



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: Marja Grobbink Harmer

Heard: September 9, 2021 by electronic hearing in Regina, Saskatchewan
Decision (Motion): September 9, 2021
Reasons for Decision (Motion): October 25, 2021

**REASONS FOR DECISION
(MOTION)**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh

Chair

Appearances:

Justin Dunphy

) Senior Enforcement Counsel for the Mutual
) Fund Dealers Association of Canada

Sakeb Nazim

)
) Enforcement Counsel for the Mutual Fund
) Dealers Association of Canada

Marja Grobbink Harmer

)
) Respondent
)
)

Background

1. On December 14, 2020, the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Hearing pursuant to sections 20 and 24 of MFDA By-law No. 1.
2. The Notice of Hearing concerned a disciplinary proceeding which was commenced by the MFDA against Marja Grobbink Harmer (the “Respondent”).
3. In the Notice of Hearing the MFDA alleges the following violations of its By-laws, Rules or Policies:

Allegation #1: Between June 2013 and February 2017, the Respondent engaged in personal financial dealings with clients by:

- a) jointly investing with clients in real estate investments through a company that she owned or operated; or
- b) opening and maintaining a joint bank account with clients relating to real estate investments, which gave rise to a conflict or potential conflict of interest that she failed to disclose to the Member or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to the policies and procedures of the Member and MFDA Rules 2.1.4, 2.1.1, 2.5.1 and 1.1.2.

Allegation #2: Between June 2013 and February 2017, the Respondent engaged in securities related business that was not carried on for the account or through the facilities of the Member, when she solicited, recommended, sold or facilitated the sale of investments by clients in real estate investments, contrary to MFDA Rules 1.1.1 and 2.1.1.

Allegation #3: Between June 2013 and February 2017, the Respondent engaged in outside business activities that were not disclosed to or approved by the Member when she:

- a) solicited, recommended, sold or facilitated the sale of investment by clients in real estate investments;
 - b) incorporated companies or served as the President or Director of the companies; or
 - c) became an independent distributor for a skin care company,
- contrary to the Member’s policies and procedures and MFDA Rules 1.2.1(c)1 (now 1.3.2), 2.1.1, 2.5.1 and 1.1.2.

Allegation #4: Between December 2013 and February 2017, the Respondent engaged in securities related business that was not carried on for the account or through the facilities of the Member, by recommending, selling or facilitating the sale of investment in exempt market or other investment products to clients, contrary to the Member’s policies and procedures and MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1.

Allegation #5: Commencing in July 2019, the Respondent failed to cooperate with an investigation by MFDA Staff into her conduct, contrary to section 22.1 of MFDA By-Law No. 1.

4. The Respondent filed a Reply on January 7, 2021.
5. A first appearance in this matter was held on February 26, 2021.

6. That appearance was attended by Enforcement Counsel, the Respondent, and six members of the public, all of whom participated by videoconference.
7. The purpose of the appearance was to discuss procedural issues relating to the hearing on the merits and to schedule a date for the hearing.
8. Enforcement Counsel requested that the hearing be scheduled in person to allow the MFDA's witnesses who, they advised, were individuals who had filed complaints about the Respondent, and lived in Regina, to testify in person.
9. It was determined that the hearing on the merits would take place from October 19 to October 22, 2021 in Regina, Saskatchewan, at a venue to be determined.
10. It was also determined that a further appearance should be held by videoconference, closer to the time of the hearing to address COVID related issues. Following the appearance, the Panel issued an Order which set out dates for the parties to exchange disclosure, witness lists, and will-say statements.
11. The next appearance of the matter took place by teleconference on August 31, 2021.
12. At that appearance the parties made further submissions relating to disclosure and the evidence they intended to adduce at the hearing.
13. Enforcement Counsel requested that one of the witnesses they intended to call – from the Member – be allowed to testify by videoconference.
14. The Panel granted that request and set deadlines for the parties to provide written submission and authorities to the Panel, in advance of the hearing.
15. There were no discussions regarding COVID related issues.
16. Immediately following the hearing, however, the Panel asked the Corporate Secretary to convey a message to the parties that upon reflection, the Panel was not prepared to hold the hearing in-person because the matter was almost two months away and the situation regarding COVID was too uncertain to be able to predict whether the hearing would in fact be able to proceed in person. The Panel expressed the view that now that the parties knew the hearing would be proceeding remotely, this would allow them sufficient time to prepare so that there would be no last-minute technical difficulties, including having time to make whatever arrangements they saw

