

Amended pursuant to the Order of Madam Justice Martinson dated September 17, 2001
(pronounced, but not yet entered)
Original filed May 16, 2001

No. S002736
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**MARK S. C. SCOTT and
CHRIS A. BALLINGALL**

PLAINTIFFS

AND:

**TD WATERHOUSE INVESTOR SERVICES (CANADA) INC. and
TD SECURITIES INC.**

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50

FURTHER AMENDED STATEMENT OF CLAIM

The Parties

1. The Plaintiff Mark S.C. Scott (“Scott”) is a resident of Vancouver, British Columbia. He has been a resident of British Columbia since at least November 1, 1999, having returned to Canada after an extended residence in Hong Kong.
2. The Plaintiff Chris A. Ballingall (“Ballingall”) is Scott’s spouse and a resident of British Columbia since at least November 1, 1999.
3. The Defendant TD Securities Inc. (“TD Securities”) is incorporated pursuant to the laws of Ontario, and has a registered office in British Columbia at Pacific Centre, 4th Floor, 700

West Georgia St., Vancouver.

4. The Defendant TD Waterhouse Investor Services (Canada) Inc. (“TD Waterhouse”) is incorporated pursuant to the laws of Ontario, and has a registered office in British Columbia at Pacific Centre, 4th Floor, 700 West Georgia St., Vancouver.

The Account

5. In or about July 1996, Scott entered into a standard form Introducing Broker Customer Agreement (the “Broker Agreement”) with Green Line Investors Services (Hong Kong) Inc. (“Greenline Hong Kong”) to open a Direct Trading Account for the purpose of trading in securities through members of the Toronto-Dominion Bank Financial Group (“TD Financial Group”). TD Securities and TD Waterhouse are members of the TD Financial Group.
6. In or about September 1996, Scott opened a U.S. Dollar Direct Trading Account, also for the purpose of trading in securities through members of the TD Financial Group.
7. In or about February 1997, Scott’s Direct Trading Account was converted into a “President’s Account”, and his U.S. Dollar Direct Trading Account was converted into a U.S. Dollar “President’s Account”. All of the investments made by Scott and Ballingall relevant to this action were made through the U.S. Dollar President’s Account (hereinafter referred to as the “Account”).
8. At its inception, the Account was managed by Green Line Investor Services, a division of TD Securities.
9. On or about May 11, 1998, Scott and Ballingall submitted an application to make Ballingall a joint owner of the Account.

10. By letter dated September 28, 1998, the Defendant confirmed that Ballingall had been made a joint owner of the Account.
11. In or about July 1999, TD Bank combined its global discount brokerage operations to create TD Waterhouse Group, Inc. (“TD Waterhouse Group”). TD Waterhouse is a subsidiary of TD Waterhouse Group.
12. In or about September 1999, TD Waterhouse took over management of the Account, and assumed any contractual and other obligations owed by TD Securities to the Plaintiffs.

The Contract

13. The Broker Agreement provides that investment in securities shall be made through the TD Financial Group member and governed by a client agreement entered into by Scott and Ballingall and the applicable TD Financial Group member.
14. The Broker Agreement also provides that in the event of claims or disputes arising from investments through a TD Financial Group member, the appropriate course of action or proceedings will be against the appropriate TD Financial Group member.
15. All of the investments made by Scott and Ballingall that are relevant to this action were made through TD Securities or TD Waterhouse.
16. In accordance with the TD Securities Customer Agreement (the “Customer Agreement”), Scott accepted the terms of the Customer Agreement when he completed his first transaction with TD Securities in or about December 1996. Similarly, Ballingall accepted the terms of the Customer Agreement when she, in conjunction with Scott, made her first trade after becoming a joint owner of the Account, at the latest by November, 1998. The

Customer Agreement is a standard form agreement for clients of the TD Financial Group, including TD Securities and TD Waterhouse.

17. The terms and conditions incorporated by reference into the Customer Agreement do not include any reference to foreign exchange except the following: “Conversion of any foreign currency funds when necessary will take place at trade date, unless otherwise agreed.”
18. A TD Financial Group policy statement contains terms and conditions incorporated by reference into the Customer Agreement and provides as follows: “TD Waterhouse and its officers and employees must deal fairly, honestly and in good faith with clients.”
19. Collectively, the Broker Agreement, the Customer Agreement, and the terms and conditions incorporated by reference into the Customer Agreement constitute the contract between the Plaintiffs and the Defendants (the “Contract”).

