Re Boswell

IN THE MATTER OF:

THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

ROBERT WILLIAM BOSWELL

2008 IIROC 21

Investment Industry Regulatory Organization of Canada
(Formerly, and at the time of the Penalty Hearing,
the Investment Dealers Association of Canada)
Hearing Panel (Alberta District)

Heard: April 28, 2008 at Calgary, Alberta
Written submission of the Respondent received September 16, 2008
Decision: October 30, 2008
(27 paras.)

Hearing Panel:
Alan V.M. Beattie, Q.C., Chair
Karen Henderson, Industry Representative
Kathleen Jost, Industry Representative

Appearances:
Kathryn Andrews, counsel for the Association
Gil Gauthier, The Manager, Investigations, Calgary Office of the Association
Faye Emmanuel, Enforcement Counsel

The Respondent did not attend but had been in communication and was allowed time within which to provide a written submission.

PENALTY DECISION

INTRODUCTION: CONTRAVENTIONS

¶ 1 In a Decision issued November 3, 2007, this Hearing Panel ("the Panel") found that the Respondent, Robert William Boswell, committed all five contraventions alleged by the Association. The conclusions of the Panel on the five counts were (pp. 35, 36 of the Decision):

Our decision on each Count is:

Count 1

We are satisfied with the evidence that the Respondent engaged in making trades in client accounts without the prior knowledge and consent of those clients, contrary to Association By-Law 29.1. As discussed above, there is compelling, uncontradicted evidence, including admissions by the Respondent, of numerous unauthorized trades with different clients, while employed at two different investment firms, and we do not require proof of every one of the alleged 350 unauthorized trades.

Count 1 has been proven.

Count 2

We are satisfied with the evidence that the Respondent offered to compensate a client and made a misrepresentation to the client that his firm would participate in reimbursing the client, contrary to Association By-Law 29.1. He provided personal cheques to the client which were returned NSF. The evidence was compelling and uncontradicted.

Count 2 has been proven.

Count 3

We are satisfied with the evidence that the Respondent traded outside of his province of registration, contrary to the respective ***Securities Acts*** and of Association By-Law 29.1. The evidence was compelling and uncontradicted.

Count 3 has been proven.

Count 4

We are satisfied with the evidence that the Respondent made misrepresentations to a client as to their proper account balance, which is contrary to Association By-Law 29.1. The evidence was compelling and uncontradicted.

Count 4 has been proven.

Count 5

We are satisfied with the evidence that the Respondent failed or refused to cooperate with the investigation by not providing requested records (the cellphone records). The Respondent was warned of the possible disciplinary action consequence of not providing those records, and nonetheless the records were not provided by him. The evidence is compelling and uncontradicted.

Count 5 has been proven.

¶ 2 The Panel reserved jurisdiction to hear arguments at a continuation of the Hearing to be arranged by the Association, regarding penalties to be imposed on the Respondent and costs to be assessed against the Respondent.

¶ 3 The Association arranged for the Penalty Hearing to be held in Calgary on April 28, 2008, and provided appropriate notice to the Respondent on or about December 6, 2007. In March the Association provided the Respondent with the Association's "Penalty Book" (including cases) and "Bill of Costs". On April 25, 2008 the Respondent emailed the Association advising that, for health reasons, he would be unable to attend the Penalty Hearing scheduled for April 28. In view of previous delays in the Disciplinary Hearing, Counsel for the Association advised that she wished to proceed with the Penalty Hearing on April 28 and suggested a possible course of action whereby she would make her submissions on Penalty to the Panel on April 28, the Association would subsequently provide a transcript of the submissions to the Respondent and he would have such time as

the Panel directed to respond in writing. With the telephone assurance of the Chair, on April 25, regarding ample time to respond, the Respondent agreed to the process suggested. The Penalty Hearing proceeded on April 28. The Respondent did not attend nor did a representative on his behalf.

¶ 4 At the commencement of the Hearing on April 28, the Chair read into the record the particulars of the exchange of emails and telephone communications with the Respondent.

SUBMISSIONS OF THE ASSOCIATION ON PENALTY

¶ 5 Ms. Andrews, Counsel for the Association, advised at the outset of the Penalty Hearing that the Association is seeking, against the Respondent, a permanent ban on registration with the Association, total fines of $150,000.00 ($75,000.00 on Count 1, $25,000.00 on Count 2, $10,000.00 on Count 3, $25,000.00 on Count 4 and $15,000.00 on Count 5) and costs of $25,000.00.

