

Decision and Reasons (Penalty)

File No. 2018124



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: Stuart Michael Gibson

Heard: August 14, 2019 (Misconduct); October 2, 2019 (Penalty) in Toronto, Ontario
Decision and Reasons (Penalty): December 2, 2019

**DECISION AND REASONS
(Penalty)**

Hearing Panel of the Central Regional Council:

Martin L. Friedland, CC, QC
Patrick Galarneau
Guenther W. K. Kleberg

Chair
Industry Representative
Industry Representative

Appearances:

Paul Blasiak)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
Stuart Michael Gibson)	Respondent, in person
)	
)	

Background

1. This is a Hearing under Sections 20 and 24 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the “MFDA”). The Hearing on the issue of misconduct by Stuart Michael Gibson (the “Respondent”) was held on August 14, 2019, at which time the Respondent was found to have engaged in misconduct. A date was set for determining the penalty. The penalty hearing was held on October 2, 2019 and the Panel reserved its decision. The Respondent was not represented by counsel at either hearing. These are our reasons for the finding of misconduct and for the penalty we imposed on the Respondent.

2. From April 1982 to December 2016, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with Investors Group Financial Services, Inc. (“Investors Group”), a Member of the MFDA. From March 2002 when Investors Group became a Member of the MFDA until December 2016, when Investors Group terminated the Respondent as a result of the matters described in these reasons, the Respondent was an Approved Person of Investors Group. At all material times, the Respondent conducted business in the Toronto, Ontario area. The Respondent is not currently registered in the securities industry in any capacity.

Alleged Misconduct

3. Proceedings against the Respondent were commenced by a Notice of Hearing, dated December 18, 2018.

4. The MFDA alleged the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between 2008 and September 2016, the Respondent borrowed a total of \$102,500 from four clients, thereby engaging in personal financial dealings with the clients which gave rise to conflicts or potential conflicts of interest that the Respondent failed to disclose to the Member or address by the exercise of responsible business judgment influenced only by the best interest of the clients, contrary to the policies and procedures of the Member, and MFDA Rules 2.1.4, 2.10, 1.1.2, and 2.1.1.

Allegation #2: Between November 2012 and October 2013, the Respondent engaged in a dual occupation that was not approved by the Member, contrary to MFDA Rule 1.2.1(c) (now Rule 1.3.2) and 2.1.1.

Allegation #3: Between 2009 and March 2016, the Respondent misled the Member when he submitted annual consultant certificates to the Member in which he falsely certified that he had not borrowed money from clients and did not engage in any undisclosed outside business activity, contrary to MFDA Rule 2.1.1.

5. As described in the Affidavit of Senior Investigator Stephen Davis, sworn August 8, 2019 (the “Davis Affidavit”), the Respondent advised Staff that he does not dispute Allegations #1, #2 and #3 in the Notice of Hearing. The Respondent, however, argued in his Reply and at the hearings on misconduct and on penalty that there were a number of factors, to be discussed below, that lessened the seriousness of his conduct and should be taken into account in determining the penalty.

Summary of the Facts

6. The evidence in the Davis Affidavit established to the Panel’s satisfaction that:

- At all material times, Investors Group’s policies and procedures prohibited its Approved Persons from borrowing from clients.
- Between 2008 and September 2016, the Respondent borrowed a total of \$102,500 from the following four clients whose accounts he serviced at Investors Group: TB, ST, DS, and IM. The Respondent borrowed \$3,500 from client TB in 2008; \$31,500 from client ST between July 2010 and November 2010; \$60,000 from client DS between May 2013 and July 2016; and \$7,500 from client IM in September 2016.
- The Respondent did not disclose the loans described above to Investors Group.
- The Respondent used the monies he received from the loans to pay for personal expenses and to make payments required pursuant to the terms of a consumer proposal that he had filed in November 2010.

