ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Dwyer, 2023 ABASC 38 **Date: 20230411**

Paul Anthony Dwyer
Appeal of Mutual Fund Dealers Association Decisions

Panel:	Kari Horn Tom Cotter Bryce Tingle, K.C.
Representation:	Roderick Onoferychuk for the Appellant
	Justin Dunphy Shelly Feld for the New Self-Regulatory Organization of Canada (Mutual Fund Dealer Division)
Submissions Completed:	January 5, 2023
Decision:	April 11, 2023

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I. INTRODUCTION

[1] Paul Anthony Dwyer (**Dwyer**) appealed (the **Appeal**) to the Alberta Securities Commission (the **ASC**) from two disciplinary decisions issued against him by a hearing panel of the Prairie Regional Council (the **Panel**) of the Mutual Fund Dealers Association of Canada (the **MFDA**).

[2] At the material time, the MFDA was the self-regulatory organization (**SRO**) for Canadian mutual fund dealers, responsible for regulating in the public interest the operations, standards of practice, and business conduct of its **Member** firms and their **Approved Persons** (as defined in MFDA By-Law No. 1). As of January 1, 2023, the MFDA and the Investment Industry Regulatory Organization of Canada (or IIROC) were amalgamated and temporarily renamed the "New Self-Regulatory Organization". A permanent name is expected to be chosen later in 2023.

[3] In Alberta, the MFDA was under the oversight of and recognized by the ASC pursuant to s. 64 of the *Securities Act* (Alberta) (the **Act**) (see *Re MFDA/ACFM*, 2014 ABASC 452, as varied by *Re MFDA/ACFM*, 2018 ABASC 53, and *Re MFDA/ACFM*, 2021 ABASC 32). The Appeal was brought before the ASC pursuant to ss. 36 and 73 of the Act and s. 26.1 of MFDA By-Law No. 1.

[4] On July 29, 2022, staff counsel for the MFDA (**Staff**) brought an application for an order dismissing the Appeal from the first of the Panel's decisions (defined below as the Merits Decision) on the basis that it was not filed within the statutory appeal period set out in the Act. Dwyer opposed the application.

[5] After consideration of the written submissions and the oral submissions made by the parties at a hearing held on September 8, 2022, we dismissed Staff's application for the reasons set out in a ruling cited as *Re Dwyer*, 2022 ABASC 164.

[6] We heard oral argument on the Appeal from Dwyer's counsel and from Staff on January 5, 2023 (the **Appeal Hearing**), and admitted into evidence an affidavit affirmed by MFDA investigator Patricia West (**West**) on December 9, 2022 (the **2022 West Affidavit**). We also received written submissions from the parties and the record of the proceedings before the Panel (the **Record**).

[7] For the reasons set out below, we dismiss the Appeal.

II. BACKGROUND

[8] From October 2007 to July 2018, Dwyer was registered as a mutual fund dealing representative or Approved Person in Alberta, British Columbia, Manitoba, and Ontario. He worked in Calgary for MFDA Member firm Investors Group Financial Services Inc. (**Investors Group**) during that period.

[9] As of May 2017, Stephen Judd (**Judd**) was Investors Group's Interim Regional Director for the Calgary Centre region, and acted as Dwyer's supervisor and Branch Manager at the material time.

[10] On August, 20, 2020, MFDA Staff issued a notice of hearing (the **NOH**) alleging that:

> In March 2018, [Dwyer] submitted for processing to the Member [i.e., Investors Group] two trades for which he stood to earn commissions, after being informed by his Branch Manager that the trades would not be approved, thereby engaging in conduct that fell below the standard of conduct required of Approved Persons, and that gave rise to a conflict or potential conflict of interest which he failed to address by the exercise of responsible business judgement influenced only by the interest of the client, contrary to MFDA Rules 2.1.1 and 2.1.4.

[11] At the time, MFDA Rules 2.1.1 and 2.1.4 stated:

> **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 [MFDA].
>
> . . .
>
> **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 interests 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).

[12] A hearing into the merits of the allegation in the NOH was held before the Panel from July 26 to 29, 2021 (the **Merits Hearing**). On January 20, 2022, the Panel issued its decision and found that Staff had proved the allegation against Dwyer (the **Merits Decision**).

[13] At the material time, **KM** was an Investors Group client whose accounts were Dwyer's responsibility. When KM's mental health declined, her grandnephew, **SE**, was designated as her

guardian and trustee by court order issued in September 2013 (the **Trustee Order**). SE was therefore authorized to make financial decisions on KM's behalf.

