

Re Mitchell

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Alexander George Mitchell

2019 IIROC 04

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: Tuesday, September 11, 2018 in Toronto, Ontario
Decision: February 20, 2019

Hearing Panel:

John A. Campion, Chair, Elizabeth Tripp and Vanessa M. Gardiner

Appearance:

Kathryn Andrews, Enforcement Counsel

John Fabello, counsel to Alexander George Mitchell

REASONS FOR DECISION

Part I – Introduction

¶ 1 The staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Respondent, Alexander George Mitchell (“Mitchell”) entered into a Settlement Agreement negotiated pursuant to section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC (“IIROC Rules”). The parties submitted the Settlement Agreement to this Hearing Panel pursuant to section 8215 of the IIROC Rules for approval or rejection. After considering material filed and submissions made by counsel, the Panel issued an Order accepting the Settlement Agreement. These are Reasons of the Panel for the approval Order.

¶ 2 There are 29,000 approved persons under the regulatory umbrella of IIROC. Mitchell was one of those approved persons until he resigned his supervisory post at BMO Nesbitt Burns (“BMO”) in 2014, when he ceased to be a Branch Manager and ceased to be an IIROC registrant when he retired as of January 2017. The Panel was informed that it was unusual for a retired registrant to appear personally before the hearing Panel. Mitchell did appear. Besides the strong penalty to which he has agreed in the Settlement Agreement, he has suffered reputational risk. His presence at the hearing illustrates a respect for the Regulator and the profession of which he was a long-time participant. His appearance answers much of the past reputational damage by his grace under pressure. The Panel stresses that Mitchell’s lack of adequate supervision which forms the basis of the complaint against him did not carry with it a taint of impropriety.

¶ 3 The Panel is of the view that the penalties contained in the Settlement Agreement, which forms part of

this Decision, are strong and should stand as a specific and general deterrent for supervisors in the investment industry from failing to pay close attention to the daily details of their important work in protecting the public and the institutions for whom they work where appropriate. For reasons set out below, the Panel has formally approved the Settlement Agreement.

Part II – The Facts

¶ 4 Mitchell was a Branch Manager in a Toronto branch of BMO Nesbitt Burns Inc. and responsible for the supervision of a Registered Representative, Nadir Janmohamed, from January 2009 to December 2012.

¶ 5 Mitchell was responsible for the supervision of Nadir Janmohamed during the time Mitchell was the Branch Manager. Janmohamed engaged in a pattern of trading in DSC mutual funds for clients, where he sold DSC funds and then repurchased similar funds, which required the client to pay a redemption fee and caused the redemption period to re-set on the new fund purchases. In some instances, this activity was detrimental to clients. Additionally, Janmohamed frequently traded DSCs in client accounts by switching from one fund to another fund, and then charging the client the switch fee. This switching process could have been effected without charging the client.

¶ 6 The trading activity of Janmohamed involved two main red flags from a supervisory perspective: (1) the amount and frequency of the switch fees, and (2) the redemption fees. The gross amount of the switch fees was \$367,459. The gross amount of the redemption fees was \$125,402. Janmohamed was permitted to trade through the period without adequate questioning, follow-up or any restrictions.

¶ 7 While Mitchell asked Janmohamed about his trading activities and made an effort to contact at least two of his clients, Mitchell took insufficient action in response to the trading activity in Janmohamed's client's accounts.

¶ 8 Mitchell ceased to be a Branch Manager as of 2014, remaining a registered representative until January 2017, when he retired, and ceased to be an IIROC registrant.

¶ 9 Mitchell does not have a prior disciplinary history. He did contact at least two clients by telephone in April 2012. The clients indicated they were satisfied with the DSC fees, and that they were happy with the services of Mr. Janmohamed. Mitchell's practice was to make frequent inquiries of the registered representatives who were supervised by him. Mitchell made notes of his inquiries in the normal course, but notes concerning Janmohamed could not be located.

The Complaint

¶ 10 IIROC characterized the complaint against Mitchell as follows:

By engaging in the conduct described above, Mitchell committed the following contraventions of IIROC's Rules: **Contravention 1:** Between January 2009 and December 2012, Mitchell failed to adequately supervise the client trading activity of Nadir Janmohamed, contrary to Dealer Member Rule 38.4.

