Re Tassone

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Alberto Tassone

2019 IIROC 03

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

Heard in Writing: Written Submissions of Counsel for IIROC received December 14, 2018;
no submissions received on behalf of Mr. Tassone
Decision and Reasons: February 13, 2019

Hearing Panel:
Leon Getz, Q.C., Chair, Barbara Fraser and David Pearson
Appearance:
Stacy Robertson, Enforcement Counsel, on behalf of IIROC
No appearance by or on behalf of Alberto Tassone

SUPPLEMENTAL DECISION AND REASONS ON PENALTY

A BACKGROUND

¶ 1 In a Notice of Hearing dated April 4, 2016, IIROC made, in substance, two allegations of misconduct against Mr. Tassone. First, it was alleged that between 2003 and 2014 he had been engaged in an unauthorised outside business activity (the "JED Energy Investment" or the "Investment) without the authorization of his successive employers, Global Securities Corporation and Raymond James Ltd. Secondly, it was alleged that in October 2015, Mr. Tassone had provided misleading information to IIROC Staff with respect to certain matters relating to his involvement in the Investment.

¶ 2 In a decision dated February 23, 2017 (the "Liability Decision" – 2017 IIROC 14), we concluded that while the second of these allegations had been made out, the first had not.

¶ 3 In view of these conclusions, a further hearing was held in October 2017 with respect to the appropriate sanctions to be imposed on Mr. Tassone. In a decision dated December 26, 2017 (the "Penalty Decision" – 2017 IIROC 53), we ordered that in view of his having provided misleading information to IIROC in October 2014, he 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.

¶ 4 Following the issuance of the Penalty Decision each of IIROC and Mr. Tassone applied to the British Columbia Securities Commission (the "Commission") for a hearing and review of both the Liability Decision and the Penalty Decision. On July 3, 2018 the Commission issued its decision and reasons (the "Commission Decision"), reported at 2018 BCSECCOM 212.

¶ 5 The Commission concluded (Commission Decision paragraph [73]) that "Tassone was engaged in an outside business activity for the purposes of IIROC's Dealer Member Rules", and that our decision to dismiss the complaint in this respect was an error in law. The Commission accordingly returned the matter to us to determine whether Tassone's outside business activity was unauthorized and, if we so determine, to decide on any appropriate penalties.

¶ 6 After considering a further submission from counsel for IIROC (nothing having been received from or on behalf of Mr. Tassone) on the question whether Mr. Tassone had disclosed his involvement in the Investment and obtained his employers' approval to it, on November 1, 2018 we issued a decision (the "Supplemental Liability Decision" – 2018 IIROC 46) in which we concluded that he had failed to disclose his involvement in the Investment and to obtain the approval of his employers for it.

¶ 7 It now falls to us to consider whether this conclusion warrants the imposition of any sanctions additional to those provided for in our Penalty Decision, summarized in paragraph 3 above. We invited submissions on this matter and received one from IIROC but, once again, had no response from Mr. Tassone.

¶ 8 IIROC seeks the imposition of the following "fresh" sanctions additional to those previously imposed:

(a) an order requiring Mr. Tassone to disgorge and pay to IIROC the sum of $103,648 representing the undisclosed cumulative financial benefit received by him from his participation in the Investment;

(b) an order imposing an administrative penalty of $35,000;

(c) a suspension of 6 months duration; and

(d) an order requiring Mr. Tassone to pay an amount of $40,000 on account of IIROC's costs in connection with this matter.

B. SOME RELEVANT GENERAL PRINCIPLES CONCERNING SANCTIONS

¶ 9 The most recent (2015) iteration of IIROC's Sanction Guidelines (the "Guidelines") includes a number of observations that are relevant to the sanctions sought by IIROC in this case. We set them out below.

¶ 10 Part I, Section 1 of the Guidelines includes, among others, the following observations:

> **Disciplinary sanctions are preventative in nature and should be designed to protect the investing public, strengthen market integrity, and improve overall business standards and practices.**
>
> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, 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 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 conduct in similar circumstances.* (Emphasis supplied)

¶ 11 Part I, Section 4 of the Guidelines provides that:

Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.

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

¶ 12 Part I, Section 5 of the Guidelines declares among other things that:

A suspension should be considered where:

- there has been one or more serious contraventions;
- there has been a pattern of misconduct;
- the respondent has a prior disciplinary history;
- the contraventions involved fraudulent, willful and/or reckless misconduct; or
- the misconduct in question has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.