Statutory and other duties

20. Both s. 14 of the British Columbia Securities Rules, B.C. Reg. 194/97 (the “Securities Rules”), and Part 2 of the Ontario Securities Commission Rule 31-505, “Conditions of Registration”, provide that a registered dealer or advisor of securities, and its officers, partners and salespersons, must “deal fairly, honestly and in good faith with . . . clients”.
21. Further, By-Law No. 29.1 of the Investment Dealers Association By-laws provides that:

Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any

business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

22. The Plaintiffs say that at all times relevant to this action, the Defendants were subject to the ethical obligations and duty of fair dealing imposed by s. 14 of the Securities Rules, Part 2 of the Ontario Securities Commission Rule 31-505 and By-Law No. 29.1 of the Investment Dealers Association By-laws.
23. Further, s. 36(2) of the Securities Rules describes the information that the confirmation for a purchase or sale of a security must disclose, including:
 - (c) the price at which the security was purchased or sold and the total cost of the purchase or total proceeds of the sale,
 - (d) the commission and fees charged for the purchase or sale,
 - (e) the date on which the purchase or sale took place,
 - (h) whether the registered dealer acted as principal or agent,
 - (i) whether the registered dealer used another dealer as its agent to effect the purchase or sale.

The Plaintiffs say that, at all times relevant to the within action, the Defendants were subject to the duty of disclosure provided for by s. 36(2) of the Securities Rules.

24. Further, the Plaintiffs say that the duties outlined in paragraphs 20 to 23 form part of the

custom of the securities industry, and therefore, at all times relevant to the within action, the Defendants were subject to a customary duty to deal fairly, honestly and in good faith with their clients.

25. The Plaintiffs say that, at a minimum, the duties of the Defendants and any affiliated companies were those of a broker to its client. The Plaintiffs say that the duties of a broker to its client include, *inter alia*, those of an agent acting for his or her principal. Accordingly, the Defendants and any affiliated companies had a duty to:

(a) act in the best interests of the Plaintiffs;

(b) not allow its personal interests to conflict with those of the Plaintiffs unless full and fair disclosure of all material facts relative to the transactions, including its interest in any transactions, was made to the Plaintiffs;

(c) not earn any undisclosed profits or commissions from the Plaintiffs.

26. In the alternative, if the duties of the Defendants and any affiliated companies are not those of an agent acting for his or her principal, the Plaintiffs say that the Defendants any affiliated companies acted as an undisclosed principal. Accordingly, the Defendants and any affiliated companies had a duty to disclose its conduct to the Plaintiffs and a duty not to earn any undisclosed profits or commissions from the Plaintiffs.

Trading activity

27. As of December 1, 1999, Scott and Ballingal held in the Account 697,000 shares of PT Medco Energi Corp. (“Medco”), an Indonesian company trading on the Jakarta Stock Exchange.
28. On or about December 6, 1999, Scott and Ballingall instructed the Defendant TD Waterhouse to sell through the Account 50,000 shares of Medco (the “1st Sale”).
29. On or about December 7, 1999, Scott and Ballingall instructed a representative of the Defendant TD Waterhouse to sell through the Account 197,000 shares of Medco (the “2nd Sale”).
30. On or about December 8, 1999, Scott and Ballingall instructed a representative of the Defendant TD Waterhouse to sell through the Account 100,000 shares of Medco (the “3rd Sale”).
31. On or about December 10, 1999, Scott and Ballingall instructed a representative of the Defendant TD Waterhouse to sell through the Account 100,000 shares of Medco (the “4th Sale”).
32. In or about mid-January, 2000, Scott and Ballingall received the December 1 to December 31, 1999 Account Statement for the Account (the “December 1999 Account Statement”). The December 1999 Account Statement provides the following data for each of the four sales:

1 st Sale:	Activity Date:	December 10, 1999
	“As of” Date ¹ :	no date indicated
	stock price (IDR):	3845.7710
	stock price (USD):	0.515
	exchange rate ² :	7463 (0.000134)
	proceeds (USD):	\$25,490.00
2 nd Sale:	Activity Date:	December 13, 1999
	“As of” Date:	December 7, 1999
	stock price (IDR):	4145.5621
	stock price (USD):	0.534
	exchange rate:	7752 (0.000129)
	proceeds (USD):	\$104,815.90
3 rd Sale:	Activity Date:	December 14, 1999
	“As of” Date:	December 8, 1999
	stock price (IDR):	4216.45
	stock price (USD):	0.543
	exchange rate:	7752 (0.000129)
	proceeds (USD):	\$53,980.00

¹ The “As of Date” appears in the monthly Account Statements next to the stock price and exchange rate data for the various transactions. It appears to represent the reference date for that data, and therefore, the date “as of” which the transaction occurred in fact.

² All exchange rates are first expressed as the number of Indonesian Rupiah necessary to purchase one U.S. Dollar and then vice versa.

