

Re Gunderson

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

Trevor Ian Gunderson

2012 IIROC 66

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

Heard: October 29, 2012 at Calgary, Alberta

Written Decision: November 13, 2012

Hearing Panel:

Alan V.M. Beattie, Q.C. – Chair, William Welton, Martin Davies

Appearances:

Tayen Godfrey - Enforcement Counsel

Trevor Ian Gunderson - the Respondent

REASONS FOR DECISION

1. INTRODUCTION

¶ 1 A Settlement Agreement was entered into September 6, 2012 between the Investment Industry Regulatory Organization of Canada Enforcement Staff (“Staff” or “IIROC”) and Trevor Ian Gunderson (“the Respondent”) 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.

¶ 2 The Settlement Agreement contains a complete Statement of Facts, a description of the Contraventions and the Terms of Settlement (all below). In the Settlement Agreement the Respondent admits to the contraventions. Staff of IIROC and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement. It is stated that the Settlement Agreement is subject to acceptance by the Hearing Panel and if the Panel accepts the Settlement Agreement, the Respondent waives his right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

¶ 3 A Settlement Hearing Book was provided in advance of the Hearing by IIROC to the Respondent and members of the Hearing Panel.

2. SETTLEMENT AGREEMENT

¶ 4 The Settlement Agreement includes the following:

STATEMENT OF FACTS

(i) Acknowledgment

8. For the purposes of this Settlement Agreement only, 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) Overview

9. Between August of 2009 and October of 2010, the Respondent borrowed \$133,900.00, from eleven different clients. He did not disclose these activities to his firm. The Respondent also reimbursed a client \$2,500.00 for losses emanating from a trade in March of 2008.

(iii) Registration History

10. At the time of the violations, the Respondent was a Registered Representative (“RR”) with CIBC World Markets Inc. (“CIBC”) in Calgary.

11. His registration history is as follows:

- a) January 2001 to April 2005: Mutual Fund Dealer with Investors Group Financial Services Inc.
- b) June 2005 to January 2011: RR with CIBC World Markets Inc.
- c) January 2011 to October 2011: RR with Canaccord Genuity Corp. (“Canaccord”).

12. The Respondent has not worked in a Registered capacity since leaving Canaccord in October 2011.

13. The Respondent has no disciplinary history.

(iv) Undisclosed Financial Dealings

14. Between August of 2009 and October 2010, the Respondent borrowed approximately \$133,900.00, from eleven different clients.

15. All of the clients in question were close friends of the Respondent, many of which he had a relationship with prior to becoming their financial advisor.

16. All of the loans were obtained after CIBC had issued a letter (in April of 2010) to the Respondent directing him to not borrow money from clients. Despite this warning, the Respondent borrowed money from his clients.

17. The loans ranged between \$4,000.00 and \$25,000.00. The Respondent paid interest on 10 of the 12 loans, and all but one of the loans have been repaid.

18. The Respondent used the loans to fund personal expenses.

(v) Compensating Client

19. The Respondent also reimbursed a client who is a close relative, his Aunt, \$2,500.00 for losses emanating from a trade in March of 2008. He did not disclose this activity to his firm.

(vii) Dealings with IIROC

20. In Response to an IIROC request, the Respondent submitted a letter, dated June 9, 2011, in which he admitted borrowing \$20,000.00 from three clients (one of which was his parents), but failed to disclose another \$124,000.00 borrowed from another ten clients.

21. Similarly, he was not forthright in his IIROC interview. He originally only admitted to borrowing money from three clients. Only after being confronted with the names of seven other clients did he admit having borrowed money from them as well.

22. Eventually, in a letter dated August 25, 2011, the Respondent admitted to borrowing money from

eleven different clients. The loans were verified with bank statements.

CONTRAVENTIONS

6. The Respondent admits that:

- a) Between August of 2009 and October of 2010, the Respondent borrowed money from clients without his member firm's knowledge or consent, thereby acting contrary to Dealer Member Rule 29.1;
- b) In February of 2010, the Respondent reimbursed a client for losses without his member firm's knowledge or consent, thereby acting contrary to Dealer Member Rule 29.1.

