Re Sammy

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

Krishna Sammy

2016 IIROC 16

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

Heard: April 27, 2016 at Toronto, Ontario
Written Decision: May 4, 2016

Hearing Panel:
Patrick T. Galligan, Q.C., Chair, Debbie Archer and Neil Murphy
Appearances:

Robert Del Frate	Senior Enforcement Counsel
Robyrt H. Regan	for the Respondent

DECISIONS ON PENALTY AND STAY APPLICATION

¶ 1 By its decision dated January 18, 2016, this Hearing Panel found the Respondent guilty of the following charges:

(i) On multiple occasions between January 2009 and December 2011, the Respondent purchased or recommended the purchase of securities in client accounts on the same day he either had sold or intended to sell the securities of these same issuers from his personal account, thereby placing him in a conflict of interest with those clients which he failed to address appropriately, contrary to Dealer Member Rules 29.1 and National Instrument 31-103.

(iii) Between January 2009 and December 2011, the Respondent recommended the purchase of securities to several clients without using due diligence to ensure that:

b. The recommendations were in accordance with the risk tolerance stated on clients' New Account Application Forms and within the bounds of good business practice, contrary to Dealer Member Rules 1300.1(o) and/or (q).

PRELIMINARY OBSERVATIONS

¶ 2 When the hearing respecting penalty began, counsel for the Respondent advised that he wished to apply for a stay of any penalty imposed pending the determination of the Respondent's appeal to the Ontario Securities Commission ("O.S.C."). We decided that we would first hear submissions respecting penalty and we would then hear the application for a stay. At the conclusion of counsel's submissions we reserved our decision as to penalty. We then heard the stay application and reserved our decision on it. These reasons will render our decisions on both matters.

¶ 3 In the written submissions of Staff it is contended that the Respondent's actions were calculated, deceitful and dishonest. We note that the charges against the Respondent, contained in the Notice of Hearing,

made no such allegations. In our decision dated January 18, 2016 we made no such findings. In our consideration of the appropriate penalty we consider those allegations to have neither been charged nor proven.

PENALTY

¶ 4 The contraventions fall into two separate categories. They are conflict of interest and unsuitable investments. We will make brief comments about each of them. Before doing so we keep in mind the purpose of penalty as a part of regulatory law.

¶ 5 The Supreme Court of Canada has considered that purpose in two frequently cited cases. They are *Committee for Equal Treatment of Asbestos Minority Shareholders v. O.S.C.*, [2001] 2 S.C.R. 132, and *Cartway Resources Corp. (Re)*, [2004] 1 S.C.R. 672. We derive from those decisions considerations which should be applied in this case. The focus of regulatory law is on the protection of the societal interest in having safe and efficient capital markets. The focus is not to punish an individual for his/her moral faults. Administrative penalties can be considered orders in the public interest because they are intended to be protective and preventive. General deterrence is an appropriate consideration in arriving at a penalty which will attempt to prevent the happening of conduct which has a deleterious effect upon the safety of investors in, and the efficiency of, the capital markets. We think, therefore, that the penalty to be imposed in this case should be one which can act as a general deterrent to try to prevent advisors from being in conflict of interest with their clients, and to prevent them from recommending investments which are unsuited to their clients.

¶ 6 We note that the Respondent does not have a disciplinary history. That is a circumstance of mitigation which we take into account. We are not aware of any other circumstance of mitigation.

a) Conflict of Interest

¶ 7 On 16 days, over a three-year period, the Respondent purchased shares for certain of his clients and on the same days sold personal shares of the same issues. There were no direct crosses. There was no evidence of client losses. Our conclusion was:

> Our finding is that when the Respondent decided to sell his stock at a time when he was buying the same stock for clients he put himself in a clear conflict of interest with his clients. He failed to disclose that conflict before completing the transactions.
>
> … The motivation for his sales is irrelevant. His position, as his clients' financial adviser, required of him a high standard of financial probity to them. His failure to see the obvious question which a client would ask "why are you buying for me when you are selling your own" indicates a failure to understand the importance of his being seen as completely trustworthy. We hold that the Respondent's failure to disclose his sales when buying the same stock for his clients does not observe high standards of ethics and business conduct and amounts to conduct which is unbecoming.

