

Re Polischuk

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Brent Michael Polischuk

2023 CIRO 03

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: May 18, 2023 by electronic hearing in Vancouver, British Columbia
Decision and Reasons: October 12, 2023

Hearing Panel

Michael Carroll, Chair

Barbara Fraser, Industry Representative

Susan Monk, Industry Representative

Appearances:

Jennifer Galarneau, Enforcement Counsel

Brent Michael Polischuk, Respondent

Richard S. Margetts, K.C., Counsel for the Respondent

DECISION AND REASONS

BACKGROUND

¶ 1 On April 7, 2022 the Mutual Fund Dealers Association of Canada (the “MFDA”) commenced disciplinary proceedings against Brent Michael Polischuk (the “Respondent”) by issuing a Notice of Hearing alleging the following misconduct contrary to the By-laws, Rules and Policies of the MFDA

Allegation #1: Between November 2018 and March 16, 2020, the Respondent engaged in personal financial dealings with clients which gave rise to conflicts or potential conflicts of interest that he failed to disclose to the Member or otherwise address by the exercise of responsible business judgement influenced only by the best interests of the client, 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 On or about March 11, 2020, the Respondent made false or misleading statements to the Member during the course of its investigation into his conduct, contrary to MFDA Rule 2.1.1

Allegation #3 Commencing approximately June 16, 2020, the Respondent failed to cooperate with an investigation by MFDA Staff (“Staff”) into his conduct, contrary to section 22.1 of MFDA By-

law No. 1¹

¶ 2 Prior to the scheduled hearing date Staff and the Respondent concluded an Agreed Statement of Facts dated April 6, 2023 (the “ASF”) attached hereto as Schedule A wherein the Respondent admitted to the misconduct as described in the above noted allegations. As a result, the Panel has been convened solely for the purpose of determining the appropriate penalties to be assessed.

FACTS

Respondent’s Registration History

¶ 3 From January 14, 2002, to March 16, 2020, the Respondent was registered in British Columbia as a dealing representative with Sun Life Financial Investment Services (Canada) Inc.(the “Member”) a Member of the MFDA. On March 16, 2020, the Member terminated the Respondent as a result of the conduct described below and the Respondent is no longer registered in the securities industry in any capacity. At all material times the Respondent conducted business in the Victoria B.C. area.

¶ 4 The relevant facts in this matter are set out in paragraphs 8-59 of the ASF. However, it is worth repeating the details of the financial dealings between the Respondent and his clients which led to allegation #1.

Client SH

¶ 5 At all material times, client SH (“SH”) was a friend of the Respondent and a client of the Member whose accounts were serviced by the Respondent.

¶ 6 On or about November 9, 2018, the Respondent borrowed \$100,000 from SH.

¶ 7 On or about November 9, 2018, the Respondent and SH signed a promissory note (the “Promissory Note”) acknowledging that the Respondent had borrowed \$100,000 from SH and would pay SH an annual interest rate of 4.45% on the unpaid principal. The Promissory Note provided that:

- a. the Respondent would make repayment in full to SH on January 11, 2019 in the amount of \$111,250;
- b. the Respondent would grant SH, as collateral, the right to 25% of the revenue stream arising from the Respondent’s book of business; and
- c. the current value of the 25% revenue stream was \$249,000.

¶ 8 Contrary to the terms of the Promissory Note, the Respondent did not repay SH by January 11, 2019, and the parties signed additional addendums to the Promissory Note, all of which deferred the repayment date.

¶ 9 On or about April 26, 2019, the Respondent and SH signed a document entitled “Promissory Note – Final Addendum #2”, which provided that:

- a. by June 1 or 15, 2019, the Respondent would fully repay SH the amount of \$120,000; and
- b. the Respondent would pay an increased rate of interest of 8.95% on \$25,000 of the loan.

¶ 10 Contrary to the terms of the “Promissory Note – Final Addendum #2”, the Respondent did not repay SH by June 15, 2019.