TERMS OF SETTLEMENT

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

- a) (To pay) a fine to IIROC in the sum of \$25,000.00;
- b) A period of suspension from registration in any category with IIROC for one month;
- c) Successful completion of the Conduct and Practices Handbook examination; and
- d) To pay costs to IIROC in the sum of \$3,000.00

3. SUBMISSIONS OF IIROC

¶ 5 The foregoing Agreed Statement of Facts, Contraventions and Terms of Settlement were reviewed by Mr. Godfrey, Enforcement Counsel for IIROC.

¶ 6 Mr. Godfrey referred to pertinent parts of the Settlement Hearing Book including IIROC Dealer Member Rules 15.3 ("Facts not to be Disclosed") and 20.36 ("Hearing Panel Powers").

¶ 7 (The Panel Members confirmed that we had read the Settlement Hearing Book and were familiar with the Rules and the Disciplinary Sanction Guidelines.) Mr. Godfrey emphasized the pertinence of Disciplinary Sanction Guidelines 2.5 ["Undisclosed Personal Business with a Client (includes borrowing from a client without firm knowledge or consent) - Dealer Member Rule 29.1" and headings "Considerations in Addition to General Principles" and "Recommended Sanctions"]; 2.6 ["Attempt to Settle Client Claim for Compensation - Dealer Member Rule 29.1" and headings "Considerations in Addition to General Principles" and "Recommended Sanctions"].

¶ 8 Mr. Godfrey discussed the main aspects of the violations by the Respondent, being that he had borrowed \$133,900.00 from eleven different clients and aggravated the situation by initially only disclosing three loans and only disclosing the other loans after being confronted with the names of the clients from whom he had borrowed the money. Furthermore, the firm had warned him not to borrow money from clients. The Respondent also reimbursed a client, his aunt \$2,500.00 for losses on a trade, which he did not disclose to the firm. The clients were all close friends or a relative. To the credit of the Respondent he has repaid all the loans, and interest, except one. Mr. Godfrey explained that although the circumstances of this case are at the low end of the scale of misconduct, a suspension of one month was deemed appropriate as a penalty because of the initial lack of candour of the Respondent.

¶ 9 Mr. Godfrey referred to the minimum fine of \$10,000.00 in each of the pertinent Disciplinary Sanction Guidelines 2.5 and 2.6 (above) and submitted that the fine agreed upon in this Settlement Agreement of \$25,000.00 is very appropriate in the circumstances. While acknowledging it is very difficult to find any cases directly on point with similar circumstances he said the following three decisions provide some guidance in determining the reasonable range of penalties (the decisions are discussed in the Reasons for Decision section, below):

Re Dass, 2009 IIROC 22, April 20, 2009 (Pacific District Council)

Re Kwok, 2010 IIROC 38, July 29, 2010 (Pacific District Council)

Re Wong, 2005 I.D.A.C.D. No. 24, July 29, 2005 (Pacific District Council)

Re Milewski, 1999 I.D.A.C.D. No. 17, July 28, 1999 (Ontario District Council)

Mr. Godfrey submitted that the foregoing cases involved more egregious circumstances, and accordingly more severe penalties were warranted than are warranted in the present case.

4. SUBMISSIONS OF THE RESPONDENT

¶ 10 Mr. Gunderson spoke briefly. He said the situation has made it very tough for him and he has left the investment industry. He reiterated that the clients were all close friends, or an aunt he has known all his life, and that he has repaid everyone with interest.

5. REASONS FOR DECISION

¶ 11 In the Settlement Agreement the Respondent admits to the Contraventions of IIROC Rules, IDA By-Laws, Regulations or Policies set out above. The Hearing Panel accepts that the Contraventions have been established.

¶ 12 We believe the Respondent has recognized that he exercised bad judgment and if he decides to return to the investment industry will have learned a lesson. He had no disciplinary history and he repaid all but one of the loans. He had good intentions in repaying his aunt for her investment loss. However, in each instance, he should have advised his firm and in the case of the loans he should have been forthright with his firm from the outset. That was his greatest failing and warranted the penalties which have been agreed upon.