- Clients TB, DS and IM were seniors at the time the Respondent borrowed money from them. TB was 75 years old, DS was 81 years old, and IM was 90 years old. They were vulnerable clients.
- Of the \$60,000 that the Respondent borrowed from client DS, \$25,000 was funded by redemptions that the Respondent processed in client DS's account at Investors Group. Client DS incurred a deferred sales charge fee as a result of one of the redemptions.
- The respondent failed to repay \$90,950 out of the \$102,500 that he borrowed from clients TB, ST, DS and IM. The Respondent did not repay any amount of the loan to client TB or otherwise account for the \$3,500 that he borrowed from her. The Respondent paid back amounts totaling \$10,550 to client ST, but failed to repay or otherwise account for the balance owing, totaling \$20,950 plus interest. The Respondent repaid \$1,000 of the \$60,000 that he borrowed from client DS, but did not make any other payments to client DS. The Respondent failed to repay or otherwise account for the \$7,500 that he borrowed from client IM.
- At all material times, Investors Group's policies and procedures prohibited its Approved Persons from engaging in outside business activities that were not approved by Investors Group.
- Between November 2010 and October 2013, the Respondent was employed as a telemarketer at a newspaper call centre. At no time did the Respondent request or obtain approval from Investors Group to engage in the Call Centre occupation.
- Between 2009 and March 2016, the respondent misled Investors Group when he submitted annual consultant certificates to Investors Group in which he falsely certified that he had not borrowed money from clients and did not engage in any undisclosed outside business activity.

Borrowing from Clients

7. There are many MFDA cases disciplining Approved Persons for borrowing from clients. See, for example, *Re Nunweiler* MFDA File No. 201030; *Re Lipovetsky* MFDA File No. 201252; *Re Davis* MFDA File No. 201615; and *Re Bott* MFDA File No. 2016101.

8. As stated above, at all material times Investors Group prohibited its Approved Persons from borrowing funds from clients. This prohibition is in line with similar MFDA Rules. See MFDA Rule 2.1.4 which provides:

- a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.
- b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interest of the client and in compliance with Rules 2.1.4(c) and (d).
- c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.
- d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

9. Since at least October 2005, there has been an MFDA Staff Notice on “Personal Financial Dealings with Clients” (MSN-0047). The Notice states, in part: “Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of a client.” As stated by the Panel in *Re Nunweiler* at paragraph 17:

“Where an Approved Person borrows money from a client...such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that...borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client.”

Proposed Penalty

10. Staff sought the following sanctions against the Respondent:

- a) a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) a fine in the amount of at least \$175,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- c) costs attributable to conducting the investigation and hearing of this matter in the amount of \$7,500, pursuant to s. 24.2 of MFDA By-law No. 1.

11. The Panel agrees that costs of \$7,500 are appropriate in this case. The MFDA submitted a bill of costs of \$14,900. The amount sought is about half of the costs itemized by the MFDA and those costs do not include work done by several other MFDA employees.

12. Similarly, the Panel agrees that a permanent prohibition on the authority of the Respondent to conduct securities related business is the proper penalty in the circumstances of this case. Such a prohibition was ordered in all the comparable cases cited to us by counsel for the MFDA. See *Re Bangway* MFDA File No. 201238; *Re Nunweiler* MFDA File No. 201030; *Re Lui* MFDA File No. 201124; *Re Davis* MFDA File No. 201615; *Re Lipovetsky* MFDA File No. 201252; and *Re Bott* MFDA File No.2016101.

13. The Respondent had been in the securities industry since 1982 and this is the first time he has been disciplined. The conduct, however, is very serious. It took place over an eight year period, involving multiple clients. During this period the Respondent solicited 18 separate loan payments from his clients.

14. The conduct is particularly serious because the loans involved vulnerable clients. The recently issued MFDA Sanction Guidelines states with respect to vulnerable investors:

“If there is evidence that the Respondent's conduct involved vulnerable investors, then this may be seen as an aggravating factor worthy of a greater sanction. The MFDA disciplinary process aims to protect the investing public and in particular vulnerable investors...”

15. The Panel's main concern is with Allegation #1 involving borrowing from clients. It is less concerned with Allegations #2 and #3. Engaging in another occupation as a telemarketer without the approval of the Member is clearly wrong and should have been disclosed to the Member for approval, but in the circumstances of this case it is not close to egregious. It only lasted for about a year and was not related to the securities industry. It may well be true that the Respondent actually believed, as he stated to the Panel, that he did not have to report it.

