

Re O'Reilly

IN THE MATTER OF:

The Investment Dealer and Partially Consolidated Rules and the Dealer Member Rules

and

James O'Reilly

2025 CIRO 09

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: January 20, 2025 in Toronto, Ontario

Decision: February 5, 2025

Hearing Panel:

Christopher Portner, Chair, Guenther W. K. Kleberg and Mary Savona

Appearances:

Kathryn Andrews, Senior Enforcement Counsel, and Maria Di Clemente, Enforcement Counsel

Bruce O'Toole, for James O'Reilly

James O'Reilly (present)

REASONS FOR DECISION ON SANCTIONS

BACKGROUND

[1] On February 28, 2024, the Canadian Investment Regulatory Organization ("CIRO") issued a Notice of Hearing stating that an initial appearance would be held before a hearing panel pursuant to Rule 8200 of the Investment Dealer and Partially Consolidated Rules to schedule a hearing in the matter of James O'Reilly (the "Respondent").

[2] Concurrently with the issuance of the Notice of Hearing, Enforcement Staff of CIRO ("Staff") issued a Statement of Allegations in which they alleged that, during 2021 and 2022, the Respondent engaged in personal financial dealings with clients, contrary to Dealer Member Rule 43.1 (in 2021) and Rule 3115 (in 2022) of the Investment Industry Regulatory Organization of Canada ("IIROC"), a predecessor of CIRO.

[3] Rule 43.1 (during 2021) and 3115 (during 2022) provided that Approved Persons must not, directly or indirectly, engage in personal financial dealings with clients, which includes borrowing money from clients.

[4] The Respondent commenced working in the financial services industry in 1997 and worked for two firms before joining Assante Capital Management Ltd. ("Assante") in June 2016.

[5] Following two pre-hearing conferences, the Panel was advised that Staff and the Respondent had entered into an Agreed Statement of Facts on September 26, 2024 (the "ASF") and that the Panel would be asked to make a finding of liability on the basis of the ASF on October 21, 2024, the first day on which the hearing on the merits had been scheduled to commence.

[6] In the ASF, the Respondent admitted to engaging in personal financial dealings with clients contrary to IIROC Dealer Member Rule 43.1 (in 2021) and IIROC Rule 3115 (in 2022). More specifically, the Respondent admitted that, directly or indirectly through corporate entities, he had obtained \$1.6 million from three sets of clients (the "Clients") and used the funds in connection with three real estate development projects without the knowledge or approval of Assante. The Respondent needed the funds to purchase and renovate various

commercial or residential properties, which the Clients agreed to lend or otherwise provide to the Respondent

[7] During the relevant period, the Respondent was a Registered Representative with Assante. He has not been a CIRO registrant since November 2022.

[8] Assante's Sales Compliance Manual prohibits personal financial dealings with clients. In 2021 and 2022, the Respondent erroneously affirmed to Assante that he had complied with that requirement.

[9] On October 21, 2024, the Panel heard oral submissions on liability from Staff and Mr. O'Toole, counsel to the Respondent. In essence, the Panel was advised that, at the time the ASF was signed by the parties, a total amount of \$305,000 had been repaid to two of the Clients. The third client had not received any repayment of the principal amount advanced to the Respondent.

[10] On behalf of Staff, Ms. Andrews submitted that the ASF provided the basis for a finding of liability against the Respondent and that a penalty hearing should be scheduled in December 2024. She further submitted that a delay of two months to permit the Respondent to repay all amounts owing to the Clients, as he had undertaken to do, was in the public interest given that the Respondent is not currently a CIRO registrant.

[11] The submissions by Staff were agreed to by Mr. O'Toole on behalf of the Respondent, other than the date of the penalty hearing, which he proposed to take place in January 2025.

[12] Following its deliberations, the Panel advised the parties of its decision that the ASF clearly established that the Respondent had contravened IROC Dealer Member Rule 43.1 (in 2021) and IROC Rule 3115 (in 2022). The Panel also confirmed that a sanctions hearing would be held on January 20, 2025.

[13] In their written Sanctions Submissions dated January 13, 2025, Staff stated that the Respondent had provided evidence that he had repaid an additional \$300,000 to two of the Clients, leaving a balance owing to the third set of Clients in the amount of \$1.0 million. As a result, Staff sought the following sanctions:

- (a) a three-month prohibition on any re-registration by the Respondent with CIRO;
- (b) a fine in the amount of \$30,000; and
- (c) disgorgement in the amount of \$1.0 million.

