



**Mutual Fund Dealers Association of Canada**  
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT AGREEMENT  
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1  
OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Berkshire Investment Group Inc.**

**SETTLEMENT AGREEMENT HEARING**

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill, Chair

Darlene Thomas, Panel Member

Susan Monk, Panel Member

Appearances:

Hugh Corbett	)	For the Mutual Fund Dealers
Shelly Feld	)	Association of Canada
	)	
Joel Wiesenfeld	)	For Berkshire Investment Group Inc.
Julie Clarke	)	

Heard December 13, 2007 at Vancouver, B.C.

## REASONS

1. By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (“MFDA” or “the Association”) announced that it proposed to hold a hearing to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, a Hearing Panel of the Pacific Regional Council should accept the Settlement Agreement dated November 26, 2007 (the “Settlement Agreement”) entered into between Staff of the MFDA and Berkshire Investment Group Inc. (the “Respondent” or “Berkshire”). The appropriate Notice of Hearing has been given in accordance with the Rules of procedure.
2. At the outset of the proceedings, the Panel considered a joint motion by Staff and counsel for the Respondent to move the proceedings “in camera”. We granted that motion. The Panel then carefully reviewed the Settlement Agreement, and heard submissions of Staff of the MFDA, and of counsel for the Respondent. Staff provided written submissions, and a bound book of authorities, to assist the Panel in accepting or rejecting the Settlement Agreement. The Panel then adjourned to consider the Settlement Agreement, the authorities, and submissions. After deliberation, the Panel reconvened and unanimously concluded that it was appropriate to accept the Settlement Agreement, and signed the Order. These are the reasons for that decision.

## **Background: Thow**

3. This Settlement Agreement, between the Association and Berkshire, arises out of the activities of an Approved Person, Ian Gregory Thow (“Thow”). The activities of Thow between January, 2003 and May, 2005 are set forth in a decision of the British Columbia Securities Commission of October 16, 2007. See: *British Columbia Securities Commission v. Thow et al*, 2007 BCSECCOM 627 (BCSC) (the “Reasons”). Neither of Thow or the corporate respondents appeared at the hearing of the B.C. Securities Commission. As the synopsis of the decision sets out, the hearing involved Thow’s misappropriation of millions of dollars of his clients’ funds through his promotion of securities other than the mutual funds he was registered to sell. The Commission’s Notice of Hearing alleged that Thow misappropriated up to \$30 million, but the Executive Director proved the misappropriation of a lesser amount, although still millions of dollars. We refer to paragraph 7-11 of the Reasons:

7. Thow was a mutual fund salesperson employed by Berkshire Investment Group Inc., a mutual fund dealer and member of the Mutual Fund Dealers Association of Canada. Thow was also an officer, director, and branch manager with Berkshire. Thow’s registration permitted him to trade only in mutual funds. Thow started as a mutual funds salesperson with Investors Group Financial Services Inc. He moved to Berkshire in November 1998. Berkshire terminated his employment in June 2005. Thow is no longer registered under the Act.

8. Thow persuaded some clients to invest in short-term construction loans. There is no evidence that these loans existed. Thow persuaded others to buy shares in National Commercial Bank Jamaica Limited. To some clients he identified the shares as preferred shares. Those shares did not exist. Thow persuaded one client to invest in Berkshire’s initial public offering. Berkshire never had any plans to go public.

9. Thow advised clients to liquidate their mutual fund portfolios, to mortgage their homes, or to use other sources of borrowed funds, to raise the money to buy these investments. In several cases, Thow helped the clients arrange financing through relationships he apparently had with two individuals who were loan officers at Scotiabank and the Bank of Montreal, respectively.

10. To buy the investments that Thow promoted, his clients gave their funds to Thow personally, to AYG Investments Inc., or to 657594 BC Ltd. Thow owned and controlled AYG and 657594. He also owned and controlled all of the other corporate respondents, some of which were the ultimate recipients of the funds these clients gave to Thow to invest in the construction loans, the NCB Jamaica shares, and the Berkshire shares.

11. Thow used the money he received from his clients for these investments for other purposes, mostly for his own personal and business use.

