

Re Cole

IN THE MATTER OF:

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

and

Henry Cole

2012 IIROC 5

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

Hearing: January 18, 2012 in Toronto, Ontario
Decision: February 3, 2012
(17 paras.)

Hearing Panel:

Terrance Sweeney (Chair), Richard Austin, Hugh McNabney

Appearances:

Susan Kushneryk, IIROC Enforcement Counsel

Michael Arthur, IIROC Investigator

Scott Fenton, Counsel for the Respondent who was not present

DECISION OF THE ONTARIO DISTRICT COUNCIL

BACKGROUND

¶ 1 This Panel was constituted pursuant to the rules of the Investment Industry Regulatory Organization of Canada (“IIROC”) to consider, pursuant to dealer member rule 20.36 a Settlement Agreement, signed by counsel for IIROC and the Respondent on January 30, 2012 and recommended by both counsel. A copy of the Settlement Agreement is attached as Schedule “A”.

¶ 2 We were constituted a Hearing Panel of the Ontario District Council of the Investment Industry Regulatory Organization of Canada (IIROC) to consider, pursuant to Dealer Member Rule 20.36, a Settlement Agreement, attached as Schedule “A”,¹ jointly recommended by Counsel for IIROC and the Respondent and signed by the parties on January 18, 2012.

¶ 3 In the Settlement Agreement the Respondent admitted that, between February 2009 and December 2010, he failed to observe high standards of ethics and conduct in the transaction of his business, and engaged in a business conduct or practice which was unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1, in that he:

- (a) misappropriated client funds in the amount of approximately \$5 million;
- (b) created false documents; and
- (c) misrepresented payments to investors out of a pool of investor funds as being returns on

¹ Exhibit 2

investment.

¶ 4 IIROC Staff and the Respondent agreed to the following terms of settlement:

- (a) A fine of \$5,020,022; and
- (b) The Respondent shall be permanently banned from registration with IIROC.

¶ 5 The Respondent also agreed to pay costs to IIROC of \$10,000.

SUBMISSIONS

¶ 6 Counsel for IIROC explained that the fine of \$5,020,022 was made up of \$4,945,022, the amount misappropriated by the Respondent plus \$25,000, being the minimum fine for each fraud, forgery and misappropriation as set forth in the Guidelines.²

¶ 7 She took the Hearing Panel quickly through some relevant case law and urged the Hearing Panel to accept the penalties as falling within a reasonable range of appropriateness.

¶ 8 Counsel for the Respondent addressed the Hearing Panel. He informed us that just that very morning the Respondent had been sentenced to 30 months in jail and that he was now in custody.

¶ 9 Counsel explained that on his arrest in the summer of 2011, the Respondent had waived his constitutional rights and had cooperated with the police investigation.

¶ 10 Counsel said the Respondent recognizes that his actions were an egregious breach of trust for which he was fully responsible.

REASONS, DECISION AND SETTLEMENT AGREEMENT

¶ 11 The Hearing Panel is restricted by Dealer Member Rule 20.36. It may only accept or reject the Settlement Agreement.

¶ 12 We are well aware of the proper tests to employ in evaluating a Settlement Agreement. The Hearing Panel respects the settlement process and will not lightly interfere with a negotiated settlement. In *Milewski*³ the Hearing Panel said:

... a District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

¶ 13 The facts are fully set out in the Settlement Agreement and will not be repeated here.

¶ 14 There is, however, one fact which bore heavily in the decision of the Hearing Panel. The Respondent had entered into a settlement agreement with the Investment Dealers Association in 2002. He was fined \$125,000 and suspended for ten years from specified management roles or any role with compliance or supervisory responsibilities.

¶ 15 That did not deter this reptilian Respondent from stealing nearly \$5 million from at least 21 clients, one of whom was an 80-year old widow.

¶ 16 In these circumstances, the Hearing Panel quickly and unanimously approved the Settlement Agreement as being within the range of reasonableness.

¶ 17 The members of the Hearing Panel signed the Settlement Agreement. The Chair indicated that brief reasons would follow. These are those reasons.

² Exhibit 3

³ [1999] I.D.A.C.D. No. 17 (decided on July 18, 1999 at p. 9)

Dated at Toronto, Ontario, this 3rd day of February 2012.

