

Re Eley

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Douglas John Eley

2014 IIROC 52

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

Heard: October 2, 2014
Decision: October 30, 2014

Hearing Panel:

Thomas G. Heintzman, Chair, T. Hugh McNabney and Zahra Bhutani

Appearances:

Natalija Popovic, Senior Enforcement Counsel, IIROC

Michael W. Lacey, Counsel for Douglas John Eley

DECISION OF THE HEARING PANEL

¶ 1 These are the Reasons for Decision and the Order of the Hearing Panel arising from a Notice of Hearing dated July 25, 2014 issued by the Investment Industry Regulatory Organization of Canada (IIROC) against Douglas John Eley (Mr. Eley).¹

¶ 2 IIROC and Mr Eley entered into an Agreed Statement of Facts and Contraventions dated September 29, 2014 (Agreed Statement). In the Agreed Statement, Mr. Eley admitted contravening IIROC Dealer Member Rule 29.1 as follows:

Count 1: From or about August 2011 to April 2013 the Respondent engaged in conduct unbecoming a registrant or detrimental to the public interest, in that he made misrepresentations to his firm's compliance staff by inflating certain clients' net worth, contrary to IIROC Dealer Member Rule 29.1.

Count 2: From or about August 2011 to April 2013, the Respondent engaged in conduct unbecoming a registrant or detrimental to the public interest, in that he falsely endorsed the signatures of several clients on certain client account documentation and other forms, contrary to IIROC Dealer Member Rule 29.1.²

¶ 3 As a result of the Agreed Statement and Mr. Eley's admission of the contravention of the IIROC Dealer Member Rules, a hearing was held on October 2, 2014 to determine the appropriate penalty to be imposed on Mr. Eley. At the hearing, IIROC submitted that a suspension for two years, a fine of \$75,000 and supervision for 12 months following re-registration should be imposed as the penalty. In addition, IIROC and Mr. Eley agreed that Mr. Eley should pay costs in the amount of \$15,000. Mr. Eley submitted that no further period of

¹ Notice of Hearing dated July 25, 2014, IIROC Book of Authorities, Tab 1

² Agreed Statement, para. 3, IIROC Book of Authorities, Tab 2

suspension should be ordered having regard to the fact that he has been non-registered for the past 18 months since the termination of his employment which occurred at the time of the conduct in question in this proceeding.

I. The Facts

¶ 4 The facts stated in paragraphs 5 to 16 of these Reasons for Decision are taken from the Agreed Statement.

¶ 5 Mr. Eley has been a Registered Representative with IIROC Dealer Members since 2000. From 2006 until April 2013 Mr. Eley worked in the Burlington, Ontario office of Macquarie Private Wealth Inc. (MPW), and its predecessors. In April, 2013, Mr. Eley was terminated for cause by MPW as a result of the events set forth in the Agreed Statement.³

¶ 6 Between August 2011 and April 2013, Mr. Eley worked at MPW in a joint code with Julian Ricci. Their book of business consisted of assets under management of approximately \$225 million. A significant portion of their book of business involved a leveraged investment strategy. Under that strategy, clients were able to borrow up to three times the amount they were willing to deposit to a maximum of \$300,000. The funds were used to purchase mutual funds which were held as collateral for the loans by the lenders.⁴

¶ 7 MPW had in place internal protocols relating to leveraged investments. In order for a MPW client to qualify to engage in the leveraged investment strategy, MPW required Mr. Eley to complete a leveraged investment strategy spreadsheet for each client. The information contained in the spreadsheet or work sheet included client's net worth, assets and liabilities.⁵

¶ 8 The information in the work sheet was used by the firm to ascertain whether this strategy was suitable for the client. If the leveraged investment strategy was found to be acceptable for the client by MPW, the client was approved internally by MPW and Mr. Eley would then submit the necessary documentation for the client to obtain the loan from one of the institutional lenders which provided loans for the strategy.⁶

¶ 9 Mr. Eley admitted to IIROC Staff that he inflated and thereby misrepresented to MPW the net worth of certain clients, as reflected on the work sheets, in order to get past the firm's suitability requirements. In his view, these requirements were unreasonable and unnecessary. Mr. Eley therefore deliberately circumvented the firm's compliance protocols.⁷

¶ 10 By increasing the client assets under his management through the use of leverage, Mr. Eley obtained a direct economic benefit in the form of additional trailer fees earned on the mutual funds purchased as part of the leveraged investment strategy; for example trailer fees increased from one half to one per cent on the annual ten per cent free redemption portions of the mutual funds.⁸

¶ 11 In particular, Mr. Eley made the following admissions:

a) Inflation of Net Worth

The clients for whom Mr. Eley implemented the leveraged investment strategy held assets that represented in excess of 60% of his assets under management (of approximately \$225 million). For approximately 5% of the clients applying to use the leveraged investment

³ Agreed Statement, paras. 6-7, IIROC Book of Authorities, Tab 2

⁴ Agreed Statement, paras. 8-10, IIROC Book of Authorities, Tab 2

⁵ Agreed Statement, para. 12, IIROC Book of Authorities, Tab 2

⁶ Agreed Statement, paras.13, IIROC Book of Authorities, Tab 2

⁷ Agreed Statement, para.15, IIROC Book of Authorities, Tab 2

⁸ Agreed Statement, para. 16, IIROC Book of Authorities, Tab 2

strategy, Mr. Eley inflated their respective net worth by approximately 10-25% on their NCAFs and on their leveraged investment strategy spreadsheet. He did not advise some of the clients that he had done so.

