

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-024398-052

DATE: February 20, 2007

BY: THE HONOURABLE CHANTAL CORRIVEAU, J.S.C.

BETTY R.L. RHIND
Plaintiff

v.

DIGITAL WORLD FINANCIAL INC.

and

WILLIAM W. WISHNOUSKY

and

IFORUM FINANCIAL SERVICES INC.

and

CERTAIN UNDERWRITERS AT LLOYD'S

Defendants

JUDGMENT

INTRODUCTION

[1] The Court is called upon to decide if the Plaintiff Betty R.L. Rhind (**Mrs. Rhind**) is entitled to recover the amounts of \$674,212.50 and \$100,937.50 for a total of \$775,150.00 in capital, plus contractual interest pursuant to two investments in Defendant, Digital World Financial Inc. (**DWF**).

[2] Mrs. Rhind's first investment was made in December 2001 in the amount of \$95,000.00 and her second one in May 2002 for an additional amount of \$635,000.00. Both were renewed for two year terms.

[3] The investments in DWF were represented to Mrs. Rhind as being equivalent to Guaranteed Investment Certificates (**GIC**). To secure repayment, DWF issued two promissory notes.

[4] The investments were made on the advice of Defendant William Wishnousky (**Wishnousky**), who had been acting as Mrs. Rhind's financial advisor since 1987.

[5] At the time of these investments, Wishnousky was associated with Diversifolio Financial Services (**Diversifolio**) as a representative. This firm was continued under the name IForum Financial Services (**IForum**) in 2002. For clarity, the Court will refer to IForum to apply to both entities.

[6] The Defendant, Certain Underwriters at Lloyd's (**Lloyd's**) was the professional liability insurer of both Wishnousky and IForum at all relevant times to these proceedings.

[7] DWF and Wishnousky have not filed an appearance or contested this action. At trial, DWF's representative Jos Simon Lacroix (**Lacroix**) and Wishnousky testified.

[8] On November 30, 2004, the Financial Service Commission of Ontario (**FSCO**) issued a temporary order against Lacroix and DWF calling upon them to cease activity in Ontario for failure to comply with certain requirements set out in the *Loan and Trust Corporations Act*¹. The order specifically referred to the unwillingness or inability of DWF to repay its promissory notes.

[9] On June 15 2005, l'Autorité des marchés financiers (**AMF**) the financial regulatory commission in Quebec, issued an order preventing Wishnousky and DWF from selling any DWF financial products in Quebec.

[10] On December 13, 2005, a trustee was named to act in the bankruptcy of IForum.

[11] On September 28, 2006 a notice to suspend proceedings was issued by the trustee of IForum.

[12] Both IForum and Lloyd's are contesting the present action alleging that Wishnousky was not acting in his capacity as IForum's representative when he advised Mrs. Rhind to purchase and renew her investments in DWF.

¹ R.S.O. 1990, c. L.25.

[13] On January 29, 2007, Mrs. Rhind received \$200,000 to partially indemnify her losses in DWF as a result of Wishnousky's negligence². This indemnification is the highest amount recoverable from the AMF following its review of a complaint.

FACTS

[14] The Plaintiff, Betty Rhind, is an eighty-seven (87) year-old retired registered nurse.

[15] From 1987 onwards, Mrs. Rhind and her husband were clients of Wishnousky and transferred their investment portfolios to the various firms with which he became associated. William Rhind died in 1992, at which time his investments were consolidated with those of his wife.

[16] Following the death of her husband, Mrs. Rhind continued to rely on the investment counsel offered by Wishnousky.

[17] In the year 2000, Wishnousky informed Mrs. Rhind that he had learned about a company by the name of DWF, with offices in Montreal and Toronto, which he considered to offer a solid investment opportunity. The investment was represented by Wishnousky as a guaranteed promissory note equivalent to a GIC.

[18] On the recommendation of Wishnousky, Mrs. Rhind purchased a first GIC from DWF on December 5, 2001 in the amount of \$95,000.00, bearing interest at 6.25% for one year. For this, Mrs. Rhind wrote a cheque to the order of DWF.

[19] At maturity on December 5, 2002, Mrs. Rhind renewed her GIC for a two-year period, as appears from the DWF Certificate number 00481 in the amount of \$100,937.50. The promissory note bearing 5.25% interest was repayable on December 5, 2004.

