Re Jaques

IN THE MATTER OF:

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

and

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

and

Simon Roy Jaques (The "Respondent")

2014 IIROC 28

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

Heard: March 31 and June 24, 2014
Decision: July 9, 2014

Hearing Panel:
Jean P. Whittow Q.C. (chair), Barbara Fraser and William J. Welton
Appearances:
Lorne Herlin, Enforcement Counsel:
Simon Ray Jaques, absent, and not represented

DECISION AND REASONS

¶ 1 This hearing commenced on March 31, 2014 in relation to a Notice of Hearing issued to the Respondent on January 21, 2014. The Notice of Hearing alleged:

Count 1

Between 2008 and 2009, the Respondent failed to use due diligence to ensure that the orders that he placed for the accounts of Client A were suitable for her, contrary to IIROC Dealer Member Rule 1300.1(p) (IDA Regulation 1300.1(p) prior to June 1, 2008) and/or IIROC Dealer Member Rule 1300.1(q) (IDA Regulation 1300.1(q) prior to June 1, 2008).

Count 2

In April 2013, the Respondent refused and/or failed to attend and give information in respect of an IIROC investigation into his conduct, contrary to IIROC Dealer Member Rules 19.5 and/or 29.1.

¶ 2 The Respondent did not attend the hearing. Accordingly, enforcement counsel made application pursuant to Rules 7.2 and 13.5 of the IIROC Rules of Practice and Procedure ("ROP") to proceed in the Respondent's absence.

¶ 3 ROP Rule 7.2 provides:

7.2 Failure to Serve Response

If a Respondent served with a Notice of Hearing fails to serve a Response in accordance with

7.1:

(a) the Organization may proceed with the hearing of this matter as set out in the Notice of Hearing without further notice to and in the absence of the Respondent; and

(b) the Hearing Panel may, accept as proven the facts and violation alleged by the Organization in the Notice of Hearing, and may impose penalties and costs pursuant to Dealer Member Rules 20.33, 20.34 and 20.49.

¶ 4 ROP Rule 13.5 provides:

13.5 Where Respondent Fails to Attend Disciplinary Hearing

Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the Notice of Hearing.

Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Organization regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant to Dealer Member Rule 20.33 and 20.34.

¶ 5 Enforcement counsel also referred to the panel to a number of cases in which IIROC and IDA panels had made similar orders, including *Re Dass*, 2009 IIROC 22; *Re Stewart*, [2005] I.D.A.C.D. No. 23; and *Re Puccini*, [2007 I.D.A.C.D. No. 11.

¶ 6 Enforcement counsel provided the Panel with the Affidavit of Sandra Borsato, an IIROC investigator, sworn March 24, 2014. Attached to that Affidavit was an Affidavit sworn by George Burns, Process Server, dated January 23, 2014, in which Mr. Burns deposed that he personally served the Respondent with the Notice of Hearing on January 21, 2014.

¶ 7 Ms. Borsato's affidavit carefully details her communications with the Respondent during the course of IIROC's investigation. She also deposes that since being served with the Notice of Hearing, the Respondent has not provided IIROC staff with a Response nor otherwise been in contact with her or IIROC counsel.

¶ 8 Ms. Borsato also deposed that Mr. Jaques has not been registered in any capacity with IIROC since November 2, 2011.

¶ 9 The Panel notes that the Notice of Hearing states, with reference to the relevant ROP Rules, that if the Respondent fails to serve a Response or attend the hearing, the hearing panel may proceed with the hearing in his absence, accept as proven the facts and contraventions alleged and order penalties and costs, without further notice.

¶ 10 The Panel was satisfied that IIROC had proven that the Respondent had been served with the Notice of Hearing. It therefore ordered that it would accept the matters as proven and proceed pursuant to ROP Rules 7.2 and 13.5.

¶ 11 Enforcement counsel then proceeded to make submissions as to penalty and costs. In summary, counsel submitted that the following was an appropriate disposition of the matter:

a. a $50,000 fine with respect to Count 2;

b. a $30,000 fine with respect to Count 1;

c. an order that the Respondent be permanently banned from the industry; and

d. an order that the Respondent be required to pay $20,000 in costs.

¶ 12 IIROC's Dealer Member Rules (the "Rules") provide the authority for the imposition of penalties.

20.33 Approved Persons

(2) Pursuant to subsections (1), a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) $1,000,000 per contravention; and

(ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention

(c) suspension of approval for any period of time and upon any conditions or terms;

(d) terms and conditions of continued approval;

(e) prohibition of approval in any capacity for any period of time;

(f) termination of the rights and privileges of approval;

(g) revocation of approval;

(h) a permanent bar from approval with the Corporation; or

(i) any other fit remedy or penalty.

Count 1

¶ 13 At the hearing on March 31, 2014, enforcement counsel reviewed the facts alleged in the Notice of Hearing in support of Count 1, the “suitability” allegation.

¶ 14 The essence of the allegation, to paraphrase Rule 1300.1 (and its predecessors, referred to in Count 1), is that a Registered Representative "shall use due diligence to ensure that the [security or transaction] is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance."

