Re Malic

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Gordon Albert Malic

2021 IIROC 10

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District)

Heard: May 18, 2021 in Edmonton, Alberta (by videoconference)
Decision: May 18, 2021
Reasons for Decision: June 1, 2021

Hearing Panel:
Eric Spink, QC, Chair, James Ross and Martin Davies
Appearance:
Tayen Godfrey, for IIROC Enforcement Staff
Jeremy Taylor, for Gordon Albert Malic

REASONS FOR ACCEPTANCE OF SETTLEMENT

Introduction

¶ 1 This settlement hearing was commenced by a notice of motion dated May 6, 2021, to consider a Settlement Agreement between the staff of of the Investment Industry Regulatory Organization of Canada ("IIROC") and Gordon Albert Malic ("Respondent"), under Section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC ("Consolidated Rules").

¶ 2 In the Settlement Agreement, the Respondent admitted the following contraventions.

Between May 2013 and August 2017, the Respondent, in relation to a property development business:

(a) failed to report and address an existing or potential material confilict of interest with clients, within the meaning of and contrary to Dealer Member Rule 42;

(b) failed to inform his Dealer Member of an outside business activity prior to engaging in that activity, within the meaning of and contrary to Dealer Member Rule 18.14; and

(c) misled his Dealer Member about outside business activities, contrary to Consolidated Rule 1400.

¶ 3 The Settlement Agreement proposed the following sanctions and costs:

(a) A fine in the amount of $75,000;

(b) A suspension from registration in any registered capacity with IIROC for a period of six months;

(c) Close supervision for a period of six months;

(d) Succesful completion of the Conduct and Practices Handbook exam; and

(e) Costs in the amount of $5,000.

¶ 4 After hearing submissions from both counsel, the Panel accepted the Settlement Agreement, and these are our Reasons.

Summary of Facts

¶ 5 The Settlement Agreement, which sets out the facts in detail, is attached as an Appendix to these Reasons. Early in the hearing, the panel sought clarification of a few points and invited the parties to consider whether, under Consolidated Rule 8428, they might agree to provide additional relevant facts. After a brief adjournment, both counsel provided additional information, some of which is reflected in this summary.

¶ 6 The Respondent has worked in the securities industry since 1987 and, at the time of the contraventions, was a Registered Representative at Mackie Research Capital Corp. ("Mackie Research").

¶ 7 The Respondent and two business partners planned to subdivide and sell residential lots in a plot of land in Alberta (the "Project"). They incorporated a development company in May 2013 (the "Development Company") and a (subsidiary) project company in February 2014 (the "Project Company"). The Respondent was President of the Development Company until September 2015, and his primary role was to obtain construction financing to develop the Project.

¶ 8 In February 2014, two individual clients of the Respondent, HW and MY, through their respective holding companies, each invested $800,000 in the Project, expecting to receive preferred shares.

¶ 9 In October 2014, HW's holding company pledged a $1,000,000 Guaranteed Income Certificate in support of the Project by way of a Letter of Credit for the local municipality.

¶ 10 Also in October 2014, two other clients of the Respondent, Mr. and Mrs. P, entered into a Priority Purchase Reservation with the Project Company, providing a future right to buy one of the subdivided lots, and paid an $18,000 deposit as part of the agreement.

¶ 11 In February 2016, HW's holding company lent the Development Company $1,100,000.

¶ 12 The Respondent did not inform Mackie Research of the Project until June 2014. At that time, he stated that he was only a passive shareholder, and that there was "no cross over" with the Development Company and Mackie Research clients. He continued to make incomplete and misleading statements to his firm regarding his activities, and Mackie Research did not become aware of any client involvement in the Project until being notified by HW's lawyer in August 2017.

¶ 13 The Project was not completed. Mr. and Mrs. P's deposit, which had been held in trust by a law firm, was returned. However, the $800,000 investment by MY's holding company was entirely lost, as were the $800,000 investment and $1,100,000 loan by HW's holding company, and the $1,000,000 Letter of Credit is currently in jeopardy.

¶ 14 The loss to MY's holding company was approximately 4% of its net worth, and the loss to HW's holding company was approximately 9.6%. Although MY and HW both had experience running their own businesses, they had moderate investment knowledge.

¶ 15 The Respondent lost his own personal investment in the Project, and paid $570,000 to settle a deficiency judgment on the Project Company's mortgage, which he had personally guaranteed.

¶ 16 The Respondent is 69 years old and has no previous disciplinary history.

Test to be applied

¶ 17 The panel was referred to Re Smith 2019 IIROC 13, which reviews the test to be applied when considering a settlement agreement. Re Smith refers to Re Milewski [1999] IDACD No. 17, R. v. Anthony-Cook 2016 SCC 43, and Re Scotia Capital 2017 IIROC 48. Those decisions all reflect what the Supreme Court of Canada described in Anthony-Cook as the "public interest test".