[20] Prior to renewing the first DWF GIC, Mrs. Rhind purchased a second one in the amount of \$635,000.00 on May 13, 2002, as appears from the DWF promissory note bearing number 00453. The interest rate was 7.75%. Mrs. Rhind made payment by authorising a transfer of funds directly from her bank account to DWF's account.

[21] This second DWF GIC in the amount of \$674,212.50 was renewed for a two-year period on May 13, 2003, as appears from the DWF promissory note certificate number 00493. The interest rate was again 7.75%. On October 26, 2004, Mrs. Rhind contacted Wishnousky telling him that she wanted to be paid on her two DWF promissory notes.

[22] When she did not receive payment, Mrs. Rhind sent a letter dated November 22, 2004 to Wishnousky, with a copy to Lacroix, once again demanding payment.

² As stated in the conclusions of the AMF decision rendered on December 19, 2006, Decision 2006-IND-0114 (SR05-014S).

[23] When Mrs. Rhind received no reply, she instructed her attorneys to serve a formal demand upon DWF dated December 6, 2004, calling for the payment of her DWF promissory note bearing number 00481.

IForum and the DWF product

[24] In 2001, Wishnousky introduced the DWF product to the president of IForum, Mr. Tony Tiberi.

[25] IForum conducted a due diligence of DWF which led to the registration of its work force of 79 representatives including its president, Mr. Tiberi and Wishnousky as sales agents of DWF. This registration process was completed by June 27, 2001.

[26] On June 18, 2001, Mr. Tiberi sent a memo to all IForum's representatives, including Wishnousky, recommending the new product from DWF.

[27] According to IForum the new DWF product had a guarantee of repayment secured by an institutional bond. The June 18, 2001 memo entitled "New Investment products" stated the following:

As our mandate is to give you access to as many products and services as possible, we would like to **introduce a new product** for your possible distribution. This commercial paper product is of the **guaranteed rate and term variety**. Section 41 (Chapter II: Exemptions) of the Quebec Securities Act allows the distribution without prospectus of promissory notes which are payable in one year or less for a sum of \$50,000 or more.

The criteria for us to distribute any such product would be guarantee of repayment. This is in place through a blanket institutional bond of \$5,000,000, similar to what Diversifolio holds.

The product in question is the following:

<u>COMPANY</u>	<u>Minimum (\$)</u>	<u>Term</u>	<u>Rate(%)</u>	<u>Security</u>
Digital World Financial	\$ 50,000	1 year	6.25	Institutional Bond

This instrument is also available in US dollars.

Finally, this product will earn you a commission of 40 basis points.

You can get applications for this product by contracting Frank or myself in the office.

(our emphasis)

[28] There is a second version of the same memo also dated June 18, 2001, addressed by IForum to all representatives promoting the DWF product. This memo

contained additional information concerning a comparative product offered by Mount Real Capital Inc., which also offered a guarantee of repayment.

[29] The evidence concerning the distribution of memos was contradictory. Mr. Tiberi testified never having distributed them. Mr. Tiberi said that the memos had been drafted but not finalised and were never distributed to any representatives because IForum never endorsed the DWF product.

[30] The Court does not believe Mr. Tiberi. A copy of the June 18, 2002, memo was produced at court by Mr. Lacroix who said that he had obtained it either from IForum or from Wishnousky. Following his examination on discovery, Wishnousky communicated his file to the Plaintiff's lawyers, which contained the abridged version of the memo.

[31] On February 5, 2002, IForum sent another memo to its sales representatives stating that:

Several months ago we sent out a memo regarding 3 alternative, capital guaranteed investment products. One offered by Digital World Financial and the other two offered by Mount Real Corp. These are short and long term promissory notes.

We believe there is a demand for such products. However, it is important to understand **that these products do not replace GICs. They are only guaranteed by the issuer.** Therefore, the financial health of the issuer is the most important feature you must rely on. We strongly suggest that the issuer's year-end; audited statements accompany any interest in such products. We also recommend that the client get a third party accountant to comment on the issuer's viability prior to investing. In conclusion, **these are products for sophisticated investors.**

You may have recently been approached to take a closer look at the **Digital World product. We would like to advise you that we no longer support or promote this Company and its products.**

If you believe you have a demand for such guaranteed notes, please advise Frank Perillo or myself. We will be more than happy to advise you on what is available in the market.

