Re McErlean

IN THE MATTER OF:

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

and

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

and

Shaun Gerard McErlean

2012 IIROC 12

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

Heard: January 27, 2012
Decision: March 16, 2012
(17 paras.)

Hearing Panel:
Hon. Patrick T. Galligan, Q.C. (Chair), David Lang, Stuart Livingston
Appearances:
Milton Chan and Natalija Popovic, IIROC Enforcement Counsel
Shaun Gerard McErlean, the Respondent appearing personally without counsel

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DECISION AND REASONS ON PENALTY

¶ 1 By a decision dated October 31, 2011, the Hearing Panel found that the Respondent committed the following violations:

1. From January 2008 to January 2009 the Respondent engaged in business conduct that is unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1 and its predecessor IDA by-law 29.1 in that he:
   (i) provided falsified account documents to two clients; and
   (ii) misrepresented investment information to two clients about their accounts.
2. From July 2005 to January 2009 the Respondent made discretionary trades in the account of his client MR without first having the client's written authorization or having the account approved as discretionary by his firm, contrary to IIROC Dealer Member Rule 1300.4 and its predecessor IDA Regulation 1300.4.
3. Between December 2008 and January 2009, the Respondent personally compensated two of his clients for losses in their accounts without the knowledge or approval of his Member firm, contrary to IIROC Dealer Member Rule 29.1.

PRELIMINARY MATTER

¶ 2 At the opening of the penalty hearing, the Respondent applied for a stay of proceedings pending a hearing by way of appeal to, or review by, the Ontario Securities Commission ("OSC"). After hearing his submissions and the reply of Enforcement Counsel we withdrew to consider the application. We then resumed the hearing and stated that it was our opinion that there is a strong public interest in having a hearing panel complete the hearing of the issues put before it by the Notice of Hearing as expeditiously as possible. It would be contrary to that public interest to bifurcate the hearing by postponing the penalty part until proceedings before the OSC could be completed. Moreover, it is our opinion that we should defer to the OSC to decide whether a stay is appropriate in a case which will be before it.

¶ 3 Accordingly, we directed that the penalty hearing proceed to its conclusion. We did, however, advise the parties that we would stay the implementation of the penalties for 60 days from the date of release of this decision to allow the Respondent time to apply to the OSC for a stay if he sees fit to do so.

PENALTY

¶ 4 The circumstances of the case are set out, in some detail, in our reasons for decision and need not be repeated in any detail. In essence, the allegations made against the Respondent were proved to the requisite degree of proof. The Respondent did give falsified documents to two clients and he did misrepresent investment information to them. He did make a significant number of discretionary trades in a client's account. And he did partially compensate two clients for their losses.

¶ 5 It is the position of Enforcement Counsel that the giving of falsified documents to his clients and the misrepresentation of investment information to them is so serious that a permanent bar on approval is called for. We agree that those actions amount to grave misconduct and call for a very serious sanction. We are not persuaded, however, that the ultimate penalty of a permanent bar is called for. In our consideration of this issue we have been influenced by the decision of the hearing panel in *Re Bell*, [2005] I.D.A.C.D. No. 15 at para. 35:

> Forgery is always serious. It is unequivocally condemned because it is fundamentally dishonest and dangerous. Any act of forgery is a step onto a steep and slippery slope of deception that is always potentially harmful to clients and actually harmful to the Member firm and the securities industry as a whole. Where there is no such thing as a "minor case" of forgery, we can distinguish between more and less egregious examples of forgery.

¶ 6 The decision in *Re Bell* involved forgery. That is a different offence than those of which the Respondent was found guilty. They too are to be condemned. But *Re Bell* establishes an important principle which should be applied whenever serious misconduct occurs. A hearing panel should consider whether the case before it is a more or less egregious one. In *Re Bell* a permanent bar was not imposed. Thus, we think a permanent bar should be reserved for the more egregious cases. We do not think that a permanent bar to approval should follow automatically from the giving of falsified documents or the misrepresentation of investment information to clients.

¶ 7 We think that a helpful approach is to be found in *IDA v. Peroni and Hétu,* [2006]. In that case the Respondents were found guilty of very serious misconduct. After referring to *Re Mills* [2001] I.D.A.C.D. No. 7 at p. 3, the hearing panel said this:

> It is apparent, therefore, that we must consider this particular case and these particular respondents, not just the offence itself. While principles which are applied in criminal cases are not directly applicable to these disciplinary proceedings, there is one which can give some helpful guidance. That principle is that the maximum sentence is reserved for the worst offence and the worst offender.