4. In its Reasons, the Securities Commission found that Thow had hundreds of clients, but the Securities Commission heard or received evidence from only twenty-six of those clients. The Securities Commission, in its Reasons, stated:

13. Thow built trust with his clients, in some cases charming and befriending them in the process.

14. Some clients trusted him simply because he had been their financial adviser for many years. He had been their adviser when he was with Investors Group. They said they were satisfied with his advice and with the investments he had recommended for their portfolios. When he moved to Berkshire, they followed him.

15. Thow's public profile also engendered trust among his clients. When explaining why they found him trustworthy, clients mentioned his senior executive position in Berkshire and his high profile support of various charities and community causes. As one client put it, "We thought he was a paragon of virtue ... he was running Crime Stoppers and he was always donating to these charities, and he just seemed, like, you know, the man of the hour.

5. The evidence before the Securities Commission included a report from James P. Blatchford Consulting Ltd., a forensic accounting firm. The Commission stated:

106. The objective of the Blatchford report was to account for the funds that Thow's clients gave him for investment in the construction loans and the shares of NCB Jamaica. By reviewing banking records and documents, Blatchford traced investor funds through personal, family and corporate bank and credit card accounts controlled by Thow.

107. **As a result of the review, Blatchford says that Thow did not account for client funds through Berkshire, instead depositing them into personal, family and corporate bank accounts that he controlled and managed.** He says that Thow made significant numbers of transfers among the personal, family and corporate bank accounts that he controlled and managed, and that as the clients' funds moved among the accounts, they were depleted.

108. Blatchford found that, in many cases:

- Thow used client funds to eliminate overdrafts in Thow's personal, family and corporate account and to pay existing balances on Thow-controlled credit cards, lines of credit, and corporate loans.
- Thow's use of funds were more consistent with the payment of Thow's personal, family and corporate expenses than with investment in construction loans or shares in the NCB Jamaica.
- Client funds were traceable through several bank accounts and were used in a manner inconsistent with investment in construction loans or shares in NCB Jamaica.
- Thow commingled client funds with each other and with other funds in a manner inconsistent with the implicit trust expected by investors of a registered representative.

109. Blatchford also found that in some cases client funds were depleted by immediate payment to another client.

(emphasis added)

6. In their Reasons, the Securities Commission stated:

136. This is how Thow treated his clients:

- He solicited funds from his clients to invest in the construction loans, the NCB Jamaica shares, and the Berkshire IPO. Then he used the funds his clients gave him to invest in those securities for other purposes.
- Most of the money he took was for investments that did not exist.

- He encouraged clients to sell their mutual funds and mortgage their homes to raise the money for these so-called investments.
- He “reinvested” their funds without their permission.
- He liquidated one client’s mutual fund account without the client’s permission and appropriated the proceeds before reversing the transactions at the client’s insistence.
- He provided no documentation to evidence his clients’ investments;
- He lied to them about where their money had gone, how much their investments were worth, and when they would be repaid.

137. Thow’s conduct represents as blatant a contravention of these rules as one could imagine: he dealt unfairly, dishonestly, and in bad faith with his clients.

138. We find that Thow failed to deal fairly, honestly and in good faith with his clients, and in so doing contravened section 14(2) of the *Securities Rules* and MFDA Rule 2.1.1(a).

7. The Securities Commission also found that Thow engaged in a series of transactions which perpetrated a fraud on persons inside and outside of British Columbia.

8. In summary, the Securities Commission stated:

181. This case represents one of the most callous and audacious frauds this province has seen. Thow preyed on his clients by offering them non-existent securities and instead using the funds to support his lavish lifestyle. He took their money and betrayed their trust. He has left a trail of financial devastation and heartbreak.

9. It is important to note that this Settlement Agreement does not concern Thow, but concerns only Berkshire. It is our view that in some respects Berkshire was also a victim of Thow, as the agreed facts will clarify.

### **The Settlement Agreement**

10. As is usual in these cases, the Settlement Agreement is a joint recommendation of Staff and the respondent. Berkshire agrees to the

settlement on the basis of the facts set out in parts IV and V of the Settlement Agreement. In summary, Berkshire has admitted that between September 16, 2004, and June 4, 2005, it failed to conduct reasonable supervisory investigations into the activities of Thow on two occasions. It is important to note that, at the material time, none of Thow's fraudulent activities had been identified as such. However, on two occasions, in response to concerns communicated to Berkshire about Thow's dealings with two individuals named LV and DS, Berkshire failed to take such reasonable supervisory and disciplinary measures as would be warranted by the results of such investigations, contrary to MFDA Rules 2.5.1, 2.1.1(C) and the public interest.

