Re Jessiman

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada (IIROC)

and

The By-laws of the Investment Dealers Association of Canada (IDA)

and

Earl Jessiman

2014 IIROC 21

Hearing Panel
of the Investment Industry Regulatory Organization of Canada
(Nova Scotia District)

Heard May 21, 2014
Decision: May 27, 2014

Hearing Panel:
The Honourable J. Armand DesRoches (Chair), David Chabassol, and Tony Evans
Appearances:
Kathryn Andrews, Senior Enforcement Counsel, IIROC
Michelle C. Awad, Q.C., for the Respondent Earl Jessiman

REASONS FOR DECISION

INTRODUCTION

¶ 1 The Hearing Panel was constituted pursuant to Part 10 of Dealer Member Rule 20, and Section 1.a of Schedule C.1 to Transition Rule No. 1 of the Investment Industry Regulatory Organization of Canada (IIROC).

¶ 2 Staff of IIROC and the Respondent, Earl Jessiman, entered into the attached Settlement Agreement dated the 31st day of March, 2014. The Settlement Agreement was presented to the Hearing Panel on the 21st day of May, 2014 at Halifax, Nova Scotia. At the conclusion of the hearing, and after considering the written material filed, the submissions of counsel, the terms of the Settlement Agreement and the applicable principles, the Panel decided to approve and accept the Settlement Agreement.

¶ 3 It will be noted that the Settlement Agreement has been signed as accepted by only two members of the Hearing Panel. Unfortunately, the third member was unable to attend the hearing due to illness. On the advice of counsel for IIROC, and with the full consent of counsel for the Respondent, and of the Respondent himself, the remaining members of the Hearing Panel continued to deal with the matter in accordance with section 10.3 of the Universal Market Integrity Rules relating to Quorum Provisions.

SETTLEMENT AGREEMENT

¶ 4 The Settlement Agreement contains the following factual background:

11. The Respondent was the Branch Manager at the Halifax branch of Canaccord Genuity

Corp. ("Canaccord"). He was responsible for supervision at the branch from December 2004 until May 2012. Specifically, the Respondent was responsible for supervision of the activity in the client accounts of Registered Representative John Brodie ("Brodie") until Brodie left Canaccord in January 2010.

12. Brodie's clients the Ws opened a margin account in December 2005 (the "Margin Account"), along with three other accounts.

13. Between December 2005 and December 2008, the Respondent failed to adequately supervise the activity in the Margin Account by failing to ensure that its holdings were suitable for the Ws. The suitability issues included an over-concentration in income trusts and the energy/resource sector, excessive holdings in high risk securities and the amount of margin used.

14. Following an IIROC disciplinary hearing against Brodie, a hearing panel (the "Brodie Hearing Panel") found that Brodie made unsuitable investment recommendations regarding the Margin Account, amongst other findings. After a penalty hearing, the Brodie Hearing Panel imposed various sanctions on Brodie, including a six month suspension from registration in any capacity and a fine of $60,000; $20,000 of which related to the unsuitable investment recommendations violation.

¶ 5 The Settlement Agreement contains confirmation that between December, 2005 and December, 2008 the Respondent failed to adequately supervise the activity in the Ws' margin account despite a number of red flags relating to it that were or should have been apparent to the Respondent as Branch Manager. As a consequence, the Respondent contravened IIROC Dealer Member Rules 2500 (Minimum Standards for Retail Account Supervision), and IDA Regulation 1300 (Supervision of Accounts).

¶ 6 In late March, 2014 after lengthy negotiations IIROC staff and the Respondent signed the Settlement Agreement in which they agree to the following terms:

(a) Payment of a fine in the amount of $20,000;

(b) A suspension in any supervisory capacity for a period of 12 months; and

(c) Payment of costs to IIROC in the sum of $2,000.

¶ 7 The Respondent has been an approved person with IIROC in various capacities since 1996. He is currently approved as a Registered Representative but has not been a branch manager or in any supervisory position since May, 2012.

