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: Adam Kryn Vandermey

Heard: August 24, 2017 in Toronto, Ontario
Decision: August 24, 2017
Reasons for Decision: October 2, 2017

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Paul M. Moore, QC	Chair
Guenther W. K. Kleberg	Industry Representative
Joan Smart	Industry Representative

Appearances:

Maria L. Abate	)	Counsel for the Mutual Fund Dealers Association of Canada
Adam Kryn Vandermey	)	Respondent, not in attendance not represented by counsel

Introduction

1. Adam Kryn Vandermey ("Respondent") was a long-time dealing representative with Sun Life Financial Investment Services (Canada) Inc. ("Sun Life"), a Member of the Mutual Fund Dealers Association of Canada ("MFDA"). He was a trusted advisor of Sun Life client, JK, and of Sun Life client, JR, and was an associate of his fellow Sun Life dealing representative, MF.

2. The Respondent misappropriated $30,000 from client JK from monies she had entrusted to him for investment. The monies were from insurance proceeds for the death of her husband who had fallen from a ladder at his home and died just three weeks before client JK met with the Respondent to entrust the funds to him for investment.

3. Sun Life reimbursed client JK for her loss but has not received reimbursement from the Respondent.

4. The Respondent misappropriated $7,718.80 from the monies client JR intended to be paid into his RRSP with Sun Life by fraudulently depositing JR's employer's cheque payable to Sun Life into a bank account controlled by the Respondent.

5. The Respondent misappropriated $10,300 from a bank account set up by the Respondent and his associate, MF, to hold funds to operate a charity golf tournament sponsored by Sun Life. The Respondent repaid $2,000. However, MF borrowed the balance from his sister to, in effect, replace monies taken by the Respondent. The Respondent did not repay MF and left Canada.

6. The Respondent failed to cooperate with the MFDA in its investigation of these matters, although he misleadingly advised the MFDA that he would.

7. The Respondent did not defend the allegations against him. He did not file a Reply and did not appear at any of the appearances in connection with the hearing of this matter.

8. Once we reached our decision on the merits, we briefly adjourned and then heard MFDA staff's submission as to penalty.

Issue

9. The deep issue we faced in this case was: What level of fine was appropriate, in addition to a permanent prohibition and a costs award, to provide a meaningful general and specific deterrent in light of the facts and the circumstances regarding the Respondent?

Allegations

10. In the Notice of Hearing dated January 27, 2017, staff alleged:

> **Allegation #1**: Between December 10, 2013 and August 1, 2014, the Respondent misappropriated approximately $48,018 from two (2) clients and a bank account used to conduct charitable activities, thereby failing to deal fairly, honestly and in good faith with clients and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.
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> **Allegation #2**: Commencing on May 5, 2015, the Respondent failed to cooperate with an investigation into his activities conducted by Staff of the MFDA, contrary to section 22.1 of MFDA By-law No. 1.

Evidence

11. The evidence of staff was presented in an affidavit of Ian R. Smith, a senior investigator with the MFDA, sworn August 14, 2017, together with 25 exhibits to the affidavit.

12. The exhibits contained documents and transcripts of statements from client JK and others. Although the transcripts were hearsay evidence there was nothing in the documentary evidence to suggest that the hearsay evidence was inconsistent with the other evidence or was unreasonable or not credible.

13. We found the evidence in the affidavit of Mr. Smith and the exhibits to be clear and cogent and accepted it, on a balance of probabilities, as establishing fact.

Facts

14. From the evidence we found the following facts regarding the misappropriation of monies by the Respondent from client JK:

a) The Respondent was a highly experienced dealing representative sponsored by multiple MFDA Dealer Members from 2002 to 2014, namely Clarica Investco Inc. and Sun Life.

b) JK was a client of Sun Life and the Respondent was the mutual fund salesperson responsible for servicing client JK's accounts at Sun Life.

c) On December 10, 2013, client JK met with the Respondent to discuss the investment of proceeds from an insurance claim received by client JK as a result of the death of her spouse three weeks earlier, and at that time, client JK provided the Respondent with a cheque for $120,000 payable to Sun Life Assurance Co., an insurance affiliate of Sun Life. Client JK instructed the Respondent to open an account at Sun Life Assurance and deposit the cheque into the account in order to purchase insurance products.

d) At the same meeting, client JK provided the Respondent with a cheque for $30,000 payable to "Vandermey Financial Services" and instructed the Respondent to open an account at Sun Life and deposit the cheque into a daily interest account for later use by client JK.

