Re Rivet

IN THE MATTER OF:

The Mutual Fund Dealers Association of Canada

and

Nicholas Andrew Rivet

2023 CIRO 17

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: June 22, 2022
Decision (Misconduct): June 22, 2022
Decision (Sanctions) and Reasons: November 2, 2023

Hearing Panel:
John Lorn McDougall, K.C., Chair
Samuel Mah, Industry Representative
Eugene Park, Industry Representative
Appearances:
Brendan Forbes, Enforcement Counsel for the Mutual Fund Dealers Association of Canada (now CIRO)
Nicholas Andrew Rivet, Respondent, not in attendance or represented by counsel

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DECISION ON SANCTIONS AND REASONS

I. INTRODUCTION AND PROCEDURAL HISTORY

¶ 1 This case arises from an admitted theft by Nicholas Andrew Rivet ("Respondent") who was registered in Ontario as a dealing representative for a member of the MFDA, CIBC Securities Inc., ("CIBC Securities" or "Member") from November 7, 2016, to May 4, 2018. As well, he was employed by CIBC bank ("CIBC") during that same time period.

¶ 2 The victim of the theft was a client of the Respondent, one D.T., who was a long-time acquaintance, having formerly been his coach when he was a player on a minor league hockey team in North Bay, Ontario, where both parties resided. At the time of the theft, D.T. was 75 years old and retired.

¶ 3 The Notice of Hearing ("NOH") is dated November 16, 2021, and the Respondent accepted service of it, through counsel on November 26, 2021.

¶ 4 The NOH sets out the following three allegations that the Respondent had violated the By-laws, Rules or Policies of the MFDA as follows:

> **Allegation #1:** Between approximately December 2017 and January 2018, the Respondent misappropriated or failed to account for monies obtained from a client, contrary to MFDA Rule 2.1.1.
>
> **Allegation #2:** On or about April 12, 2018, the Respondent created and provided a fictitious document to a client in order to conceal from the client that the Respondent had misappropriated the client's monies, contrary to MFDA Rule 2.1.1.

Allegation #3: On December 18, 2017, and January 4, 2018, the Respondent processed two trades in the accounts of a client without first obtaining instructions from the client with respect to all elements of the trades, contrary to the Member's policies and procedures and MFDA Rules 2.3.1(b), 2.1.1, 1.1.2, and 2.5.1.

¶ 5 The Respondent filed a Reply dated January 5, 2022, to the NOH as was required by Rule 8 of the MFDA Rules of Procedure. In that Reply, the Respondent admitted Allegation #1 and Allegation #2. He neither admitted nor denied allegation #3 to which he responded as follows:

> The Respondent, Nicholas Andrew Rivet (the "Respondent"), admits the allegations contained at paragraphs 1 –21 and 23 –24 of the Notice of Hearing. The Respondent denies and/or has no (or insufficient) knowledge of the allegations at paragraphs 22 and 25–31 of the Notice of Hearing.

¶ 6 The MFDA investigation, which preceded the issuance of the NOH, followed well after the proceedings in the Superior Court of Justice which began with the Respondent's plea of guilty in August of 2018 and ended September 27, 2019, with his sentencing. This will be discussed further in what follows.

¶ 7 Staff of the MFDA learned, according to the affidavit of Sheila Daneshvaziri filed in these proceedings ("Daneshvaziri Affidavit"), and who was the investigator charged with the review of the Respondent's conduct from a news article dated September 25, 2019, of the conviction of the Respondent for the misappropriation of client's funds.

> The Respondent's conduct came to the attention of Staff on September 25, 2019, as a result of a news article discovered by Staff alleging that the Respondent had misappropriated monies from a client of CIBC.
>
> Daneshvaziri Affidavit, paragraph 8

¶ 8 It is important to note that what Staff must have learned at that time was substantially more than there was simply an allegation of misappropriation. In fact, there had been a plea of guilty, as pointed out earlier, and a sentencing which was accompanied by Reasons for Sentence and all of this by September 27th, 2019.

¶ 9 On October 26, 2018, The MFDA received a Member Events Tracking System ("METS") Report from the Member which stated, among other things, that the Respondent was responsible for the theft of cash from a client's bank account. It seems to follow that that information must not have reached enforcement staff and that the only information available to them is that which appeared in the newspaper article referred to above.

¶ 10 There was some confusion during the hearing as to whether there was an error in the date of the METS Report. However, examination of that document, which is Exhibit 4 to the Daneshvaziri Affidavit, makes it clear that the MFDA had been advised of the Respondent's misconduct a full eleven months before its investigation began.