b) Use of Pre-Signed Forms

- i. In approximately 20% of client files, Mr. Eley utilized pre-signed blank New Client Application Forms that he subsequently completed and presented to MPW in order to open accounts for clients.
- ii. In some cases, Mr. Eley utilized pre-signed blank loan application documents that he subsequently completed and presented to the institutional lenders to assist with executing the leveraged investment strategy for clients.
- iii. The mutual funds used in the leveraged investment strategy were purchased on a deferred sales charge basis. Every year a client was able to transfer out 10% of the value of the mutual fund at no cost. In order to effect the transfer, a Switch Ticket would have to be completed.
- iv. Rather than have a client complete a new Switch Ticket each year, Mr. Eley would simply re-use Switch Tickets from previous years for the relevant client. Mr. Eley submitted approximately 30 Switch Tickets over the relevant time. Where changes were made to the fund codes, these changes were authorized by the client.⁹

c) False Endorsements

- i. Mr. Eley admitted to IIROC Staff of that during the relevant time, he also falsely endorsed the signatures of clients on client account related documentation on approximately 5-10 occasions while at employed at MPW.¹⁰
- ii. In one instance he falsely endorsed the name of a client in order to enable the client to obtain funds out of a RIF.¹¹
- iii. In another instance a client had missed one of several required signatures on a loan application and Mr. Eley falsely endorsed the client's signature in order to complete the loan documentation and enable the client to participate in the leveraged investment strategy.¹²

¶ 12 Mr. Eley admitted that he intentionally concealed this conduct and there is no evidence that MPW was aware of Mr. Eley's conduct until April of 2013 at which time MPW terminated his employment.¹³

¶ 13 In the Agreed Statement, IIROC and Mr Eley agreed that the following mitigating and aggravating factors are relevant in this matter:

Mitigating

- Mr. Eley has no discipline history with IIROC;
- None of the clients in question suffered a loss as a result of Mr. Eley's conduct;

⁹ Agreed Statement, para. 17, IIROC Book of Authorities, Tab 2; Amendments agreed to by the parties on Oct. 2, 2014

¹⁰ Agreed Statement, para.18, IIROC Book of Authorities, Tab 2

¹¹ Agreed Statement, para.19, IIROC Book of Authorities, Tab 2

¹² Agreed Statement, para.20, IIROC Book of Authorities, Tab 2

¹³ Agreed Statement, para. 21, IIROC Book of Authorities, Tab 2

- The majority of Mr. Eley’s clients from MPW have continued to maintain a relationship with him in his unregistered capacity at Chippingham Financial Group (Chippingham) ; and
- Eley was co-operative with the MPW investigation and throughout the IIROC investigation and made the admissions indicated herein.

Aggravating

- The conduct was intentional and was designed to go undetected by MPW;
- Eley deliberately circumvented MPW’s suitability assessment policies; this conduct provided a direct financial benefit to Eley; and
- The conduct continued for 16 months and ceased only when Eley was confronted by MPW.¹⁴

¶ 14 Four witnesses testified at the hearing. The following paragraphs set forth their evidence.

Ms. Sharon Lloyd- Gyurkovics

¶ 15 Ms. Sharon Lloyd-Gyurkovics, IIROC’s investigator, identified the documents contained in the IIROC Book of Documents, being sample documents referred to in the Agreed Statement and the IIROC Compendium. She reviewed the Macquarie Leveraged Investment Worksheet used by MPW for the investment leveraged strategy. She said that Mr. Eley had admitted to IIROC staff that he had inflated the information in this document. She reviewed the Macquarie Switch Ticket and said that Mr. Eley had admitted using a Switch Ticket in one year for a transaction in a subsequent year, and an Application to Withdraw or Transfer Money and RRSP/TFSA Withdrawal Form being examples of documents which Mr Eley acknowledged that he had signed for clients.¹⁵

¶ 16 Ms. Lloyd-Gyurkovics said that after Mr Eley and Mr. Ricci were terminated by MPW in April 2013 they joined Kernaghan Securities Limited, which then became Chippingham, in a non-registered capacity. She referred to the Referral Fee Agreement dated June 3, 2013 by which Mr. Eley’s and Mr. Ricci’s company, 2375834 Ontario Incorporated received 70 per cent of the gross commissions on fees generated by the clients referred to Kernaghan Securities by Mr. Eley and Mr Ricci (Tab 6); the Referral Disclosure Letter sent to the clients which also stated that Messrs. Eley and Ricci would, directly or indirectly, be paid 70 per cent of the commission or fees generated by the accounts (Tab 7); and the Memorandum of Understanding between the clients and the Chippingham registered representative (Patricia Moltar) handling the accounts stating that Doug Eley is currently an unlicensed associate and has applied for re-instatement (Tab 8).¹⁶

¶ 17 Ms. Lloyd-Gyurkovics acknowledged that much of the information about the events in question was obtained by IIROC staff through Mr Eley’s cooperation. She said that Mr Eley admitted that he had inflated clients’ net worth in 5 per cent of clients. Of the 500 clients that Messrs. Eley and Ricci had in their joint book, 70 per cent – or about 350 clients -were Mr. Ricci’s clients, and 30 per cent – or about 150 clients – were Mr. Eley’s clients; and that Mr Eley admitted that he had inflated the net worth of about 5 per cent of those clients, or about 7-8 clients. Mr. Lloyd-Gyurkovics acknowledged that Mr. Ricci’s inflation of client net worth information was more serious and was by a higher percentage and involved up to 30 per cent of his clients, as compared to Mr. Eley’s numbers.

