Re Tassone

IN THE MATTER OF:

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

and

Alberto Tassone

2017 IIROC 53

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

Heard: September 27, 2017 in Vancouver, British Columbia
Decision: December 26, 2017

Hearing Panel:
Leon Getz, Chair, Barbara Fraser and David Pearson
Appearances:
Stacy Robertson, Enforcement Counsel
Owais Ahmed, for Alberto Tassone

PENALTY DECISION

INTRODUCTION

¶ 1 In a Notice of Hearing dated April 4, 2016, IIROC's Enforcement Staff alleged that Mr. Tassone contravened IIROC's Dealer Member Rules in two respects:

Count 1

From 2003 to the present, the Respondent participated in and managed an investment in oil and gas wells in the United States (the "JED Energy Investment") without the prior knowledge or approval of his Dealer Member firm and thereby:

i. acted contrary to Dealer Member Rules 18.14 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008) by conducting an unauthorized outside business activity; and

ii. acted contrary to Dealer Member Rule 18.15 by accepting remuneration directly from someone other than his Dealer Member firm or its affiliates or related companies.

Count 2

In October of 2014 the Respondent misled IIROC Staff by:

i. providing misleading information concerning the extent of his personal financial interest in the JED Energy Investment;

ii. providing misleading information concerning his status as an officer and Director of one of the constituent corporate entities of the JED Energy Investment; and

iii. providing misleading information concerning the existence of bank accounts in the name of JED Energy Ventures

and thereby acted contrary to Dealer Member Rules 19.6 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008).

¶ 2 In a Decision dated February 23, 2017 (2017 IIROC 14) (the "Discipline Decision") we concluded that:

(a) Count 1 failed completely;

(b) Count 2 was made out in two respects:

(i) Mr. Tassone did mislead IIROC about the extent of his personal financial interest in the JED Energy Investment as alleged in Count 2 (i); and

(ii) Mr. Tassone did mislead IIROC about his involvement in the affairs of the Investment as alleged in Count 2 (ii);

(c) Mr. Tassone did not mislead IIROC about the existence of bank accounts in the name of JED Energy Ventures and Count 2(iii) accordingly failed.

¶ 3 These reasons are addressed, accordingly, to determining the appropriate penalty for Mr. Tassone's misconduct.

¶ 4 The parties are far apart. IIROC seeks the imposition of:

a. a fine of $50,000;

b. a suspension from registration with IIROC in any capacity for 2-4 years;

c. a requirement that Mr. Tassone rewrite the Conduct and Practices Handbook course prior to any re-registration;

d. 12 months of strict supervision upon any re-registration; and

e. $40,000 in costs.

¶ 5 Mr. Tassone describes the penalties sought by IIROC as "harsh, excessive and unreasonable when compared to the previous decisions of the British Columbia Securities Commission and IIROC." He proposes, instead, a fine of not more than $10,000 payable in monthly instalments over two years and a suspension not exceeding 30 days. He also contends that no order of costs should be made against him.

SUMMARY

¶ 6 In summary, for reasons that we attempt to explain below, we have concluded that Mr. Tassone must:

(a) be suspended for a period of 6 months following which he must be subject to a 6 month period of close supervision;

(b) pay an administrative penalty of $40,000, of which $10,000 shall be paid within 180 days of the effective date of this decision; and the balance, in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000; and

(c) pay an amount of $40,000 by way of reimbursement of IIROC's costs incurred in connection with this matter. of which $10,000 shall be paid within 180 days of the effective date of this decision; and the balance in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000.

DISCUSSION

(a) General

¶ 7 This case involves two separate violations. They have in common Mr. Tassone's failure to tell the truth. Given this, we think that it is not appropriate to determine penalties for individual specific violations. Rather, the sanctions should be determined in relation to the overall situation. We therefore approach this matter globally, rather than considering each violation separately.

¶ 8 IIROC has published Sanction Guidelines for the purpose of providing guidance to hearing panels in circumstances such as those that face us now. Section 1 of Part 1 of the Guidelines says, among other things,

that "sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence)." It adds that "general deterrence can be achieved if a sanction strikes an appropriate balance by addressing a Regulated Person's specific misconduct but is also in line with industry expectations. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors." All of this seems obvious and apposite and we have approached our task with these general considerations in mind.

(b) The obligation to tell the truth in an IIROC investigation

¶ 9 Simply put, Mr. Tassone lied to IIROC in circumstances in which he was obliged to tell the truth and did so, we found, deliberately. He did so on matters that were not trivial or incidental but went to the heart of the two Counts on which we found that IIROC had made out its case. He compounded this offence by offering an explanation for his lies that was itself untrue. On any analysis, Mr. Tassone's misconduct was serious. He has acknowledged this.