¶ 18 In Anthony-Cook, the Supreme Court explained that the public interest test asks whether the proposed sanctions "would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest" (para. 5). This as an "undeniably high threshold" and a joint submission should only be rejected where it is "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down" (para. 34). The test requires that joint submissions be approached "from a position of restraint" (para. 46) which considers "the critical systemic benefits that flow from joint submissions" (para. 48). The Supreme Court also observed that joint submissions are "commonplace and vitally important to the well-being of our criminal justice system as well as our justice system at large" (para. 25).

¶ 19 Although Anthony-Cook considered joint submissions on criminal sentencing, these principles apply equally to administrative settlement agreements. Indeed, the Supreme Court's 2016 articulation of the public interest test expands upon, yet remains fundamentally consistent with, the principles stated in Re Milewski: that a panel "will not reject a settlement unles it views the penalty as clearly falling outside a reasonable range of appropriateness" and that a panel "will reflect the public interest benefits of the settlement process in its consideration of specific settlements" (pp 9-10).

Guidelines, Previous Decisions, and Key Factors in Determining Sanctions

¶ 20 The Panel was referred to the 2015 IIROC Sanction Guidelines ("Guidelines") and to the following decisions: Re Tassone 2019 IIROC 3; Re Blackmore 2014 IIROC 43; Re Lee 2013 IIROC 10; Re Bridgman 2018 IIROC 14; and Re Rudensky 2018 IIROC 38.

¶ 21 The non-binding Guidelines are intended to assist: "IIROC Enforcement Staff and respondents in the negotiation of settlement agreements; [and] hearing panels in determining whether to accept settlement agreements". The Guidelines recognize that this is a "discretionary and fact specific process". The Guidelines describe the general principles to be applied and also provide, for illustrative purposes, a non-exhaustive list of commonly considered "key factors". The Guidelines describe the primary principle as follows:

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 22 Both counsel's submissions focussed on the same key factors. The aggravating factors are that:

- the contraventions involved large investments in the Respondent's outside business activity (over $2.7 million), which were entirely lost;
- the contraventions occurred over an extended period of time (2013-2017); and
- the Respondent misled his firm throughout that period.

The mitigating factors are that:

- the Respondent has no prior disciplinary history;
- MY and HW were both aware of the Respondent's personal interest in the Project;

- the Respondent did not profit from the contraventions; and
- the Respondent, by entering into the Settlement Agreement, has now accepted responsibility for the contraventions.

¶ 23 IIROC's counsel properly observed that the previous decisions are "goal posts" in the sense that they reflect the range of sanctions imposed in circumstances that are roughly comparable, but not identical, to the current situation. The decisions generally affirm the seriousness of the contraventions in this case. By failing to report an existing or potential material conflict of interest with his clients, and by misleading Mackie Research, the Respondent undermined its ability to address or avoid any conflict of interest arising from his outside business activities. The Panel agreed with the following statements in *Re Rudensky* (para. 8):

> Because firms are required to address existing or potential conflicts of interest, it is essential that a registrant's answers to their queries are true and complete. This is particularly the case where a registrant solely possesses information about existing or potential conflicts of interest. The failure to provide true and complete disclosure prevents a firm from being able to fulfil its obligation to respond to existing or potential conflicts of interest, thereby exposing the firm to potential damages.

¶ 24 Both counsel submitted, and the Panel agreed, that the six-month suspension will have greater impact on the Respondent because of his age and the fact that he is nearing the end of his career. The Panel also noted that the $75,000 fine is significant because the Respondent did not profit from the contraventions, and sustained major financial losses from the Project. Having regard to all the circumstances, the Panel concluded that the agreed-upon sanctions, in total, are fair, reasonable, and sufficient to provide both specific and general deterrence.

Conclusion

¶ 25 For these reasons, the Panel accepted and executed the Settlement Agreement on May 18, 2021.

Dated at Edmonton, Alberta this 1 day of June, 2021.

Eric Spink

James Ross

Martin Davies

APPENDIX

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Motion to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Gordon Albert Malic ("Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III

of this Settlement Agreement.

Overview

4. The Respondent was involved in a property development business, which he initially failed to report to his Dealer Member. He also failed to report and address an existing or potential material conflict of interest, within the meaning of Dealer Member Rule 42, which arose when clients invested in the business. When he eventually reported these activities to his firm, he misled them about the extent of his involvement in the business, and failed to disclose his clients' financial interest in the business.

Background

5. The Respondent is currently employed with Mackie Research Capital Corp. ("Mackie Research"), where he has worked as an RR since 2009. He has worked in the securities industry since 1987. The allegations occurred while the Respondent was a Registered Representative at Mackie Research.