¹ On January 1, 2023 the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Mutual Fund Dealers Association of Canada (the “MFDA”) were consolidated into a single self-regulatory organization that is temporarily called the New Self -Regulatory Organization of Canada (the “Corporation”). The Corporation adopted interim rules that incorporate the pre-amalgamation regulatory requirements contained in the rules and include inter alia the Mutual Fund Dealer Rules. The Mutual Fund Dealer Rules are largely based on the MFDA Rules in force immediately prior to the amalgamation. Pursuant to Mutual Fund Dealer Rule 1A and s.14.6 of By-law No. 1 of the Corporation, contraventions of former MFDA regulatory requirements may be enforced by the Corporation. Pursuant to Mutual Fund Dealer Rule 1A, MFDA By-law No.1 continues to be applicable to this proceeding.

¶ 11 SH filed a civil claim against the Respondent and the Member in relation to the debt owed. SH and the Respondent came to a settlement agreement. The Member was not a party to the settlement agreement. The Respondent states that he has paid \$2,500 per month to SH since June, 2021 and has provided bank statements from October 2021 to March 2023 that demonstrate payments have been made to SH each month.

Client JN

¶ 12 At all material times, client JN (“JN”) was a client of the Member whose accounts were serviced by the Respondent. In December 2019, JN was approximately 74 years of age, and by virtue of his age was a vulnerable client. He was a friend of the Respondent’s father.

¶ 13 In or about December 2019, the Respondent requested a \$25,000 loan from JN. The Respondent obtained the monies from JN and told him that he would repay the loan by the end of January 2020.

¶ 14 The Respondent did not repay the \$25,000 loan in January 2020.

¶ 15 Instead, in or about January 2020, the Respondent requested an additional loan from JN in the amount of \$15,000. JN declined the Respondent’s request for an additional loan.

¶ 16 JN became concerned that the Respondent would not repay the \$25,000 loan and demanded repayment of the loan.

¶ 17 On February 25, 2020, the Respondent paid the amounts that he owed to JN with interest.

Client DN

¶ 18 At all material times, client DN (“DN”) was a client of the Member whose accounts were serviced by the Respondent.

¶ 19 In or about February 2020, the Respondent requested two loans from DN in the total amount of \$30,000 and, in late February 2020, the Respondent obtained \$30,000 from DN. The Respondent told DN that he would repay the amounts owed no later than March 20, 2020.

¶ 20 The Respondent has been making payments of \$500 per month to DN and provided an email confirming that, as of February 1, 2023, there was an outstanding balance of \$5000.00. He has provided bank statements from October 2021 to March 2023 that demonstrate payments have been made to DN each month.

The Respondent Solicited Additional Loans from a Client

¶ 21 In or about October 2019, the Respondent solicited loans on three occasions from client JG (“JG”) who at all material times was a client of the Member whose accounts were serviced by the Respondent. Initially, the Respondent requested a \$160,000 loan, which JG refused to provide. The Respondent then approached JG approximately two weeks later and requested that JG lend him \$80,000, which JG again refused to provide. Shortly thereafter, the Respondent solicited a loan from JG in the amount of \$50,000, which JG again refused to provide.

Misleading the Member

¶ 22 On or about March 5, 2020, SH complained to the Member alleging that the Respondent borrowed \$100,000 from him for a real estate investment but failed to repay this amount by the agreed upon repayment date. In response to the complaint, the Member commenced an investigation into the Respondent’s conduct.

¶ 23 On March 11, 2020, the Member conducted a telephone interview (“Interview”) with the Respondent in respect of the complaint from SH, during which the Respondent stated that SH was the only client with whom he had a loan agreement, and that he did not have loans from other clients.

¶ 24 As part of its investigation, the Member sent audit letters to all of the Respondent’s clients resulting in JN and DN responding and identifying that they had loaned money to the Respondent. JG also responded and indicated that the Respondent had requested a loan but he had declined.

¶ 25 The Respondent’s statement to the Member was false or misleading because, as set out above, by the

date of the interview the Respondent had borrowed money from DN that had not been repaid.