e) On December 18, 2013, the Respondent cashed the $30,000 cheque written by client JK to Vandermey Financial Services and he misappropriated the proceeds.

f) On December 19, 2013, after a request from client JK for confirmation that the $30,000 she had provided to the Respondent earlier had been deposited into a daily interest account on her behalf, the Respondent provided client JK with a "Daily Interest Confirmation Form" bearing account number AN-J933152-1 and a

hand written note on Sun Life letterhead confirming receipt of $30,000 from client JK.

g) The documents provided by the Respondent to client JK falsely represented that the funds had been deposited into an account at Sun Life.

h) The Respondent fabricated the Daily Interest Confirmation Form; the form was not issued by Sun Life; and policy number AN-J933152-1 does not exist. Sun Life was not aware that the Respondent was purporting to conduct business using the name, Vandermey Financial Services.

i) On January 6, 2014, the Respondent opened a new account for client JK at Sun Life Assurance and arranged for the $120,000 cheque to be deposited into the account for the purchase of an insurance product for client JK.

j) In January 2014, client JK requested a redemption in the amount of $10,000 from her daily interest account at Sun Life which she believed held her previous deposit of $30,000.

k) On January 27, 2014, the Respondent processed a $10,000 redemption from client JK's insurance account at Sun Life Assurance and provided these monies to client JK. Client JK was not aware that these monies had been redeemed from her Sun Life Assurance insurance account rather than her Sun Life daily interest account.

l) Sometime in July 2014, client JK requested a further redemption in the amount of $20,000 from her daily interest account at Sun Life.

m) On August 7, 2014, the Respondent processed a $20,000 redemption from client JK's insurance account at Sun Life Assurance and provided these monies to client JK. Client JK was not aware that these monies had been redeemed from her Sun Life Assurance insurance account rather than her Sun Life daily interest account.

n) On October 3, 2014, the Respondent resigned from Sun Life and is no longer in the mutual fund industry.

o) In January 2015, client JK contacted Sun Life to inquire about the insurance product that she had purchased for $120,000. As a result of client JK's inquiry, it was subsequently discovered that her insurance policy had a balance of only $91,000 as a result of redemptions made by the Respondent.

p) Shortly thereafter, Sun Life commenced an investigation into the Respondent's activities and on February 17, 2015, Sun Life reimbursed client JK for the losses caused by the Respondent.

Client JR

15. From the evidence we found the following facts regarding the misappropriation of monies by the Respondent from client JR:

a) Client JR was a client of Sun Life and the Respondent was the mutual fund salesperson responsible for servicing client JR's accounts at Sun Life.

b) On March 14, 2014, client JR's employer QCC sent a cheque to the Respondent for $7,718.80 payable to Sun Life. The QCC cheque represented QCC's employer contribution for client JR's Registered Retirement Savings Plan account for 2014

c) The Respondent did not deposit the QCC cheque into client JR's RRSP account, but instead, on April 30, 2015, the Respondent deposited the QCC cheque into a bank account he controlled. He misappropriated the monies.

d) The Respondent's misappropriation was discovered after a complaint by client JR, prompted by his inability to properly file his taxes stemming from the confusion regarding his RRSP contributions. A replacement cheque from client JR's employer for the monies misappropriated by the Respondent was received by Sun Life on June 17, 2015 and an RRSP purchase was backdated to March 14, 2015.

Charitable golf tournament

16. From the evidence we found the following facts regarding the misappropriation of monies by the Respondent from a charity golf tournament:

a) The Respondent and another Approved Person at Sun Life, MF, organized and held an annual charity golf tournament sponsored by Sun Life.

b) The Respondent and MF held a bank account in order to operate the charity tournament. The Respondent and MF had signing authority with respect to the charity bank account and any cheques written from the charity bank account required the signatures of both the Respondent and MF.

c) On May 15, 2014, the Respondent wrote a cheque for $5,000 payable to himself from the charity bank account. The Respondent falsified MF's signature on the cheque.

d) On July 26, 2014, the Respondent wrote a second cheque for $5,300 payable to himself from the charity bank account and falsified MF's signature on the cheque. This withdrawal caused the charity bank account to be overdrawn.

e) MF became aware that the charity bank account was overdrawn and notified the Respondent and the Respondent advised MF that he was aware of the overdraft situation and would rectify it shortly.

f) On August 5, 2014, the Respondent deposited a cheque in the amount of $2,000 into the charity bank account to cover the overdraft

g) In late September 2014, MF became aware that the charitable beneficiaries of the golf tournament had yet to be paid and reviewed the charity bank account to discover that $10,300 in unauthorized withdrawals had been made by the Respondent.

