Re Trenholm

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

DANIEL MURRAY TRENHOLM

2009 IIROC 52

Investment Industry Regulatory Organization of Canada
on behalf of
Investment Dealers Association of Canada
Hearing Panel (Nova Scotia District)

Heard: November 5, 2009 in Halifax, Nova Scotia
Decision: November 24, 2009
(16 paras.)

Hearing Panel:
Stewart McInnes (Chairman), Edward Cleather, Nancy Ross
Appearances:
Dianne Iannetta, Enforcement Counsel
Daniel Trenholm appeared on his own behalf

DECISION

¶ 1 The Respondent, Daniel Trenholm was found to have committed the following contraventions pursuant to a written decision of this Panel dated September 6, 2009:

(a) During the period October 2001 to February 2004, the Respondent failed to properly perform his role as a gatekeeper in the capital markets, contrary to Rule 29.1 (then By-law 29.1) and Rule 1300.1(a) (then Regulation 1300.1(a)) when dealing with a group of related clients by:

(i) facilitating certain transactional activity in five related accounts without making diligent inquiries to ensure the legitimacy of the transactions in circumstances which should have called the transactional activity into question because it was peculiar, suspicious or appeared to be consistent with market manipulation, deception or other improper market related activity; and

(ii) during the period October 2001 to February 2004, the Respondent accepted trading instructions in respect of four client related accounts from a person not authorized in writing to provide such instructions for those accounts, contrary to Association Rule 200.1(i)(iii) (then, Regulation 200.1(i)(3)).

¶ 2 The Respondent has been employed as a broker with a number of Halifax firms for the last 32 years and apparently no complaints or disciplinary action have been registered against him during that time. The Respondent represented that he did not profit by any of the trades which were commented upon at length in the September 9 decision. However, his trading activity in Rally shares indicates otherwise. Obviously, commissions were earned, but there is no evidence of the amount or of a claim for disgorgement by the regulatory authority. The Respondent comments that at no time did any of his colleagues suggest to him that any transactions were suspicious. As well, BMO Nesbitt Burns, in their compliance daily reviews, and the IDA in their sales compliance reviews didn't adversely comment. However, the record shows that supervisory personnel on two occasions made inquiries about trades and when the Respondent was questioned he advised that there was nothing to be concerned about and no further action was taken.

¶ 3 The Respondent advised the Panel that he was in dire financial circumstances and that he and his wife were experiencing medical difficulties with large attendant expenses. His plea is that he did nothing wrong and in no way does he appreciate why the charges were initiated. He conceded that perhaps he was at fault in failing to file documents permitting others than the client to issue trading instructions, but explains that the requisite authority was given as evidenced by the filing of affidavits at this hearing although they are dated prior to September 9th. No witnesses were called and the Respondent did not give evidence at the original hearing.

¶ 4 A significant number of letters were filed with the Panel testifying to the character and integrity of the Respondent over his many years as a broker. The representations were made by senior persons in some of the firms where he was employed and from clients who unreservedly spoke of his positive performance and interest in the welfare of the industry. It is apparent that the Respondent is a good family man and enjoys a positive reputation in the community.

¶ 5 The Panel is alarmed at the claim of the Respondent that he did nothing wrong of significance. While he stated that he was aware of his obligations as a "gatekeeper" he would not concede to any breach of the regulations. There is no evidence that his clients were prejudiced by any of the trading activity. There was nothing on the record to implicate the Respondent as a participant in the questionable trades of Rally Corporation over the two and half years. Yet we are concerned that the integrity of the market was compromised by artificial trading volumes in Rally.

¶ 6 The Panel can only conclude that the Respondent was totally unaware of his obligations to perform as a gatekeeper. Alternatively, he was grossly negligent in failing to recognize what was required of him.

¶ 7 Pursuant to the penalties set out in Section 20.33(ii) a Hearing Panel may impose, inter alia, one or more of the following penalties:

(a) a reprimand;
(b) a fine not exceeding the greater of:
    (i) $1,000,000 per contravention; and
    (ii) an amount equal to three times the profit made or loss avoided by such approved person by reason of the contravention;
(c) suspension of approval for any period of time and upon any conditions or terms;
(d) a permanent bar from approval with the Corporation; or
(e) any other fit remedy of penalty.

¶ 8 The main concerns when determining an appropriate penalty are set out in *Re: Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26 at page 3:

(i) protection of the investing public;
(ii) protection of the investment industry regulatory organizations membership;
(iii) protection of the integrity of the investment industry regulatory organizations process;
(iv) protection of the integrity of the securities markets; and
(v) prevention of a repetition of conduct of the type under consideration.