[14] KM ceased to be an Investors Group client in or around October 2014, but in February 2018, SE agreed to transfer KM's assets back to Investors Group. On or about February 16, 2018, SE signed documents to open two Investors Group accounts for KM, and instructed Dwyer to purchase an income mutual fund in each of the accounts once KM's money arrived from her previous financial institution. The funds were delayed – apparently at least in part due to the paperwork having been lost at Investors Group's head office – and did not arrive at Investors Group until March 27 or 28, 2018.

[15] Dwyer testified at the Merits Hearing that late in the evening on Friday, March 23, 2018, SE called him to advise that KM had passed away that day. Dwyer said he suspected that SE might be playing a "prank" on him given that SE had a tendency to "kid around" and had told him that KM had died on two prior occasions (although Dwyer acknowledged that he did not have a written record or other evidence of those conversations because they ostensibly occurred during the period that KM was not his client). Dwyer also thought that SE's March 23, 2018 call was uncharacteristic of SE because it had come so late and it had sounded as though SE were calling from a crowded, noisy space. Dwyer testified that as a result, he was uncertain whether to believe that KM had actually passed away.

[16] Nonetheless, on the same evening, Dwyer emailed his Branch Manager, Judd, to inform him of SE's call and to request that they speak. They did not speak that night, but the next morning, Saturday, March 24, 2018, Dwyer sent Judd another email that stated in part, "I guess there[']s a contractual technicality that may void our arrangement with [SE]."

[17] Both Dwyer and Judd testified that over the next several days, they had a number of communications about KM and SE. It was Judd's view that once KM died, SE lost his authority under the Trustee Order. He said he therefore told Dwyer more than once that because of KM's death, no trades could occur in her accounts and her money would have to be transferred to an estate account when it arrived from the other financial institution. He also told Dwyer that the matter would have to be addressed by Investors Group's estates department.

[18] Judd further testified that on March 27 and 28, 2018, he contacted two of Investors Group's other Regional Directors to seek their advice about the situation. He said he told them that they did not yet have KM's death certificate and that Dwyer was of the view her assets could not be held in cash because the terms of the Trustee Order required them to be invested. Based on his discussions with the two Regional Directors, Judd continued to take the position that no trades could occur in KM's accounts. The Panel noted in the Merits Decision that Judd "was adamant in saying that at no time did he tell [Dwyer] that the trades could proceed based on the information that [Dwyer] had given him" (at para. 47).

[19] However, after receiving KM's cash from her previous financial institution on March 27 or 28, 2018, Dwyer submitted two mutual fund purchases for her accounts in the amounts of approximately $1,120,000 and $40,000, in accordance with SE's February 2018 instructions. He received commissions of approximately $16,279 on the transactions. He sent an email to SE to

inform him of the transactions, and ended the message by stating, "I'm pleased to be starting the adventure with you and your [a]unt".

[20] Dwyer testified that he called SE to confirm the transactions before making them, but they did not discuss KM's death between March 23 and 28, 2018. His explanation was that, "he assumed that if he had brought it up it was extremely likely that SE would have carried on with what [Dwyer] described as the 'farce'" – i.e., the "farce" that KM had in fact passed away (Merits Decision at para. 51). According to Dwyer, his email reference to "starting the adventure" with SE and KM after the trades were made was his attempt to "call out the farce" because he believed KM was still alive. SE did not reply.

[21] Judd acknowledged that late in the afternoon of March 28, 2018, Dwyer told him that he had gone ahead with the trades in KM's accounts. Judd then spoke to the former Regional Director for the Investors Group office, Rob Bisson (**Bisson**), to tell him about the situation and ask for advice. According to Judd, Bisson agreed that the trades should not be permitted.

[22] On the morning of March 29, 2018, Judd flagged the trades as "under review" on Investors Group's internal computer system. He also called an associate manager in Investors Group's Compliance Department, Kate Schroeder (**Schroeder**), for further advice. Judd testified that Schroeder told him she did not believe that Dwyer's reasons for proceeding – the lack of a death certificate and the purported terms of the Trustee Order – were reasons to allow the trades, but recommended that Judd contact Compliance Operations to confirm. Judd's call with Schroeder appears to be confirmed in an email she wrote to other Investors Group staff on June 14, 2018.

[23] After he spoke to Schroeder, Judd sent an email to the Compliance Department address she had provided him, asking for someone to contact him on an urgent basis to discuss the situation. However, he did not receive a reply until April 9, 2018, and only after he followed up on April 6, 2018. At that time, he was told that someone would get back to him that day.

