

Reasons for Decision (Misconduct)

File No. 201561



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: Gilles Robert Latour

Heard: May 30, 2016 in Toronto, Ontario
Reasons for Decision (Misconduct): June 7, 2016

**REASONS FOR DECISION
(Misconduct)**

Hearing Panel of the Central Regional Council:

Paul M. Moore, Q.C.	Chair
Guenther W. K. Kleberg	Industry Representative
Kenneth P. Mann	Industry Representative

Appearances:

David Halasz)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Gilles Robert Latour)	In attendance by teleconference; not represented
)	by counsel
)	
)	

The Allegations

1. By Notice of Hearing (“Notice of Hearing”) dated November 18, 2015, Staff of the MFDA (“Staff”) alleged that Gilles Robert Latour (the “Respondent”) engaged in the following conduct:

Allegation #1: Between May 2007 and October 31, 2014 the Respondent solicited and accepted a total of at least \$651,946 from at least three clients, which the Respondent has failed to return or otherwise account for, contrary to MFDA Rules 2.1.1 and 2.1.4.

Allegation #2: Commencing August 22, 2014, the Respondent failed or refused to provide documents and information, and attend an interview, as requested by MFDA Staff during the course of an investigation into his conduct, contrary to section 22.1 of MFDA By-law No.1.

Failure of Respondent to file a Reply or otherwise defend

2. In an email on the date of the hearing (the latest email) to Staff, the chair of the panel, and the MFDA Manager of Hearings Administration, the Respondent stated that "As mentioned on a number of occasions, I fully intend on defending myself".

3. However, the Respondent never at any time filed a Reply and never filed any documentation or submitted any evidence or other information or gave any testimony to defend himself.

4. In the latest email, the Respondent stated: "...you only have one side of the story. Important items missing in the 'Repayment' and the participation of the 'as you referred to 'the client' and several other items including 'disclosures'". Although the Respondent was present at the hearing by teleconference, and had the opportunity to testify, he chose not to testify and did not provide any information or particulars about repayment or disclosures. Nor did the

Respondent at any time leading up to or during the hearing challenge or bring into question the truth of any of the evidence submitted by Staff.

Burden of proof

5. Staff bears the burden of demonstrating, on a balance of probabilities, that allegations against the Respondent have been proved. Staff must present evidence that is sufficiently clear, cogent and convincing to establish that it is more likely than not that the alleged misconduct occurred.

6. However, the Rules of the MFDA provide, and the Notice of Hearing clearly states, that a hearing panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the Reply.

Decision

7. The panel reviewed all the evidence submitted by Staff. This included three affidavits and a multitude of documentary exhibits to the affidavits that supported the testimony in the affidavits. The panel found the evidence submitted by Staff to be clear, cogent and convincing and concluded that Staff had satisfied the burden of proof and that the allegations had been proven.

Preliminary matters

8. A first appearance in this matter occurred on February 2, 2016. In view of the non-cooperation of the Respondent to that point in time, Staff requested an order that a Reply be delivered by February 19, 2016. Staff also requested firm dates for the Hearing on the Merits. The Respondent attended the first appearance by teleconference and was not represented by counsel. The panel requested the Respondent to make arrangements for representation by counsel in a timely manner if he chose to be represented, and warned the Respondent that the panel would not entertain kindly any last-minute request for an adjournment because of the failure of the Respondent to arrange representation.

9. On several occasions prior to the hearing on the merits, Staff requested the Respondent to file a Reply and to provide the name of his counsel, if any, and reminded the Respondent that the hearing of this matter on its merits would take place on May 30 and 31, 2016, commencing at 10:00 a.m.

10. On May 10, Staff advised the Respondent that he had not advised whether he intended to participate in the hearing. Staff advised the Respondent that the documents it intended to rely on at the hearing and witness statements were available if he would like to inspect them or to receive copies of them.