> *Daneshvaziri Affidavit, Appendix to Exhibit 4*

¶ 11 Turning to the proceedings before the Honorable Justice, Mr. D. Nadeau, it also follows from the forgoing that Justice Nadeau could not have been aware of any involvement on the part of the MFDA as there was little or none at the time that he pronounced sentence on the Respondent on September 27, 2019.

II. DECISION ON THE MERITS

¶ 12 The admissions by the Respondent in his Reply to Allegations #1 and #2 and to all the facts pertaining to them, constitute admissions of the gravest kind of misconduct possible by a member of the financial services industry. Theft from a client, coupled with creating a "fake letter" to conceal that theft and deceive the client, is behaviour that is simply indefensible. It is not an exaggeration to say it breaches the basic principles which underpin the whole of the financial services industry.

¶ 13 MFDA Rule 2.1.1, titled Standards of Conduct, could not be clearer. It is as follows:

> *2.1.1 Standard of Conduct*
>
> Each Member and each Approved Person of a Member shall:
>
> a. deal fairly, honestly and in good faith with its clients;

b. observe high standards of ethics and conduct in the transaction of business;

c. not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and

d. be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

¶ 14 In contrast to Allegation #1 and #2, Allegation #3 is quite different in nature. It is as follows:

Allegation #3: On December 18, 2017, and January 4, 2018, the Respondent processed two trades in the accounts of a client without first obtaining instructions from the client with respect to all elements of the trades, contrary to the Member's policies and procedures and MFDA Rules 2.3.1(b), 2.1.1, 1.1.2, and 2.5.1. In Paragraph 9 of the Reply, the Respondent admits that he processed two trades which gave rise to the Allegation but in respect to the relevant particulars of the trades, he states as follows:

The Respondent denies and/or has no/or insufficient knowledge of the allegations at paragraph 22 and 25-31 of the Notice of Hearing.

¶ 15 Paragraphs 22 and 25-31 of the NOH referred to above are as follows:

22. At all material times, the policies and procedures of CIBC Securities prohibited discretionary trading and required Approved Persons to obtain a client's prior approval for every transaction processed in the client's account.

25. The compliance department rejected the request because the Respondent had not submitted the Personal Portfolio Services Account Change form 15 days in advance of the prospective withdrawal date as required by CIBC Securities.

26. Without communicating with client DT, on December 18, 2017, the Respondent completed another Personal Portfolio Services Account Change form in order to withdraw $20,000 from client DT's RRIF on December 20, 2017. The Respondent purported to rely upon a Limited Trading Authorization (the "LTA") that had been signed by client DT authorizing the acceptance of verbal instructions rather than a signed account form to process transactions in client DT's account. The Respondent failed to obtain authorization from client DT to prepare and submit a new form to process a different withdrawal amount on December 20, 2017. The Respondent submitted the form dated December 18, 2017 and indicated that the proceeds of redemption should be deposited into Bank Account #1.

27. On January 4, 2018, without discussing the proposed transaction with Client DT, the Respondent completed another Personal Portfolio Services Account Change form, and again purported to rely upon the LTA to withdraw a further $25,000 from Client DT's RRIF, and had the proceeds deposited into Bank Account #1.

28. The Respondent did not discuss with client DT the elements of the two withdrawals from client DT's RRIF on December 20, 2017 and January 4, 2018 as described above, including the amount or timing of the withdrawals.

29. As a result of the withdrawals from client DT's RRIF, as described above, client DT incurred a tax liability of approximately $5,000.

30. On or about January 29, 2019, client DT complained to the Bank about the Respondent's conduct, and requested compensation for the tax liability that he incurred as a consequence of the withdrawals from his RRIF. The Bank compensated client DT to address his complaint.

31. By virtue of the foregoing, the Respondent processed two trades in the accounts of a client without discussing all the elements of the trades with the client, contrary to the policies and procedures of CIBC Securities and MFDA Rules 2.3.1(b), 2.1.1, 1.1.2, and 2.5.1.

¶ 16 The MFDA Rule of Procedure in relation to the contents of a Reply is as follows:

8.2 Contents of Reply

(1) Subject to sub-Rule (2), the Reply shall:

(a) identify the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing which the Respondent,

(i) admits,

(ii) denies, with a summary of the grounds for denying them,

(iii) denies, because the Respondent has no knowledge of them, and

(b) state any additional facts and conclusions on which the Respondent intends to rely at the hearing.

(2) Where the Respondent admits all or substantially all of the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing, the Respondent may state in the Reply circumstances in mitigation of any penalty to be imposed.

