Re Derksen

IN THE MATTER OF:

The Mutual Fund Dealers Association of Canada

and

Ken David Derksen

2023 CIRO 45

Canadian Investment Regulatory Organization
Hearing Panel (British Columbia District)

Heard: December 7, 2022 by electronic hearing in Vancouver British Columbia
Decision: December 7, 2022
Reasons for Decision: October 25, 2023

Hearing Panel:
Joseph A. Bernardo, Chair
Barbara Fraser, Industry Representative
Susan E. Monk, Industry Representative
Appearances:
Justin Dunphy, Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Molly McCarthy, Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Ken David Derksen, Respondent, not in attendance

REASONS FOR DECISION

I. INTRODUCTION

¶ 1 On January 1, 2023, the Mutual Fund Dealers Association of Canada ("MFDA") and the Investment Industry Regulatory Organization of Canada ("IIROC") amalgamated to form the New Self-Regulatory Organization of Canada ("New SRO"). Under New SRO's transitional provisions, the conduct addressed by these reasons remains subject to the Rules and By-laws of the MFDA that were in force at the time the conduct occurred.

II. OVERVIEW

¶ 2 Ken David Derksen ("Respondent") was registered as a dealing representative with Investors Group Financial Services Inc., a Member of the MFDA.

¶ 3 On May 6, 2022, the staff of the MFDA ("Staff") issued a Notice of Hearing alleging that:

a) Between November 2016 and May 13, 2020, the Respondent misappropriated or otherwise failed to account for client monies, contrary to MFDA Rules 2.1.1.

b) Between November 2016 and May 13, 2020, the Respondent engaged in personal financial dealings with a client which gave rise to a conflict or potential conflict of interest that he failed to disclose to the Member or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the policies and procedures of the Member and MFDA Rules 2.1.4 (as it was prior to June 30,

2021), 2.1.1, 2.5.1 and 1.1.2.

c) Commencing in June 2020, the Respondent failed to cooperate with an investigation by MFDA Staff into his conduct, contrary to section 22.1 of MFDA By-Law No. 1.

¶ 4 An electronic disciplinary hearing concerning these allegations was held on December 7, 2022. The Respondent declined to attend. At the conclusion of the hearing, the Hearing Panel ordered sanctions against the Respondent. The Order is attached as Appendix "A".

¶ 5 These are the reasons for the Hearing Panel's decision.

III. PROCEDURAL MATTERS

Notice

¶ 6 The first appearance in this matter took place on July 4, 2022. The Respondent did not attend or otherwise participate in the proceeding.

¶ 7 Rule 7(2)(1) of the MFDA's Rules of Procedure prescribes the content requirements for Notices of Hearing. Among other things, these must disclose:

a) the particulars of Staff's case;

b) that an adverse finding could result in penalties being ordered against the respondent; and

c) that a failure to file a Reply to the allegations or attend the hearing could result in penalties being ordered without further notice and in the respondent's absence.

¶ 8 The Notice of Hearing in this case meets the content requirements of Rule 7(2)(1).

¶ 9 Rule 4(2)(1) of the MFDA's Rules of Procedure identifies the methods by which a Notice of Hearing may be served on a respondent. Personal service is one of them.

¶ 10 At the July 4, 2022 first appearance, Staff tendered into evidence a May 26, 2022 affidavit sworn by a process server in which he testified that he had:

a) attended the Respondent's residence that day;

b) spoken with the Respondent, who acknowledged his identity; and

c) personally served the Respondent with copies of:

i) a letter from Staff;

ii) the Notice of Hearing;

iii) the MFDA's Rules of Procedure; and

iv) the MFDA's Guide to the Disciplinary Hearing Process.

¶ 11 Staff's letter advised the Respondent that:

a) the MFDA had commenced disciplinary proceedings against him;

b) the first appearance in his case was scheduled for 10 a.m. on July 4, 2022;

c) the purpose of the first appearance would be to schedule a date for the hearing of the allegations in the Notice of Hearing;

d) he could attend the first appearance by conference call; and

e) failing to file a written Reply to the Notice of Hearing or to participate in the first appearance could result in the hearing taking place in his absence and penalties being imposed on the Respondent without any further notice to him.

