Re Hoshizaki

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Vance Virgil Hoshizaki

2017 IIROC 40

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

Heard: July 18 and 19, 2017
Decision: August 11, 2017

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), Neil Murphy, Jane Waechter
Appearances:
Paul Smith, Senior Enforcement Counsel, IIROC
Vance Virgil Hoshizaki, by teleconference

DECISION AND REASONS FOR DECISION

Background

¶ 1 The Respondent, Vance Virgil Hoshizaki ("Mr. Hoshizaki" or "the Respondent") was a Registered Representative in the Thunder Bay Branch of Assante Capital Management Ltd. ("Assante"), an IIROC Dealer Member Firm, at the time of the alleged transactions, described below. He had been registered as a Branch Manager between July 2006 and January 2008, had been employed in the financial services industry for more than 30 years, and had been registered at Equion Securities Canada Ltd., a predecessor firm of Assante, since January 1997. He has not worked for an IIROC Dealer Member Firm since his position was terminated by Assante on June 17, 2013.

¶ 2 On March 1, 2013 two of the Respondent's clients, NP and AP, complained to Assante about an investment of $29,500 they had made ten years earlier through the Respondent. They had already complained to the Respondent, who gave them a cheque for $15,000 in response to their concerns. In a sworn interview with IIROC on May 13, 2014, the Respondent was asked: "you knew these particular clients, if they didn't get their money you knew you would be reported and this would get escalated. Right?" The Respondent's answer: "I would say that yeah, I thought it would be a possibility, yes.'

¶ 3 Assante's termination letter of June 17, 2013, states, in part:

> "The purpose of this letter is to provide you with notice that, effective the date of this letter...ACM [Assante Capital Management] has terminated your engagement with ACM and its affiliates for cause as a result of a breach by you of ACM's policies and procedures as well as IIROC Rules. Specifically, your failure to disclose your business activities with [a numbered company], your failure to give notice to or obtain the consent of ACM to enter into a settlement agreement and make a payment to resolve a client

complaint and your failure to cooperate with the investigation regarding your sale of securities of [the numbered company].”

¶ 4 IIROC commenced an investigation following a report by Assante of the Respondent’s termination for cause. On May 13, 2014, the Respondent, accompanied by his then counsel, took part in an interview with IIROC about the events and after further investigation – including obtaining an order for bank records – a Notice of Hearing was issued on February 1, 2017, with a first appearance set for May 31, 2017.

¶ 5 The Respondent did not acknowledge receipt of the Notice of Hearing and did not file a formal Response to the allegations. At the May 31, 2017 hearing, Counsel for IIROC and the present Panel were prepared to proceed in the absence of the Respondent. An hour before the hearing was to commence, the Respondent telephoned IIROC to say that he had received the Notice and would like an adjournment to allow him time to prepare a Response to the allegations.

¶ 6 The hearing was therefore adjourned and a new hearing date was set for July 17 and 18, 2017, with an earlier date, June 14, 2017, set for the delivery of the Respondent’s Response. Again, no Response was given by the Respondent to IIROC and there was no indication that the Respondent was planning to attend the Hearing, in spite of emails and phone messages sent to the Respondent by IIROC. On the morning of July 17, 2017, after waiting ten minutes, Counsel for IIROC started presenting its case. There was a knock on the door of the hearing room and Staff was given a message from the National Hearing Coordinator reporting that the Respondent had just called saying that he would like to call into the Hearing.

¶ 7 The Panel, with the agreement of Counsel for IIROC, decided that we should hear from the Respondent and not proceed in his absence. The Panel, with the assistance of Counsel for IIROC and the Respondent, then worked out a process for the Hearing. The Respondent did not intend to have a lawyer and did not wish to appear in person. The Respondent , who was in Thunder Bay, would appear by teleconference and would enter a verbal Response to the Notice of Hearing. The various documents that were to be introduced at the hearing by Counsel for IIROC would be sent electronically to the Respondent. Then, after a suitable adjournment, Counsel for IIROC would make an opening statement and the Respondent would also have the opportunity to make an opening statement. The IIROC Investigator would give his evidence and the Respondent would be entitled to cross-examine him. Then the Respondent, if he wished to do so, could make a statement under oath, He would then be cross-examined by Counsel for IIROC.