fit to assist with participating remotely, as has been the case for participants in MFDA hearings over the last year and a half.

17. The Panel indicated that if the parties wished to convene another interim appearance by videoconference to discuss any further procedural issues it would be happy to oblige.

18. Enforcement Counsel requested an interim appearance to be held the following week, to explore other options.

19. On September 9, 2021 a further appearance was, therefore, convened by videoconference.

20. At that time Staff advised that the “victims, the Respondent and Management” were all in agreement that the hearing needed to be held in-person and that prejudice would result if that were not the case.

21. Staff did not adduce any evidence nor provide any legal authorities in support of its request; nor did it set out any information about any type of safeguards that would be taken at an in-person hearing to address COVID related concerns.

22. Staff then proposed two options to the Panel:

- a) That the Chair recuse themselves in the hope of finding a chair who was prepared to attend in-person; or
- b) That the Corporate Secretary’s Office could accommodate the Chair to attend remotely.

Hybrid Hearing Ordered

23. After some discussion between the parties and the Panel, it was agreed and the Panel determined that the hearing will be conducted as an electronic hearing, in a hybrid manner – allowing anyone who wishes, to participate by attending in the physical location the Corporate Secretary will secure in Regina.

24. Members of the public will have access to participate by videoconference, in the same manner they have been able to do, since the MFDA began holding electronic hearings in response to the COVID-19 pandemic.

Analysis

25. The MFDA Rules of Procedure make it clear that hearing panels have the ability to control their own process. See, for example, Rule 1.5:

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.

MFDA Rules of Procedures, Rule 1.5

26. With respect to electronic hearings, Rule 5 provides:

RULE 5: ELECTRONIC HEARINGS

5.1 When Electronic Hearings may be Held

- (1) A Panel may hold an electronic hearing to determine:
 - (a) any procedural matter; or
 - (b) any other matter, unless a party objects and the Panel is satisfied that holding an electronic hearing is likely to cause significant prejudice to the party.
- (2) A Panel may continue an oral hearing as an electronic hearing, or an electronic hearing as an oral hearing, at the request of a party or on its own initiative, on such terms as it considers appropriate.
- (3) In determining whether to hold an electronic hearing, the Panel may consider any relevant factors, including:
 - (a) convenience;
 - (b) fairness;
 - (c) cost, efficiency and timeliness;
 - (d) public access to and participation in the hearing;
 - (e) the Panel's mandate;
 - (f) whether an electronic hearing is appropriate having regard to the evidence and the issues to be considered.
- (4) A Panel may impose any terms on an electronic hearing it considers appropriate, including that one or more of the parties to the electronic hearing shall pay all or part of the costs of conducting the electronic hearing.

MFDA Rules of Procedures, Rule 5

27. Although there was ultimately no disagreement as to how the hearing would proceed, and Enforcement Counsel did not refer the Panel to any case law about the issue, despite the Panel's offer to allow Counsel an opportunity to do so, the Panel believes it is useful, for contextual purposes, to cite some cases which demonstrate how courts and tribunals are proceeding in response to the exigencies of the COVID-19 pandemic.

