Re Jory Capital Inc & Cooney

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada (IIROC)

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Patrick Cooney

and

Jory Capital Inc

[2011] IIROC No. 7

Investment Industry Regulatory Organization of Canada
Hearing Panel (Manitoba District Council)

Heard: January 18, 2011 at Winnipeg, Manitoba
Decision: January 28, 2011
(36 paras.)

Hearing Panel:
Mr. Robert Hucal, Chair, Mr. William J. Welton, Mr. Eric M. Wray

Appearances:
Wietzke Gerber, Counsel for IIROC
Art Stacey & Paul Simms, Counsel for Patrick Cooney and Jory Capital Inc.

PENALTY DECISION

¶ 1 In our decision of November 12, 2010, this Hearing Panel found that the Respondent, Patrick Cooney ("Cooney"), majority owner and sole director of Jory Capital Inc. ("Jory"), failed to take measures to ensure that Jory meet compliance standards regarding maintenance and monitoring of regulatory capital and reliability of financial reporting and that Patrick Cooney breached IIROC Member Rules in that he:

(a) **Systemic Failure and Risk Adjusted (RAC) Deficiencies**

Failed to ensure that Jory designed, established and implemented an effective financial compliance program from October 2007 to April 2010 contrary to Rules 29 and 2600;

(b) **Deteriorating Sales Compliance Reviews**

Failed to ensure that Jory developed, maintained and implemented a supervisory system from 2005 to 2009, contrary to Rule 38;

(c) **Trading Conduct Compliance**

Failed to ensure that Jory developed and implemented a trade supervision policy from 2006 to 2009, as required by Universal Market Integrity Rules (UMIR) 7.1; and

(d) **Failure to Fulfill Representations**

Engaged in conduct unbecoming by failing to ensure that Jory fulfilled representations provided to IIROC from 2005 to 2009, contrary to Rule 29.1.[1]

¶ 2 The facts of the case are set out in our Decision and we will not repeat them. We noted that over a long period of time Jory had serious deficiencies and while some effort was made to deal with the deficiencies, those efforts appeared to be half-hearted and when dealt with by untrained or unqualified persons, proper compliance was beyond reach and never achieved. There was a clear failure to correct repeat deficiencies.

¶ 3 Prior to commencement of the Penalty proceedings, we considered the Respondents' request for an Adjournment.

¶ 4 The Respondent claims that proceedings before the Manitoba Securities Commission ("MSC") should be disposed of prior to our dealing with the sanctions to be imposed upon Jory and/or Cooney as those proceedings are material to our reaching a decision.

¶ 5 We are of the opinion that the MSC proceedings and its ultimate decision will not affect our ability to reach a decision in these penalty proceedings.

¶ 6 The MSC matter is not, in our opinion, relevant to today's Penalty Hearing and we do not believe the Respondents are prejudiced by our going ahead at this time.

¶ 7 We must therefore deal with the appropriate penalty for the Respondents. Enforcement Counsel provided us with a series of cases to aid in determining the appropriate sanctions. Those decisions clearly required us to consider protection of the investing public, of IIROC's members, of the integrity of the process, of securities markets [1]and prevention of a repetition of conduct under consideration[2]. In addition we were asked to consider both a specific and general deterrence[3]. We reviewed the decisions noted.

¶ 8 We were asked to take into account the guidelines developed by IIROC staff and formed from previous IDA/IIROC/RS disciplinary decisions. These guidelines, we were reminded, were not binding on us, but should be treated as indicative of industry expectations and as relevant to penalty determination.

¶ 9 IIROC Counsel has proposed penalties as follows:

As to Jory Capital:

- A fine of $40,000 per RAC deficiency, for a total of $120,000;
- Suspension for 30 days; and
- Retain a compliance consultant for one year.

As to Patrick Cooney:

- A fine of $200,000; and
- Permanent ban from registration in all capacities with the exception of registered representative, investment representative or trader.