¶ 8 This process, which had been agreed to by both IIROC Staff and the Respondent, was followed on the first day of the Hearing: a Response was given verbally; an opening statement was made by IIROC; the IIROC investigator presented sworn evidence; and the Respondent cross-examined the investigator. On the second day of the hearing, the Respondent was affirmed under oath, gave his evidence, and was then cross-examined by Counsel for IIROC. Finally, as prescribed under the current Rules of Procedure, Counsel for IIROC made his closing submission and the Respondent made his closing remarks. This process seemed to work well.

Alleged Contraventions

¶ 9 IIROC issued a Notice of Hearing on February 1, 2017, alleging that Mr. Hoshizaki committed the following contraventions:

Count 1

> “Between 2002 and 2013 Vance Virgil Hoshizaki engaged in undisclosed outside business activity without the consent of his firm contrary to Dealer Member Rule 29.1 by raising capital for a private company that was planning to run an automotive service business.”

Count 2

> “Between 2002 and 2013 Vance Virgil Hoshizaki engaged in personal financial dealings with clients without the consent of his firm contrary to Dealer Member Rule 29.1 by having clients deposit funds to a private company that he controlled for the purpose of being invested in another

company that was planning to run an automotive service business."

Count 3

"Between March 2012 and July 2013, Vance Virgil Hoshizaki engaged in undisclosed outside business activity without the consent of his firm contrary to Dealer Member Rule 29.1 by running a personal online securities trading business."

Count 4

"In March 2012 and March 2013, Vance Virgil Hoshizaki engaged in personal financial dealings with clients contrary to Dealer Member Rule 29.1 by arranging to have clients deposit funds to a private company that he controlled for the purpose of being used for his personal online securities trading business."

Count 5

"Between March 2012 and June 27, 2013, Vance Virgil Hoshizaki engaged in conduct that was unbecoming or detrimental to the public interest contrary to Dealer Member Rule 29.1 by taking money that was entrusted to him by clients for investment purposes and using it for his personal use."

Rule 29.1

¶ 10 Rule 29.1 reads as follows:

"Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment 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) or as may be prescribed by the [IIROC] Board."

¶ 11 Unauthorized Outside Business Activities fall within Rule 29.1. Counsel for IIROC referred us to the IIROC case of *Re Bortolin* 2012 IIROC 13, where the issue is discussed as follows in paragraphs 33-35 and 39:

"The Respondent [Bortolin] 'carried on outside business activities without the knowledge or approval of his Member Firm.' Both 'knowledge and approval' are required. The Member neither had knowledge of the Respondent's outside business activities nor approved them. Outside business activities without the knowledge and approval of the Member are not permitted by IIROC or by the Member. There is no evidence that [the Member] knew about these extensive outside business activities engaged in by the Respondent over many years.

Disclosure and approval are necessary in such circumstances in order to allow the Member to supervise and control a Registered Representative's activities. Not to do so can create conflicts of interest for the Registered Representative and lead to the type of improper activity found in this case. The policy also helps protect the integrity of the securities market as well as the reputation of the Member.

The policy against such outside business activities without knowledge and approval of the Member firm can be found in the *Conduct and Practices Handbook*, a handbook used widely within the industry that provides guidance on various ethical and conduct issues.... A number of IIROC hearing panels have held that such engagement in outside business activities without the Member's knowledge and approval is a breach of Rule 29.1: see *Deck* [2007] I.D.A.C.D. No. 19 and *Rail* [2008] IIROC No. 4....

Failure to disclose is a breach of Rule 29.1. The first two subsections of Rule 29.1 are particularly applicable and it is arguable that the third subsection is applicable as well."

