Re Baird

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Colin George Graham Baird

2019 IIROC 19

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

Heard: Thursday, February 21, 2019 in Toronto, Ontario
Decision: June 25, 2019

Hearing Panel:
John A. Campion, Chair; Vanessa Gardiner; and Daniel Iggers
Appearance:
Elissa Sinha, Senior Enforcement Counsel
Safina Lakhani, counsel to Colin George Graham Baird

DECISION ON THE MERITS

REASONS FOR DECISION

Part I – Introduction

¶ 1 The staff of the Investment Industry Regulatory Organization of Canada ("IIROC") and the Respondent, Colin George Graham Baird ("Baird") entered into a Settlement Agreement negotiated pursuant to section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC ("IIROC Rules"). The parties submitted the Settlement Agreement to this Hearing Panel pursuant to section 8215 of the IIROC Rules for approval or rejection. After considering material filed and submissions made by counsel, the Hearing Panel issued an Order accepting the Settlement Agreement. These are Reasons of the Hearing Panel for the approval Order.

¶ 2 There are 29,000 approved persons, including Registered Representatives, under the regulatory umbrella of IIROC. Baird was a Registered Representative beginning in 1998. In September 2012, Baird became a registered representative with MGI Securities Inc. ("MGI"), which became "Industrial Alliance Securities" in 2014.

¶ 3 The Hearing Panel is of the view that the penalties contained in the Settlement Agreement, which forms part of this Decision, are reasonable when compared to similar cases and should stand as a specific and general deterrent for registered representatives investment industry from failing to pay close attention to the client understandings of added risks of investing on margin.

Part II – The Facts

(a) The Client

¶ 4 The Respondent recommended and implemented significant margin use for a client, which Baird admitted was not suitable, having regarding to the fact that she was a retired senior and wholly dependent on her account and the income it generated. We will say more on this issue later.

¶ 5 As set out above, Baird has been registered in the securities industry since approximately 1998. In September 2012, the Respondent became a Registered Representative with MGI Securities Inc. ("MGI"). When that firm was acquired by Industrial Alliance Securities Inc. ("IAS") in April 2014, the Respondents employment and registration was transferred to IAS.

¶ 6 MM became a client of the Respondent's in the mid-2000s when he was registered with another Dealer Member firm.

¶ 7 In October 2012, just after the Respondent transferred to MGI, he completed a New Client Application Form ("NCAF") for MM which reflected the following circumstances, risk and tolerance and objectives:

(a) Born in 1941;

(b) Retired;

(c) Total net worth of $600,000 consisting of $250,000 fixed assets and $350,000 liquid assets;

(d) "Good" investment knowledge;

(e) Risk tolerance of 90% medium and 10% high;

(f) Investment objectives of 80% moderate to higher-risk income-producing securities, 10% growth-oriented securities, and 10% speculative securities;

(g) A handwritten comment stating that MM "will be transferring in some speculative positions which will be liquidated where appropriate – will not be buying speculative positions will also engage in short-term trading"; and

(h) Time horizon of 10 years or more.

¶ 8 Despite the characterization of MM's investment knowledge as "good" in the NCAF signed by MM, she had limited understanding of investment products and strategies. The Respondent had discussed MM's investments with her on numerous occasions over their lengthy relationship and genuinely believed that she had good investment knowledge.

¶ 9 MM trusted the Respondent and relied on his advice. Her objective was to remain financially independent and she was not seeking large gains.

¶ 10 The fixed assets of $250,000 represented MM's home. MM invested all of her liquid assets with the Respondent and her only sources of income were her portfolio, CPP and OAS. She depended on her portfolio to generate the rest of the income she need for living expenses.

¶ 11 The Respondent set up a monthly transfer to MM of $1,500 that was intended to cover her living expenses. However, MM withdrew additional funds such that over the relevant period she withdrew double the anticipated amount from her accounts. This made the portfolio more challenging for the Respondent to manage.

(b) Unsuitable Use of Margin

¶ 12 In October 2012, MM opened a margin account at MGI, which both she and MGI approved. MM had had a margin account with the Respondent before she transferred her portfolio to MGI.

¶ 13 As of January 2013, MM maintained a margin account, an RRIF, and LIF. She subsequently opened a TFSA. Most of MM's money was held in the margin account.