¶ 26 Prior to the date of the interview, the Respondent had also borrowed \$25,000 from JN and repaid the loan. The Respondent did not inform the Member about his loan from JN during the interview.

¶ 27 By stating to the Member that SH was the only client with whom he had a loan agreement and that he had not obtained loans from any other clients, the Respondent made false or misleading statements to the Member during the course of an investigation into his conduct, contrary to MFDA Rule 2.1.1 [now Mutual Fund Dealer Rule 2.1.1].

Failure to Cooperate with Staff's Investigation

¶ 28 Details of the Respondent's failure to co-operate with Staffs investigation are fully detailed in paragraphs 47-55 of the ASF and need not be repeated here save as to say that the lack of co-operation was significant.

PENALTY

Power of Hearing Panels to Impose a Penalty

¶ 29 Pursuant to s. 24.1.1(i) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(i)), if in the opinion of a Hearing Panel an Approved Person has failed to comply with the provisions of any By-law, Rule or Policy of the Corporation, a Hearing Panel has the power to impose any one or more of the penalties set out in s. 24.1.1 (a) – (f) (now Mutual Fund Dealer Rule 7.4.1.1(a)-(f)).

Section 24.1.1 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1)

¶ 30 Section 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2) grants a Hearing Panel the discretion to require an Approved Person to pay the whole or part of the costs of proceedings before the Hearing Panel and any investigations relating to that proceeding.

Section 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2), *supra*

¶ 31 In the present case, Staff seeks the following penalties against the Respondent:

- a. a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Dealer Member of the Corporation that is registered as a mutual fund dealer, pursuant to section 24.1.1(e) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(e)];
- b. a fine of at least \$228,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.1.1(b)]; as follows:
 - (i) at least \$89,000 with respect to contravention #1 (borrowing) consisting of disgorgement of at least \$64,000 that was received by the Respondent from clients but was not paid back or otherwise accounted for and a \$25,000 premium to deter such conduct,
 - (ii) at least \$25,000 with respect to contravention #2 (misleading the Dealer Member), and
 - (iii) at least \$50,000 with respect to contravention #3 (failure to cooperate).
- c. costs of at least \$10,000 supported by a bill of costs (to be provided at the hearing of this matter) pursuant to s. 24.2 of MFDA By-law No. 1 [now Mutual Fund Dealer Rule 7.4.2].

Sections 24.1.1 and 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rules 7.4.1.1 and 7.4.2), *supra*

Factors Concerning the Appropriateness of the Proposed Penalty

¶ 32 The Supreme Court of Canada decision in *Pezim v. British Columbia (Superintendent of Brokers)*, cited with approval in subsequent MFDA decisions, held that the primary goal of securities regulation is the protection of investors including ensuring efficient capital markets and public confidence in the industry.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557

¶ 33 Sanctions imposed by a Hearing Panel should be protective and preventative to prevent likely future harm to the markets. In exercising its discretion to impose a penalty, MFDA Hearing Panels have held that the following factors should be taken into consideration:

- a. the protection of the investing public;
- b. the integrity of the securities market;
- c. specific and general deterrence;
- d. the protection of the MFDA's membership; and
- e. the protection of the integrity of the MFDA's enforcement process.

Tonnies (Re), MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005

¶ 34 Other factors that Hearing Panels frequently consider when determining the appropriate penalty to be imposed on a Respondent include the following:

- a. the seriousness of the allegations proved against the Respondent;
- b. the Respondent's past conduct, including prior sanctions;
- c. the Respondent's experience and level of activity in the capital markets;
- d. whether the Respondent recognizes the seriousness of the improper activity;
- e. the harm suffered by investors as a result of the Respondent's activities;
- f. the benefits received by the Respondent as a result of the improper activity;
- g. the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- h. the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- i. the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- j. the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k. previous decisions made in similar circumstances.

