

Re Dennis

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

Mark Allen Dennis

2011 IIROC 35

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

Hearing: April 25, 2011

Decision: June 3, 2011

(31 paras.)

Hearing Panel:

Hon. R. Jeffrey Flinn, Q.C. Chair , Daniel Iggers and Hugh McNabney, Members

Appearances:

Enforcement Counsel Rob DelFrate

No one appeared for Mark Allen Dennis

DECISION AND REASONS

¶ 1 Mark Allen Dennis herein referred to as “ the Respondent “ is charged with having contravened the regulatory rules of the Investment Dealers Association of Canada In that he engaged in manipulative, fraudulent and deceptive conduct by misappropriating approximately \$1.4 million from a client. The Respondent’s conduct offends the foundation of trust upon which the securities industry relies , caused harm and great anxiety to his client , and compromised the reputation and integrity of his Dealer Member Firm . He then failed to attend and give information regarding his conduct , thereby undermining the ability of the Investment Industry Regulatory Organization (IIROC) to conduct a full and complete investigation.

¶ 2 He was duly served with the Notice of Hearing containing full particulars of the charges and the proceedings including the fact that the hearing would proceed with or without his presence , he has not appeared and consequently the hearing proceeded .

¶ 3 The facts are set out in the affidavits of Bob Natanson and Tom Hancock filed as Exhibits 3 and 4 as well as the Notice of Hearing Exhibit 1. But briefly are as follows;

The respondent was registered as a Registered Representative (Retail) and an Officer (Trading) with TD Waterhouse, a Dealer Member of IIROC between March 2003 and October 2008. He has not been registered since January 2010. He became a regulated person of IIROC on June 1 2008.

One E. R. a widow who had inherited a substantial sum of money from her deceased husband became a client of the Respondent in March 2003 having been referred by the TD Bank, E.R.'s bank. At that time she deposited with TD Waterhouse in excess of \$5,000,000. In an account noted to be for investing and chequing. The evidence was that she had no experience in investing and became to rely completely on the Respondent as to what she read and what she signed, including blank cheques. A second investing account was opened for E.R. by the Respondent in September of 2003 and \$1,000,000. was moved from the bank account of E.R. to this second investing account.

In September 2004 the sum of \$720,000 was moved from the second investing account to the bank account of E.R. and the next day the Respondent withdrew \$708,592.36 by bank draft payable to a law firm acting for the Respondent's sister and used for the purchase of real estate of which E.R. denied knowledge of the transaction, and the persons involved.

In October 2005 the Respondent opened a home equity line of credit in the name of E.R. with the T.D. Bank and transferred \$500,000. firstly from the TD Waterhouse account to E.R.'s bank account and then to the home equity account. This account was secured by a charge on the home of E.R. Again this transfer, the home equity account were matters upon which she relied completely on the Respondent and was ignorant of the charge or the nature of the transactions.

Shortly after that transfer, the Respondent withdrew \$400,000 from the home equity account of E.R. by cheque payable to one R.R. which the Respondent deposited to his own account at the same TD Bank. R.R. had no knowledge of this transaction .

In May 2006 the Respondent repeated the attack on the property of E.R. by withdrawing \$300,000. from the bank account of E.R. drawn on R.R. and deposited the same into his own bank account.

The evidence is clear that neither E.R nor R.R. knew anything about these transactions, but that E.R. was providing the funds and R.R. was a cover of some sort.

E.R. remarried later and as a result of her new husband becoming suspicious of the course of transactions, E.R. made a complaint to TD Waterhouse, which resulted in that Dealer Member reporting the same to IIROC.

The respondent was advised of the investigation by IIROC in June of 2010 and in August of 2010 he was requested to arrange for an interview with IIROC. Originally he advised that he was not available but subsequently by email advised he would neither attend nor provide a statement. Thereafter he did not reply to IIROC despite the threat of proceedings.

¶ 4 The Panel heard from the Enforcement Counsel and in addition to the affidavits filed as Exhibits evidence was given viva voce by Tom Hancock , the Senior Investigator for TD Waterhouse. There was also documentary evidence found as exhibits to the affidavits, as well as the affidavit of E.R. In view of the fact that the Respondent neither appeared nor filed any material in full knowledge of the charges against him the Panel was prepared to make and made adverse inferences against the Respondent on the evidence.

¶ 5 It is not unusual for a middle aged lady left without husband and with a substantial sum of money to care for, to rely so innocently on the advice and assistance of an investment dealer such as the Respondent particularly when he has been introduced by her banker. The fact that the fraud and the misappropriation was not discovered until the new husband of E.R. discovered suspicious circumstances which led to the complaint rather supports the innocence of E.R.