¶ 15 At the request of the Panel, a further hearing was convened in order to provide further evidence as to the basis for the allegation that the securities were unsuitable. The Panel was advised that the Respondent was given notice of the continuation, which took place on June 24, 2014. The Respondent did not attend.

¶ 16 The Respondent was a Registered Representative at Mackie Research Capital Corporation (the “Firm”) from November 14, 2002 to April 22, 2008 and again from December 4, 2008 to October 4, 2010.

¶ 17 In around November 2002, Client A opened a RRSP account and a margin account with the Firm. The Respondent was responsible for Client A’s accounts during both periods that he was with the Firm.

¶ 18 The Notice of Hearing states:

7. The New Client Application Forms (the NCAFs) that Client A completed on November 19, 2002 in order to open the Accounts indicated that she was 56 years of age and retired. The NCAFs further indicated that Client A’s:

- net liquid assets were $750,000;
- net fixed assets were $350,000;
- annual income from all sources was $70,000;
- spousal income was $35,000;
- investment objectives were 50% income, 25% capital gains, and 25% medium term; and
- risk objectives were 25% low risk, 50% medium, and 25% high.

¶ 19 The Notice of Hearing also states that Client A is unable to work due to illness and so requires these

assets to provide income, and that the NCAF was never updated.

¶ 20 Enforcement counsel submitted that three orders placed by the Respondent in January 2008 in Client A's RRSP account were unsuitable.

¶ 21 The first was a January 15, 2008 purchase of 10,000 shares of Orko Silver Corp. ("Orko") at a cost of $19,066. The second was the sale of all of the Orko shares on January 22, 2008 for $15,113.

¶ 22 Orko was in the business of the acquisition and exploration of mineral properties in Mexico and was listed on the TSX Venture ("TSX-V") Exchange. Ms. Borsato explained that the company's publications showed that Orko had earned no revenue in 11 quarters, that its losses increased during that time and that it paid no dividends. The Respondent earned $675 in commissions on the purchase and sale of Orko, while Client A incurred a loss of $3,953.

¶ 23 The third transaction alleged to be unsuitable was the purchase on January 22, 2008 of 150,000 shares of KCC Capital Corp. ("KCC") at a cost of $15,000. The Respondent earned $1200 in commissions, paid by KCC.

¶ 24 KCC was a TSX-V capital pool corporation. It is described in its prospectus as a "highly speculative investment". It did not complete a qualifying transaction and was de-listed from the TSX-V.

¶ 25 Enforcement counsel emphasized that these securities did not conform to Client A's investment objectives, risk tolerance level, financial situation and/or investment knowledge. He as well noted that the only person who benefitted by these transactions was the Respondent.

¶ 26 The Panel agrees. While Client A's NCAF indicated she had some tolerance for high risk, these securities were entirely unsuitable.

¶ 27 The Notice of Hearing alleges that the holdings in the margin account did were unsuitable. The basis for this allegation is that the only holding in the margin account that generated any significant income, CI Signature Dividend Fund, was sold in its entirety in January 2009. The proceeds, $65,389, were used to purchase three resource based securities which were sold within a short period of time. These transactions generated commissions for the Respondent, but losses for Client A.

¶ 28 The securities are listed on Schedule B to the Notice of Hearing. Ms. Borsato referred the Panel to the company disclosure upon which she formed the opinion that each of these securities were high risk.

¶ 29 These securities were unsuitable given Client A's circumstances.

¶ 30 The IIROC Dealer Member Disciplinary Sanction Guidelines ("Guidelines") recommend sanctions of a fine of a minimum of $10,000, disgorgement of profits, and additional sanctions depending on the circumstances. Since the Respondent has not participated in these proceedings, he has not provided any evidence as to his due diligence, if any, which might mitigate the penalty.

¶ 31 Counsel referred the Panel to two settlement decisions concerning suitability. In *Re Chrabalowski*, 2011 IIROC 49, in which the Respondent admitted to a single unsuitable trade. He was fined $20,000, ordered to repay the commission earned, and to pay costs of $2000. In *Re Hanna*, 2012 IIROC 71, the Respondent admitted he had failed to know his client and use due diligence, resulting in a decline in the value of the portfolio. He cooperated fully with IIROC and was fined $30,000, suspended for 30 days, required to pay $2500 in costs and re-write the Conduct and Practices examination.

¶ 32 The Respondent's conduct in the present case was at least as egregious as that of the registered representative in either of the precedent cases provided. In the present case, the Respondent's lack of diligence seems to be linked to his own gain.

¶ 33 The Panel is satisfied that a $30,000 fine is appropriate in respect of Count 1.

