Re Price

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Kevin Frederick Price

2017 IIROC 54

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

Heard: December 13, 2017
Decision: December 13, 2017
Reasons: January 3, 2018

Hearing Panel:
Louise Barrington, Chair, Donald Lawson and Zahra Bhutani
Appearances:
Elissa Sinha, Senior Enforcement Counsel, Michelle Keen and April Engleby
James Gibson, Counsel for the Respondent
In attendance:
Kevin Frederick Price

REASONS FOR ACCEPTANCE OF SETTLEMENT AGREEMENT

Settlement Agreement

¶ 1 Enforcement Counsel for the Investment Industry Regulatory Organization of Canada (IIROC) and for the Respondent submitted a Settlement Agreement for acceptance or rejection pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC. Following a hearing at the office of IIROC, the panel has accepted a Settlement Agreement between IIROC and Kevin Frederick Price, ("the Respondent) dated November 19, 2017. The agreed facts are set out in Part III of the Settlement Agreement attached to these Reasons.

Agreed Penalties

¶ 2 The Respondent agrees to pay the agreed penalties within 30 days of the acceptance of the Settlement Agreement, unless otherwise agreed between IIROC Staff and the Respondent. The agreed penalties were a fine of $15,000 and costs of $5000.

The Role of the Hearing Panel

¶ 3 According to IIROC Dealer Member Rule 20.36 (1), a Hearing Panel is to accept or reject the Settlement Agreement. We agree with the following statement by the panel in *RE Deutsche Bank Securities Ltd.*[1] 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

[1] [2013] IIROC 7 para. 9

meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry."

¶ 4 Further, as noted by panel chairman Paul M Moore QC in the case of *Donnelly*[2], a hearing panel will accept a settlement agreement where it is in the public interest to do so. It is usually in the public interest to settle these matters rather than proceed to contested hearings. Early determination of a dispute is desirable as it is efficient, fosters certainty and conserves resources that would otherwise be expended in contested litigation. It is also more palatable to the parties and to society than the result of a contested hearing. Thus a panel will generally try to agree on acceptance of a negotiated settlement.

Settlement Hearing

¶ 5 At the settlement hearing, Enforcement Counsel presented the details and circumstances of the case and the Settlement Agreement. Counsel for the Respondent endorsed the comments of Enforcement Counsel and confirmed that the Settlement Agreement was acceptable to the Respondent. The Staff and the Respondent jointly recommended that the panel accept the Settlement Agreement.

Issue

¶ 6 The Hearing Panel has the duty to decide whether to accept or reject the proposed settlement as set out in the Settlement Agreement negotiated between counsel for IIROC and for the Respondent. The Panel recognizes that counsel for the parties are in the best position to know the circumstances of the case and the principles which apply to it. That said, to accept the Settlement Agreement the Hearing Panel must be satisfied as to three conditions:

(a) The agreed penalties must be fair and reasonable, that is, proportional to the seriousness of the contravention, and considering all relevant circumstances;

(b) the agreed penalties must be within an acceptable range, taking into account similar cases; and

(c) the agreed penalties should serve as a deterrent to the Respondent and to industry.

(a) Were the agreed penalties fair and reasonable?

¶ 7 What is fair and reasonable will vary, depending on the facts and circumstances of each case. In a case such as this one, where both parties are represented by counsel and could have continued to a contested hearing, it is unlikely that a panel would disagree that the negotiated settlement was fair and reasonable.

¶ 8 The Respondent admitted that, over a period of two years, he had recommended to a client that she use significant margin, and that he earned significant compensation by engaging that client in short-term trading to an extent which was not within the bounds of good practice. The risk associated with the margin and the short-term trading was unsuitable for the client. During the two-year period the client, a retired individual with a total net worth of just under $1 million, lost approximately $369,000 across her accounts with the Respondent.