Similar considerations are applicable to the present case. See also *Re Blackmore* 2014 IIROC 43, a settlement agreement concerning outside business activities, in which the Panel accepted an agreement which stated (paragraph 3): "The facilitation of securities transactions for these clients off-book without the approval of his firm, and in relation to an outside investment in which he held a personal financial interest, constitutes conduct unbecoming of a registrant."

Overview of the Transactions

¶ 12 The alleged facts relate to the period of time from 2002 through 2013 when the Respondent worked as a Registered Representative for Assante.

¶ 13 The first two counts refer to the following allegations: that starting in 2002 and continuing as late as 2013, the Respondent engaged in undisclosed outside business activities and in personal financial dealings with his clients; that he raised $413,000 from 14 clients for the operation of an automotive service business, but placed the proceeds into a private company that he controlled; and that his private company then invested some, but not all, of that money in the automotive service business.

¶ 14 The last three counts refer to the following allegations: that in 2012 and 2013, the Respondent engaged in further outside business activities and personal financial dealings with three clients when he arranged for the deposit of another $123,000 into his private company for the purpose of running his personal online trading business; that one of these three clients was among the original group of 14 clients with whom the Respondent had previously engaged in personal financial dealings; and that the Respondent used some or all of this money to pay his personal debts and expenses.

¶ 15 Precise details of how the money raised from clients was spent are not available because the Respondent did not keep or refused to provide proper financial records. It was also alleged that none of the money raised was ever repaid to the clients.

Our Conclusion

¶ 16 As is well known, the onus of proof is on IIROC to establish the allegations on a balance of probabilities. The Supreme Court of Canada unanimously held in *F.H. v. McDougall* ([2008] 3 S.C.R. 41 at paragraph 40) that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." The Court went on to say at paragraph 46 that "[I]f a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test."

¶ 17 After hearing the evidence presented by IIROC and the Respondent – at the Hearing and at the earlier Interview with Staff – the Panel had no difficulty in concluding, for the reasons to follow, that the evidence "was sufficiently clear, convincing and cogent" to find that the Respondent was responsible for the alleged contraventions in counts 1-5.

¶ 18 In his Response and his sworn testimony, the Respondent accepted the accuracy of almost all of the particulars set out in the Notice of Hearing. There were several issues, however, where he differed from the position taken by IIROC, which we will now deal with.

¶ 19 One of these was whether the Respondent gave notice to his branch manager about the 2003-2004 transactions through a numbered company, which he controlled, relating to the auto service business. Here is his evidence given under oath at the Interview:

> "Q. At the time you did not believe it was necessary to disclose that [outside] relationship with this company to your firm?
>
> A. I did disclose it to the manager. I spoke to my – Bob Thompson who is the manager of Assante and I explained my relationship to the company and he felt, at the time, that it wasn't – it wasn't a problem.
>
> Q. Okay. And would you have anything – would you have any evidence to support that –.

A. No...Never thought at that time – I mean, when we talked – when I talked to Bob Thompson about it, we – it wasn't – because it was a private company he explained to me it wouldn't be a problem and as my manager, I took it at face value of what he had said. It didn't occur to me to go beyond that but –

Q. Okay. And when did – when did Bob pass away?

A. 2005....

Q. Did you ever discuss this numbered company with your new manager?

A. No."

Nor did the Respondent take steps to learn if Assante's approval had been recorded anyplace when he himself became the branch manager. Nor did it ever appear on the National Registration Database.

¶ 20 Further, each year the Respondent filled out an Assante form which reads: "I have disclosed all outside business activities to head office's registration department and have obtained approval." His response on the form says "yes".

¶ 21 The panel has concluded that if a conversation did take place with the branch manager about investment in the automotive service business, full disclosure was not made that 14 Assante clients were investing $413,000 in this auto service franchise venture through the Respondent's numbered company.