¶ 12 The process server's May 26, 2022 affidavit established that Rule 4(2)(1) had been satisfied in this case. It also left no doubt that the Respondent had been given clear advance notice of the potential adverse consequences of failing to participate in the hearing.

¶ 13 Therefore, at the conclusion of the first appearance the Panel ordered that a hearing on the merits of the allegations take place by videoconference on December 7, 2022.

¶ 14 The Respondent received notice of this development. At the hearing, Staff tendered into evidence a July 15, 2022 affidavit sworn by the process server in which he testified that he had attended the Respondent's residence that day and personally served him with copies of:

a) the Panel's July 4, 2022 order;

b) a letter from Staff offering to make document disclosure; and

c) the MFDA's news release notifying the public of the hearing.

IV. HEARING IN RESPONDENT'S ABSENCE

¶ 15 When a respondent has been properly served with a Notice of Hearing but fails to file a Reply or attend the hearing, Rules 8.4(1) and 7(3) of the MFDA's Rules of Procedure give a hearing panel the discretion to accept the uncontested allegations as proved and to order sanctions, all without further notice to the respondent or any need to receive Staff's evidence. While this is a significant departure from usual hearing practices, it is nonetheless consistent with procedural fairness.

¶ 16 A respondent's procedural rights in a MFDA hearing must be understood in the context of the public interest, which requires the timely and efficient resolution of outstanding allegations of misconduct. The discretion granted by Rules 8.4(1) and 7(3) is limited: a hearing panel may accept as proved only the allegations particularized in the Notice of Hearing, that is, only those factual and legal assertions of which the respondent has been given explicit prior notice and chosen not to defend. In such circumstances, it is neither unreasonable nor unfair to leave the question of whether or not Staff should be required to tender evidence to the hearing panel's discretion.

¶ 17 Moreover, nothing in Rules 8.4(1) or 7(3) changes the onus on Staff to establish its case on the civil standard of a balance of probabilities. To accept a violation as proved, a hearing panel must always be satisfied that the facts, whether deemed or established on evidence, *prima facie* establish the legal elements of the alleged misconduct.

¶ 18 In the event, at the December 7, 2022 hearing on the merits Staff elected to supplement the deeming provisions of Rules 8.4(1) or 7(3) by tendering into evidence a December 5, 2022 affidavit sworn by the principal investigator in the case, who also testified in person to affirm the material particulars of her affidavit testimony.

¶ 19 Evidence adduced in a respondent's absence must still be assessed for relevance and probative value. As well, if the evidence in some respect appears to materially change the character of Staff's case from what is alleged in the Notice of Hearing, a hearing panel must consider whether receiving that evidence into the record without notice to the respondent would be unfair.

¶ 20 Nothing in the investigator's December 5, 2022 affidavit or her live testimony introduces any material uncertainties about the allegations in the Notice of Hearing or otherwise changes the character of Staff's case.

V. MATERIAL FACTS

¶ 21 The Notice of Hearing and the investigator's testimony establish the following facts.

¶ 22 In August 2007, the Respondent became registered and commenced carrying on business as a dealing representative with the Member in Victoria, British Columbia.

¶ 23 In April 2015, JB opened four mutual fund accounts ("Accounts") with the Member. At all material times the Respondent was responsible for servicing the Accounts.

¶ 24 In 2016, JB commenced an extended period of travel and living abroad that lasted until 2019.

¶ 25 To cover his expenses while outside of Canada, prior to his departure JB arranged to have the Respondent periodically deposit funds from his Accounts into JB's bank account ("Bank Account"). This would allow JB to use his bank card to withdraw funds as required while outside of Canada.