¶ 17 Rule 8.3 of the MFDA Rules of Procedure is also germane:

8.3 Acceptance of Facts and Conclusions

(1) A Hearing Panel may accept as proven any facts alleged or conclusions drawn by the Corporation in the Notice of Hearing that the Respondent does not specifically deny in the Reply in accordance with Rule 8.2(1)(a)(ii) and (iii).

¶ 18 In the Panel's view, the Reply is not an adequate denial to satisfy the requirements of MFDA Rules of Procedure 8.2. It is not the specific denial which is required by the Rules.

¶ 19 However that issue at lack of specificity became moot when the Respondent did not attend at the hearing. Because of this failure to appear and as a result of Rule 7.3 of the MFDA Rules of Procedure, the Panel can accept all the facts and conclusions drawn in the NOH as proven in reaching its conclusion. The Panel exercised that right and confirmed that it has accepted all the facts and conclusions drawn by the MFDA in the NOH. Rule 7.3 is as follows

7.3 Failure to Attend Hearing

(1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:

(a) proceed with the hearing without further notice to and in the absence of the Respondent; and

(b) accept the facts alleged, and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 7.4.1 and 7.4.2 respectively of Mutual Fund Dealer Rules.

¶ 20 For the foregoing reasons and having regard to all of the evidence and facts as they appear in the proceedings before us and having heard counsel on behalf of the staff of MFDA, the Respondent not having appeared, the Panel found that Allegations #1, #2, and #3 had been proven.

Allegation #1: Between approximately December 2017 and January 2018, the Respondent misappropriated or failed to account for monies obtained from a client, contrary to MFDA Rule 2.1.1.

Allegation #2: On or about April 12, 2018, the Respondent created and provided a fictitious document to a client in order to conceal from the client that the Respondent had misappropriated the client's monies, contrary to MFDA Rule 2.1.1.

Allegation #3: On December 18, 2017, and January 4, 2018, the Respondent processed two trades in the accounts of a client without first obtaining instructions from the client with respect to all elements of the trades, contrary to the Member's policies and procedures and MFDA Rules 2.3.1(b), 2.1.1, 1.1.2, and 2.5.1.

III. SANCTIONS

¶ 21 By virtue of section 24 of MFDA By-law No. 1, the Panel is able to impose any of the penalties set out in s. 24.1.1 (a-f) which include a permanent prohibition of the authority of an Approved Person to conduct securities-related business and a fine not exceeding the greater of $50,000,000 or three times the profit obtained, or loss avoided by engaging in the misconduct. In addition, the Panel has the power to award costs against a Respondent.

¶ 22 Staff asked for the following sanctions in its written submissions:

> Staff proposes the imposition of the following penalties on 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;
> (b) a fine in the amount of at least $50,000;
> (c) costs in the amount of $7,500.

¶ 23 Following the completion of the merits hearing held on June 22, 2022, and after deliberating, the Panel returned to the hearing room and advised counsel and those others in attendance of a concern that it had with respect to the proceedings in the Superior Court of Justice. While the Panel had been aware of the sentence imposed by Justice Nadeau, given Staff's heavy emphasis on the need for general deterrence in respect, in particular to Allegation #3, we asked that inquiries be made to determine if Justice Nadeau had delivered any reasons for his sentence and, if so, to obtain a copy for the Panel. Staff agreed to do so, and these proceedings were then adjourned, the Panel having reserved its decision with respect to penalty.

¶ 24 Justice Nadeau's court, the Superior Court of Justice for Ontario, is the senior trial court in Ontario and has appellate jurisdiction over the Ontario Securities Commission ("OSC"), which in turn has supervisory authority over the MFDA. The OSC hears applications for review of decisions of the MFDA. A MFDA hearing panel such as the present one, on the other hand is a quasi-judicial body which was created as a key part of the self regulation that the MFDA has enjoyed and will continue to enjoy within the new SRO. The short point is that a hearing panel is not a court.

¶ 25 On July 21, 2022, Staff provided a copy of the Reasons for Sentence of Justice Nadeau dated September 27, 2019, to the Panel. On the same day, the Panel granted Staff's request for permission to file supplementary written submissions, which filing subsequently occurred.

> *Her Majesty the Queen v. Nicholas Rivet*, Reasons for Sentence, Justice D. Nadeau, September 29, 2019, at North Bay, Ontario ("Reasons for Sentence").

¶ 26 The basic facts in the case before Justice Nadeau were the same as before this Panel. The only significant difference is that the Panel knew about the Superior Court proceedings of Justice Nadeau while Justice Nadeau knew nothing about any involvement of the MFDA as there was none at the times he was dealing with the plea of guilty and the sentence. However, we cannot think that had he known, he would have done anything other than what he did; that is to deal with the case before him by applying the well-known principles of sentencing.