GENERAL PRINCIPLES AND THE STANDARD OF REVIEW

¶ 8 Both counsel made reference to the main concerns when determining an appropriate penalty. As set out in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26 at page 3, a Hearing Panel's main concerns in determining an appropriate penalty are:

A. Protection of the investing public;

B. Protection of the Investment Industry Regulatory Organization's membership;

C. Protection of the integrity of the Investment Industry Regulatory Organization's process;

D. Protection of the integrity of the securities markets, and

E. Prevention of a repetition of conduct of the type under consideration.

¶ 9 Counsel for IIROC invited the Panel's attention to the aspect of general deterrence, and to the following statement form *Re Mills*, [2001] I.D.A.C.D. No. 7, April 17, 2001 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 the conduct

under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment."

¶ 10 The Panel must also take into account the various aggravating and mitigating factors in deciding whether to accept or reject the proposed Settlement Agreement.

¶ 11 *IIROC Sanction Guidelines: General Principles* include a number of key considerations to be looked at when determining sanctions. The first is; "Harm to Clients, Employer and/or the Securities Market". The parties agree that the Ws suffered losses amounting to about 44%, or some $300,000 of the amount deposited in the margin account. While these losses were directly the result of Brodie's failure to ensure the holdings in the margin account were in line with the risk ratings in the Ws New Account Application Form, the Respondent's equal failure to adequately supervise the activity in the margin account contributed to those losses.

¶ 12 IIROC counsel also requested the Panel take into account the fact that the misconduct occurred over an extended period of time. The parties agree that the Respondent's failure of supervision occurred between December, 2005 and December, 2008.

¶ 13 On the other hand, as counsel for the Respondent pointed out, there are a number of mitigating factors that tend to reduce the gravity of the Respondent's breach of the Dealer Member Rules. These are:

(a) the conduct was not manipulative, fraudulent or deception;

(b) there was no direct participation by the Respondent;

(c) there was no enrichment to the Respondent;

(d) despite the fact the Respondent has been an approved person with IIROC in various capacities since 1996, he has no prior disciplinary history;

(e) the Respondent has been forthcoming and has accepted responsibility for his misconduct;

(f) the Respondent has co-operated with the investigation and prosecution of this matter; and

(g) there was no pre-meditation or planning.

¶ 14 The standard for reviewing a Settlement Agreement has been enunciated many times in various decisions. Our attention was directed to the following remarks in *Re Ast*, 2012 IIROC 38, with which we agree:

13 The standard for reviewing a Settlement Agreement was well-stated in a recent Pacific District hearing, Re Johnson (2012 IIROC 19), where the panel stated:

> *"The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside a reasonable range of appropriateness."*

14 There are many similar statements. See, for example, Re Jiwa and Hoffar (2012 IIROC 9), which adopted an earlier IDA decision, stating: "It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness." Another recent example is Re Trapeze Capital (2012 IIROC 25), where the panel states:

> *"It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment*

industry."

15 And, finally, see the statement in the Re Rotstein and Zackheim (2012 IIROC 27):

> *"Based upon this material it is our responsibility to review the agreement in order to satisfy ourselves that it falls within a reasonable range of appropriateness to the offence and circumstances recorded in the agreement and that there is nothing in the agreement which would be contrary to the public interest or bring the administration of the Rules of IIROC in to public disrepute. If we are satisfied that the Settlement Agreement does not offend these principles then it should be accepted."*

¶ 15 We also share the opinion, expressed by a number of Hearing Panels, that the settlement process is important and should be encouraged and supported.

CONCLUSION

¶ 16 Counsel have provided for our guidance nine previous Hearing Panel decisions relating to sanctions approved for persons who have committed failures in their supervisory duties. While these decisions are not binding, they are helpful in setting out what penalties other Hearing Panels have accepted as appropriate in circumstances somewhat analogous to that of the Respondent in this case.

¶ 17 Having taken into account the facts surrounding the Respondent's offence and the various aggravating and mitigating factors, and having carefully considered counsel's written and verbal submissions, the Hearing Panel concluded that the Settlement Agreement, including the penalty provided, does not clearly fall outside a reasonable range of appropriateness.

