Lotz (Re)

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

MARK PIERRE LOTZ

[2009] IIROC No. 1

Investment Dealers Association of Canada
Appeal Panel

Heard: December 4, 2008.
Panel Decision: January 5, 2009
(25 paras.)

Appeal Panel:
The Honourable Thomas Braidwood QC, Chair
Mr. Daniel Leclair, Panel Member
Mr. Stanford Riley, CM, Panel Member

Appearances:
Robert W. Cooper, for the Investment Inventory Regularly Organization of Canada
Tom Manson & Bronson Toy, for Mark Pierre Lotz

DECISION

1. On or about February 13, 2008, the Investment Industry Regulatory Organization of Canada, formerly the Investment Dealers Association of Canada (the "Association"), issued an Amended Notice of Hearing (the "Notice of Hearing") directed to the Appellant, Mark Pierre Lotz, a Member, alleging that the Appellant had committed the following contraventions:

    a. COUNT 1

    In or around April 2002, the Respondent completed and then submitted, or caused to be submitted to the Association a Form 1-U-2000 Uniform Application for Registration/Approval (the "2002 Registration Form") that failed to disclose an outside business activity, contrary to Association By-law 29.1 ("Count 1"); and

    b. COUNT 2

    Between July 7, 2006 and November 2006, the Respondent failed to disclose to Golden Capital Securities that in July 2006 he had become the Chief Financial Officer of a publicly traded company, contrary to Association Policy 8 and/or By-law 29.1 ("Count 2").

2. In February 2008, counsel for the Appellant and the Association engaged in discussions which culminated in an Agreed Statement of Facts dated February 13, 2008.

3. On February 20, 2008, counsel for the Appellant and counsel for the Association appeared before a hearing panel, at which time, pursuant to those admissions, Mr. Lotz admitted the validity of the two Counts alleged against him and thereafter counsel made submissions as to the appropriate penalty that the panel should impose.

4. On September 15, 2008, Mr. Lotz lodged an appeal against the decision of the panel dated March 31, 2008. The appeal came on before us on December 4, 2008.

5. The gravamen of the submission before us was that the panel made findings of fact that were outside the scope of the admissions and indeed contrary to the admissions made. Consequently, the Appellant submitted that Mr. Lotz's reputation had been unduly damaged by these unfounded inferences and the penalty is unreasonably high. We agree with this submission.

6. Paragraph 18 of the Factum of the Appellant reads as follows:

> The Parties appeared before the Panel on February 20, 2008. During the course of the hearing, a member of the Panel asked counsel for the Association why the Association felt that the violative conduct was not deliberate. Counsel replied that the Agreed Facts stated that the respondent "ought to have known, and that's what the (Appellant) has indicated occurred and that's what the Association accepts" (AB, Tab 14, p.32). There was further discussion and the Association counsel referred the issue to counsel for the Appellant who stated "… we do have an agreement of facts, and my friend and I don't want to go beyond obviously it was a considered conclusion of the Association that the mistake that my client – the omission that my client made was not a knowing mistake or an intentional one, but an inadvertent one or a careless one or a negligent one." (AB, Tab 14, p.34). Shortly thereafter another member of the Panel asked "To clarify, Mr. Herlin, on the point of was the contravention intentional or inadvertent, the Association's position is simply what is in the ASF?" Counsel for the Association replied "Correct. What he admitted to. That he ought to have known. So I would not characterize that as intentional." (AB, Tab 14, p.36). Later in the hearing, counsel for the Appellant, in referring to the blameworthiness": criteria for sanctions stated (AB, Tab 14, p.76):
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> > "The Guidelines make a distinction between intentional or deceptive conduct and inadvertent, careless, or negligent. This is a case that my friend concedes that the omissions were not knowing omission, but inadvertent or negligent ones."
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> Later, the Chair of the Panel stated: "You say this is a negligence case." And counsel for the Appellant replied: "My friend concedes that point." (AB, Tab 14, p.88). The characterization that the matter before the Panel was a "negligence case" and that the omissions were not knowing, but inadvertent or negligent ones was not disputed by counsel for the Association.

7. Likewise, the Factum of the Association, paragraph 5 reads as follows:

> Prior to the Hearing, counsel agreed that the Appellant's conduct would be characterized as negligent omissions and not ones arising from a knowing or intentional failure to comply with the Association's Rules, Policies and By-laws.

8. We do not see there is any necessity to repeat the facts and circumstances carefully set out by the panel.

9. We simply say briefly that in February 2001, the Applicant became the Acting Chief Financial Officer of Golden Capital Securities. On or about April 16, 2002, the Respondent executed a Form 1-U-200 Uniform Application for Registry/Approval (the "Application for Registration") that had been prepared by the Registration Department of Golden Capital Securities in order to obtain the Association's approval to be designated as the Chief Financial Officer of Golden Capital Securities on a permanent basis.

10. Question 8 of the Application for Registration required the Respondent to, amongst other things, fully disclose all of his business activities including any periods of self employment during the ten years prior to the date that he completed the Application for Registration.

