Re Odorico

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Mark Odorico

2022 IIROC 06

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

Heard: March 1-2, 2022 in Toronto, Ontario via videoconference
Decision: March 2, 2022
Reasons for Decision: April 7, 2022

Hearing Panel:
Frederick H. Webber, Chair, Emily Jelich
Appearances:
Kathryn Andrews, Senior Enforcement Counsel
Mark Odorico (present)

DECISION ON THE MERITS

INTRODUCTION

A. COMMENCEMENT

¶ 1 This matter was commenced by a Notice of Hearing and Statement of Allegations dated February 12, 2021, a copy of which is attached hereto as Schedule A (the "NOH"). The Respondent, through his counsel at the time, filed a response to the NOH dated April 21, 2021, a copy of which is attached hereto as Schedule B (the "Response").

B. ADJOURNMENTS

¶ 2 The first appearance in this matter was scheduled to take place on April 27, 2021. However, at a pre-hearing conference on April 22, 2021, all parties agreed that the hearing would take place on August 31 and September 1 and 2, 2021.

¶ 3 On August 21, 2021, pursuant to a request by the Respondent, the scheduled hearing was adjourned on consent to November 22, 24 and 25, 2021.

¶ 4 In October 2021, the Respondent requested a second adjournment, supported by a doctor's letter stating that the Respondent was scheduled for surgery on November 22, 2021 and that the "recovery period for this procedure is usually 2 weeks". Accordingly, on October 25, 2021, the Hearing Panel agreed to adjourn the hearing to January 17, 19 and 20, 2022.

¶ 5 On January 13, 2022, the Respondent made a third request for an adjournment, based on health

concerns. This request was supported by a letter dated January 11, 2022 from a different doctor which made general references to the Respondent's health issues which, the Respondent felt, prevented him from participating in the hearing and suggested an accommodation of 4-6 weeks."

¶ 6 At the commencement of the hearing on January 17, 2022, at the request of Respondent's counsel, the Panel decided that the hearing of the Respondent's motion to adjourn would proceed in-camera. The Panel dealt with two issues in the in-camera session. First, Respondent's counsel requested that he be removed from the record because he was unable to prepare due to his inability to obtain instructions from the Respondent. This request was granted by the Panel. Second, the Panel dealt with the adjournment request which was opposed by IIROC counsel. The Panel found that the doctor's letter was vague regarding the Respondent's physical and mental condition, was not supported by an affidavit, was unconnected to the first doctor's letter and provided no prognosis or assurance that the Respondent would recover sufficiently to participate in the hearing any time in the future. However, in order to ensure procedural fairness to the Respondent, the Panel agreed to adjourn the hearing to March 1, 2 and 3, 2022, but the adjournment was made peremptory.

¶ 7 At the hearing on March 1, 2022 only two panel members were present, the Chair and Ms. Jelich. The third panelist, Mr. Bates, had informed IIROC that he would be unable to attend the hearing due to health reasons. Under IIROC Rule 8408 (10), if a member of a hearing panel becomes unable to continue to serve as a panel member for any reason, the hearing could proceed with the remaining members, with the consent of both parties. This was clearly explained to the Respondent and he agreed that the hearing could proceed with the two members of the Hearing Panel and in fact, he participated in the hearing. IIROC counsel similarly agreed to proceed.

¶ 8 At the Respondent's request, a portion of the hearing then proceeded in-camera. The Respondent submitted a request for a further adjournment, based upon ongoing physical and mental health issues and a number of personal issues. This request was supported by a letter from a third doctor, dated January 22, 2022. IIROC counsel vigorously opposed any further adjournment. After hearing submissions by both parties, the Panel decided not to grant the Respondent's adjournment request and ordered that the hearing on the merits should proceed. The reasons for the panel's decision are:

a) the third doctor's letter was just as vague as the prior letter regarding the Respondent's health and prognosis and did not offer any possibility of accommodation that may assist the Respondent in proceeding;

b) the Respondent's submissions consisted of only vague, unsubstantiated old and new complaints of physical and mental problems and additional personal problems;

c) when the Panel granted the previous adjournment request, it stressed that it was granted on a peremptory basis and that no further adjournments would be allowed, unless clearly required due to changed circumstances, which was not the case;

d) arrangements had been made for witnesses to attend and testify at the hearing as currently scheduled and any further delay would impair their ability to testify at a future, undetermined date;

e) the Respondent's clients have a right to have the Respondent's conduct dealt with expeditiously so that justice may be served in their particular cases;

f) the Respondent's right to procedural fairness had been satisfied and the public interest in a timely resolution of this matter now took priority.

