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: Christiaan Albert Hesselink

Heard: September 27, 2013 in Toronto, Ontario
Decision and Reasons: October 16, 2013

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Terrance Sweeney	Chair
Nick Pallotta	Industry Representative

Appearances:

Lyla Simon	)	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Christiaan Hesselink	)	Self-represented

1. We were constituted as a hearing panel of the Central Regional Council (the "Hearing Panel") of the Mutual Fund Dealers Association of Canada (the "MFDA") to conduct the hearing concerning a disciplinary proceeding commenced by the MFDA against Christiaan Albert Hesselink (the "Respondent").

2. By a Notice of Hearing, dated May 10, 2013,[1] the MFDA gave notice that the first appearance in this matter would take place by teleconference before the Hearing Panel on July 10, 2013 at 10:00 a.m.

3. In a press release, dated June 18, 2013, the MFDA announced that it had commenced disciplinary proceedings in respect of the Respondent and repeated the allegations in the Notice of Hearing that the Respondent engaged in the following conduct contrary to the By-laws, Rules or Policies of the MFDA:

> **Allegation #1**: Between October 2007 and April 2011, the Respondent engaged in securities related business that was not carried out for the account and through the facilities of the Member by selling, recommending, referring or facilitating the sale of approximately $8.4 million of two different exempt market investment products to at least 58 clients and 18 other individuals outside the Member, contrary to MFDA Rules 1.1.1(a) and 2.1.1.
>
> **Allegation #2**: Between October 2007 and April 2011, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling, recommending, referring or facilitating the sale of approximately $8.4 million of exempt market investment products outside the Member to at least 58 clients and 18 other individuals, contrary to MFDA Rules 1.2.1(c) and 2.1.1.
>
> **Allegation #3**: Between October 2007 and April 2011, the Respondent entered into referral arrangements with two parties in respect of the sale of two different exempt market investment products pursuant to which he was paid referral fees or commissions of at least $355,000, contrary to MFDA Rules 2.4.2(b) and 2.1.1.

[1] Exhibit 1

Allegation #4: Between 2005 and April 2011, the Respondent engaged in personal financial dealings with a client by co-owning and operating a storage business with the client, thereby giving rise to a conflict or potential conflict of interest between the Respondent and a client which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.

4. The Respondent filed a Reply[2] to the Notice of Hearing.

5. Our colleague, M. Sylvain Theriault, was unable to attend the hearing on September 27. The Hearing Panel proceeded as a panel of two as we are allowed to do.[3]

6. Counsel for the MFDA filed an affidavit of Stephen Davis ("Mr. Davis").[4] He is an investigator with the MFDA and was responsible for the investigation of the Respondent. His affidavit consists of two thick volumes including 22 exhibits.

THE CASE FOR THE MFDA

7. Mr. Davis was sworn and testified at length. Counsel took him through his affidavit and the important parts of his investigation. His testimony is summarized as follows:

a) The Respondent was registered as a mutual fund salesperson with FundEX Investments Inc. or its predecessor firms ("FundEX") from 2004 until July 5, 2013 when he sold his practice and retired from the securities industry.
b) On November 7, 2006, the Respondent asked FundEX for approval to recommend an exempt market product offered by Skyline Apartment Real Estate Investment Trust ("Skyline").
c) On September 5, 2007, FundEX denied the Respondent's request.
d) Despite FundEX's refusal to approve the Skyline product, the Respondent referred a number of clients and others to Skyline. Skyline sold $7,887,263.00 of its units to 52

[2] Exhibit 3
[3] MFDA By-law No. 1, subsection 19.9(b)
[4] Exhibit 4

clients of the Respondent and 18 other individuals. The Respondent's corporation, 624006 Ontario Inc. ("624006"), received about $346,286.00 in fees for his efforts.[5]

e) At least six clients redeemed a part of their mutual funds held at FundEX in order to acquire units in Skyline.

f) On March 18, 2011, the Ontario Securities Commission accepted a settlement wherein Skyline admitted breaches of Ontario securities laws and agreed to repay all clients who had invested in Skyline who did not qualify as accredited investors.

g) In late March 2011 and on April 11, 2011, the Respondent informed FundEX that he had referred clients and others to Skyline.

h) FundEX immediately informed the MFDA of the Respondent's conduct.

i) In or about March 2010, 624006 agreed with HarbourEdge Capital Corporation ("HarbourEdge") to refer clients to HarbourEdge for a fee. Between April 2010 and April 2011, the Respondent referred six clients to HarbourEdge who bought $850,000.00 worth of the HarbourEdge product. 624006 earned about $9,000.00 in fees.

j) The HarbourEdge product was not an approved FundEX product and the Respondent never sought to obtain the approval of FundEX to refer his clients to HarbourEdge.

k) The Respondent informed FundEX of his activities on behalf of HarbourEdge in March 2011.