¶ 10 Mr. Tassone's obligation to refrain from lying in the circumstances did not derive from some abstract moral principle. It was a violation of Dealer Member Rule 29.1, which he was bound to observe, and which required him, among other things, to "observe high standards of ethics and conduct" and to refrain from engaging in any business conduct or practice "which is unbecoming or detrimental to the public interest".

¶ 11 In *Re Nuttall*, 2012 BCSECCOM 97, the BC Securities Commission, speaking of the obligation to refrain from lying during the course of a Commission investigation, said:

> 8. The Commission's investigative powers under the Act are one of the most powerful tools at the Commission's disposal to protect the public interest. A witness who fails to tell the truth puts at risk the effective exercise of those powers.
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> . . . .
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> 10. What makes this sort of misconduct serious is the potential impact on an investigation. Giving false or misleading information in an interview could hinder or frustrate an investigation in several ways. If, as here, the witness keeps information from investigators, the information withheld could be what investigators need to know to determine if wrongdoing has occurred (and if so, how much and by whom), or what they need to know to avoid following false leads.

¶ 12 These observations are equally applicable to the exercise of IIROC's investigative powers. See *Re Li, 2016 IIROC 34* at paragraphs 43 and 44; and see *Re Rail* 2011 IIROC 64 where it was held that lying during the course of an IIROC investigation was a breach of the obligation "to observe high standards of ethics and conduct" within the meaning of Dealer Member Rule 29.1.

(c) Are there any mitigating considerations?

¶ 13 Mr. Tassone argues, by way of mitigation as we understand it, that his misconduct "did not delay, frustrate, harm or impede" IIROC's investigation. He points out that the misleading information that he provided about his financial interest in the Investment when he was interviewed by IIROC on October 1, 2014 was promptly corrected by him on October 19, 2014 and – which for present purposes we will accept - that there is no evidence that IIROC was in any way delayed or otherwise prejudiced by his evidence about his role with the general partner of the Investment.

¶ 14 There can only be one reason for deliberately lying to IIROC investigators: to mislead or distract them. If the deception is successful, the result is to "delay, frustrate, harm or impede" the investigation. If this happens, that is obviously an aggravating consideration. It cannot be the case, however, that if the lying is unsuccessful and does not produce the intended result this is a mitigating factor, for that would be to reward the liar for his or her failure. This makes no sense to us.

¶ 15 In *Re Johnson,* 2007 BCSECCOM 437 Johnson lied to Commission staff on two occasions. He admitted to this at a subsequent disciplinary hearing before the Commission and argued that while his misleading statements to staff "were regrettable and a 'significant aggravating factor', his subsequent admissions before the Commission "considerably ameliorated" the gravity of his misconduct. The Commission rejected this argument, saying (at paragraph 28): "What is important is that at the crucial time of the investigation, he chose, under oath, to mislead commission investigators on the very matter that was under investigation." In our view this is exactly right. it is also germane here that we found Mr. Tassone's explanation for his lies – a faulty memory – to be "utterly implausible". See *Discipline Decision*, paragraphs 52-53. Not to put too fine a point on it, that characterization is tantamount to a finding that the explanation was itself a lie.

¶ 16 Accordingly, we do not think the facts relied on by Mr. Tassone as described in paragraph 13 can properly be considered as mitigating his offence.

¶ 17 No other mitigating factors have been suggested or occur to us.

(d) Are there any aggravating considerations – Mr. Tassone's disciplinary history

¶ 18 Mr. Tassone has a disciplinary history.

¶ 19 In 1996 he entered into a settlement agreement with the Toronto Stock Exchange in which he acknowledged that in 1989 he had facilitated a transfer of funds to an issuer listed on the Alberta Stock Exchange without obtaining adequate or proper security and documentation to evidence the transactions, which were found to be detrimental to his clients. He was fined $20,000 and ordered to pay $2,000 on account of costs.

¶ 20 In 2003 a disciplinary tribunal of a predecessor of IIROC found that between 1994 and 1996 Mr. Tassone had given options trading advice to a client without being registered to do so and failed to ensure that his recommendations were appropriate and consistent with the client's investment objectives. He was fined $15,000, ordered to pay costs of $10,000 and to rewrite the Conduct and Practices Handbook examination. [1]

¶ 21 Section 2 of the Sanctions Principles set out in IIROC's Sanction Guidelines makes it clear that a prior disciplinary record - even where the prior misconduct is different - may be an aggravating factor, but notes that it "generally becomes less relevant as it becomes more dated". Having regard to the fact that Mr. Tassone's record relates to conduct quite different from that involved in this case and in any event is at least 15 years old, we consider its significance to be somewhat marginal. We point out, however, that as noted in paragraph 20, in one of the previous cases Mr. Tassone was ordered to rewrite the Conduct and Practices Handbook Examination. One might have expected, therefore, that he would by now have a clear understanding of his obligations and ensure that he performed them meticulously.