¶ 14 Prior to 2013, the Respondent had recommended that MM use margin to cover the cost of renovations on her home without liquidating assets. The margin use continued and increased between 2013 and 2015 even though the home improvements were completed. During this period, MM's portfolio experienced volatility and, ultimately significant losses.

¶ 15 As of month-end January 2013, the cash balance owing in MM's margin account represented 31% of the value of securities held. At December 2015 month-end, the cash balance owing in MM's margin account was 60% of the value of securities. During this period, the lowest margin usage was in January 2013 with 31% and the peak was 68% in August 2015.

¶ 16 Following is a summary of the average margin used for MM in 2013, 2014 and 2015:

Year	Average Cash Balance	Average Securities	Average Equity	Average Margin Usage
2013	($93,682)	$230,101	$136,419	40%
2014	($150,242)	$288,058	$137,816	52%
2015	($133,345)	$224,426	$91,081	60%

¶ 17 MM had discussed the use of margin with the Respondent, but did not have a complete understanding of how margin worked or the risk involved in using margin. The Respondent was not aware that MM's understanding of margin was incomplete.

(c) Margin Magnified MM's Losses

¶ 18 In June 2015, the market dipped and MM's portfolio declined in value. In July and August 2015 there were margin calls in MM's account and the Respondent sold securities to cover them after obtaining MM's instructions. Thereafter, when the value of MM's holdings declined, the Respondent sold positions in the margin account to avoid a further margin call, also after obtaining MM's instructions.

¶ 19 During the latter half of 2015, MM's margin account balance declined by approximately 24%. There was a general market decline during this time, but the Respondent's use of margin magnified MM's losses. The Respondent recommended that MM sell positions at a loss because her marginable holdings had declined in value. MM accepted the Respondents' advice.

¶ 20 IAS never questioned the Respondent about the suitability of his use of margin for MM. The Respondent only received communications from the IAS credit department when there were margin calls.

¶ 21 Between 2013 and 2015, MM suffered net losses of approximately $40,000 in her margin account and $51,000 in her portfolio, representing approximately 15% of her portfolio and 8.5% of her overall net worth.

¶ 22 For a significant portion of the relevant period, the Respondent used the maximum margin allowable for MM. The Respondent did not adequately "assess" the suitability of his use of margin in MM's account. The Respondent's use of margin for MM between 2013 and 2015 was not suitable for her since she was retired and relied almost exclusively on her portfolio to generate income for living expenses.

(d) The Complaint

¶ 23 IIROC characterized the complaint against Baird as follows:

> By engaging in the conduct described above, the Respondent committed the following contravention of IIROC's Rules:
>
> > Between January 2013 and December 2015, the Respondent failed to ensure that his use of the margin was suitable for his client, contrary to Dealer Member

Rule 1300.1(q).

(e) Terms of Settlement

¶ 24 IIROC and Baird have agreed to the terms of the contravention and the following sanctions and costs (subject to the Hearing Panel's approval):

(a) fine of $22,500;

(b) successfully complete the conduct Practices Handbook Examination within 90 days of acceptance;

(c) close supervision for a period of 12 months from the date of acceptance; and

(d) costs in the amount of $2,500.

(f) Mitigating Factors

¶ 25 Mitigation is an important consideration in assessing the reasonableness of a settlement agreement and the penalties that flow from it. The Hearing Panel weighed the following facts in mitigation:

(a) the securities that the Respondent purchased for MM were consistent with her stated risk tolerance and objectives;

(b) all trades were authorized by MM;

(c) the Respondent has no disciplinary history.

(g) Caveat

¶ 26 The Hearing Panel raised issues during argument about the lack of facts as to why Baird's judgment was flawed regarding the suitability of margin trading for MM. The Hearing Panel was concerned that the bald facts concerning the use and misuse of margin for a retiree were not sufficient to declare the conduct unsuitable in the Settlement Agreement. The use of margin was approved by the client and productive. The losses were small and did not obviously support a finding of a lack of suitability by the client. The Hearing Panel did not wish to send a decision to the industry based on such limited facts. But for the admission made by Baird that margin trading was not suitable, the Hearing Panel might not have approved the settlement in the end. While reluctant to approve the Settlement Agreement because of the facts, the Hearing Panel was persuaded to approve the Settlement Agreement based on the admissions made but notes that the admissions are not backed by strong facts in support.