16. Similarly, Allegation #3 relating to misleading the member by certifying in an annual document required by the Member that he had not borrowed funds from clients and had not engaged in any undisclosed outside business activity will normally be present if money is borrowed or there is a dual occupation. In criminal cases, convicted persons are rarely also charged with perjury, although if they have given evidence they could be.

17. A permanent prohibition will achieve the MFDA's mandate of investor protection, as the Respondent will no longer be able to operate in the securities industry and it will at the same time deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants, and foster public confidence in the securities industry.

18. The main question for the panel is what the fine should be. The MFDA asks for a fine of a minimum of \$175,000. We think this is too high in the circumstances of this case. The cases cited to us where a substantial fine was imposed were generally cases where the Respondent failed to cooperate with the MFDA or failed to show remorse, or both. The Respondent in the present case, however, cooperated with the MFDA and was at pains to express at every opportunity his remorse for his conduct

19. Again, this is not a case where there was an intention to defraud the clients. We believe that for the most part he intended to pay back the funds borrowed or have the debts forgiven.

20. The Respondent is not in good financial shape. Whatever fine is imposed is unlikely to ever be collected. The recent MFDA Sanctions guidelines state that ability to pay should be taken into account as one of many factors. There are, apparently, very few cases interpreting that provision, which states (section 11):

“The Respondent’s ability to pay may be a consideration in determining the appropriate monetary sanction to be imposed. However, it is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA’s disciplinary processes.”

The Respondent produced a document showing he now has a low yearly income – about \$50,000 – and claimed that he has no assets apart from an RRSP of about \$5,000. He told the Panel that he was prepared to submit his tax returns. His financial position was not challenged by the MFDA.

21. The issue of ability to pay came up in the MFDA case of *Re Brauns* MFDA File No. 201203. The conduct in that case was serious and the panel stated (paragraph 16):

“In our view, any inability to pay the fine (while relevant) is trumped by the need to articulate the seriousness of the Respondent’s misconduct, and to at least impose a fine that bears some relationship to the benefit obtained as a result of the misconduct and/or the loss to those affected.

22. The matter also came up in the IIROC case of *Re Hoshizaki* 2017 IIROC 52, where there is a provision similar to section 11. The IIROC panel stated (paragraph 19):

“Guidelines state that inability to pay is a factor when considering an appropriate monetary sanction, but the Guidelines go on to state that ability to pay ‘should not be considered a predominant or determining factor.’ In our view, the more egregious the conduct, the less it should be taken into account. The conduct here involves misappropriation of funds”.

The present case is serious, but it is not a case of wilful fraud or deliberate misappropriation of funds. The MFDA counsel did not label the conduct as “egregious”. So we have given the provision some, but relatively little weight. If the Respondent had substantial assets, the fine would likely have been significantly higher.

23. Many of the cases link the amount of the fine to the sum that was involved in the wrongdoing. That is the right approach. The sum borrowed here was about \$100,000. The sum not repaid was about \$90,000. The Respondent argued that some of the sum was “forgiven” by some of the clients, but we do not accept that to be a significant factor, although it cannot be completely ignored in determining the penalty. Nor do we give very much weight to the fact that the Respondent did errands for and was kind to one of the clients from whom he borrowed funds.

24. Should we take into account the fact, as argued by the Respondent, that the Member reimbursed the clients for the unpaid sums? This is not an easy question to answer. There was still a loss of about \$90,000, but it was borne by the Member, not the vulnerable clients. Still, had the loss been borne solely by the clients, most people would consider that fact to be an aggravating factor. So to that extent we have taken it into account.

25. The important point is that the Respondent profited by about \$90,000. The figures are not exact because the Respondent recently discovered three cheques totalling \$750 which he had given to one of the clients, which were not taken into account in the original calculations. On the other hand, the calculations did not take into account the opportunity loss and the interest that could have been earned by the clients on the amount lent to the Respondent.

26. Taking all of these considerations into account, we have decided that a proper fine in the present case is the very substantial round number of \$100,000.

27. We therefore order a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member; a fine of \$100,000; and costs of \$7,500.

DATED this 2nd day of December, 2019.

“Martin L. Friedland”

Martin L. Friedland, CC, QC
Chair

“Patrick Galarneau”

Patrick Galarneau
Industry Representative

“Guenther W. K. Kleberg”

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