Re Claggett

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Bryan Dale Claggett

2011 IIROC 18

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

Heard: November 23, 24 and 25, 2010
Decision: April 4, 2011
(43 paras.)

Hearing Panel:
Leon Getz, Q.C., Mark Redcliffe and Douglas Stewart
Appearances:
Barbara Lohmann for the Investment Industry Regulatory Organization of Canada
David Mitchell for Bryan Dale Claggett

DECISION

INTRODUCTION AND BACKGROUND

¶ 1 We have been constituted as a hearing panel pursuant to IIROC Member Dealer Rule 20 to consider two allegations against Mr. Claggett. They are set out in a Notice of Hearing dated March 15, 2010 as follows:

> **COUNT 1**
>
> Between November 2005 and November 2007, inclusive, (the "Relevant Period") the transactions effected by the Respondent in multiple client accounts, while employed at BMO Nesbitt Burns Inc. ("BMO"), a Member firm, were discretionary and without the prior written authorization of the respective clients and without the accounts being specifically approved and accepted as discretionary accounts, contrary to Regulation 1300.4 (now Dealer Member Rule 1300.4).
>
> **COUNT 2**
>
> On or about February 9, 2006, the Respondent, paid $14,000 to his client WB in an attempt to settle WB's complaint, without the prior knowledge and approval of his employer, BMO, and he thereby engaged in conduct unbecoming and detrimental to the public interest, contrary to By-law 29.1 (now Dealer Member Rule 29.1).

¶ 2 The Notice of Hearing includes some 24 paragraphs of Particulars of these allegations.

¶ 3 Dealer Member Rule 1300.4 provides that a registered representative may not exercise discretionary authority over a customer account unless certain conditions are fulfilled. It is not disputed that those conditions were not fulfilled. Mr. Claggett, however, denies that he engaged in the activities that IIROC alleges in Count 1 were in breach of Dealer Member Rule 1300.4. He has admitted that he engaged in the conduct alleged in Count 2 to have been a violation of Dealer Member Rule 29.1 but alleges certain additional facts that he contends, as we understand it, mitigate the seriousness of the transgression.

¶ 4 We shall deal with each count separately.

COUNT 1 – DISCRETIONARY TRADING

Background

¶ 5 On November 12, 2007, Elizabeth Petticrew, the Branch Manager of BMO's Vancouver Office, suspended Mr. Claggett. She did this, as we understand it, after seeking advice from BMO's Managing Director and Chief Compliance Officer, based in Toronto.

¶ 6 Two "incidents" provoked the decision to suspend Mr. Claggett and investigate his trading activities. The first is described in paragraphs 7 and 8 of the particulars alleged by IIROC in support of the allegation of discretionary trading, as follows:

> 7. On September 29, 2007, the Respondent's Branch Manager, EP [Elizabeth Petticrew] , while on a flight from to Toronto to Vancouver had a chance meeting with an acquaintance, RP, who was also the Respondent's client. At the time, RP was returning to Vancouver from a three week trip to Europe. EP gave RP a drive home from the airport as they live near each other. During the drive home, RP told EP that the Respondent was her investment advisor and RP had questions about how to judge account performance. EP suggested that RP meet with the Respondent to which RP responded that she really did not speak with the Respondent because he just took care of things.
>
> 8. Upon her return to the office, EP reviewed RP's account. She noted that three trades had taken place in RP's account during the time that RP was in Europe. The trades were:
>
> September 12, 2007 buy of 500 shares of Killam Properties @ $9.09
>
> September 17, 2007 sell of 700 shares of Crescent Point Energy Trust @ $19.60
>
> September 18, 2007 buy of 600 shares of Talisman Energy Inc. @ $18.43.

¶ 7 Ms. Petticrew gave evidence at the hearing. She said that having reviewed the three transactions in RP's account she discussed them with Mr. Claggett. This apparently happened on October 4. According to an email that Ms. Petticrew sent to her head office on November 16, 2007:

> Bryan advise that he had had a discussion with the client, prior to their trip, and had discussed the companies, Talisman, Crescentpoint and Killam. I asked if he had placed the orders as open orders? no, he had not. Bryan explained that he talked in general terms and general prices. I had a very direct, frank discussion with Bryan. I reviewed with him timing of trades, held orders and discretion. I advised that he should never execute trades like this again.

Ms. Petticrew essentially confirmed this account at the hearing.

¶ 8 As we understand it, following her meeting with Mr. Claggett on October 4, Ms. Petticrew contacted RP to advise her of this conversation. That, at least, is what she reported to her superiors in her November 16 email. She said that she spoke to RP on October 13[1] and:

---

[1] This seems to be a mistake. The actual date was November 13.

