



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

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Gabriele Gentile

Heard: April 10, 2013
Decision and Reasons: September 16, 2013

DECISION and REASONS (MOTION)

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.
Ann Etter
Darrell Bing

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)
Lyla Simon)
)

For the Mutual Fund Dealers Association
of Canada

Brian K. Awad)
)

For the Respondent

A. HISTORY OF PROCEEDINGS

1. On December 21, 2011, the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Hearing in respect of a disciplinary proceeding commenced against Gabriele Gentile (“Respondent”).

2. The First Appearance took place on February 2, 2012, at which time the Hearing Panel scheduled the date of April 19, 2012, for the hearing of a Motion for Dismissal brought by the Respondent.

3. On April 19, 2012, Counsel for the Respondent and the MFDA appeared before the Hearing Panel and made submissions with respect to the Respondent’s Motion.

4. The Hearing Panel dismissed the Respondent’s Motion as set out in our Decision and Reasons (Motion), dated May 8, 2012.

5. On August 30, 2012, after hearing submissions from Counsel for both the MFDA Staff and the Respondent, the Hearing Panel set a schedule for certain procedural steps and ordered that the Hearing on the Merits would be held from November 26 to 29, 2012, in Halifax.

6. On November 6, 2012, MFDA Staff brought a Motion seeking directions with respect to certain procedural matters, including amending the Notice of Hearing and rescheduling the Hearing on the Merits.

7. On November 6, 2012, after hearing submissions from Counsel for the parties, the Hearing Panel ordered that the Hearing on the Merits be adjourned to be spoken to and scheduled an appearance before the Hearing Panel on January 10, 2013.

8. On December 31, 2012, MFDA Staff brought a Motion, returnable January 10, 2013, seeking to amend the Notice of Motion and other relief.

9. On January 10, 2013, after hearing submissions from Counsel for the parties, the Hearing Panel ordered that:

- (a) MFDA Staff was to serve and file, by February 4, 2013, all moving Motion materials, including any evidence, submissions and authorities;
 - (b) The Respondent was to serve and file, by February 22, 2013, all responding materials, including any evidence, submissions and authorities; and
 - (c) MFDA Staff was to serve and file, by March 8, 2013, all reply Motion materials, including any evidence, submissions and authorities.
10. The parties served and filed extensive written materials in compliance with the Order.
11. The parties agreed that the Motion would be heard orally, by teleconference, on April 10, 2013.
12. On April 10, 2013, after hearing the oral submissions made by the parties, the Hearing Panel reserved its Decision on the Motion.
13. Later, on April 10, 2013, after reviewing and considering the written moving, responding and reply Motion materials, including evidence, submissions and authorities served and filed by Staff and the Respondent, and considering the oral submissions, the Hearing Panel issued the following Order:
- (a) Staff be granted leave to amend the Notice of Hearing in the form attached as Schedule "A" to this Order;
 - (b) Staff shall provide additional disclosure to the Respondent, on or before April 19, 2013;
 - (c) The Respondent may serve and file an Amended Reply on or before June 7, 2013; and
 - (d) In assessing costs, pursuant to section 24.2 of MFDA By-law No. 1, at the conclusion of the within proceedings, including whether any costs should be granted with respect to this motion, the Hearing Panel will consider whether the amendment to the Notice of Hearing resulted in wasted efforts and/or expenses on the part of the Respondent.
14. In that Order, the Hearing Panel stated that it would issue written Reasons for its Decision. These are those Reasons.

B. POWER TO AMEND

15. The MFDA Rules of Procedure (“ROP”) do not contain an express provision entitling Staff to seek an Order to amend an issued Notice of Hearing. On the other hand, there is no express prohibition to such an Order being granted in appropriate circumstances.

16. Rule 1.3 of the ROP provides general principles as to how the ROP should be interpreted. It states:

“1.3 General Principles

- (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.
- (2) Where matters are not provided for in these Rules, the practice may be determined by analogy to them.”

17. In addition, Rule 1.5 outlines the general powers of a Hearing Panel in the following manner:

“1.5 General Powers of a Panel

- (1) A Panel may:
 - (a) exercise any of its powers under these Rules on its own initiative or at the request of a party;
 - (b) waive or vary any of these Rules at any time, on such terms as it considers appropriate;
 - (c) issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.”

18. In our view, it is clear that an MFDA Hearing Panel has the power to hear and consider a Motion seeking an Order to amend a Notice of Hearing. The Hearing Panel has the discretion to determine the appropriate practice and procedure to determine this Motion and, in doing so, may use elements of analogous practices found in adjudicative procedures.