Regards,

(our emphasis)

[32] One month later, on March 11, 2002, the manager of operations at IForum, sent a letter to Wishnousky. The letter reiterated that IForum no longer supported or promoted DWF products.

Over the recent past we have had many conversations and or memos concerning Digital World and we are constantly reiterating the same concerns. **We believe there is a demand for such products. However, it is important to understand that these products do not replace GICs.** We need to respect

the conditions stated by the Quebec Securities Act. In the case of Sharron Kelly, without a proper legal opinion on the investment proposed, we as a registered firm in Quebec we will not participate in this transaction.

We would like to **advise you again that we no longer support or promote Digital World products.** (...)

(our emphasis)

[33] However, IForum did not inform its clients at this time that it had change its position regarding the DWF product.

[34] Shortly thereafter, Mrs. Rhind invested \$635,000 in a DWF GIC, obtaining another promissory note on May 13, 2002.

[35] A year later, on May 13, 2003, the investment was renewed for a two year term.

[36] It is only in 2004, that IForum informed some of its clients that it did not support the DWF products.

[37] In 2004, Mrs. Rhind contacted IForum and was told by its compliance officer to address her complaint to DWF and the AMF.

PLAINTIFF'S ALLEGATIONS

[38] The \$730,000.00 which Mrs. Rhind invested in DWF represented over two-thirds of her life savings.

[39] Mrs. Rhind's investments in DWF were based solely and entirely on Wishnousky's advice.

[40] Prior to Mrs. Rhind's first investment in December 2001, Wishnousky assured her that the DWF product had been approved by his firm, IForum.

[41] Mrs. Rhind received a letter from Wishnousky dated December 18, 2003, written on IForum stationary, in which he continued to promote the DWF investment, asserting in particular that:

Digital World Financial Inc. Corporate Debt notes are issued and secured by DWF Inc. and carries (sic) a written promise to repay the principal and interest on the date / year of maturity based on the financial profitability of the company.

[42] In this action Mrs. Rhind asks for the repayment of her DWF promissory notes and tenders the duly endorsed originals.

[43] Mrs. Rhind alleges that Wishnousky is jointly liable with DWF for the repayment of the DWF promissory notes.

[44] Furthermore, Mrs. Rhind claims that IForum should indemnify her. At the time Wishnousky encouraged Mrs. Rhind to purchase the DWF product, Wishnousky was a sales representative associated with IForum, which was responsible for overseeing his actions and conduct.

[45] Mrs. Rhind argues that in light of IForum's bankruptcy Lloyd's is liable as the insurer of IForum, in virtue of article 2501 C.C.Q. and can be called to answer for its insured's liability.

[46] Mrs. Rhind claims that IForum is liable pursuant to section 80 of an *Act respecting the distribution of financial products and services*³. She is also claiming extra-judicial fees and disbursements from IForum and Lloyd's incurred in the pursuit of her case.

[47] She also claims that as the insurer of Wishnousky and IForum, Lloyd's is responsible for their negligence.

[48] Finally, Mrs. Rhind is seeking an order of provisional execution of the judgment to be rendered herein, notwithstanding appeal, in view of the Defendants' conduct and her advanced age and state of health.

IFORUM AND LLOYD'S ALLEGATIONS

[49] IForum alleges that Mrs. Rhind is a sophisticated investor, having taken a ten hour course on investments.

[50] They also allege that Mrs. Rhind's DWF investments were not made through IForum: Mrs. Rhind did not get any notices from IForum confirming her DWF purchases and both her initial investments in DWF and the renewals were processed directly by DWF. Mrs. Rhind made payment directly to DWF. Furthermore, there were no references to her DWF investments on Mrs. Rhind's monthly statements from IForum.

[51] According to the Defendants, Mrs. Rhind knew that Wishnousky was acting as the vice-president corporate services of DWF when he sold her the DWF products. When on May 17, 2002, Wishnousky wrote to Mrs. Rhind confirming her second investment, he signed the letter as vice-president, corporate services of DWF, under the firm's letterhead.

[52] IForum alleges that Mrs. Rhind considered Wishnousky and DWF to be responsible for her loss since she only claimed payment or indemnification from Wishnousky, DWF and AMF and did not send a demand letter to IForum before proceedings were taken.

³ R.S.Q., c. D-9.2.