Part III – Standard of Review and Principles

¶ 27 The Hearing Panel is required to accept the Settlement Agreement unless it were of the view that the penalty provided fell outside a reasonable range of appropriateness,[1] and meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry.[2]

¶ 28 The Hearing Panel is required to consider the public interest but in so doing should reflect that the public interest benefits from the settlement process as reflected in the Settlement Agreement.[3]

¶ 29 The Hearing Panel is also required to consider the proportionality of the proposed penalties to the admitted misconduct, and consider whether the proposed penalties are analogous to misconduct by others in like circumstances based on the self-evident proposition that the appearance of fairness requires that the objective observer perceives a consistency in the application of the rules and disposition in similar

[1] Re *Johnson,* 2012 IIROC 19; *Bugden*, 2017 LN IIROC 30; *Milewski* [1999] I.D.A.C.D. No. 17 at p. 10

[2] Re *Trapeze* 2012 IIROC 25

[3] *Milewski*, *supra*

proceedings.[4]

¶ 30 The agreed penalties must serve as a specific deterrent to Baird and a general deterrent in the industry.[5] General deterrents will follow from an appropriate decision, and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. General deterrents can be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations. Prevention rather than punishment is the primary purpose of the penalty.[6]

¶ 31 In analyzing and applying the above principles, the Hearing Panel is required to develop an understanding of the particular facts of the case, appreciate the circumstances of Baird and the impact on him of the agreed penalties.[7] As set out in *Re Trapeze*, 2012 IIROC:

> "Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment."

Part IV – Analysis

¶ 32 The Hearing Panel will first deal with the facts as they apply to the principles set out above, and will then analyze the reasonableness of the range of penalty.

Facts Applied to the Principles

¶ 33 Except for his admitted lack of judgment regarding the appropriate use of margin at a point in time (as opposed to generally) and the relatively small losses that occurred in MM's account, Baird's advice and judgment was carefully managed in the best interests of his client. The main case against Baird was his admission that: "... he failed to recognize the lack of suitability for margin trading in a period when losses occurred". The Hearing Panel accepts the admission but with the caveats set out above.

¶ 34 From these facts, the Hearing Panel has concluded that Baird was involved in a contravention of the IIROC rules but he has shown that he is aware of the gravity of his conduct and shown appropriate remorse by negotiating the Settlement Agreement.

¶ 35 The penalty is due warning to any other advisor in the industry that strategies with high risk must be carefully analyzed so that public confidence in the judgment of industry representatives is maintained. On the facts of this case, the penalties agreed to set out above reflect both a specific deterrence to him and a general deterrence to the industry. The purpose of any penalty is primarily prevention rather than punishment. It is the Hearing Panel's view that this penalty fits in the golden mean of being neither excessive nor *de minimis*.

Comparative Analysis

¶ 36 The Hearing Panel was presented with a series of cases which dealt with a failure to properly advise. There is no obvious uniform penalty in the cases, as each case is determined on its unique facts. The penalties agreed to in this matter are within the range to be a specific deterrent to Baird and a general deterrent to the

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[4] *Bugden*, 2017 LN IIROC 30; and Re *Donnelly* 2016 IIROC 23, at p. 2

[5] *Bugden*, *supra*; and *Donnelly*, *supra*

[6] *Bergh*, 2011; *Linrock* LN IIROC 41; and *Re Mills*, [2001] I.D.A.C.D. No. 7, at p. 3

[7] *Bugden*, *supra*; and *Donnelly*, *supra*

industry. The penalties in this case have achieved the appropriate balance and are similar to sanctions imposed in other supervision cases which were drawn to our attention.

Conclusion

¶ 37 Having considered all of the principles of reasonableness, maintenance of industry integrity, public interest, proportionality, fairness and specific and general deterrence, the penalties contained in the Settlement Agreement and the Settlement Agreement itself as a whole were approved by the Hearing Panel.

Postscript

¶ 38 At the end of the hearing, the Hearing Panel complimented Ms. Elissa Sinha for her presentation on behalf of IIROC and Ms. Safina Lakhani for her presentation on behalf of Baird. Both counsel presented their respective case in the highest traditions of the Bar. Their professional demeanor added to the efficiency of the hearing.

Dated at Toronto, Ontario this 25 day of June 2019.

John A. Campion

Vanessa Gardiner

Daniel Iggers