Terms of Settlement

¶ 11 IIROC and Mitchell have agreed to the terms of the contravention and the following sanctions and costs (subject to the Panel's approval):

- (a) a fine in the amount of \$17,000;
- (b) a three-month prohibition on re-approval in any supervisory capacity;
- (c) to re-write and pass the Branch Manager's course within six months of any re-registration of

- any supervisory capacity with IIROC;
- (d) costs of \$2,000;
 - (e) Mitchell agreed to pay the fine and costs within 30 days of the Panel's order accepting the settlement, unless otherwise agreed between the staff of IIROC and Mitchell;
 - (f) if the Settlement Agreement is accepted, staff has agreed not to initiate any further action against Mitchell in relation to the facts and contraventions set out above, subject to the exception that if, Mitchell fails to comply with any terms of the Settlement Agreement, staff of IIROC may bring proceedings under Rule 8200 against Mitchell based on the facts set out above but not limited to those facts.

Seriousness of the Contraventions

¶ 12 Supervision of registered representatives is an important obligation placed upon a supervisor, as it is necessary to ensure ethical conduct, fair trading and, ultimately, integrity of the investment industry. A failure to properly supervise is therefore treated as a serious contravention.

¶ 13 The failures identified above by Mitchell are serious contraventions. The Panel has accepted this observation.

Mitigation

¶ 14 Mitigation is an important consideration in assessing the reasonableness of a settlement agreement and the penalties that flow from it. The Panel weighed the following facts in mitigation:

- (a) Mitchell has no disciplinary history; and
- (b) Mitchell cooperated fully with staff during the investigation, has acknowledged the contraventions in the Settlement Agreement, has therefore accepted his responsibility and shown remorse. This latter fact was further illustrated by his attendance at the hearing even though he was no longer subject to IIROC's jurisdiction.

Part III – Standard of Review and Principles

¶ 15 The Panel is required to accept the Settlement Agreement unless it were of the view that the penalty provided fell outside a reasonable range of appropriateness,¹ and meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry.²

¶ 16 The Panel is required to consider the public interest but in so doing should reflect that the public interest benefits from the settlement process as reflected in the Settlement Agreement.³

¶ 17 The Panel is also required to consider the proportionality of the proposed penalties to the admitted misconduct, and consider whether the proposed penalties are analogous to misconduct by others in like circumstances based on the self-evident proposition that the appearance of fairness requires that the objective observer perceives a consistency in the application of the rules and disposition in similar proceedings.⁴

¶ 18 The agreed penalties must serve as a specific deterrent to Mitchell and a general deterrent in the

¹ Re *Johnson*, 2012 IIROC 19; *Bugden*, 2017 LN IIROC 30; *Milewski* [1999] I.D.A.C.D. No. 17 at p. 10

² Re *Trapeze* 2012 IIROC 25

³ *Milewski*, *supra*

⁴ *Bugden*, 2017 LN IIROC 30; and Re *Donnelly* 2016 IIROC 23, at p. 2

industry.⁵ General deterrents will follow from an appropriate decision, and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. General deterrents can be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations. Prevention rather than punishment is the primary purpose of the penalty.⁶

¶ 19 In analyzing and applying the above principles, the Panel is required to develop an understanding of the particular facts of the case, appreciate the circumstances of Mitchell and the impact on him of the agreed penalties.⁷

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.

Part IV – Analysis

¶ 20 The Panel will first deal with the facts as they apply to the principles set out above, and will then analyze the reasonableness of the range of penalty.

Facts Applied to the Principles

¶ 21 Mitchell has to-date an unblemished record as a registered representative and supervisor. Two clients were contacted by Mitchell when there were a large number of transactions. The clients indicated they were aware of the fees and "... happy with their adviser ...". Mitchell cooperated fully in the investigation, and has acknowledged the contraventions alleged. By doing so, he has accepted his responsibility and shown remorse. He has admitted to failing to supervise only one of many persons under his supervision. He has ceased to become a supervisor as of 2014, and ceased to be an IIROC registrant in January 2017. Mitchell did supervise Mr. Janmohamed and met with him to discuss his review. It is agreed that Mitchell made frequent inquiries of registered representatives who were supervised by him. The main burden of the complaint against Mitchell is that he failed to adequately supervise; it is not that he failed to supervise at all.

