IN THE MATTER OF
THE INVESTMENT DEALERS ASSOCIATION OF CANADA
AND
JULIUS CAESAR PHILIP VITUG

DECISION OF THE ONTARIO DISTRICT COUNCIL

HEARING:	April 20 and June 8, 2007
DISTRICT COUNCIL:	Hon. Fred Kaufman, C.M., Q.C., Chair Duncan Webb D.W. Grant
ASSOCIATION COUNSEL:	Natalija Popovic and Diana Iannetta
RESPONDENT'S COUNSEL:	Alistair Crawley, Crawley Meredith LL.P.

DECISION

Introduction

As set out in the Amended Notice of Hearing (January 25, 2007), Julius Caesar Phillip Vitug (the “Respondent”), was charged by the Investment Dealers Association of Canada (“IDA” or “the Association”) that he “committed the following contraventions that are alleged by the Association”:

1. In or about April and July, 2006 the Respondent engaged in business conduct or practice which is unbecoming or detrimental to the public interest, in that he misled Staff of the Association on two occasions by failing to respond truthfully and/or completely to questions, posed in relation to two clients, at an Association interview conducted pursuant to Association By-law 19.5, in violation of Association By-law 29.1

The particulars alleged, again as set out in the Amended Notice of Appeal, are as follows:

The Respondent

1. At all material times, the Respondent was registered with the Association, among other capacities, as a Registered Representative (RR).

2. The registration history of the Respondent is as follows:

Firm	From / To	Registration
Fortune Financial Corp.:	Sept 5, 1997 – Aug 27, 1999	Securities Dealer
Dundee Securities Corp:	Aug 27, 1999 – Apr 14, 2000 Apr 14, 2000 – Apr 2, 2001	Trading Officer, Registered Representative, Branch Manager Director, Registered Representative, Branch Manager
TD Securities Inc:	Apr 3, 2001 – July 18, 2001 July 18, 2001 – June 30, 2002	Salesperson, Registered Representative, Branch Manager Trading Officer, Registered Representative, Branch Manager
TD Waterhouse Canada Inc:	July 1, 2002 – Oct 22, 2004	Trading Officer, Registered Representative, Associate Portfolio Manager, Branch Manager
Blackmont Capital Inc:	Oct 25, 2004 – present	Trading Officer, Registered Representative, Associate Portfolio Manager

3. By letter dated April 6, 2006, the Respondent was requested to attend at the offices of the Association for an interview to be conducted pursuant to Association By-law 19.5.

4. On April 11, 2006 the Respondent attended at the offices of the Association, represented by counsel. The Respondent was placed under oath and the interview was video-recorded, with the Respondent's knowledge.

5. On July 21, 2006 the Respondent attended a further interview at the offices of the Association. The Respondent was represented by the same counsel as at the April 11, 2006 interview. The Respondent acknowledged that he was still under oath and that the interview was again being video-recorded.

AD Account

6. At his interview on April 11, 2006, the Respondent was asked questions about AD. At the material time AD was a RR at SSCC, another Member of the Association. AD's spouse was a part owner of SSCC. Specifically, the Respondent was asked whether AD had any client accounts with the Respondent as the RR at Blackmont. The Respondent stated that AD did not, although AD's spouse was a client of the Respondent.

7. The Respondent was also asked whether AD was a principal behind any corporate accounts at Blackmont. The Respondent stated that AD was not.

8. The following is an excerpt from the transcript of the Respondent's April 11, 2006 interview:

Q. Okay. Does [AD] have any accounts with you now –

A. No.

Q. --that you're aware of?

A. His wife opened up an account.

Q. Okay. That's with you at Blackmont now?

A. Yes, it is.

Q. And that's the only account?

A. Yeah.

Q. Is he a principal behind any corporate accounts or anything like that?

A. No.

Q. No?

A. No, no, no, nothing. He's doing – you know what he's doing right now? He's working –

Q. My question was what's he doing now?

A. No, no. He's working for the [S.] family.

Q. Mm-hmm.

A. [M.], [A.] and like the [S.] clan, and he is currently running a fund for them, just running their money.

Q. Okay.

A. So he's trading and trying to make money. That's his gig right now.

9. At his interview on July 21, 2006, Staff repeated the Respondent's evidence from his April 11, 2006 interview regarding whether AD had any corporate accounts with the Respondent. Staff then asked the Respondent if "that was still the case".