¶ 18 The Panel therefore accepted the Settlement Agreement.

Dated at ON the 27th day of May, 2014.

J. Armand DesRoches, Chair

Tony Evans

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent Earl Jessiman (the "Respondent"), consent and agree to the settlement of this matter by way of this settlement agreement (the "Settlement Agreement").
2. The Enforcement Department of IIROC has conducted an investigation (the "Investigation") into the Respondent's conduct**.**
3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.
4. The Respondent consents to be subject to the jurisdiction of IIROC.
5. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (the "Hearing Panel").

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines,

IDA By-Laws, Regulations or Policies:

From December 2005 to December 2008, Earl Jessiman as Branch Manager failed to adequately supervise the activity in the account of two clients, contrary to IIROC Dealer Member Rules 1300.2 and 2500 (IDA Regulation 1300.2 and Policy 2, prior to June 1, 2008).

8. Staff and the Respondent agree to the following terms of settlement:

   a) Payment of a fine in the amount of $20,000;

   b) A suspension in any supervisory capacity for a period of 12 months;

9. The Respondent agrees to pay costs to IIROC in the sum of $2,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

10. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) Factual Background

Overview

11. The Respondent was the Branch Manager at the Halifax branch of Canaccord Genuity Corp**.** ("Canaccord"). He was responsible for supervision at the branch from December 2004 until May 2012. Specifically, the Respondent was responsible for supervision of the activity in the client accounts of Registered Representative John Brodie ("Brodie") until Brodie left Canaccord in January 2010.

12. Brodie's clients the Ws opened a margin account in December 2005 (the "Margin Account"), along with three other accounts.

13. Between December 2005 and December 2008, the Respondent failed to adequately supervise the activity in the Margin Account by failing to ensure that its holdings were suitable for the Ws. The suitability issues included an over-concentration in income trusts and the energy/resource sector, excessive holdings in high risk securities and the amount of margin used.

14. Following an IIROC disciplinary hearing against Brodie, a hearing panel (the "Brodie Hearing Panel") found that Brodie made unsuitable investment recommendations regarding the Margin Account, amongst other findings. After a penalty hearing, the Brodie Hearing Panel imposed various sanctions on Brodie, including a six month suspension from registration in any capacity and a fine of $60,000; $20,000 of which related to the unsuitable investment recommendations violation.

Background

15. The Respondent has been an approved person with IIROC in various capacities at Canaccord and other firms since 1996. In 2005, the Respondent became registered with IIROC as a Branch Manager at Canaccord. The Respondent is currently approved as a Registered Representative at another firm and has not been a Branch Manager/Supervisor since May 2012.

16. On June 1, 2008, the Respondent became a regulated person of IIROC.

The Ws' Margin Account and updates

17. The Ws were husband and wife. They opened the Margin Account with Brodie in December 2005, along with three other accounts. Both of the Ws were age 47 at the time. Mr. W was employed and Mrs. W was a homemaker.

18. The New Account Application Form ("NAAF") for the Margin Account was signed by the Ws and indicated investment objectives of:

- 20% preservation of capital (low risk),

-20% income (low-medium risk),

-50% moderate growth (medium risk) and

-10% speculative (high risk).

19. An initial deposit of $500,000 was made on December 15, 2005 into the Margin Account, as a result of a lottery win by Mr. W's mother. An additional deposit of $186,500 was made into the Margin Account in February 2006.

20. The NAAF was amended in April 2006 (the "2006 update) to indicate investment objectives of:

-75% medium risk, and

-25% high risk

21. The NAAF was again amended in November 2007 (the "2007 update") to indicate investment objectives of:

-50% medium risk and

-50% high risk

22. The 2006 update was signed by the Ws. The 2007 update was not signed by the Ws. Instead, a letter outlining the changed objectives was sent to the Ws by Canaccord's compliance department.

Unsuitable investments

23. From account inception until December 2008 the holdings in the Margin Account were not in line with the Ws' NAAF. This assessment is based on risk ratings applied by IIROC Staff in its analysis. The investments were mainly income trusts and later highly speculative securities and were not appropriate for the Ws. The risk level of the Ws' holdings exceeded even those stated in their revised account documentation.