¶ 6 Ms. Andrews made the following submissions:

¶ 7 A. Pertinent provisions of the Association's "Disciplinary Sanctions Guidelines" were referenced by Counsel and the conduct of the Respondent discussed under each provision. (The Guidelines are set out in italics and Ms. Andrews' submissions in regular type.)

DISCIPLINARY SANCTION GUIDELINES

GENERAL PRINCIPLES

The following principles and rules are proposed to provide a framework for assessing the gravity of a particular breach of the Association's By-laws, Regulations, Rules and Policies, and help to determine which sanctions(s) is reasonable in the circumstances.

1. Disciplinary Sanctions are Remedial in Nature

As set out in Re Derivative Services Inc., [2000] I.D.A.C.D. No. 26, at page 3, a Hearing Panel's main concerns in determining an appropriate penalty are:

1. *Protection of the investing public;*
2. *Protection of the Investment Dealers Association's membership;*
3. *Protection of the integrity of the Investment Dealers Association's process;*
4. *Protection of the integrity of the securities markets, and*
5. *Prevention of a repetition of conduct of the type under consideration.*

The penalty imposed in a specific proceeding should reflect the Hearing Panel's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrence.

2. Disciplinary Sanctions as Deterrence

Registrants and Member firms have significant responsibilities that they must meet if investors are to be protected and market integrity maintained. Registrants who choose to act in ways that threaten the integrity of the capital markets must have the expectation that they will be held accountable through enforcement action by regulators. Sanctions should be based on the circumstances of the particular misconduct by a respondent with an aim at general deterrence.

General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry

expectations. As was observed by the Ontario District Council in Re Mills [2001] I.D.A.C.D. No. 7, April 17, 2001, at p. 3:

> *Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.*

....

3. Key Considerations When Determining Sanctions

3.1 Harm To Clients, Employer and/or the Securities Market

Actual harm can sometimes be quantified by considering the type of transactions, the number of transactions, the size of the transaction, the number of clients affected by the misconduct, the length of time over which the misconduct took place, and the size of the loss suffered by the client(s) or the Member firm. Harm can also be measured using less empirical, but more subjective factors, such as the impact of a specific misconduct on a client's life (from an emotional, physical and/or mental perspective), or the impact on the reputation of the Member firm, or the reputation of the Canadian securities industry as a whole.

¶ 8 There was evidence of several of these factors, involving a large number of clients, which conduct continued to some extent even after the Respondent changed firms.

3.2 Blameworthiness

In appropriate cases, distinctions should be drawn between conduct that was unintentional or negligent, and conduct that involves manipulative, fraudulent or deceptive conduct. Distinctions should also be drawn between isolated incidents and repeated, pervasive, systemic violations of the Association's By-laws, Regulations or other rules.

....

¶ 9 The Respondent's conduct was intentional and deceptive. His unauthorized trading caused trust with clients to be broken. His misrepresentation regarding compensation to a client, including the firm paying one-third without any approval of that compensation by the firm, was compounded by NSF cheques.

3.5 Prior Disciplinary Record

The fact that a respondent has no prior disciplinary record should, in the absence of evidence to the contrary, lead a panel to a presumption that the respondent was of good moral character prior to the misconduct. 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.

A good employment or internal discipline record should be a mitigating factor because it demonstrates responsibility and conformity to professional norms, which are the antithesis of the misconduct.

However, in certain cases it may be that the misconduct at issue is so serious/ egregious as to nullify the mitigating effect of the respondent having no prior disciplinary history (or at least no relevant disciplinary history).

....

¶ 10 The fact that the Respondent had no prior disciplinary record is the one mitigating factor in the Respondent's favour, but the contraventions by the Respondent were sufficiently serious that a lack of prior record cannot mitigate against the penalty of a permanent ban.

> ***3.6 Acceptance Of Responsibilities, Acknowledgement Of Misconduct And Remorse***
>
> *An admission of wrongdoing by a respondent is usually considered to be a mitigating factor because it implies remorse and an acknowledgement of responsibility. The extent of the mitigating value is affected by timing: the earlier, the better. Remorse can be indicated even after a hearing, although its value may be diminished.*

¶ 11 Although there were some admissions by the Respondent of unauthorized trading, other misconduct was only partially admitted. There was no acknowledgement of remorse.

