

Re Newbury

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Richard Shaw Newbury

2019 IIROC 07

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

Heard: March 8, 2019 in Vancouver, British Columbia

Decision: March 8, 2019

Written Decision: March 21, 2019

Hearing Panel:

Gary Snarch, Chair, Brian Worth and Bradley Doney

Appearance:

Paul Smith, Senior Enforcement Counsel

Dana H. Prince, Counsel for the Respondent

DECISION ON THE ACCEPTANCE OF SETTLEMENT AGREEMENT

Introduction

¶ 1 This settlement hearing was convened to consider the joint recommendation of the parties to accept a Settlement Agreement entered into between Enforcement Staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Respondent, pursuant to Section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC. A copy of the Settlement Agreement is attached.

¶ 2 After considering the material filed and submissions of counsel and after reviewing the proposed Settlement Agreement, the Panel advised counsel at the hearing that the Settlement Agreement was accepted. The Panel further advised counsel that written Reasons would be provided.

¶ 3 The Respondent admitted to the following contravention of IIROC Dealer Member Rules:

- (a) Between January 2013 and February 2016, the Respondent failed to use due diligence to ensure that investment recommendations were suitable for one client contrary to Dealer Member Rule 1300.1(q); and
- (b) Between January 2013 and February 2106, the Respondent exercised discretionary authority over a client’s account without proper approval contrary to Dealer Member Rule 1300.4.

- ¶ 4 The Respondent agreed to the following sanctions:
- (a) A fine in the amount of \$10,000
 - (b) A six month suspension from registration in any capacity;
 - (c) A requirement that no future registration be considered unless the Respondent successfully rewrites the Conduct and Practices Handbook Examination; and
 - (d) A requirement that any future registration be subject to a one year period of close supervision.

Background Agreed Facts

¶ 5 The agreed upon facts are set out in detail in the attached Settlement Agreement. They are summarized below with much of the following taken directly from the undisputed agreed facts and submissions provided by counsel for IIROC:

- (a) The Respondent was born in 1950 and was first registered in the securities industry in the mid-1970s working continuously since 1999 as a Registered Representative at the Dealer Member where the contraventions occurred (“Dealer Member”);
- (b) The Client, JM, was born in 1968 and in 2005, at the age of 37, was widowed and left with sole responsibility for two children, aged 9 and 12. At the relevant time, JM worked as a retail sales clerk and earned between \$30,000 and \$35,000 annually. She had limited investment knowledge;
- (c) In 2006, JM opened investment accounts at the Dealer Member with the Respondent being the responsible Registered Representative. Approximately \$200,000 was transferred at the time of opening these accounts;
- (d) In 2007, JM sold her home and transferred the net proceeds of the sale of approximately \$200,000 to her accounts at the Dealer Member;
- (e) In 2012, JM opened a tax free savings account with the Respondent. Her New Client Application Form was updated and showed the following:
 - i. JM was 44 years old and had limited investment knowledge;
 - ii. JM’s combined annual family income with her spouse (she had remarried) was \$80,000;
 - iii. JM had liquid assets with an estimated value of \$540,000;
 - iv. JM had fixed assets with an estimated value of \$275,000;
 - v. JM’s estimated total net worth was \$815,000; and
 - vi. Except for JM’s registered account for which the investment objectives indicated “Growth”, the investment objectives for all her other accounts indicated “Aggressive Growth”.

¶ 6 All securities that JM held in her account at the Dealer Member were recommended by the Respondent and were in the natural resource/commodities sector.

¶ 7 From 2013 to 2016, most of the securities in JM’s accounts were held for a short period of time before they were sold, with the proceeds of sale used to purchase other securities. These purchases were in large dollar figure amounts and characterized as high risk/high reward securities.

¶ 8 By January 2012, the Respondent was regularly executing transactions in JM’s account without first

confirming them with her. JM verbally gave the Respondent ongoing authority to execute any transactions that he felt were right.

¶ 9 In May 2013, after an internal firm review of a different client's account, the Respondent received a written reminder that he was not permitted to engage in discretionary trading.

¶ 10 In October 2013, after an internal review of JM's accounts, the Respondent was fined \$5,000 by the Dealer Member for using his own discretion to execute transactions in JM's accounts without first obtaining her instructions.

¶ 11 From October 2013 to March 2016, the Respondent regularly communicated his recommendations and received authorization from JM before executing transactions in her accounts. However, there were many occasions when transactions were not sufficiently specified and approved by JM prior to being executed by the Respondent.