Count 2

¶ 34 As to Count 2, the failure to cooperate in the investigation, the facts alleged, and accepted by this Panel

as proven, are set out in paragraphs 26 to 38 of the Notice of Hearing, reproduced below:

> 26. By way of a letter dated November 19, 2012, IIROC Staff asked the Respondent to provide a written response to Client A's complaint by December 3, 2012.
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> 27. On December 21, 2012, IIROC Staff contacted the Respondent by telephone at his home. In the course of the conversation, the Respondent confirmed his home address and he indicated that he would send IIROC a written response by January 7, 2013. The Respondent never provided IIROC Staff with a written response.
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> 28. By way of a letter dated January 3, 2013, IIROC Staff informed the Respondent that it had opened an investigation into his conduct (the Opening Letter). The Opening Letter was sent by registered mail and regular mail. The registered letter was unclaimed and ultimately it was returned to IIROC.
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> 29. On January 21 and 22, 2013, IIROC Staff left a voice mail message for the Respondent at his home asking that he contact IIROC Staff.
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> 30. On January 23, 2013, the Respondent left a voice mail message for IIROC Staff wherein he confirmed that he had received IIROC Staff's voice mail messages and he promised to call back on January 29 or 30, 2013. The Respondent failed to do so.
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> 31. On January 31 and February 1, 2013, IIROC Staff left a voice mail message for the Respondent at his home asking him to contact IIROC Staff.
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> 32. On February 4, 2012, the Respondent left a voice mail message for IIROC Staff indicating that he would call back later that day. The Respondent failed to do so.
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> 33. On February 12, 2013, IIROC Staff left a voice mail message for the Respondent at his home asking him to contact IIROC Staff in order to set a date for his IIROC investigatory interview.
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> 34. On February 21 and March 18, 2013, IIROC Staff left a voice mail message for the Respondent at his home informing him that his investigatory interview had been scheduled for April 1, 2012 and asking him to contact IIROC Staff to confirm his availability. The Respondent failed to contact IIROC Staff.
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> 35. On March 26, 2013, the Respondent was personally served with the Opening Letter and a letter dated March 22, 2013 from an IIROC Staff investigator which, among other things, stated:
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>> If you fail to attend your April 1, 2013 interview, IIROC Staff may commence disciplinary proceedings against you for failing to cooperate with IIROC Staff's investigation in addition to the substantive matters under investigation.
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> 36. The Respondent did not respond to the March 22, 2013 letter.
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> 37. The Respondent failed to attend his April 1, 2013 investigatory interview.
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> 38. The Respondent's failure to attend his interview and to provide information has prevented IIROC Staff from completing the Investigation.

¶ 35 The Guidelines recommend sanctions of a fine from $10,000 to $50,000 and include expulsion and a permanent ban for an Approved Person who does not remedy the failure to cooperate.

¶ 36 Enforcement counsel provided the Panel with written submissions summarizing fifteen cases in which a finding of failure to cooperate had been made after an Approved Person failed to attend an interview. He referred in particular to *Re Robb* [2002] I.D.A.C.D. No. 1; *Re Stewart* [2005] I.D.A.C.D. No. 23 and *Re Seguin*, 11 March 2008 (Montreal IDA), aff'd. 2014 QCCA 247.

¶ 37 In each of the precedents referred to, a $50,000 fine was imposed for the failure to cooperate, and a permanent ban on registration in any capacity was imposed. The costs imposed ranged from a low of about $4000 to a high of $40,000.

¶ 38 This Panel agrees with the remarks of the hearing panels in *Re Robb, Re Stewart* and *Re Dettelbach*, 2011 IIROC 6, that the requirement to cooperate in any investigation conducted by the regulator is fundamental to maintaining the integrity of the securities system and to ensure public protection and confidence. The breach of this obligation is a serious form of misconduct because it undermines IIROC's ability to perform its public interest mandate.

¶ 39 The Panel notes that in addition to not attending the interview, the Respondent has not filed a Response and not attended the hearing. Therefore, the Respondent thwarted IIROC's investigation, and has offered no explanation for his conduct that might mitigate the penalty.

¶ 40 Therefore, the Panel is therefore satisfied that a $50,000 fine is appropriate and that a permanent prohibition is necessary to adequately protect the investing public.

Costs

¶ 41 Rule 20.49(1) permits a hearing panel to assess and order "investigation and prosecution costs determined to be appropriate and reasonable in the circumstances".

¶ 42 On March 31, 2014, enforcement counsel provided a Bill of Costs which calculated the total costs to be $35,075. He sought an order for costs of $20,000.

¶ 43 The Panel is satisfied that the costs sought are appropriate and reasonable, having regard to the effort expended and expenses incurred by IIROC. We also note that the costs sought are well within the range shown in the cases provided.

Conclusion

¶ 44 The Panel imposes the following penalties upon the Respondent pursuant to Rule 20.33(2):

a. That the Respondent pay a fine of $30,000 in relation to Count 1;

b. That the Respondent pay a fine of $50,000 in relation to Count 2; and

c. That the Respondent be permanently banned from registration in any capacity.

¶ 45 Pursuant to Rule 20.49(1), the Panel also orders that the Respondent pay IIROC's investigation and prosecution costs in the amount of $20,000.

Dated this 9th day of July, 2014.

Jean P. Whittow, Q.C., Chair

Barbara Fraser

William J. Welton