¶ 6 Rule 29 of the rules of the Investment Dealers Association which apply to all registered members of the Association sets out the requirements for members to conduct the investment business. It requires all members to

- To observe high standards of ethics and conduct in the transaction of business;
- Shall not engage in any business conduct or practice which is unbecoming or detrimental to the

public interest;

- Shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses i and ii.....

¶ 7 Rule 29.1 requires the same standards to all from Dealer Members down.

¶ 8 Rule 19 requires all members to ;

- submit a report in writing with regard to any matter involved in an investigation;
- produce for inspection and provide copies of all records, books etc. In possession or control of the member deemed relevant to the investigation;
- attend and give information.

¶ 9 There can be no question that on the evidence the Respondent clearly broke the requirements of Rule 29. It would take the most incredible evidence to excuse a member of the Investment Dealers Association in circumstances where there has been fraud and the misappropriation of funds. In this case it would appear that the Respondent ventured into a scheme early in the retention as an investment advisor by opening a second account, funding it with the money of E.R., transferring part of the money to the bank account of E.R. and then funding the purchase of real estate either for his sister or through his sister. The opening of the home equity account then used as a cover to move funds from this equity account on two occasions to his own bank account perhaps in circumstances where he convinced his bank to breach their own requirements in allowing the funds to be deposited into his account.

¶ 10 The fact that by email he refused to cooperate in any way with the demands of IIROC in investigating this course of events leads one to conclude that the requirements of Rule 19 were likewise not followed.

¶ 11 The Panel therefore concludes that the Respondent has committed the offences set forward in counts 1 and 2 as set out in the Notice of Hearing served upon the Respondent, in that he misappropriated approximately \$1,400,000. from his client E.R. and that not only did he fail to attend and give required information but he refused to do so.

¶ 12 As to the penalties that should be imposed upon the Respondent for the offences described Counsel for IIROC asked the Panel to impose the following;

- A permanent bar on the Respondent's approval by IIROC
- A fine of \$1,450,000. representing the disgorgement of \$1,400,000. plus an additional fine of \$50,000. In relation to the first count of misappropriation of funds.
- A fine of \$50,000. On count #2, the refusal to attend or give information.

¶ 13 The Panel had some difficulty in the use of disgorgement as part of the fine in circumstances where the offence sounded in misappropriation of funds.

¶ 14 Counsel for IIROC in the Notice of Hearing calls attention to Rules 20.33 and 20.34 of the Rules of the Investment Dealers Association as giving the authority to punish by fine. They refer to a reprimand, a fine not exceeding the greater of \$1,000,000. per contravention and an amount of three times the profit made or the loss avoided by reason of the contravention. This is repeated in the introduction to the discipline sanction guidelines found in the IIROC book of authorities. At 4.1.3 of the guidelines disgorgement is again referred to in these terms;

“ At present Dealer Member Rules specifically restrict the levy of a fine to maximum of \$1,000,000. For contraventionas well , a Hearing Panel may require a respondent to pay an amount equal to three times the profit made or the loss avoided by the respondent as a result of the commission of the contravention in question, including any commissions earned, or other benefits obtained from the impugned transactions. However disgorgement is a sanction – it is not

restitution. “

¶ 15 The Panel was advised that in addition to this discipline hearing there had also been commenced a civil action in the Courts against the Respondent and that there were also Criminal Proceedings underway against the Respondent all arising out of these same transactions.

¶ 16 The Panel took the view that sanction related to disgorgement of profit arose only in those circumstances where there was a true profit made by the activity undertaken, a profit in the nature of the sum remaining after deducting all costs. This is strengthened by reference to loss in the same clause. Indeed the word profit may mean many things, such as that the Respondent profited by the misappropriation of funds. However this is a penal section of the rules and should therefore be construed strictly and where profit and loss are used in the same clause it seems to the panel that profit should therefore be used in its more restricted use that is the sum left after deducting costs. Should the Association have intended that this penalty should apply to misappropriation cases it would have been quite simple to say so merely by adding “ the profit made or the loss avoided or the amount misappropriated”

¶ 17 Counsel for IIROC argued against that interpretation and provided some authority for his position.

- In Hart [2006] I.D.A.D.C No.2 the Panel dealt with a misappropriation of some \$900,000. In imposing a fine the Panel found that the sum of \$1,300,000. was appropriate as the actions of the Respondent were the most serious and of utmost gravity. They also pointed out that it was within the range suggest by the counsel for the Association. They do not refer in the reasons to the disgorgement of funds as part of the sanction but it would appear to be implicit.
- In Bishop [2004] I.D.A.D.C. No 16 the Panel heard that the Respondent admitted misappropriating funds from six clients, the total being \$175,000. of which some \$80,000. had been repaid. He had been in trouble before. In assessing penalty, the Panel in addition to other penalties required that the Respondent “ disgorge commissions in the amount of \$450.82 ” and imposed a global fine of \$410,000. Again there is no mention of disgorgement as part of the fine but it is not necessarily implicit as the maximum fine in the rules has not been reached.
- A further case from the Mutual Funds Dealers Association was also cited. We refer to it as case #200506 of 2005. In that case the Panel at page 8 of the decision said that “ Generally speaking those cases suggest that , with the misappropriation of funds and borrowing money from clients, the fine should roughly equal the amounts misappropriated or borrowed, and we see no need to depart from this practice in the case now before us. “

¶ 18 There does not appear to have been argument in those cases touching on the matters of concern to this panel.

