

Re Stirrett

IN THE MATTER OF:

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

AND

DWIGHT ALLEN STIRRETT

2009 IIROC 12

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

Heard: March 3 & 6, 2009

Decision: March 9, 2009

(28 paras.)

Hearing Panel:

John Rogers, Chair

Brian Field

Chris Lay

Appearances:

Lorne Herlin & Paul Smith, Enforcement Counsel, for IIROC

Brent MacLean, Davis LLP Barristers & Solicitors, for the Respondent

REASONS FOR DECISION

1. A hearing panel of the Investment Industry Regulatory Organization of Canada (“IIROC”) was convened on March 3, 2009 in accordance with Rule 15 of the IIROC Dealer Member Rules of Practice and Procedure to review a settlement agreement negotiated between the Enforcement Department of IIROC and Dwight Allen Stirrett (“Respondent”) in accordance with Rule 20.35 of Part 10 of the IIROC Dealer Member Rules (the “Rules”).
2. After commencement on March 3, 2009 and with the consent of the parties, the matter was adjourned until March 6, 2009. At the commencement of the adjourned hearing counsel advised that further settlement discussions between the Respondent and IIROC Enforcement Staff had continued since March 3, 2009 in accordance with Rule 20.35 (3) of Part 10 of the Rules. These discussions had resulted in an amended settlement agreement. This amended settlement agreement (“Settlement Agreement”) was presented to the panel for its review. A copy of the Settlement Agreement is attached to this decision.

Statement of Facts

3. The Settlement Agreement contains certain facts agreed to by IIROC and the Respondent for the purpose of the Settlement Agreement. A summary of these facts are set out below.

4. The Respondent has worked in the investment industry since 1985 and is currently the Ultimate Designated Person and the sole officer and director of IIROC member, Prodigy Wealth Management Corp. (“Prodigy”). The Respondent is the sole beneficial shareholder of Prodigy and, although Prodigy has 4 approved persons in addition to the Respondent as employees, the Respondent is the registered representative responsible for all of the client accounts at Prodigy.
5. During the summer of 2007, the Respondent was absent from Prodigy’s office for a period of two months. A letter of May 31, 2007 gave a false reason for the Respondent’s planned absence.
6. Between October and November of 2008, the Respondent was again absent from Prodigy’s office. This absence meant that an employee of Prodigy who was newly approved as a registered representative was essentially left without management or qualified supervision. It also meant that the Respondent was unavailable to sign Prodigy’s audited Joint Regulatory Financial Questionnaire and Report which disclosed the deteriorating financial condition of Prodigy.
7. This financial condition caused IIROC to place Prodigy in Discretionary Early Warning Level 2 and to impose conditions on Prodigy’s continued activities. However, by the end of December 2008, sufficient funds were deposited to correct Prodigy’s risk adjusted capital deficiencies.
8. For approximately the last 5 years, in relation to a non-life threatening medical condition, the Respondent was prescribed and has regularly consumed medication which at times severely inhibited his ability to carry out his administrative responsibilities as an approved person and resulted in the conduct that is set out in the Settlement Agreement.

Contraventions

9. The Settlement Agreement contains the Respondent’s admission of the following contraventions of IIROC Dealer Member Rule 29.1 and By-law 29.1 of the by-laws of the Investment Dealers Association of Canada (“IDA”):
 1. that facts were misrepresented to clients and employees of Prodigy in a May 31, 2007 letter which gave a false reason for him being absent from Prodigy’s office for a period of two months during the summer of 2007; and
 2. that he failed to adequately attend to his business as an RR; his supervisory duties as President, CEO and UDP of Prodigy; and to the business of Prodigy between October 2008 and December 2008.

Terms of Settlement

10. In the Settlement Agreement, the Respondent consents to terms of settlement. These terms may be summarized as:
 1. That the Respondent will pay for and comply with a monitored treatment program acceptable to IIROC Enforcement Staff for as long as the professional monitoring the treatment program recommends;
 2. That the Respondent will instruct this monitoring professional to provide IIROC Enforcement Staff on a monthly basis with a letter attesting to the Respondent’s compliance with the treatment program;
 3. If this monitoring professional advises IIROC Enforcement Staff that the Respondent is not in compliance with the treatment program, that Enforcement Staff has the discretion to immediately suspend the Respondent’s registration without a hearing; although the Respondent will be entitled to have this suspension reviewed by a hearing panel pursuant to the provisions of Dealer Member Rule 20.19;

4. That the Respondent's registration will be subject to strict supervision for as long as IIROC Enforcement Staff deems necessary; and
5. That the Respondent will pay a penalty of \$20,000 and costs of \$5,000.

Decision

11. The Hearing Panel accepts the Settlement Agreement.

Reasons

Unusual Facts

12. The Settlement Agreement before us involves an unusual set of facts and resulting penalties which have been agreed upon between the Respondent and IIROC Enforcement Staff.
13. The Respondent has admitted that it was his consumption of a medically prescribed drug that resulted in the conduct leading to his contraventions of Rule 29.1. The Respondent has agreed to pay for and has already commenced a treatment program.
14. As well, to ensure that IIROC Enforcement Staff are able to be confident that the Respondent is maintaining this treatment program, the Respondent has agreed to instruct the professional monitoring his treatment program to advise Enforcement Staff on a monthly basis of his compliance.
15. Dealer Member Rule 20.33(2)(d) grants to a hearing panel the authority to impose as a penalty terms and conditions to which the continued approval of the Respondent's registration becomes subject. One of these terms and conditions agreed to by the Respondent is strict supervision. Another is continuation of the treatment program already commenced by the Respondent. And the third of the terms and conditions is the regular reporting by an independent professional to IIROC Enforcement Staff attesting to the Respondent's compliance with the program.