¶ 27 Staff submitted in its written submissions that, had the Superior Court chosen to fine the Respondent, this Panel could have taken into account the quantum of that fine when fixing its own fine. With great respect, that submission has it slightly backwards. The purpose of the fine is to create a general and specific deterrent, not the infliction of monetary punishment. In short, there are many ways to achieve the objective of sanctions. The Panel has had to examine Justice Nadeau's sentencing decision in that fashion and evaluate it for use in its own determination. In the context of this case, that assessment was of the Superior Court's sentencing decision in respect of its adequacy in achieving the objective of a general deterrent for the members of the financial industry.

> Supplementary Submissions of Staff, paragraphs 19 and 20

¶ 28 The Reasons for Sentence are slightly over 10 pages in length and were delivered September 29, 2019, following the sentencing hearing which was held two days before. The specific issue that was before Justice Nadeau was to decide whether to grant Mr. Rivet the conditional discharge which he had sought and which, if granted, would have meant that he would have had no criminal record. The application was opposed by the Crown and, in the result, the application was denied, leaving Mr. Rivet with a permanent criminal record of theft

from a client.

¶ 29 Justice Nadeau opened his Reasons by explaining the approach that he takes in criminal cases such as the one before him:

> The determination of the appropriate sentence is always a matter of discretion, and that discretion, of course, must be judicially exercised by taking into account, and balancing the various principles of sentencing, the circumstances surrounding the commission of the offence, and the circumstances of the offender. Within the available range penalty, the task of this Court is to determine a fit and just sentence.
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> Reasons for Sentence, Transcript, pg. 2, line 6 - line 14.

¶ 30 He then continued explaining the importance of specific and general deterrence as follows:

> In making this decision in this context, I have considered the case law presented by both counsel. Uppermost in the mind of a sentencing judge is the protection of society and the public by the imposition of a sentence that will hopefully restrain or dissuade such acts in the future. Deterrence may take one of two forms, general deterrence and specific deterrence. General deterrence in its simplest form is a sentence that would discourage others who may be inclined to commit the same or a similar offence. A sentence emphasizing specific deterrence is a sentence intended to discourage you, Mr. Rivet, the offender, from again committing this offense.
>
> Reasons for Sentence, Transcript, pg. 2, line 22, pg. 3, line 2 - line 5.

¶ 31 The determination of what constitutes an appropriate general deterrence is a highly subjective exercise and varies according to the individual and to the nature of the case before him or her. While some guidance can be obtained from previous cases, attempting to fashion a sanction which would deter a large number of unknown people leads to personal introspection of how it would affect that panel member. The consequence is, as would be expected, a wide range in what constitutes appropriate general deterrence in particular case.

¶ 32 Justice Nadeau then explained why he decided to decline to grant the Respondent a condition of discharge as follows:

> In these specific circumstances of Nicholas Rivet, considering the specific manner this offence was committed against this victim, and the nature of their relationship historically and at the time the offence was committed, and the fact of the falsified letter given to the victim, and the difficulties with the complete recovery by the victim, I decline to grant a discharge on the basis of the seriousness of the offence. A discharge here would be contrary to the public interest. The safety of the community, including future employers, must be able to know that this offence occurred. The sentence must reflect the need for general deterrence in order to deal with people who are in the business of managing other people's money.
>
> Reasons for Sentence, pg. 8 line 1 - line 18.

¶ 33 He concluded with these words:

> Accordingly, it is contrary to the public interest that Nicholas Rivet receive no conviction or record as a result of this criminal activity. The public interest requires a conviction to further general deterrence, to reflect the gravity of the offence, and to maintain public confidence in the criminal justice system.
>
> Reasons for Sentence, pg. 9 line 11 - line 18.

¶ 34 In the Panel's view, the Reasons for Sentence of Justice Nadeau explain why, with the tools available to him, he was able to achieve a high degree of general deterrence with the result he did not exercise the option open to him of imposing a fine. This Panel has no reason to disagree; to be stigmatized with a criminal conviction for a breach of trust is a lifetime penalty. It is hard to imagine any other penalty that could cause a greater level of general deterrence. With due respect, the Panel accepts and adopts the determination of Justice Nadeau with respect to general deterrence.

IV. CONCLUSION

¶ 35 The Panel therefore imposes the following Order:

(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; and
(b) costs in the amount of $7,500.

DATED this 2 day of November, 2023.

John Lorn McDougall K.C.

Samuel Mah

Eugene Park