¶ 8 In our opinion, conflict of interest is something that strikes at the heart of a client's right to security in the capital markets. A strong message must be sent that it cannot be tolerated. A penalty would not be adequate if it did not include a fine and a suspension.

¶ 9 Section 4 of Part I of the IIROC Sanction Guidelines provides:

> **4. Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.**
>
> It is a fundamental tenet that wrong-doers should not benefit from their wrong-doing. Accordingly, in cases where the respondent benefited financially from the misconduct, the sanction, where possible, should include a disgorgement of the amount of any such financial benefit. Financial benefit would include any profits, commissions, fees, or any other compensation or other benefit received by the respondent, directly or indirectly, as a result of the misconduct. Financial benefit may include any loss avoided as a result of the misconduct.

¶ 10 This is a case where there was misconduct. It is reasonable to expect that the Respondent probably did

obtain some profit from his trading against his clients. In paras. 13 and 14 of its written submission Staff made a calculation of what that profit might be. We do not accept that calculation because the Respondent's cost of his shares is not known. Staff's calculation is based upon the value attributed to the shares on two different dates. We do not know whether those values are the actual cost of his shares and thus we do not know whether Staff's estimate of profit is high or low. In the light of that uncertainty we have decided not to attempt to value his profit but, in fixing a fine, we will take into account, although we cannot assess the amount of the profit, that disgorgement should be a factor in the fine.

b) Unsuitable Investments

¶ 11 Over a period of three years the Respondent made many investments which were unsuitable for his clients because they were not in accordance with their risk tolerance as set out in their NAAFs. We concluded:

> The whole of the evidence has convinced us that, on many occasions, eight client accounts held significantly more risk than those clients stated, in their NAAFs, that they were prepared to authorize. There can, therefore, be no doubt that the Respondent frequently failed to use due diligence to ensure that investments which he made for clients were in accordance with their risk tolerance.

¶ 12 We were satisfied that at least four of his clients suffered losses totalling at least $279,000. Two other clients claimed to have suffered losses. However, on the evidence, we were unable to decide whether they had suffered losses, and if so, how much they were.

¶ 13 It is our opinion that a penalty would not be appropriate, to prevent the putting of clients' funds into unsuitable investments, if it did not include both a fine and a suspension.

c) Appropriate Penalty

i) Fine

¶ 14 It is technically possible to assign a particular fine to each of the convictions. We have decided, however, that it is more practical to consider the cumulative effect of the Respondent's misconduct and impose a global fine to cover it all.

¶ 15 In arriving at an amount, we have taken into account the following factors: the prevention of conflicts of interest; the disgorgement of probable profits from misconduct; dissuasion of the failure to use due diligence in the recommendation of investments to clients; and serious financial loss to the Respondent's clients.

¶ 16 In the consideration of those factors, we have decided that an appropriate fine is one of $250,000 to cover both charges of which the Respondent was convicted.

ii) Suspension

¶ 17 It is our view that the misconduct of the Respondent is so serious that a penalty would only have meaningful protective and preventive effect if it included a significant suspension. Staff has suggested that the Respondent be permanently barred from approval with IIROC.

¶ 18 Since calculation, deceit and dishonesty have neither been alleged, in the Notice of Hearing, nor proved, we decline to exercise our discretion in favour of Staff's suggestion. The issue is to decide upon a suspension which would have the desired protective and preventive effect.

¶ 19 It is a commonplace that comparing results in other cases is not always helpful because the circumstances of no two cases are ever the same. Nevertheless other cases can sometimes show what other tribunals have done in cases where similar issues were involved. While they do not involve conflicts of interest, two cases have been brought to our attention which have some similarity to the unsuitable investments part of this one. The misconduct was serious with serious consequences to the clients.

¶ 20 They are *Matthews (Re)*, [2015] IIROC 02 and *Harding (Re)*, [2011] IIROC 65. In each of those cases the suspension was for a period of five years.

¶ 21 After a consideration of all of the circumstances, and taking note of the decisions of *Matthews* and *Harding*, we have decided that a global suspension of five years, covering both offences, should have the desired protective and preventive effect.