¶ 18 Ms. Lloyd-Gyurkovics said that Mr. Ricci had “doctored” third party supporting documents, for instance by cutting and pasting information on municipal property value assessments, and whiting out account numbers on RRSP documents to make it appear that there was a second RRSP account; and that Mr. Ricci had submitted evidence that a client had assets at another institution when in fact those assets had been transferred to MPW,

¹⁴ Agreed Statement, para. 22, IIROC Book of Authorities, Tab 2

¹⁵ IIROC Compendium of Documents, Exhibit 1, Tabs 1-5

¹⁶ IIROC Compendium of Documents, Exhibit 1, Tabs 6-8

making it appear that the client had double the assets. These facts were contained in the Statement of Fact agreed to by Mr Ricci and IIROC in the proceeding against Mr Ricci.

¶ 19 Ms. Lloyd-Gyurkovics said that, so far as the Application to Withdraw or Transfer Money, Mr. Eley had helped a client, a Mr. W, by signing the form for the client.¹⁷

¶ 20 Ms. Lloyd-Gyurkovics said that RRSP/TFSA Withdrawal Form incident was in relation to a Mr B, a client who actually received the moneys in question and the incident was not a case of misappropriation; and that this incident was typical of the conduct in which Mr Eley improperly signed documents, namely, it was done with the client's knowledge. She said that, in respect of the incidents referred to in paragraph 18 of the Agreed Statement (paragraph 11 above) in each case the moneys went to the client and involved at a maximum about 10 false endorsements. She said that Switch Tickets were improperly used in about 20 percent of the clients' account, or about 30 Switch Tickets, and that the use of some of the Switch Tickets were not authorized by the clients. She said that the economic benefit of the inflation of client's net worth referred to in paragraph 16 of the Agreed Statement (paragraph 10 above) flowed to the client.

¶ 21 Ms. Lloyd-Gyurkovics said that Mr. Eley's status as a registered representative had been terminated upon the termination of his employment by MVP. Once the facts relating to this proceeding were revealed, Mr Eley wanted to resolve the matter as quickly as possible and cooperated in IIROC's investigation. Mr. Eley applied for re-registration in May-June 2013 but was denied re-registration pending the outcome of the investigation into his conduct and the completion of this proceeding.

Mr. Daniel Bowering

¶ 22 Mr. Daniel Bowering is now the Director of Compliance at Richardson GMP and was the Chief Compliance Officer of MPW. He outlined the implementation by Mr. Eley and Mr. Ricci of the leveraged investment strategy while employed by MPW. He understood that Messrs. Eley and Ricci were in partnership and had a joint code and split their income 50-50.

¶ 23 Mr. Bowering explained the use of the leveraged investment worksheet by MPW registered representatives (or advisors). He said the worksheet had two purposes; to provide the advisor with a guide to the assets and liabilities of the client; and to help supervise the advisor. The document was signed off by the branch manager and by Mr Bowering as chief compliance officer. He would review the document as a second check on the suitability of the investment strategy for the clients, and relied upon its accuracy for that purpose.

¶ 24 Mr. Bowering said that the risk for a client is greater if leverage is used, through the borrowing of funds to purchase the securities for the client's account, than if no leverage is used. However, the banks which had agreed to loan funds required the moneys to be invested in certain mutual funds which were, generally speaking, of high quality. Mr. Bowering explained the difference between a non-margin account, a margin account and an account managed through the leveraged strategy, the latter strategy involving lower interest costs than a margin account. He said that if a client's net worth was inflated on the work sheet, the client would obtain a larger loan than the lender would otherwise have made. If there were a downturn in the market, the client might have a harder time repaying the loan, thereby increasing the risk.

¶ 25 Mr. Bowering said that the leveraged investment strategy was undertaken by Mr. Eley and Mr. Ricci, by two other registrants in the MPW Burlington office and by one registrant in the MPW Markham office.

¶ 26 Mr. Bowering said that MPW's investigation into the facts giving rise to this proceeding occurred when a complaint was received by a client. Then an MPW employee came forward to say that practices in the Burlington office were not in accordance with MPW's permitted practices.

¶ 27 Mr Bowering said that MPW had incurred total costs of over \$1 million in relation to the events giving rise to this proceeding. Those costs included the investigation of MPW employees in addition to Messrs. Eley

¹⁷ IIROC Compendium of Documents, Exhibit 1, Tab 4

and Ricci, and MPW's offer to clients allowing them to withdraw their funds from the leveraged strategy without cost to them. Counsel for IIROC submitted, however, that there is no evidence that Mr. Eley contributed to any of the cost that was incurred by MPW when clients withdrew from the strategy.

¶ 28 Mr. Bowering testified that several of the MPW documents used by Mr. Eley, including Switch Tickets, a LIF transfer application and an RRSP withdrawal form, were not required to be seen by him during the normal course of his functions, and that therefore he did not review these documents. Mr. Eley submitted these documents directly to the appropriate back office department at MPW.

¶ 29 Mr. Bowering said that the inflation of accounts by Mr. Eley was by about 10 to 25 percent, and that occurred in about 5 percent of accounts. He said that, when the facts giving rise to this proceeding were discovered, it was MPW's decision to entirely terminate the leveraged investment strategy and to compensate any clients for any losses for accounts that were "under water" on that strategy even if those accounts were above water in other respects.

Mr. Douglas John Eley

¶ 30 Mr. Douglas Eley is 42 years old, is re-married and has three children. He testified about his employment in the banking industry from his graduation from university in 1996 until he became an investment advisor in 2000. He also obtained his insurance license. He joined Blackmont Capital in 2006 which became MPW. In April 2013 he was terminated by MPW at which time he tried to obtain re-registration but that registration was denied.