Terrance A. Sweeney, Chair

Richard Austin, Panel Member

Hugh McNabney, Panel Member

******* SETTLEMENT AGREEMENT *******

I. INTRODUCTION

1. IIROC Enforcement Staff (“Staff”) and the Respondent, Henry Cole, (“Cole” or the “Respondent”) consent and agree to the settlement of this matter by way of this agreement (the “Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (the “Investigation”) into Cole’s conduct.
3. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (the “Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

4. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

Between February 2009 and December 2010, the Respondent, while a Registered Representative, failed to observe high standards of ethics and conduct in the transaction of his business, and engaged in a business conduct or practice which is unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1, in that he:

- (a) misappropriated client funds in the amount of approximately \$5 million;
 - (b) created false documents; and
 - (c) misrepresented payments to investors out of a pool of investor funds as being returns on investment.
6. Staff and the Respondent agree to the following terms of settlement:
 - (a) Cole will pay a fine of \$5,020,022; and
 - (b) Cole shall be permanently banned from registration with IIROC.
 7. As a result of the Respondent’s cooperation at an early stage of this investigation, Staff were not required to incur substantial investigation or prosecution costs. The Respondent agrees to pay costs to IIROC in the sum of \$10,000 to reflect the costs that Staff incurred in connection with this matter.

III. STATEMENT OF FACTS

(i) Acknowledgment

8. 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) Factual Background

A. Overview

9. Cole misappropriated approximately \$5 million from various clients while he was an advisor at RBC Dominion Securities (“DS”).

10. Cole conducted his misappropriation by creating a purported private investment fund (the “Private Fund”), without the knowledge, authorization or consent of DS. Cole induced clients to provide him with funds for the purported purpose of investment in the Private Fund. Instead of investing those funds in the Private Fund, Cole misappropriated them for his own personal purposes.
11. To facilitate his scheme, Cole created promissory notes on which he forged the signature of a third party, a lawyer in Woodbridge, who was not in fact aware of the promissory notes or anything whatsoever about the clients or their purported investments.
12. Cole further deceived his clients as to the nature of the Private Fund by making payments to those clients on a monthly basis and falsely representing those payments as interest on an investment in the Private Fund, when they were in fact a return of the clients’ own principal.
13. Cole concealed all of his dealings with the Private Fund from DS.

B. Registration History

14. Cole first became a registrant of the Investment Dealers Association of Canada in 1986, and became a registrant of IIROC on June 1, 2008.
15. Cole served as President and a director of Rampart Securities Inc. (“Rampart”) from 1997 to 2001 and as Alternate Designated Person from 1999 to 2001. Cole admitted to certain compliance deficiencies while he was at Rampart and, pursuant to a settlement agreement approved by the IDA on July 23, 2002, was fined \$125,000 and suspended for ten years from specified management roles or any role with compliance or supervisory responsibilities.
16. Cole joined DS in 2005, where he worked until his employment was terminated for cause on November 29, 2010. Cole is no longer a registrant with an IIROC firm.

C. Trinity Real Estate Partners Inc.

15. While he was at DS, Cole operated one or more personal business entities. One of those entities existed as an Ontario corporation, 1319448 Ontario Inc., and operated as Trinity Real Estate Partners Inc. until it changed its name to Trinity on July 23, 2010 (“Trinity”). Cole was the sole officer, director and shareholder of Trinity.
16. Cole did not disclose his personal business entities to DS.

D. Client T and the Private Fund

17. Cole’s investment client T (“T”) is a private holding company that was incorporated as part of an estate plan. Interest off its investments supports BR, a widow in her early 80s. T’s investments were transferred to Cole in late 2008 after significant losses with a previous advisor.
18. In the summer of 2009, Cole recommended that T invest in the Private Fund. He made a representation to T that the Private Fund would pay an 8% to 9% return based on real estate investments. T’s principals, including BR’s children, agreed to invest in the Private Fund. They assumed that the Private Fund was approved by DS and Cole did not at any time clarify that the Private Fund was unknown to DS.
19. Between September 2009 and July 2010, Cole induced T and its principals to transfer over \$2 million from their investment accounts into their RBC bank accounts for investment in the Private Fund. Cole provided them with a series of promissory notes in exchange for their investments in the Private Fund.
20. The promissory notes were purportedly signed by both Cole and a third party, a lawyer in Woodbridge. In fact, Cole forged the signature of the third party, who was not aware of the promissory note or of anything regarding the purported investment.
21. At all times following its initial investment in the Private Fund, Cole paid T and its principals amounts on a monthly basis that were falsely represented as being returns on their investments in the Private

Fund.