[14] Staff also sought costs in the amount of \$15,000 and provided an affidavit of CIRO's Enforcement Litigation National Coordinator, which was attached to the Bill of Costs. The Bill of Costs sets out in detail that the cost of the prosecution was \$65,230.50, and the cost of the investigation was \$64,625.50 for a total of \$129,856.

[15] Four days before the sanctions hearing, the Respondent provided Staff and the Panel with his Sanctions Submissions and Affidavit, both dated January 16, 2025. In both documents, the Respondent stated that, on the same day, he had repaid \$1.0 million plus interest, legal fees and other expenses to the third set of Clients and that all the amounts he had obtained from the Clients as a result of his misconduct had been repaid.

[16] At the commencement of the sanctions hearing on January 20, 2025, Staff advised the Panel that, as the Respondent had provided evidence that the three sets of Clients had been repaid after Staff's written Sanctions Submissions were filed, they were no longer seeking disgorgement.

POSITIONS OF THE PARTIES

A. Staff

[17] In their written and oral submissions, Staff submitted that sanctions should achieve both specific and general deterrence and cited the decision of the Supreme Court of Canada in *Re Cartaway Resources Corp.*

[18] ¹ in which the Court addressed the important role of general deterrence in making orders that are both protective and preventive as follows:

60 In my view, nothing inherent in the Commission's public interest jurisdiction, as it

¹ [2004] 1 S.C.R. 672 at paras. 60-61

was considered by this Court in *Asbestos, supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: “The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others” (para. 125).

61 The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines “preventive” as “[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle”. A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

[19] Staff also cited *Re Wong*² in which an IIROC hearing panel stated that:

29 To achieve both general and specific deterrence, the penalties imposed must be appropriately unpleasant to the respondent taking into account the respondent's specific misconduct, and must also be in line with industry expectations. As stated in *Re Mills*, [2001] I.D.A.C.D. No. 7 at p. 3:

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for conduct under consideration, it may undermine the goals of the Association's disciplinary processes; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Counsel in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is preventative rather than punishment.

[20] Having regard to CIRO's Sanction Guidelines, Staff referred to the following five key factors in determining sanctions.

[21] With respect to the number, size and character of the transactions in issue, Staff submits that the Respondent's personal financial dealings involved three sets of Clients who provided a total of \$1.6 million to the Respondent. The amount was significant, and the misconduct took place over a two-year period, which is an aggravating factor.

[22] The personal financial dealings show a pattern of misconduct as the Respondent approached the Clients on a number of occasions for substantial amounts to fund the three real estate projects.

[23] The Respondent's misconduct was intentional with respect to all of his personal financial dealings. He approached the Clients with the proposed investments in which he had an interest and did not inform, or seek the approval of, Assante, his Dealer Member. He also affirmed to Assante that he had complied with Assante's Sales Compliance Manual, which was not accurate.

[24] The intentional and deceptive nature of the Respondent's conduct further supports the need for the sanctions proposed by Staff.

[25] The Clients sustained harm as they did not receive the return on their investments as assured by the Respondent. Furthermore, none of the Clients' Know-Your-Client forms indicated that any of them had sophisticated investment knowledge as alleged by the Respondent in his Response to the Statement of

² 2010 IIROC 50 at para 29

Allegations. The Respondent's conduct was harmful to market integrity and the reputation of the marketplace.

[26] A further factor in CIRO's Sanction Guidelines is the extent of harm to market integrity or the reputation of the marketplace. In this regard, Staff cited *Re Little*³ in which the hearing panel stated:

It is our view that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect which the transgressions could have upon that reputation. The public interest demands that Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people's money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming.

[27] Staff submitted that the proposed sanctions are consistent with those imposed by hearing panels in prior cases that address similar misconduct in comparable circumstances. They appended to their written submissions a chart summarizing a number of prior decisions including the following:

- (a) *Re Blackmore*⁴, in which the respondent engaged in outside business activities by facilitating off-book investments in private placements by five clients in the amount of \$780,000 without the approval of his firm and contrary to Rule 29.1. The matter involved a settlement, which provided for a fine of \$30,000, a 45-day suspension and costs of \$2,500.
- (b) *Re Rudensky*⁵, in which the respondent engaged in personal financial dealings with a client of his firm by borrowing \$3.0 million from the client contrary to Rule 43. The matter involved a contested hearing, which resulted in a fine of \$5,000 for the contravention of Rule 43, a fine of \$25,000 for the contravention of Rule 29.1, disgorgement of \$25,923, a suspension from registration for two years and costs of \$24,500.
- (c) *Re O'Brien*⁶, in which the respondent engaged in personal financial dealings with a client by borrowing at least \$156,603 without the knowledge or approval of his firm contrary to Rule 43. The matter involved a contested hearing, which resulted in a fine of \$100,000, prohibition on registration for two years (reduced to nine months on appeal), supervision for the first 18 months on re-entry to the investment industry, a Conduct and Practice Handbook ("CPH") examination following the conclusion of suspension and costs of \$20,000.