¶ 31 Mr. Eley then joined Kernaghan Securities as a non-registered employee and he, or rather the company incorporated by Mr. Ricci and him, entered into the Referral Fee Agreement with Kernaghan Securities.¹⁸

¶ 32 Mr. Eley said that it was very important for him to re-gain his status as a registered representative. He said that he has spent 20 years in the investment industry and before this incident he had never been engaged in this sort of inappropriate conduct. He has gotten to know his clients personally and the vast majority of them have been his clients for more than three years. For him, the clients are the be-all and end-all. He is always looking out for the client and doing his best for the client. He "fessed up" to IIROC as it was the right thing to do. His personal health has deteriorated due to this investigation and proceeding. In his view, the prospects of future misconduct are inconsistent with his character.

¶ 33 Mr. Eley acknowledged that, at the time of the relevant conduct, he knew it was wrong. He said that every time he did it, he knew he shouldn't be doing it. Nevertheless, he continued his conduct until it was uncovered, a period of some 16 months.

¶ 34 Mr. Eley acknowledged that he was the more experienced person in his relationship with Mr. Ricci who was a young man at approximately 19 years of age when he began working with Mr. Eley. Mr. Eley also acknowledged that there is no evidence that he discouraged Mr. Ricci from engaging in the conduct.

¶ 35 Mr. Eley emphasized in his evidence that there was a difference between his own and Mr. Ricci's conduct, noting the fact that Mr. Ricci altered and or inflated values on third party documents such as MPAC and RRSP statements, in addition to MPW documents. Yet, Mr. Eley went to work with Mr. Ricci at Chippingham under a referral fee arrangement and incorporated a numbered company with Mr. Ricci for that purpose. Mr. Eley said that it made more sense for Mr. Ricci and him to move to Chippingham as a united front.

¶ 36 Mr. Eley testified that, in his unregistered status with Chippingham, he continues to have an income stream as a result of the referral fee agreement and that approximately 90% of his former MPW clients have transferred their accounts to Chippingham. The referral agreement paid him 70 per cent of the fees earned by Chippingham, but after 12 months with Chippingham the fee changed to pay him 50 percent. If he is re-

¹⁸ IIROC Compendium of Documents, Exhibit 1, tab 6

registered, then he would receive 100 per cent. In addition, Mr. Eley earns an income from his insurance business as he was allowed by that regulatory body to retain his registration.

¶ 37 Mr. Eley gave evidence about the impact that this proceeding has had on him and his family. He said that he understood the importance of complying with IIROC rules and that he had no interest in putting himself at risk again. However, he did not expressly state any remorse about his actions nor did he expressly apologize for the impact which his conduct has had on MPW.

¶ 38 Mr. Eley submitted three supporting letters from clients. IIROC's counsel submits that these letters are of little value since this proceeding did not arise from client complaints, but rather from Mr. Eley's failure to follow the firm's suitability requirements and his signing of client signatures to documents.

¶ 39 Mr. Eley said that he voluntarily completed the Canadian Securities Institute's Conduct and Practices Handbook (CPH) course in September 2013. However, Mr. Pereira said that Chippingham required Mr. Eley to take this course when he joined that firm in May 2013.¹⁹

Mr. Cliff Pereira

¶ 40 Mr. Cliff Pereira is the Chief Compliance Officer of Chippingham Financial Group. He has been in the investment industry for 15 years in risk management and compliance capacities.

¶ 41 Mr. Pereira knew Messrs. Ricci and Eley before they were terminated by MPW and knew that they had been fired for cause, allegedly because they had altered documents. He discussed with them the circumstances of their dismissal. Chippingham decided to take the two individuals on and have their book of business transferred to Chippingham on a stop gap basis.

¶ 42 To his knowledge, Messrs. Ricci and Eley shared fees on their referral business. However, when Messrs. Ricci and Eley came over to Chippingham, Mr. Pereira didn't think they should have a joint code since they didn't really have a truly shared operation. Also, Mr. Eley did not want to have a relationship with Mr. Ricci. Accordingly a separate relationship with a registered representative was established for each individual. Each of them were required to re-do the securities examinations and be supervised for six months. A compliance officer was hired to supervise the Burlington office. Chippingham is prepared to implement supervision measures to ensure that Mr. Eley's conduct is properly governed.

¶ 43 Mr. Ricci was terminated by Chippingham in March 2014. Initially, Mr. Ricci and Mr. Eley were both very remorseful but Mr. Ricci did not have the same commitment. It was only Mr. Eley who remained steady and remorseful. Mr. Pereira said that he had no concerns about Mr. Eley's improper conduct re-emerging.

¶ 44 IIROC submitted a Bill of Costs reflecting costs being sought in the amount of \$15,000, to which Mr. Eley has agreed.

II. Issues and Analysis

¶ 45 Based upon the admissions made by Mr. Eley and the facts proven at the hearing, the Hearing Panel finds that Mr. Eley has contravened the IIROC Dealer Member Rule 29.1 as set forth in Counts 1 and 2 of the Notice of Hearing.

¶ 46 Accordingly, the issue in this hearing is the appropriate penalty to be imposed upon Mr Eley in light of all the circumstances. In determining that penalty, regard must be had to the specific facts applicable to Mr. Eley, the principles applicable to the appropriate penalty and the previous decisions of IIROC which are relevant to the present proceeding. The prior decisions of IIROC are relevant to ensure that Mr. Eley is dealt with fairly in relation to other person in similar circumstances. In addition, prior decisions provide a wealth of judgment and experience in assessing what penalty is fair in light of circumstances similar to those in this matter.

¹⁹ Mr. Eley's Book of Documents, Exhibit 3, Tabs 6 and 7

¶ 47 The principles to be applied in determining the appropriate penalty are:

- a. Protection of the investing public;
- b. Protection of IIROC's Membership;
- c. Protection of the integrity of the securities markets;
- d. Prevention of a repetition of conduct of the type under consideration.²⁰

These principles are further expanded in the IIROC Dealer Member Disciplinary Sanction Guidelines (Guidelines) to which reference is made below.