¶ 13 As submitted by Counsel for IIROC, Guideline 2.5 of the IIROC Dealer Member Disciplinary Sanction Guidelines is pertinent to this case as regards the borrowing from clients (selected portions of the Guidelines set out):

2.5 Undisclosed Personal Business with a Client (includes borrowing from a client without firm knowledge or consent) - Dealer Member Rule 29.1

As a professional, a registrant must use his specialized knowledge to protect his client. He must strive to put the interest of his client ahead of his own.

The relationship between the client and the registrant is one of principal and agent. The registrant is bound not only to carry out his client's instructions, but also has a duty to act in the client's best interest and is not permitted to allow personal interest to conflict with the interests of the client.

Personal business dealings with clients should be avoided as they create a potential for the registrant to place his interests above those of his client. When such dealings are not objectionable, such as in cases of a pre-existing relationship or a family relationship between the client and the registrant the consent of both the client and the registrant's firm should be sought and obtained.

Considerations in Addition to General

Recommended Sanctions

Principles

1. Are there any circumstances which make the offensive activity less objectionable-pre-existing/family relationship between client and the Respondent?
2. Was the activity an isolated incident or part of a larger pattern of conduct involving multiple clients?

- Fine: Minimum of \$10,000.
- Disgorgement of commissions earned as a result of impugned transactions.
- Successful completion of appropriate industry program within

6 months.

3. Was the conflict of interest/potential conflict explained to the client?
4. Was the activity disclosed to the firm and its consent obtained?
-
7. Did the Respondent conceal or attempt to conceal his activity from the client and/or the firm?
8. Was the client harmed by the activity and if so to what extent?
9. Did Respondent profit from the activity?

- Period of close supervision for 12 to 24 months.
- In cases involving multiple clients/ Client losses/conduct over a period of time, consider a suspension from acting in relevant capacity.
- In egregious cases, consider permanent prohibition on approval in any capacity.

¶ 14 Guideline 2.6 of the IIROC Dealer Member Disciplinary Sanction Guidelines is somewhat pertinent to this case as regards reimbursing his aunt for her \$2,500.00 loss (selected portions of the Guideline set out):

2.6 Attempt to Settle Client Claim for Compensation - Dealer Member Rule 29.1

A client who has a complaint regarding the activities of a registrant is entitled to a fair and unbiased determination as to the validity of that complaint. If the client's complaint is well-founded, he is entitled to present same to civil dispute resolution channels and the Dealer Member firm for compensation; and to the appropriate regulatory bodies to consider possible disciplinary action. A registrant who attempts to, or does, settle a client claim deprives his client of these options, and prefers his interest over that of his client.

Considerations in Addition to General Principles

1. Did the Respondent conceal or attempt to conceal his activity from the Dealer Member firm?
2. Were any clients harmed by the activity and if so to what extent?
3. Was the client advised of the prohibited nature of this activity and, if so, did he/she appreciate same?

Recommended Sanctions

- Fine: Minimum of \$10,000.
- Suspension from acting in relevant capacity for 6 to 12 months.
- Successful completion of appropriate industry program within 6 months.
- Period of close supervision for 12 to 24 months.

4. Was the client coerced to accept the settlement offered?

- In egregious cases, consider permanent prohibition on approval in any capacity.

¶ 15 Hearing panels are always conscious of the opening section of the Disciplinary Sanction Guidelines:

GENERAL PRINCIPLES

The following principles and rules are proposed to provide a framework for assessing the gravity of a particular breach of the Dealer Member Rules, and help to determine which sanction(s) is reasonable in the circumstances.

1. 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:

1. Protection of the investing public;
2. Protection of the Investment Industry Regulatory Organization's membership;
3. Protection of the integrity of the Investment Industry Regulatory Organization's process;
4. Protection of the integrity of the securities markets, and
5. Prevention of a repetition of conduct of the type under consideration.

The penalty imposed in a specific proceeding should reflect the Hearing Panel's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrence.

¶ 16 In the cases referred to by Counsel for IIROC (above) the circumstances of the *Dass* case are much more egregious than those in the present case. The circumstances in the *Kwok* and *Wong* cases are more similar and provide some assistance in assessing the appropriate penalties in the present case.