Personal Financial Dealings with Client

8. Mr. Davis said that from and after May 2006, the Respondent, together with a client and others, operated a storage business under a numbered company. FundEX knew about the storage company and approved it. The Respondent, however, did not tell FundEX, until April 2011, that one of his clients was a shareholder in the company.

9. The Respondent cross-examined Mr. Davis. He did not challenge any of Mr. Davis' testimony save for two points:

1. Mr. Davis agreed that the fees the Respondent received were referral fees and not sales commissions.

[5] Exhibit 9

2. Mr. Davis agreed that the Respondent did not promote Skyline, except for sending some clients the Offering Memorandum.

THE CASE FOR THE RESPONDENT

Christiaan Albert Hesselink

10. He was sworn and testified.

11. He has always put his clients first. He did a lot of due diligence on Skyline and thought it was a sound investment and invested in it himself. He did not get involved in Skyline solely for the fees. He wanted his clients to balance their portfolios with the Skyline product.

12. He has done everything aboveboard. He has been a councillor in his hometown and a long-time volunteer firefighter.

13. He did not think there was a conflict in the storage business. His client is a long-time friend who simply provided a 99-year lease of the land on which the storage units were erected. Besides, the only investment the client had with him was a very small RRSP account. He undertook to provide a letter from the client saying that no conflict existed.

14. Counsel cross-examined the Respondent and asked him why he kept separate files for each of his clients and others who invested in Skyline and HarbourEdge. He replied that was because it was his company's business.

15. Counsel then put to the witness the following, all of which he acknowledged that he had received and read:

1. FundEX Compliance Notice dated February 16, 2006;[6]
2. Excerpt from FundEX manual on Approved products;[7]

[6] Exhibit 11
[7] Exhibit 10

3. FundEX Compliance Notice "Product Approval Committee" dated October 13, 2006;[8]
4. FundEX Compliance Notice 2004-08 "Referral Arrangements" dated March 25, 2004;[9]
5. FundEX Product Approval Request Form;[10]
6. FundEX Product & Referral Agreement Approval Process dated October 2006;[11]
7. FundEX Compliance Policies and Procedures Manual dated November 2006.[12]

16. He said that, except for the allegation that he was told in March 2007 that Skyline would be denied, he did not dispute the allegations in Mr. Davis' affidavit.

Mr. VW

17. He was sworn and testified that he has known the Respondent for ten years. The Respondent has an exceptional reputation and many people have spoken highly of his work. He and his colleagues at FundEX liked Skyline but could not get it on their FundSERV platform so had to deny the Respondent's request for approval.

18. He described the Respondent as very upset when he came to see him in April 2011. The Respondent said that he "might have screwed up". Mr. VW agreed that the Respondent was offside and called FundEX's lawyer which led to reporting the matter to MFDA.

19. He confirmed that FundEX knew about the storage business and the Respondent's private company. FundEX was not entitled to share in any of the fees the Respondent earned as the Respondent paid FundEX a flat annual $20,000.00 fee for back office support.

20. He said that, in his experience, the Respondent was the only person who came forward on his own to admit that he might have transgressed MFDA Rules.

Dale Murray

[8] Exhibit 12
[9] Exhibit 13
[10] Exhibit 14
[11] Exhibit 15
[12] Exhibit 16

21. He is a consulting engineer. He testified that he has known the Respondent for over 25 years. He values the Respondent's judgment and the Respondent has served his family very well as a financial planner.

22. He invested in Skyline through the Respondent and is very happy with his investment.

Philip Gleeson

23. He was in the general insurance business. He has sold his firm. He has known the Respondent for 40 years. The Respondent is an honest person who has done many good things in their community. The Respondent is a true financial planner, not just a mutual fund salesman.

24. He had heard about Skyline and invested in it before it became a Real Estate Investment Trust. He also bought units for his children. It has been a wonderful investment. He knew that the Respondent had tried to get it approved by FundEX and had failed. He was also aware that the Respondent was earning a referral fee. He described the Respondent as a person who takes care of his clients.

ANALYSIS

25. The Hearing Panel accepts the evidence of Mr. Davis; indeed, so did the Respondent, save for two or three irrelevant parts thereof. The facts have, thus, been established.

26. This Respondent is ungovernable. He blithely ignored FundEX's ruling that Skyline was not an approved product and went "off book" to refer numerous clients and others to Skyline. His pious statement that he did this, in part, so that his friends and clients could get a good product with which to balance their portfolios rings hollow when one considers the amount of fees he earned. After all, if he were the altruistic individual he would have us believe, he could have referred his clients to a third party and avoid earning any fees.

27. Apparently, he learned his lesson through Skyline. When the HarbourEdge chance came up he went ahead and did the same thing without even asking FundEX for approval. Throughout

the hearing, the Respondent seemed to suggest that as the investments were good and no one complained we should somehow simply ignore that he breached MFDA Rules and FundEX's compliance policies and procedures. This illustrates his complete misunderstanding of the MFDA as a self-regulating organization.