¶ 22 From these facts, the Panel has concluded that Mitchell was involved in a serious contravention of the IIROC rules in an important area but he has shown that he is aware of the gravity of his conduct and shown appropriate remorse by negotiating the Settlement Agreement and by appearing before the Panel personally when he was no longer a registrant.

¶ 23 The penalty is due warning to any other supervisor in the industry that detailed analysis and supervision is essential to maintain public confidence in the industry. On the facts of this case the penalties agreed to set out above reflect both a specific deterrence to him and a general deterrence to the industry. The purpose of any penalty is primarily prevention rather than punishment. It is the Panel's view that this penalty fits in the golden mean of being neither excessive nor *de minimus*.

Comparative Analysis

⁵ Bugden, *supra*; and Donnelly, *supra*

⁶ Bergh, 2011; Linrock LN IIROC 41; and *Re Mills*, [2001] I.D.A.C.D. No. 7, at p. 3

⁷ Bugden, *supra*; and Donnelly, *supra*

¶ 24 The Panel was presented with a series of cases which dealt with a failure to supervise. There is no obvious uniform penalty in the cases, as each case is determined on its unique facts. The penalties agreed to in this matter are within the range to be a specific deterrent to Mitchell and a general deterrent to the industry. The penalties in this case have achieved the appropriate balance and are similar to sanctions imposed in other supervision cases which were drawn to our attention.

Conclusion

¶ 25 Having considered all of the principles of reasonableness, maintenance of industry integrity, public interest, proportionality, fairness and specific and general deterrence, the penalties contained in the Settlement Agreement and the Settlement Agreement itself as a whole were approved by the Panel.

Postscript

¶ 26 At the end of the hearing, the Panel complimented Ms. Kathryn Andrews for her presentation on behalf of IIROC and Mr. Fabello for his presentation on behalf of Mitchell. Both counsel presented their respective case in the highest traditions of the Bar. Their professional demeanor added to the efficiency of the hearing.

Dated at Toronto, Ontario this 20th day of February 2019.

John A. Campion

Elizabeth Tripp

Vanessa M. Gardiner

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (“IIROC”) will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel (“Hearing Panel”) should accept the settlement agreement (“Settlement Agreement”) entered into between the staff of IIROC (“Staff”) and Alexander George Mitchell (the “Respondent” or “Mitchell”).

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. The Respondent was a Branch Manager at a BMO Nesbitt Burns branch in Toronto. He was responsible for the supervision of a Registered Representative (“RR”), Nadir Janmohamed (“Janmohamed”), during the period of January 2009 to December 2012 (the “Relevant Period”).
5. Janmohamed engaged in a pattern of trading in DSC mutual funds for clients, where he sold DSC funds

and then repurchased similar funds, which required the client to pay a redemption fee and caused the redemption period to re-set on the new fund purchases. This activity was detrimental to clients in some instances. In addition, Janmohamed frequently traded DSCs in client accounts by switching from one fund to another fund and then charging the client a switch fee, when the switch could have been effected without charging the client.

6. Janmohamed's trading activity in DSC funds in numerous client accounts during the Relevant Period involved two main red flags from a supervisory perspective: (1) the amount and frequency of switch fees and (2) the redemption fees.
7. The Respondent queried the RR and made an effort to contact at least two of the RR's clients but took insufficient action in response to the trading activity in Janmohamed's client accounts during the Relevant Period.

Background

8. The Respondent had been in the industry since the late 1980s. During the Relevant Period, the Respondent was a Branch Manager and was himself a Registered Representative with BMO Nesbitt Burns ("BMONB") at its Lakeview Branch. In 2014, the Respondent ceased to be a Branch Manager and as of January 2017, retired and is no longer an IIROC registrant.
9. In November 2016, an IIROC hearing panel accepted a settlement agreement between IIROC Staff and Janmohamed, in which the RR admitted to failing to use due diligence to ensure that the acceptance of orders for certain client accounts was within the bounds of good business practice, discretionary trading related to three clients and failure to know essential facts related to one client.

The Amount and Frequency of Switch Fees

10. Janmohamed often made switches between the same family of mutual funds in a client's account and the client was charged a switch fee. On occasion, he purchased new DSC mutual funds in clients' accounts that would re-set the redemption period.
11. Some clients said they were not informed by the RR of the switch fees. The switch fees were at times detrimental to the client because switches could have occurred without charging the client a fee. The amount of switch fees on various dates during the Relevant Period was significant, with the gross amount of switch fees totaling \$367,459 during the Relevant Period.

