BABIN BESSNER SPRY

185 Frederick Street, Suite 101, Toronto ON, M5A 4L4
Tel: 416 637 3244 ■ Fax: 416 637 3243 ■ www.babinbessnerspry.com

Sanctions Ordered by SROs Facing Increased Scrutiny from Regulators

By Aaron Gold and Ellen Bessner BABIN BESSNER SPRY LLP

Provincial securities regulators are given broad powers to review the decisions of self-regulatory organizations ("SROs"), such as the Mutual Fund Dealers Association of Canada ("MFDA") or the Investment Industry Regulatory Organization of Canada ("IIROC").[1] Until recently, regulators across Canada have taken a restrained view of these powers. Not only have they chosen to limit the circumstances under which they will interfere with the SRO's decision,[2] but the power to substitute their own order has traditionally been reserved for exceptional cases.

The decisions discussed below suggest the regulators' reluctance may be waning, indicating an increased willingness to ensure that sanctions imposed by SROs are responsive and proportionate to the advisor's misconduct.

***Re Rojas Diaz*, 2021 ONSEC 24**

Background: In early 2017, Mr. Rojas advised one of his clients that she had been pre-approved for a $10,000 line of credit. The client was not interested in obtaining a line of credit; however, Mr. Rojas encouraged and ultimately convinced her to do so.

[1] For instance, section 21.7 of the *Securities Act* (Ontario) allows any person or company directly affected by a decision or order of a recognized SRO to apply to the Ontario Securities Commission for a hearing and review. See *Securities Act*, RSO 1990, c S-5, ss 21.7(1)-(2), 8(3).

[2] See *Re Ziaian*, 2021 ONSEC 9 (CanLII) at para 28, citing *Re Canada Malting Co* (1986), 9 OSCB 3565, 1986 CarswellOnt 151 at para 24.

In September 2017, Mr. Rojas altered the client's file to contain fictitious contact information, allowing him to conceal subsequent activity in her account. Without the client's knowledge or authorization, he then opened a new account in the client's name and began paying the minimum interest on the line of credit from the new account. Each of these actions were facilitated by submitting a letter of direction on which Mr. Rojas had falsified the client's signature.

Between September 2017 and June 2018, Mr. Rojas misappropriated $39,270 from the line of credit, which he used for his personal benefit.

The MFDA Decision: Mr. Rojas avoided a hearing on the merits by agreeing to a statement of facts with MFDA Staff, admitting to misappropriating $39,270 from the client contrary to MFDA Rule 2.1.1 [Standard of Conduct]. The hearing was limited to determining the appropriate penalty (discipline hearing).

While the Hearing Panel acknowledged that Mr. Rojas' misconduct would ordinarily warrant a financial penalty,[3] it noted various factors to suggest that such a sanction was neither fair nor appropriate in the circumstances, including that (i) his employer had reimbursed the amounts taken from the client's line of credit; (ii) Mr. Rojas had needed the money to pay his bills, and had not misappropriated the funds to support a lavish lifestyle; and (iii) Mr. Rojas' financial situation was such that he was unable to pay any financial penalty, rendering such an order punitive in nature.

The MFDA ordered that Mr. Rojas be permanently prohibited from conducting securities related business while in the employ of or affiliated with a Member of the MFDA,[4] but did not order any monetary penalty.

The OSC Decision: MFDA Staff applied for an order varying the Hearing Panel's decision to impose a fine. The OSC held that the Hearing Panel erred in failing to impose a financial penalty, and ordered a $32,270 fine representing disgorgement of all profits obtained from Mr. Rojas' misconduct, less the amounts he repaid pursuant to a consumer proposal. The OSC also imposed an additional $20,000 fine, reasoning that "[t]he seriousness of the misconduct and the principles of public protection and deterrence require a more onerous financial penalty than simply disgorgement."[5]

Re Eisenberg, 2022 ABASC 22

Background: In February 2009, the client, TG, told Ms. Eisenberg that she wanted to put $40,000 into a low-risk investment she could redeem on short notice, so she could use the funds toward a down payment on the purchase of a house. Without her registered firm's knowledge or approval, Ms. Eisenberg recommended TG purchase shares in CareVest Blended Mortgage Investment Corporation ("CareVest"). The purchase was facilitated off book, rather than through TG's account at the firm.

In December 2012, CareVest underwent a corporate restructuring and amalgamated the shares held by TG with other CareVest securities. The reclassified shares imposed limits on shareholders' ability to retract their shares, forcing TG to borrow money from her partner's retired parents in

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[3] *Re Rojas Diaz*, 2021 CanLII 15682 (CA MFDAC) at para 65.
[4] *Ibid* at para 8.
[5] *Re Rojas Diaz*, 2021 ONSEC 24 (CanLII) at para 69.

order to fund her down payment. TG continued to experience difficulties accessing her funds, and ultimately submitted a complaint to the MFDA.

The MFDA Decision: The Hearing Panel concluded that Ms. Eisenberg had engaged in serious misconduct warranting a significant penalty. Reasoning that engaging in securities related business without the knowledge and approval of the Member undermines the regulatory regime, exposes clients to potential harm, and can bring the mutual fund industry into disrepute,[6] the Hearing Panel ordered a three-month suspension, a $15,000 fine and $5,000 in costs.

The ASC Decision: Ms. Eisenberg applied to the Alberta Securities Commission ("ASC") for a review of the MFDA's decision. The ASC held that the sanctions imposed by the Hearing Panel were unreasonable, based on error of law and principle, and beyond what was necessary to protect the public interest and prevent future harm.[7]

The ASC found that the Hearing Panel overemphasized the need for specific and general deterrence in light of the facts and circumstances of the case.[8] It also found that the Hearing Panel overlooked or gave insufficient weight to material evidence, including Ms. Eisenberg's expressions of remorse, shame, and regret,[9] and her subsequent attempts to help the client find alternatives to finance her down payment or sell her shares.[10]

The ASC vacated the three-month suspension, concluding that the sanction was disproportionate to the gravity of the offence and Ms. Eisenberg's degree of responsibility.

Conclusion

Both of these decisions suggest an increased willingness to interfere with and replace the sanctions imposed by SROs at first instance. We will have to stay tuned to see whether these decisions are exceptional cases, or emblematic of a broader shift.

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[6] *Re Eisenberg*, 2020 CanLII 80703 (CA MFDAC) at para 55.
[7] *Re Eisenberg*, 2022 ABASC 22 (CanLII) at para 180.
[8] *Ibid* at paras 153-163.
[9] *Ibid* at para 152.
[10] *Ibid* at para 168.