[53] As a result, IForum and Lloyd's claim that the only parties who can be found liable for Mrs. Rhind's loss are Wishnousky and DWF.

ISSUES

[54] 1. Is DWF liable for the repayment of Mrs. Rhind's promissory notes?

[55] 2. Is Wishnousky's liability engaged as a result of Mrs. Rhind's investments in the DWF promissory notes?

[56] 3. Did IForum have an obligation to act diligently toward Mrs. Rhind, and if so did it respect that obligation?

[57] 4. Is Lloyd's bound as the insurer of Wishnousky and IForum to indemnify Mrs. Rhind pursuant to section 2501 C.C.Q.?

1) Is DWF liable for the repayment of Mrs. Rhind's promissory notes?

[58] DWF issued promissory notes that have not been repaid despite reaching maturity and Mrs. Rhind's demand for payment. DWF is contractually responsible for the payment of the promissory notes. DWF will be ordered to pay:

- a) \$100,937.50 plus interest calculated at the rate of 5.25% as of December 5, 2002, pursuant to the Digital World Financial Inc. guaranteed investment certificate bearing number 00481;
- b) \$674,212.50 plus interest calculated at the rate of 7.75% as of May 13, 2003, pursuant to the Digital World Financial Inc. guaranteed investment certificate bearing number 00493;

2) Is Wishnousky liability engaged as a result of Mrs. Rhind's investments in the DWF?

[59] Wishnousky caused Mrs. Rhind to invest a substantial amount of her money in an unsecured investment, representing to her that it was guaranteed.

[60] Furthermore, the lack of diversification in Mrs. Rhind's investment portfolio exposed her to a substantial risk and constitutes negligence on behalf of Wishnousky.

[61] Wishnousky knew that his client, then an 82 year old widow, was a vulnerable client with a minimal tolerance for risk.

[62] Mrs. Rhind, who is an intelligent, articulate woman, is not a sophisticated or knowledgeable investor. The fact that she received confirmation of her investments only from DWF, and not on IForum's monthly statements, did not alert her to the fact

that these investments were made without the knowledge of IForum. Mrs. Rhind had full confidence in Wishnousky and had no reason to suspect of any wrong doing.

[63] Wishnousky admits not having done any due diligence on DWF before investing \$95,000 of his client's money in a product represented as a GIC and which in fact was not secured or guaranteed.

[64] Furthermore, Wishnousky acted in conflict of interest in recommending the DWF investments. Although Wishnousky had obtained the title of vice-president corporate services of DWF, he did not disclose this fact to Mrs. Rhind before she made her second investment. As a result of his status at DWF, Wishnousky received a higher rate of commission on the second investment by Mrs. Rhind.

[65] The Court concludes that when Mrs. Rhind purchased her investments in 2002, she knew there was an association between Wishnousky and DWF. However, the evidence does not demonstrate that this knowledge changed Mrs. Rhind belief that Wishnousky was acting as a representative of IForum from 1997 until October 28, 2004, when she was informed that he was no longer employed as IForum's representative.

[66] When Wishnousky counselled Mrs. Rhind to invest additional money in a second GIC in May 2002, and when she renewed both GIC's in December 2002 and May 2003, Wishnousky did not reveal to Mrs. Rhind that IForum no longer promoted or supported this product.

[67] The Court refers to the Supreme Court of Canada decision in *Placements Armand Laflamme inc. c. Roy et Prudential Bach Commodities Canada Ltd*⁴ which reviews the scope of the duty that falls on a broker. A parallel may be drawn as to the duties that fall on an agent such as Wishnousky.

[68] In *Laflamme*, the Court reviewed the obligations of an agent toward his client. An agent is required to adequately inform his client respecting proposed financial products. An agent must inform his client of the suitability of a proposed investment in light of the investment's risk and the client's objectives.

[69] The Court finds that Wishnousky is in breach of the obligations set out in the *Laflamme* decision.

[70] Also, the Court concludes that Wishnousky did not act toward Mrs. Rhind "with competence and professional integrity", as this obligation is stated in the *Act respecting the distribution of product and financial services*⁵.

⁴ [2000] 1 R.C.S. 638. See also a recent Court of Appeal decision in *Richter & Associés c. Merrill Lynch Canada inc.*, 2007 QCCA 124, par. 75, February 5, 2007.