Tonnies (Re), *supra*, at para. 23

Headley (Re), [2006] Hearing Panel of the Pacific Regional Council, MFDA File No. 200509, Decision dated February 21, 2006, at para. 85

¶ 35 The Hearing Panel may also refer to the MFDA's Sanction Guidelines, which came into effect on November 15, 2018. The Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA Hearing Panels, are also reflected and described in the Guidelines.

MFDA Sanction Guidelines

Application to the Present Case

Seriousness of the Misconduct

¶ 36 The conduct of the Respondent in this case is serious. The Respondent abused the trust that he had established with his clients and confidential information about their finances that he acquired in his capacity as an Approved Person in order to borrow money from his clients, resulting in a financial benefit to the Respondent while simultaneously placing the clients' money at risk.

¶ 37 This conduct was not an isolated incident but occurred in respect of several clients, one of whom (JN) was vulnerable by age and by having suffered a heart attack around the same time he was solicited by the Respondent. In addition, the Respondent attempted to borrow money from another client. These are aggravating factors that should be taken into account when determining the appropriate penalty to be imposed.

¶ 38 The Respondent also deprived the Member of the ability to prevent or address the conflict of interest that arose as a result of his personal financial dealings with clients by withholding mandatory disclosure of the conflict that he was required to provide to the Member, and subsequently by misleading the Member about the extent of his misconduct.

¶ 39 The Respondent's misconduct was further aggravated as the Respondent lied to the Member about the extent of his personal financial dealings with clients after his misconduct came to light as a result of a client complaint to the Member.

¶ 40 The comments of another Hearing Panel apply to the Respondent:

"The Panel considered that the failure of an Approved Person to cooperate with an MFDA investigation by among other things, not complying with a request by an MFDA investigator made pursuant to s. 22.1 of the By-law is serious misconduct. It subverts the ability of the MFDA to perform its regulatory function by fully investigating a matter and determining all of the facts. Further, the failure to provide information requested in an investigation undermines the integrity of the industry's self-regulatory system and the effectiveness of its operations, including the MFDA's mandate to protect the public."

Dixon (Re), [2017] Hearing Panel of the Central Regional Council, MFDA File No. 201728, Reasons for Decision dated November 13, 2017

¶ 41 In this case, by failing to submit to an interview with Staff, the Respondent deprived Staff of the opportunity to further investigate his conduct to reveal and confirm the nature and full extent of the contraventions of his regulatory obligations.

The Respondent's Recognition of the Seriousness of the Misconduct

¶ 42 At the hearing the Respondent admitted the seriousness of his misconduct and has expressed remorse for his actions. His explanation as set out in his affidavit filed as part of the proceedings and supplemented by answers to questions imposed by the panel, was that he had a number of personal issues. However, the Panel notes and places significant weight on the fact that the Respondent admitted that the large loan of \$100,000 from SH was for a business venture and not related to his personal issues. Furthermore, he refused to attend an interview during the Corporation's investigative process for alleged medical reasons which he later admitted were spurious and misled the Member during its investigation of his conduct. Although the Respondent accepted some responsibility and accountability for his misconduct by entering into the ASF, he did so only after it became clear to him that Staff had the evidence to prove his misconduct

Insurance Council of British Columbia Investigation

¶ 43 An order and Intended Decision of the Insurance Council of B.C. dated January 10, 2023 was introduced as evidence in this hearing. Counsel for the Corporation and the Respondent agreed that the panel could accept the findings of fact as evidence in this case, but solely for the purposes of assessing penalties.

¶ 44 The Panel considers the following facts referenced in the Intended Decision to be relevant in assessing the penalties to be imposed on the Respondent:

- a. Insurance Council found that the Respondent's client SH had loaned the Respondent \$100,000 for the purpose of investing in a townhouse development and that in order to do so he had taken out a home equity line of credit against his home. The risk to SH was therefore significant, particularly when the Respondent's own financial situation was problematic and when he was possibly in arrears in paying his income taxes.
- b. The Insurance Council found that the Respondent's representation to SH that the loan was to be secured by an assignment of 25% of his book of business was false as the book of business belonged to his employer and could not be assigned. Furthermore, the Insurance Council found that the Respondent made a material misstatement to it when he stated he did not use his book of business to secure the loan when the promissory note evidencing the loan clearly stated the contrary.
- c. The Insurance Council found that the Respondent did not make timely replies to its enquiries and did not attend an interview with the Review Committee.
- d. JG reported that the Respondent had approached him in October or November of 2019 requesting a loan of \$160,000 and told him that he was in financial trouble with the Canada Revenue Agency and needed the money to "pay them off".
- e. JN reported that when the Respondent had approached him for a loan of \$25,000 in December, 2019 he had just suffered a heart attack and was in a vulnerable position.

