Jenkins

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Dean Martin Jenkins

2021 IIROC 05

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

Heard: March 9, 2021 in Toronto, Ontario by videoconference
Decision: March 24, 2021

Hearing Panel:
Emily Cole, Chair, Peter Gribbin and Guenther Kleberg
Appearance:
S Kathryn Andrews, Senior Enforcement Counsel
Mitchell Fournie, for Dean Martin Jenkins
Dean Martin Jenkins (present)

PENALTY DECISION

INTRODUCTION

¶ 1 On December 18, 2020, this Hearing Panel found on an agreed statement of facts that between November 2013 and February 12, 2016, the Respondent Dean Martin Jenkins facilitated $980,000 of off-book syndicated mortgage investments for 11 clients and seven other investors without the knowledge or approval of his Dealer Member contrary to Dealer Member Rules 18.14 and 29.1. The Respondent received $55,450 net compensation for his role in the sale of these investments. See *Re Jenkins* 2020 IIROC 44 referred thereafter as the "Merits Decision".)

¶ 2 This Penalty Hearing was adjourned to facilitate the completion of a related Mutual Fund Dealers Association of Canada ("MFDA") disciplinary proceeding against the Respondent arising from similar misconduct.

¶ 3 The Respondent registered with MFDA on February 22, 2016. In 2016, he continued to recommend, sell, or facilitate the sale of an additional $1,079,350 of the same syndicated mortgage off-book investments that are in issue in this case to an additional 11 clients and five other investors without the knowledge or approval of his MFDA Member. The Respondent received approximately $28,970.17 net compensation for his role in those sales.

¶ 4 The Respondent also admitted in his MFDA proceeding that he misled his MFDA Member about the compensation he received. In addition, the Respondent admitted that he obtained, possessed and, in some instances, used to process transactions, 70 pre-signed account forms in respect of 45 clients.

¶ 5 On January 5, 2021, MFDA released its decision on Sanctions (the "MFDA Sanctions Decision") and ordered the penalty imposed on the Respondent would be:

(i) a permanent prohibition from registration with MFDA

(ii) a fine of $30,000 and

(iii) costs of $2,500.

¶ 6 The MFDA determined that these amounts may be paid in 60 monthly instalments of $541.67 each, without interest, on the first day of each month, with the first instalment commencing July 1, 2021. If any instalment is not paid when due, the unpaid balance of the fine and costs award shall become due and payable unless MFDA agrees otherwise.

¶ 7 We have determined the appropriate sanctions in this case are:

(a) a permanent prohibition from registration with IIROC

(b) disgorgement in the amount of $55,450 and

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

¶ 8 These amounts may be paid in 60 monthly instalments of $965.83 each, without interest, on the first day of each month, with the first instalment commencing after the Respondent completes his schedule of payments to MFDA. If any instalment to MFDA or IIROC is not paid when due, the unpaid balance of the fine and costs award shall become due and payable unless IIROC agrees otherwise.

ANALYSIS

JURISDICTION

¶ 9 The Hearing Panel has the discretion to decide what sanctions are appropriate under Rules 20.33(1) and (2). The Hearing Panel also has the discretion to assess and order the Respondent to pay any investigation and prosecution costs determined to be appropriate and reasonable in the circumstances under Rule 20.49.

GUIDING PRINCIPLES

SERIOUSNESS OF THE MISCONDUCT

¶ 10 Off-book dealings are serious misconduct and a significant breach of the IIROC Dealer Member Rules because they remove the Member's ability to supervise and address issues such as suitability. An Investment Dealers Association Hearing Panel explained:

> When a transaction is done off the books, the Association member loses the ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor.
>
> *Thomson (Re),* [2004] I.D.A.C.D. No. 49, at para. 60

PROTECTION OF THE PUBLIC

¶ 11 One of the overarching purposes of securities regulation in Ontario is to protect the investing public from unfair, improper, or fraudulent practices. IIROC and MFDA are self-regulating organizations that derive their authority from Recognition Orders issued by the respective provincial securities regulators.

¶ 12 IIROC and MFDA fulfill this purpose and protect the investing public by establishing and enforcing rules of business conduct for their members. IIROC Approved Persons and MFDA Dealing Representatives are the face of the securities industry and, as such, it is of utmost important that their conduct be held to a high standard. Where these individuals who are registered to assist investors fail to maintain the high standards expected of them, they must be sanctioned to restore public confidence.

GENERAL DETERRENCE

¶ 13 General deterrence is necessary to remind other members of the industry that the registration that has been granted to them is a privilege which bears rights and responsibilities and to discourage them from engaging in similar misconduct.

¶ 14 The Supreme Court of Canada has held that general deterrence is appropriate and necessary to make orders that are protective and preventive.