⁵ *Op. cit* not 3, section 16.

[71] In the present case, the Court concludes that Wishnousky is personally responsible for the loss sustained by Mrs. Rhind as a result of her investments in DWF.

[72] In light of the fact that the Autorité des marchés financiers indemnified \$200,000 of Mrs. Rhind's loss, the amount of the condemnation against Wishnousky will be reduced accordingly⁶.

3) Did IForum have an obligation to act diligently toward Mrs. Rhind and if so, did it respect that obligation?

[73] Mrs. Rhind alleges that IForum has a duty to supervise its employee Wishnousky and is liable for his actions pursuant to section 80 of an *Act respecting the distribution of financial product and services*⁷ which states that:

80. A firm is responsible for any injury caused to a client by the fault of one of its representatives in the performance of the representative's functions.

[74] Other relevant provisions of the statute are the following:

9. A securities representative is either a group savings plan representative, an investment contract representative or a scholarship plan representative who does not act for a person registered as a dealer acting as principal or as agent within the meaning of the Securities Act (chapter V-1.1).

A group savings plan representative is a natural person who offers shares or units in mutual funds.

An investment contract representative is a natural person who offers a participation in investment contracts within the meaning of the second paragraph of section 1 of the Securities Act.

A scholarship plan representative is a natural person who offers units in scholarship plans.

16. All representatives are bound to act with honesty and loyalty in their dealings with clients.

They must act with competence and professional integrity.

76. Legal persons who register as firms must establish that they have subscribed for liability insurance that is consistent with the requirements determined by regulation. They must also establish that every representative

⁶ In application of the Regulation respecting the eligibility of a claim submitted to the Fonds d'indemnisation des services financiers, R.R.Q. c. D-9.2, r.1.

⁷ *Op.cit* note 3.

acting on their behalf without being an employee has liability insurance that is consistent with the requirements determined by regulation.

Where an insurance fund has been established, such legal persons and every representative acting for them without being an employee must, instead, pay the insurance premium fixed by the Authority.

84. All firms and their executive officers are bound to act with honesty and loyalty in dealings with clients.

Competence.

They must act with care and competence.

1998, c. 37, s. 84.

Compliance.

85. A firm and its executive officers shall oversee the conduct of the firm's representatives. They shall ensure that the representatives comply with this Act and the regulations.

1998, c. 37, s. 85.

Compliance.

86. The firm shall ensure that its executive officers and employees comply with this Act and the regulations.

[75] The question to be decided is whether Wishnousky was acting as a sales representative of IForum when he sold the two investments to Mrs. Rhind and advised her to renew them for a two year term.

[76] The evidence clearly demonstrates that Wishnousky did not process the two DWF investments through the accounting system of IForum, nor was his commission paid through IForum. His commission was paid by DWF.

[77] It is also clear that Mrs. Rhind was a client of IForum between 1997 and 2004, during the same period that Wishnousky was associated with this firm, and that her other investments were managed by Wishnousky at IForum.

[78] The authors Raymond D. Lemoyne and Georges R. Thibodeau⁸ deal with the question of the liability of an investment firm for the acts of its representatives:

⁸ La responsabilité du courtier en valeurs mobilières du Québec. *Revue du Barreau*, tome 51, n° 4, novembre 1991, p. 524.

F. LA RESPONSABILITÉ DE LA MAISON DE COURTAGE POUR LES ACTES ET OMISSIONS DE SON REPRÉSENTANT

En plus des cas où elle pourrait être tenue directement responsable d'un défaut de surveillance, la maison de courtage est responsable à titre de commettant des dommages causés par ses représentants dans l'exécution de leurs fonctions.

A cet égard, **les tribunaux ont donné une interprétation large à la notion des fonctions du représentant dont la firme sera responsable : il suffit que l'acte du représentant ait un rapport quelconque avec les opérations de valeurs mobilières. La maison est responsable des dommages causés par des opérations non autorisées, ou par des opérations qui peuvent selon les circonstances être inappropriées.** Cette responsabilité peut même s'étendre à des opérations sur des valeurs dont la distribution publique est interdite, si pareille opération se réalise dans le compte établi chez le courtier. **Il en résulte alors une présomption de fait que les actes dommageables ont été accomplis dans l'exercice des fonctions du représentant. Cette présomption devra être repoussée par la maison en établissant de façon prépondérante que le fait du représentant n'a été posé qu'à l'occasion seulement de ses fonctions et non dans leur exécution.** Par ailleurs, si le client n'est pas au courant que l'illégalité a été commise par le représentant en dehors de ses fonctions, mais l'apprend et accepte la situation, il perd son recours contre le patron.