¶ 26 In the course of setting up this arrangement, JB provided the Respondent with the confidential information required to carry out online transactions from the Bank Account. JB did this because, for reasons that remain unknown, he believed the Respondent was his personal banker and that providing this kind of information to a mutual fund dealing representative was normal practice. JB did not make use of online banking services himself because he did not know how.

¶ 27 The Member's policies and procedures strictly prohibited its Approved Persons from engaging in personal financial dealings with clients, stating that:

> Consultants must put the interest of clients ahead of their own. You are bound not only to carry out client instructions, but also have a duty to act in the client's best interest and are not permitted to allow personal interest to conflict with the interest of the client.
>
> Consultants must not engage in any personal dealings of any kind with clients [.]

¶ 28 Between November 2016 and February 2019, the Respondent redeemed approximately $484,900 in mutual funds in the Accounts and deposited the proceeds into the Bank Account.

¶ 29 During the same period, the Respondent also moved money belonging to JB out of the Bank Account and placed it under his personal control. This was done without JB's consent or knowledge.

a) The Respondent executed 70 online banking transactions that transferred a total of $155,800 from the Bank Account to the Respondent's own email address.

b) The Respondent caused $137,000 of this money to be deposited into bank accounts held by him.

c) It is not known where the Respondent directed the remaining $18,800.

¶ 30 After taking personal control over the $155,800, the Respondent disposed of the funds as follows:

a) Using wire transfers, the Respondent:

ii) forwarded $35,049.43 of the funds to JB or other persons on his behalf; and

iii) returned $5,800 back to the Bank Account.

b) The Respondent used the remaining $114,950.57 for his own personal benefit or has otherwise failed to account for it.

¶ 31 While he was abroad, JB did not receive any financial statements and was unaware of the balances in his Accounts. JB also had significant health issues that interfered with his ability to inform himself of his financial situation. From approximately January 2017 to November 2017, JB was rendered legally blind and unable to view mobile phone or computer screens. Then, from February 2018 to June 2018, liver and kidney ailments caused JB to be hospitalized in Thailand.

¶ 32 Following his hospitalization JB returned to Canada. On July 31, 2019, he emailed the Respondent to ask about the value of his holdings in the Accounts. By return email the same day, the Respondent told JB that the total value of the Accounts was "closer to $450,000". This was false. JB's account statement for the period of July 1 to September 30, 2019 states that the total value of his portfolio at that time was approximately $326,000.

¶ 33 In March 2020, JB met with the Respondent to request updated account statements and to discuss the value of his portfolio. At that meeting, the Respondent disclosed to JB that the value of his holdings was significantly lower than what he had previously told JB.

¶ 34 On April 6, 2020, JB filed a complaint with the Member alleging that the Respondent had:

a) mismanaged the Accounts;

b) lied to him about the value of his portfolio;

c) repeatedly evaded JB's requests for an accounting; and

d) twice attended JB's residence begging him to not say anything to the Member and offering to repay JB privately out of his own funds.

¶ 35 The Member commenced an internal investigation. On April 8, 2020, representatives of the Member spoke to the Respondent over the telephone. Among other things, the Respondent:

a) Acknowledged being able to conduct online banking from the Bank Account.

b) Acknowledged that he had wire transferred funds to JB.

c) Claimed that the Bank Account's online banking facility included an option to send money by wire transfer.

d) Denied accessing the Bank Account for his own personal use.

¶ 36 On April 13, 2020, the Member reported JB's complaint to the MFDA.

¶ 37 On May 13, 2020, the Member terminated the Respondent for having misappropriated JB's monies and offering to personally reimburse him. The Member reported this development to the MFDA on May 20, 2020.