28. The Panel's decision in this matter is consistent with decisions by courts and administrative tribunals, including panels from the Investment Industry Regulatory Organization of Canada (IIROC) and the Manitoba and British Columbia Securities Commissions. See, for example: *Arconti v Smith* 2020 ONSC 2782; *Miller v FSD Pharma, Inc.* 2020 ONSC 3291; *Re Ziaian*, 2020 IIROC 34; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 COMP Trib 14; *Canadian Union of Public Employees, Air Canada Component v Air Canada Grievance No. CHQ-17-42 (Adjournment Request)*, 2020 CanLII 35454 (CA LA); and *College of Physician and Surgeons of Ontario v Mikhail*, 2021 ONCPSD 38.

29. In all of the above referenced cases, the respective court or tribunal, after considering submissions from parties that they would suffer prejudice if forced to participate remotely, determined that none of the evidence or arguments brought before them led to the conclusion that it was not appropriate for the hearing to proceed virtually.

30. In light of Staff's submission in this case that its witnesses were not technologically adept, the arbitrator's comments in *Canadian Union of Public Employees, supra*, are of particular relevance:

24. What the outer limits of the reasonable steps that the institutional parties must take to facilitate a remote hearing is best determined on a case by case basis. However, arranging for a witness to have access to a suitable device (such as a laptop or tablet) and sufficient internet access, absent compelling reasons why that is not possible, falls within the range of reasonable steps. A party has several options by which it can take these reasonable steps, including providing the witness with a room, computer and internet access at an employer location or counsel's office, renting a computer and a room with internet access at a hotel near the witness, or perhaps providing the witness with a suitable device and or internet access (through a cell phone hot spot, mobile internet stick or other means) at their home. There are many ways that remote access to the hearing can be facilitated. It is up to the party calling the witness to determine the best way to bring that about, in exactly the same way it is up to a party to arrange for a witness to be present at an in-person hearing.

Canadian Union of Public Employees, supra (para 24)

31. The decisions cited above also identify that a hybrid hearing as has been determined will occur in this instance, is not without precedent. See, for example, *Parrish & Heimbecker, supra*, where the tribunal found that a hybrid virtual hearing was appropriate with the witnesses testifying remotely from a hearing room in Virden, Manitoba while the tribunal remained in their home jurisdiction.

32. The tribunal in that case said:

17 ... the Tribunal is satisfied that the hearing format set out herein respects the principles found in subsection 9(2) of the Competition Tribunal Act, RSC 1985, c 19 (2nd Supp) and will allow it to deal with the Application as informally and expeditiously as the circumstances and considerations of fairness permit. In the Tribunal's view, the requirement for an informal, expeditious and fair determination of matters before

it does not mandate that parties invariably have the mode of hearing they prefer, or that hearings necessarily have to occur in person despite the exigencies of a pandemic.

Parrish & Heimbecker, supra (para 17)

33. In reaching its decision on this matter, the Panel also notes the decision from the College of Physicians and Surgeons of Ontario, cited above, which was released in August of 2021, where the Chair found that despite the re-opening of Ontario and widespread vaccination: "... we are far from back to normal" due to the Delta variant, the lack of vaccines in children and the fourth wave beginning. The hearing in that matter was, therefore, determined to proceed virtually.

34. As the Chair in that decision pointed out, after nearly a year and a half of using them, videoconference hearings are fair and effective, allow for credibility issues to be fully aired and evidence properly attested by cross-examination.

35. Indeed, the MFDA has been holding disciplinary hearings – both hearings on the merits and settlement hearings – by videoconference, for almost 18 months.

36. The decision to hold the hearing of this matter as an electronic hearing, conducted in a hybrid manner, will allow all participants, including the parties, counsel, witnesses, members of the public and the Panel, to participate in a manner in which they feel most comfortable, in light of the COVID 19 pandemic.

37. The Panel thanks the parties for their willingness to be creative and flexible in achieving this result.

DATED this 25th day of October, 2021.

"Sherri Walsh"

Sherri Walsh
Chair

DM 848855