¶ 45 The Insurance Council found that the Respondent was not suitable to hold a license and that his actions "brought into question his trustworthiness, ability to act in good faith, financial reliability, and ability to act in accordance with the usual practice of the business of insurance". It held that he "would pose a threat to the public if allowed to hold an insurance license again". It prevented him from applying for a license for a period of 5 years.

The Respondent's Past Conduct

¶ 46 The Respondent's misconduct demonstrated a willful disregard for the authority of the regulator and a lack of honesty and integrity when responding to questions about his conduct from the Member. He failed to comply with important policies and procedures of the Member and placed his own financial interests ahead of those of his clients by soliciting and obtaining loans that he had limited means to repay. While the Respondent has not previously been the subject of disciplinary action by the MFDA the Panel has placed relatively little significance on this fact.

Risk to Investors in the Capital Markets

¶ 47 The panel is satisfied that the Respondent poses a risk to the capital markets and the investing public if he is allowed to return to the industry. He borrowed significant sums from his clients one of whom was required to commence legal proceedings to recover his loan and another of whom was in poor health. Even after his misconduct came to light, his failure to provide fulsome and accurate information to the Member during its investigation and his failure to cooperate with the MFDA's investigation demonstrated an on-going disregard for his regulatory obligations. His explanations for borrowing from his clients because of his personal problems are no excuse for his failure to cooperate with the Member and the MFDA in their investigations. There is no indication that the Respondent has been able to overcome the financial problems that he says were the reason for the loans from his clients, and there is a real risk that this could contribute further risk to other clients should he be permitted to return to the industry.

Damage Caused to the Integrity of the Capital Markets from the Respondent's Actions

¶ 48 The Respondent's actions constitute an example of the type of conduct that brings the reputation of the

industry into disrepute. His misconduct was deliberate and runs contrary to both the fundamental requirements of operating in the mutual fund industry and the expectation that Approved Persons will comply with Staff's requests for information to ensure compliance with all regulatory requirements and to prevent client harm.

Deterrence

¶ 49 The Supreme Court of Canada in *Cartaway Resources Corp.* has held that it is appropriate for deterrence to be among the factors taken into account when determining the penalty for securities related contraventions.

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672, at paras. 52-62

¶ 50 In order to properly protect investors, penalties imposed by Hearing Panels should prevent or at least discourage the Respondent and other Approved Persons from engaging in similar conduct in the future.

¶ 51 Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

¶ 52 A permanent prohibition of the Respondent from engaging in securities related business, will prevent the Respondent from further wrongdoings. It will also demonstrate to other Approved Persons that engaging in personal financial dealings with a client, misleading a Member during an investigation into possible misconduct, and failing to cooperate with a regulatory investigation will result in dire consequences even when the Approved Person has significant financial and personal family problems.

Benefits Received by the Respondent and Harm Suffered by Investors

¶ 53 The Respondent arranged for loans totaling at least \$155,000 from his clients. The Respondent has fully repaid one loan and has partially repaid the other two clients.

¶ 54 The Respondent took advantage of his professional relationship with clients to solicit loans from them. In doing so, he put substantial client money at risk without the knowledge or approval of the Member and derived personal access to loans that more sophisticated lenders (such as institutional lenders) may not have advanced on similar terms.