¶ 22 It seems that the Respondent thought that he would not have to report to Assante any of the transactions relating to the auto service business if the company was in his wife's name. He was asked in the earlier interview with IIROC why he put the company in his wife's name:

"Q. Why was that done?

A. Why was that done? Because I wouldn't be allowed to be a principal in any company. Like, I wouldn't be a principal. I wasn't – I couldn't be a director or a president of a numbered company –

Q. Why?

A. – controlling interest. Because of the regulations.

Q. The regulations forbid you to be a director or an officer of a numbered company?

A. Well not forbid me but to report on that basis."

¶ 23 The Respondent's wife may have been the president of the numbered company, but the company was under the Respondent's complete control. He was the only person with signing authority for the bank account. He agreed that he was "the operating mind of the company." One cannot do indirectly what cannot be done directly. One cannot be relieved of responsibility by such steps.

¶ 24 Moreover, the Respondent never disclosed to Assante the outside transactions in 2013 and 2014 relating to the online trading business where three clients, including one who had invested in the auto service scheme, had invested a total of $123,000.

¶ 25 Another contention made by the Respondent was that the online trading scheme from 2013-2014 was set up after he had left Assante. This is not so. Bank records were put into evidence that had been obtained by IIROC through a formal Order by the Ontario Securities Commission to the Respondent's bank to disclose these records. We were shown one cheque deposited in the numbered account for $23,000 in 2012 and another for $50,000 in March 2013 while the Respondent was still with Assante.

¶ 26 There is no question that most of transactions set out in the numbered bank account used by the Respondent for both the auto service franchise transactions and the later on-line trading transactions were for the Respondent's own personal use. Further details will be set out below, but the transactions of paying for groceries, canoe trips, men's clothing, dry cleaning, credit card payments, vision centre, movie theatres , etc. etc. appear to us to be typical personal expenses. Yet, when asked under oath whether they were personal he

would say “don’t recall,” “can’t recall” “could have been” and similar comments. At the earlier interview with IIROC, the interviewer alleged that “those funds were used for personal use or whatever” and the Respondent said: “Not personal use but it would be used for running the company sort of thing.’ At that point IIROC did not have the bank records and did not pursue the matter further.

¶ 27 Some funds likely went into the auto service franchise, but how much is not known. The Respondent claims he has no records and the bank could not produce the front and back of the cheques that were more than 7 years old. In the end, all the funds were used up. As far as we are aware, the investors in the auto service franchise and the on-line trading company received nothing back from their investments. How much the Respondent actually gained from these schemes is not known.

¶ 28 The investigator spoke to many of the investors, who thought that they were investing directly in the auto-service company. They did not realize that the funds were going into the Respondent’s own numbered company’s account. There were, it seems, no shares issued. There was, apparently, no share registry. All the investors received was a certificate stating that they were subscribing for sixty common shares in a numbered company. They never received any further documentation about their investment. They knew, however, that it was not being done through Assante because they each signed a statement saying: “The undersigned hereby acknowledges that although you are employed as a broker with Assante Capital Management Ltd., the subject investment is not being marketed through Assante and Assante has no connection therewith.”

¶ 29 Only two of the investors, NP and AP, made any formal complaint. The investor who had participated in both schemes was, however, prepared to make an affidavit about what had transpired – an affidavit that is consistent with IIROC’s allegations. She was 79 years old when she gave $50,000 for the second scheme.

¶ 30 We agree with Counsel for IIROC that this was “misappropriation of funds” by the Respondent. Counsel also referred to the “ponziesque nature of the transactions.” This is particularly true of the money obtained for the on-line trading business. The Respondent needed money to buy off NP and AP, so he started another scheme and induced three people to invest in it.