[24] Dwyer testified that in the meantime, after receiving a call from SE on April 3, 2018, he picked up a copy of KM's death certificate. Though he said he expected a continuation of SE's "practical joke", the death certificate confirmed that KM had died on March 23, 2018. Dwyer then sent an email to SE that stated in part:

> Sincere condolences on the passing of your Dear Great Aunt [KM]. RIP.
>
> I'm sorry to hear about the news especially after the recent transactions. I commit to respecting your privacy during this time of grief.
>
> . . .
>
> By the way . . .
>
> I'm looking at the dates, and I'm a little concerned that the final confirmation on the transaction was done after [KM] [p]assed. While we are working on the written instructions dated in January and approved and executed in February, would you take a quick look when you're able to confirm that you are still authorized to act for your [g]reat aunt. I'd hate to make any mistakes . . .
>
> I'm so sorry to hear the news my friend.

[25] Dwyer also sent an email to the Investors Group estates department (with a copy to Judd) stating:

> Hi,
>
> Just received terrible news about [KM] . . . late of March 23, 2018. (DOD)
>
> . . .
>
> Attached is a certified copy of the Death Certificate . . .
>
> [SE] has been notified of our process and is waiting on your letter. Thanks

[26] In a separate email to Judd on April 3, 2018, Dwyer wrote:

> Hi Stephen,
>
> Horrible news… Mrs. [KM].. died recently.
>
> I've sent off a letter to Estates and sent an email to [SE] to describe the process.

[27] When asked during his MFDA interview with West why he had phrased this email in this way, suggesting that he had just found out instead of referring to his earlier discussions with Judd about KM's death, Dwyer acknowledged that he did not know and had "no excuse" for it.

[28] Dwyer's evidence on whether he had Judd's approval to make the trades in KM's accounts was the opposite of Judd's. Dwyer maintained that he told Judd about SE's earlier "pranks" concerning KM's death and his concerns about the requirements of the Trustee Order, and Judd had told him that he could proceed with the trades and then confirm whether KM had actually died, based on SE's earlier instructions. Dwyer denied that Judd ever told him the trades would not be approved.

[29] In his November 27, 2020 reply to the NOH, Dwyer stated that he had not believed KM was actually dead until he received a copy of her death certificate on or about April 3, 2018. He therefore "chose to ignore what he thought was a prank", but acknowledged that he should not have done so. However, he stated that he was in a dilemma at the time, because "if [KM] had passed, though technically an unauthorised transaction[,] he believed that [Investors Group] would be able to reverse the transaction quickly and easily". On the other hand, if KM "actually were alive and he did not proceed, [he] would have delayed the transaction, and dishonored written instructions".

[30] During his MFDA interview, Dwyer expressed two additional concerns: first, that he might be called upon to explain to the courts why KM's money had not been invested, and he did not want to have to say that it was because SE, KM's court-appointed trustee and guardian, had a tendency to play pranks about whether his great-aunt was dead or alive; and second, he was unsure whether SE had obtained legal authority to act on KM's behalf after her death, and he did not want to have ignored SE's instructions if so.

[31] Investors Group reversed the trades and commissions in June 2018. In July, it terminated Dwyer's employment because of these events. As of the date of the NOH, Dwyer was not registered in the securities industry in any capacity, but as of September 1, 2020, he became registered with a different Member.

III. THE MFDA PROCEEDINGS

[32] As mentioned, the Panel issued its Merits Decision on January 20, 2022. It found that Staff had proved the allegation against Dwyer for the reasons discussed in the next section of this decision.

[33] Following the Merits Decision, the proceeding moved to its second phase on March 3 and 23, 2022: a hearing into the appropriate sanction for Dwyer's misconduct (the **Sanction Hearing**). After the parties completed their submissions on March 23, 2022, the Panel ordered that Dwyer:

- was suspended from conducting securities-related business in any capacity while in the employ of or associated with any MFDA Member for a period of three months commencing April 4, 2022 and expiring July 3, 2022;
- must pay a fine of $12,500; and
- until December 31, 2022, was subject to strict supervision by any Member with which he became re-registered after his suspension expired.

[34] The Panel also ordered that Dwyer pay costs in the amount of $20,000. Both the fine and the costs were ordered to be paid in monthly installments until July 1, 2023, in default of which any outstanding balance would become immediately due and payable to the MFDA.

[35] On July 6, 2022, the Panel issued its reasons for decision on sanction (the **Sanction Decision**), also discussed below.

A. The Merits Decision

[36] The Panel identified two issues to be resolved:

(i) did Dwyer process two trades in KM's accounts after being advised by his Branch Manager that the trades would not be approved? (or, stated another way, did Dwyer have Judd's approval to proceed with the trades at issue?); and

(ii) if Dwyer did not have Judd's approval to proceed, did his conduct fall below the standard required of Approved Persons and give rise to a conflict or potential conflict of interest that he failed to address by the exercise of responsible business judgment influenced only by his client's interests?