10. The Respondent then stated that it was not, but that he had said so originally because he was trying to protect the identity of ALP. At the relevant time ALP was a corporate account for which the Respondent was the RR at Blackmont. AD was a 20% owner of ALP and had trading authority on the account.

11. The Respondent stated that in fact AD traded on that account. This was contrary to the Respondent's earlier evidence given to Staff at his April 11, 2006 interview.

12. The following is an excerpt from the transcript of the Respondent's July 21, 2006 interview:

Q. Now in your first interview, you advised that you had no accounts with [AD] at the time. That was April '06.

A. Mm-hmm.

Q. Nor was he the principal behind any corporate accounts with you. Is that still the case?

A. No. It's not the case 'cause I was trying to protect the identity of [ALP] account, but I mean he trades on that account.

Q. Okay.

A. So [ALP] does trade through me, absolutely.

Q. Okay.

A. [ALP].

DT Account

(i) Purchase of Fareport Capital Inc. (Fareport)

13. At his interview on April 11, 2006, the Respondent was questioned by Staff regarding DT. DT had been a client of the Respondent while he was an RR at TDW and is also the Respondent's father-in-law.

14. The Respondent stated that he had recommended that DT purchase the Fareport convertible debenture at SSCC FOR $108,000. The Respondent stated that the debentures were only available through SSCC as they were being sold through a private placement.

15. At his interview on July 21, 2006, the Respondent stated that his involvement with DT's purchase of the Fareport debenture was limited to his referral of DT to AD at SSCC to open an account and his recommendation that DT purchase the debenture..

16. Staff asked the Respondent whether there was anything else about his involvement with DT's Fareport transaction that he wanted to discuss. The Respondent stated there was not.

17. The following is an excerpt from the transcript of the Respondent's July 21, 2006 interview:

Q. …DT, we talked about him briefly…

A. Mm-hmm, mm-hmm.

Q. September, and we talked about a transaction regarding Fareport.

A. Yeah.

Q. In September 2003, he purchased I guess it was a special warrant financing, I think it was termed.

A. I thought –

Q. Fareport.

A. I thought it was a debenture to be honest with you.

Q. Yeah.

A. But I –

Q. [Inaudible]

A. I didn't know.

Q. Yeah, that's fine. It was $180,000 (sic) and he did this. We talked about this before. You felt he had done this through [SSCC].

A. Yeah.

Q. He owned an account at [SSCC] –

A. Yeah.

Q. and did it there.

Q. Could you take me through any of your involvement with that purchase at all?

A. Other than referring the business to him.

Q. Yeah.

A. I referred the business to [SSCC]. I thought it was an opportunity for him.

Q. Yeah.

A. And so I said open up an account there, and you can take down this trade or

this deal or this offering, and it was pitched to me that, you know, it's a hot deal and whatnot.

Q. Yeah.

A. And I can't take it through TD because it's – we're not on the book, and in terms of a syndicate – in terms of a syndicate, they're taking it down, and we can't pass it through TD. So if you want to get involved here, open up an account there, and do the trade over there.

Q. Okay, was there anything further than that?

A. No.

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Q. Yeah, okay. Are you sure there's nothing else about that transaction that you want to talk about?

A. Absolutely not. I don't, I don't know of anything else.

18. Staff then advised the Respondent that the Association had evidence that contradicted his evidence regarding DT's purchase of Fareport. Staff advised that the Association had evidence that the Respondent paid for DT's purchase of the Fareport debenture at SSCC with funds from his personal brokerage account at TD.

19 The Respondent did not ask to see the Association's evidence in relation to the purchase. At this point in the interview he remained silent for period of time following which he and his counsel requested an opportunity to consult in private. Staff agreed but requested an answer to the question of whether the account was in fact the Respondent's account first; instead the Respondent and his counsel left the interview to consult in another room and subsequently returned to the interview.

20. When the interview resumed, the Respondent stated that he had lent DT the money to purchase the Fareport debenture because DT did not want to fund the purchase

himself. This was contrary to the Respondent's earlier position that his involvement was limited to the referral and recommendation.

21. The following is an excerpt from the transcript of the Respondent's July 21, 2006 interview:

Q. Okay, okay. I'm going to tell you, Phil, that we have evidence sitting right here specifically regarding the [DT] matter that completely contradicts what you're saying. And if there's something you want to say this is – you know, I'll show you the documents in a minute if you want, but without seeing them, is there anything you want to clarify?