(our emphasis)

[79] This Court held the following in *Marseille c. Bourque*⁹:

Vu la preuve et les documents versés au dossier, le Tribunal considère que le défendeur Paul Bourque est responsable de tous les dommages subis par les demandeurs et la défenderesse, Valeurs mobilières Desjardins inc. est responsable de son employé **n'ayant exercé aucun contrôle de quelque façon que ce soit sur ses agissements. Bien plus, le Tribunal note un laxisme quant à l'implantation de mesures permettant à cette dernière de vérifier les agissements et décisions de ses courtiers.**

(our emphasis)

[80] The Court of Appeal decision in *J.L. Lévesque et L.M. Beaubien Itée c. Dr Paul McMahon*¹⁰ provides guidance to the Court. In this case, the Court of Appeal had to decide whether the defendant firm should reimburse a client following an illegal investment made by its broker:

(...) je dois dire avec respect pour toute opinion contraire qu'à ce sujet je ne partage pas l'opinion du juge de première instance et qu'à mon avis le docteur

⁹ *Marseille c. Bourque*, REJB 2003-40802 (C.S.), par. 44.

¹⁰ *Azimut AZ 7801-1164* (C.A. 1978).

McMahon n'a jamais réussi à prouver que Provencher agissait dans l'exercice de ses fonctions comme vendeur de l'appelante.

En effet, il a été prouvé que Provencher dans toutes les transactions qu'il a faites dans les dix ans de son commerce avec le docteur McMahon **agissait pour lui-même et non pas pour ses employeurs** J.L. Lévesque & L.G. Beaubien Ltée sauf peut-être quant à une seule transaction qui a été retracée dans les livres de l'appelante, soit 3,000 actions au prix total de \$100.00 en date du 31 octobre 1960.

Même là, le docteur McMahon aurait peut-être encore pu réussir dans sa demande s'il était parvenu à prouver que lui-même était de bonne foi et que l'appelante était au courant des agissements de son vendeur.

La bonne foi du docteur McMahon me paraît plus que douteuse à la lecture de la preuve ou bien s'il était de bonne foi sa naïveté serait assez extraordinaire: pendant près de dix ans il a toujours fait affaires avec Raymond Provencher lequel lui remettait des reçus portant l'en-tête L.G. Beaubien Cie, compagnie qui n'existait plus depuis le 27 février 1963, reçus qui comportaient l'indication telle que mentionnée ci-dessus: "qu'il était provisoire et qu'il serait remplacé par un reçu officiel dans les trois jours"; le docteur McMahon aurait transigé par Raymond Provencher plus de \$100,000.00 de valeurs sans jamais recevoir un tel reçu officiel et il ne s'en serait pas inquiété.

Au dossier conjoint aux pages 213 et 214, on voit que le docteur McMahon se servait de ses transactions avec Raymond Provencher dans le but d'éviter le fisc et cette illégalité que les deux parties acceptaient nous permet de douter sérieusement des affirmations du docteur McMahon lorsqu'il prétend qu'il croyait que Raymond Provencher agissait pour le compte de ses employeurs lorsqu'il lui aidait ainsi à échapper aux lois de l'impôt. Comment croire, par exemple, que Raymond Provencher agissait pour J.L. Lévesque & L.G. Beaubien Ltée lorsqu'il faisait des chèques personnels au docteur McMahon?

Quoi qu'il en soit même si le docteur McMahon était de bonne foi et qu'il ne s'était jamais rendu compte que Raymond Provencher agissait pour lui-même et non pas pour l'appelante, cela à mon point de vue ne change rien au débat à moins que le docteur McMahon ait pu réussir à prouver que la compagnie appelante ratifiait les actes de son vendeur ou même les tolérait.

Au contraire, la preuve démontre d'une façon catégorique que l'appelante ignorait complètement les agissements de son vendeur, que ces agissements étaient strictement défendus par les règlements de la compagnie, et que ce n'est qu'après le décès de Raymond Provencher que ces faits ont été connus.