11. Counsel for the parties emphasized that the Settlement Agreement is the result of extensive negotiations between the Association and Berkshire. Counsel for the Association stated that there was a thorough and lengthy investigation of Berkshire by Staff including: examination of a great many documents; interviews with employees of Berkshire from the bottom to the top of the organization; and they looked at the pleadings and affidavits in civil litigation involving Berkshire. Counsel for the Association stated that the facts and circumstances that are set forth in the Settlement Agreement are the whole case of the Association in respect of the member firm Berkshire.
12. Counsel for the parties also emphasized that the Settlement Agreement is restricted to the facts that are set forth in the Settlement Agreement.

13. In Part IV of the Settlement Agreement, the parties set forth Staff's conclusions regarding the conduct of Thow. Prior to his resignation, Thow had persuaded more than forty individuals to provide him with at least \$18 million for the purchase of investments outside of Berkshire. Many of the individuals who provided money to Thow were clients or former clients of Berkshire, whose accounts were formerly the responsibility of Thow.

### **Registration History of Berkshire and Thow**

14. Berkshire has been a member of the MFDA since March 8, 2002 and is registered to carry on business as a mutual fund dealer throughout Canada. Its head office is in Burlington, Ontario. Berkshire has not been subject to previous MFDA disciplinary proceedings.
15. Between November, 1998 and June, 2005, Thow was registered in British Columbia as a mutual fund salesperson, branch manager and officer of Berkshire. Thow held the titles of senior vice-president of Berkshire and co-branch manager of Berkshire's Victoria branch office.
16. It is important to note that all of Thow's illicit activities were off book. As is stated in the Agreed Facts, none of the monies that Thow obtained from individuals for the purpose of purchasing the three bogus investments were made payable to Berkshire, nor deposited in any account of Berkshire or its clients. It is important to note that Berkshire did not benefit from any of the improper conduct of Thow described in the Settlement Agreement. Thow actively concealed his misconduct from Berkshire. The Agreed Facts state that the MFDA's investigation yielded no information to contradict

Berkshire's representation that, except to the extent indicated in the Settlement Agreement, Berkshire was not informed about or otherwise made aware of Thow's involvement with the illicit investment schemes, including the repayment of monies to certain individuals, prior to Thow's resignation. Further, Berkshire did not receive, prior to June 7, 2005, any complaints from clients of Berkshire, nor any complaints from non-clients of Berkshire, other than those identified in the Settlement Agreement, with respect to Thow's involvement with the illicit investment schemes.

### **The Report from LV**

17. As is described in the Settlement Agreement, commencing on approximately Thursday, September 16, 2004 Berkshire received reliable information via the lawyer of LV, a wealthy businessman, who communicated to a former senior executive of Berkshire. The lawyer also acted as counsel for Berkshire on various matters. LV was not at any time a client of Berkshire, nor did Berkshire have any prior knowledge of, nor dealings with LV. The former senior executive immediately conveyed the information reported by the lawyer concerning LV's dealings with Thow, to representatives of Berkshire including the President, and Berkshire's Legal Department. Although notified about the call from the lawyer, the President of Berkshire did not play any role in dealing with the matter. He allowed Berkshire's Legal Department, with assistance from the former senior executive, to determine and take appropriate action.
18. The information that was provided was significant. In summary, the information was that LV had been among a group of guests on a fishing trip

hosted by Thow at a lodge on the Coast of B.C., and there had met Thow. During the fishing trip Thow had described the investment in a bank in Jamaica (“NCBJ”). Three or four individuals, including LV, provided money to Thow to purchase shares in the Jamaican bank. The names of the two or three investors other than LV were not provided. LV subsequently transferred \$1.2 million to Thow’s bank account for the purchase of shares in NCBJ. LV had not received any documentation concerning his purchase. When LV requested documentation from Thow, Thow provided LV with \$1.2 million in travel vouchers relating to Thow’s aircraft leasing business.

19. Berkshire did not request, and neither LV nor the lawyer provided Berkshire with documentation relating to the information communicated to Berkshire by the lawyer. After obtaining a more detailed account of the facts from the lawyer, Berkshire’s Legal Department notified the Compliance Department about the information received concerning Thow’s dealings with LV. However, no-one informed the branch manager or anyone else at Thow’s branch.
  