19. With respect to the factors which a Hearing Panel may consider on amendment Motions, Staff suggested the following:

- (a) whether prejudice or unfairness would be suffered by the responding party resisting the Motion to amend;
- (b) timeliness, that is, the extent to which the proceedings have already advanced;
- (c) whether the proposed amendments would clarify or better define the issues for the Respondent, the Hearing Panel and the public at large; and
- (d) whether the proposed amendments would have the effect of bringing the administration of justice into disrepute.

20. We agree that these factors are appropriate to the Motion before us. We carefully considered each of these factors when we reviewed the factual underpinnings of this Motion.

C. POSITION OF THE RESPONDENT

21. In both his written and oral submissions, the Respondent did not dispute the jurisdiction of the Hearing Panel to consider this Motion. Rather, he submitted that, in evaluating the Motion and the position of the parties, the Hearing Panel should be guided by certain principles that have been adopted elsewhere in the Canadian judicial system.

22. With respect to the issue of prejudice, the Respondent stated that he was not in a position to predict “whether prejudice may eventuate from the amendments.”

23. He stated, however, that the amendments, if permitted, will mean that “certain efforts have been wasted or will have to be duplicated.”

24. Consequently, the Respondent submitted that in any Order made by the Hearing Panel granting leave to amend there should be a provision providing that “should prejudice become evident at a later date, the Respondent will have the right to ask the Hearing Panel to make “allowances”.”, as was done by the Ontario Court of Appeals in King’s Gate Developments Inc. v. Drake, (1994), 17 O.R. 841.

25. The Respondent raised concerns about both the relevance and veracity of one of the proposed amended paragraphs. The proposed paragraph alleges that the Member became licensed to sell insurance in Nova Scotia at a certain time and then details certain subsequent business steps taken by the Member.

26. The Respondent provided evidentiary material suggesting that the Member was never licensed pursuant to the *Insurance Act* of Nova Scotia.

27. The Respondent requested that before the amendment was permitted, Staff provide the Hearing Panel with evidence that the Member did, in fact, hold an insurance licence. He also requested further and better particulars with respect to the proposed paragraph.

28. The Respondent also made submissions with respect to the “wasted efforts and expense” on his part should the amendments be permitted. The Respondent correctly pointed out that following the Hearing Panel’s Decision in May of 2012, dismissing his Motion for Dismissal, he prepared and filed a detailed Reply to the original Notice of Hearing.

29. The Respondent referred to what he described as an “asymmetrical” cost rule in Section 24.2 of By-law No. 1 – namely that costs may be awarded against a respondent but not in his favour. He submitted that, if the amendments were granted, at the very least the Reply would have to be redrafted.

30. In light of this, the Respondent requested that the Hearing Panel attach to any Order granting leave to amend, both a provision that there be no costs payable to Staff with respect to this Motion and that, in assessing costs at the conclusion of the proceeding, the Hearing Panel would consider whether the amendment resulted in wasted efforts and expenses on the part of the Respondent.

D. DECISION

31. In our view, Staff’s Motion to amend should be granted with certain terms inserted to protect the legitimate concerns of the Respondent.

32. The proposed amendments appear to relate to alleged facts that provide further details concerning the supervisory and business structure at the Branch/Member and the interaction between various clients and the Respondent and others at the Branch, with respect to a particular individual having borrowed money from the clients. In our view, the Respondent should be in a position to admit, deny or assert that he has no knowledge of the facts alleged and conclusions drawn by Staff in the proposed amended Notice of Hearing.

33. We did not think it appropriate, at this stage of the proceedings, to require Staff to submit evidence to prove that the Member held an insurance licence at a particular time. If Staff makes the allegation of the existence of such a licence, it will be incumbent upon it, at the Hearing on the Merits, to provide proof of same. The Hearing Panel will then be in a position to conclude whether or not this allegation has been established.

34. In fairness to the Respondent, we ordered that Staff make certain additional disclosure. We also provided the Respondent with an extended period of time in which to serve and file an Amended Reply. This time period was subsequently expanded on receipt of a request from the Respondent.

35. In our Order, we also included an expanded version of one of the cost provisions suggested by the Respondent. At the conclusion of the proceedings, we will be in a better position to assess what costs, if any, should be granted to Staff with respect to both the Motion and the proceedings as a whole, pursuant to Section 24.2 of MFDA By-law No. 1. This will entail a consideration as to whether the amendment resulted in wasted efforts and/or expenses on the part of the Respondent.

DATED this 16th day of September, 2013.

“Thomas J. Lockwood”
Thomas J. Lockwood, Q.C.,
Chair

“Ann Etter”
Ann Etter,
Industry Representative

“Darrell Bing”

Darrell Bing,
Industry Representative

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