¶ 17 In *Dass* there were similar circumstances regarding loans from friends and repayment by Mr. Dass. However, other misconduct was serious. He misappropriated funds for his personal use, attempted a cover-up by asking the former client to make a misrepresentation to IIROC and he did not cooperate in the investigation by his firm or by IIROC. He lied to his branch manager. This serious misconduct resulted in a fine of \$220,000.00, costs of \$83,184.00 and a "permanent ban from approval with IIROC". The *Dass* case provides no assistance to us.

¶ 18 In *Kwok* the respondent personally compensated three of his clients for \$26,408.00 (US) and \$3,500.00 (Cdn.) without the knowledge or consent of his employer. He did so after the clients had said if he did not compensate them they would complain to the IDA. Not reporting the complaint was contrary to the employer's compliance manual. Another complaint which resulted in the respondent repaying the client \$750.00 was not reported to his employer. The terms of settlement were a fine of \$15,000.00, costs of \$3,000.00, a suspension for six months, re-writing and passing the Conduct and Practices Handbook examination and to be under close supervision for a period of twelve months. The hearing panel was obviously concerned about the harshness of the six month suspension which they said "can, in some cases, effectively result in the registrant's loss of his book of business". However, applying the rationale of *Milewski* (below) and the fact that it was a negotiated settlement between the IDA and the respondent, the hearing panel found that the settlement terms fell within a reasonable range.

¶ 19 In *Wong* there was a similarity to the present case in that Mr. Wong had, on four separate occasions, over a year and one-half, without the knowledge of his firm, personally compensated a client for a total of

\$4,200.00. He made the payment after the client had complained to him. He also recommended investments which were not suitable for the clients and failed to use due diligence. The clients lost a total of \$168,000.00 (US). The firm repaid the clients the \$168,000.00 of which Mr. Wong paid approximately \$105,000.00. IDA Staff concluded that because of the repayment, a suspension and a larger fine which might otherwise have been required, were not required. The Settlement Agreement provided for a fine of \$25,000.00 respecting the bad investment advice and a fine of \$15,000.00 plus a two year suspension for personally compensating the clients without the knowledge of his firm. As in *Kwok* the panel had concerns with the severity of the two year suspension but, following the rationale of *Milewski*, concluded that the settlement terms agreed upon fell within a reasonable range.

¶ 20 We agree with the rationale in the *Milewski* decision (above) about panels not altering the terms of a settlement agreement unless the penalty “clearly fall(s) outside a reasonable range of appropriateness”.

¶ 21 We believe that IIROC, in agreeing to the penalties in this case, were mindful of the reservations of the hearing panels in *Kwok* and *Wong* regarding the extent of the suspensions. In this case, as far as we know, the Respondent had not received a complaint so the recommended sanction in Guideline 2.6 of a suspension for six or twelve months should not be considered appropriate in this case. Similarly the suspensions in *Kwok* and *Wong* should not be considered appropriate in this case. The Respondent is contrite, had no disciplinary record and has done his best to right the wrongs. He has considerable mitigating factors acting in his favour.

¶ 22 In our opinion the settlement terms agreed upon by IIROC and the Respondent fall within “a reasonable range of appropriateness” and should be accepted.

¶ 23 The Hearing Panel advised, at the conclusion of the Hearing, that we accepted, and we signed, the Settlement Agreement. We confirm that decision.

¶ 24 The Respondent, in the Settlement Agreement, agreed to the following terms of settlement, which we have accepted as appropriate:

- a) To pay a fine to IIROC in the sum of \$25,000.00;
- b) A period of suspension from registration in any category with IIROC for one month;
- c) Successful completion of the Conduct and Practices Handbook examination; and
- d) To pay costs to IIROC in the sum of \$3,000.00.

¶ 25 We consider the amount of the costs to be within the reasonable range and although they may not fully cover IIROC’s costs, they reflect the reduced involvement and cost for IIROC resulting from the Respondent’s cooperation.

November 9, 2012

Alan V.M. Beattie, Chair

Martin Davies

William Welton

Copyright © 2012 Investment Industry Regulatory Organization of Canada. All Rights Reserved.