(e) Aggravating considerations – Mr. Tassone's explanation for his lies

¶ 22 We regard it as an aggravating consideration that, as we have pointed out in paragraph 9, above, Mr. Tassone's attribution of his false statements to a faulty memory was itself a lie. He compounded one set of lies with another. This is clearly an aggravating consideration.

(f) The components of a sanctions "package"

¶ 23 The parties referred us to a number of previously decided cases[2] on sanctions for, or including, lying to

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1 Counsel for IIROC also referred us to a 1997 decision of the Vancouver Stock Exchange dismissing a complaint of misleading the Exchange. The purpose of the reference was stated to be "to simply note that the Respondent is familiar with the consequences of misleading the regulatory authorities and is keenly aware of his obligation to provide full true and plain disclosure to IIROC".

2 See for example: *Re Nuttall* (above paragraph 9) where the respondent, a non-registrant, had misled Commission investigators and then, at a hearing before the Commission, tendered an explanation for that misconduct that was found to be "not credible". She was, in effect, suspended for 6 months and ordered to pay an administrative penalty of $15,000. *Re Wood,* BCSECCOM 169, where a respondent who had lied to Commission investigators (and others) causing a delay in the

regulators. In some of these cases the misconduct hampered or impeded the investigation, in others it did not. In some cases the respondent had a prior disciplinary history, in others not. In some there were several "offences" in addition to misleading regulators, in others not. Suspensions imposed have varied from as little as 2 to as much as 12 months.

¶ 24 It is easy to say that, as Mr. Tassone acknowledges, his misconduct was serious. It is difficult – much more difficult – to assign to it a place on a spectrum from less to more egregious, to say it was more or less serious than the misconduct found to have occurred in other cases. For this reason, while we have read carefully the various decisions that were cited to us we do not think it is particularly helpful to examine their minutiae or attempt to calibrate the factual similarities and differences among them and the present case, to determine where Mr. Tassone's conduct falls on a spectrum from less to more egregious and, accordingly, the appropriate period of suspension.

¶ 25 In the nature of the case, such determinations have about them large elements of impression, instinct and intuition. So, while we agree that a suspension is appropriate, determining the duration of the suspension is best done in the context of a decision about the sanctions "package" as a whole rather than in isolation.

(i) Suspension

¶ 26 It seems to be agreed between IIROC and Mr. Tassone that a suspension of some period is appropriate and we agree. As we have noted, IIROC seeks a 2-4 year suspension while Mr. Tassone argues for a period of not more than 30 days.

¶ 27 In *Re Investment Industry Regulatory Organization of Canada (Steinhoff)* 2013 BCSECCOM 308, the British Columbia Securities Commission, in setting aside a one-year suspension imposed by an IIROC panel, said, at paragraph 90:

> Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter. A suspension of one year, what the IIROC panel ordered here, is tantamount to the termination of the registrant's career. At a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort. That assumes a clean slate. A person in their mid-fifties, like Steinhoff, attempting the task following the expiry of a mandated suspension, even a person with Steinhoff's apparent energy, is likely to find it impossible to build much more than a shadow of their former career.

¶ 28 These observations seem equally applicable to Mr. Tassone, who has been a registrant in British Columbia for more than 20 years, with no relevant disciplinary history. While couched in terms of a suspension, IIROC is effectively seeking a permanent ban. In view of the passage from *Steinhoff* quoted above; and the fact that in a subsequent penalty hearing before the Commission in that case, IIROC acknowledged that "longer suspensions are usually reserved for cases involving multiple clients or a pattern of misconduct" (2014 BCSECCOM 23 at paragraph 22), we agree with Mr. Tassone that IIROC's request is "excessive".

¶ 29 Having regard to the seriousness of Mr. Tassone's conduct, the considerations identified in IIROC's Sanction Guidelines and the previously decided cases to which we were referred, we are satisfied that it is appropriate and necessary to impose a suspension .

