Modified per the Order of the British Columbia Securities Commission 2023 BCSECCOM 313

Re LIDDER

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Kamal Lidder

2023 CIRO 03

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

Heard: August 12, 2021 in Vancouver, British Columbia via videoconference
Decision: August 12, 2021
Reasons for Decision: September 20, 2021

Hearing Panel:
Joseph A. Bernardo, Chair, Bradley Doney and Alexandra Williams
Appearances:
Stacy Robertson, Senior Enforcement Counsel
Patrick Sullivan, for the Respondent
Kamal Lidder (present)

REASONS FOR DECISION

¶ 1 On August 12, 2021, the Hearing Panel was asked in a closed session to consider a settlement agreement (Settlement Agreement) made between the staff of the Investment Industry Regulatory Organization of Canada (IIROC Staff) and the Respondent. It is attached as Exhibit A.

¶ 2 The Hearing Panel accepted the Settlement Agreement for the following reasons.

Agreed facts

¶ 3 The material facts are set out in the Settlement Agreement. Briefly:

(a) The Respondent developed a cyclical short term investment strategy while employed at a Vancouver, British Columbia branch of BMO Nesbitt Burns, an IIROC Dealer Member (BMO). The strategy was predicated on purchasing a selected security at the beginning of each week and then selling it at the end of it.

(b) The Respondent developed marketing materials explaining his strategy, which he provided to interested clients for whom the strategy was suitable. These materials, which had not been approved by BMO, contained information relating to the past performance of the strategy.

(c) The Respondent implemented his investment strategy for 22 client accounts belonging to 15 households. Most of these account holders were recipients of the Respondent's marketing

materials.

(d) It was the Respondent's practice to send an email to participating clients at the beginning of each week identifying the security to be purchased and sold. However, he did not always follow up to obtain specific instructions from each client prior to executing trades on their behalf.

(e) From February 2018 to April 2019, the Respondent implemented his investment strategy in part by making trades without first obtaining express client authorization. During this time, the Respondent was not registered as a portfolio manager, and neither the clients nor BMO had provided prior written authorization for the relevant accounts to be managed on a discretionary basis.

¶ 4 The written submissions tendered by IIROC Staff include references to the following facts:

(a) The Respondent's contraventions did not involve unsuitable trading.

(b) The Respondent has no prior disciplinary record with IIROC.

¶ 5 These facts are not among those the parties agreed upon in the Settlement Agreement. However, in his oral submissions defense counsel on the Respondent's behalf concurred with IIROC Staff's submissions, and did so without registering any qualifications. On that basis, the Hearing Panel accepts the above facts as having been entered into the record by consent.

Contraventions

¶ 6 Rule 29.7(3) of IIROC's Dealer Member Rules (Rules) requires a registered representative to obtain prior approval from their employing Dealer Member before using any materials that contain performance reports or summaries to solicit clients.

¶ 7 Rule 1300.4 prohibits a registered representative from exercising discretionary authority over a customer account without the client's prior written authorization or the Dealer Member's approval.

¶ 8 Rule 1300.7 prohibits discretionary trading from a client account unless the individual managing the account on the Dealer Member's behalf is registered as a portfolio manager or equivalent.

¶ 9 The Respondent acknowledges that between February 2018 and April 2019 he:

(a) prepared and sent clients sales literature containing performance summaries that had not been approved by BMO, contrary to Rule 29.7(3); and

(b) executed discretionary transactions in client accounts, contrary to Rule 1300.4.

¶ 10 The facts as set out in the Settlement Agreement are cursory. Nonetheless, they are sufficient to support the Respondent's admissions of fault.

Applicable standard

¶ 11 Rule 8215(5) defines a hearing panel's jurisdiction over settlement outcomes in highly circumscribed terms. It states simply that a settlement hearing panel "may accept or reject a settlement agreement", making it abundantly clear that panels do not have the authority to impose their own preferred outcomes on the settlement process.

¶ 12 From this, hearing panels have time and again drawn the obvious corollary: when considering a settlement, a panel ought not to assess it against what the panel itself might judge to be a more optimal outcome. Rather, taking the facts as they have been disclosed in the settlement at face value, a panel's task is to determine whether the proposed outcome falls within a reasonable range of appropriateness. If it clearly does not, a settlement may properly be rejected; otherwise, it is incumbent on the panel to accept it.