11. On May 16, the Respondent replied to Staff and stated: "I fully intend on defending myself. At the request of both my lawyers, they are asking for an adjournment till after the criminal pre-trial dated June 15–17, 2016. All of my efforts and resources are dedicated to those three days in Cornwall. They also requested not to attend any hearing without proper counsel. We would appreciate an adjournment till after the dates from above. "

12. On May 16, Staff replied: "Staff does not agree to your request for an adjournment. This hearing date was known to you since February 2, 2016 when you participated in the first appearance on this matter. You have not since participated in this proceeding as described in my emails below. You are free to bring your request for an adjournment to the Hearing Panel by motion. Given the pending hearing, you should bring the motion in advance of the hearing. You can obtain a motion date by contacting Marco Wynnyckyj, the Manager of Hearings at the MFDA,[...] and file motion materials in accordance with Rule 6 of the MFDA's Rules of Procedure available on the MFDA's webpage [...]. Should you bring the motion, I expect my instructions will be to oppose it. Staff intends on proceeding with the hearing on the merits on May 30–31 as scheduled."

13. On May 25, Staff advised the Respondent: "We have not heard from you further to our email below. As indicated, Staff intends on proceeding with the hearing on May 30–31, 2016, as scheduled. Attached are the affidavits of [Client #1] and [BC] which Staff intends to file in

advance of the hearing. We do not intend to have [Client #1] and [BC] attend at the hearing on Monday. If you have any questions about this, or the matter in general, please contact me. Please note that Staff is having its documentation on this matter delivered to you by process server [...]"

14. On May 25, the Respondent advised Staff: "At this point I am 'Unrepresented' and I am NOT comfortable about dealing with the issues below without representation. I would like to have the opportunity to defend myself. I am asking to have the proceedings remanded in such time to be able to secure representation. Please advise."

15. On May 25, Staff requested a teleconference on this matter before the panel on an urgent basis to seek directions with respect to the upcoming hearing.

Appearance of May 27, 2016

16. An appearance before the panel was held on May 27, 2016. The Respondent attended by teleconference. Staff submitted an email thread of the communications between Staff and the Respondent.

17. Although the appearance was held at the request of Staff, and the Respondent had made no motion for adjournment, the panel decided to address the questions of adjournment raised by the Respondent in his emails.

Adjournment based on co-temporal criminal proceedings

18. The original request for adjournment was based on the fact that the Respondent was subject to criminal charges and that a pre-trial hearing would be taking place on June 15–16 and 17, 2016 in Cornwall.

19. The panel refused an adjournment based on the ongoing criminal proceedings against the Respondent, in the absence of extra-ordinary and exceptional circumstances.

20. The panel based its decision on the reasoning in two MFDA decisions and the cases cited in those decisions: *Reeves* (201509), dated March 30, 2016; and *Scribnock* (201322), dated August 19, 2014.

21. Those decisions make it clear that a panel has the discretion whether or not to adjourn a hearing. The authorities referenced in the decisions consistently confirm that the exercise of that discretion is bound by the principle that a disciplinary hearing before a professional tribunal should not be adjourned pending completion of a co-temporal criminal prosecution, addressing the same or closely related allegations, in the absence of "extra-ordinary and exceptional circumstances".

Adjournment to retain counsel

22. The panel refused an adjournment based on the request of the Respondent for time to arrange legal representation.

23. When questioned by the panel about references in his e-mails with Staff referring to consultations by the Respondent with his counsel, and the fact that the Respondent had been warned at the first appearance not to delay arranging for representation until the last minute, the Respondent stated that the reason he did not have counsel was that he had no funds to pay counsel a retainer, and that without any source of income he had no prospects of acquiring funds in the future for such purpose. It, therefore, appeared to the panel that an adjournment to allow the Respondent time to accumulate funds in order to retain counsel would, in effect, require an indefinitely delayed adjournment.

The latest email

24. At the commencement of the hearing on May 30, 2016, Staff filed an email from the Respondent dated May 30, 2016. The Respondent was in attendance at the hearing by teleconference.

25. The Respondent did not raise any new matter or information that was not fully addressed in the appearance on May 27, 2016, except for the following. In the email the Respondent stated: "I've spent every moment perusing the over 6000 pages (received less than five days ago) and as late as last night. Even if I was able to secure counsel (which I will) there is no way anyone can get through the amount of material that was sent to me just a few days ago."

26. The panel considered that the Respondent had been advised on several occasions that the material that Staff would be relying on at the hearing was available to him and that copies could be delivered to him. The fact the Respondent failed to avail himself of the opportunity to review the materials on a timely basis was not a reason to delay the hearing.

