

Re Hoang

IN THE MATTER OF:

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

and

David Hoang

2013 IIROC 02

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

Heard: December 20, 2012

Decision: January 13, 2013

Hearing Panel:

Catharine Esson, Chair; L. Karen Henderson, Member; J. Chris Lay, Member

Appearances:

Wietzke Gerber, Enforcement Counsel for IIROC

Sean Boyle and Alexandra Luchenko, for David Hoang

DECISION ON SANCTION

¶ 1 In our Decision on the Merits dated November 1, 2012, we concluded that on or about March 30, 2011, Mr. Hoang failed to attend and give additional information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5. We dismissed two other allegations against Mr. Hoang:

- that Mr. Hoang failed to comply with BC Interpretation Note 33-705, and
- that Mr. Hoang failed to respond truthfully or completely to questions put to him at his June 2010 interview.

¶ 2 The circumstances of Mr. Hoang's failure to attend on March 30, 2011 are more fully described in the Decision on the Merits. For the purposes of determining the appropriate sanction, the following circumstances are particularly significant:

- a. Mr. Hoang was interviewed by IIROC in June, 2010. At that time, he was interviewed as a witness only.
- b. By February, 2011, IIROC had obtained additional information on the basis of which Mr. Hoang became a subject of the investigation. This information included the instant messages to and from Mr. Hoang which are discussed in the Decision on the Merits. IIROC made these documents available to Mr. Hoang to review and sought to interview Mr. Hoang again.
- c. Mr. Hoang was aware in February, 2011, that he was under investigation by IIROC and that IIROC wanted to speak with him. Through his counsel, he agreed to attend an interview scheduled for February 23, 2011.
- d. Late in the evening on February 22, 2011, Mr. Hoang's counsel sent an email to Mr. Ferguson

advising him that:

I have heard from Mr. Hoang and unfortunately he is unable to attend the interview tomorrow. Please feel free to contact him directly as I am no longer acting for him.

- e. Upon receiving this email on the morning of February 23, 2011, Mr. Ferguson telephoned Mr. Hoang who was, at that time, in his office in Calgary. Mr. Hoang confirmed that he would not be attending the interview but, when pushed for a new interview date, said he would get back in touch with Mr. Ferguson.
- f. Mr. Hoang quit his employment that day.
- g. IIROC made efforts to get in touch with Mr. Hoang, including sending two letters to Mr. Hoang at the address recorded in the National Registration Database. The second letter compelled Mr. Hoang to attend an interview on March 30, 2011. The evidence did not establish that Mr. Hoang received either letter.
- h. Mr. Hoang did not attend the March 30, 2011 interview or contact IIROC again. However, approximately a year later, on the eve of the initial hearing date in this proceeding, new counsel acting for Mr. Hoang contacted IIROC. Although the hearing did not actually commence on the merits for another 6 months, neither IIROC nor Mr. Hoang's counsel raised with the other the outstanding interview request.

¶ 3 We concluded that, in the particular circumstances of this case, Mr. Hoang had a duty to remain in touch with IIROC to reschedule his interview and that, had he done so, he would have been aware of the March 30, 2011 interview. On that basis, we concluded that on or about March 30, 2011, Mr. Hoang failed to attend and give additional information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

¶ 4 Pursuant to IIROC Dealer Member Rule 20.33, we have the discretion to impose any one or more of a number of types of sanction on Mr. Hoang, including a fine and a bar from approval with IIROC.

¶ 5 IIROC sought a fine of \$40,000 and costs related to the failure to attend allegation but did not seek to bar Mr. Hoang from membership for any period. Mr. Hoang submitted that a fine of \$10,000 would be an appropriate sanction.

¶ 6 Both parties relied upon IIROC's *Dealer Member Disciplinary Sanction Guidelines* and previous IIROC decisions in "failure to attend" cases in support of their positions.

¶ 7 IIROC referred to a number of previous decisions but noted that this case presented a combination of factors not seen together in any previous case in that:

- a. there was a partial but not a complete failure to cooperate;
- b. the failure to cooperate did not prevent IIROC from issuing a Notice of Hearing on the basis of the underlying allegations of misconduct; and

¶ 8 IIROC brought, but did not prove, the underlying allegations of misconduct.