The Respondent's Outside Business Activity

6. The Respondent and two business partners, GG and TG, (the "Partners") planned to subdivide and sell residential lots in a plot of land in Alberta (the "Project). In the course of their business, the Partners incorporated two companies (the "Companies"), corporation A (the "Development Company") and corporation B (the "Project Company").

7. The Development Company was incorporated in May 2013. The Respondent and his two business partners were listed as directors, with each owning 33.33% of the company through various incorporated entities. In the Respondent's case, his corporation Malic Ventures Inc. was the one third shareholder of the Development Company. The Respondent held the Position of President. The Respondent was a 51% shareholder of Malic Ventures Inc., with his wife being the remaining 49% shareholder.

8. The Project Company was incorporated in February 2014. The Respondent's two business partners were listed as directors of that company. The Project Company was held by the Development Company.

9. Ultimately, the Project was never completed. The Project Company eventually defaulted on a 2.4 million dollar mortgage, and the land for the Project was subject to foreclosure proceedings.

10. Two of the Respondent's Mackie Research clients invested in the Project through their holding companies, and lost all, or a significant portion, of their investments. Two other clients jointly made a deposit on an option to purchase a lot, which was later returned.

11. The Respondent also lost his own personal investment in the project, plus paid $570,000 to settle a deficiency judgment on the Project Company's mortgage, which he had personally guaranteed.

The Respondent's Role in the Business

12. Each of the Partners had different primary roles in developing the Project:

    a) partner TG oversaw construction;

    b) partner GG was a realtor, and was in charge of selling the units; and

    c) the Respondent's role was to obtain construction financing to develop the Project.

13. In the course of developing the Project, the Respondent, in his capacity as President of the Development Company and indirect owner of the Development and Project Companies:

    a) accepted investments for the Project from some of his Mackie Research clients;

    b) was the President of the Development Company until September 2015;

    c) sent two of his Mackie Research clients investment proposals and updates for the Project;

d) in his capacity as President, signed documents described as General Security Agreements, relating to share purchases by two corporations, one of which was a Mackie client, and one of which was owned by a Mackie client; and

e) contacted and directed legal counsel for the Companies, when arranging a loan from a corporation owned by one of his clients to the Development Company.

Clients' Involvement

14. The Respondent's Mackie Research clients, HW and MY, invested in the Project through their corporate holding companies. In the case of MY, his holding company also held a corporate account with the Respondent. HW's holding company did not. In addition, the Respondent's Mackie Research clients, Mr. and Mrs. P, made a joint deposit to potentially purchase a lot in the Project.

Client HW's Investments

15. HW had been a client of the Respondent's since approximately 2003. While HW had experience running his own businesses he owned through a holding company ("HH Ltd."), which he estimated in 2018 to be worth approximately $30 million, he had moderate investment knowledge. The Respondent approached HW about investing in the Project. The Respondent told HW that the Respondent was personally involved with and had invested in the Project.

16. HH Ltd. invested approximately $1.9 million in both companies, while pledging a further $1,000,000 in support of the Project. HH Ltd.'s investments were as follows:

    a) Around February 13, 2014, HH Ltd. received a document titled "General Security Agreement" from the Project Company. This document was signed by the Respondent, in his capacity as President, and by the Respondent's two business partners. HH Ltd. invested $800,000 for which it expected to receive 10 preferred shares;

    b) On February 24, 2016, HH Ltd. entered into a loan agreement with the Development Company. Under the terms of the agreement HH Ltd. lent the company $1,100,000. In addition to the loan agreement, the Development Company agreed to provide shares of the company as collateral security for the loan. HH Ltd. did not receive any repayment of the loan or any of the share certificates; and

    c) On October 9, 2014, HH Ltd. pledged a $1,000,000 Guaranteed Income Certificate in support of the Project by way of an Irrevocable Standby Letter of Credit (the "Letter of Credit") for the local municipality. HW also incurred approximately $30,000 in fees related to the yearly renewal of the Letter of Credit.

17. HH Ltd.'s investments (including the Letter or Credit) represented approximately 96% of the amount of HW's liquid personal assets (as estimated by HW in 2011), and approximately 9.6% of the value of the main business owned by HH Ltd. (as estimated by HW in 2018). HH Ltd. lost its initial $800,000 investment and the $1,100,000 loan. Due to the failure to develop the Project, the municipality informed HW of its intent to exercise its rights in the Letter of Credit. This would allow the municipality to finish certain incomplete work with the funds HH Ltd. pledged in the Letter of Credit.

Client MY's Investment

18. MY had been a client of the Respondent for approximately 18 years. A numbered corporation owned by MY ("MY Ltd.") was also a client of the Respondent. While MY had experience running his own businesses, he had moderate investment knowledge, and had been relying on the Respondent as his Investment Advisor.