Appropriateness of Penalty

16. The test for a hearing panel to use in determining whether or not to accept a settlement agreement has been defined in *Milewski* [1999] I.D.A.C.D. No. 17, Bulletin No. 2605, August 5, 1999, and *Clark* [1999] I.D.A.C.D. No. 40, Bulletin No. 2674, December 14, 1999 to be whether or not the settlement agreement reached between the respondent and IIROC Enforcement Staff includes a penalty which clearly falls outside a "reasonable range of appropriateness". If in the opinion of the hearing panel the penalty falls outside this reasonable range, the hearing panel should not accept the settlement agreement. Otherwise it should do so. The rationale behind this approach is that a hearing panel should be cognizant of the settlement process and should not interfere in a negotiated settlement by attempting to substitute its discretion for that of the IIROC Enforcement Staff.
17. In the matter at hand, in addition to the penalty of a fine of \$20,000 and costs of \$5,000, the Respondent has agreed to terms and conditions to be attached to his continued registration. These attached terms and conditions are not easily quantified to fit within the "reasonable range" test. Rather, apart from the fine and the costs, the balance of the penalty agreed to in the Settlement Agreement takes a remedial rather than punitive approach.
18. As well, unlike instances where the conduct complained of is past conduct and there is not the consideration of the possibility of a repetition of this conduct included in the penalty to be imposed, the terms of the Settlement Agreement suggest the concern of IIROC Enforcement Staff that the Respondent continue to maintain his treatment program and that for at least as long as he is under this treatment program, that he be subject to strict supervision.

Additional Test for Appropriateness of Penalty

19. *Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26 at page 3 provides for five considerations of which a hearing panel should be cognizant in determining an appropriate penalty. They are:

1. Protection of the investing public;
 2. Protection of the IIROC membership;
 3. Protection of the integrity of the IIROC hearing process;
 4. Protection of the integrity of the securities markets; and
 5. Prevention of a repetition of the conduct leading to the penalty.
20. In reviewing the terms and conditions attached to the Respondent's ongoing registration, the requirement for strict supervision to ensure that each trade effected by the Respondent is monitored and the requirement for a monthly compliance report from an independent professional to ensure that IIROC Enforcement Staff are aware of the continuance of the Respondent's treatment program gives us assurance that the proposed arrangement provides an independent oversight to assist in ensuring the protection of the investing public, the IIROC membership and the securities markets. As well, the ability of IIROC Enforcement Staff without a hearing to act swiftly and decisively in suspending the Respondent's registration will go a long way to prevent a repetition of the Respondent's conduct set out in the Settlement Agreement and to protect the integrity of the IIROC hearing process.
21. We find that the five interests enumerated above have been considered in the terms and conditions of the Respondent's ongoing registration and that the terms and conditions agreed to in the Settlement Agreement will protect on an ongoing basis and as far as may be reasonably possible these five interests.
22. In conducting the above review, we are not attempting to substitute our discretion for that of IIROC Enforcement Staff. Rather, the review was conducted to satisfy ourselves that given the unusual nature of the facts before us, the five interests referred to in *Derivative Services Inc.* had not been overlooked in the penalty agreed to in the Settlement Agreement between IIROC Enforcement Staff and the Respondent.

Mitigating Factors

23. Under the terms of settlement in the Settlement Agreement, the Respondent acknowledges that the admitted contraventions would have carried a significantly greater fine if not for two mitigating factors. The first mitigating factor is that the Respondent's ability to carry out his responsibilities was severely limited by his consumption of prescribed medication. The second mitigating factor is the Respondent's early willingness to pay for and comply with a monitored treatment program acceptable to IIROC Enforcement Staff.
24. The errant conduct described in the Settlement Agreement refers mainly to the failure of the Respondent to carry out his administrative responsibilities. There is no reference to client complaints, client losses, mishandling of client accounts, or client trading losses.
25. Although the Respondent missed the deadline to sign Prodigy's audited Joint Regulatory Financial Questionnaire and Report, the document prepared for his signature was accurate and there was no misrepresentation of Prodigy's financial situation. Indeed, although Prodigy was placed on Discretionary Early warning Level 2 at the end of November 2008, by the end of December 2008 the capital deficiencies had been corrected.
26. The Respondent appears to have accepted full responsibility for his actions and on his own initiative commenced a treatment program to prevent similar unacceptable behaviour from occurring in the future. The Respondent appears to have cooperated with IIROC Enforcement Staff in an expeditious manner. In addition, the Respondent has committed to pay for a program to ensure that IIROC Enforcement Staff are apprised on a regular basis of his compliance with his treatment program.
27. All the above are mitigating factors in addition to those included in the Settlement Agreement.
28. Taking into account the mitigating factors set out above, the imposition of strict supervision and the ongoing involvement of IIROC Enforcement Staff in monitoring the Respondent's treatment program,

we find the agreed upon fine and costs to be within a reasonable range of appropriateness and the terms and conditions attached to the Respondent's ongoing registration to constitute an appropriate overview of his ongoing activities. We therefore accept the Settlement Agreement.

DATED at Vancouver, British Columbia this 9th day of March, 2009.

John Rogers, Chair
Chris Lay, Member
Brian Field, Member

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