11. In response to question 8 of the Application for Registration, the Respondent among other things indicated that between June 1998 and December 2000 he had operated the accounting practice, however question 20(b) of the Application for Registration asked:

> Are you engaged in any other business or have any other employment for gain except your occupation with the firm which you are now applying?
>
> If so, attach full details including the full name and address of the business and nature of the business, your title or position, and the amount of time you devote to the business.

The Respondent answered "No" to question 20(b) of the Application for Registration.

12. At all material times, Golden Capital Securities knew that the Responded operated the accounting practice. It was not aware of the identity of most of its clients, nor did it inquire.

13. With reference to Count 2, the agreed State of Facts discloses the following:

> 23. UraniumCore Company (UraniumCore) was incorporated in the State of Delaware on or about December 7, 1992. UraniumCore's registered office is in the State of Nevada. The shares of UraniumCore are traded through the facilities of the Over-the-Counter bulletin Board. UraniumCore is in the uranium mining industry.
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> 24. On July 3, 2006 the Board of Directors of UraniumCore elected the Respondent to serve as the CFO of UraniumCore.
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> 25. Pursuant to Association Policy 8(A), the Respondent was required to report to Golden Capital Securities within two business days, the change to the information contained in his Application for Registration.
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> 26. In turn, pursuant to Association Policy 8(B), golden Capital Securities was required to report to the Association the change to the information contained in the Respondent's Application for Registration.
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> 27. At all material times the Respondent did not inform Golden Capital Securities that he had become the CFO of UraniumCore.
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> 28. On November 20, 2006 Association staff first learned that the Respondent had become the CFO of UraniumCore.
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> …
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> 33. The Respondent admits that he ought to have disclosed to Golden Capital Securities that in July 2006 he had become the Chief financial Officer of UraniumCore and that he ought to have known that this disclosure was required.…

14. The Panel was justifiably concerned with the seriousness of the omission to properly disclose the information required to be set out under Oath in the forms. They wrote in part: "In the view of the Panel this is a very significant omission, especially in view of the "caution" that appears in page 9 of the Application for Registration form …" The importance of an Applicant making these disclosures to the investment industry and the public cannot be overemphasized but here we are of the opinion, in view of the admissions by counsel, that the involvement of this Appellant and the seriousness of his conduct was overstated by the panel. After careful investigation and thoughtful negotiation between the lawyers, counsel agreed on a Statement of Facts and in that agreement the conduct of Mr. Lotz was characterized as a negligent omission and not one arising from a knowing or intentional failure to comply with the rules.

15. We are of the opinion that the following findings made by the Panel are against the evidence, namely:

> 13. The Panel does not accept that the Respondent was not aware of the false and misleading answers he gave to question 8 and question 20(b) of the application for Registration. Alternatively, his false answers show a callous disregard for the Association Policies and By-laws.
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> …
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> 33. … His failure to ensure the Application Form was correct resulted in a serious misrepresentation, which is at best gross negligence, which does not absolve the Respondent from responsibility.
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> 34. … Again the Respondent's conduct appears to indicate a callous disregard for the Association's Rules.

16. We also note in paragraph 31 the Panel states: "… his counsel submits he did so negligently."

17. This is erroneous; it was not a submission, it was an agreement between counsel.

18. Cases were cited to us indicating that a tribunal need not agree with the submissions of prosecuting counsel even when it favours his Respondent. This is undoubtedly so, but what we have before us is not submissions but an agreement. This is not a case where witnesses were called and their evidence should then should be characterized by the submissions of counsel and later by the panel. Rather, here, after due consideration and investigation, an admission of negligence was reached.

19. The panel registered the following order:

    a. With respect to Count 1, the Respondent pay a fine of $15,000.00.

    b. With respect to Count 2, the Respondent pay a fine of $10,000.00.

    c. That within six months of these Reasons, the Respondent write and pass the examination based on the Partners, Directors and Officers Course administered by the Canadian Securities Institute.

    d. With reference to costs, costs were set in the sum of $10,000.00.

20. We have reviewed the guidelines, the submissions of counsel, and considered carefully the reasons given by the panel now under appeal.

21. Counsel for the Association submitted before the panel the following as the appropriate penalty:

    a. Count 1 should be a fine of $5,000.00

    b. With respect to Count 2, a fine of $15,000.00

    c. That the Respondent successfully complete the course above mentioned and that, further, costs in the sum of $5,000.00 would be appropriate.

22. Counsel for the Appellant continued to urge a reprimand and a nominal fine.

23. We are of the opinion that the position taken by the Association's counsel before the panel is the correct one, and that is the verdict that we desire to render. Namely:

    a. With respect to Count 1, a fine of $5,000.00.

    b. With respect to Count 2, a fine of $15,000.00.

    c. That within six months of these Reasons, the Respondent write and pass the examination based on the Partners, Directors and Officers Course administered by the Canadian Securities Institute.

24. With reference to costs of the proceedings below, we are of the opinion that the amount of $5,000.00 is appropriate.

25. With reference to costs of these proceedings, we are of the opinion that there should be no cost to either party.

The Honourable Thomas Braidwood, QC
Daniel Leclair
Stanford Riley, CM