¶ 31 It is not entirely clear to the panel what the object of the second scheme was. The person who invested in both schemes, Mrs. CV, and who later gave an affidavit, stated: “Hoshizaki told me he would use this money to get back the lost [auto-service company] investment money through what I understood to be day-trading in oil and other commodities that Hoshizaki would do.” Mr. Hoshizaki says that the scheme, under the name Vince Virgil Trading, was in fact an educational scheme in which he instructed people on how to invest using what he described as his “Slow Hand Method of Price Action.” Certainly a risky business in which to invest $50,000, to say the least.

¶ 32 The following five sections (paragraphs 33-57) – with some minor changes – are drawn from the Particulars section of the Notice of Hearing. They give further information on the complicated facts in this case and may assist the reader to understand the details of the Respondent’s conduct. They can be considered the findings of the Panel. Some facts set out in the Particulars have been left out. We removed, for example, a sentence from the Particulars which said that the Respondent promised the investors that they could withdraw their money at any time. We are not convinced that he would have said that.

The Auto Service Franchise

¶ 33 In 2002, the Respondent began marketing and soliciting funds for a proposed private investment opportunity. The proposed opportunity was to invest in an automotive service business (the “Auto Service Franchise”) which would operate in Thunder Bay, Ontario.

¶ 34 The Respondent collected a total of $413,000 from 14 of his clients who contributed $29,500 each.

¶ 35 The Respondent required each client to subscribe to the proposed investment by writing a cheque payable to 1188733 Ontario Limited, a numbered company that he had incorporated in 1996 (the “Numbered Company”). In 2002, the Respondent’s wife replaced him as the sole Director and officer of the Numbered Company because he believed that this would relieve him of any regulatory obligation to report his outside

business activities and personal financial dealings with clients. The Respondent, however, continued to control the Numbered Company.

¶ 36 The Respondent did not advise the clients that they were not subscribing directly to the Auto Service Franchise and did not advise them that he controlled the Numbered Company.

¶ 37 In addition to delivering their cheques, clients signed a subscription agreement which indicated they were purchasing 60 non-voting shares in the Numbered Company. Although each client paid the same amount to subscribe for their shares, two of the clients received a different class of shares than the other twelve. Moreover, because the number of issued and outstanding shares of the Numbered Company changed, the eight clients who subscribed in 2002 each received an approximately 6% ownership interest in the Numbered Company, while the six clients who subscribed in 2003 each received only a 3% ownership interest for the same amount of money invested.

¶ 38 The shares of the Numbered Company that the clients received were non-voting shares.

¶ 39 None of the clients obtained a direct ownership interest in the Auto Service Franchise, which was operated by a third party.

¶ 40 Between 2004 and 2007, the Respondent and the third party hosted meetings for the clients at the business location of the Auto Service Franchise. Although the information presented at these shareholder meetings was vague and non-specific, clients were left with the impression that their investment and ownership interest was held in the Auto Service Franchise directly.

The Auto Service Franchise Proceeds

¶ 41 The Respondent advised IIROC Staff that approximately 85-90% ($351,000 - $371,000) of the client money placed in the Numbered Company was invested in the operation of the Auto Service Franchise and approximately 10-15% ($41,000 - $62,000) of the money placed in the Numbered Company was retained. The Respondent advised IIROC that the retained funds were used to pay for administrative expenses related to the Numbered Company's investment in the Auto Services Franchise.

¶ 42 Despite repeated requests from IIROC Staff, the Respondent did not produce corporate records or account documents to demonstrate how the money raised from clients was invested in the Auto Service Franchise or what ownership other rights the Numbered Company obtained in exchange for the money it gave the Auto Service Franchise.

¶ 43 As far as IIROC can determine, the Respondent and the Numbered Company did not maintain a proper share register to properly document ownership of the Numbered

Company or proper financial records to document the investment it made in the Auto

Service Franchise or other related expenses.