Re Milewski, [1999] I.D.A.C.D. No. 17 at p. 12

Re Deutsche Bank Securities Ltd. 2013 IIROC 7 at para. 9
Re Gill 2015 IIROC 39 at paras. 7 to 9
Re Edward Jones 2016 IIROC 42 at paras. 25 to 28
Re Cheng 2018 LNONOSC 314 at para. 8

¶ 13 There is a strong policy reason for this deference: the core regulatory goal of protecting the investing public is advanced by the efficient allocation of limited enforcement resources. As the British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission:

> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation.
>
> *British Columbia Securities Commission v. Seifert*, 2007 BCCA 484 at para. 49

¶ 14 Moreover, a policy of deference is warranted because settlements are the product of negotiations between litigants opposed in interest. This means they are always pragmatic compromises arrived at by the persons best positioned to assess the significance of the relevant facts — not all of which may be disclosed in the settlement text.

Re Clark [1999] I.D.A.C.D. No. 40 at p. 4
British Columbia Securities Commission v. Seifert, 2007 BCCA 484 at paras. 26 and 31
Re Heakes 2019 IIROC 09 at paras. 15 to 18

Proposed sanctions

¶ 15 The Settlement Agreement contemplates that the Respondent be ordered to pay:

(a) a financial penalty of $15,000; and

(b) costs of $2,000.

¶ 16 With respect to the Respondent's contravention of Rule 29.7(3), neither counsel was able to bring forward pertinent sanction precedents. This is perhaps not surprising given the nature of the provision, which is concerned solely with placing certain forms of marketing under Dealer Member supervision and not with the reliability of their content. IIROC's Sanction Guidelines indicate that ordering a global sanction is appropriate in cases involving multiple violations, if the cumulative effect of ordering a separate penalty for each contravention would be disproportionate to the gravity of the misconduct as a whole. This appears to be one of those cases.

¶ 17 The substantive disciplinary issue in this case is the Respondent's improper discretionary trading. Senior Enforcement Counsel reviewed a number of settlement precedents where the character of the Rule 1300.4 contraventions was more or less comparable to that of the Respondent's in this case. In these precedents the trading took place over periods that ranged from eight months to four years, and averaged about 31 months. The trading typically involved transactions made on behalf of three or fewer clients, except in one case where 21 clients were involved. Neither suitability nor client harm was an issue in any of the cases. In all of them, it appears the discretionary trading was undertaken for the practical convenience of the respondent or client or both, and not to benefit the respondent at the client's expense.

Re Dykeman 2017 IIROC 49
Re Black 2020 IIROC 33
Re Smith 2016 IIROC 15
Re Karim 2015 IIROC 04
Re Pace 2019 IIROC 11

¶ 18 The Respondent's inappropriate discretionary trading was undertaken for the sake of simplifying the implementation of the Respondent's trading strategy. It took place over a period of 15 months, which is at the

lower end relative to the precedents. The contraventions did not involve unsuitable trading, and the clients whose accounts were involved were aware of the strategy and of the transactions being made on their behalf. As in the other cases, there is no evidence of client harm. The Respondent's discretionary trading involved 15 client households, which, although at the higher end, is commensurate with the precedents.

¶ 19 The financial penalties in the settlement precedents ranged between $10,000 and $25,000. Costs of $1,500 were ordered in all but one case, where the amount ordered was $5,000. In each case, the respondent was required to successfully rewrite the Conduct and Practices Handbook examination. In all but one case, a period of strict or close supervision of between 6 to 12 months was ordered.

¶ 20 Taking these factors into consideration, together with the fact that the Respondent has no disciplinary history with IIROC, it is evident that the proposed sanctions fall within the range of outcomes established by previous settlements involving comparable circumstances. The Hearing Panel therefore concluded that the penalties agreed upon by the parties did not fall outside the reasonable range of appropriateness, and accepted the Settlement Agreement.

Dated at Vancouver, British Columbia this 20th day of September, 2021.

Joseph A. Bernardo, Chair

Bradley Doney

Alexandra Williams

Copyright © 2023 Canadian Investment Regulatory Organization. All Rights Reserved