¶ 9 The Respondent was disciplined by his employer, paying a fine of $21,000, successfully re-sat the Conduct and Practices Examination, and was subject to strict supervision for a period of six months. He is personally contributing $55,000 towards compensating the client for her losses.

¶ 10 Mitigating factors in the negotiation of the penalties include:

(a) The Respondent, a registered dealer since 1992, had had no prior disciplinary history over 25 years.

(b) The Respondent acknowledged misconduct at an early stage of the IIROC investigation.

(c) From inception, the Respondent purchased securities on margin, which increased the income generated. Over time when the clients living expenses exceeded her original the anticipated needs, she withdrew significant amounts of capital from her accounts. The capital withdrawals

[2] [2016] IIROC 23 para 7-13

increased the client's reliance on margin in order to maintain her desired level of income.

(d) Although there was excessive use of short-term trading, the risk profile of the new issues purchased was generally consistent with the client's investment objectives. Some of the new issues were purchased and held, consistent with the client's income and growth investment objectives.

(e) The issuer-paid commissions on the new issues were generally disclosed to the client, both at the opening of her accounts and in the subscription documents relating to each purchase.

(f) Prior to the hearing the Respondent had paid an internal fine, successfully re-sat the Conduct and Practices Examination, and worked under strict supervision for six months. He is also personally contributing the amount of $55,000 to compensate the client. The respondent will thus pay a total of $76,000 in fines and in restitution. This amount constitutes a disgorgement of the approximately $40,000 in commissions which he earned as a result of his misconduct.

¶ 11 The panel considers that the agreed penalties are fair and reasonable.

(b) Were the agreed penalties within an acceptable range?

¶ 12 Enforcement Counsel noted at the hearing that the penalties set out in the Settlement Agreement were at the lower end of the range for similar cases. The Hearing Panel is aware that settlement sanctions are often in the lower end of the reasonable range to reflect the benefits of avoiding a contested hearing.

¶ 13 In deliberating, a panel is not to consider what its own members might consider appropriate, but will accept a Settlement Agreement where penalties are within a reasonable range, rejecting it only if it views the penalty as clearly falling outside the range of appropriateness. This reflects the public interest benefits of an efficient settlement process which is in the words of the *Bugden*[3] panel, "a cornerstone of effective and efficient regulatory process."

¶ 14 Acknowledging that the fixing of penalties is an art rather than a science, given that no two cases are exactly the same, Counsel referred the Hearing Panel to a number of cases with similar circumstances to those of this case. This provided the Hearing Panel with a range of agreed penalties in settlements in similar circumstances. Most helpful were the cases of *Bugden*[4] *and Putzi*[5], both of which concerned clients with similar net worth and risk profiles, and similar contraventions of the Rules.

¶ 15 The Hearing Panel has concluded that the agreed penalties were within an acceptable range.

(c) Will the penalties serve as a deterrent to the Respondent and to industry?

¶ 16 According to the Sanction Principles for IIROC Disciplinary Proceedings, the purpose of sanctions is to protect the public interest by restraining future conduct that may harm the capital markets. To achieve this, sanctions should be significant enough to prevent and to discourage future misconduct, specifically by the respondent and generally by others engaged in similar misconduct. Deterrence is achieved when a sanction strikes an appropriate balance between a Regulated Person's specific misconduct but is also in line with industry expectations.[6]

¶ 17 Further, the Principles provide that sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.

¶ 18 The Hearing Panel has accepted that the agreed penalties, in light of all the circumstances presented to us, will achieve the objectives described above and are thus adequate to serve as a deterrent to the Respondent

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[3] 2017 IIROC 30 at page 2
[4] 2017 IIROC 30
[5] 2017 IIROC 27
[6] See *Re Mills,* [2001] I.D.A.C.D. No. 7

and to the industry.

¶ 19 In conclusion the hearing panel has agreed that the Settlement Agreement is in the public interest and we therefore accept it.