20. As is set out in detail in the Agreed Facts, the next day the former senior executive called Thow and informed him of the call from the lawyer; Thow claimed that the report from the lawyer was a mistake, and that Thow would contact LV, and that LV or the lawyer would call the former senior executive concerning the matter later in the day. The former senior executive informed the Respondent’s Legal Department and Compliance Department about his discussion with Thow. On Monday, September 20 Thow called Berkshire’s Legal Department about the report, and denied that he had received monies from LV to invest in shares in the Jamaican bank,

and claimed that LV had purchased a block of flight time on his aircraft, and now wanted the return of his monies, and was playing hardball.

21. After receiving the call from Thow, Berkshire's Legal Department organized a meeting with Compliance and the National Sales Departments to discuss Thow's response. It was agreed that the Compliance Department would follow up with Thow to obtain backup for his account of the facts concerning his dealings with LV, and to ensure the details of Thow's involvement in outside business activities were clarified and appropriately disclosed to the Provincial Securities Regulators. No-one contacted LV or the lawyer.
  
22. On Wednesday, September 22, 2004 before Berkshire's Compliance Department followed up with Thow, LV called Berkshire's Legal Department and told them that the information previously provided by the lawyer was "a misunderstanding". He said Thow was his personal friend and one of his companies intended to do business with Thow's aircraft leasing company. Berkshire asked LV to call the lawyer to inform him of the misunderstanding. LV told Berkshire that he would; Berkshire heard nothing further from the lawyer or LV. Unbeknownst to Berkshire, after hearing about the complaint to Berkshire, Thow contacted LV and told LV that Thow would repay him the \$1.2 million that Thow had received if LV would tell Berkshire that the account of their dealings provided to Berkshire by the lawyer was a misunderstanding. LV agreed, and in the result, LV made the call to Berkshire as described and Thow repaid LV the \$1.2 million Thow had previously received from LV.

23. On the basis of LV's telephone call to Berkshire, Berkshire accepted LV's statement that the information conveyed by the lawyer about LV's dealings with Thow was a misunderstanding, and considered the matter resolved. Berkshire took no further steps to investigate the matters communicated by the lawyer regarding LV and others, including not taking the step of notifying the co-branch manager of Berkshire's Victoria branch office of the information received from the lawyer.

24. The Settlement Agreement states:

29. In light of the potentially serious implications of the information communicated to the Respondent about Thow's dealings with LV, the Respondent had an obligation to conduct a reasonable supervisory investigation over and above its communications with LV and Thow in order to ensure that Thow was complying with his regulatory obligations and was acting in the best interests of the Respondent's clients, but failed to do so.

30. In the circumstances, a reasonable supervisory investigation would have included, among other things, obtaining written confirmation and documentary corroboration of Thow's and LV's accounts of Thow's dealings with LV.

31. Had the Respondent conducted a further supervisory investigation of the information originally communicated by the Lawyer, it would have increased the likelihood that Thow's solicitation of monies for the purchase of investments outside the Respondent and improper outside business activities would have been discovered and Thow would have been prevented from continuing to engage in such conduct while registered as an Approved Person of the Respondent.

32. MFDA Staff has concluded on the basis of its investigation that the Respondent's failure to conduct a reasonable supervisory investigation did not arise from any general failure to maintain and adhere to appropriate supervisory policies and procedures or from any intentional non-compliance on the part of the Respondent.

## The Report by DS

25. On Wednesday, April 20, **2005** Berkshire's National Sales Department received a telephone call from the individual DS reporting a concern about money that DS had provided to Thow for an investment in shares of NCBJ. DS stated that he had not received any confirmation of his investment, and that Thow was not returning phone calls or attending appointments to address the matter. **DS stated that this had been going on for six months to one year.** DS stated he just wanted his money back. DS was not, and had never been, a client of Berkshire.
26. As is set forth in the Agreed Facts, the call from DS was referred to Berkshire's Compliance Department who followed up the complaint and sought documentation from DS. DS stated that he had given Thow \$200,000 U.S. to invest in shares of NCBJ, and gave them a copy of a cheque for \$100,000 payable to Thow's numbered company with the words "NCB bank shares" written on the memo line of the cheque.
27. The report by DS was substantially similar to the information previously communicated by the lawyer to Berkshire concerning LV.
28. Between April 26 and May 5, 2005, Berkshire made attempts to respond to the complaint by DS, but subsequently DS cancelled a scheduled in-person meeting and thereafter, as it turned out, refused to cooperate with Berkshire's investigation.