¶ 22 Hearing panels have the power, when imposing a suspension of approval, to provide for conditions. We have decided that before the Respondent can be considered for re-approval he must pay to IIROC the amount of fine and costs imposed or make arrangements satisfactory to IIROC to do so.

iii) Costs

¶ 23 We have reviewed the draft bill of costs contained in the affidavit of Katie Trotman. Counsel for the Respondent has conceded that the bill of costs accurately shows the hours which have been recorded by the UBSS electronic docketing system. We accept that IIROC's costs are fairly set out in that bill. Accordingly we fix the costs in the amount claimed of $75,000.

d) Penalty Imposed

¶ 24 For the reasons set out above we impose the following penalty upon the Respondent.

i) The Respondent shall pay a fine of $250,000 to IIROC.

ii) The Respondent is barred from approval with IIROC for a period of five years with the condition that he cannot be considered for re-approval until he has paid the fine and costs imposed hereby, or has made arrangements satisfactory to IIROC to do so.

iii) The Respondent shall pay to IIROC $75,000 on account of its costs.

THE STAY APPLICATION

¶ 25 Counsel for the Respondent applied for an order staying the enforcement of any penalty, which we might impose, pending the outcome of the Respondent's appeal to the O.S.C. No affidavit or other material was filed or tendered in support of the application.

¶ 26 Counsel argued that when the factors set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. A.G. Canada*, [1994] 1 S.C.R. 311 at p. 334, are weighed, the balance of convenience favours the Respondent. Those factors are neatly summarized by Kruzick J. of the Ontario Superior Court in his endorsement in *Azeff et al. v. OSC*, October 19, 2015 (affirmed on appeal 2016 ONSC 1279):

> The appellants have the burden to satisfy the court that (a) there is a serious issue to appeal; (b) that they will suffer irreparable harm; and (c) the balance of convenience favours the granting of the stay.

¶ 27 We will consider those three factors.

a) Serious issue to appeal. For the purpose of this application we will assume, without deciding, that the Respondent has satisfied us that there is a serious issue to appeal.

b) Irreparable harm. The penalty imposed in the case comprises monetary matters, i.e., a fine and an obligation to pay costs, and a suspension of approval. The payment of the fine and costs by the Respondent could not amount to irreparable harm because if his appeal succeeds he will be able to claim reimbursement of those amounts.

Mr. Regan argued that a suspension would cause irreparable harm because it would prevent his client from carrying on business as a registrant until his appeal is determined. The problem with that argument is that the Respondent is not currently carrying on business as a registrant in Ontario. He has not carried on business here for over three years. He does not live in Ontario and has not lived here for some time. He cannot be said to suffer irreparable harm by being prevented from doing something which he is not doing and which he has not been doing for a number of years.

The onus of showing irreparable harm rests upon the Respondent. There is no evidence of a firm

intention to return to Ontario and carry on business as a registrant in the foreseeable future or ever. He has not satisfied his onus of proving that the suspension, which we have ordered, will cause him irreparable harm.

c) The balance of convenience. Because the Respondent has failed to show that his suspension would cause him irreparable harm, it is not necessary for us to consider the balance of convenience. However, because in our penalty decision we held that administrative penalties can be considered to be "orders in the public interest", we wish to make reference to the concluding paragraph of Kruzick J.'s endorsement in *Azeff (supra)*:

> As expressed in *RJR-MacDonald* in the balancing exercise, the interest of the public must be given extra weight. Here the Commission is mandated to protect investors and confidence in capital markets. In the end, it is not in the public interest to grant the stay which would allow the Appellants to conduct themselves in registerable activities. I therefore conclude that the balance of convenience favours the Commission.

If it had been necessary to consider the balance of convenience, we would have given the penalty extra weight because it can be said to be part of an order in the public interest.

¶ 28 It is our opinion that the application for a stay is entirely without merit. It is dismissed.

DATED at Toronto, this 4th day of May 2016.

Patrick T. Galligan

Chair

Debbie Archer

Industry Representative

Neil Murphy

Industry Representative