C. SOME PARTICULAR CONSIDERATIONS

¶ 13 We begin by expressing our respectful agreement with the Commission's observation, at paragraph [72] of the Commission Decision, that "Tassone's circumstances involved both rampant potential conflicts of interest and personal gain". The following considerations are relevant in this connection.

¶ 14 First, Mr. Tassone was allocated a proportionate interest in the Investment that was significantly greater than that of other investors who had invested roughly the same amount; the other investors were assigned a smaller percentage interest than their invested funds entitled them to; and there was no evidence that any of the other investors were aware of these disparities.

¶ 15 Second, the evidence indicates that Mr. Tassone's actual monetary contribution to the Investment was approximately $22,987. His actual return on that investment was $126,835, resulting in a financial benefit to him, undisclosed to either his co-investors or his employer, of some $103,648.

¶ 16 Third, Mr. Tassone concealed a large part of his assigned interest in the Investment by causing it to be recorded in the name of his sister. As we understood the evidence, she remitted to him any revenue distributions received by her.

¶ 17 Fourth, Mr. Tassone repeatedly misrepresented to his firms the nature and extent of his involvement in the Investment. Raymond James' policies required Mr. Tassone to make an annual written disclosure in the form of answers to specific questions on various matters relating to outside business activities. For example:

(a) From 2004 to 2009, the disclosure form asked: "Do you have any financial interest in, or control or direction over, an offshore entity? For purposes of this certification, "offshore entity" means any type of account, corporation, trust, partnership, investment club, nominee arrangement, or any other entity, structure, arrangement or organization which is incorporated, located,

domiciled, registered or resident outside of Canada." In each of the relevant years, Mr. Tassone answered "no" to this question despite the fact that during at least some of this period he was the President of a Nevada corporation that was the general partner in connection with the Investment.

(b) From 2010 onwards the disclosure form also included the following question: Are you currently engaged in, or do you intend to engage in, any outside business activities (OBA) (any activity where you receive compensation, where employment is affected or where services are expected from a source other than RJL)? In each relevant year, Mr. Tassone falsely answered "no".

¶ 18 Finally, in this connection, we note the oddity, to put it at its lowest, that all the financial transactions relating to the Investment were processed through a personal bank account in the name of Mr. Tassone created for the purpose.

¶ 19 We proceed now to consider IIROC's requests having regard to the general principles and particular considerations identified above.

D. DISGORGEMENT OF $103,648 IN FINANCIAL BENEFITS

¶ 20 Part I, Section 4 of the Guidelines leaves little room for doubt as to the appropriateness, on the facts here, of an order requiring Mr. Tassone to disgorge and pay over to IIROC the sum of $103,648, representing the financial benefit derived by him through his misconduct. See also Re Dennis 2011 IIROC 3 on facts not significantly different from those here.

¶ 21 We accordingly order that Mr. Tassone must disgorge and pay over to IIROC the sum of $103,648.

E. ADMINISTRATIVE PENALTY OF $35,000

¶ 22 On the facts we have briefly outlined above, we are satisfied that quite independently of any other misconduct, it is entirely appropriate that Mr. Tassone's misconduct in respect of his failure to disclose and obtain approval for his outside business activities is deserving of the imposition of an administrative penalty. In this connection we have considered a number of previously decided cases – among them, Re Che [2002] I.D.A.C.D. No. 53 and Re Rail 2009 IIROC 36 - which suggest that an administrative penalty of $35,000 in such cases is well within the range of appropriate penalties for such misconduct. Cf. also, Re Dariotis and Fiiumdinisi 2011 IIROC 75.

¶ 23 We have accordingly concluded in the light of these decisions and in the absence of any mitigating considerations, that Mr. Tassone must pay an administrative penalty of $35,000 in respect of his failure to disclose and obtain approval for his outside business activities and we so order.

¶ 24 This administrative penalty is additional to the penalty of $40,000 (the "Original Administrative Penalty") previously imposed in the Penalty Decision in respect of Mr. Tassone's misconduct in providing misleading information to IIROC so that the cumulative administrative penalty amount is $75,000 (the "Amended Penalty Amount").

F. SUSPENSION FOR A PERIOD OF SIX MONTHS

¶ 25 Having regard to the circumstances briefly summarized in Section C of these Reasons and quite independently of any other considerations, we are satisfied that Mr. Tassone's sustained failure to make proper disclosure of his outside business activities to his employers, and to obtain their approval for those activities, warrants the imposition of a six month period of suspension. We so order.

¶ 26 Once again, this period of suspension is additional to the six-month suspension imposed in the Penalty Decision in respect of Mr. Tassone's misconduct in providing misleading information to IIROC (the "Original Suspension") so that cumulatively he is to be suspended for 12 months.