¶ 38 The MFDA commenced its own investigation, in the course of which:

a) On June 22, July 8, and July 13, 2020, Staff used secured email to send letters to the Respondent requesting information. He did not respond to any of them. The June 22 and July 8, 2020 emails generated receipts that confirmed they had been read by the Respondent.

b) On November 4, 2020, a process server personally served the Respondent with a letter from Staff reiterating its request for information. He did not respond.

c) On November 30, 2020, Staff used secure email to send the Respondent a letter that, in addition to repeating the unanswered information request, informed him that he was required to attend an interview on December 17, 2020. The Respondent did not reply.

d) On December 3, 2020, Staff used secure email to send a message to the Respondent that reiterated the content of the November 30, 2020 letter. The Respondent did not answer and failed to attend the interview.

e) On January 18, 2021, Staff sent a letter to the Respondent by both regular mail and secure email to advise that due to his failure to attend the interview Staff would seek authorization to commence disciplinary proceedings against him. The Respondent did not reply.

f) On June 23, 2021, a process server personally served the Respondent with a letter from Staff reiterating the content of the January 18, 2021 letter. The Respondent did not reply.

¶ 39 The Member compensated JB for his losses arising from the Respondent's actions.

¶ 40 The Respondent is not currently registered in the securities industry in any capacity.

VI. MISCONDUCT

¶ 41 The allegations in the Notice of Hearing are proved by operation of Rules 8.4(1) and 7(3) of the MFDA's Rules of Procedure. They are also established by the principal investigator's testimony.

Allegation one

¶ 42 An Approved Person is required by MFDA Rule 2.1.1 to observe high ethical standards. This includes refraining from business conduct that is unbecoming or detrimental to the public interest.

¶ 43 The facts in this case are as straightforward as they are dismaying. JB gave the Respondent confidential Bank Account information because he trusted the Respondent would access the account solely for the purpose of helping him draw on his funds. Instead, the Respondent exploited JB's trust to steal money from him.

¶ 44 It is difficult to imagine conduct more detrimental to the public interest than stealing from a client. The Respondent indisputably contravened Rule 2.1.1.

Allegation two

¶ 45 The broad ethical obligation articulated by Rule 2.1.1 is informed, among other things, by the specific requirements imposed by MFDA Rules 1.1.2 and 2.5.1, which obligate an Approved Person to follow the employing Member's supervisory policies and procedures.

¶ 46 Under the Member's policies and procedures, the Respondent was prohibited from entering into any arrangements in which his personal interests conflicted or potentially conflicted with JB's interests.

¶ 47 Further to MFDA Rule 2.1.4, an Approved Person who becomes aware of any conflict or potential conflict of interest is required to immediately disclose it to their employing Member. The Approved Person and the Member then become jointly obligated to exercise responsible business judgment to address the situation in the client's best interests.

¶ 48 Acquiring access to the Bank Account's online banking facility gave the Respondent direct access to JB's money. This created a situation that inherently put the Respondent's financial interests into conflict with those of his client. If any proof is required for that obvious proposition, it is established by the fact the Respondent's access to JB's money enabled him to steal $114,950.57 of it.

¶ 49 The Respondent engaged in personal financial dealings with JB that gave rise to a blatant conflict of interest that contravened MFDA Rules 2.1.4, 2.1.1, 2.5.1 and 1.1.2.

Allegation three

¶ 50 Section 22.1 of MFDA By-law No. 1 states, in part, that:

> For the purpose of any examination or investigation pursuant to this By-law, [an]... Approved Person... under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation... to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and... to attend and give information[.]

¶ 51 Section 22.1 exists because a fully transparent mutual fund industry and the effective supervision of its participants is fundamental to the public interest. The crucial importance of the duty to co-operate with a MFDA investigation is emphasized by section 24.1.4 of MFDA By-law No. 1, which provides that an individual who ceases to be an Approved Person nonetheless remains subject to section 22.1 for a period of five years.

¶ 52 As an Approved Person, the Respondent was obligated to be forthright to the MFDA. Instead, the Respondent deliberately and completely evaded all of Staff's efforts to obtain information from him in contravention of section 22.1 of MFDA By-law No. 1.

VII. SANCTION CONSIDERATIONS

¶ 53 Penalties in MFDA enforcement proceedings are justifiable to the extent that they serve to protect the investing public from future harm. They must be forward looking, in the sense that they should be preventative in orientation, not retrospective or punitive.