I advised [RP] that I just wanted to very briefly follow up on our car discussion. I asked for clarify on her comment that they didn't really talk to Bryan. She clarified that normally, and always understood by them, he would act on his own and in their best interests. Whenever [RP] did call Bryan he would always explain what and why he had enacted the trades that he did.

¶ 9 The second "incident" occurred on November 9, 2007, a Friday. The previous day, it seems, one of Mr. Claggett's clients, MM, apparently telephoned to the BMO office and left a somewhat irate message. As a result, Ms. Petticrew spoke to MM by telephone. We do not have any notes of that conversation but in her November 16 email she summarized it this way:

> She was very upset that Bryan had sold her precious metals fund (Dynamic). had been a star performer in her account – her baby.
>
> Bryan had sold her G[oldcorp] and K[inross] after she specifically wanted to maintain a 10% weighting in gold at all times.
>
> Didn't know why he kept buying REITs.
>
> Why did she ever own FMF [FMF Capital Group Ltd.]?
>
> . . . .
>
> Advised I would be back once reviewed. . . .

¶ 10 Ms. Petticrew's email went on to explain that on the following Monday, November 12, 2007, she

> informed Bryan of entire conversation and allegations from [MM] on Friday.
>
> Bryan denied selling the previous metals fund. he wasn't in the office when the trade was executed [6thj] and that Deb his SA had taken the order.
>
> He denied any discretion in the account
>
> I called Deb at home and she confirmed that she had indeed taken the trade from [MM]..
>
> Called [MM]. She confirmed that she did place the trade with Deb and to take the cash out, so Bryan couldn't put it into more REITs.
>
> The reference to sale of the Dynamic precious metals was to a trade for $10m that dated back to over 1.5 years ago.
>
> States she faxed Bryan to restate she didn't want any of that particular investment sold – it was her baby
>
> States she complained to Paul Bakalar, who had originally referred the client to Bryan

¶ 11 It is clear from this email that Mr. Claggett was not involved in the transaction that seems to have provoked MM's complaint; and that in fact that transaction had been effected on MM's instructions given directly to Mr. Claggett's assistant. Ms. Petticrew testified that she had been unable to confirm MM's claim of an unauthorized trade some 18 months previously, or that MM had complained about it to Mr. Bakalar.

¶ 12 It seems that in December 2007 MM made a formal written complaint to BMO about various matters relating to Mr. Claggett's conduct of her account. In March 2008, after having investigated the matter, BMO responded with a letter which seems to reject virtually all of MM's complaints but nonetheless offered to pay her almost $28,000 to resolve her concerns. This offer was apparently accepted.[2]

Ms. Petticrew's investigation

¶ 13 In the days following Mr. Claggett's suspension on November 12, Ms. Petticrew conducted what was referred to as an internal "investigation" during which she made telephone contact with 13 of his clients. Ms.

---

[2] See Particulars, paragraph 17.

Petticrew positioned her enquiries as "client service calls" and as judged from a brief outline included in the notes that she made, she told the clients that she was calling in her capacity as branch manager to enquire "how things are going".

¶ 14 It is clear from this outline, and indeed from Ms. Petticrew's notes of particular client conversations, that she was for the most part careful to avoid asking specific questions about specific transactions. Rather, she contented herself with fairly general enquiries about the level of client satisfaction with Mr. Claggett and the way he handled accounts.

¶ 15 It is not surprising, therefore, that for the comments that Ms. Petticrew recorded in her notes are fairly general in character. They do not refer to particular transactions or specific securities. The following are some of the recorded observations:

(a) "we are fairly hands off . . .meet with Bryan once a year"

(b) "he leaves us alone . . . he updates us periodically . . we don't discuss transactions";

(c) "Bryan doesn't call to discuss trades – not how it works. She only knows when buys/sells arrive in the mail;

(d) "whenever she called, Bryan would explain why he had enacted what he had";

(e) "Bryan runs the account on his own, client is 90";

(f) "he leaves us alone . . . we look at the end of the month how many "$thousands we are ↑ or ↓. We don't discuss transactions are we supposed to?

¶ 16 It is these comments that seem to be the basis for the statement in the Particulars that "at least six of the clients contacted advised [her] that the Respondent had effected transactions in their accounts on a discretionary basis"[3]; and, indeed, for the allegation in the Notice of Hearing that Mr. Claggett engaged in unauthorized discretionary trading in "multiple" client accounts.