29. Unbeknownst to Berkshire, after DS contacted Berkshire to report Thow's conduct and agreed to meet, Thow and DS through their respective lawyers, entered into negotiations for the return of DS's money. Apparently DS cancelled his scheduled meeting with Berkshire on information that his money had been returned, but subsequently stated that he was not repaid by Thow.

30. The Agreed Facts state:

42. During the period between Wednesday, April 20 and Thursday, May 5, 2005, the Respondent did not take sufficient steps in furtherance of a reasonable supervisory investigation of Thow's activities and did not impose any interim supervisory measures to protect its clients' interests until such time as it could assess the merits of DS's report.

43. On Thursday, May 5, 2005, at the request of the Respondent, senior representatives of the Respondent's Compliance and National Sales departments met with Thow at the Respondent's Head Office. At the commencement of the meeting, Thow submitted a letter of resignation. Thow advised the Respondent that he was resigning in order to spend more time on his outside business activities, including his aircraft leasing business. During the meeting, Thow refused to answer most of the Respondent's specific questions concerning his dealings with DS because he said he was bound by contractual confidentiality obligations with DS. Thow denied that he had sold shares in NCBJ to DS and insisted that DS had wired money to Thow's aircraft leasing company to purchase a block of flight time. Thow's story was inconsistent with the existence of the cheque provided to Thow by DS for NCBJ shares. Although Thow insisted to the Respondent that the money that he had received from DS had been wire transferred to his aircraft leasing business, when the cheque from DS was shown to him by the Respondent, Thow claimed that the memo line referencing "NCB bank shares" was not filled out on the copy of the cheque that he had received.

44. The Respondent accepted Thow's resignation, but agreed to defer the effective date to a mutually acceptable date in the future. Thow represented that he was going on vacation in New Zealand. By subsequent agreement, Thow's resignation became effective on June 1, 2005. The respondent did not conduct any further supervisory investigations.

45. In the circumstances as outlined above, the Respondent had an obligation to, at a minimum, suspend Thow immediately on Thursday,

May 5, 2005 and take such other interim supervisory and disciplinary measures as were appropriate to protect its clients' interests and preserve relevant documentation pending the outcome of an investigation of DS's report.

46. In the circumstances, a reasonable supervisory investigation of DS's report would have included, among other things, obtaining written confirmation and documentary corroboration of Thow's and DS's accounts of Thow's dealings with DS.

47. Had the Respondent conducted a reasonable supervisory investigation of DS's report, it is more likely that Thow's solicitation of monies for the purchase of investments outside the Respondent and improper outside business activities would have been discovered at that time and Thow would have been prevented from continuing to engage in such conduct while registered as an Approved Person of the Respondent.

48. MFDA Staff has concluded on the basis of its investigation that the Respondent's failure to conduct a reasonable supervisory investigation did not arise from any general failure to maintain and adhere to appropriate supervisory policies and procedures, or from any intentional non-compliance on the part of the Respondent.

#### **Current Practices**

49. MFDA Staff is satisfied that since these events occurred, the Respondent has reviewed its policies and procedures and supplemented them concerning outside business activity to ensure that reports of the type received from both non-clients such as LV and DS, as well as clients, and events such as the withdrawal of LV's report and DS's subsequent refusal to cooperate, will result in the Respondent conducting reasonable supervisory investigations of the relevant subject matter.

31. The failure of Berkshire to conduct reasonable supervisory investigations was very significant. The Association's investigation concluded that between September 16, 2004 and April 20, 2005, Thow solicited and obtained more than \$5.8 million from individuals by means similar to those employed in his dealings with LV and DS. Of that amount, more than \$4.3 million was obtained from clients of Berkshire. Thow has not repaid or otherwise accounted for these monies, other than any situation for which Thow used monies received from some individuals to repay others. (Settlement Agreement, para. 50).

