



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Peter Ewens

Heard: March 16, 2017, in Vancouver, British Columbia
Reasons for Decision: April 6, 2017

REASONS FOR DECISION

Hearing Panel of the Pacific Regional Council:

Robert G. Ward, Q.C.
Holly Millar
Richard Sydenham

Chair
Industry Representative
Industry Representative

Appearances:

Justin Dunphy)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Shaun T. Frost)	Counsel for the Respondent
)	
)	

BACKGROUND

1. This hearing was duly constituted by the Mutual Fund Dealers Association of Canada (the “MFDA”). Mr. Sydenham, a member of the Prairie Regional Counsel, was cross-appointed pursuant to section 19.10 of MFDA By-law No. 1 to sit on this case which was constituted before this Hearing Panel. Subject to a decision of the Hearing Panel, a settlement agreement (“Settlement Agreement”) dated February 14, 2017 was entered into between staff of the MFDA (“Staff”) and Mr. Ewens (the “Respondent”). On March 16, 2017, the Settlement Agreement between the Staff and Respondent was considered by this Panel.

2. The proposed Settlement Agreement concerned an allegation that between November 29, 2013 and August, 2014 the Respondent processed approximately 53 authorized discretionary trades as part of a dollar-cost averaging strategy in relation to one client, contrary to MFDA Rules 2.3.1 and 2.1.1.

3. On March 16, 2017, the Hearing Panel considered the Settlement Agreement to determine whether the Settlement Agreement should be accepted. Both the Staff, represented by Mr. Dunphy, and the Respondent, represented by Mr. Frost, made submissions which the Panel also considered and found helpful in its analysis.

4. By unanimous order, the Settlement Agreement was accepted.

FACTS

The MFDA and the Respondent agreed to certain facts for the purposes of this Settlement Agreement. Contained in subparagraphs 7 to 28 inclusive hereof are the facts, as agreed to between the MFDA and the Respondent, taken from the Settlement Agreement.

Registration

7. The Respondent has been registered in the securities industry since 2010.

8. The Respondent has been registered as a mutual fund salesperson (now known as a dealing representative) in British Columbia since February 1, 2010 with Investors Group Financial Services Inc. ("IG"), a Member of the MFDA.

9. At all material times, the Respondent carried on business in the North Vancouver, British Columbia, area.

Discretionary Trading

10. At all material times, IG had a policy in place prohibiting its Approved Persons from engaging in discretionary trading.

11. Since November 20, 2013, client BG was a client of IG, whose account was serviced by the Respondent.

12. On November 29, 2013, client BG and the Respondent discussed client BG's investment portfolio and recommended he invest in certain funds and provided client BG with a list of funds and what percentage of the client's total investment would be allocated to each mutual fund (the "Target Portfolio"). Client BC agreed to invest in the Target Portfolio at the allocations recommended by the Respondent and began transferring his monies to be invested with IG.

13. The Respondent states that he processed the trades on behalf of client BG to implement a dollar-cost averaging strategy. Dollar-cost averaging is a strategy whereby a client will make investments at periodic intervals in order to diversify the purchase price for a unit of a given mutual fund. The Respondent obtained client BG's authorization to proceed with the purchases of the mutual funds using this strategy.

14. The Respondent invested client BG's monies totaling \$185,000 in a money market mutual fund. The Respondent then, at his discretion, periodically processed trades on

behalf of client BG by transferring client BG's investment from the money market mutual fund to the mutual funds that comprised client BG's Target Portfolio (the "Transfers").

15. The Respondent periodically processed the Transfers until client BG's entire investment was allocated in accordance with the agreed upon Target Portfolio. Generally, the Respondent would fully allocate the client's investment within several weeks to several months after the determination of the Target Portfolio.

16. Between November 29, 2013 and August 2014, the Respondent processed approximately 53 authorized discretionary trades as part of the dollar-cost averaging strategy.