¶ 48 When considering previous IIROC decisions, the decision in *Re Ricci*²¹ is particularly relevant since Mr. Ricci and Mr. Eley worked together at MPW and the circumstances reflected in the decision of the IIROC Hearing Panel in that case are similar to, and in many cases the same as, those found in this case. In that decision, the penalty which was imposed was a two year suspension, a fine of \$200,000, strict supervision for one year after re-registration and costs of \$15,000.

¶ 49 There is a substantial comparative difference between the facts relating to Mr. Ricci and those relating to Mr. Eley: the total number of affected accounts (Ricci: 350; Eley 150); the amount inflated (Ricci; 30 per cent; Eley 10 to 25 per cent); and the total accounts inflated accounts (Ricci 105; Eley 7 or 8). On any comparison, the severity of Mr. Eley's misconduct is much smaller compared to that of Mr. Ricci.

¶ 50 In addition, some of Mr. Ricci's conduct was abusive in the extreme: altering and whitening out documents to give a deceptive impression and using financial information twice to double the client's assets. There is no evidence before this panel that Mr. Eley engaged in this sort of conduct.

¶ 51 This comparison in no way diminishes the severity of Mr. Eley's conduct. Over a 16 month period, he deliberately and repeatedly falsified information that was required to be provided in his employer's risk assessment system. He signed documents with clients' signatures and re-used documents improperly. In doing so, he abused the trust that his employer placed in him. He also abused the standards of professional conduct which are an essential ingredient of the investment industry.

¶ 52 The proper functioning of the investment industry, and the protection of public investors, depends upon each registered representative executing his or her duties with honesty. This is particularly so with respect to the information which the registered representative puts into documents and systems relating to the suitability of investments. It is impossible and impracticable for the employer to check that information before it is acted upon. The same goes for the signature on a document or the use of a document. Others using the document must be able to have total confidence that the document was signed by the person whose signature apparently appears on the document and that the document is being used properly. It is these fundamental principles underlying the investment industry that Mr. Eley abused.

¶ 53 These principles are captured in numerous documents pertaining to the investment industry. Thus the Registrant's Code of Ethics of the Canadian Securities Industry states:

“Registrants must conduct themselves with trustworthiness and integrity and act in an honest and fair manner in all dealings with the public, clients, employers and colleagues.”

Similarly, the IIROC Dealer Member disciplinary Sanction Guidelines state that “the securities industry is a business of trust and confidence.”

¶ 54 These principles are the foundation for Rule 29.1 under which this proceeding is brought:

“Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment

²⁰ *Re Derivative Services Inc.*, [2000] 1 I.D.A.C.D. No. 26 at p. 3.

²¹ *Re Julian Robert Ricci*, 2014 IIROC 24

Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) 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)....” (emphasis added)

¶ 55 In determining the appropriate penalty for Mr. Eley in light of the decision in *Re Ricci*, in our view the principle of consistency and this panel’s obligation to make a decision in light of the circumstances of this particular case must both be born in mind. The panel in *Re Ricci* was of the view that the conduct of Mr Ricci was deplorable and ought to be severely punished. While in our view the conduct of Mr Eley was less serious in terms of the number of incidences and the seriousness of the incidences, Mr. Eley’s misconduct was nevertheless very serious as it undercut, as we have said, the ethical foundation of the investment industry.

¶ 56 In arriving at our conclusion, we have also considered the other IIROC decisions cited to us. Thus, in *Re Rotstein and Zackheim*,²² the respondents signed clients’ names to an indeterminate number of documents which may literally have been hundreds of documents. The penalty was a 12 month suspension, a fine of \$250,000 for Mr. Rotstein and a fine of \$50,000 for Ms. Zackheim, and \$10,000 in costs. In *Re Dickson*,²³ the respondent forged signatures on various documents. The penalty was a 6 month suspension and a fine of \$7500 and costs in the amount of \$1000. In *Re Abbott*,²⁴ the respondent forged over 40 documents. The penalty was a six month suspension, a fine of \$25,000 and costs of \$3500. Other cases involve higher penalties, particularly when the registered representative loaned money to or otherwise had financial transactions with the client or the client lost substantial monies.²⁵

¶ 57 In some cases, misrepresentations and concealment to the employer about the nature of the trades has elevated the seriousness of the allegations and blameworthiness of the respondent, particularly if the trades resulted in financial loss.²⁶

¶ 58 With those principles in mind, we return to the facts revealed in this hearing and apply the factors set forth in the Guidelines.

¶ 59 As to criteria of blameworthiness, planning and organization and multiple incidents, Mr. Eley’s conduct is of a serious nature. As his own evidence demonstrates, he was conscious of his wrongdoing and yet proceeded to conduct himself in an unethical and improper fashion. However, his conduct was not as egregious as that of Mr Ricci and the penalty to be imposed should recognize the difference in degree of seriousness of the respective misconduct. The panel recognizes that an “arithmetic” approach to this comparison is not appropriate,²⁷ but based upon the difference in conduct the penalty which is imposed upon Mr. Eley should be a portion of that imposed upon Mr. Ricci.

²² *Re Mark Steven Rotstein and Jessica Elisabeth Zackheim*, 2012 IIROC 27

²³ *Re Graeme Dickson*, 2013 IIROC 53. See similarly with respect to forgeries or unauthorized signing of documents: *Re Dean*, 2010 LNIRO 43: forged documents and misleading information to investigators: fine of \$30,000, suspension for period which had elapsed by the hearing time, costs of \$10,000; *Re Dustin Rene John Lanontagne*, 2009 LNIRO 6: forged documents and misleading information to investigators: 6 months suspension, fine of \$35,000, costs of \$15,000; *Re Kenneth Court Anderson*, [2004] I.D.A.C.D. 10: falsely endorsing signature: \$25000 fine and \$5000 costs, together with prior one month suspension; *Re Harrison Fitzpatrick Keenan*, 2013 LNIRO 29; falsely signing documents: suspension of 2 months, fine of \$25,000, disgorgement of profits of \$4398.97, strict supervision for five months .