The termination

¶ 17 Mr. Claggett was terminated by Ms. Petticrew at a meeting held in the late afternoon on November 19, 2007. The meeting was also attended by Mr. Carlo Acoste, the local branch compliance manager. Towards the end of it Ms. Petticrew handed Mr. Claggett a termination letter, apparently prepared in advance, reading in part as follows:

> This is to confirm our discussion of today, when you were advised that your employment with BMO Nesbitt Burns Inc. has been terminated with cause effective immediately. Our investigation has revealed, and you have admitted, trading in multiple client's account without authorization and that this is your regular practice.

¶ 18 Ms. Petticrew prepared a more or less contemporaneous handwritten account of what transpired[4] at the meeting. In part, it is as follows:

> Advised Bryan that we had conducted a thorough investigation into his trading activity. Our investigation revealed, and you have admitted to 25% of your book, trading in an unauthorised manner. This is a serious breach of regulatory and firm policy and thus I have to terminate you, with cause, with no severance or pay in lieu.
>
> Bryan said " I know, I know - I broke the rules and therefore I have to pay".
>
> He apologised to Carlo and I for any impact his actions may cause us - he stated this several times.

---

[3] Particulars, paragraph 13.

[4] While nothing turns on this the first paragraph of her account suggests that it may have been prepared in advance of the meeting as a sort of "script" for Ms. Petticrew to follow.

¶ 19 Mr. Acoste, though present, took no part in the meeting, and did not take any notes. Shortly after the meeting ended, however, he sent himself an email reading, in part, as follows:

> Bryan admitted to Discretionary/Unauthorized Trades. "You get Lulled into after awhile". Clients say do it for me. …. 1/3 of clients unauthorized trades. …. Admitted he is the only one to blame.

Mr. Acoste told us that he thought Ms. Petticrew's notes were generally accurate and consistent with his own recollection of what had happened.

¶ 20 Mr. Acoste also told us that Mr. Claggett's statement that he had undertaken unauthorized transactions for about one-third of his clients was made in response to Ms. Petticrew's suggestion that he had done this in about 25% of his accounts. Ms. Petticrew's notes are silent on Mr. Claggett's "correction" though in an email that she sent on November 26, about ten days later, she said that Mr. Claggett "stated that his unauthorized trading was more likely 30% of his entire client base."

¶ 21 Following his termination, BMO contacted Mr. Claggett's clients to advise them of this fact and that alternate arrangements were being made for their accounts. This communication resulted in several clients making written complaints about unauthorized or discretionary trading in their accounts while Mr. Claggett was their investment advisor.

Mr. Claggett's evidence

(a) General

¶ 22 Mr. Claggett gave evidence at the hearing. He told us that approximately 70% to 75% of his clients were people with whom he had a close and long standing relationship – he described it as "intimate" –and the remainder, were people over whose investment decisions he had significant influence but who were not, generally speaking, interested in matters of detail. He explained that he always told his clients in advance what he intended to do and he always acted on the basis of their instructions. Mr. Claggett testified that he does not keep any written record of these conversations or the instructions given to him by his clients. He said he has never sold a security for a client without express instructions; and he told us that he meets with every client periodically to discuss their investments but sometimes those conversations are brief – he described them as "almost perfunctory".

(b) RP and the meeting in October 2007

¶ 23 Mr. Claggett did not, at least as we understood him, dispute the accuracy or completeness of Ms. Petticrew's account of his conversation with her in October 2007 about the 3 trades in RP's account the previous month(see above, paragraphs [6] and [7]). He testified that when he learned that RP was going out of town he had a general discussion with her about her account and, in addition, "we discussed specific stocks and what I thought should be done. We agreed on what would happen while she was away." Mr. Claggett indicated that in acting on her instructions he had not placed any open orders. He denied undertaking any trades in RP's account without instructions. As we understood him, however, Mr. Claggett does not agree with Ms. Petticrew that there was any impropriety in his conduct in relation to the three transactions.

(c) The termination meeting

¶ 24 Mr. Claggett did dispute Ms. Petticrew's (and, in some respects, Mr. Acoste's) account of what happened at the termination meeting on November 19, 2007. In particular, he denied that, as Ms. Petticrew claimed, he had admitted to unauthorized trading "in approximately 25% your book" or that he had said that his unauthorised trading was "more likely 30% of his entire client base".

¶ 25 On the latter point, Ms. Petticrew testified that Mr. Claggett had made the admission concerning his "unauthorized trading" activities not only at the termination meeting on the afternoon of November 19, but also earlier in the day during the course of a conference call in which he participated with her and certain senior officers of BMO in Toronto, among them Mr. Bill Haldane. It was unclear from Ms. Petticrew's evidence on this point whether the alleged admission related to 25% of Mr. Claggett's clientele or 30%. Mr. Claggett

testified that he had no recollection of any conference call and that he had first heard about such a call the day before the hearing before us.