(ii) Financial penalties

¶ 30 We consider, under this heading, both the imposition of a fine or administrative penalty and, although as explained below this is not strictly speaking a "penalty", of a requirement that Mr. Tassone pay some amount in

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completion of the investigation, was suspended for 12 months and ordered to pay a $30,000 administrative penalty. *Re Rail* 2012 IIROC 17 where a registrant who had impeded the conduct of an IIROC investigation by lying to investigators was permanently banned and fined $50,000. *Re Li*, 2016 IIROC 34, where a respondent who was found, among a number of other transgressions, to have been guilty of a "failure to cooperate" with IIROC, was permanently banned and fined, on a global basis, $250,000. In *Re Johnson* 2007 BCSECCOM 437 a Respondent with no disciplinary history who had lied to investigators was suspended for 2 months and fined, in effect, $20,000.

respect of IIROC's costs. As noted in paragraphs 4 and 5 above, IIROC seeks a fine of $50,000 and a $40,000 award on account of its costs while Mr. Tassone argues for a fine not exceeding $10,000 with time to pay and no order in respect of costs.

Administrative penalty

¶ 31 In *Re Wong,* 2010 IIROC 50 an administrative penalty of $100,000 was imposed on a respondent. The panel, noting that it had heard "no cogent evidence as to the respondent's current net worth and [was] uncertain as to his ability to pay monetary sanctions," observed (at paragraph 40) that "a respondent's present ability to pay a fine should not be an important factor in determining whether a fine should be imposed, and, if so, in what amount. Panels, however, have considered the respondent's financial circumstances in determining the payment schedule of monetary penalties."

¶ 32 In the light of these observations and Section 7 of the Sanction Guidelines, we have concluded that whatever relevance Mr. Tassone's impecuniosity may have to the question whether he should be given time to pay an administrative penalty, it is irrelevant to whether such a penalty should be imposed and to its amount if one is appropriate. These are questions to be answered in the light of the principles set out in Part I, Section 1 of IIROC's Sanction Guidelines, quoted at paragraph 8, above and in the context of a sanctions "package" as a whole.

Costs

¶ 33 Dealer Member Rule 20.49 provides that a Hearing Panel "may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances." The general approach taken by hearing panels on the subject of costs is well described in the following passage from the decision in *Re Van Hee* [2009] IIROC No. 34:

> 101 An award of costs should not constitute an additional penalty against the Respondent but should be reflective of the time and effort expended by the Association and the Hearing Panel's assessment of how much of those costs the Respondent should be asked to bear. While there may be some cases where it would be appropriate to award substantial costs, as stated in *Credifinance Securities Ltd.*, [2006] I.D.A.C.D. No. 30 at paragraph 56:
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> 102 In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one sided, we think that a conservative approach to costs is not unwarranted.

See also *Re Steinhoff*, 2012 IIROC No.39 at paragraph 58 and *Re Deeb*, 2013 IIROC 8, at paragraphs 250-254.

¶ 34 In *Re Van Hee* the panel suggested some factors to be considered when determining costs. These included the Respondent's degree of success of in resisting any or the charges; the Respondent's financial circumstances and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed; that basis; the seriousness of the charges; and whether the amount of the costs proposed would in effect be a "penalty".[3]

¶ 35 IIROC tendered an affidavit of its Senior Enforcement Counsel, Mr. Paul Smith. Attached to it is a Bill of Costs of $179,583.50 made up of investigation costs of $92,677.50 and prosecution costs of $86,906. IIROC's actual claim on account of costs is for $40,000, or approximately 22% of the total incurred.

¶ 36 Mr. Tassone claims that IIROC only proved 20% of the allegations made against him. Accordingly, he argues, he should not be held responsible for any of its costs. We do not understand the argument.

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[3] See also *Re Suppal* 2014 IIROC 45

¶ 37 The Counts set out in the Notice of Hearing – both those on which IIROC failed and those on which it succeeded – were, factually, intimately connected. They arose out of an investigation into what was, in essence, a single set of intimately interrelated facts. Had IIROC not investigated the circumstances surrounding the alleged unauthorized business activity that was the subject of Count 1, on which it failed, it would never have uncovered the facts that gave rise to the other Counts on which it succeeded. In these circumstances, we do not think it is appropriate to assign success and failure on a Count by Count basis.

¶ 38 Moreover if, as contended, IIROC only achieved a 20% success rate, it seems logical to award it 20% of its costs. That, more or less, is precisely what IIROC claims. We simply do not understand why it should be denied this.

¶ 39 In the result we consider an award of $40,000 to IIROC on account its costs to be "appropriate and reasonable", and so order.