¶ 12 The Respondent also executed 11 discretionary transactions in JM's accounts from January 20, 2015 to February 11, 2016 when JM was temporarily out of the country. Before travelling, JM sent the Respondent a text message asking him to "please just trade and buy and sell as needed" while she was away. The Respondent replied, "Will do" but did not properly document, advise or request permission from his firm to use his discretion on a temporary basis.

¶ 13 Over the 10 year life span of all of JM's accounts, JM had realized and unrealized losses close to \$200,000, which was approximately half of the amount she had invested with the Respondent.

¶ 14 Notwithstanding the recorded investment objectives on the NCAFs, JM was not a high risk investor. The Respondent's recommendations and short term trading strategy were not suitable for her.

¶ 15 None of JM's accounts were ever designated or approved as discretionary accounts and, accordingly, were never properly supervised.

¶ 16 In March 2016, JM transferred all of her account holdings out from the Dealer Member. The Dealer Member has since paid financial compensation to JM, and the Respondent has contributed to that compensation.

Analysis

¶ 17 In considering the proposed Settlement Agreement, the Panel has taken into consideration that the Respondent has advised IIROC that upon execution of the Settlement Agreement and after serving the period of agreed suspension, the Respondent will be retiring from the securities industry and will not be seeking registration with an IIROC firm at any point in the future.

¶ 18 In addition, the Panel has considered the fact that the Respondent has demonstrated to the satisfaction of IIROC a *bona fide* inability to pay a higher fine than provided for in the proposed Settlement Agreement and that the expectation is that the fine will be paid. Although the inability to pay is not an overriding and predominant factor in assessing financial penalties, it is to be taken into consideration. See *Re Kloda* 2016 IIROC 50, *Re Sawisky* 2017 IIROC 28, *Re Pedersson* 2017 IIROC 32 and *Re Giroux-Garneau* 2016 IIROC 46.

¶ 19 As well, the Panel notes that the Respondent has contributed to the financial compensation paid to JM.

¶ 20 The Panel has been advised by counsel for IIROC that the Respondent resigned his employment with the Dealer Member in December 2018 and, accordingly, the proposed suspension of six months is in effect an eight month suspension.

¶ 21 Counsel for IIROC has provided the Panel with a number of cases regarding the proposed agreed upon sanctions as it relates to both suspension and fines.

¶ 22 With respect to suitability cases where there was no suspension, we were referred to the following:

- (a) *Re Birkeland* 2015 IIROC 14;
- (b) *Re Dion* 2017 IIROC 20; and
- (c) *Re Kunz* 2017 IIROC 2013.

¶ 23 With respect to discretionary trading cases where there was no suspension, we were referred to:

- (a) *Re Karim* 2015 IIROC 14; and
- (b) *Re Smith* 2016 IIROC 15.

¶ 24 With respect to suitability/discretionary cases where a suspension was ordered, we were referred to:

- (a) *Re Gareau* 2011 IIROC 72;
- (b) *Re Brodie* 2013 IIROC 39;
- (c) *Re Jones* 2014 IIROC 15;
- (d) *Re Husebye* 2016 IIROC 21;
- (e) *Re Bodon* 2018 IIROC 12;
- (f) *Re Reyes* 2018 IIROC 47; and
- (g) *Re Kloda* 2016 IIROC 50.

¶ 25 Counsel for IIROC submitted that the six month suspension proposed was consistent with the range found in the following cases:

<i>Re Reyes</i>	2 months
<i>Re Jones</i>	3 months
<i>Re Brodie</i>	6 months
<i>Re Bodon</i>	6 months
<i>Re Husebye</i>	6 months
<i>Re Gareau</i>	12 months

¶ 26 With respect to the range of fines, counsel for IIROC proposed that the following cases defined the range:

<i>Re Huebye</i>	\$20,000
<i>Re Dion</i>	\$25,000
<i>Re Brodie</i>	\$40,000
<i>Re Birkeland</i>	\$45,000
<i>Re Jones</i>	\$48,000
<i>Re Bodon</i>	\$50,000

¶ 27 It is well established that the Panel's role is not to substitute what we may consider appropriate penalties but to determine whether the proposed sanctions are reasonable in all the circumstances. Panels are not privy to the give and take that is necessary in any settlement and we acknowledge the benefits that settlements have to offer. This is especially the case when dealing, as we are here, with very experienced counsel. See *Re Donnelly* 2016 IIROC 23, *Re Deutsche Bank Securities Ltd.* 2013 IIROC 7 and *Re Clark* [1999] IDA 40.

