive roles in the course of his misconduct including his roles as a director and officer of the general partners and as director and chair of Thompson Kernaghan. These multiple roles combined with his status as a registrant provided Valentine with the power and influence to conduct the deals and trades that he did. They also appear to have provided him with the ability to hide many of his activities from scrutiny.

[18] In light of these facts, Valentine agrees that a permanent ban on ever becoming or acting as a director or officer of any Ontario issuer is appropriate. In addition, he has consented to a similar permanent ban being imposed in every other Canadian province and territory in respect of their issuers. The permanent registration ban and the permanent director and officer ban are rationally connected to Valentine's misconduct. They will prevent him from every abusing a position of authority and trust in the securities industry in the future.

[19] Valentine has been subject to a partial cease-trade order since June of 2002. The proposed cease-trade order in the settlement agreement is for 15 years., with some trading permitted after five years. This is of comparable duration to other cases of serious registrant or market participation misconduct. See: *Harper and Donnini*.

[20] The cease-trade order is carefully tailored to respond to the specific facts of Valentine's misconduct. All of the stocks involved in Valentine's wrongdoing were listed on the NASDAQ exchange. The proposed sanctions remove Valentine's ability to trade on this exchange for a total of almost 18 years, taking into account the period already covered by the temporary order.

[21] There are some other limitations in the order, with respect to the percentage of shares of any issuer that may be owned when Valentine trades. We're satisfied that the cease-trade order does not need to go any further than it does in order to fulfill the protective and preventative mandate that this Commission has in sanctioning respondents who have shown that their past conduct is unreliable in the Canadian securities marketplace.

[22] In conclusion, taken together with the sanctions previously mentioned, the cease-trade order is an appropriate specific and general deterrent to other market participants.

[23] I'd like to briefly observe that in executing the settlement agreement, Valentine has avoided the necessity of the Commission conducting a lengthy hearing in respect of his actions.

[24] In addition, the resolution of this matter through an agreed statement of facts in the settlement agreement demonstrates to us Valentine's acceptance of responsibility for his misconduct.