We have considered the cases provided to us by both parties. *Re: Mirza* [2007] IDACD No 39 is helpful. Like this case, *Mirza* was a case of partial compliance. Mr. Mirza refused to attend an interview for a period of about eight months, although he subsequently did so. IIROC highlighted a significant difference in the circumstances of *Mirza* and the circumstance of Mr. Hoang's case. In *Mirza*, the noncompliance stalled the investigation for about eight months. IIROC advised us that Mr. Hoang's noncompliance did not significantly impact the investigation. Mr. Mirza was fined \$40,000 and was not suspended for any period.

¶ 9 In our view, this case is somewhat less serious than *Mirza*, both for the reason IIROC highlighted and because the degree to which the breach was proven to be intentional was not as great in this case. This is discussed in more detail in paragraph 13(b), below.

¶ 10 The parties referred us to three cases where significantly smaller fines were imposed for failure to

cooperate: Re: Armstrong, [2003] IDACD No. 19, Re: Gaudreault, [2001] IDACD No. 9 and Re: Andersen, [2001] IDACD No. 15. We do not find these cases helpful. In each one, the respondent was found to have committed numerous violations including failing to cooperate and, in addition to receiving a fine for the failure to cooperate, each respondent was permanently prohibited from approval in any capacity with a member firm. One cannot determine the extent to which the failure to cooperate contributed to the permanent prohibition and therefore one cannot isolate the penalty for the failure to cooperate.

¶ 11 While IIROC's *Disciplinary Sanction Guidelines* are not binding on us, they provide useful discussion of the purposes of sanctions and of factors which a hearing panel may find relevant in assessing the sanction for a failure to cooperate with an IIROC investigation.

¶ 12 The *Disciplinary Sanction Guidelines* recommend the following penalty for failing to cooperate contrary to Bylaw 19.5:

- a. Fine: Minimum of \$10,000 for an Approved Person;
- b. Immediate suspension of 30 days to 90 days pending compliance with Dealer Member Rule 19.5; and
- c. Permanent ban from approval in any capacity of an Approved Person if the Respondent still fails to cooperate at the end of the temporary suspension.

¶ 13 The *Disciplinary Sanction Guidelines* recommend a number of "General Principles" and "Considerations in Addition to General Principles" which may be relevant to sanction. In our view the following considerations are particularly relevant in this case:

- a. The disciplinary history of the Respondent –Mr. Hoang has no disciplinary history. We note the advice in the *Disciplinary Sanction Guidelines* that:

A first conviction may be seen as a measure of punishment in and of itself, given the attendant stigma attached to the process of charging, finding of guilt and imposition of sanction.
- b. Was the contravention intentional or inadvertent? IIROC submitted that the contravention was intentional. Mr. Hoang submitted that it was inadvertent. In our view, Mr. Hoang's contravention had elements of both. Mr. Hoang was aware IIROC wanted to interview him and he had a duty to contact IIROC about this. His failure to do so was intentional. However, we also concluded that the evidence did not establish that Mr. Hoang was actually aware of the March 30 interview date. His failure to attend that particular interview may not have been intentional. In our view, the misconduct which has been proven, while serious, is less serious that it would have been if we had found that Mr. Hoang was aware the interview had been scheduled and failed to attend.
- c. Was there complete or partial noncompliance? The parties agree that Mr. Hoang's noncompliance was partial.
- d. The impact that the noncompliance had on the investigation. IIROC advised us that the noncompliance did not have a significant impact on its investigation. We understand the basis of this concession to be that IIROC was able to proceed to a hearing on the basis of evidence obtained without Mr. Hoang's additional information. In our view, this is reinforced by the fact that IIROC did not press its request to interview Mr. Hoang once Mr. Hoang retained counsel.
- e. Was the refusal to cooperate based on reasonable reliance on competent legal advice? There is no evidence of this.
- f. Was the information requested of material importance to the pending investigation? IIROC argued that the information it sought at the interview likely would have been of material importance in that it could have resolved grey areas in the evidence. Mr. Hoang argued that given Mr. Hoang's role in the firm and that the investigation proceeded in the absence of the further information, we should conclude that the information would not have been material. In our view, it is likely that the

information IIROC sought would have been material. For example, by March 30, 2011 IIROC had received the instant messages referred to in the Decision on the Merits. IIROC had identified to Mr. Hoang that it wished to ask him about these messages in the second interview. Mr. Hoang's evidence concerning these messages would likely have been material.