¶ 28 Having said that, the Panel is of the view that but for the Respondent's financial situation and the fact that he is retiring from the industry, we would expect the fine to have been higher and the suspension to be longer.

¶ 29 In all of the circumstances, the Panel is of the unanimous opinion that the penalties fall within the reasonable range of appropriateness in dealing with both personal and general deterrence and accepts the proposed Settlement Agreement.

Dated at Vancouver, BC, this 21st day of March, 2019.

Gary Snarch

Brian Worth

Bradley Doney

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 Richard Shaw Newbury ("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. These facts relate to the period of time from January 2012 through March 2016 when the Respondent was a Registered Representative ("RR") working at Haywood Securities Inc. ("Haywood") in Vancouver, British Columbia.
5. Over a period of approximately three years, in one client's account, the Respondent recommended and executed a short term trading strategy in higher risk securities that was not suitable for the client. The Respondent used his own discretion to execute many of these transactions.

The Respondent

6. The Respondent was born in 1950 and was first registered in the securities industry in the mid-1970s. He had been working continuously as an RR at Haywood's Vancouver office since 1999. In anticipation of the execution of this Settlement Agreement, he resigned from Haywood effective December 31, 2018.
7. The Respondent has advised IIROC that upon the execution of this Settlement Agreement and after serving the period of suspension set out in paragraph 36 he is retiring from the securities industry and will not be seeking registration with a Dealer Member at any point in the future. The Respondent has demonstrated to Staff that he has a bona fide inability to pay a higher fine than the one provided for in paragraph 35 of this Settlement Agreement. The Respondent acknowledges that if not for his inability to pay, the agreed fine would be higher and an order to pay costs would also be made.

The Client Opens Accounts with the Respondent

8. JM is a resident of Saskatchewan who was born in 1968. In 2005, at the age of 37, she was widowed and left with sole responsibility for two children aged 9 and 12.
9. At all times relevant to this settlement agreement, JM worked as a retail sales clerk and earned \$30,000 - \$35,000 annually. She had limited investment knowledge.
10. After her husband's death, JM initially opened investment accounts at a Dealer Member that was associated with the bank where she conducted her daily banking activities. She invested primarily in low or medium risk income producing securities.
11. In 2006, on the recommendation of a close family friend, who had accounts with the Respondent at Haywood, JM opened investment accounts at Haywood, with the Respondent being the RR responsible for her accounts.
12. After using some of the money to pay off the balance of the mortgage on her house, the remaining holdings in the accounts at the other Dealer Member were subsequently transferred to her accounts at Haywood – approximately \$200,000.
13. In 2007, JM married a widower with two young children of his own. JM moved with her children to her second husband's home, sold her home and invested the proceeds of sale - approximately \$200,000 - in her accounts at Haywood.
14. In 2012 when JM opened a Tax Free Savings Account her New Client Application Form was updated to show the following:
 - JM was 44 years old and had limited investment knowledge
 - JM's combined annual family income with her spouse was \$80,000
 - JM had Liquid Assets with an estimated value of \$540,000
 - JM had Fixed Assets with an estimated value of \$275,000
 - JM's estimated total net worth was \$815,000
 - Except for JM's registered account for which the Investment Objectives was "Growth", the investment objectives for her other accounts were "Aggressive Growth."

The Respondent's Recommendations

15. All of the securities that JM held in her accounts at Haywood were recommended by the Respondent.

He recommended natural resource companies that he followed that he believed had significant growth potential. When JM first sought to open accounts with him, the Respondent told her that his background was in commodities and that his recommendations were mostly restricted to such companies.

16. The Respondent rationalized that since JM chose to open an account with him knowing his background, then his recommendations were suitable for her. In this way, rather than build a portfolio that was specifically suited to her needs, the Respondent fit JM into his book of business.