h) MF had discovered that the Respondent had misappropriated funds from the charity bank account by writing cheques payable to himself and falsifying MF's signature on the cheques. MF confronted the Respondent who promised to repay the $8,300 in misappropriated funds using proceeds from the sale of a personal property which had recently been sold.

i) On November 26, 2014, the Respondent provided a cheque to MF for $8,300 in order to repay the monies he had misappropriated from the charity bank account, but when MF attempted to deposit the cheque into the charity bank account, it was returned due to insufficient funds.

j) MF borrowed monies from his sister to repay the monies taken by the Respondent from the charity bank account.

k) The Respondent did not repay MF and left Canada after the above-mentioned events.

l) On July 4, 2017, the Respondent was arrested on fraud related charges when attempting to re-enter Canada in Sarnia, Ontario.

Failure to cooperate

17. Mr. Smith's affidavit outlines at least seven requests by staff to the Respondent for copies of his bank records and a statement concerning the misappropriation allegations.

18. Staff's requests were made by email and formal letters and include a final letter dated October 2, 2015 which was personally served on the Respondent.

19. The Respondent failed to comply with staff's requests in the emails and formal letters.

Law

Allegation #1

20. MFDA Rule 2.1.1 sets out the standard of conduct to be followed by all Members and Approved Persons. Registrants are to conduct themselves in accordance with "high standards of ethics and conduct" in the transaction of business.

21. MFDA Hearing Panels have consistently held that misappropriation of client funds by an Approved Person is dishonest conduct, which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1. See *In The Matter of Raymond Brown-John*[2005], MFDA File No. 200502, decision dated June 27, 2005; *In The Matter of Earl Crackower* [2005], MFDA File No. 200506, decision dated July 20, 2005; *In The Matter of Stephan Headley* [2006], MFDA File No. 200509, decision dated February 21, 2006; *In The Matter of Dale Michael Graveline* [2006], MFDA File No. 200606, decision dated December 20, 2006; *(Re) Cory Piggott* [2007], MFDA File No. 200706, decision dated October 29, 2007.

22. The Respondent's conduct in misappropriating funds from clients JK and JR, and from the charity bank account violated Rule 2.1.1.

Allegation #2

23. Section 22.1 of MFDA By-law No, 1 enables the MFDA undertaking an investigation of an Approved Person to require the Approved Person to submit a report in writing with regard to any matter involved with the investigation pursuant to the By-law, and to produce for inspection and provide relevant copies of the books, records and accounts of such person, and to attend and give information respecting any such matters. It also provides that the Approved Person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend accordingly.

24. MFDA Hearing Panels have consistently held that a failure to provide information, documents or a report requested in the course of an MFDA investigation constitutes a failure to cooperate, contrary to section 22 of MFDA By-law No. 1. See *Brown-John*, supra, *Crackower*, supra. G*raveline*, supra.

25. The Respondent's failure to comply with the many requests of the MFDA in this regard, constituted a failure to cooperate contrary to his obligation in section 22.1 of By-law No. 1.

Decision on the merits

26. We found that staff had proved the allegations against the Respondent on a balance of probability.

Decision as to penalty

27. We determined that a fine of $200,000 (being approximately three times the monies he misappropriated, plus $50,000 because of the failure to cooperate) was appropriate, in addition to

a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, and a costs award of $10,000.

Appropriateness of the penalty

28. The authority of the MFDA to impose sanctions, or penalties, on a Member or an Approved Person is grounded on its mandate to protect the investing public and industry and to prevent harm to them. A sanction may prevent future harm and may protect against similar conduct in the future by serving as a deterrent, both to a specific respondent and to others in the industry.

29. To be preventative of future harm, a sanction may be a prohibition order removing a person permanently from the industry or preventing forever the re-entry of a person to the industry. Where an Approved Person is still in the industry, a prohibition order will have a significant impact on the person. However, where the person has already left the industry or has no intention to continue in it, a prohibition order, while still preventative, usually will have much less of an impact on him or her. In such a situation, a significant fine will also be necessary as a deterrent to the individual and generally to others in the industry.

30. Merely taking back funds misappropriated by a thief will often have little deterrent impact on the thief. For this reason, law enforcers are sometimes given authority to impose fines greater than the amounts misappropriated. The threat of this counters the adage “nothing ventured, nothing gained” with the prospect of increasing the odds unfavorably so that dishonest conduct may result in significant loss to the perpetrator.