A. No. I don't. He took the trade down at [SSCC]. He had an account at [SSCC], and he took the trade down. So I don't what you're saying when you say you have evidence to —

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Q. We have documentary evidence that day, you withdrew 125,000 from your TD brokerage account. You went to TD Bank, deposited that into your bank account, drew a draft for 108 to [SSCC].

A. Mm-hmm.

Q. Forwarded that to [SSCC].

A. Mm-hmm.

Q. And paid for that special warrant financing directly out of your brokerage account.

A. I don't remember. I don't remember.

Q. I'm going to tell you, it appears to us that's your account. You opened it, and it's your trade. Is that the case?

A. Can I…

Respondent's Counsel No. Let's consult. Is that okay?

Q. Yeah. I mean preferably I'd like an answer.

Respondent's Counsel Yeah, I know. Well, that's why, that's why ---

Q. (INAUDIBLE)

Respondent's Counsel --- that's why I was sitting quietly.

Q It's a yes or no answer. Is it your account or not?

Respondent's Counsel If you want to consult, let's consult.

A. Sure.

Q. Okay. Thanks, [Respondent's Counsel].

(Brief Recess)

A. Okay. So I'm not meaning to be evasive, and I told you when I referred my father-in-law in there, it was a deal that I could not take down.

Q. Mm-hmm.

A. Okay, through [SSCC]. I mean through TD or even [SSCC] because I'm a pro.

Q. Yeah.

A. And so I got my father-in-law to open up an account, and I said there's an opportunity here to do it. He didn't want to upfront all the dough, so I said let's – I'm going to lend you the dough. So in essence, yeah. Is it my money? Yeah, absolutely.

(ii) Account Opening at SSCC

22. Staff then questioned the Respondent as to his involvement in the opening of DT's account at SSCC. The Respondent stated that he referred DT to AD at SSCC but would not have supplied the documentation to open the account.

23 The following is an excerpt from the transcript of the July 21, 2006 interview:

Q. Okay. What was your involvement in the opening of that account?

A. I referred him over to it. What do you mean my involvement?

Q. What about documentation? Did you supply documentation to open that account?

A. No, I wouldn't have done that. [AD] would have done that or –

24. Staff then advised the Respondent that the Association had evidence that DT's personal cheque used to open his account with the Respondent while at TDW, was exactly the same cheque used to open DT's account at SSCC for the purposes of the Fareport purchase.

25. The Respondent did not ask to see a copy of the cheque but subsequently stated that "we might have faxed it over for him, yeah." This was contrary to the Respondent's initial response that he would not have supplied the documentation to open the account.

26. The following is an excerpt from the transcript of the July 21, 2006 interview:

Q. How do you explain the cheque then? I mean I can show it to you. It's the exact same cheque. You know how you give a void cheque to open an account? The void cheque to open the account at TD, which you opened for your father-in-law, two years later that exact same void cheque is utilized to open the account at [SSCC]. I'm trying to imagine how that cheque gets up to SSCC.

A. I don't know. We might have faxed it over for him, yeah.

27. The Respondent's conduct has undermined the Association's ability to fulfill its regulatory function and the integrity of its process.

At the close of the evidence, the panel suggested that this would be an appropriate case to argue in writing, and the parties agreed to do so. In due course we received the submissions, first from the Association (since the Respondent had not called any witnesses), followed by those from the Respondent. As agreed, we then met again, and counsel expanded on their written arguments and also answered questions put by the panel. That done, we took the case under advisement, and this, after deliberation, is the Council's Decision.

Discussion

As can be seen from the description of the alleged offences, the Respondent would have misled the staff of the Association on two occasions by "failing to respond truthfully and/or completely to questions, posed in relation to two clients," while being examined by an investigator in accordance with the provisions of By-law 19.5.

This By-law (leaving out non-essentials), obliges a registered representative, when so required by the Association, "to attend and give information" respecting matters under investigation. A person so summoned "shall be advised in writing of the matters under investigation," and he or she may be required to testify under oath and to have his or her statement "recorded by means of an electronic recording device or otherwise."

We were told that it is now the custom that interviews conducted in virtue of this By-law are video-taped, that statements are always taken under oath and that, moreover (as was done in this case), the person examined is told that if he or she is not truthful, perjury charges may result.