¶ 55 It would appear from submissions from counsel and the Respondent's affidavit and attached exhibits that the balance of the loan and accrued interest owing to SH as at May 15, 2023 is \$57,713.41 including interest. As at February 1, 2023 there was \$5,000 remaining due on the \$30,000 loan from DN which is being repaid at the rate of \$500 per month. The Respondent has repaid the entirety of the 25,000 loan from JN.

¶ 56 Staff acknowledges that it is reasonable for a Hearing Panel to take into account the repayments that can be established by the Respondent when determining the appropriate penalty to impose. It is reasonable and appropriate to reduce a portion of the fine by any amount that has been repaid prior to a regulatory hearing to address the misconduct.

Inability to Pay

¶ 57 The Guidelines provide that the Respondent's ability to pay may be one of the factors to be considered along with all other factors, including specific and general deterrence and the need to ensure public confidence in the MFDA's disciplinary process. Under the Guidelines the "burden is on the Respondent to...provide evidence of... a bona fide inability to pay..." such as tax returns or audited financial statements, in order to obtain a reduction or waiver of a fine or instalment payments thereof.

MFDA Sanction Guidelines

¶ 58 The Respondent has stated in his affidavit that he is currently employed as a delivery driver and has a monthly income of between \$2,000-2,500, before taxes from which he pays DN \$500. He says he receives \$2,801.40 per month from Sun Life from which he pays SH \$2,500. He says he does not have any assets and rents his home. Counsel for the Corporation states that he has not provided any documentation to support an inability to pay and urges the Panel to take anything in his affidavit that is not corroborated in some way with a grain of salt. However, she points to the fact that even if the Respondent had provided documentation,

Hearing Panels have found that:

“...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.”

Dean (Re) [2020] Hearing Panel of the Central Regional Council, MFDA Hearing No.2018104, Reasons for Decision dated January 29,2020

Brauns (Re), MFDA File No. 201203, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 4, 2014 at paras. 58-61 and 83-85.

¶ 59 While the Panel agrees with Counsel for the Corporation that the Respondent has not furnished tax returns to corroborate his representations as to income, he has provided an affidavit stating he has no assets and cannot pay the \$7,500 fine imposed on him by the Insurance Council. The Respondent is 55 years old and was employed in the securities industry from 2002 until his termination by the Member. A permanent prohibition will prevent him from returning to the industry and his ability to pay a substantial fine and repay the balance of the loans to his clients is doubtful. We will take this into account when imposing terms for payment of the penalties.

Previous Decisions Made in Similar Circumstances

¶ 60 Counsel for the Corporation has cited a number of cases supporting its request for the proposed penalties. Each turns on its own facts but has similar elements to the present case including borrowing from clients (including some from vulnerable clients), misleading the Member and the MFDA, and repayments of all or part of the borrowed monies. The Panel has found the following cases to provide guidance in determining the penalties to be imposed on the Respondent:

- a. *Smith(Re)*, Hearing Panel of the Central Regional Council, MFDA File No. 202083, Reasons for Decision dated September 24, 2021
- b. *Okopny (Re)*, Hearing Panel of the Central Regional Council, MFDA File No. 201512, Reasons and Decision (Penalty) August 31, 2016
- c. *Smokum(Re)*, [2021], Hearing Panel of the Central Regional Council, Decision and Reasons dated February 8, 2023
- d. *Elwood (Re)*, [2020], Hearing Panel of the Central Regional Council, MFDA File No. 201940, Reasons for Decision (Penalty) September 20, 2020

¶ 61 Counsel for the Respondent cited the following cases as support for his submission that a permanent prohibition should not be imposed on the Respondent and that fines in the amounts proposed by the Corporation will never be paid, could put the Respondent into bankruptcy and could jeopardize the repayment arrangements the Respondent has made with his clients for repayment of the balance of the loans:

- a. *De Backer (Re)* 2016 CanLii 48519
- b. *Wolfenden (Re)* 2017 CanLii 83862

¶ 62 The Panel has reviewed all of the above noted decisions as well as a number of others cited by counsel for the Corporation. Each of them has facts similar to the present case but contain distinguishing features as well. Some of them have imposed less than permanent prohibitions but on the facts of this case the Panel for the reasons previously stated has concluded a permanent prohibition is warranted.