¶ 9 Comment has been made in many authorities concerning sanctions that should aim at general deterrence

to inhibit others from engaging in similar misconduct or in infringing upon the overall business standards in the securities industry. It is clear that a balance can be struck between sanctions which address specific misconduct and those which respond to the industries integrity. We have considered the Respondent's relevant disciplinary history and his record. We have reflected on other salient matters such as harm to clients, the extent to which the Respondent was enriched, his lack of remorse and the co-operation exhibited by the Respondent. The Respondent has been found to be in violation of two rules of the Association, but the Panel will deal with an appropriate penalty on a global basis. Our principal concern is the number of serious transgressions over a lengthy period and the misconduct which has caused harm to the integrity of the securities industry as a whole. In our opinion, a suspension is the principal penalty which we deem to be appropriate. We are guided by the conclusions in other panels and in particularly the following.

¶ 10 In *Re: Ng* [2007 1 DACD No. 47] where there was a finding of gross negligence as the Respondent was found to have accepted trade orders which facilitated the manipulation of a stock and accepted trading instructions from a person not authorized in writing to accept those instructions. Mr. Ng was penalized by:

(a) a suspension from approval for one year;
(b) $40,000 fine;
(c) $25,000 in costs;
(d) requirement to rewrite the CPH exam; and
(e) upon resumption of employment, subject to a period of close supervision for six months.

The Panel noted several mitigating factors in Ng's case and found that he had "suffered significantly as a result of his misconduct". His conduct after the manipulation was discovered was described by the Hearing Panel as "exemplary". He was cooperative with the IDA investigation, to a police investigation and to the investigation by his employer; he also agreed to testify for the Crown in upcoming trials. He was terminated by his employer and he participated in seminars at his new employer where he told of his experiences as a caution to other RRS. He was the subject of close supervision for two years and was subject to a lawsuit for very substantial damages.

¶ 11 In *Re: Friedman* [2005] IDACD No. 37, it was found that the Respondent ought to have made further inquiries and taken steps to ensure that certain transactions complied with the *Securities Act*. The Respondent also failed to ensure the acceptance of every order as within the balance of good business practice. Friedman received the following penalty:

(a) a three year suspension from approval;
(b) a fine of $35,000;
(c) costs in the amount of $15,000; and
(d) a requirement that he rewrite the CPH exam as a condition of re-registration.

¶ 12 In *Re: Trudeau* [2007] IDACD No. 22, the Respondent was found to have failed to use due diligence to ensure that the acceptance of client orders was within the bounds of good business practice. He was also found to have failed to learn the essential facts relative to certain clients, and to every order or account accepted. Trudeau was penalized by:

(a) a fine of $130,000;
(b) repayment of $41,000 in commissions;
(c) payment of costs of $30,000; and
(d) requirement that he rewrite the CPH exam within one year.

¶ 13 In *Re: George Akopoulos*, (2009) IIROC No. 25 and dated May 12, 2009, the Respondent was found to have committed the exact same contraventions as those alleged in Trenholm's case – failure to perform his gatekeeper role. Although there were two counts in total, the Panel imposed one set of sanctions which applied to the convictions. That Respondent received the following penalty:

(a) a three year suspension;
(b) a fine of $50,000;
(c) disgorgement of commissions of $24,576;

(d) costs of $40,000; and
(e) rewrite of CPH exam prior to re-approval.

¶ 14 There are many common findings in the George Akopoulos and Trenholm cases. Our decision found that Trenholm "either tacitly participated in a questionable activity in the related accounts or he was totally oblivious to questionable activity …". The Supreme Court of Canada has defined wilful blindness as follows:

> "Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or a risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risks and by proceeding in the face of it, while in wilful blindness it is justified by the accused fault in deliberately failing to inquire when he knows there is reason for inquiry." *Sansregret* v. *The Queen* [1985] 1SCR 570 at par. 22.

¶ 15 It is determinative of our findings that Trenholm's activity took place over 2½ years and that there were numerous incidences of irregular and suspicious trading activity. The Respondent is not a newcomer to the industry and he personally traded in the security at issue. It is abundantly clear that he exposed his employer to inappropriate risks and damaged the reputation and public confidence in the securities industry. While cooperative with IROC's investigation and has no previous disciplinary history he has absolved himself from criticism and accordingly expresses no remorse for his failures.

¶ 16 We conclude that the Respondent:

(a) be suspended for a period of three years;
(b) pay a fine of $15,000;
(c) pay costs of $15,000;
(d) rewrite the CPH examinations prior to re-approval.

Dated this 24th day of November, 2009.

Stewart McInnes, Chairman

E.J. Cleather

Nancy Ross