1. Derivative Services Inc. and Kyle 2000 IDA SC#26 July 11, 2000
[2] E.R. Milewski & IDA 1999 IDA CD#17 Aug. 5, 1999
[3] Richard Mills & IDA Feb. 23, 2001

¶ 10 Counsel has provided us with precedents with minimum penalties relating to each of the offences for which the Respondents were found liable.

Cooney Sanctions

¶ 11 As for Cooney's penalty, what must be recognized is that the ultimate responsibility for Jory must be with Cooney. He was the sole Director and in whatever function he performed at any given time, everyone reported to him. We heard that when a consultant was finally hired in 2006, his role was minimal and he was not actively engaged until 2010, coincidental with the issue of the Notice of Hearing relating to these proceedings.

¶ 12 IIROC Counsel notes that Cooney's pattern of misconduct included:

- 5 year period of failing to comply with Business Conduct Compliance Rules;
- 4 year period of failing to comply with Trade Desk Compliance Rules;
- 3 year period of filing to comply with Financial Compliance Rules;
- Repeated pattern of failing to fulfil representations to IIROC.

¶ 13 We are of the opinion that continuing breach of rules and regulations reflected Cooney's lack of concern for honouring IIROC and IDA's financial compliance rules over a lengthy period and therefore the public interest requires that significant sanctions be imposed.

¶ 14 Counsel for Cooney took the approach that the proposed fine was excessive and reflected punishment rather than prevention. He also reminded us that no clients had been affected and no criminal or quasi-criminal misconduct existed.

¶ 15 None of the evidence indicated that Cooney acted in a criminal or quasi-criminal manner (one of the tests in determining the extent of the sanctions) but even if his conduct was neither unethical nor in bad faith, the deficiencies which Jory failed to cure extended over several years, indicating possibly that there was little interest in fixing the problem or even considering that there were rules and regulations to respond to and follow and to which he acceded as an IIROC registrant.

¶ 16 As has been pointed out in other decisions[4], the non-observance of rules, regulations and by-laws could eventually lead to criminal or quasi-criminal conduct, leaving the public exposed and a measure of harm to the integrity of the securities industry.

¶ 17 Enforcement Counsel stressed the gravity of Cooney's conduct and, aside from the suggested permanent ban from registration in all capacities with the exception of registered representative, investment representative or trader, she felt that the monetary penalty warranted an escalating sanction – a fine in the amount of $200,000.

¶ 18 Cooney's Counsel, aside from his position that the fines were excessive, felt that sanctions should reflect what is most in the public's interest from a prevention aspect, recognizing that what Cooney does for the industry and his clients, does not warrant the penalties.

¶ 19 We had evidence that Cooney serviced his clients in a positive manner and assisted in raising capital and financing various projects. His involvement was highly endorsed. We considered those representations and comment that acting in the interests of your clients is what any business should do and obtaining endorsements for assistance provided and work performed does not mean that Cooney's failures should be ignored.

¶ 20 We have considered the decisions, in addition to those mentioned, of Rampart Securities[5], MGI[6] and Union Securities[7], where suspensions were imposed along with fines.

[4] Argosy Securities Inc. 2008 IIROC #22 – Oct. 29, 2008
[5] Rampart Securities Inc. 2002 IDA CD#3 – Jan. 25, 2002
[6] MGI Securities Inc. 2006 IDA CD#16 – May 25, 2006
[7] Union Securities Inc. 2005 IDA CD – July 29, 2005

¶ 21 We make the following determination regarding Cooney:

¶ 22 Firstly, that he be banned from registration in all capacities with the exception of registered representative, investment representative or trader.

¶ 23 Secondly, that a fine of $100,000 be imposed. We feel that the amount represents an escalating sanction. We also feel that the fine sends a clear message to the industry and supports the premise of prevention.

Jory Sanctions

¶ 24 Dealing next with Jory, the guidelines suggest a minimum fine of $25,000 and a suspension where the deficiency was as a result of reckless disregard for the requirements. Our deliberations considered the fact that the deficiencies were small, that only one was for a lengthy period, that all were discovered by IIROC and not Jory and that historic monetary penalties in previous disciplinary proceedings had no effect on Jory.