In the present case, the Respondent was advised by letter dated August 4, 2005, that "an investigation had been commenced into your conduct as a Registered Representative with the Toronto office of TD Waterhouse Inc." A year later, on August 6, 2006, a further letter was sent to the Respondent (Exhibit 1, Tab 2) "requesting your attendance at an interview for the purposes of providing a sworn statement as to your knowledge of the matters under investigation." No details were given. The interview was scheduled for April 11, 2006, and the Respondent presented himself at the appointed time and place, together with his counsel, Mr. Crawley. He was given the warning mentioned above and was then questioned by Michael Arthur and Carolyn Bean, two IDA investigators.

It is clear from the evidence that, prior to the examination held on April 11, Mr. Arthur had provided Mr. Crawley with the names of three clients about whose accounts he intended to

ask questions. It is equally clear that the Respondent was unaware that he would also be questioned about the accounts of two other clients, AD and DT. This is of importance because the answers which IDA staff considers to have been misleading concerned these two individuals.

It is well established that self-governing bodies have the right to investigate their members; indeed, it is their duty to do so when the circumstances (which are set out in 19.2) warrant this procedure. But, to avail itself of this investigative opportunity, the Association must follow its own procedure, which includes, as pointed out above, the duty to advise in writing the person to be examined "of the matters under investigation."

It is our view that the notice sent out in this case was insufficient, and that the provision of three particular names to the Respondent's counsel, while helpful vis-à-vis these individuals, gave the Respondent reason to believe that he would be examined with respect to those accounts only and not any others.

The reason for the Association's failure to provide notice concerning the D and T accounts was clearly stated by Mr. Arthur when cross-examined by the Respondent's counsel:

Q. So going into the interview on April the 11th, and other than the broad statement that the investigation was going to concern his conduct at TD Waterhouse, the only specific information Mr. Vitug had as to the topics that he would be questioned on were these three client names that you had provided to his counsel?

A. Correct.

Q. And it's correct isn't it that the three client names you gave did not include Mr. D or DT?

A. That is correct.

Q. Going into this interview, based on the information that the association had provided to Mr. Vitug, he would have had no idea that he was going to be questioned about accounts that Mr. T had?

A. He had no idea from me, that is for sure, yes.

Q. Or anyone else at the association?

A. Correct.

Q. And the same would apply to Mr. D?

A. Sorry, I don't understand. Oh, with regard to ---

Q. Yes, the accounts of Mr. D. I apologize.

A. Yes. Yes.

Q. Now, did you give consideration before this interview to perhaps providing a list of the specific matters that were going to be covered in the interview to Mr. Vitug before his interview on April the 11th?

A. I did.

Q. And you obviously decided not to do that. Can you explain to me why you decided not to provide some specificity as to the matters that were going to be covered?

A. The client complaints that I mentioned, it was my understanding that they were complaints that were received by TD while Mr. -- I don't think they were all when Mr. Vitug was

employed there but he was certainly aware of those complaints. He had responded to those complaints. So, in my view, there was going to be no prejudice to the investigation by informing him of those items. He had already known about them, he had replied to them. The other matters that we discussed not only involved the investigation of Mr. Vitug, they involved other ongoing IDA investigations as well. And it was my view that disclosing those matters could possibly prejudice the investigation process so I was attempting to protect the integrity of the investigation and I proceeded on that basis.

Q. Okay. Now, with respect to the questions that were asked about Mr. T's account ...

A. Yes.

Q. ... I take it you knew before the interview that you were going to be asking Mr. Vitug questions about Mr. T and I'm going to be more specific. In the April 11th interview do you recall asking questions about some trading activity that took place in March of 2004 involving Mr. T's account at Standard Securities?

A. Yes, I do.

Q. And I'm assuming that was a topic that you knew you were going to question Mr. Vitug about prior to his interview on April the 11th?

A. Yes, it was.

Q. And you made the decision not to let Mr. Vitug know that that was an area that you were going to be covering in your interview?

A. That is correct.

Q. Okay. And the reason for you deciding not to provide that advice you've indicated was because you thought it could prejudice the association's investigation?

A. Possibly.

Q. Possibly. And how do you think letting Mr. Vitug know the matters you were going to question him on was going to prejudice the association's investigation?

A. Potentially there could have been conversations had with Mr. Vitug and other people discussing these items, these matters.

Q. In terms of the object of having Mr. Vitug come into the interview on April the 11th, was the primary purpose of that to obtain information that would allow the association to further its investigation?