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at paras. 59, 68.

¶ 54 In this regard, general deterrence is the central consideration:

> 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... The respective importance of general deterrence as a factor will vary according to the breach... and the circumstances of the person charged [.]
>
> *Cartaway Resources Corp. (Re),* [2004] 1 S.C.R. 672 at para. 61.

¶ 55 The weight to be given general deterrence in any given case, therefore, must always be based on a thorough assessment of the character of the misconduct. Moreover, to be reasonable a penalty in the regulatory context must be supported by a rational analysis that establishes the penalty as proportional to the misconduct.

> *Cartaway, supra,* at para. 64.
>
> *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at paras. 14, 85.

¶ 56 Previous hearing panel decisions have consistently identified certain key factors as relevant to the determination of sanctions. These are summarized in the November 15, 2018 Sanction Guidelines issued by the MFDA to assist hearing panels in their deliberations. The factors especially relevant to this case are that:

a) Effective specific and general deterrence is crucial to preventing inappropriate conduct and ensuring public confidence in the mutual fund industry and the fairness of the capital market.

b) Public confidence requires that sanctions accurately reflect the mitigating and aggravating factors disclosed by the facts.

c) Proper weight should be given to the relative seriousness of the proven misconduct. Distinctions should be drawn between negligent and deliberately deceptive conduct, and between isolated and repeated incidents.

d) A hearing panel should consider the degree to which a respondent has accepted responsibility for their misconduct. Attempts to frustrate, delay or undermine an investigation or hearing, including by concealing or intentionally providing misleading information, should be considered an aggravating factor.

e) Sanctions should reflect whether or not the misconduct resulted in the respondent receiving benefits or investors sustaining harm.

¶ 57 The Respondent's misconduct was rife with aggravating factors:

a) It should have been patently obvious to the Respondent that having access to JB's money put him in a conflict of interest. Nonetheless, it is conceivable that he entered into the arrangement out of carelessness. The same thing cannot be said about the rest of his misconduct. Stealing a client's money and failing to cooperate with an MFDA investigation are forms of misconduct that are both defined by deliberateness.

b) The Respondent repeatedly stole money from JB for a period of about 28 months.

c) In doing so, the Respondent abused his professional trust relationship with JB and exploited his client's disabilities.

d) The Respondent's misconduct resulted in an ill-gotten gain of about $115,000, and correspondingly imposed a severe financial harm that was initially suffered by JB and then ultimately borne by the Member.

e) The profoundly dishonest nature of the Respondent's misconduct is necessarily corrosive of public confidence in the mutual fund industry.

f) The Respondent lied to cover up his misconduct.

i. He deceived JB about the true value of the Accounts.

ii. The Respondent had made all of the wire transfers from his own bank accounts, but in an attempt to mislead the Member he claimed wire transfers could be made from the Bank Account.

iii. He told the Member that he had not accessed the Bank Account for his own personal use, which was not true.

¶ 58 Nothing in the record indicates the Respondent is prepared to either acknowledge the gravity of his misconduct or accept responsibility for the harm he has caused. In this regard, his refusal to cooperate with the MFDA's investigation is particularly relevant. Separate from being a breach of section 22.1 of MFDA By-law No. 1, the Respondent's failure to cooperate eliminates remorse as a mitigating factor in the determination of penalty for the other misconduct in this case.

¶ 59 Among other things, the Respondent's refusal to make himself available to answer any of Staff's questions blocked the MFDA from learning what happened to the $18,800 he transferred to himself but did not deposit in his bank accounts. It also interfered with Staff's ability to clarify the circumstances by which JB came to entrust the Respondent with his confidential online banking details.

¶ 60 This is also why hearing panels have consistently observed that a failure to co-operate with an investigation must always be regarded as serious misconduct. An Approved Person under investigation is necessarily in possession of highly relevant information. It follows that the regulator's ability to get at the truth, and fulfill its public protection mandate, are both undermined when an Approved Person refuses to answer its questions.