The Respondent's Use of Discretion

17. JM did not have sufficient investment knowledge or experience to question or assess any of the Respondent's recommendations. She always agreed with them.
18. After a period of time of simply agreeing to recommendations that she, in any event, did not understand, JM verbally gave the Respondent ongoing authority to execute any transactions that he felt were right without first confirming the transactions with her.
19. From this point, at least by January 2012, the Respondent regularly executed transactions in JM's accounts without first confirming them with her.
20. In May 2013 after an internal firm review of a different client's account, the Respondent received a written reminder from Haywood that he was not permitted to engage in discretionary trading.
21. In October 2013, after an internal firm review of JM's accounts, the Respondent was fined \$5,000 by Haywood for using his own discretion to execute transactions in JM's accounts without first contacting her.
22. None of JM's accounts were ever designated or approved as discretionary accounts and were therefore never supervised in the manner that discretionary accounts should be supervised.
23. From October 2013 to March 2016, the Respondent regularly communicated his recommendations and received authorization from JM before executing transactions in her accounts. Still, there were many occasions when all four elements of the transaction:
 - which security was being purchased or sold
 - the quantity of the security being purchased or sold
 - the price at which the transaction would be made
 - the timing of the transactionwere not sufficiently specified and communicated to and approved by JM before the transaction was executed.
24. The Respondent also executed 11 discretionary transaction in JM's accounts from January 20, 2015 to February 11, 2016 when JM was temporarily out the country. Before travelling, JM sent the Respondent a text message asking him to "please just trade and buy and sell as needed" while she was away. The Respondent replied, "Will do" but did not properly document, advise or request permission from his firm to use discretion on a temporary basis for this client.

Suitability

25. In JM's accounts, the Respondent recommended and executed purchases of large amounts of high risk and high reward securities. Some of these securities produced significant gains, but others resulted in significant losses.

26. While the top seven gaining securities generated profits of approximately \$320,000, the top seven losing securities produced the same amount of losses.
27. Overall, throughout their existence, the losses in JM's accounts were more than the gains. Over the approximately 10 year life span of all of her accounts, JM had realized and unrealized losses close to \$200,000 which was roughly half of the amount she invested with the Respondent.
28. From 2013 to 2016, another defining characteristic of JM's accounts was the short period of time most securities were held for before they were sold and the proceeds of sale used to purchase another security.
29. The frequency with which securities were bought and sold increased the commissions charged in the accounts.
30. The cost-to-equity ratio is a calculation which compares the cost of trading to the amount of equity in the account. In other words, the cost-to-equity ratio is the percentage return the entire account would have to generate before it started to show a profit.
31. In the three year period from 2013 to 2016 the cost equity ratio in JM's cash account, where the vast majority of her funds were held, was as follows:
 - 2013 8.86%
 - 2014 9.75%
 - 2015 6.55%
32. Notwithstanding the recorded investment objectives on the NCAFs for her accounts, JM was not a high risk investor. She wanted to achieve a reasonable rate of return on her investments but did not expect or want to take on any more risk than her circumstances would have otherwise dictated. The Respondent's recommendations and short term trading strategy were not suitable for her.

JM's Complaint and Settlement

33. In March 2016 JM transferred all of her account holdings from Haywood to another Dealer Member. In April 2016, she delivered a written complaint to Haywood regarding the suitability of the Respondent's recommendations. Haywood has since paid financial compensation to JM to settle her complaint and the Respondent has contributed to that financial settlement.

PART IV – CONTRAVENTIONS

34. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:
 - (i) Between January 2013 and February 2016, the Respondent failed to use due diligence to ensure that investment recommendations were suitable for one client contrary to Dealer Member Rule 1300.1 (q); and
 - (ii) Between January 2013 and February 2016, the Respondent exercised discretionary authority over a client's account without proper approval contrary to Dealer Member Rule 1300.4.

PART V – TERMS OF SETTLEMENT

35. The Respondent agrees to the following sanction:
 - a) A fine in the amount of \$10,000.

- b) A six month suspension from registration in any capacity; and
 - c) A requirement that no future registration be considered unless the Respondent successfully rewrites the Conduct and Practices Handbook Examination, and
 - d) A requirement that any future registration be subject to a one year period of close supervision.
36. 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

37. 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.
38. 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

39. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
40. 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.
41. 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.
42. 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.
43. 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.
44. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
45. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full1 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.
46. If this Settlement Agreement is accepted, the Respondent agrees that neither it nor anyone on its behalf will make a public statement inconsistent with this Settlement Agreement.
47. 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

- 48. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
- 49. A fax or electronic copy of any signature will be treated as an original signature.

DATED this “7th” day of March, 2019.

signed “witness”

Witness

signed “Richard Newbury”

Richard Shaw Newbury

DATED this “7th” day of March, 2019.

signed “Gina Nolletti”

Witness

signed “Paul Smith”

Paul Smith

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

The Settlement Agreement is hereby accepted this 8th day of March, 2019 by the following Hearing Panel:

Per: signed “Gary Snarch”

Gary Snarch, Chair

Per: signed “Brian Worth”

Brian Worth, Member

Per: signed “Bradley Doney”

Bradley Doney, Member

Copyright © 2019 Investment Industry Regulatory Organization of Canada. All Rights Reserved