¶ 8 The evidence in this case does not, in any way, justify a finding that the Respondent's misconduct was motivated by a desire to profit personally from his actions. The reasons why he did what he did are somewhat obscure, but what is clear is that he was not trying to appropriate the clients' assets to himself. Thus, while his conduct must be condemned it does not amount to what we would see to be a worst case.

¶ 9 The Respondent is not a worst offender. He has no previous disciplinary record. He cooperated with

the IIROC investigation. His compensation of two clients for their losses is, perhaps, a doubled edged sword. Because he did so without the knowledge and approval of his employer he committed an offence. But, on the positive side for him, his remediation efforts show a concern for his clients and an acknowledgment of responsibility.

¶ 10 Because we do not think that this is the worst case and the worst offender we will not impose a permanent bar. It was pointed out in *Re Mills* (*supra*) that the purpose of penalty is to deter, not to punish. The convictions themselves will bear upon the Respondent's reputation in the business community and, therefore, constitute real punishment for him. It is necessary to determine a penalty which will serve as a realistic deterrence to others. The penalty must be such that it will deter persons who may be tempted to mislead others, whether clients or members of the investment industry.

¶ 11 It is not suggested that the offences found in Counts #2 and #3 of the Notice of Hearing, individually or jointly, would justify the imposition of a permanent bar.

¶ 12 We have considered the cases submitted to us and the Sanction Guidelines and have decided that the appropriate penalty in this case is a bar of approval and the imposition of monetary penalties. We have decided that the bar of approval should be a period of five years followed by one year subject to restrictions and conditions upon his registration.

¶ 13 Enforcement Counsel has suggested that the following fines would be appropriate in this case:

Count #1	-	$50,000.00
Count #2	-	$15,000.00
Count #3	-	$10,000.00

¶ 14 We are satisfied that those suggested fines fall well within the Sanction Guidelines and within ranges which emerge from other decided cases. We think that they are reasonable and appropriate fines to be imposed in this case.

COSTS

¶ 15 Exhibit #7, the affidavit of K. Trotman, establishes that the total cost of time for investigations and counsel is the rounded amount of $100,000.00. Mr. Chan advised us that approximately 75% of that time relates to matters which are not before us and suggested, therefore, that a costs award of $25,000.00 would be justified. We think reference should be made to the decision of the hearing panel in *IDA v. Chak Ng* (2007), at p. 6:

> The Association seeks costs. Enforcement Counsel has suggested that costs be fixed at $80,000, which is approximately 75% of the Association's estimated expenses based upon its user time reports. In the case of *IDA v. Octagon Capital Corp.*, [2007] I.D.A.C.D. No. 16, at paragraph 77, the Ontario District Council quoted with approval the following statement from *IDA v. Credifinance Securities Ltd.*, [2006] I.D.A.C.D. No. 30, at paragraph 56:
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> > In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach to costs is not unwarranted.
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> While costs are a legitimate part of the sanction imposed upon an offending Member or registered representative, we think that they should not, particularly in the case of a registered representative, be so great that they could intimidate a person from exercising the right to an impartial hearing of the complaint filed against him/her. Costs in the neighbourhood of those sought in this case could have an "*in terrorem*" effect upon an individual who wants to have his

or her day in court. While we found against Mr. Ng, he was entitled to have the charges made against him aired at an open, impartial hearing. We do not think that the fear of large costs should have a bearing upon a person's decision whether or not to exercise such a right.

¶ 16 We think it appropriate to adopt a "conservative approach". We think that the claim for costs should, accordingly be reduced to $15,000.00.

DISPOSITION

¶ 17 For the reasons set out above, the Hearing Panel orders that:

1. The Respondent be barred from approval for a period of five years and for one year thereafter he will be subject to the following restrictions and conditions upon his registration.
   (a) All trading must have the prior approval of a supervisor.
   (b) Any client account generating in excess of $1,500.00 per month in commissions must be reviewed by the CEO of the Member and/or his designate.
2. The Respondent shall pay to IIROC fines in the following amount:
   (a) Count #1 - $50,000.00
   (b) Count #2 - $15,000.00
   (c) Count #3 - $10,000.00
3. The Respondent shall pay to IIROC the sum of $15,000.00 on account of its costs.
4. The implementation of paragraphs 1, 2 and 3 hereof is stayed for 60 days from the date of the release of this decision.

Dated at Toronto, this 16th day of March, 2012.

Hon. Patrick T. Galligan, Chair

David Lang

Stuart Livingston