¶ 9 The Panel's decision as stated in paragraph 8 is supported by several cases cited by IIROC counsel, in particular *Darrigo (Re)*, 2014 IIROC 48; *Paul Christopher Darrigo (Re)*, 2016 ONSEC 21 (Ontario Securities

Commission). While the facts in *Darrigo* are not identical with this case, they are persuasively similar, in particular regarding the quality of the medical evidence, the efforts to accommodate the Respondent by granting previous adjournment requests, the interests of the Respondent's clients and the ability of witnesses to participate. Furthermore, this Panel's conclusion regarding the applicable law on procedural fairness is supported by *Darrigo* at paragraphs 9-12, in particular:

> " …the law on procedural fairness requires that a person must know the case being made against him and be given an opportunity to answer it before the decision maker….the scope and extent of the right to procedural fairness is flexible depending on the circumstances of the particular case and that the rights of the individual must be balanced against the effective and expeditious performance of public duties….the public has the right to expect that IIROC would carry out its public protection mandate in a timely manner so that, if the allegations were proven, the Respondent would be penalized appropriately and the public would be protected, to the extent possible, against such conduct in the future. In addition, the Respondent's clients have a right to expect that the Respondent's conduct would be dealt with expeditiously so that they could feel that justice was served in their particular case."

¶ 10 The decision of the panel in *Darrigo* was confirmed by the Ontario Securities Commission.

¶ 11 It is this Panel's decision that a proper balancing of the individual rights of the Respondent and the public interest in an expeditious regulatory process requires that no further adjournments of this hearing are merited.

¶ 12 The public hearing on the merits then proceeded. The Respondent stated that he would not participate, but would listen to the hearing. In fact, he did participate in the hearing.

C. STATEMENT OF ALLEGATIONS

¶ 13 IIROC made the following allegations against the Respondent:

i. Between March 2014 and October 2018, the Respondent misappropriated funds from clients RM and JR/MR, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016).

ii. Between January 2016 and February 2019, the Respondent effected unauthorized trades in client RM's account, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016).

iii. In May 2020, the Respondent failed to co-operate with Enforcement Staff who were conducting an investigation, contrary to Section 8104 of the Consolidated Rules.

D. STANDARD OF PROOF

¶ 14 The standard of proof in cases such as this, was established in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 SCR 41 and has been followed consistently since then. IIROC must prove the allegations on the balance of probabilities based on clear, convincing and cogent evidence. That is the standard applied by this Panel.

E. MISAPPROPRIATION OF CLIENT RM'S FUNDS

¶ 15 Client RM testified by videoconference, accompanied by her lawyer, Hugh MacKenzie. Her testimony established that she had only a grade 8 education and that she was divorced and unemployed when she met the Respondent when he purchased her house in 2013. At the Respondent's request, RM took back a mortgage for $500,000 (the "VTB") which was ultimately repaid. Subsequent to the house purchase, RM became a client of the Respondent at CIBC World Markets ("CIBCWM"). She stated that she knew nothing about investing, but she trusted him and needed to earn greater returns than she had been receiving.

¶ 16 RM testified that in the spring of 2014, the Respondent suggested that RM give him additional funds that he would invest in his name on her behalf. He told her that he could make more money for her than she could in the CIBCWM investment accounts held with him.

¶ 17 On various dates between March 2014 and October 2018, RM provided the Respondent with $449,000 in total, all based on his assurances that she was making money from her investments. Each of the advances was effected by bank draft and was evidenced by a promissory note signed by the Respondent. RM thought that her funds were invested in the Respondent's name at CIBCWM, but the Respondent never told her where the funds were invested and never showed her any documents to substantiate that she was making money. RM stated that she never opened CIBCWM account statements, but relied on the Respondent's verbal assurances that she was making money. She only discovered she was losing money when a friend of hers opened her CIBCWM statements and advised her so.

¶ 18 The Respondent testified that RM supplied the funds to the Respondent as a loan so that he could effect repairs on the house he had bought from her to correct defects RM had concealed from the Respondent. RM denied that the funds were advanced as a loan so that the Respondent could do repairs. On March 13, 2019, the Respondent provided a summary of the VTB which RM signed without reading. Upon noticing that it contained a statement that the funds provided to the Respondent were a loan, RM stated that she realized that the Respondent was lying to her and she immediately ripped up the statement.

¶ 19 RM testified that other than one re-payment of $9,000, when RM complained to him about her investments, the Respondent has not returned RM's funds. The Respondent's Response stated that "The Respondent paid RM interest as high as $4,000 to $5,000 per month in cash for about 4-5 years…[but] admits he still owes a balance to RM". The Respondent also testified that he made interest payments in cash to RM from RM's account.

¶ 20 Essentially the evidence of RM and that of the Respondent conflicted on the issue of whether the $449,000 advanced by RM to the Respondent was to be invested by the Respondent for RM, or was a loan from RM to the Respondent to enable him to effect repairs on the house he had purchased from her.