¶ 26 There is, however, an email string on November 19 from which it might perhaps be inferred that there was some sort of conference call that day. It begins at 3.13 p.m.[5] with a message from a Ms. Rob (a human relations consultant) to Mr. Haldane saying "I understand Bryan Claggert (sic) was part of discretionary trading. In order for me to have the termination approved, I will need to provide a rationale (for audit purposes) . . . could [you] please provide high level bullets". Mr. Haldane replied at 5.06 p.m[6] saying, among other things Mr. Claggett "admitted that he did not contact approximately 25 per cent of his client base prior to entering trades for their accounts". It is unclear from Mr. Haldane's response whether the alleged "admission" was made during the course of a conference call or otherwise. Indeed, the source of Mr. Haldane's information is not revealed.

Evaluation of the evidence and conclusion concerning Count 1

¶ 27 The core question that we must answer is whether IIROC has made out, by clear, cogent and convincing evidence, that it is more probable than not that Mr. Claggett did what he is alleged in Count 1 to have done, that is, to engage in unauthorized or discretionary trading in "multiple" client accounts.

¶ 28 We do not think that IIROC has made out its case to the requisite standard.

¶ 29 We do not for a moment doubt that Ms. Petticrew's notes of her conversations with Mr. Claggett's clients during the course of her investigation are accurate. But they conspicuously lack any detail. For the most part they reflect little more than general statements of confidence and trust in Mr. Claggett. There is no evidence that any of the clients was asked directly about any particular transactions that the client could focus on, or that Ms. Petticrew made it plain that her enquiries were related to any particular period of time. The whole process seems to us to have been both oblique and, in some respects, opaque. Given her general "soft" approach to the interviews we think it unlikely that she ever came to the point and there is little in her notes that suggests that the clients understood what her enquiries were really about.

¶ 30 The weakness of Ms. Petticrew's approach and the limitations of the "information" that she gathered, are perhaps most clearly highlighted by the "MM" affair. MM made a fairly precise complaint on November 9 of an unauthorized transaction no more than a day or two earlier. It turned out that she was simply wrong. If someone can be so mistaken about a matter so recent and particular, we think it is dangerous to draw inculpatory inferences from material that is virtually devoid of detail.

¶ 31 The evidence concerning the RP matter, despite its seeming precision, is also unsatisfactory. Ms. Petticrew confronted Mr. Claggett with what seemed on its face to be a clear case of unauthorized trading. He responded with an explanation that seemed, if not to exculpate him, at least to raise a question about RP's recollection of whatever conversations may have taken place prior to leaving on her trip abroad. But there is no evidence that Ms. Petticrew attempted to get to the bottom of whatever differences there may have been between Mr. Claggett's version and that of RP. Without the benefit of hearing from RP we are simply unable to resolve the differing accounts on this point.

¶ 32 Mr. Claggett's evidence has its own frailties. He was adamant in denying that he had ever acted without the prior authorization of his clients. That denial must be evaluated, however, in the context of his evidence about the make-up of his book and his relationship with the two broad categories of client whom he described. Mr. Claggett's description (above, paragraph [22]) is quite unclear as to how the distinction between the two groups affected in practice the way he performed his obligations and we are quite unsure of its significance or, indeed, why he considered it relevant at all. If anything it is suggestive – we put it no higher than this – of relationships that are at least conducive to acting without prior instructions. That is an impression that derives some reinforcement from Mr. Claggett's evidence that he makes no notes of his conversations with his clients

---

5 This seems to be Toronto time.

6 This also seems to be Toronto time.

or the details of the instructions that he says he always obtains. He relies on his memory.[7]

¶ 33 Mr. Claggett did not deny that, as Ms. Petticrew testified, there was a conference call earlier in the day on November 19 prior to the termination meeting and that he had participated in it. He said simply that he did not recall any such call. If there was and he had participated in it, he denied making the admission that Mr. Haldane's email refers to and that is set out in the termination letter.

¶ 34 On the face of it, the admission attributed to Mr. Claggett is a startling and dramatic one - of widespread disregard of one of the most important rules governing his role as a registered representative made, so far as the evidence before us goes, in terms of sweeping generality and not in response to any details of some, let alone "multiple", specific instances of unauthorized transactions.

¶ 35 Mr. Claggett's "admission" may have been adequate to ground his employer's decision to terminate him. We express no opinion about that. Given its startling breadth, however, and the fact that it does not seem to be supported by any other evidence that can reasonably be considered reliable, we do not think that it is a sufficient basis for us to conclude that Mr. Claggett engaged in unauthorized trading.