¶ 25 We referred to decision relating to RAC deficiencies where the lack of internal controls caused immediate suspension[8] and where the RAC deficiencies occurred on 10 occasions over 3 years and membership was terminated[9].

¶ 26 Additionally, we considered RBC Dominion Securities Inc.[10], Marlow Group Securities Inc.[11] and GRS Securities Inc.[12] which were not as flagrant or glaring as Jory's. The fines were all in excess of the minimum.

¶ 27 Jory clearly failed to develop and implement an adequate compliance system and ensure effective supervision of activity required to IIROC standards. Repeated violation of financial compliance and early warning system occurred.

¶ 28 IIROC Counsel asked for a fine of $120,000, representing $40,000 for each RAC deficiency, a suspension for 30 days and retention of the Compliance Consultant.

¶ 29 We find that the proposed fine falls within the range of appropriate sanctions and direct that the fine be $120,000.

¶ 30 The second requested penalty sanction as to Jory is for a 30-day suspension, suggested as being in accord with industry standards. In light of the request for appointment of a Monitor, a position with which we unequivocally agree, we see no purpose in a suspension and therefore reject that request.

¶ 31 We direct that a Monitor be retained, as provide in Rule 20, within a one-month period from the date hereof, on terms and conditions acceptable to IIROC. We also feel that one of the terms of retention should include an arrangement, again subject to IIROC approval, leaving the Monitor in place for at least one year, to make certain action is taken to ensure acceptance and implementation of appropriate remedies to deal with the repeat deficiencies creating financial risk.

¶ 32 A suspension, in our view, would do nothing to maintain a seamless transition to Jory's new Monitor status after removal of Mr. Cooney from any managerial activities. We are, of course, assuming that Mr. Cooney and Jory will recognize the penalty as being a reflection of IIROC's role in protecting the investing public and the integrity of the industry.

¶ 33 Jory is fundamentally Cooney and in that context we recognize that any prohibition on Cooney's registration status will impact Jory. We nevertheless feel we must proceed with the preventative sanctions against Cooney. Cooney's limited involvement in Jory as a continuing business under a Monitor environment should not preclude Jory from developing and utilizing other operational options to reflect the installation of the Monitor and maintain Cooney's continued involvement as a salesman, a role for which he is well suited.

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[8] Graydon Elliot Capital Corp. 2007 IDA CD#43 Oct. 29, 2007

[9] Rampart Securities 2003 IDA CD#3 Jan. 25, 2002

[10] RBC Dominion Securities Inc. 2006 IDA CD#28 Dec. 2006

[11] Marlow Group Securities Inc. 2005 IDA CD#39 July 28, 2004

[12] GRS Securities Inc. 2006 IDA CD#7 Apr. 17, 2006

¶ 34 The Monitor would perform executive level functions otherwise conducted by Cooney. The public interest, in our opinion, is thereby served by avoiding the risk of Jory being put out of business, a concern reflected by the Manitoba Securities Commission[13]. It should be noted that some concern was expressed about the ability of Jory to continue in business if Cooney was suspended in that situation, as an officer and director. We have considered that scenario and believe that with the installation of a Monitor and Cooney's continued sales role, Jory should be able to function.

¶ 35 We are hopeful that Cooney and Jory will recognize the sanctions as being a reflection of IIROC's role in protecting the investing public and the integrity of the industry. We are mindful of the challenges Jory and Cooney have in accepting IIROC's standards, rules and regulations, all reflective of industry standards developed over the years. We believe that Cooney's intial action in hiring a Compliance Consultant is the beginning of a recognition of the obligations to the industry, obligations which Jory's regulator has clearly found to be unfulfilled over a long period.

Costs

¶ 36 We are also asked to assess costs and, in accordance with Rule 20.49, we order costs against Jory in the amount of $10,000 and against Cooney in the amount of $40,000.

Dated this 28th day of January, 2011.

Robert Hucal

William J. Welton

Eric M. Wray

[13] In the matter of the Securities Act and Jory Capital and Patrick Michael Cooney – Oct. 10, 2001