¶ 21 Resolution of this conflict in testimony hinges on the credibility of the two witnesses. The proper approach to determining the credibility of witnesses whose testimony is in conflict, is stated in *Faryna v. Chorney*, [1952] 2 DLR 354 as follows:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced, and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

¶ 22 The Panel found RM's testimony to be simple, straight forward and sincere. RM's credibility is supported by the following. The fact that the money was given to the Respondent in his personal name is explained by RM's inexperience and complete trust in the Respondent. Taking back promissory notes might have indicated that the funds were a loan, but she testified that the promissory notes were simply to provide her with evidence of the amounts advanced by her for investment and were not evidence of a loan. The Respondent did not cross-examine RM on her testimony and therefore RM's testimony remains unimpeached.

¶ 23 On the other hand, the Respondent's testimony was rambling, vague, self-pitying and lacking anything to substantiate his claim regarding repairs or payment of interest. The Respondent failed to return to the

hearing to allow for cross-examination on his testimony.

¶ 24 The following factors also cast doubt on the credibility of the Respondent's testimony on the issue of repairs:

- the Respondent provided no evidence that any repairs were done to the house. This could have been done by providing testimony from repair people, repair estimates, invoices for repairs and corresponding payments.
- the Respondent testified that he had a house inspection done prior to closing the purchase of RM's house which revealed numerous defect which, he stated, RM agreed to fix prior to closing. However, he did not do another, pre-closing, inspection and did not obtain an undertaking from RM that the defects had been fixed, both steps which would normally be expected, especially from a financial advisor familiar with documenting financial transactions.
- In his Response, the Respondent stated that, at some point after he repaid the VTB, i.e. long after closing, he "found issues with the house which were not disclosed to him at the time of purchase" and to induce the Respondent not to sue RM for negligent misrepresentation, RM agreed to refund to the Respondent the VTB repayments so that the Respondent could fix the defects "which RM had concealed." His testimony that he had a pre-closing inspection done which revealed the defects, is in conflict with the statements in his Response to the effect that RM had concealed the defects from him.
- On the issue of interest payments to RM, the Respondent provided no evidence of the cash payments or of the amount outstanding. The Panel found that the Respondent's testimony strained credibility, that an experienced investment advisor who dealt with financial transaction daily, would make cash payments on a loan without getting receipts in writing and without knowing the amount remaining unpaid. In addition, there was no evidence, documentary or otherwise of such payments coming out of RM accounts at CIBCWM.

¶ 25 Based on both the demeanour of the witnesses and the factors outlined in paragraphs 20-22, the Panel found as a fact that the $449,000 given by RM to the Respondent was to be invested by the Respondent for RM and was not a loan to him. In addition, the Panel found as a fact that the $449,000 has not been returned to RM.

¶ 26 The last issue is whether the conduct of the Respondent in regard to the $449,000 constitutes a "misappropriation" of the funds, contrary to the Rules as alleged by IIROC. IIROC counsel referred the Panel to *Dettelbach (Re)*, 2011 LNIIROC 6, where the panel adopted the statement from the IIROC Sanction Guidelines at the time related to Rule 29.1 as follows:

> Misappropriation of funds is related to theft. Theft is the taking or converting of something that belongs to another person without the other person's knowledge or consent…. the dishonesty inherent in the offence lies in the intentional and unmistaken application of funds to an improper purpose.

¶ 27 The panel in *Dettelbach* found misappropriation had occurred where the respondent, without benefitting personally, created trade tickets without the knowledge or consent of the clients on either end of the transactions and without any authorization to do so. *Dettelbach* also cited *Silcoff (Re)*, [2004] I.D.A.C.D. No. 24, *Richard (Re)*, [2004] I.D.A.C.D. No. 9, and *Tang (Re)*, [2003] I.D.A.C.D. No. 25 where misappropriation was found in other circumstances. Of particular relevance in our case was *Dass (Re)*, [2009] I.D.A.C.D. No. 22 in which the panel found that the following constituted misappropriation: the respondent took funds payable to the respondent's personal company for his own purposes which his clients "clearly intend-ed…to be used to enable them to participate in a private placement…." The Panel also reviewed *Mark Allen Dennis (Re)*, 2011 IIROC 35 whose facts are similar to our case. These cases support this Panel's decision that the conduct of the

Respondent (taking money that was to be invested for RM and using it for other purposes, even though where it ended up was not disclosed) constituted misappropriation of RM's funds, that misappropriation is conduct in contravention of Rules 29.1 and 1400, which require honest dealing and that the second allegation had been proven in relation to RM.