27. Furthermore, Staff advised that the materials (the three affidavits and their exhibits) amounted to far less than 6000 pages as stated by the Respondent. The panel noted that it had received on the evening of May 27, 2016, the materials that Staff was submitting at the hearing, and that each member of the panel had been able to consider it on his own in reasonable detail in approximately three hours.

28. The panel refused to adjourn the matter in order to give the Respondent more time to review the materials.

Evidence

29. Rule 1.6 of the MFDA Rules of Procedure permits a hearing panel to admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

30. Rule 13.4 of the MFDA Rules of Procedure permits a hearing panel to allow evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

31. Several of the potential witnesses and victims of the Respondent in this matter were located in Cornwall, Ontario. Many were old and/ or infirm and/or in other respects incapacitated. Furthermore, the Respondent had not filed a Reply, and it appeared he was not going to challenge the evidence submitted by Staff or otherwise question the evidence against him. Indeed, the Respondent was advised by Staff that it would be proceeding by way of affidavit evidence and would not have available at the hearing the persons swearing the affidavits, other than Lara Rowles, Staff Investigator. The Respondent had been invited by Staff to ask any questions or otherwise comment on this proposed procedure. The Respondent did not object to this procedure and did not ask any questions.

Facts

32. The relevant facts in this matter are set out in:

- (a) the Notice of Hearing;
- (b) the affidavit of Lara Rowles sworn May 27, 2016;
- (c) the affidavit of Client #1 sworn May 19, 2016; and
- (d) the affidavit of BC sworn May 25, 2016.

33. We had no reason to believe that any of the testimony in the three affidavits was untrue. Accordingly, the panel found as fact the matters testified to as facts in the affidavits.

34. In this case:

- (a) At all material times, the Respondent was an Approved Person at Equity Associates Inc. (Equity), a Member of the MFDA, and clients #1, #2, and #3 mentioned in the Notice of Hearing, were clients of Equity.
- (b) The clients were seniors and were vulnerable clients.
- (c) The Respondent obtained monies from the clients as loans, and provided promissory notes.

- (d) The Respondent has not repaid or otherwise accounted for the monies obtained from the clients.
- (e) Equity was not aware that the Respondent was obtaining monies, including for personal loans, from any client. As a result, Equity could not ensure that conflicts of interest were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients. In any event, these transactions were prohibited by Equity's policies and procedures
- (f) The Respondent has failed to cooperate with Staff's investigation into the matter's outlined in the Notice of Hearing. Staff made a number of attempts to contact the Respondent to obtain a written statement and documents, and to arrange his attendance at an interview with Staff. The Respondent did not comply with any of this.

Allegation #1- Conflicts of interest and Standard of Conduct

35. Since February 27, 2006, MFDA Rule 2.1.4 explicitly imposes obligations on Approved Persons to be aware of the possibility of conflicts of interest or potential conflicts of interest with clients, to disclose such conflicts to the Member and together with the Member, to ensure that any conflict is addressed by the exercise of responsible business judgment influenced only by the best interest of the client. The rule states:

“ 2.1.4 Conflicts of Interest

a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interest of the client and in compliance with Rules 2.1.4(c) and (d).

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4 (a),(b),and (c).”

36. An MFDA hearing panel considered the meaning and implications of the previous version of Rule 2.1.4, which contained much of the same language as the current version of the rule, and stated that:

"The phrase ‘responsible business judgment ‘, which is contained in the Rule, is not defined by the Rules. However, a reasonable interpretation would suggest that it requires the exercise of care and diligence in the circumstances to address the conflict or potential conflict of interest always subject to being in the best interest of the client [...]. In cases involving a significant and actual conflict of interest, the exercise of responsible business judgment may require a blanket prohibition on, or refusal to proceed with, the type of transaction giving rise to the conflict." ***Tonnies (Re) (2005), Decision of a Hearing Panel of the Prairie Regional Council, MFDA File No. 200503 (“Tonnies”) at page 13-14.***

37. MFDA Staff Notices provide non-binding guidance to the industry about Staff’s position with respect to certain types of conduct and Staff’s interpretation of the application of MFDA Rules and Policies. In MFDA Staff Notice MSN – 0047 dated October 3, 2005, Staff informed the industry of the MFDA's view that:

"Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA Rules, MFDA Staff are unaware of any circumstances where Members or Approved Persons proposing to enter into any such arrangement would be able to demonstrate that the conflict has been properly dealt with." ***MSN-0047 - Personal Financial Dealings***

38. MFDA hearing panels have consistently held that borrowing from clients gives rise to a conflict of interest and the failure of an Approved Person to address the conflict by the exercise

of responsible business judgment influenced only by the best interests of the client constitutes a serious contravention of MFDA Rule 2.1.4

Frank (Re), (2015) Decision and Reasons of a Hearing Panel of the Central Regional Council, MFDA File No. 201407

Tonnies, supra,

Brown-John, (2005) Decision and Reasons (Misconduct) of the Hearing Panel of the Pacific Regional Council (“Brown-John”) MFDA File No. 200502

Brauns (Re) (2013), Decision and Reasons (Misconduct) of a Hearing Panel of the Central Regional Council, MFDA File No. 201203

Greyeyes (Re), (2006) Decision and Reasons of the Hearing Panel of the Prairie Regional Council MFDA File No. 200510

Ryan (Re), (2011) Decision and Reasons of the Hearing Panel of the Central Regional Council, MFDA File NO. 201014

Wellings (Re) (2011) Reasons for Decision of the Hearing Panel of the Central Regional Council, MFDA File No. 201121

39. MFDA hearing panels have consistently held that an Approved Person who engages in personal financial dealings with a client by borrowing money from a client, and particularly in circumstances where the Approved Person later fails to pay back or otherwise account for all or part of the amount obtained, contravenes the standard of conduct, contrary to MFDA Rule 2.1.1.

Tonnies, supra

Brown-John, supra

Greyeyes, supra

Lui (Re), (2011) Reasons for Decision of a Hearing Panel of the Central Regional Council, MFDA File 201124

Nunweiler (Re), (2011) Reasons for Decision of a Hearing Panel of the Pacific Regional Council, MFDA File No. 201030

Allegation #2 – Failure to cooperate with an investigation

40. Section 22.1 of MFDA By-law No. 1 states that:

“For the purpose of any examination or investigation pursuant to this By -law, the Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) To submit a report in writing with regard to any matter involved in any such investigation;

(b) To produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and

(c) To attend and give information respecting any such matters;

[...]"

41. This provision of the By-law empowers the MFDA to require individuals under its jurisdiction to attend interviews and to provide information and produce documents relevant to investigations undertaken by Staff.

42. Pursuant to section 24.1.4 of MFDA By-law No. 1, for purposes of the enforcement processes set out in sections 20–24 of MFDA By-law No. 1, the MFDA retains jurisdiction over a Member, Approved Person or other person subject to the jurisdiction of the MFDA notwithstanding the fact that the person has ceased to be an Approved Person. Accordingly, the Respondent continued to be bound to comply with section 22.1 of MFDA By-law No. 1 even after his termination by Equity.

43. In this case, the Respondent failed to provide documentation and information and did not attend for an interview with Staff during Staff's investigation into his conduct.

44. The information and documentation that the Respondent failed to answer or provide was highly material to Staff's investigation including information and documentation relating to loans that the Respondent obtained from individuals described in the Notice of Hearing, and the extent to which he may have engaged in similar conduct with other clients and individuals, including clients and individuals described in the particulars in the Notice of Hearing and those described in the charges against the Respondent under the Criminal Code.

45. Hearing panels have consistently held that failure to cooperate with an investigation by the MFDA by attending interviews if requested, or by providing relevant information and documentation requested by Staff constitutes a contravention of section 22.1 of MFDA By-law No. 1 and subverts the MFDA's ability to perform its regulatory functions.

Tonnies, supra
Brown-John, supra
Ryan, supra
Wellings, supra,
Nunweiler, supra

Conclusion

46. In summary, the evidence and the law support findings that each of the allegations of Staff set out in the Notice of Hearing has been established, and, accordingly, that the Respondent has contravened his regulatory obligations and engaged in the regulatory misconduct as alleged by Staff.

DATED this 7th day of June, 2016.

“Paul M. Moore”

Paul M. Moore, Q.C.
Chair

“Guenther W. K. Kleberg”

Guenther W. K. Kleberg
Industry Representative

“Kenneth P. Mann”

Kenneth P. Mann
Industry Representative