(our emphasis)

[81] The following principles are applicable to the present situation:

1. The firm has duty of surveillance, to protect its clients;
2. When the duty of surveillance is not adequately performed, the firm may be liable toward its clients;
3. When the injured party is in good faith;
4. When the firm has knowledge of or tolerates the actions of its representative;
5. When the representative's actions are related to the firm's business;
6. There is a presumption that the firm is responsible for the representative's actions based on the firm's duty of surveillance.

[82] As appears from the National Assembly debates and the report from the Permanent commission on public finances¹¹, the purpose of the *Act respecting the distribution of financial products and services*¹² is to protect consumers.

[83] It is for IForum to prove that it adequately oversaw Wishnousky's conduct.

[84] IForum provided its representatives with minimal support. It had an accounting system (Back Office) to register transactions and pay commissions once they were received and available for distribution.

[85] In the present case, Wishnousky and almost every other IForum sales representative worked from their respective homes or offices but not at IForum's premises. Nevertheless, IForum authorised its representatives to use IForum stationary with its letterhead when communicating with clients.

[86] IForum organised occasional seminars in order to offer its sales representatives some continuing education. IForum's representatives occasionally received bulletins from the firm supporting or criticising a product that was available on the market.

[87] IForum's representatives were solely responsible for recruiting clients and managing their portfolios.

[88] In the present case, Wishnousky registered himself as a sales representative of DWF in January 2001. In June 2001, Mr. Tiberi registered himself, Wishnousky and 77 other IForum sales representatives as sales representatives of DWF.

[89] In light of this fact, and considering the content of the June 18, 2001 memos, the Court concludes that IForum fully endorsed the DWF product as early as June 2001.

¹¹ Québec, Assemblée nationale, Commission du budget et de l'administration, «Rapport quinquennal sur la mise en œuvre de la Loi sur intermédiaires de marché», décembre 1996; Québec, Assemblée nationale, *Journal des débats*, 10 juin 1998, 11 juin 1998, 16 juin 1998 et 17 juin 1998; Québec, Assemblée nationale, *Journal des débats*, 18 juin 1998.

¹² *Op. cit* note 3.

IForum's former president Mr. Tiberi was untruthful when he told the Court that after completing its due diligence IForum distanced itself from the DWF product and never endorsed it.

[90] IForum promoted the DWF product from June 18, 2001, until February 5, 2002, when it sent a letter to its sales representatives informing them that IForum no longer supported the DWF product because of its highly speculative nature.

[91] In light of its sudden change of opinion after February 5, 2002, IForum had a duty not only towards its sales representatives but also towards its clients to inform them that it no longer supported the DWF product.

[92] IForum's change of opinion had nothing to do with the profitability of the product but was caused by IForum's understanding of the true nature of the DWF product. IForum initially presented the DWF product as a guaranteed investment equivalent to a GIC, guaranteed by an institutional bond. Later, IForum corrected this, stating that the guarantee of repayment depended entirely on the financial capacity of DWF to honour its commitment. DWF was a new company with no assets to guarantee repayment. The DWF product was only appropriate for sophisticated investors who could accept significant risks, not exactly the profile of a 82 year old widow.

[93] In a letter dated March 11, 2002, addressed to Wishnousky, IForum put in writing what its manager had apparently said several times to Wishnousky: that IForum no longer supported the DWF product and that Wishnousky should stop selling it.

[94] At trial, Mr. Tiberi confirmed that he knew that Wishnousky "was not a very good listener".

[95] Therefore, as of March 2002, IForum knew that Wishnousky was continuing to promote the DWF product although he had been told to stop.

[96] In the present case, the Court finds that IForum is liable toward Mrs. Rhind who purchased the DWF product during the period when IForum was promoting and supporting it. When IForum withdrew its support and knew that its sale representative Wishnousky was still actively selling the product, IForum had an obligation to alert Mrs. Rhind. As a result of its failure to do so, IForum's liability toward Mrs. Rhind is established.

[97] Had Mrs. Rhind been informed before May 2002 of the highly speculative nature of the DWF promissory note, the Court believes that she would not have invested \$635,000 in DWF or renewed her investment a year later.

[98] It is not until 2004 that IForum informed Mrs. Rhind that it had changed its mind concerning the DWF product.

4) Is Lloyd's bound as the insurer of Wishnousky and IForum to indemnify Mrs. Rhind pursuant to section 2501 C.C.Q.?