¶ 19 It was apparent to the panel that Enforcement Counsel was somewhat caught by surprise by the views expressed by the Panel members and while Counsel was able to produce some authority during a recess, the Panel advised that in fairness should he wish to make further submissions following the hearing , the Panel would take these further submissions into account . Draft of the decision was circulated among the members of the Panel and subsequently the Panel was advised that further submissions would be made and these together with authorities were submitted on May 3rd.

¶ 20 Of particular significance in the new submissions was the information that S. 20.23 with respect to penalty were changed in September of 2004. The penalty section had been 20.10 and referred to the penalty as follows ;

ii) a fine not exceeding the greater of :

- 1) \$1,000,000.00
- 2) An amount equal to three times the pecuniary benefit which accrue to such person as a result of committing such violation.

¶ 21 It would appear that the Rules changes of 2004 came about as the result of the commencement of IIROC in carrying out the disciplinary functions of the Investment Dealers Association. While the penalty section was further modified the other changes have no bearing on the interpretation of the section dealing with monetary penalty.

¶ 22 Webster defines " pecuniary " as " of or involving money ". With great respect to the submissions of counsel it is the view of the Panel that such is a much broader term than what is envisaged by profit and loss. Therefore all of the authorities cited dated before September 2004 must be considered in light of the penalty charging section as it then was. The Panel now notes that the case involving Bishop (supra) was a decision of May 2004.

¶ 23 Counsel argues that the amendment did not alter the intent or the application of the penalty section as indicated by the observations of other Panels , both before and after the change in the wording. We have above dealt with that argument as it applies to cases after 2004.

¶ 24 Counsel further argues that the penalty section should be construed very broadly citing dictionary definitions supporting uses that might include the results from misappropriation of funds. The argument is that to construe the penalty clause strictly as Counsel claims is correct ,the underpinning of the Rules would be jeopardized , in that the mandate of IIROC is to set high standards in the enforcement of the regulatory measures and that the Rules should be interpreted broadly to be in harmony with the mandate.

¶ 25 A further argument is that if the Panel cannot disgorge all of the misappropriated funds the violator will have achieved a benefit as a result of his activity. This argument appears to run contrary to the Guidelines published and as referred to above wherein it is declared that the disgorgement is not restitution but sanction. As well there are the other two forums , the criminal and the civil court to deal with any pecuniary benefit.

¶ 26 The Panel is grateful to Counsel for the additional submissions but does not agree with the argument.

¶ 27 This is a most serious violation of the rules. It required the manipulation of a middle aged widow and her finances. It is quite obvious that the Respondent cultivated her financial dependence on him. There was planning of a predatory nature from the sixth month of the relationship as financial advisor, continuing with the removal of funds in a suspicious manner, from her bank account and not the investment account that may be subject to scrutiny by the Respondents employer. The planning behind the home equity line of credit, and the movement of funds from there followed by deposit in his own bank account by apparently convincing one or more bank employees to not follow the rules. There are no grounds for mitigation and while the Respondent has not appeared he has not admitted his guilt, nor made any attempt to rectify the trouble.

¶ 28 The amounts involved were indeed substantial causing harm to a client of TD Waterhouse and indeed to TD Waterhouse itself.

¶ 29 In Re Mills [2001] I.D.A.C.D. No.7 the Panel said as follows;

“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 Association’s disciplinary process; similarly excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. “

¶ 30 The Panel has considered all matters in coming to an appropriate penalty for the transgressions of this Respondent.

¶ 31 The penalties to be imposed are as follows;

- There will be a permanent bar on the Respondent’s approval with IIROC;
- A fine of \$1,000,000. with respect to the count dealing with the misappropriation of funds which the Panel considers to be the maximum fine.
- A fine of 25,000. with respect to the count involving the failure to provide information of any

sort to IIROC. This is the minimum fine in that by the Spring of 2010 IIROC through TD Waterhouse had all the necessary facts to support this hearing.

- Costs to IIROC fixed at \$7500. Counsel has agreed to file a docket supporting at least that sum.

Dated this 3rd day of June 2011 at Toronto On.

Jeffrey Flinn

Hugh McNabney

Daniel Iggers

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