Vitch (Re), MFDA File No. 201103, September 22, 2011, at paras. 55-56.

VIII. ORDERS

¶ 61 On behalf of Staff, Enforcement Counsel submitted that the Respondent's misconduct should attract the following sanctions:

a) A permanent prohibition.

b) A total financial penalty of $265,000, notionally comprised of:

i. $115,000, representing disgorgement of the Respondent's ill-gotten gains;

ii. $100,000, representing a fine in respect of the Respondent's conflict of interest and misappropriation; and

iii. $50,000, representing a fine in respect of the Respondent's failure to co-operate.

c) Costs of $10,000, representing roughly half of the total costs itemized in the supporting Bill of Costs.

¶ 62 In support of this position, Enforcement Counsel referenced a number of MFDA penalty decisions that were concerned with misconduct similar to that of the Respondent.

Shaw (Re), MFDA File No. 201359, November 3, 2014.

Ng (Re), MFDA File No. 201539, July 8, 2016.

Latour (Re), MFDA File No. 201561, December 19, 2016

Backer (Re), MFDA File No. 201791, February 8, 2019.

Davies (Re), MFDA File No. 201968, June 16, 2020.

Dudding (Re), MFDA File No. 202119, December 17, 2021, (Penalty Order, reasons for decision pending).

¶ 63 Collectively, these precedents are typical examples of how hearing panels approach sanctioning in misappropriation cases. Their guidance can be succinctly summarized as follows:

a) An Approved Person who has misappropriated client funds and refuses to cooperate with the MFDA presents an unacceptably high risk of harm to the investing public going forward. In virtually all such cases, specific deterrence and public protection warrant a permanent prohibition.

b) In the interests of general deterrence:

i. Misappropriation must necessarily attract a financial penalty that accurately reflects the grave character of the misconduct and the objective harm it has imposed on clients and the mutual fund industry.

ii. A failure to account for client monies demands the disgorgement of all ill-gotten gains.

iii. Deception must be recognized as a seriously aggravating factor.

iv. To preserve the MFDA's public protection capability, a failure to cooperate must result in sanctions that communicate to both the public and the industry that those who choose to frustrate MFDA investigations will face serious consequences. A fine of $50,000 is typical.

¶ 64 In Staff's submission, the Respondent cannot be allowed to return to the mutual fund industry in any capacity. With respect to the financial penalty, the scale and duration of the Respondent's misappropriation and his failure to account for client monies justify the most serious of penalties. The Panel agrees.

¶ 65 However, we differ in our assessment of the appropriate financial penalty. The Respondent attempted to cover up his misconduct first by lying to JB about the value of his Accounts, then by trying to induce JB to refrain from reporting him to the Member, and finally by trying to mislead the Member. In our view, the Respondent's persistent recourse to deception deserves to be given greater weight as an aggravating factor.

¶ 66 JB entrusted the Respondent with his finances. Moreover, his health issues rendered JB especially vulnerable for extended periods during the time he was the Respondent's client. The Respondent returned JB's trust by taking advantage of his vulnerabilities to steal from him.

¶ 67 For these reasons, the Panel ordered that the Respondent:

a) Be permanently prohibited from conducting any securities related business while employed by or associated with any Member of the MFDA.

b) Pay a total financial penalty of $315,000, notionally comprised of:

i. $115,000, representing disgorgement of the Respondent's ill-gotten gains;

ii. $150,000, representing a fine in respect of the Respondent's conflict of interest and misappropriation; and

iii. $50,000, representing a fine in respect of the Respondent's failure to co-operate.

c) Pay costs of $10,000.

DATED this 25 day of October, 2023.

"Joseph A. Bernardo"

Joseph A. Bernardo

Chair

"Barbara Fraser"

Barbara Fraser

Industry Representative

"Susan E. Monk"

Susan E. Monk