Dated at Toronto, Ontario this 3rd day of January, 2018.

Louise Barrington

Donald Lawson

Zahra Bhutani

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 Kevin Frederick Price ("Respondent").

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 recommended that his client use significant margin and engage in short-term trading of new issue securities. The amount of margin used was unsuitable for the client. The amount of short-term new issue trading was not within the bounds of good business practice, given the significant additional compensation generated for the Respondent and the fact that the amount of short-term trading was unsuitable for the client.

The Respondent

5. The Respondent, Kevin Frederick Price, has been registered with IIROC or its predecessor organizations since approximately 1992. In November 2012, the Respondent became registered with MGI Securities Inc. When that firm was acquired by Industrial Alliance Securities Inc. ("IAS") in April 2014, the Respondent's employment and registration was transferred to IAS.

6. The Respondent has no disciplinary history.

The Client

7. In October 2013, the client opened two margin accounts with the Respondent, along with TFSA and RRSP accounts. All of the accounts were fee-based and the client paid a percentage fee to the Respondent based on the market value of the securities held.

8. The New Client Application Forms ("NCAF") for the client reflected the following circumstances, risk tolerance and objectives:

    a. Born in 1948.

    b. Retired and separated with no dependents.

c. Total net worth of $988,000 consisting of $825,000 fixed assets and $163,000 liquid assets.

d. "Good" investment knowledge.

e. Risk tolerance of 90% medium and 10% high.

f. Investment objectives of 80% income, 10% growth, and 10% speculative. A handwritten note stated that the speculative portion was intended "for possible short term trading of medium risk stocks".

9. Despite the characterization of investment knowledge as "good", the client had limited understanding of investment products and strategies.

10. The client required regular income from her portfolio for living expenses. The Respondent advised that he could generate income of approximately $40,000 per year on the assumption that investable assets were approximately $500,000.

11. In November 2013, the client transferred approximately $470,000 in securities and cash to IAS that were held with a previous firm and deposited $50,000 in cash. However, a portion of her assets had been pledged to the former firm as collateral to secure a loan. After the loan was retired, the client was left with approximately $155,000 in equity invested with the Respondent.

12. The client's fixed assets consisted of two condominiums. In September 2014, the client sold one condominium and transferred the entire proceeds of approximately $492,293 to IAS.

13. Throughout the relationship, the client invested virtually all of her liquid assets with the Respondent.

Margin

14. From inception, the Respondent purchased securities for the client on margin. This increased the income generated, but also the risk.

15. Although the client had pledged securities held by her former investment dealer to secure loans, she only had the general understanding that margin was a loan on which interest would be charged. She told Staff that she believed that IAS had assumed the loan she had with her former firm, she intended to reduce it as she was able, and she did not want it increased.

16. Over time, the client's living expenses significantly exceeded the needs that she had originally estimated and she withdrew significant amounts of capital from her accounts.

17. The Respondent told Staff that he attempted to compensate for the withdrawals by increasing margin. However, he did not adequately discuss the associated increase in risk and volatility with the client.

18. There was a significant amount of securities purchased on margin in the accounts. With the capital withdrawals, the client's reliance on margin increased as time went on. Between January 2014 and December 2015, the debt/equity ratio in the client's accounts ranged from 0.44 to 3.21, with a monthly average of 1.92. The value of securities purchased on margin fluctuated from $111,510 to $1,004,853.

19. After the deposit of the proceeds from the condominium sale in September 2014, the client was in a position to generate the income she had originally estimated for her needs without margin. However, in light of the client's repeated withdrawals and increased living expenses, the Respondent continued to use margin in increased amounts, thereby exposing his client to risk beyond her stated tolerance.

Short-Term Trading of New Issues

20. According to the NCAF, the client was prepared to allocate 80% of her portfolio to income, 10% to growth and 10% to speculative trading. The NCAF noted that the speculative trading objective was for possible short-term trading in medium-risk securities.