²⁴ *Re Karen Elizabeth Abbott*, 2012 IIROC 2

²⁵ *Re Kenneth Gareau*, 2011 LNIRO 72; *Re Sammy Shieh Lung Pan*, 2012 LNIRO 22; *Re Daniel Lindsay Cuthbertson*, 2012 LNIRO 24.

²⁶ *Re Sammy Shieh Lung Pan*, 2012 LNIRO 22 at para 52: loaning of monies to client, failure to make inquiries, misrepresentation: fine of \$150,000, permanent ban, costs of \$15,000; *Re Daniel Lindsay Cuthbertson*, 2012 LNIRO 24 at para. 9: execution of unauthorized trades, loss of \$418,000: 18 month suspension, fine of \$35,000, costs of \$5000.

²⁷ *Re Carolann Steinhoff*, 2010 LNIRO 42 at paras 25-26.

¶ 60 Moreover, Mr Eley’s conduct was not apparently for the direct purpose of enriching himself. He did not loan to or take money from his clients. Indeed, his fault was an over-zealous and mis-guided attempt to do more for his clients, or to lessen the inconvenience for his clients, which led him to abuse his obligations to his employer.²⁸

¶ 61 As to the harm (to clients, the employer and/or securities markets), prior disciplinary record and acceptance of responsibility, these factors are generally in Mr. Eley’s favour. As IIROC acknowledges, the clients suffered no loss. Indeed, the evidence is that the leveraged investment strategy was not an unsound strategy and the mutual funds purchased by the clients were apparently sound and conservative funds and suitable investments for the clients. The amount of over-leveraging was relatively small and there is no real evidence about the degree, if any, to which the clients were exposed to greater loss by over-leveraging.

¶ 62 We did not give weight to the clients’ letters submitted by Mr Eley. In our view, the clients were unaware and unaffected by Mr. Eley’s conduct. Mr. Eley’s error was to ignore or abuse his relationship with his employer and his obligations as a member of the investment industry, perhaps in his effort to accommodate his clients. The fact that he did so while not alienating his clients is not a factor to consider in his favour.

¶ 63 So far as MPW’s loss, it decided to close down the leveraged investment strategy and as a result it suffered costs in the amount of \$1 million. In that process it decided to pay clients any amount by which they were “under water” even if the client was ahead on other investments. There is no evidence about what loss on this account was suffered by MPW. There is really no evidence at all about what amounts constitute the \$1 million loss or what portion of that loss was caused by Mr Eley.

¶ 64 So far as acceptance of responsibility, Mr. Eley’s evidence at the hearing did not demonstrate any real remorse. But the evidence of Mr. Pereira was strongly in support of Mr. Eley being remorseful and his understanding of the gravity of what he had done and his determination not to repeat it.

¶ 65 Another factor is any enrichment received by Mr. Eley from his misconduct. Aside from Mr. Eley’s admissions in the Agreed Statement, no specific evidence was led on this issue but one can surmise that Mr. Eley did receive some compensation from the additional investments that were made as a result of his activities. It does not appear that the additional income was large or a motivating factor.

¶ 66 A further potential factor is the reliance, if any, by Mr. Eley upon others in conducting himself as he did. There is no evidence that Mr. Eley relied upon anyone else to proceed as he did, so this factor is not one that is relevant in this case.

¶ 67 IIROC submits that Mr. Eley’s failure to tell his firm’s compliance staff that the leveraged investment work sheets or Switch Tickets were false amounted to misrepresentations which should count against him. However, the conduct to which IIROC counsel refers to is really part and parcel of Mr. Eley’s misconduct in the first place, and has been addressed in the first factors referred to above, namely, his blameworthiness and organization. In the present case, Mr Eley did not make additional specific misrepresentations about what he was up to, as occurred in *Pan* and *Cuthbertson*.²⁹

¶ 68 A final factor considered in the Guidelines is the cooperation of the respondent, if any. In the present case, Mr. Eley did cooperate with IIROC once the events in question came to light and MPW started its investigation. That cooperation assisted IIROC in its investigation and in this proceeding. Indeed, several of the documents produced during the hearing were not ones which Mr. Eley had prepared or signed or had used, and IIROC relied on his admission that he had done so on other similar documents for the proof of its case. The cooperation of regulated persons in investigations of their conduct is an essential element in the proper functioning of a regulated industry. Without that cooperation, effective regulation cannot occur. Accordingly,

²⁸ *Re Kenneth Court Anderson*, [2004] I.D.A.C.D. 10 at paras. 20-21.

²⁹ *Re Sammy Shieh Lung Pan*, 2012 LNIROC 22 at para 52.2; *Re Daniel Lindsay Cuthbertson*, 2012 LNIROC 24 at para. 9.3.2.

Mr. Eley's cooperation should be considered as a substantial factor in his favour, and also one tending to show that he will not repeat the misconduct in the future.

¶ 69 Another factor which we have considered is the time since April 2013 during which Mr. Eley has been effectively suspended from being a registered representative. Counsel for Mr Eley submits that this time should be deducted from any time that we might impose for the suspension of Mr. Eley's registration, and relies upon prior IIROC Hearing panel decisions in which such a deduction has been made.³⁰ IIROC submits that this issue should not be a factor since it amounts to considering it as the same as "time served" in a prosecution for a criminal offence; however, IIROC counsel submitted no other IIROC decisions holding that such a deduction is impermissible. Additionally, IIROC submits that Mr Eley earned income in the investment industry during that period, and therefore there is no reason to allow that time to be deducted from a suspension.