28. If we were to accept such an argument, it would destroy the MFDA and its Members. It would rob the Member of its ability to monitor Approved Persons, their clients and the suitability of recommended products for those clients. The Respondent further suggests that as he referred clients to Skyline and HarbourEdge through his numbered company and not as a FundEX representative, he has avoided MFDA Rules and FundEX's policies.

29. This is a patently preposterous proposition. An Approved Person cannot do indirectly what he cannot do directly. Such a ruling by this Hearing Panel would mean that Approved Persons could easily avoid the very rules put in place to protect Members and clients.

30. Previous MFDA panels have so held.[13]

MFDA Rules 1.1.1 and 1.2.1(c)

31. The Hearing Panel rules that the Respondent contravened MFDA Rules 1.1.1 and 1.2.1(c). Rule 1.1.1 prohibits an Approved Person from going "off book", which is precisely what this Respondent did in Skyline and HarbourEdge.

32. Rule 1.2.1(c) provides that an Approved Person may have another gainful occupation provided, among other things, that:

> Clear disclosure is provided to clients that any activities related to such other gainful occupation are not business of the Member and are not the responsibility of the Member…

33. The Respondent certainly told FundEX about his numbered company. He carefully did not inform FundEX of just what it was he was doing with HarbourEdge and Skyline. He might

[13] *Taylor*, MFDA Prairie Regional Council, MFDA File No. 201135, Panel Decision, February 6, 2013; *Majdoub*, 2010, MFDA Central Regional Council, MFDA File No. 201010, Panel Decision, November 12, 2010

also have told his clients that was what he was doing because FundEX could not approve the Skyline product. This is hardly "clear disclosure".

34. In *Vitch*,[14] the Hearing Panel said:

> The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious...The first is that a failure to know about an employee's other commercial activities impinges upon a Member's ability to properly supervise its employee. The second...the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with Member.

Referral Arrangement Requirements – Rule 2.4.2(b); Sections 13.7 to 13.11 of National Instrument 31-103

35. It is more likely than not that the Respondent knew, when he entered into the referral arrangements with Skyline and HarbourEdge, that he was breaching the rules above and the policies of FundEX.

36. The rules and policies could hardly be clearer. An Approved Person, like the Respondent, is prohibited from entering into referral arrangements of any kind except through a Member. Otherwise, how could a Member monitor its Approved Persons?

Rule 2.1.1

37. The Respondent's conduct fell far short of the standard of conduct expected of an Approved Person. The Rule reads, in part:

> Each ... Approved Person ... shall
>
> (b) observe high standards of ethics and conduct in the transaction of business.

38. The Respondent's argument was peculiar. He stressed his integrity yet conceded that he earned fees in his private company on an unapproved product. The members of the Hearing Panel were simply astonished by this obvious contradiction.

[14] *Vitch (Re)* 2011 MFDA Central Regional Council, MFDA File No. 201103, Panel Decision, September 22, 2011

Rule 2.1.4 – The Respondent's Personal Dealings with a Client

39. The Hearing Panel struggled with this allegation.

40. The Respondent and two friends and their wives incorporated a company in 2006 which constructed storage units. The land on which the units were erected was contributed through a 99-year lease from one friend who became a shareholder in the company with his wife. During the relevant time the friend had a small RRSP account with the Respondent.

41. The Respondent said that it was an oversight on his part. If it was a conflict or a potential conflict, it would be a technical one.

42. The Hearing Panel notes that, subsequent to the hearing, the Respondent delivered an acknowledgment from all of the shareholders in the company saying there was no conflict. This, of course, cannot cure a conflict or a potential one, but it is entitled to some weight. In any event, if there were a conflict, it has ceased as the Respondent has retired from the industry.

DECISION

43. Counsel for the MFDA has proved, on a balance of probabilities, Allegations 1, 2 and 3. She has failed to prove Allegation #4 against the Respondent.

PENALTY

44. The Hearing Panel has carefully considered the evidence, case law, MFDA Penalty Guidelines and the oral and written submissions of Counsel for the MFDA. The Respondent has demonstrated that he has no idea of the seriousness of his conduct, so he has shown no remorse for his actions. There are, however, a number of mitigating factors.

1. He has no prior disciplinary record.
2. He did self-report.
3. He did cooperate in the investigation.

4. There have been no client complaints.

45. Any sanctions imposed must be preventive, protective and prospective. The Hearing Panel is alert to the need to convey to the industry that it will not tolerate those who treat MFDA rules and Member policies as optional. The Hearing Panel has tried to fashion sanctions sufficient to punish, but not crush, the Respondent while warning others who might be tempted to deal as this Respondent did.

46. We believe that the penalties below are reasonable and proportionate:

a) The Respondent shall be prohibited for a period of five years from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
b) A global fine in the amount of $400,000.00, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c) Costs of $7,500.00, pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 16th day of October, 2013.

"Terrance A. Sweeney"
Terrance A. Sweeney,
Chair

"Nick Pallotta"
Nick Pallotta,
Industry Representative

DM 356843 v2