[28] The cases submitted by Staff show that hearing panels have previously imposed fines (or accepted settlement agreements) in varying amounts for cases involving personal financial dealings. In their submission, the fine of \$30,000 sought by Staff is a proportionate and fair sanction in the circumstances of this case.

[29] Staff also sought an order for costs in the amount of \$15,000 to recover a portion of the actual costs incurred in connection with the investigation and prosecution of this case, the actual costs being substantially greater.

[30] Finally, Staff submitted that the Respondent was an experienced registrant and that his conduct fell short of the public's expectations of registrants. Accordingly, the sanctions imposed should reflect the nature of that conduct. Imposing a three-month prohibition on re-approval and a fine of \$30,000 would meet the goals of general and specific deterrence and encourage public confidence in the investment industry.

B. The Respondent

[31] Having fully repaid the capital invested by the Clients immediately prior to the sanctions hearing, the Respondent limited his written and oral submissions to the fine and costs proposed by Staff as the issue of disgorgement had become moot.

[32] At the sanctions hearing, Mr. O'Toole advised the Panel that the Respondent accepted the amount of

³ 2007 IDACD No. 24 at para 42

⁴ 2014 IIROC 43

⁵ 2018 IIROC 28, 38 and 2019 ONSEC 24

⁶ 2020 IIROC 10; 2020 ABASC 54, 76 and 160

the fine, and implicitly the three-month prohibition on re-registration, and that he would focus on the proposed costs.

[33] In his submissions, Mr. O'Toole stated that the Respondent agreed that Staff is entitled to costs but that the \$15,000 amount proposed by Staff was too high. He cited the case of *Re Spooner*⁷, in which the hearing panel stated in its Decision on Costs that:

- a) most of the cases with cost awards at the lower end of the scale (i.e., \$2,500 to \$5,000) involved settlement agreements or were somewhat dated;
- b) the cases with higher cost awards (i.e., \$25,000 to \$60,000) involved more serious quasi-criminal conduct or past disciplinary history; and
- c) there were cases involving similar conduct with cost awards between \$10,000 and \$15,000.

[34] In *Re Spooner*, the liability portion of the proceeding was based on an agreed statement of facts, and at a separate hearing, costs were awarded in the amount of \$15,000 on the basis of a joint submission by the parties.⁸

[35] In *Re Saavedra*⁹, the panel awarded costs in the amount of \$5,000 in a matter in which Staff had docketed 212.50 hours, and, in *Re Mott*¹⁰, the Panel awarded costs in the amount of \$7,500 and noted that the use of an agreed statement of facts reduced the costs and should be taken into account.

[36] Mr. O'Toole submitted that costs should be awarded in the amount of \$10,000 to take into consideration the use of the ASF and the Respondent's cooperation with Staff thereby eliminating the need for a fully contested hearing. He also acknowledged that there is no evidence of an inability to pay such costs.

C. Reply by Staff

[37] In response to the Respondent's written submissions relating to costs, Staff noted that, although the parties entered into the ASF, thereby saving the parties and the Panel multiple days for a hearing, the ASF was not concluded until after the Notice of Hearing and Statement of Allegations were served, disclosure was made, two pre-hearing conferences were conducted, and Staff's compendium and written submissions on sanctions had been prepared.

[38] Staff also submitted that it is not possible to tell from the decision in *Re Spooner* how the parties arrived at what was a joint submission as to costs. They also submitted that \$15,000 costs in that case was appropriate because, as the panel noted in the costs decision, they did not have any written submissions and did not have a Bill of Costs. They accepted a joint submission and ordered that the costs were within a reasonable range and were not crushing, either alone or in the circumstances of that particular case.

[39] In *Re Saavedra*, the panel stated that they were not able to give any substantive weight to the respondent's submission of an inability to pay sanctions as he gave no evidence to support that claim. However, the panel did take into consideration that the respondent was under a related criminal sentence, which included a requirement to pay a fine.

[40] In *Re Mott*, there was an important difference in that the respondent had filed for bankruptcy, and the agreed statement of facts also set out factors relating to Mott's inability to pay, such as her age and unemployment status.

[41] In Staff's submission, there is no inability on the part of the Respondent to pay a fine or costs order, and the proposed costs are not punitive.