¶ 36 Our instinct is that Mr. Claggett did indeed engage in unauthorized trading. We are not constituted, however, to give effect to our instinct. We can only act on the basis of proper evidence. In our view, IIROC has failed to establish, by evidence that, taken as a whole, is clear, cogent and convincing that it is more probable than not that Mr. Claggett engaged in unauthorized trading in multiple client accounts. In the result, we are of the opinion that the violation alleged in Count 1 of the Citation has not been made out and must be dismissed.

COUNT 2 - SETTLING A CLIENT COMPLAINT PRIVATELY AND WITHOUT THE KNOWLEDGE AND APPROVAL OF BMO

¶ 37 Count 2 which, as we have noted Mr. Claggett has admitted, alleges a violation of Member Dealer Rule 29.1. That Rule requires investment representatives, among others, to observe high standards of ethics and conduct in the transaction of their business and to refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest. The particular transgression that Mr. Claggett has admitted is that he paid $14,000 to his client WB in an attempt to settle WB's complaint, without the prior knowledge and approval of his employer, BMO.

¶ 38 It is not in our view necessary to explore the background to this matter in any great detail. Mr. Claggett's explanation for the payment to WB is set out in the following extract from a facsimile that he sent to BMO on January 15, 2008, after he had been terminated.

> During the period of the FMF fiasco in the Fall of 2005, I was very upset and vocal about it at BMONB for what I thought was a truly deplorable job as lead Underwriter. I felt that their due diligence was awful as the stock planged to near zero six months after listing. I thought they should have stood up, shown some leadership and taken responsibility and in some way

---

[7] There is a perhaps unintentionally revealing passage in the transcript of an interview of Mr. Claggett conducted by an IIROC investigator on January 27, 2009. Mr. Claggett was asked whether he kept an order log or a blotter, to which he answered "no". The examination continued:

Q No? Did you keep notes of your conversations with clients?

A. No.

Q. If you didn't keep an order blotter how would you follow up on your commissions to see if orders are correctly filled the next day, if they're correctly contracted?

A I'd remember.

Q You would remember?

A M'mm-hmm.

Q Can you give me an idea of how many orders you would place on avere a day, a normal day.

A I don't remember. I'm not sure.

compensate everyone involved in the deal as a result of their shoddy work. To date nothing has been done at BMONB.

[WB] was extremely upset at the melt down of FMF as was everyone else who owned the stock. He harangued me relentlessly on the matter; however, I finally gave in to get him off my back and reimbursed him as he said.

¶ 39 On March 25, 2008 BMO agreed to pay WB some $57,000 to resolve the concerns that he had expressed and sent him a letter advising him of this. The letter is quite unclear as to the reason for this decision but the amount was predicated in part upon the payment that WB had received from Mr. Claggett.

¶ 40 In November 2010 BMO entered into a settlement agreement with the Ontario Securities Commission in which it acknowledged that "certain aspects of Its conduct [in relation to the FMF offering] were not consistent with reasonable underwriting practices. BMO was also a named defendant in a class action arising out of the FMF financing. The action was settled. It is not known whether WB was entitled to any payments from BMO pursuant to its agreement with the Ontario Securities Commission or out of the funds set aside to settle the class action.

¶ 41 As we understand it, Mr. Claggett did not tender the evidence summarized in paragraphs [37] to [39] as a basis for withdrawing his admission of a violation of Dealer Member Rule 29.1 but rather to mitigate the disciplinary consequences of that admission.

SUMMARY

¶ 42 In summary we find that:

(a) Count 1 in the Notice of Hearing has not been made out and must be dismissed; and

(b) Count 2 in the Notice of Hearing has been made out, Mr. Claggett having admitted that without the prior knowledge and approval of his employer he made a payment to his client WB to settle the latter's complaint and so engaged in a business conduct or practice which is unbecoming or detrimental to the public interest.

¶ 43 There remains the question of the appropriate sanction for the misconduct particularised in Count 2 of the Notice of Hearing. We will receive written submissions on this question. Counsel for IIROC should provide submissions to the National Hearing Coordinator and counsel for Mr. Claggett within one week of the date of publication of this Decision; counsel for Mr. Claggett will have one week thereafter to provide his submissions. If counsel for IIROC wishes to make any reply to the latter, these should be made within 3 days of receiving them. If this timetable creates difficulty for counsel we invite them to agree on a reasonable alternate timetable and, if agreement is reached, to advise the National Hearing Coordinator; failing agreement, we are prepared to consider submissions.

Leon Getz, Chair

Mark Redcliffe

Douglas Stewart

April 4, 2011