[37] The Panel determined that the first issue was largely dependent on whether it preferred Dwyer's evidence or Judd's. It found that "[o]verall", Dwyer's evidence "was neither clear, cogent, nor credible", and that it "was not given in a straight forward [sic] manner but was instead rambling and at times inconsistent" (Merits Decision at para. 116). By contrast, the Panel concluded that Judd had testified "in a straight forward [sic], clear and consistent manner" (*ibid.* at para. 117).

[38] The Panel further observed that while Dwyer's and Judd's evidence was similar concerning certain communications, they had differed (as mentioned) on the fundamental issue of whether Dwyer had Judd's approval to proceed with the trades. According to Dwyer, his initial conclusion was the same as Judd's: the trades could not be made once KM passed away. However, he testified that he had been able to convince Judd that there were mitigating circumstances militating in favour of proceeding with the trades: specifically, Dwyer's uncertainty that KM was actually dead, and his understanding that the Trustee Order required KM's money to be invested rather than held in cash. Dwyer said that as a result, Judd allowed him to proceed with the trades on the understanding that they could be reversed later if necessary.

[39] Concerning Judd's evidence to the contrary, the Panel found that his actions at the relevant time were consistent with his testimony and reinforced his credibility. That Judd flagged the trades as "under review" on March 29, 2018, called Schroeder to seek her advice, and emailed Compliance as Schroeder had suggested supported his evidence that he had not approved the trades. The Panel found that it would not have been reasonable for him to instruct Dwyer to proceed while waiting for confirmation of KM's death, "only to have to be in a position to reverse the trades at a later date" (Merits Decision at para. 121). In addition, the Panel noted that Judd's Merits Hearing testimony was consistent with the statements he gave earlier to Investors Group and the MFDA during their respective investigations.

[40] On the other hand, the Panel found that Dwyer's Merits Hearing evidence was not consistent with what he said to MFDA Staff during their investigation. For example, he gave a convoluted and incredible explanation at the Merits Hearing about what he meant when he wrote in his March 24, 2018 email to Judd that, "I guess there[']s a contractual technicality that may void our arrangement with [SE]." However, when he was asked about that email during his MFDA interview, he told the Staff investigator that he meant "[t]hat if this woman is actually dead, then the trade can't go through, but she's probably not dead because [SE has] lied to me a couple of times before".

[41] The Panel also found that Dwyer deliberately worded several emails in a way meant to cover up his conduct by making it appear as though he had not been informed of KM's death on March 23, 2018 and was not aware of any circumstances that would have prevented him from making the trades when he did. This included his March 28, 2018 email to SE with the statement that he was "pleased to be starting the adventure" with SE and his great-aunt, his April 3, 2018 email to SE expressing his condolences on KM's death as though he had just heard the news, and his April 3, 2018 email to the Investors Group estates department indicating that he had "[j]ust received terrible news" about KM's death.

[42] In reality, the Panel concluded, the evidence showed that Dwyer knew that if KM had passed away, he did not have authority to proceed with the transactions. Despite this, he "acted in accordance with what he wanted to believe and not what he knew to be true" concerning both KM's death and the fact that Judd had not approved the trades (Merits Decision at para. 147).

[43] The Panel then addressed Dwyer's argument that he had authority to process the trades based on an Investors Group document entitled, "*Death of a Client Administration Procedures – Learner's guide*" (the **Guide**). Section 10.2 of the version in effect during the material time stated:

> **TRANSACTIONS REQUESTED BEFORE DEATH BUT RECEIVED AFTER NOTIFICATION**
>
> One-time (non-periodic) transfers, purchases and/or redemption requests will be acted on if the request was initiated, signed and dated by the deceased prior to death.

[44] The Panel found that there was no evidence Dwyer had ever consulted or relied on the Guide, nor that he ever discussed the Guide with Judd or that Judd told him the trades could be approved in accordance with the Guide.

[45] The Panel therefore concluded on a balance of probabilities that Dwyer processed two trades in KM's accounts despite Judd having advised him that the trades would not be approved because SE had lost his authority to give instructions once KM passed away. On her death, her estate replaced her as the client, and the Panel found that Dwyer was aware of that fact when he processed the trades.