32. The Association's investigation concluded that between April 20, 2005 and June 1, 2005, Thow solicited and obtained approximately \$510,000 Cdn. and \$30,000 U.S. from individuals by means similar to those employed in his dealings with LV and DS. Of that amount, approximately \$210,000 was obtained from clients of Berkshire. Thow has not repaid or otherwise accounted for these monies, other than any situations where Thow used monies received from some individuals to repay others. (Settlement Agreement, para. 51).

### **Restitution**

33. Berkshire received complaints from some individuals concerning losses sustained in connection with Thow's investment schemes, and Berkshire voluntarily initiated mediations with 29 of its clients. All of these mediations resulted in payments being made by Berkshire to the clients in settlement of their claims. The total payments made by Berkshire to the 29 clients at the conclusion of the mediations was approximately \$4.1 million.
34. As is set forth in paragraph 53 of the Agreed Facts, Berkshire has rejected claims for compensation by other individuals, and is defending itself in both civil litigation and alternative dispute resolution proceedings against claims for compensation for losses sustained by both clients and non-clients who paid money directly to Thow in connection with his illicit investment schemes.
35. The Agreed Facts state:

54. The MFDA continues to monitor the Respondent's complaint handling process in relation to MFDA Rule 2.11 and MFDA Policy No. 3 with respect to complaints arising from Thow's conduct and reserves the right to take further disciplinary action against the Respondent in respect of its future complaint handling and its obligations with respect to the Ombudservice under section 24.A of By-law No. 1, if warranted.

55. The Respondent has cooperated fully with Staff's investigation of the matters which are the subject of this Agreement.

#### **CONTRAVENTIONS**

56. On the basis of the facts set out in Parts IV and V of this Settlement Agreement, the Respondent admits that between September 16, 2004 and June 1, 2005, the Respondent failed to conduct reasonable supervisory investigations of Thow's activities in response to the concerns communicated by DS and on behalf of LV and to take such reasonable supervisory and disciplinary measures as would be warranted by the results of its investigations, contrary to MFDA Rules 2.5.1, 2.1.1(c) and the public interest.

#### **Discussion**

36. Berkshire has admitted that it failed to conduct reasonable supervisory investigations, on two occasions, after concerns about Thow's dealings with firstly LV, and secondly DS, were communicated to it. This case demonstrates the potentially serious consequences that can follow if a member firm does not conduct reasonable supervisory investigations. The facts communicated on behalf of LV were serious, and involved not only LV, but apparently two or three other individuals on the fishing trip who became "investors". If LV's allegations with respect to Thow's activities and promotion of an illicit investment scheme were true, the consequences to Berkshire could be significant. Berkshire has acknowledged that reasonable supervisory investigations in response to the reports received concerning Thow's business dealings (with LV and DS) would have included, among other things, obtaining written confirmation and documentary corroboration of the description of events received from those

individuals, and from Thow concerning Thow's business dealings with those individuals (Settlement Agreement paras. 30 and 46).

37. Counsel for the Association submits, and we agree, that in addition to obtaining written confirmation and documentary corroboration of descriptions of Thow's business dealings with LV from Thow, the lawyer, LV, and any other fishing trip investors who could be identified, a reasonable supervisory investigation following receipt of the report concerning LV's dealings with Thow, would have included, at a minimum, the following:

- (i) Contacting LV and the Lawyer to confirm the nature of the purported misunderstanding between them concerning LV's transactions with Thow;
- (ii) Taking steps to ascertain whether any other individuals who had attended the fishing trip hosted by Thow had given Thow money to invest on their behalf;
- (iii) Ascertaining whether Thow's co-Branch Manager of the Victoria branch was aware of any unusual activity on Thow's part which might suggest that Thow was conducting securities related business outside Berkshire, or was engaging in undisclosed outside business activities, and requesting that the co-Branch Manager report the possibility of any such activity to Berkshire if suspected in the future;

- (iv) Conducting a review of Thow's office and client files to determine whether there was any evidence that Thow was conducting securities related business outside Berkshire or engaging in undisclosed outside business activities; and
  - (v) Requiring Thow to provide written disclosure to individuals involved in his outside business activities that the activities were not the business or responsibility of Berkshire.
38. Counsel for the Association submits, and we agree, that in the circumstances of this case, in addition to obtaining written confirmation and documentary corroboration of descriptions of Thow's business dealings with DS from Thow, and DS, a reasonable supervisory investigation following receipt of the report from DS would have included, at a minimum:
- (i) Making inquiries of DS to ascertain whether he was aware of any other individuals who had provided money to Thow for similar investments;
  - (ii) Ascertaining whether Thow's co-Branch Manager of the Victoria branch was aware of any unusual activity on Thow's part which might suggest that Thow was conducting securities related business outside Berkshire, or was engaging in undisclosed outside business activities, and requesting that the co-Branch Manager report the possibility of any such activity to Berkshire if suspected in future;