A. Yes.

Q. Were there any other objectives that you had other than to obtain information?

A. No.

Q. Would it not have been more likely that you would have obtained accurate, useful information if Mr. Vitug was aware in advance of the interview the general matters that were going to be covered so that he could have refreshed his memory, perhaps reviewed some documents, could have consulted with counsel in advance; did that occur to you?

A. Well, I think -- it certainly occurred to me. I mean, that is why I had to make a decision whether I was going to or I was not going to disclose those items. You have to weigh the -- do you want to let the subject of the interview know what we're going to be talking about against the possibility that, you know, the investigation process would be prejudiced. So -- and

I think I -- back up a little bit. But that the Union Securities decision, and I believe the wording they use is a potentially unscrupulous person could take advantage of this situation knowing the details. I believe that is in their decision. I'm not saying that is at all what has happened here but that is the reason.

Q. Well, I guess we'll have to address that decision separately. But in terms of the weighing -you were aware, I take it, from your answer that there is a weighing then, on the one hand, lack of notice about the matters to be covered makes it more likely that the witness is not going to have a good recollection or an instant recollection of some of the matters you're going to cover in the interview; would you agree with that?

A. It could, yes.

Q. And that if they were aware of the matters that were going to be covered they -- if they -- at least, if they were diligent they would be in a position to be able to refresh their recollection about those matters before the interview?

A. Yes.

Q. But you, in this case, made the conscious decision that you were going to give heightened weight to these prejudice concerns over the interest in obtaining, perhaps, accurate information?

A. That is correct.

In our view, if the Association wishes to avail itself of the opportunity to examine a registered representative (as it has every right to do), it must follow the prescribed procedure. This was not done in this case, and failure to do so deprived the Respondent of the opportunity to prepare himself for the examination and, should he have so wished, to discuss the matter with his counsel. The reasons advanced for failing to do so are insufficient to overcome a clear provision of the relevant By-law.

The Association, in its written closing argument, submits (in paragraph 21) that "Mr. Vitug did not fail to answer truthfully or completely because he did not have sufficient notice of the matters which would be covered at the interview. He chose to hold back information from the IDA." In support of this statement, the Association cites *Re Union Securities Ltd*. (October 17, 2005), which is a decision of the IDA's Ontario District Council.

While it is true that the hearing panel in that case pointed out that the "narrow purpose for which notice is required to be given implies that the information conveyed by it need not be broad," and that, indeed, "it should be as narrow as possible so that it does not give to an unscrupulous member information which could help it defeat or hinder the investigation," it is equally true that the panel also said that a notice must, at least, contain "*the minimum*

information which is necessary to enable the member to understand in what respect its cooperation with the investigation is required" (emphasis added). In the case now before us this did not happen.

The Association also cites *The Nova Scotia Securities Commission v. Potter*, 2006 NSCA 45, April 19, 2006, a decision of the Nova Scotia Court of Appeal. In that case, the court considered the "fundamental issue" of "how to balance two competing requirements: the applicant's need to know and the investigators' need to keep secret." While the circumstances of that case are different, we note the court's use of the word "balance," for that is exactly what is required: enough to let the person know in what respect his or her cooperation is required and no more. Clearly, this was not done in this case.

In the result, it is our view that the complaint should be dismissed.

There is another matter. The complaint, as drafted, charges the Respondent with breach of By-law 29.1, that is to say that he "engaged in business conduct or practice which is unbecoming or detrimental to the public interest." This appears to be a departure from the usual norm, where breaches of By-law 19 were charged as being precisely that, and not violations of By-law 29.1, which is a catch-all relating, as it says, to the conduct of business.

We believe that it is inappropriate to call in aid the provisions of By-law 29.1 when the 'real' offence, if any, is a violation of By-law 19. However, in light of our conclusion that

the Respondent was given inadequate warning prior to his interview, it is unnecessary for us to decide this particular point.

We were also told that this is the first time that a violation of By-law 19 was proceeded with without alleging also violations of a more substantive nature. The investigation, we understand, has not yet been completed, and further charges may be laid later. While we believe the Association is entitled to proceed in this manner, there is some inconvenience in doing so, particularly for the Respondent, who is obliged to appear in two proceedings rather than one, incurring thereby additional costs and the commitment of additional time to the process. Again, it is unnecessary for us to decide this point in this case.

Therefore, for the reasons set out above, the complaint is dismissed.

Given at Toronto, Ontario, this "5th" day of July, 2007.

Hon. Fred Kaufman, C.M., Q.C., Chair

Duncan Webb

D.W. Grant