Ability to pay

¶ 40 Mr. Tassone argued that he does not have the means or ability to pay any significant fine or order for costs and in support of his position tendered an affidavit dated June 21, 2017 purporting to show that he has essentially no assets and is earning only enough income to cover his debt payments and basic living expenses. Despite a vigorous cross-examination on his affidavit, we did not think that his claim of relative impecuniosity was seriously undermined and so, for present purposes, we accept it. The question is how, if at all, this should factor into our determination of an appropriate sanctions "package" and not as a stand-alone item.

¶ 41 Section 7 of the IIROC Sanction Guidelines says, among other things:

> Evidence of Inability to pay is a relevant consideration in determining the appropriate financial sanctions to be imposed on a respondent. It should not be considered a predominant or determining factor, but it is a relevant factor depending on the circumstances of the misconduct.
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> inability to pay could result in the reduction/waive of a fine and/or in the imposition of an instalment payment plan. In cases in which a hearing panel reduces or waives a fine based on a *bona fide* inability to pay, the written decision should so indicate.

¶ 42 In *Hogan v. British Columbia Securities Commission*, 2005 BCCA 53, Hogan, a part-time accounting student who had not worked for some years and was a non-registrant, was found to have engaged in a classic "pump and dump" scheme, from which he profited to the tune of some US$42,000, with respect to the shares of five different companies. The Securities Commission imposed in effect, a 10-year ban, together with an administrative penalty of $25,000. He had apparently presented the Securities Commission with evidence that he had debts aggregating some $33,000 and no income and relied on this evidence in support of an appeal on the grounds that the penalty was unreasonable and disproportionate to penalties imposed in other cases.

¶ 43 In dismissing the appeal, the Court said, on the "ability to pay" issue:

> [17] [I]f Mr. Hogan were correct in saying that the amount of the penalty should be commensurate with his ability to pay, then individuals such as himself, who have no other assets and who do not make their living as licensed players in the market, could engage in the same type of activity as Mr. Hogan, and, because of their straightened financial circumstances (after disgorging any profit they made), face no real penalty. The amount of the administrative penalty in this case recognizes the need to deter just those types of players from manipulating the market.

¶ 44 The only remaining question is whether, having regard to Mr. Tassone's straitened financial circumstances, he should be given time to pay all or any part of the administrative penalty and the costs. Although there is no objectively correct answer to this question, we think that he should be given time to pay. That concession should, however, be on terms that do not have the effect of, or be capable of being construed as, any softening of the condemnation that his misconduct deserves and that the overall sanctions package is designed to reinforce. In our view this balance can be achieved by ordering that Mr. Tassone must pay $10,000

within 180 days of the effective date of this decision; and the balance, in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000 and that the same schedule should apply to the order as to costs.

(iii) Conduct and Practices Handbook examination and strict supervision

¶ 45 IIROC's Dealer Member Rules provide, in part, that a hearing panel may impose, in addition to "one or more of" a list of specified sanctions, "any other sanction determined to be appropriate under the circumstances."

¶ 46 The sanctions sought by IIROC include a requirement that Mr. Tassone rewrite the Conduct and Practices Handbook course prior to any reregistration, and that he be subject to a 12 -month period of strict supervision following reinstatement. Although neither IIROC nor Mr. Tassone made any submission on either point, it is appropriate that we consider these requests.

¶ 47 Mr. Tassone's offence was to tell lies to IIROC investigators and he will suffer significantly from the suspension and fine that we think it appropriate to impose. We are not persuaded that rewriting the Conduct and Practices Handbook course adds anything of value in the circumstances.

¶ 48 On the other hand, having regard to the nature of Mr. Tassone's misconduct and the facts of his disciplinary record, it is in the public interest to require him to serve a period of close supervision following his reinstatement. In our view, however, IIROC's proposal for a 12-month period of such supervision is excessive.

¶ 49 We would impose a six-month period of close supervision.

CONCLUSION AND ORDERS

¶ 50 Taking account of the nature and seriousness of Mr. Tassone's offence, the aggravating elements that we have discussed and the absence of any mitigating factors, the need to strike an appropriate balance between specific and general deterrence and to give proper regard to the results in previously decided similar cases, our best judgment is that the components of an appropriate "sanctions package" are that Mr. Tassone must:

(a) be suspended for a period of 6 **months** following which he must be subject to a 6 month period of close supervision;

(b) pay an administrative penalty of $40,000, of which $10,000 shall be paid within 180 days of the effective date of this decision; and the balance, in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000; and

(c) pay an amount of $40,000 by way of reimbursement of IIROC's costs incurred in connection with this matter of which $10,000 shall be paid within 180 days of the effective date of this decision; and the balance in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000.

Dated at Vancouver, British Columbia this 26th day of December, 2017.

Leon Getz

Chair

Barbara Fraser

David Pearson