¶ 27 In that connection, we should add this. The Original Suspension was imposed notwithstanding IIROC's request for a suspension of between 2 and 4 years, which noting the observations of the British Columbia Securities Commission in In Re Carolann Steinhoff v Investment Industry Regulatory Organization of Canada ("Steinhoff") 2013 BCSECCOM 308 at paragraph 90, we found was "excessive". We noted, however (Penalty Decision, paragraph 28), 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" (Steinhoff 2014 BCSECCOM 23,paragraph 22).

¶ 28 In our view, having regard to the facts set out in Section C above, this is clearly a case of "a pattern of misconduct" for which a cumulative suspension of 12 months is appropriate.

G. COSTS

¶ 29 IIROC seeks an order that Mr. Tassone pay an amount of $40,000 by way of reimbursement of its costs incurred in connection with this matter. If ordered, that would be additional to the $40,000 (the "Original Costs Order") he was ordered to pay in the Penalty Decision.

¶ 30 The reasoning underlying the latter order is set out in paragraphs 33 to 39 of the Penalty Decision and we do not repeat it here.

¶ 31 The original $40,000 costs award was predicated on the fact that IIROC had succeeded on only one of the two counts alleged. The $40,000 represented a modest 20% of the costs actually incurred.

¶ 32 The predicate has now changed – and significantly – because of the determination that Mr. Tassone failed to disclose and obtain approval for his outside business activities.

¶ 33 In the circumstances, an additional award of $40,000 on account of IIROC's costs for a cumulative amount of costs of $80,000 seems appropriate and reasonable and we so order (the "Amended Costs Amount").

H. FINANCIAL SANCTIONS AND ABILITY TO PAY CONSIDERATIONS

¶ 34 The cumulative financial impact of the financial sanctions imposed in the Penalty Decision and this decision is that Mr. Tassone must pay an amount of $258,648 to IIROC comprised of:

(a) $103,648 by way of disgorgement of financial benefits;

(b) $75,000 by way of administrative penalty; and

(c) $80,000 by way of reimbursement of IIROC's costs.

¶ 35 In paragraph 40 of the Penalty Decision we wrote:

> 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.

¶ 36 After considering the matter, and in particular the provisions of Part I, Section 7 of the Guidelines, we ordered (paragraph 44 of the Penalty Decision) that Mr. Tassone must, in respect of each of the Original Administrative Penalty and the Original Costs Order, pay $10,000 within 180 days of the effective date of this decision; and the balance in equal monthly instalments commencing on the first day of the first month following payment in full of the $20,000.

¶ 37 The same schedule should apply in respect of the $155,000 cumulative Amended Penalty and

Amended Costs amounts. Mr. Tassone must pay $40,000 within 180 days of the effective date of this decision; and the balance of $115,000 in 25 equal monthly instalments commencing on the first day of the month following the payment date of the first $40,000.

¶ 38 This brings us to the question of the relevance, if any, of "ability to pay" considerations to Mr. Tassone's obligation to disgorge financial benefits amounting to $103,648. We received no submissions on this point and are unaware of any consideration of it in any prior decisions.

¶ 39 The $103,648 represents Mr. Tassone's "ill-gotten gain" misappropriated in secrecy from the other investors in the Investment and "belonging" to them in proportion to their interests in it. For practical reasons, no doubt, they do not seem to have taken any steps to recover these funds. Had they done so and obtained a judgment against Mr. Tassone, their entitlement and his obligation under it would have been unqualified. "Ability to pay" considerations would have been irrelevant.

¶ 40 We are unable to see why the fact that the "plaintiff" is IIROC rather than the individual investors should make any difference. In our view, "ability to pay" considerations are irrelevant to this liability. Mr. Tassone must disgorge the full $103,648 forthwith upon the effective date of this decision.

I. SUMMARY

¶ 41 In summary, Mr. Tassone must:

(a) forthwith on the effective date of this decision, disgorge and pay over to IIROC the amount of $103,648;

(b) be suspended for a period of 12 months following which he must be subject to a 6 month period of close supervision;

(c) pay an amount $75,000 as an administrative penalty, and

(d) pay an amount of $80,000 by way of reimbursement of IIROC's costs, the $155,000 provided for in paragraphs (c) and (d) being payable as to $40,000 within 180 days of the effective date of this decision and the balance of $115,000 being payable in 25 equal monthly instalments commencing on the first day of the month following the payment date of the first $40,000.

Dated at Vancouver, British Columbia as of this 21st day of March, 2019.

Leon Getz

Barbara Fraser

David Pearson