17. The Respondent decided particulars for each of the Transfers, including the date of the Transfer and the number of mutual fund units purchased by client BG. The Respondent did not contact client BG prior to processing the Transfers. In some instances, the Respondent contacted client BG to provide details of the Transfers after they had been processed. Client BG met with the Respondent on November 29, 2013, February 3, 2014, June 22, 2014, and August 11, 2014 to discuss the Target Portfolio.

IG's Response

18. On November 19, 2014, client BG complained to IG about the Respondent making a series of discretionary investments without consulting client BG.

19. IG commenced an investigation into the Respondent's conduct, and on December 17, 2014, IG placed the Respondent on close supervision.

20. The Member deducted from the Respondent commissions totaling 7,569.29 representing the amounts earned by the Respondent on the Transfers.

21. On March 5, 2015, IG issued a warning letter to the Respondent with respect to the discretionary trading described above.

Additional Factors

22. The Respondent has not previously been the subject of MFDA disciplinary proceeding.

23. There is no evidence of client loss. The Target Portfolio increased in value during the period it was invested with IG.

24. There is no evidence that the Respondent obtained any personal financial gain other than commission he would normally have been entitled to for the Transfers had the transactions in the client's accounts been carried out in the proper manner.

25. The Respondent states that he has amended his practice to ensure compliance with MFDA Rules in the future.

26. The Respondent has cooperated in full with both IG and the MFDA. By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing on the allegations.

IV. ADDITIONAL TERMS OF SETTLEMENT

27. This settlement is agreed upon in accordance with section 24.4 of MFDA By-law No. 1 and Rules 14 and 15 of the MFDA Rules of Procedure.

28. The Settlement Agreement is subject to acceptance by the Hearing Panel which shall be sought at a hearing (the "Settlement Hearing"). At, or following the conclusion of, the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.

5. In addition, by consent both of Mr. Dunphy and of Mr. Frost, additional facts were led, the most persuasive of which to the Panel was that, the Respondent, formerly a school principal, has undertaken a program pursuant to which he will seek to train other Approved Persons in a manner which is designed to ensure compliance with the Rules and Regulations of the MFDA.

APPLICABLE RULES AND REGULATIONS

6. MFDA Rule 2.1.1 provides standards of conduct which are applicable herein, including the obligation on each Approved Person to:

- a) deal fairly, honestly and in good faith with its clients;
- b) to observe high standards of ethics and conduct in the transaction of business;
- c) to avoid any practices detrimental to the public interest;
- d) to have experience and training consistent with the standards prescribed by the Rule and generally by the MFDA.

7. By Rule 2.3.1, Approved Persons are prohibited from engaging in any discretionary trading.

PRINCIPLES GOVERNING THE DETERMINATION OF THIS PANEL

8. By Section 24.4.3 of By-law No. 1, the Hearing Panel is to:

- a) accept the Settlement Agreement; or
- b) reject it.

9. The Panel is not to determine the penalty that it might impose, but to consider whether the Settlement Agreement is a reasonable one under the circumstances.

10. This is consistent with authorities on the topic which state that the Hearing Panel is not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement

process and the fact that the parties have agreed. The role of the Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing, where the Panel's duty is to determine the correct penalty.

11. A penalty is not to be rejected unless it clearly falls outside a reasonable range of appropriateness. The overriding objective is the protection of the public.

Sterling Mutuals Inc, (Re), 2008 MFDA 16, at para. 37

12. The regulatory objective of the Hearing Panel is to protect the public. A settlement advances the regulatory objective by proscribing activities harmful to the public, and enabling the parties to reach a flexible remedy, tailored to address the interests of the regulator and the Respondent.

R. v. 974649 Ontario Inc., 2001, SCC 81, as cited in *British Columbia Securities Commission v. Seifert*, 2007 BCCA 484, para. 31

13. Settlement agreements can be an effective means of protecting the public; they can be flexible, efficient and inexpensive, and at the same time ensure that the overriding objective is met.

R. v. 974649 Ontario Inc., 2001, SCC 81, [2001] 3 S.C.R. 575, para. 49.

14. Factors relevant to the penalty are stated to be:

- a) Whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;
- b) Whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
- c) Whether the settlement agreement addresses the issues of both specific and general deterrence;

- d) Whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;
- e) Whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
- f) Whether the settlement agreement will foster confidence in the integrity of the MFDA; and whether the settlement agreement will foster confidence in the regulatory process itself.