¶ 70 In our view, in an appropriate case an allowance can be made by a Hearing Panel for the time during which the respondent is effectively suspended from acting as a registrant. Such an allowance was agreed to by IIROC staff in the *Re Smith* proceeding referred to by counsel for Mr. Eley and was utilized by the Hearing Panel in setting the penalty in that case. However, in this case Mr. Eley worked in the investment industry during the period since April 2013, albeit in a non-registered capacity and at a reduced share of the income produced from his clients. For this reason, a one-to-one allowance of the time since April 2013 should not be allowed against whatever suspension is imposed. Accordingly, the preferable approach is to consider the amount of the suspension from a total, over-all perspective and decide what period of suspension is appropriate having regard to all of the facts.

¶ 71 When we consider the facts in this case, and in particular the prolonged and intentional nature of Mr. Eley's conduct, the evidence of Mr. Pereira about Mr. Eley's conduct since May of 2013, Mr. Eley's cooperation with IIROC, the absence of any loss by the clients, and the year and a half that has passed since April 2013 during which Mr. Eley has not been able to fully act as a registered representative, and apply the factors referred to in paragraph 47 of these Reasons for Decision and the Guidelines, in our view the appropriate penalty is a fine of \$50,000, a suspension of 6 months from the date of the hearing on October 2, 2014, namely, to April 2, 2015, one year of strict supervision from the time of Mr. Eley's re-registration, and costs of \$15,000. Such a penalty will demonstrate the seriousness of Mr. Eley's misconduct and serve to protect the investment public, the investment industry and securities markets from a re-occurrence of this misconduct by Mr. Eley and others.

¶ 72 The fine of \$50,000 is relatively high in relation to other decisions involving improperly signed documents but reflects the length of time during which the activity occurred and the continuous knowledge of Mr Eley that it was wrong. That amount of fine bears a reasonable relationship to the \$200,000 imposed in *Re Ricci* having regard to the different conduct in each case. A further suspension of 6 months, together with some recognition of Mr. Eley's non-registered status since April 2013, also bears a reasonable relationship to the two year suspension imposed upon Mr. Ricci and is reasonable having regard to suspensions imposed in other similar cases. A one year period of strict supervision is consistent with Mr. Pereira's evidence that his firm will supervise Mr. Eley if he re-registers as an advisor with Chippingham. The costs of \$15,000 have been agreed to by Mr. Eley.

III. Order

¶ 73 Accordingly, this Hearing panel orders that:

- a. Mr. Eley shall be prohibited from re-applying for registration with IIROC for a period of six months from the date of the hearing on October 2, 2014, namely, to April 2, 2015, and thereafter until the fines and costs as set forth in this Order are paid in full.

³⁰ *Re Peter Michael Smith*, 2014 IIROC 16 at para. 21, referring in turn to *Re Bell*, [2005] I.D.A.C.D. 15; *Re Nott*, 2011 LNIROC 26; *Re Morrison* [2004] I.D.A.C.D. No. 36; *Re Conville* 2013 IIROC 5, *Re Little* [23007] I.D.A.C.D. No. 24; *Re Parkinson* 2012 LNIROC 18.

- b. Should Mr. Eley obtain registration, he shall be subject to strict supervision for a period of one year.
- c. Mr. Eley shall pay a fine of \$50,000, and costs of \$15,000.

Dated at Toronto, Ontario this 30th day of October, 2014

Thomas G. Heintzman, Chair

T. Hugh McNabney

Zahra Bhutani

Agreed Statement of Facts and Contraventions

I. INTRODUCTION

1. The Respondent offered certain clients a leveraged investment strategy. In order to ensure that the clients would meet internal thresholds to qualify for the strategy, he misrepresented their net worth to his member firm by altering and inflating certain amounts on account documentation. He did so in order to get past the firm's suitability requirements which were, in his view, too stringent.
2. In addition, he also falsely endorsed the signatures of several clients on account documentation and other forms during the same period of time.

II. CONTRAVENTIONS AND PENALTY

3. The Respondent admits the following contraventions:

Count 1: From or about August 2011 to April 2013 the Respondent engaged in conduct unbecoming a registrant or detrimental to the public interest, in that he made misrepresentations to his firm's compliance staff by inflating certain clients' net worth, contrary to IIROC Dealer Member Rule 29.1

Count 2: From or about August 2011 to April 2013, the Respondent engaged in conduct unbecoming a registrant or detrimental to the public interest, in that he falsely endorsed the signatures of several clients on certain client account documentation and other forms, contrary to IIROC Dealer Member Rule 29.1.

4. Staff and the Respondent will make submissions in relation to penalty, including the quantum of the fine and the length of a suspension, if any.
5. Staff and the Respondent will make a joint submission in relation to the payment of costs in the sum of \$15,000.

III. STATEMENT OF FACTS

A. Registration History

6. Eley has been a Registered Representative ("RR") with IIROC Dealer Members since 2000, initially at Berkshire Securities Inc. In late 2006 he moved to Blackmont Capital Inc., which was acquired by the Macquarie Group in 2010; the firm changed its name to Macquarie Private Wealth Inc. ("MPW") in February 2010.
7. In April 2013, Eley was terminated for cause by MPW as a result of the matters addressed herein. From approximately May 2013 to the present Eley has been working in an unregistered capacity at Chippingham Financial Group ("Chippingham"), another IIROC Dealer Member.
8. Between August 2011 and April 2013 ("the relevant time") while at MPW the Respondent worked

with Julian Robert Ricci (“Ricci”), who was at that time also an IIROC registrant. Ricci and Eley shared a book of business and a joint RR code.