31. In our case, the Respondent left the industry and left the country. It is unlikely he intends to return to the industry. Accordingly, the prohibition order, while being protective of the investing public, will likely have minimal impact on him. In this case, a significant fine is also warranted.

32. The Respondent had been registered as a dealing representative in Ontario for at least 14 years and was in a long-standing relationship with Sun Life and client JK. He was in a position of trust with client JK who was particularly vulnerable after her husband's recent tragic death. Yet he deliberately and deceitfully set out to defraud her. He fabricated documents and statements which included his Member's letterhead, to mislead the client as to the whereabouts of her funds. This was not a case of a dealing representative having good intentions that went wrong, or negligence. The Respondent misled and deceived his clients JK and JR, and his associate, MF, and left his associate (or his associate's sister) and his Member, unreimbursed. The Respondent showed no remorse. He left the country for Nicaragua.

33. The MFDA Penalty guidelines state that in appropriate cases, distinctions should be drawn between misconduct that was unintentional or negligent, and misconduct that was manipulative, fraudulent or deceptive. Factors to consider include deception, vulnerable clients and premeditation, all of which were present in our case.

34. The guidelines also suggest that hearing panels should consider the extent to which a respondent received a financial benefit from the misconduct and whether there has been any restitution or disgorgement. In our case there has been no repayment by the Respondent of the funds he misappropriated, with the limited exception of $2,000 deposited to the charity bank account.

35. The penalty guidelines state that the appropriate amount of a fine or other penalty depends on the facts of each case, including the need for specific and general deterrence. They state that while prior decisions are instructive, the nature and extent of the penalty to be imposed in a given case cannot necessarily be determined by comparison with the penalties imposed in similar proceedings. Staff provided us with several cases involving conduct in violation of MFDA Rule 2.1.1. There was no case in which the fine amounted to three times the benefit received or loss avoided by the applicable respondent. However, many were 10 years or more old, and some involved reimbursement and other factors.

36. The guidelines suggest that where conduct involves deceptive activities intended to deprive a person of property or rights, the fine for an Approved Person should be $25,000 *as a minimum* (no maximum is specified in the guidelines), and that the actual fine should include the amount of any financial benefit to the respondent.

37. Section 24.1.1 of MFDA By-law No. 1 provides that a hearing panel may impose upon an Approved Person a fine not exceeding the greater of $5,000,000 or "an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation." While the fine we imposed on the Respondent does not exceed the limit provided in section 24.1.1, we found the reference to three times the profit instructive. We concluded that this multiple was intended for a most egregious situation.

38. We concluded that the conduct of the Respondent as alleged in allegation #1, was most egregious.

39. The MFDA penalty guidelines suggest a minimum fine of $50,000 for failure to cooperate.

40. Staff originally suggested that the penalty be a permanent prohibition, a fine in the range of $100,000 to $125,000, and a costs award of between $7,500 and $10,000. However, in response to questions and suggestions from the panel, staff gave argument in favour of the penalty we imposed.

Costs

41. Although staff did not provide a bill of costs, in view of the work undertaken by staff in investigating this matter, the difficulty posed by the lack of cooperation by the Respondent, the steps required to attempt to serve the Respondent and the nature of the investigation, we considered that a costs award of $10,000 was reasonable in the circumstances.

Procedure

42. On January 27, 2017, the MFDA issued a Notice of Hearing in this matter.

43. At a first appearance hearing on April 12, 2017, a hearing panel examined the steps staff had taken to notify the Respondent of the hearing. Although staff was unable to serve the Respondent in person, it did send notice to the last address of the Respondent on file with the MFDA and to the email address of the Respondent's that the Respondent had been using in communicating with staff. The panel was satisfied that the Respondent had been in earlier communication with staff and was aware that an investigation of him was underway. The panel ruled that the Respondent had been properly served with notice of the hearing. Further, the panel instructed staff to take certain steps to bring further appearances to the Respondent's attention.

44. At the hearing on August 24, 2017, Staff confirmed that it had carried out the further steps suggested by the hearing panel at the first appearance to notify the Respondent of the date of the hearing on August 24. The panel, after submissions by staff determined that every reasonable effort was made to bring the date of the hearing to the attention of the Respondent.

DATED this 2nd day of October, 2017.

"Paul M. Moore"

Paul M. Moore, QC
Chair

"Guenther W. K. Kleberg"

Guenther W. K. Kleberg
Industry Representative

"Joan Smart"

Joan Smart
Industry Representative