E. Misappropriation from Client T and Principals

22. Cole arranged for the funds of T and its principals to be transferred from their bank accounts into a Trinity bank account at the Bank of Montreal (the “Trinity Account”). Trinity did not generate any income over the relevant period other than funds contributed by Cole’s clients and the money in the Trinity Account was made up almost exclusively of client funds.
23. The funds in the Trinity Account, including those transferred in from T and its principals, were not used for legitimate investment purposes, real estate or otherwise. Instead, the funds in the Trinity Account were used to fund Cole’s personal expenses, including his daughter’s private school tuition, his personal credit card debts, his personal loan debts and payments to family members, and to make lump sum payments to various Cole clients, including T, from time to time.
24. Cole never disclosed to T or its principals that payments made to them from time to time as returns on their investments were actually made from the Trinity Account.

F. Misappropriation from Other Clients

25. Cole followed the same pattern of soliciting investments in an off-book private placement with a number of his DS clients in addition to T and its principals.
26. In each instance, Cole provided the clients with promissory notes in exchange for their investments. Those promissory notes included a signature of a third party as forged by Cole. Cole also made payments to each client on a periodic basis, representing those payments to be returns on investments. They were in fact a return of capital from the clients’ own funds on deposit in the Trinity Account.
27. The clients from whom Cole misappropriated funds through the Trinity investment scheme and the amounts misappropriated from each, less capital returned in the form of purported investment returns, include those listed on Schedule “A” to this Settlement Agreement.
28. In total, Cole misappropriated at least \$4,945,022 from his DS clients through this scheme. This does not include \$384,028 that was paid to investors as fictitious returns on their investments.
29. DS substantially reimbursed the clients whose funds were misappropriated by Cole.

G. Bankruptcy Orders

30. Each of Cole and Trinity were adjudged bankrupt by Orders of the Ontario Superior Court of Justice dated February 10, 2011 in Court File Nos. 31-OR-207805-T and 31-OR-207806-T.

IV. TERMS OF SETTLEMENT

31. This settlement is agreed upon 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.
32. The Settlement Agreement is subject to acceptance by the Hearing Panel.
33. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
34. The Settlement Agreement will be presented to the Hearing Panel at a hearing (the “Settlement Hearing”) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
35. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
36. 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 in relation to the matters disclosed in the Investigation.

37. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
38. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
39. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
40. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Toronto, in the Province of Ontario, this 18th day of January, 2012.

“Mike Arthur”

Witness – Mike Arthur

Fenton, Smith Barristers

Counsel to Henry Cole

“Henry Cole”

Henry Cole

Respondent

AGREED TO by Staff at the City of Toronto, in the Province of Ontario this 18th day of January, 2012.

“Michael Arthur”

Witness – Michael Arthur

Senior Investigator

Investment Industry Regulatory Organization of Canada

“Susan Kushneryk”

Susan Kushneryk

Senior Enforcement Counsel on behalf of

Staff of the Investment Industry Regulatory

Organization of Canada

ACCEPTED at the City of Toronto, in the Province of Ontario, this 18th day of January, 2012, by the following Hearing Panel:

“Terrance Sweeney”

Mr. Terrance Sweeney

“Richard Austin”

Mr. Richard Austin

“Hugh McNabney”

Mr. Hugh McNabney

SCHEDULE “A” to Settlement Agreement between IIROC and Henry Cole

Clients of Henry Cole and Amounts Misappropriated

- T – \$1,945,752
- BR – \$125,000
- ER in trust for MRR – \$63,090
- ER in trust for JWR – \$63,090

- ER in trust for HMR – \$63,090
- #’d Company c/o EW – \$45,000 (less \$3,442)
- AI c/o EM – \$50,000
- MaB – \$25,000 (less \$2,250 repaid) and US\$25,000 (less \$1,688 repaid)
- MeB – \$128,000 (less \$28,865)
- MiB – \$28,000 (less \$3,780)
- KD – \$35,000 (less \$6,401 repaid)
- Dr. AB – \$325,000 (less \$56,208 repaid)
- NG – \$375,000 (less \$70,813 repaid)
- HH – \$11,000 (less \$743 repaid)
- JK and BK – \$150,000 (less \$39,375 repaid)
- DB and RM – \$670,000 (less \$78,208 repaid)
- BiR – \$250,000 (less \$29,025 repaid)
- RR – \$58,000
- RT – \$50,000 (less \$6,077 repaid)
- TH – \$160,000
- EW – \$300,000 (less \$57,333 repaid)