4th Sale: Activity Date: December 16, 1999
 "As of" Date: December 10, 1999
 stock price (IDR): 4765.6342
 stock price (USD): 0.610
 exchange rate: 7813 (0.000128)
 proceeds (USD): \$60,520.00

33. The Reuter's Rate³ for the relevant dates compared with the actual exchange rate charged to the Plaintiffs is as follows:

		Reuter's Rate			Plaintiffs	minimum % premium ⁴
		high	low	Close		
1 st Sale	Order Date (Dec 6)	7245	7090	7150	7463	3.0
2 nd Sale	"As of" Date (Dec 7)	7225	7080	7170	7752	7.0
3 rd Sale	"As of" Date (Dec 8)	7225	7135	7190	7752	7.0
4 th Sale	"As of" Date (Dec 10)	7245	7185	7225	7813	7.8

34. The 1st Sale, the 2nd Sale, the 3rd Sale and the 4th Sale are hereinafter collectively referred to as the "Trades".

35. Other securities trades involving foreign currency exchange were transacted through the Account, and particulars of those transactions will be made known as and when they become available.

³ The Reuter's Rate tracks currency exchanges between financial institutions for a given currency. The Rate is indicative of the exchange rate that those institutions used for trades on a particular day and, therefore, is indicative of the currency's value or cost to the Defendants on that day.

⁴ The Plaintiffs do not know the rate at which the Defendants actually transacted the foreign exchange portion of Sales 1 through 4, or whether they used currency in their own account. The "minimum % premium" equals the difference between the highest rate recorded by Reuter's for the day in question, and the exchange rate actually charged to the Plaintiffs.

Breach of contract

36. The Plaintiffs say that it is an express or implied term of the Contract that when the Defendants or any affiliated companies, as part of a security transaction, conduct currency exchanges as a principal with their clients (the “Principal Exchanges”), the Defendants or any affiliated companies will charge a reasonable rate in light of the duties owed to those clients.

37. The Plaintiffs say that it is an express or implied term of the Contract that when the Defendants or any affiliated companies, as part of a security transaction, conduct currency exchanges as an agent for the Defendants’ clients (the “Agency Exchanges”), the Defendants or any affiliated companies will not charge or profit from any fees, commissions or rates of exchange that were not specifically provided for in the Contract and agreed to in advance.

38. The Plaintiffs say that it is an express or implied term of the Contract that the Defendants and any affiliated companies that participate in or facilitate the foreign exchange transactions will:

- (a) disclose any commissions, fees or charges they or any affiliated companies extract from foreign exchange transactions associated with securities trades;
- (b) disclose the basis upon which the Defendants and any affiliated companies set the foreign exchange rate for securities trades;
- (c) ensure that the Defendants and any affiliated companies obtain the best available foreign exchange rate for their clients;
- (d) not make any profit from the foreign exchange transactions associated with

securities trades;

(e) disclose whether the Defendants or any affiliated companies were acting as principal in relation to the foreign currency transactions;

(f) disclose any financial arrangements between the Defendants (or any affiliated companies) and those companies conducting foreign currency transactions for the Defendants' clients, that benefit the Defendants or affiliated companies in return for the right to conduct such foreign currency transactions .

39. In particular, the Plaintiffs say that there is nothing in the Contract which permits the Defendants to conduct currency exchanges at rates that are not the best available rates, are not reasonable, or that would yield a profit for the Defendants or any affiliated companies at the expense of clients. The Plaintiffs were not advised in advance that such rates would be used, nor did they agree to them.

40. The Plaintiffs say that the Defendants breached the Contract by:

(a) conducting the Principal Exchanges and Agency Exchanges at foreign exchange rates that were not reasonable in light of the duties owed to clients;

(b) conducting the Principal Exchanges and Agency Exchanges at foreign exchange rates which profited the Defendants or affiliated companies at the expense of clients; or

(c) conducting the Principal Exchanges and the Agency Exchanges at foreign exchange rates that were not the best available rates to the Defendants or any affiliated companies.

41. In addition, the Plaintiffs say that the Defendants breached the Contract by failing to

disclose to the Plaintiffs;

- _____ (a) the basis upon which the Defendants or any affiliated companies were setting the foreign exchange rate, or any commissions, fees, or charges they were extracting from the foreign exchange transaction;
- _____ (b) the fact that the Defendants or their affiliated companies were acting as principal in relation to the foreign exchange transactions;
- _____ (c) financial arrangements between the Defendants (or any affiliated companies) and those companies conducting foreign exchange transactions for the Defendants' clients, that benefitted the Defendants or affiliated companies in return for the right to conduct such foreign currency transactions.