> ***3.10 Planning and Organization***
>
> *Evidence of planning and pre-meditation are aggravating factors. District Council should consider the degree of organization and planning, associated with the misconduct, along with the number, size and character of the transactions. Evidence of calculated and deliberate acts may foreclose a claim of rash action or temporary lapse of judgment. Other factors that may come into play include:*
>
> *(i) Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive, or intimidate a client, regulatory authorities, or, in the case of an individual respondent, the Member firm with which he or she is/was associated.*
>
> ....

¶ 12 The Respondent did not have a temporary lapse of judgement. His actions were deliberate and over an extended period.

> ***3.11 Multiple Incidents Of Misconduct Over An Extended Period of Time***
>
> *Generally, blameworthiness is compounded as the number of incidents expands. This rationale applies to all types of misconduct: a series of victims indicates a pattern, which compounds the culpability.*

¶ 13 This has already been referred to in 3.1. This is one of the most significant issues. The penalty being sought is appropriate; the Respondent should not be practicing in the industry.

> ***3.13 Failure to Cooperate with the Association's Investigation***
>
> *Failure to cooperate with the Association's investigation into a Registrant's conduct can form the grounds for a separate disciplinary offence, under Association By-law 19.5. However, if the primary misconduct being investigated can be proven without the cooperation of the registrant, a failure to cooperate can be taken into account as an aggravating factor, or as evidence of a registrant's ungovernability that may escalate the sanction from a fine to a temporary or permanent suspension/ban from membership.*

¶ 14 The Respondent did come to an interview but he did not provide his cell phone records as requested.

> ***4.3.2 Permanent Bar From Membership In The Association***
>
> Permanent revocation of registration is a severe economic penalty and should generally be reserved for cases where
>
> (1) the public itself has been abused;

(2) Where it is clear that a respondent's conduct is indicative of ungovernability;
(3) the misconduct has an element of criminal or quasi-criminal activity; or
(4) there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

District Council may consider imposing a fine and requiring disgorgement even when a registrant is permanently barred in egregious cases involving significant harm to clients and/or to the integrity of the securities industry as a whole.

¶ 15 A number of these considerations are pertinent in the present case and it is therefore appropriate that the penalty be a permanent ban.

¶ 16 Ms. Andrews also referred to specific provisions **"3.7 Unauthorized Trading - By-law 29.1", "2.6 Attempt to Settle Client Claim for Compensation - By-law 29.1", "1.4 Securities Act breach or related Provincial or Federal legislation breach - Association By-law 29.1"** and **"5.1 Failure to Cooperate - By-law 19.5".** Minimum fines (e.g. $15,000.00 for unauthorized trading) are set out. In the latter three sections there is provision for a permanent ban, with particular reference in 2.6 and 1.4 to "egregious" cases.

¶ 17 B. Ms. Andrews referred to the following Association Disciplinary Hearing decisions as indicating that the penalty of "permanent prohibition on registration in any capacity with the Association" and the fines being sought, are reasonable in all the circumstances:

Darrell Donald Osadchuk (November 27, 2005, Alberta)

Gregory James Evans (October 18, 2007, Ontario)

Esther Inglis (2005) I.D.A.C.D. No. 10 (March 11, 2005, Ontario); Bulletin No. 3398, February 16, 2005

Kenneth Richard Miller (2005) I.D.A.C.D. No. 4 (March 16, 2005, British Columbia); Bulletin No. 3390, February 4, 2005

Richard Scott Latta (2004) I.D.A.C.D. No. 31 (June 24, 2004, Nova Scotia); Bulletin No. 3308, July 13, 2004

Moin Mirza (2007) I.D.A.C.D. No. 39 (June 19, 2007, Alberta); Bulletin No. 3679, October 10, 2007

¶ 18 C. On the matter of a fine, the Association proposes a total fine of $150,000.00 (see p. 1 above). Counsel referred to fines levied in the decisions (above).

¶ 19 D. On the matter of costs, the Association proposes payment by the Respondent of costs in the amount of $25,000.00. An extensive, detailed Affidavit of Ms. Karim, Enforcement Litigation Associate, was submitted to the Panel (and provided earlier to the Respondent). Ms. Karim states in her Affidavit:

20. In order that the amount of costs sought be both reasonable and conservative, the IDA is seeking costs of the Investigation and Prosecution in the amount of $25,000 and is not seeking the full amount as set out in the Bill of Costs.