¶ 63 The same can be said for the cases imposing fines and costs. Some have imposed fines far in excess of the amounts borrowed, some for less particularly in cases involving evidence of an inability to pay and some have taken into account the fact that all or a portion of the amounts borrowed were repaid. Some of the cases cited imposed substantial fines where there was a failure to cooperate or misleading members or the

corporation only.

¶ 64 The *De Backer* case cited by the Respondent's counsel can be distinguished from the present case in that there was a settlement agreement which the hearing panel could only approve or disapprove. Furthermore it did not deal with a conflict of interest resulting from loans from clients. In addition the respondent had only been an approved person for 3 years when the misconduct started to occur.

¶ 65 In *Wolfenden, supra*, the MFDA was only seeking a 3 year suspension and not a prohibition. Also, unlike the present case, the hearing panel found that the respondent had not appreciated that when he had borrowed money from clients he was violating MFDA Rules or the Member's directives. Also the panel found that the loans were adequately secured by mortgages on a cottage owned by the respondent and were never in default. On one of the loans the lender was represented by legal counsel. The Panel finds these cases are sufficiently distinguishable so as not to provide assistance in determining penalties in the present matter.

¶ 66 As stated earlier, the evidence is that as of May 15, 2023 the Respondent has repaid all of the loans plus interest, save for \$57, 713.41 owing to SH and \$5,000 owing to DN. Under the arrangements made with them, and provided that the Respondent complies with the terms agreed upon for repayment, the loans will have been completely repaid by May 15, 2025. These amounts together with the sums already paid to the clients, will constitute payment of the disgorgement element of the fine.

¶ 67 After a review of the evidence and previous cases cited to us, the Panel assesses the following penalties against the Respondent:

- a. A permanent prohibition from conducting securities related business while in the employ of or associated with any Dealer Member of the Corporation that is registered as a mutual fund dealer, pursuant to s. 24.1.1(e) of MFDA By-law No.1 [now Mutual Fund Dealer Rule 7.4.1(b)]
- b. A fine of \$25,000 for personal financial dealings with clients as alleged in Contravention No. 1
- c. A fine of \$50,000 for failure to cooperate and misleading the Member and the Corporation as alleged in Contraventions Nos. 2 and 3.

¶ 68 The fines set out above shall not be payable until May 15, 2025 the date of the last payment of the balance of the loan owing to SH. However, should the Respondent fail to make any of the monthly payments due to SH and DN, the Corporation may apply for an increase in the amount of fine set out in paragraph 67 and the terms for repayment of all fines.

Costs

¶ 69 The Corporation seeks an order for payment of costs of at least \$10,000 and has produced a bill of costs showing time spent in connection with these proceedings of \$45,787.50. The Respondent is hereby ordered to pay costs of \$10,000. However, as in the case of the fines, the costs shall not be payable until May 15, 2025 unless the Respondent defaults on any of the monthly payments due to SH and DN at which time the Corporation may apply for a reconsideration of the terms for payment of costs.

¶ 70 It should be obvious from these Reasons that the Panel has struggled with settling the amounts and terms for payment of the fines where the Respondent is 55 and has, by virtue of these Reasons, been prohibited from returning to the securities industry where he was employed for 18 years until he was terminated by the Member in March 2020. The imposition of more substantial fines payable forthwith, could place his clients in danger of not being repaid. We believe their interests must take priority. Nevertheless, the penalties we have imposed will serve as a notice to other Approved Persons that borrowing from clients and misleading and failing to co-operate with investigations by Members and the Corporation will result in substantial fines and permanent prohibitions.

Dated at Vancouver this 12 day of October 2023.

“Michael Carroll”

Michael Carroll K.C., Chair

“Barbara Fraser”

Barbara Fraser, Industry Representative

“Susan Monk”

Susan Monk, Industry Representative

Copyright © 2023 Canadian Investment Regulatory Organization. All Rights Reserved