42. _____ The Plaintiffs have sustained loss and damage as a result of these breaches of contract, particulars of which are calculated by reference to either:

- (a) the difference between the foreign exchange rate charged by the Defendants to effect Principal Exchanges and Agency Exchanges and a reasonable rate for such exchanges;
- (b) the difference between the foreign exchange rate charged by the Defendants to effect the Principal Exchanges and Agency Exchanges and an exchange rate that would not have yielded a profit for the Defendants or any affiliated companies; or
- (c) the difference between the foreign exchange rate charged by the Defendants to effect either the Principal Exchanges or the Agency Exchanges and the best available rate to the Defendants or any affiliated companies.

Breach of Duty

43. The Plaintiffs say that the Defendants breached the ethical obligations and duty of fair and honest dealing imposed by s. 14 of the Securities Rules, Part 2 of the Ontario Securities Commission Rule 31-505 and By-Law No. 29.1 of the Investment Dealers Association By-laws by:

- (a) conducting the Principal Exchanges and Agency Exchanges at foreign exchange rates that were not reasonable;
- (b) conducting the Principal Exchanges and Agency Exchanges at foreign exchange rates which profited the Defendants or any affiliated companies; and
- (c) conducting the Principal Exchanges and the Agency Exchanges at foreign exchange rates that were not the best available rates to the Defendants or any affiliated companies.

44. Further, the Plaintiffs say that the Defendants breached the duty to advise their clients of all commissions, fees or charges associated with securities trades imposed by the Defendants or any affiliated companies, and the basis upon which the Defendants or any affiliated companies were setting the foreign exchange rate, and whether the Defendants or any affiliated companies were acting as principal in relation to the foreign currency transactions.

45. Further, the Plaintiffs say that, pursuant to s. 36(2) of the Securities Rules, the Defendants had a duty to provide their clients with full particulars of securities trades, including, but not limited to, the particulars listed in paragraph 23 above, and that this duty was breached.

46. Further, the Plaintiffs say that the Defendants breached the customary duty to deal fairly, honestly and in good faith with their clients.

47. The Plaintiffs say that as a result of these breaches of the duty of care owed to the Plaintiffs, the Plaintiffs have sustained loss and damage, as particularized in paragraph 40.

Unjust enrichment

48. Further, or in the alternative, the Plaintiffs say that by reason of the foregoing, the Defendants have been unjustly enriched at the expense and to the detriment of the Plaintiffs in respect of the foreign exchange transactions that formed a part of the Trades, and there is no juristic reason for this enrichment and corresponding deprivation.

49. As such, the Defendants are constructive trustees of all amounts accruing to them as a result of the failure to conduct the Principal Exchanges and Agency Exchanges at a reasonable rate, all profits accruing to them or their affiliate subagents through and as a result of the Principal Exchanges and Agency Exchanges, and all sums in excess of the best available rate in relation to the Principal and Agency Exchanges. The Plaintiff says that such amounts must be returned to the Plaintiffs.

Subagency

50. The Plaintiffs says that the Defendants' affiliates acted as subagents of the Defendants in relation to any steps taken by the affiliates to facilitate or participate in foreign exchange transactions as part of securities trades conducted by the Plaintiffs. As such, the Plaintiffs say that the Defendants must repay any profit earned by its affiliates and are otherwise responsible for any wrongful conduct by its affiliates, as though such profit were earned or wrongful conduct performed by the Defendants.

Class Proceedings Act

51. The Plaintiffs seek to represent the following class of persons:

All clients of the Defendants resident in Canada who conducted securities trades through the Defendant from May 16, 1994 that included a foreign exchange transaction.

Relief sought

52. The Plaintiffs claim, on their own behalf, and on behalf of the class:

- (a) an order certifying the proceeding as a class proceeding;
- (b) general and special damages;
- (c) restitution;
- (d) a declaration of trust over sums received by the Defendant by reason of the foregoing;
- (e) costs pursuant to s.37 of the *Class Proceedings Act*, R.S.B.C. 1996, c.50;
- (f) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79;
- (g) such further and other relief as to this Honourable Court may seem just.

PLACE OF TRIAL: Vancouver, British Columbia

Dated at Vancouver, British Columbia, May 16, 2001.

GROIA & COMPANY

BRANCH MacMASTER

Per:

Per:

Solicitors for the Plaintiffs, Mark S.C.

Solicitors for the Plaintiffs, Mark S.C.

Scott and Chris A. Ballingall

Scott and Chris A. Ballingall

Address of solicitor:

P.O. Box 156
Suite 2880, Royal Bank Plaza, South Tower
Toronto, Ontario M5J 2J4
Phone: (416) 203-2115
Fax: (416) 203-9231

Address of Solicitor:

1210-777 Hornby St.
Vancouver, B.C. V6Z 1S4
Phone: (604) 654-2999
Fax: (604) 684-3429