¶ 14 IIROC submitted that the failure to cooperate is serious misconduct as it undermines the integrity of the self regulatory system and the effectiveness of its operations. We agree.

¶ 15 We have concluded that this case warrants more than a minimal fine. While there are mitigating circumstances, Mr. Hoang's conduct frustrated IIROC's attempts to interview him. It is likely that interview would have given rise to material information. Mr. Hoang did not advance any explanation for his failure to contact IIROC which might have minimized its significance. As noted above, his conduct was intentional, at least to the extent he knew IIROC intended to interview him, he promised to contact IIROC about the interview and he did not do so.

¶ 16 On the other hand, this case is less serious than it would have been if it had been established Mr. Hoang knew about the March 30 interview date. In addition, Mr. Hoang is a first offender. His failure to cooperate was partial and IIROC did not consider that it substantially impacted the investigation. IIROC did not renew its interview request when Mr. Hoang retained counsel in March, 2012.

¶ 17 In our view, the sanction should be substantial enough to reinforce the importance of registrants cooperating with IIROC's investigations. At the same time, however, the fine should reflect that the misconduct for which Mr. Hoang is being sanctioned is not an intentional refusal to attend the March 30 interview. It is Mr. Hoang's failure to remain in touch with IIROC which resulted in him not being aware of the March 30 interview.

¶ 18 We consider a fine of \$25,000 is appropriate in the circumstances of this case.

Costs

¶ 19 Pursuant to Dealer Member Rule 20.49, we have discretion to assess and order any IIROC Staff investigation and prosecution costs we determine are appropriate and reasonable in the circumstances. IIROC sought costs of in the amount of \$2329.80.

¶ 20 IIROC filed an Affidavit of Tim Ferguson, the investigator in this matter, and a Bill of Costs in support of its claim for costs. IIROC has estimated the portion of the investigation and hearing which was attributable to the breach of s. 19.5. Mr. Hoang does not dispute this estimate and we accept it. IIROC has then charged an hourly rate for its investigative costs and an hourly rate for its legal costs. These rates are described as "the hourly rates ascribed by IIROC's Finance Department to Enforcement Staff". While we received evidence that these rates are approved by IIROC's Board of Directors and that they are set after a review which includes a consideration of the costs incurred by IIROC Staff, this does not establish that the rates are reasonable. While we are concerned about this, we have concluded that the overall amount sought is, subject to the issue discussed below, a reasonable amount to attribute to the failure to cooperate portion of the case.

¶ 21 Mr. Hoang asserted that he should not be required to pay IIROC's costs because he has incurred greater costs in successfully defending himself on the other allegations and he cannot claim his costs from IIROC.

¶ 22 The issues which may arise from reducing an award of costs in IIROC's favor on account of the costs a respondent incurred in successfully defending some portions of a hearing were not fully canvassed before us. This is understandable, given the amount of money in dispute for costs in this case. It does, however, affect any precedential value this decision might have on this point. That being said, we have concluded that it is appropriate and reasonable not to award any costs to IIROC in this case in light of the fact that the vast majority of the hearing was devoted to issues on which Mr. Hoang was successful and that he cannot recover his costs for his successful defense from IIROC.

Sanction

¶ 23 Pursuant to Dealer Member Rule 20.33, we order that Mr. Hoang pay a fine the amount of \$25,000. We

have not made any order as to costs.

Dated at Vancouver, BC, this 13th day of January, 2013.

Catharine Esson, Chair

L. Karen Henderson, Member

J. Chris Lay, Member

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