B. Leveraged Investment Strategy

9. During the relevant time, Ricci and Eley’s book of business consisted of approximately 500 households with assets under management of approximately \$225M. A significant portion of their book of business involved a leveraged investment strategy. The remainder of the book involved portfolio management.
10. The leveraged investment strategy worked such that Eley assisted clients with obtaining loans used to purchase mutual funds. The clients were able to borrow up to three times the amount they were willing to deposit to a maximum of \$300,000. In most cases, the loans were obtained from one of two institutional lenders. The mutual funds were held as collateral by the lenders as against the loans. In some cases, certain clients took out more than one loan.
11. The intent of the strategy was that the return on the mutual funds would be sufficient to pay the interest on the loan and also provide additional income to the clients. The additional income was intended to be used by clients to pay off their mortgage, and/or other debts. Once these debts were paid off, the ongoing income would be directed to repaying the principal and the interest on the loan.

C. Misrepresentations to MPW

12. MPW had in place internal thresholds with respect to offering this leveraged investment strategy. In order for a MPW client to qualify to engage in the leveraged investment strategy, MPW required Eley to complete a leveraged investment strategy spreadsheet for each client. The information contained in the spreadsheet included client net worth, assets and liabilities.
13. This information was used by the firm to ascertain whether this strategy was suitable for the client. If the leveraged investment strategy was found to be acceptable for the client by MPW, the client was approved internally by MPW and Eley would then submit the necessary documentation for the client to obtain the loan and/or mortgage from one of the institutional lenders.
14. The institutional lenders would conduct their own due diligence to determine the suitability of the loan and/or mortgage for the borrower for their own internal purposes and in relation only to the advancement of the loan or mortgage, but not to the leveraged investment strategy as a whole. If the loan and/or mortgage were granted, he would then implement the leveraged investment strategy for the client.
15. Eley admitted to IIROC Staff that he inflated and thereby misrepresented the net worth of certain clients, as reflected on the spreadsheets, to MPW in order to get past the firm’s suitability requirements. In his view, these requirements were unreasonable and unnecessary. Eley therefore deliberately circumvented the firm’s compliance protocols. These protocols were in place in order to assess the clients’ suitability to participate in the leveraged investment strategy.
16. By increasing the client assets under his management through the use of leverage, Eley obtained a direct economic benefit in the form of additional trailer fees earned on the mutual funds purchased as part of the leveraged investment strategy; for example trailer fees increased from one half to one per cent on the annual ten per cent free redemption portions of the mutual funds.
17. In particular, Eley made the following admissions:

a) Inflation of Net Worth

The clients for whom Eley implemented the leveraged investment strategy held assets that represented in excess of 60% of his assets under management (of approximately \$225M). For approximately 5% of the clients applying to use the leveraged investment strategy, Eley inflated their respective net worth by approximately 10-25% on their NCAFs and on their leveraged investment strategy spreadsheet. He did not

advise some of the clients that he had done so.

b) Use of Pre-Signed Forms

- i. In approximately 20% of client files, Eley utilized pre-signed blank New Client Application Forms that he subsequently completed and presented to MPW in order to open accounts for clients.
- ii. In some cases, Eley utilized pre-signed blank loan application documents that he subsequently completed and presented to the institutional lenders to assist with executing the leveraged investment strategy for clients.
- iii. The mutual funds used in the leveraged investment strategy were purchased on a deferred sales charge basis. Every year a client was able to transfer out 10% of the value of the mutual fund at no cost. In order to effect the transfer, a Switch Ticket would have to be completed.
- iv. Rather than have a client complete a new Switch Ticket each year, Eley would simply re-use Switch Tickets from previous years for the relevant client. In some cases changes were made to the fund codes as authorized by the client. Eley submitted approximately 30 Switch Tickets over the relevant time.

D. False Endorsement

18. Eley further admitted to IIROC Staff that during the relevant time, he also falsely endorsed the signatures of clients on client account related documentation on approximately 5-10 occasions while at employed at MPW.
19. In particular, in one instance he falsely endorsed the name of a client in order to enable the client to obtain funds out of a RIF.
20. In another instance a client had missed one of several required signatures on a loan application and Eley falsely endorsed the client's signature in order to complete the loan documentation and enable the client to participate in the leveraged investment strategy.
21. Eley admitted that he intentionally concealed this conduct and there is no evidence that MPW was aware of Eley's conduct until April of 2013. Once MPW learned of this conduct they terminated Eley's employment.

E. Mitigating and Aggravating Factors

22. The following mitigating and aggravating factors are relevant in this matter:

Mitigating

- Eley has no discipline history with IIROC;
- None of the clients in question suffered a loss as a result of Eley's conduct;
- The majority of Eley's clients from MPW have continued to maintain a relationship with him in his unregistered capacity at Chippingham ; and
- Eley was co-operative with the MPW investigation and throughout the IIROC investigation, and made the admissions indicated herein.

Aggravating

- The conduct was intentional and was designed to go undetected by MPW;
- Eley deliberately circumvented MPW's suitability assessment policies; this conduct provided a direct financial benefit to Eley; and
- The conduct continued for 16 months and ceased only when Eley was confronted by MPW.

AGREED TO by the Respondent at the City of _____, in the Province of Ontario, this ____ day of September, 2014.

Witness

Douglas John Eley

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this _____ day of September, 2014.

Witness

Natalija Popovic
Senior Enforcement Counsel
On behalf of the Staff of the
Investment Industry Regulatory Organization of Canada

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