19. Around February 13, 2014, MY Ltd. received a document titled "General Security Agreement" from the

Project Company. The document was signed by the Respondent, in his capacity as President, and by the Respondent's two business partners. MY Ltd. invested $800,000 for which it expected to receive 10 preferred shares. However, MY Ltd. never received any share certificates. MY did not have a lawyer review this document, but instead relied on the Respondent to be acting in his best interest.

20. MY Ltd.'s investment represented approximately 20% of its liquid assets, and 4% of its net worth (as stated in its account documents). MY Ltd. lost the entirety of its $800,000 investment.

Clients Mr. & Mrs. P's Deposit

21. Mr. and Mrs. P had been clients of the Respondent since July 2013. In October 2014, Mr. & Mrs. P entered into a Priority Purchase Reservation Agreement with the Project Company providing a future right to buy one of the subdivided lots. They provided an $18,000 deposit as part of the agreement. However, the Reservation Agreement was eventually cancelled and their deposit was refunded.

Failure to Inform Mackie Research

22. The Respondent did not inform Mackie Research of the outside business activity in either company until June, 2014. When the Respondent did inform the firm, he stated he was only a passive shareholder, and stated that there was "no cross over" with the Development Company and Mackie clients, notwithstanding that HH Ltd. and MY Ltd. had invested in the Project Company.

23. The Respondent continued to make incomplete and misleading statements to his firm regarding his activities in these companies, both in July 2015, and January 2017. At no time did the Respondent ever inform Mackie Research about his clients' investments in the companies. Mackie Research did not become aware of any client involvement until being notified by HW's lawyer, in August 2017.

24. Of note:

    a) The Respondent incorrectly stated he was only a passive shareholder in the Companies (June 2014);

    b) The Development Company, for which the Respondent was a director and President, had already been incorporated approximately 13 months before his initial disclosure (May 2013);

    c) The Project Company had already been incorporated approximately four months before his initial disclosure (February 2014);

    d) The Respondent advised his firm that there was no "cross over" with the Development Company and Mackie clients, (June 2016), knowing that HH Ltd. and MY Ltd. had already each invested $800,000 into the Project, approximately 15 months earlier (February-March 2014);

    e) Mr. and Mrs. P entered into an agreement to purchase a lot in the Project, and made an $18,000 deposit for the lot (October 2014), after Mackie Research approved the outside business activity on the condition that there be no solicitation of any Mackie client with regard to the selling of real estate under the OBA (June 2014); and

    f) The Respondent sought, and secured, the $1,100,000 loan from HW well after (February 2016) Mackie Research approved the outside business activity on the understanding that there was no "cross over" between clients of the Development Company and current Mackie clients (June 2014).

The Conflict of Interest

25. The Respondent failed to report, and address, an existing or potential material conflict of interest with his clients, within the meaning of Dealer Member Rule 42, when they (or companies they owned) invested in the Project. By failing to inform and misleading Mackie Research, the Respondent undermined the firm's ability to manage and avoid any conflict of interests arising from his outside business activities.

PART IV – CONTRAVENTIONS

26. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

    Between May 2013 and August 2017, the Respondent, in relation to a property development business:

    (a) failed to report and address an existing or potential material conflict of interest with clients, within the meaning of and contrary to Dealer Member Rule 42;

    (b) failed to inform his Dealer Member of an outside business activity prior to engaging in that activity, within the meaning of and contrary to Dealer Member Rule 18.14; and

    (c) misled his Dealer Member about outside business activities, contrary to Consolidated Rule 1400.

PART V – TERMS OF SETTLEMENT

27. The Respondent agrees to the following sanctions and costs:

    a) A fine in the amount of $75,000;

    b) A suspension from acting in an registered capacity with IIROC for a period of six months;

    c) Close supervision for a period of six months;

    d) Successful completion of the Conduct and Practices Handbook exam;

    e) Costs in the amount of $5,000.

28. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 6 months of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

29. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

30. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

31. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

32. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

33. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

34. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

35. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

36. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

37. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

38. If this Settlement Agreement is accepted, the Respondent agrees that neither [he/she/it] nor anyone on [his/her/its] behalf, will make a public statement inconsistent with this Settlement Agreement.

39. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

40. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

41. A fax or electronic copy of any signature will be treated as an original signature.

DATED effective May 5, 2021.

"Witness"

Witness

"Gordon Albert Malic"

Gordon Albert Malic

"Witness"

Witness

"Tayen Godfrey"

Tayen Godfrey

Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this 18 day of May, 2021 by the following Hearing Panel:

Per: "Eric Spink"

Panel Chair

Per: "James Ross"

Panel Member

Per: "Martin Davies"

Panel Member

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