Inadequate Supervision of Switch Fees

12. The switch fees were indicated on the Daily Production Reports reviewed by the Respondent, with the indication "switch". There were no written queries by the Respondent in 2009 or 2010 and only one written query in 2011, regarding switch fees. The two written queries in 2012 were not sufficiently followed up on by the Respondent. During the Relevant Period, the Respondent did not adequately review or query the amount and frequency of switch fees.

The Redemption Fees

13. Mutual funds purchased on a DSC basis are usually subject to a declining scale of redemption fees. Redemption fees were incurred by some clients when Janmohamed sold a fund before the expiration of the locked-in time period. When these mutual funds were sold, the client paid a fee to the mutual fund company because the funds had been sold before the original expiry date. The amount of the redemption fee varied depending on how early Janmohamed sold the fund. The redemption fees for Janmohamed's clients totaled \$125,402 during the Relevant Period.

Inadequate supervision of Redemption Fees

14. The amount of redemption fees for each client was indicated on the Daily Production Report reviewed by the Respondent. The Respondent did not adequately review or query the amount and frequency of the redemption fees.
15. During the Relevant Period, queries about Janmohamed's trading by the Respondent did not involve a thorough review of the above two issues of concern. The Respondent accepted Janmohamed's response which was that the clients were aware of any fees and assessed that the trades were rational and suitable. The Respondent did not conduct adequate supervisory review to satisfy himself that Janmohamed's trading was within the bounds of good business practice for his clients.

Switch Fees and Redemption Fees indicated on Daily Reports

16. During the Relevant Period, there were a number of days where the switch fees or redemption fees for Janmohamed's clients were several thousands of dollars in a single day alone and should have triggered queries.

Monthly Supervision Issues

17. In monthly reports for 2009, seven months in 2010 and nine months in 2012, Janmohamed's name appears at least once on each of these reports, whether it be for a commission greater than \$1,500 per month issue, other suitability issue or a pro account issue. Despite this flag, in terms of monthly queries, only a few were made during the Relevant Period.

Trading permitted to continue

18. Janmohamed was permitted to continue this trading pattern throughout the Relevant Period without adequate questioning, follow up or any restrictions.

Other

19. The Respondent does not have a prior disciplinary history.
20. The Respondent contacted at least two clients by telephone in April 2012 when there had been a large number of transactions. He indicated that the clients told him that they were aware of DSC fees and that they were happy with their advisor.
21. The Respondent's supervision practice was to make frequent queries of the RRs in his branch (including the RR) by in person conversations and to take notes of those queries. He indicated that his handwritten notes of his in person queries of Janmohamed were not able to be located by his former employer.

PART IV – CONTRAVENTIONS

22. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

Contravention 1: Between January 2009 and December 2012, the Respondent Alexander George Mitchell failed to adequately supervise the client trading activity of Nadir Janmohamed, contrary to Dealer Member Rule 38.4.

PART V – TERMS OF SETTLEMENT

23. The Respondent agrees to the following sanctions and costs:
 - a) A fine in the amount of \$17,500;

- b) A three month prohibition on re approval in a supervisory capacity;
 - c) To re write and pass the Branch Manager's course within six months of any re-registration in a supervisory capacity with IIROC; and,
 - d) Costs of \$2,000.
24. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

25. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the following paragraph.
26. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

27. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
28. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.
29. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.
30. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.
31. 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 based on the same or related allegations.
32. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
33. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.
34. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf will make a public statement inconsistent with this Settlement Agreement.
35. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

- 36. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
- 37. A fax or electronic copy of any signature will be treated as an original signature.

DATED this “11th” day of “September”, 2018.

“John Fabello”

Witness

“Alexander George Mitchell”

Respondent Alexander George Mitchell

“Frank Scali”

Witness

“Kathryn Andrews”

Kathryn Andrews

Senior Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this “11th” day of “September”, 2018 by the following Hearing Panel:

Per: “John A. Campion”

Panel Chair

Per: “Elizabeth Tripp”

Panel Member

Per: “Vanessa M. Gardiner”

Panel Member

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