¶ 44 IIROC obtained some documents relating to the Numbered Company's bank account. Those statements indicate the following:

a) The Numbered Company's bank account was opened in May 2002 and the Respondent had sole signing authority over the account.
b) From June 2002 – May 2004 there were 129 point of sale debit transactions in the account totaling approximately $13,500. Many of these transactions were purchases of personal consumption items such as clothing, recreational activity, canoe trips, dry cleaning, groceries and video rentals. There were also 12 credit card bill payments totaling approximately $10,700 and 27 cash withdrawals totaling approximately $6,500.
c) Between May 2004 and March 2012 there was minimal activity in the account.

¶ 45 In August 2008, the Numbered Company was involuntarily dissolved by order of the province of Ontario's Director of Companies for failure to comply with the Ontario Corporations Tax Act.

¶ 46 In approximately 2010, the business of the Auto Service Franchise failed and its ownership changed. Despite the business failure and the change of ownership, the Respondent did not report any losses to the clients.

NP & AP's First Requests for Reimbursement

¶ 47 Beginning in February 2011, and on more than one occasion thereafter, two clients who had invested in the Auto Service Franchise, NP & AP, advised the Respondent that they wished to redeem their investment. Rather than tell NP & AP that the Auto Service Franchise had failed and that their money was lost, the Respondent stated that their concerns would be addressed at a future shareholder meeting. Contrary to the Respondent's assurances, no such shareholder meeting occurred.

The On-Line Trading Business

¶ 48 In or about March 2012, the Respondent began soliciting clients to place money with him so that he could trade crude oil futures contracts under the business name "Vince Virgil Trading." A broad description of the Respondent's background and his "Slow Hand Method of Price Action" was later set out – but perhaps after he had left Assante – on his website, since taken down, but he did not fully reveal his identity.

¶ 49 At least three clients gave the Respondent money for this purpose as follows:

- $23,000 from LM on March 16, 2012
- $50,000 from CC & AC on March 1, 2013
- $50,000 from AV & CV on March 4, 2013

¶ 50 AV & CV had previously invested in the Auto Service Franchise. The Respondent advised AV & CV that he would use these funds to conduct trades in oil and other commodities in order to reimburse the funds that had been lost in the Auto Service Franchise venture.

¶ 51 In each case the money was deposited to the Numbered Company's Bank Account.

¶ 52 In the four month period after the March 16, 2012 deposit of $23,000 to the Numbered Company's Bank Account, the Respondent wrote four cheques totaling $6,000 for unknown purposes and a fifth cheque for $15,000 payable to himself. The remaining amount was used for cash withdrawals and point of sale purchases by the Respondent at retail stores and gas stations.

¶ 53 After the two deposits of $50,000 each were made to the Numbered Company's Bank Account in March, 2013, the Respondent, on March 5, 2013, ordered two drafts totaling $6,474 payable to another bank. More than four months later in July and August, the Respondent wrote three others totaling $85,000 payable to his online trading business name.

¶ 54 The Respondent has neither returned nor accounted for the money.

NP & AP's Other Requests for Reimbursement

¶ 55 In February 2013, NP & AP again asked the Respondent for a return of their investment. On or about February 28, 2013, the Respondent gave NP & AP a $15,000 cheque from the Numbered Company's Bank Account. At the time, the balance in the account was $47.78. The Respondent instructed NP & AP not to cash the cheque until the following week. The Respondent indicated that the remainder of the investment would be returned at a later date.

¶ 56 The balance in the Numbered Company's bank account increased on March 1, 2013 when the $50,000 from AC & CC was deposited.

¶ 57 On March 1, 2013, NP & AP complained to the Respondent's firm. At the firm's request, NP & AP refrained from attempting to cash the cheque from the Numbered Company and when they eventually tried to cash the cheque from the Numbered Company, it did not clear. No other monies were returned to NP & AP.

Final Comment by the Panel

¶ 58 We therefore find that the allegations set out in all five counts have been proven. No submissions were asked for or made with respect to sanctions. We now request the National Hearing Coordinator to set a date for a Hearing on what the appropriate sanctions should be in the circumstances of this case.

Dated at Toronto this 11th day of August, 2017

Martin L. Friedland

Neil Murphy

Jane Waechter

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