ANALYSIS

[42] Staff has acknowledged that the Respondent has repaid in full the capital invested by the Clients with

⁷ 2023 CIRO 22 at para 13

⁸ *Ibid* at paras 3 and 14

⁹ 2024 CIRO 82 at paras 62 and 63

¹⁰ 2024 CIRO 31 at para 59

the Respondent and, accordingly, is no longer seeking disgorgement. As a result, the Panel is only required to consider the \$30,000 fine and three-month ban on re-registration proposed by Staff and their request that they receive \$15,000 toward the costs incurred by CIRO in its investigation and prosecution of this proceeding. We address each of these matters in turn.

A. CIRO's Proposed Fine and Ban

[43] CIRO's Sanction Guidelines set out a number of general principles that provide a framework that should be considered when determining appropriate sanctions. The Guidelines also include numerous key factors in that regard. In their written submissions, Staff have addressed five of such factors based on the Respondent's acknowledged contraventions in the ASF.

[44] The Respondent engaged in several and continuing transactions with the Clients over a two-year period, with the total value of their investments with the Respondent totalling \$1.6 million. The Respondent had a personal interest in all of the transactions.

[45] The Respondent's behaviour demonstrated a pattern of misconduct over an extended period of time and an intentional and wilful disregard of regulatory requirements.

[46] In addition, the Respondent was deceitful in failing to inform Assante, his Dealer Member, or seek its approval of his personal financial dealings and erroneously affirmed to Assante that he had complied with its Compliance Manual.

[47] The Respondent also harmed the Clients by failing to provide the returns on their investments as he had represented to them and, with one of the Clients, he settled an arbitration proceeding by promising to repay them by November 26, 2024, which he failed to do on time.

[48] The Respondent's persistent misconduct and willful disregard for regulatory requirements over a two-year period not only harmed the Clients but also harmed market integrity and the reputation of the marketplace. In this regard, we adopt the reasoning of the hearing panel in *Re Little* (see paragraph 25 above) that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect which the transgressions could have on that reputation. The public interest demands that Dealer Members and their employees, be held to a very high standard of probity.

[49] Staff have submitted that the proposed sanctions are consistent with those imposed by hearing panels in prior cases and that the fine of \$30,000 is a proportionate and fair sanction. Given the importance of general and specific deterrence in making orders that are both protective and preventative, we would have imposed a greater fine had the Respondent failed to repay the capital invested by all of the Clients even though he only did so immediately prior to the sanctions hearing. As both Staff and the Respondent have agreed to the fine in the amount of \$30,000 and the ban on re-registration for three months, we are reluctant to modify the proposed sanctions even though we would view them to be at the lower end of the scale as can be seen from the brief summaries of *Re Blackmore*, *Re Rudensky* and *Re O'Brien* set out in paragraph 26 above.

B. CIRO's Costs

[50] Staff have provided a Bill of Costs setting out in detail that, in investigating and prosecuting this matter, CIRO incurred costs in the total amount of \$129,856. They have asked the Panel to order the reimbursement of \$15,000 which represents less than 12% of their actual costs.

[51] Mr. O'Toole submitted that the Respondent had cooperated with Staff and that his cooperation should result in a reduced cost award in the amount of \$10,000.

[52] The Respondent initially denied all of the allegations set out in the Statement of Allegations. His cooperation resulting in the ASF was not achieved until after the Notice of Hearing and Statement of Allegations were served, disclosure was made, two pre-hearing conferences were conducted and Staff's compendium and written submissions on sanctions had been prepared.

[53] Without repeating the analysis here, we agree with Staff's distinction of the *Re Spooner*, *Re Saavedra* and *Re Mott* cases which do not support Mr. O'Toole's contention that a \$10,000 cost award would suffice. In our view, a greater percentage of the costs incurred by CIRO in the investigation and prosecution of contraventions would be appropriate given the fact that whatever costs are not paid by respondents are

indirectly borne by Member Dealers. Accordingly, we are of the opinion that the costs to be paid by the Respondent should be \$20,000.

CONCLUSION

[54] In light of all of the considerations set out above, we conclude that the Respondent should:

- (a) be barred from re-registration with CIRO for the three-month period ending on May 5, 2025;
- (b) pay a fine of \$30,000; and
- (c) pay costs to CIRO in the amount of \$20,000.

DATED at Toronto, Ontario this 5th day of February 2025.

“Christopher Portner”

Christopher Portner, Chair

“Guenther W. Kleberg”

Guenther W. K. Kleberg

“Mary Savona”

Mary Savona

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