21. The Respondent recommended a significant number of trades in new securities. Over the relevant two year period, the Respondent purchased a total of $4.1 million of new issues for the client, representing

approximately 71% of all of the securities purchased during that timeframe. A significant amount of the new issues were purchased as part of the short-term trading strategy and were sold quickly. Overall, the short-term new issue trading was not profitable for the client.

22. The new issue purchases generated additional commissions for IAS and the Respondent which were paid by the issuers. Over the relevant two year period, the Respondent realized net commissions of approximately $40,000 from the purchase of new issues in the client's accounts. This compensation was in addition to the account fees paid by the client.

23. The amount of short-term new issue trading that the Respondent recommended and implemented for the client exceeded the 10% speculative investment objective stated on the NCAF and was unsuitable.

24. It should however be noted that the risk profile of the new issues that were purchased was generally consistent with the client's investment objectives and that some of the new issues were purchased and held, consistent with the client's income and growth investment objectives.

Losses

25. During the two-year period, the client incurred losses of approximately $369,000 across her accounts with the Respondent, net of withdrawals, fees and interest.

The Trading Was Not Suitable for the Client and Was Not Within the Bounds of Good Business Practice

26. The significant use of margin and short-term trading exposed the client to greater risk and volatility and was inconsistent with her stated risk tolerance and income-focused objectives.

27. The risk associated with the level of margin used and short-term trading was not suitable for the client, having regard to the fact that she was 65 years old, retired, dependent on account income, and regularly withdrawing funds from her account.

28. The amount of short-term new issue trading was also inconsistent with good business practice because the Respondent generated significant commissions from trading that was unsuitable and not in his client's interest.

Mitigating Factors

29. The Respondent has no disciplinary history in the course of his 25 years as a registrant.

30. The Respondent was subject to internal discipline by IAS pursuant to which he paid a fine in the amount of $21,000, successfully completed the Conduct and Practices Handbook Examination, and was subject to strict supervision for six months.

31. The client received compensation for a significant part of her losses. The Respondent is personally contributing the amount of $55,000 to compensating the client.

32. In total, the Respondent will pay $76,000 in fines and in restitution to the client.

33. Staff has considered the fine paid by the Respondent to IAS and the amount he has contributed to client compensation in agreeing to the penalty herein. In Staff's view, those amounts constitute disgorgement of commissions relating to the misconduct and a partial penalty. If not for the internal discipline and client compensation, the recommended penalty would have been substantially higher.

34. The issuer-paid commissions for new issues were generally disclosed to the client in the account opening documentation and in the subscription documents issued to the client prior to each purchase.

PART IV – CONTRAVENTIONS

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

Contravention 1

Between January 2014 and December 2015, the Respondent failed to ensure that his use of margin and short-term trading were suitable for one client, contrary to Dealer Member Rule 1300.1(q).

Contravention 2

Between January 2014 and December 2015, the Respondent engaged in short-term new issue trading that was not consistent with good business practice, contrary to Dealer Member Rule 1300.1(o).

PART V – TERMS OF SETTLEMENT

36. The Respondent agrees to the following sanctions and costs:

    a) A fine of $15,000; and

    b) Costs of $5,000.

37. 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

38. 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 paragraph below.

39. 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

40. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

41. 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.

42. 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.

43. 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.

44. 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.

45. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

46. 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.

47. 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.

48. 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

49. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

50. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "19" day of November, 2017.

"Witness"
Witness

"Kevin Frederick Price"
KEVIN FREDERICK PRICE

"Michelle Keen"
Witness

"Elissa Sinha"
Elissa Sinha

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

The Settlement Agreement is hereby accepted this "13" day of December, 2017 by the following Hearing Panel:

Per: "Louise Barrington"
Panel Chair

Per: "Zahra Bhutani"
Panel Member

Per: "Donald Lawson"
Panel Member

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