[99] Mrs. Rhind alleges that as an injured party, she can invoke article 2501 C.C.Q. to hold Lloyd's responsible:

2501. An injured third person may bring an action directly against the insured or against the insurer, or against both.

The option chosen in this respect by the third person injured does not deprive him of his other recourses.

[100] Pursuant to article 2502 C.C.Q. an insurance policy must be interpreted largely and unrestrictively.

[101] The essence of Lloyd's defence is that the insurer's obligation to indemnify only arises if the sales representative acted within the scope of his professional duties.

[102] The following provisions of the insurance policy are raised by Lloyd's in its defence:

- Le bénéfice de l'assurance est restreint à la garantie des seules réclamations présentées à l'Assurée pour la première fois et communiquées à l'Assureur pendant que la police est en vigueur.
- Article 1 Garantie, paragraphe d): l'Assureur paiera pour le compte de l'Assuré (...) dans le cas d'un représentant rattaché à un cabinet sans y être employé, découlant de fautes, d'erreurs, de négligences ou d'omissions commises dans l'exercice de ses **activités professionnelles...**;
- Article 3, Période d'assurance, paragraphe a): À moins d'indication contraire, cette police s'applique uniquement: a) aux fautes, erreurs, négligences ou omission commise par l'Assuré dans l'exercice de ses activités professionnelles (...);
- Article 5, Définition, paragraphe d): les mots activités professionnelles signifient les services qui relèvent des activités d'un représentant qui agit pour le compte d'un cabinet sans y être employé, d'un représentant autonome, d'un cabinet ou d'une société autonome, dans la mesure où ceux-ci sont rendus conformément aux dispositions applicables de la Loi sur la disposition des services financiers, ses modifications et ses règlements (...).

(our emphasis)

[103] Lloyd's refuses coverage on the grounds that Wishnousky acted outside the scope of his professional activities.

[104] Nevertheless, for the reasons given above, the Court concludes that Wishnousky acted within the scope of his professional activities when he sold the DWF investments to Mrs. Rhind. Therefore, Lloyd's defence fails on this ground.

[105] Lloyd's also argues that it is not bound to indemnify Mrs. Rhind because Wishnousky omitted to report the claim to Lloyd's in a timely manner. Lloyd's confirmed however, that it was notified of the claim when it was served upon IForum. For this reason, Lloyd's argument fails. Furthermore, Lloyd's was unable to prove that it suffered any prejudice resulting from late notice.

[106] Lloyd's must answer for the actions of Wishnousky and IForum.

[107] Finally, the Court does not grant Mrs. Rhind's claim for extra-judicial fees and disbursements based on an alleged abuse by Lloyd's and IForum in contesting the Plaintiff's claim. The Court does not find any abuse in the defence conducted on behalf of IForum and Lloyd's. As for the other two defendants, they did not offer any defence.

[108] The Court will not order provisional execution of this judgment notwithstanding appeal. Although the Plaintiff is now 87 years old and frail and the amount of money involved is important, the Court does not consider that it is appropriate to order an immediate payment in the event an appeal is lodged.

[109] **THEREFORE THE COURT:**

[110] **GRANTS** the Plaintiff's action:

[111] **CONDEMNS** the Defendants, Digital World Financial Inc., William W. Wishnousky and Certain Underwriters at Lloyd's to pay to the Plaintiff, Betty R.L. Rhind, the following amounts:

- a) \$100,937.50 plus interest calculated at the rate of 5.25% as of December 5, 2002, pursuant to the Digital World Financial Inc. guaranteed investment certificate bearing number 00481 and
- b) \$674,212.50 plus interest calculated at the rate of 7.75% as of May 13, 2003, pursuant to the Digital World Financial Inc. guaranteed investment certificate bearing number 00493 the whole to be reduced by an amount of \$200,000 received through the indemnification program of the Autorité des marchés financiers;

[112] **TAKES ACT** of Mrs. Rhind's offer to redeem her Digital World Financial Inc. investment certificates upon receiving full payment from Digital World Financial Inc. on the guaranteed investment certificates bearing numbers 00481 and 00493;

[113] **THE WHOLE**, with costs against the defendants.

CHANTAL CORRIVEAU, J.S.C.

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Date of hearing: October 11, 12 and 13, 2006