> In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, supra, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behavior in others" (paragraph 125).
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> The Oxford English Dictionary (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.
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> *Re Cartaway Resources Corp.,* [2004] 1 S.C.R. 672

¶ 15 Other IIROC Hearing Panels have emphasized the importance of penalties imposed being in line with industry expectations. In *Re Wong*, the Hearing Panel stated:

> To achieve both general and specific deterrence, the penalties imposed must be appropriately unpleasant to the respondent taking into account the respondent's specific misconduct and must also be in line with industry expectations. As stated in *Re Mills*, [2001] IDACD No 7 at p. 3:
>
> > 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 andconcomitantly diminish its deterrent effect. Thus, the responsibility of the [hearing panel] 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.
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> *Re Wong* 2010 IIROC 50 at para 29 citing *Re Mills*, [2001] IDACD No 7

¶ 16 Sanctions need to send a clear message that this type of misconduct and failure to protect investors will not be tolerated. Sanctions also serve to preserve the integrity of most of the members of the securities industry who are outstanding ambassadors.

SPECIFIC DETERRENCE

¶ 17 Specific deterrence is often accomplished by prohibitions that remove an individual from the market. The Respondent has closed his financial services business and secured employment in another field. Our order permanently banning him from registration with IIROC will ensure he does not have an opportunity to repeat

this type of misconduct in the future. Disgorging the financial benefit that the Respondent received from his misconduct will also serve as a specific deterrent.

DISGORGEMENT

¶ 18 The Ontario Securities Commission explained the purpose of the disgorgement remedy in *Re Northern Securities*:

> The disgorgement remedy is designed to (i) ensure that Dealer Members and Approved Persons do not profit or benefit from breaches of IIROC Rules; and (ii) satisfy the goals of specific and general deterrence.
>
> Specific deterrence is achieved as disgorgement requires a wrongdoer to disgorge the profit or benefit obtained from the misconduct. General deterrence is achieved because disgorgement orders send a message that wrongdoers cannot profit or benefit from breaches of IIROC Rules.
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> *Re Northern Securities*, 2014 ONSEC 27 paras 141 and 181

¶ 19 In this case, general and specific deterrence are achieved issuing a permanent ban from registration with IIROC and disgorging the financial benefit that the Respondent received from his misconduct.

INABILITY TO PAY

¶ 20 The Respondent filed certain documents and testified he was unable to pay. He was less than forthcoming as evidenced by his failure to include his Canadian Emergency Response Benefit ("CERB")/Employment Insurance ("EI") income in charts he prepared in October 2020, which he filed with the MFDA and IIROC. On these charts, the Respondent set out his income, expenses, assets, and liabilities. At the hearing, the Respondent referred to and then produced evidence of his CERB/EI income for the 2020 tax year. His lawyer appeared as surprised as we were.

¶ 21 The Respondent invited us to consider the family financial circumstances and his wife's income, but he failed to produce his wife's notices of assessment, any evidence of her income or CERB payments she may have received.

¶ 22 While we acknowledge the Respondent's long standing precarious financial situation, we are more concerned about the financial devastation his clients/investors are suffering because of his misconduct. Eleven of his clients and seven other investors invested a total of $980,000 – at least one investor invested 95% of her portfolio in these syndicated mortgages. The total losses are unknown, but investors lost at least 80% of their investment. In the face of these losses which were the direct result of the Respondent's actions, we cannot allow him to keep the benefits of his misconduct regardless of his financial circumstances.

¶ 23 However, while this type of misconduct would ordinarily warrant a significant fine, we decided not to impose a fine as we were satisfied there was sufficient evidence that the Respondent would be unable to pay a fine in addition to disgorgement.

CONSISTENCY

¶ 24 Fairness and the public interest require that the sanctions imposed be consistent with decisions of other Canadian securities regulators, IIROC and MFDA relating to the same type of misconduct.

¶ 25 Our decision must be consistent with the MFDA decision which considered the same type of misconduct by the same Respondent but with different clients.

¶ 26 Our decision not to impose a fine and to reduce the costs is consistent with the MFDA decision to reduce the fine and the costs it would have otherwise ordered.

CONCLUSION

¶ 27 We make the following order against the Respondent:

(i) a permanent prohibition from registration with IIROC

(ii) disgorgement in the amount of $55,450 and

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

¶ 28 These amounts may be paid in 60 monthly instalments of $965.83 each, without interest, on the first day of each month, with the first instalment commencing after the Respondent completes his schedule of payments to MFDA. If any instalment to MFDA or IIROC is not paid when due, the unpaid balance of the fine and costs award shall become due and payable unless IIROC agrees otherwise

Dated at Toronto, Ontario this 24 day of March 2021.

Emily Cole

Peter Gribbin

Guenther Kleber