- (iii) Conducting a review of Thow's office and client files to determine whether there was any evidence that Thow was conducting securities related business outside Berkshire or engaging in undisclosed outside business activities; and
  - (iv) Requiring Thow to provide written disclosure to individuals involved in his outside business activities that the activities were not the business or responsibility of Berkshire.
- 39. Further, if Berkshire had conducted an investigation of Thow and his clients say over the previous 12 months prior to the date of the LV information, a pattern may well have emerged. It appears that Thow frequently had clients cash in their accounts and transfer the monies out. If the investigators had contacted those clients, they may well have discovered Thow's off book activities.
- 40. The Panel is mindful of the fact that at the time the information concerning LV and the apparent promotion that took place on the fishing trip were communicated to Berkshire, Thow had not been identified as a rogue broker, and a review of Thow's client accounts at Berkshire would likely not yield any incriminating information. The fact is that Thow conducted his activities off book, and apparently was careful to ensure that his illicit promotional activities did not get back to officials at Berkshire. However, the fact remains that hard information was received in respect of the LV matter, from knowledgeable sources, and Berkshire utterly failed to conduct a reasonable supervisory investigation. As a consequence, Thow was able to continue to promote his fraudulent scheme.

## **Terms of Settlement**

41. The Association and Berkshire have agreed to the following terms of settlement:

57. Upon the acceptance of this Settlement Agreement, the Respondent agrees to:

(a) pay a fine in the amount of \$500,000, pursuant to s. 24.1.2(b) of By-law No. 1; and

(b) pay costs of the MFDA's investigation and of this hearing in the amount of \$50,000, pursuant to s.4.2 of By-law No. 1.

### **STAFF COMMITMENT**

58. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent or any of its officers or directors in respect of any conduct or alleged conduct of the Respondent in relation to the facts set out in Pars IV and V of this Settlement Agreement except with respect to future compliance on the part of the Respondent with complaint handling obligations triggered by existing or future complaints concerning Thow's conduct or the Respondent's conduct in relation to Thow's activities and subject to the provisions of paragraph 63 below.

## **Factors Concerning the Appropriateness of the Penalty**

42. The primary goal of securities regulation is the protection of the investor.

*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557  
per Iacobucci J. at paras. 59, 68.

*In The Matter of Robert Roy Parkinson* [2005], MFDA File No. 200501,  
Panel Decision dated April 29, 2005.

43. In coming to its conclusions in respect of the Settlement Agreement, the Panel considered and applied the observations referred to in *Re IQON Financial Inc.*, MFDA Case #200713 (May 24, 2007) at page 9:

... In determining whether the Settlement Agreement should be accepted, the Hearing Panel will consider a number of factors, including the following:

1. The public interest and whether the penalty imposed will protect investors.
2. Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent, as set out in the Agreement.
3. Whether the Settlement Agreement addresses the issues of both specific and general deterrence.
4. Whether the proposed settlement will prevent the type of conduct described in the Agreement from occurring again in the future.
5. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets.
6. Whether the Settlement Agreement will foster confidence in the integrity of the MFDA.

7. Finally, whether the Settlement Agreement will foster confidence in the regulatory process itself.

The Panel is unanimously of the view that this Settlement Agreement achieves the goals referred to.

44. During submissions, counsel for the Association referred to the MFDA's Penalty Guidelines in respect of a Member's failure to adequately fulfil its supervisory obligations. Berkshire's failure was a serious contravention of the MFDA Rules. The application of the Penalty Guideline factors to the Settlement Agreement are as follows:

(a) The extent of inadequacy in the procedures for supervision or the actual supervision of employee(s).

*The Respondent's failure to conduct reasonable supervisory investigations did not arise from a general failure to maintain and adhere to appropriate supervisory policies and procedures, or from any intentional non-compliance on the part of the Respondent*

Settlement Agreement, paragraphs 32 and 48.

(b) The extent of employee(s) misconduct that occurred.