F. MISAPPROPRIATION OF FUNDS FROM CLIENTS JR/MR

¶ 28 JR and MR (the "Rs") are a married couple who had been the Respondent's clients for some time. In September 2018, the Respondent called the Rs to recommend an opportunity to purchase a security that would generate a return of 10% on an investment of $150,000 within thirty days. On September 26, 2018, the Rs gave the Respondent a bank draft which, the Rs stated, the Respondent required be payable to himself for $150,000. The Rs agreed as they said they trusted and relied on the Respondent. The Respondent never told the Rs where the money was invested.

¶ 29 The Respondent told the Rs that the investment was guaranteed and he provided them with a postdated cheque from himself in the amount of $165,000 dated October 26, 2018. Shortly after providing them with this cheque, the Respondent told the Rs not to cash the cheque as he did not have sufficient funds to cover it. The Respondent asked the Rs not to report this matter at the time and they agreed, feeling that this was the only way to obtain the return of their funds.

¶ 30 The Respondent testified that the $150,000 was a loan from the Rs to him. Both JR and MR denied the money was a loan to the Respondent, but was for the investment described above.

¶ 31 The Rs later complained when their funds of $150,000 were not returned to them by the Respondent.

¶ 32 Similar to the situation involving client RM, there is a conflict between the testimony of the Respondent and the Rs, and the Panel resolved this conflict in the same manner. The testimony of both JR and MR was straight-forward and believable. The Panel characterized the testimony of the Respondent in the same way as his testimony regarding RM. The lack of credibility of the Respondent's testimony is supported by the following: he testified that he promised to repay the Rs as soon as he refinanced his property but was prevented from doing so because of the *lis pendens* put on the property. However, the *lis pendens* was not registered until August 29, 2019, almost a year after the funds were to be repaid to the Rs.

¶ 33 Furthermore, the Respondent did not cross-examine either JR or MR whose testimony therefore remained unimpeached; also after testifying on March 2, 2022, the hearing took a short recess after which the Respondent did not return and therefore IIROC counsel could not cross-examine him.

¶ 34 Based on the evidence of the witnesses, the Panel decided that the funds advanced by the Rs were for investment purposes and not a loan to the Respondent. Also, the funds advanced by the Rs have not been returned to them.

¶ 35 Based on the same case law, which the Panel applied regarding RM's investments, the Panel concluded that the second allegation in regard to JR and MR has been proven.

G. UNAUTHORIZED TRADING IN RM ACCOUNTS

¶ 36 Between January 2016 and February 2019, there were 43 trades effected in RM's margin account and two trades in her TFSA account. In his Response, the Respondent confirmed the trades but disputed the second allegation, stating that he met regularly with RM to explain the trades and that all the trades were authorized by RM.

¶ 37 At the hearing, RM's uncontroverted evidence was that the Respondent did not contact RM in advance to discuss trades in her account before they were made. The Respondent did not cross-examine RM on her testimony and provided no evidence, verbal or documentary, that he discussed these trades in advance with RM. Furthermore, there was no evidence that the Respondent had any discretionary trading authority over

these accounts. It is the Panel's conclusion, based on the evidence provided, that the Respondent did not obtain RM's authorization to make the trades in her accounts.

¶ 38 IIROC counsel provided the Panel with several cases confirming that failure to get advance authorization from the client prior to effecting trades in a non-discretionary trading account constitutes misconduct under the former and current Rules. These cases are *Armstrong (Re)*, 2015 IIROC 34, *Li (Re)*, 2016 IIROC 34, *Harding (Re)*, 2011 IIROC 65 and *Bodnarchuk (Re)*, 2018 IIROC 22.

¶ 39 Based on the factual evidence and the case law cited, this Panel's decision is that the second allegation has been proven by IIROC.

H. FAILURE TO COOPERATE WITH IIROC INVESTIGATION

¶ 40 The uncontroverted evidence of the IIROC investigator establishes that the Respondent was informed of IIROC's investigation in January 2020. IIROC sent the Respondent a number of demands to attend an interview in connection with its investigation. Written interview questions were sent to the Respondent on April 3, 2020, and he was asked to respond by May 22, 2020. The Respondent either did not reply to these demands or requested additional time based on alleged medical problems, and has not attended an interview with IIROC, or answered the questions as required. In addition, in his Response, the Respondent "admits that he did not attend an interview with IIROC in April 2020 [because] he was distracted with the pandemic and other pressing legal and financial issues and did not have the capacity to respond." The Panel has concluded that, as a factual matter, the Respondent has not cooperated with the IIROC investigation.

¶ 41 There are numerous cases confirming the obligation of IIROC registrants to cooperate with IIROC investigations, including *Nelson (Re)*, 2019 IIROC 22 at paragraphs 36-38, cited by IIROC counsel. It is the Panel's decision that the third allegation, failure to cooperate under Rule 8104, has been proven by IIROC.

Dated at Toronto, Ontario this 7 day of April 2022.

Frederick H. Webber

Emily Jelich

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