Jacobson (Re), MFDA File No. 200712, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated July 13, 2007 at page 9.

15. A Hearing Panel should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness having regard to the conduct of the Respondent.

Jacobson (Re), MFDA File No. 200712, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated July 13, 2007, page 9

16. Finally, MFDA penalty guidelines are relevant, having factors which may be taken into account with respect to penalty. We emphasize, however, that the MFDA penalty guidelines are not binding, but simply assist a Hearing Panel in considering the appropriate penalty.

CONSIDERATIONS OF THE PANEL

Misconduct

17. Discretionary trading is prohibited by Rule 2.3.1(b) and is serious misconduct. The client may not approve or even be aware of one or more elements of the trade. Approved Persons cannot accept a delegated authority to exercise discretion with respect to one or more elements of the trade.

18. In *Re Rounthwaite*, MFDA file no. 201123, paragraph 7, a decision of the Hearing Panel of the Central Regional Council, dated July 30, 2012, the Panel mentioned that, subject to limited

(and irrelevant) exceptions, Rule 2.3.1 absolutely prohibits discretionary trading since it destroys the integrity of the audit trail, subverts the ability of the client to make informed decisions, and generally does not allow a Member to properly supervise trading activity. That is so, as noted by the Panel, even if the Approved Person apprises the client of the details after the fact. It deprives both the client of its right to make informed decisions respecting their financial affairs and the Member of any opportunity to fulfill its obligation of supervising Approved Persons.

19. In this case, in mitigation of these potential harms, there is no evidence of any client loss. Clearly, the Respondent has recognized the seriousness of this activity, and indeed, has taken steps to train other Approved Persons and warn them of the seriousness of such conduct. The Respondent has not previously been disciplined, and has cooperated with the investigation and admitted to the misconduct as set out in the Settlement Agreement.

Past conduct

20. There have been no previous disciplinary proceedings.

PRECEDENT CASES

21. There are precedent cases which may be looked at as having some similarities. However, each case turns on its own facts and it is recognized by the Panel that the precedent cases cited may properly be considered distinguishable, at least to some degree. Insofar as they offer a degree of guidance the Panel has considered the following cases.

22. *Re Stolarz*, where the Approved Person processed increases to monthly payments made pursuant to a client's Systematic Withdrawal Plan based on requests from a person other than the client and a second allegation that he processed two annual fund switches in the account of one client without his authorization, contrary to MFDA Rules 2.3.1 and 2.1.1. In that case the Panel accepted a Settlement Agreement of a \$15,000 fine and \$2,500 in costs.

Re Stolarz, MFDA File No. 201642, Hearing Panel of the Atlantic Regional Council, dated November 4, 2016.

23. *Re Garries*, MFDA file No. 201605, 2016. While referred to by counsel, this case admittedly involved 3 other serious allegations and a more substantial penalty. This authority is not considered as compelling as *Re Stolarz*.

Penalty Guidelines

24. The penalties provided for in the Settlement Agreement exceed the minimum provided in the Guidelines for breaches of Rule 2.3.1 and 2.3.1

OPINION AND DECISION

25. It is the opinion of the Panel that the Settlement Agreement:

- a) Is reasonable and proportionate having regard to the conduct of the Respondent;
- b) Sufficiently addresses the issues of both general and specific deterrence; and
- c) Is sufficient to maintain confidence in the integrity of the MFDA and the regulatory process.

26. In the result, the Settlement Agreement is approved and confirmed. As agreed to, it is hereby ordered that the Respondent:

- a) pay a fine in the amount of \$11,500; and
- b) pay costs in the amount of \$2,500.

DATED this 6th day of April, 2017.

“Robert G. Ward”

Robert G. Ward, Q.C.
Chair

“Holly Millar”

Holly Millar
Industry Representative

“Richard Sydenham”

Richard Sydenham
Industry Representative

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