*Thow obtained at least \$18 million from more than 40 individuals (including many clients of the Respondent) for the purchase of investments outside the Respondent, including more than \$6.3 million after reports concerning Thow's conduct were first received by the Respondent in September 2004.*

Settlement Agreement, paragraphs 5-7 and 50-51.

(c) Amount of losses or compensation for which the Member is liable as a result of the employee(s) misconduct.

*Mediations have resulted in settlements with 29 clients and total payments to those clients of approximately \$4.1 million. The Respondent is defending itself against other claims for compensation associated with Thow's misconduct. The issue of the Respondent's liability for other claims is still on-going in the civil courts and in other dispute resolution proceedings.*

Settlement Agreement, paragraphs 5-7 and 50-53.

(d) "Red flag" warnings that should have been caught by a proper system of supervision or follow-up.

*In September 2004, the Lawyer informed the Respondent about LV's statements concerning Thow's dealings with him and a few other individuals and in April 2005, DS reported his own dealings with Thow. The DS report was substantially similar to the LV report.*

Settlement Agreement, paragraphs 15-18 and 33-37.

(e) Corrective measures taken since discovery of problem.

*The Respondent has reviewed and supplemented its policies and procedures to ensure that reports of the type received by the Respondent concerning Thow's dealings with LV and DS will in future result in the Respondent conducting reasonable supervisory investigations of the relevant subject matter.*

Settlement Agreement, paragraph 49.

(f) Intentional or reckless disregard for requirements, or whether due to carelessness or inadvertence.

*The Respondent's failure to conduct reasonable supervisory investigations did not arise from a general failure to maintain and adhere to appropriate supervisory policies and procedures, or from any intentional non-compliance on the part of the Respondent*

Settlement Agreement, paragraphs 32 and 48.

45. Counsel for the Association pointed out that there were mitigating factors in this case, to be considered in determining whether the proposed penalty was appropriate:
- (a) Except to the extent described in the Settlement Agreement, Berkshire was not aware of Thow's misconduct, and had not authorized Thow to offer the illicit investments described in the Settlement Agreement, to its clients or other individuals;
  - (b) None of the monies that Thow obtained from individuals for the purpose of purchasing the illicit investments were made payable to Berkshire, nor deposited in any account of Berkshire or its clients at Berkshire, and Thow actively concealed his misconduct from Berkshire (Settlement Agreement paragraphs 5-6, 11 and 13-14);
  - (c) Berkshire did not benefit from any of the improper conduct of Thow described in the Settlement Agreement (Settlement Agreement, paragraph 12);
  - (d) Berkshire has paid approximately \$4.1 million to compensate 29 clients of Berkshire who provided monies to Thow personally during Thow's period of registration as an approved person of Berkshire (Settlement Agreement, paragraph 52);

- (e) Berkshire has not been the subject of previous MFDA disciplinary proceedings (Settlement Agreement, paragraph 9);
- (f) Berkshire has cooperated with MFDA staff throughout the investigation into its conduct (Settlement Agreement, paragraph 55);
- (g) Berkshire's admissions to the misconduct described in the Settlement Agreement reflect an acceptance of responsibility for its misconduct;
- (h) By entering into a Settlement Agreement Berkshire has avoided the necessity of the MFDA conducting a lengthy hearing.

The Panel has considered the Penalty in relation to the mitigating factors.

- 46. The penalty set forth in the Settlement Agreement is at the higher end of the reasonable range when compared with recent decisions of securities regulators involving supervision deficiencies that may have facilitated the continuation of serious misconduct by an adviser: *IQON Financial Inc., supra*; *Re Canaccord Capital Corporation*, Decision of the IDA Pacific District Council dated November 23, 2006; *Re National Bank Financial Inc.*, Decision of the IDA Quebec District Council dated August 29, 2007.
- 47. In conclusion, having considered the authorities, all of the foregoing factors, and having carefully reviewed the Settlement Agreement, the Panel has concluded that the Settlement Agreement should be accepted, and it is so ordered.

48. These Reasons may be signed in counterpart.

Dated at Vancouver, British Columbia, this 3<sup>rd</sup> day of January, 2008.

“Stephen D. Gill”

Stephen D. Gill, Chair

“Darlene Thomas”

Darlene Thomas, Panel Member

“Susan Monk”

Susan Monk, Panel Member