¶ 20 Ms. Andrews advised that the total costs of the Association, calculated on the basis of hourly rates of $77.00 per hour for investigators and $96.00 per hour for Enforcement Counsel, are $89,000.00.

RESPONSE OF THE RESPONDENT

¶ 21 The Respondent, on or about September 16, 2008 forwarded the following letter to the Association by way of response:

The two months that have passed since the conclusion of the hearing has provided me with a valuable opportunity to look back at this entire affair, particularly my actions and

their consequences, which led to the hearing in the first place. When faced with serious allegations of improper conduct, as was the case here, as well as the consequences and effects of such conduct, it is not always easy to accept responsibility. Such was the case with me. I believe that a very real sense of fear - fear of loss of reputation, loss of status, letting down my family and friends and, most importantly, loss of self-respect - triggered a natural human survival instinct to defend myself and not fully accept and admit responsibility. I recognize now the folly in this. It in no way has helped me, has only served to drag matters out and necessarily keep me from moving forward. With the conclusion of the hearing, I have replayed the findings of the panel in my mind over and over again. Daily. It has been unavoidable. It has been instrumental in allowing me to accept responsibility for and accept my actions and what damage has occurred as a result.

Not only have my past denials prevented me from putting this behind me, they have served to precipitate further misguided actions on my part. During the hearing I have made excuses and used tactics designed to minimize or deflect my behaviour, including, my contention that I was being unfairly persecuted and that my actions as a broker, although stupid, were never malicious or meant to financially benefit myself. Again, this flows from my fears that made it very difficult for me to accept responsibility. I recognize now, however, the real harm my behaviour has caused my clients, my past employers and associates as well as my family and friends.

In hindsight I can think of very little I accomplished as a stock broker for which I am proud. I was clearly not well suited for the responsibilities of the profession. I was rash and impulsive which often led me to making poor decisions that failed to serve my clients best interests. When inevitably these poor decisions were exposed, rather than taking responsibility for my actions I panicked and employed manipulation and deceit to cover them up. If I were able to reverse the damage, then "no harm, no foul". Or so I rationalized to myself.

I can provide no direction or recommendation to this panel on what would be an appropriate (penalty) in my circumstances. I trust the panel will (determine) the penalties it believes to be fair in consideration to all of the circumstances. And although I will never work as a stock broker again I do intend, in time, to pay whatever amount of fine is eventually levied against me. I firmly believe that it will be impossible for me to put this matter behind me and begin to repair the trust of those persons whose faith in me I have destroyed until I prove I can accept full responsibility for the consequences for what I have done….

Very Sincerely,

Bill Boswell

¶ 22 (The Association advised, on September 22, that it had no reply to the Respondent's Response.)

DECISION

¶ 23 In our view the following are appropriate penalties for the Respondent's misconduct:

¶ 24 1. A permanent ban on registration in any capacity with the Association. We agree with Counsel for the Association that the conduct of the Respondent was sufficiently egregious to dictate a permanent ban. His deceptiveness at not one, but two, firms, his repeated misconduct over an extended period of time, and his failure to earlier acknowledge his wrongdoing and cooperate with the Association, requires strong condemnation. As stated in the General Principles (above) another objective is "an aim at general deterrence".

¶ 25 There are no mitigating circumstances other than the Respondent having no prior disciplinary record but the seriousness of his misconduct outweighs that factor. As in ***Mirza*** (above) we do not consider the

Respondent's intention to not re-enter the industry as a mitigating circumstance. However we must commend the Respondent for his recent candour, new-found self awareness and expression of remorse and regret. We wish him success in meeting his personal objectives.

¶ 26 2. A global fine of $100,000.00. We adopt the rationale of the Ontario District Counsel in ***Evans*** (above) that "anything less would be a slap on the wrist and send no message to the industry". The Association is seeking a total fine of $150,000.00. We are not aware of any Association cases (including the decisions cited by Counsel, above), involving circumstances in the nature of the Respondent's misconduct, in which total fines have exceeded $100,000.00. The Respondent will have a difficult challenge in attempting to meet his expressed objective of paying the fine. We direct that the fine be paid by January 31, 2009.

¶ 27 3. Costs of $25,000.00, as requested by the Association. Having regard to the Association's total costs being approximately $89,000.00 we agree with the Association that the costs being sought are "reasonable and conservative". We direct that the costs be paid by January 31, 2009.

October 31, 2008

Alan V.M. Beattie
Karen Henderson
Kathleen Jost