Concentration in income trusts and energy/resource sectors

24. From account inception until September 2007, the Margin Account was invested almost exclusively in income trusts. The holdings were also highly concentrated in energy/resource sector securities. After September 2007, the Margin Account holdings continued to be largely concentrated in energy/resource securities.

Margin Used Extensively

25. Between December 2005 and October 2008, margin was used extensively to facilitate purchases in the Margin Account. The Margin Account was highly leveraged at times. For most of the period between August 2006 and August 2007, the Margin Account maintained a debit balance of over $300,000 reaching a peak of $600,000 for a short time in January 2007 when the Ws also withdrew $42,000 cash.

The 2006 update

26. In April 2006, an account update form was submitted for the Margin Account. The objectives were changed to 75% medium and 25% high risk. Based on risk ratings applied by IIROC Staff, this update did not accurately reflect the risk of the investments held in the Margin Account. The risk in March 2006 at month end was closer to 9% low-medium, 8% medium, 73% medium-high and 9% high risk.

November 2007 Margin Account update

27. In late 2007 Canaccord's head office compliance department questioned Brodie about the Margin Account's current portfolio as it did not appear to be in-line with the Ws' objectives. Brodie responded by updating the Ws' NAAF to indicate a 50% medium risk allocation and a 50% high risk allocation. IIROC Staff's analysis indicates that the Margin Account's holdings at the end of October 2007 were actually closer to 23% medium, 12% medium high and 64% high risk.

The Respondent's failure to adequately supervise

28. The Respondent did not make sufficient inquiries from 2005 to the end of 2008 regarding the holdings in the Margin Account. Nor did the Respondent adequately question Brodie or document the results of any discussions with Brodie on this topic during this time period.

29. The Respondent did not provide any documentary evidence that he questioned Brodie in 2006, 2007 or 2008 about the extensive use of margin in the Margin Account and the resulting possible consequences for the Ws' Margin Account.

30. During the period December 2005 to December 2008, the Respondent initialled and dated the branch daily commission reports, which included the trading activity in the Margin Account**,** but made no notes on the reports. The Respondent made no trade inquiries to Brodie via email. The Respondent did not maintain any notes of any of his supervisory actions in the branch concerning Brodie's administration of the Margin Account.

Red flags

31. The following red flags relating to the Margin Account were or should have been apparent to the Respondent as Branch Manager:

- it was offside right from the beginning as it never held any low risk securities;
- it was overly concentrated in the income trust and/or energy/resource sector;
- it held an excessive amount of medium/high and high risk securities; and
- it made extensive use of margin.

Losses and withdrawals

32. The securities purchased in the Margin Account and the extensive usage of margin were not suitable for the Ws given their investment knowledge and investment objectives. Between December 2005 and December 2008, the Ws suffered losses of just over $300,000 in the Margin Account. In addition, the Ws made withdrawals of just over $380,000 during this same time period.

Mitigating Factors

33. The Respondent has no previous disciplinary history with the IDA or IIROC.

34. The Respondent has co-operated with the Investigation and prosecution of this matter.

IV. TERMS OF SETTLEMENT

35. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.

36. The Settlement Agreement is subject to acceptance by the Hearing Panel.

37. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

38. The Settlement Agreement will be presented to the Hearing Panel at a hearing (the "Settlement Hearing") for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.

39. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his rights under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

40. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.

41. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.

42. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.

43. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.

44. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Halifax in the Province of Nova Scotia, this "25th" day of "March", 2014.

"WITNESS"	**"RESPONDENT EARL JESSIMAN"**

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this "31st" day of "March", 2014.

"WITNESS"	**"KATHRYN ANDREWS"** Senior Enforcement Counsel on behalf of Staff of the Investment Industry Regulatory Organization of Canada

ACCEPTED at the City of Halifax in the Province of Nova Scotia, this "21st" day of "May", 2014, by the following Hearing Panel:

Per: "Armand DesRoches"

Panel Chair

Per: "Tony Evans"

Panel Member