[46] The Panel then moved on to consider the second issue: whether in acting as he did, Dwyer contravened MFDA Rules 2.1.1 and 2.1.4. The Panel agreed with Staff's argument that Dwyer was in a conflict of interest when he processed the trades because there was a conflict between his personal interest in earning $16,279 in commissions and the best interests of KM and her estate. Even if he suspected a prank, had Dwyer exercised responsible business judgment as required by Rule 2.1.4(b), he would have confirmed KM's death and then contacted her estate representative for instructions.

[47] Instead, Dwyer created the risk that KM's funds would not be liquid if needed for other purposes following her death and preferred his own interest over his client's, to his client's detriment. Although Dwyer initially testified that he did not know he would receive commissions on the trades, the Panel noted that he admitted on cross-examination that he knew he would receive trailing commissions.

[48] The Panel therefore concluded that Dwyer failed to exercise responsible business judgment influenced only by the best interests of the client, and breached Rule 2.1.4.

[49] MFDA Rule 2.1.1 sets out the general standard of conduct applicable to MFDA registrants. The Panel found that in deliberately acting contrary to his Branch Manager's directions despite knowing and understanding why Judd said the trades should not be processed, Dwyer "clearly fell below the standard of conduct [that] Rule 2.1.1 expects Members to uphold" (Merits Decision at para. 182).

[50] Accordingly, the Panel held that Dwyer breached Rule 2.1.1 as well as Rule 2.1.4, and that Staff had successfully proved the allegation in the NOH.

B. The Sanction Decision

[51] At the Sanction Hearing, the Panel received additional evidence concerning matters relevant to the appropriate penalty to be imposed against Dwyer for his misconduct. The evidence included:

- An excerpt of Dwyer's registration status on the National Registration Database, which showed that since September 1, 2020, Dwyer had been employed by and under the close supervision of MFDA Member Global Maxfin Investments Inc./Les Investissements Global Maxfin Inc. (**Global**). Other evidence confirmed that he would remain under Global's close supervision for an indeterminate period, until the MFDA proceedings were concluded.

- An affidavit Dwyer swore on March 14, 2022 (the **March 14 Dwyer Affidavit**), in which he provided information about his financial circumstances and the continuing professional education he pursued between 2018 and March 2022. In 2020, he earned just over $4,000. In the affidavit, he deposed that as a result of the incident that led to the MFDA proceedings, he and his spouse had separated but were continuing to live under the same roof. He had been using RRSP funds and a loan from his parents to cover his expenses, but noted that his spouse had had to pay the majority of their household costs.

- As attachments to the March 14 Dwyer Affidavit, letters from Global's Chief Executive Officer (**CEO**) and its Interim Chief Compliance Officer (**ICCO**). Those letters indicated that since Dwyer began with Global, he had been in compliance with the necessary protocols and was improving his administrative compliance and know-your-client suitability assessments. Global was satisfied with his performance, his diligence, and his attention to detail, including when dealing with a client who passed away in early 2021.

  The letters also spoke to Dwyer's financial circumstances. They indicated that since 2020, his gross earnings were very low, and the writers opined that clients were reluctant to invest with him fully because of the outstanding MFDA matter. According to the ICCO, Dwyer had not had a regular income since Investors Group terminated him in 2018, "despite his efforts to pivot to general and life insurance services before returning to working as an investment advisor" (Sanction Decision at para. 19). According to the CEO, any further suspension would have a substantial impact on Dwyer's ability to continue to work in the industry, and to obtain the necessary insurance.

[52] The parties differed in their respective submissions to the Panel on sanction. Staff's position was that Dwyer should be suspended for at least one month and ordered to pay a fine of at least $25,000. They also argued that he should be ordered to pay costs of at least $20,000 (discounted from their Bill of Costs totalling $27,350). Dwyer's position was that there should be no suspension and he should only be ordered to pay a fine of $3,000, but that he should also be ordered to comply with MFDA Rules 2.1.1 and 2.1.4 in the future. He did not dispute Staff's request for costs of $20,000.

[53] The Panel observed that in furtherance of the goals of investor protection and fostering public confidence in the capital market and the securities industry, sanctions are intended to deter future misconduct by both the respondent to a proceeding (specific deterrence) and by others (general deterrence). It noted that sanctions should therefore be protective and preventative, and set out some of the factors to be considered when determining an appropriate sanction:

- the seriousness of the misconduct and the respondent's recognition of that seriousness;
- any prior record of misconduct;
- the respondent's level of experience and activity in the capital market;
- the harm suffered by investors and the capital market as a result of the misconduct;
- the benefit the respondent realized as a result of the misconduct;
- the risk to investors and the market posed by the respondent, and therefore the need for deterrence; and
- previous decisions made in similar circumstances.

[54] The Panel also noted that the MFDA has Sanction Guidelines (the **Guidelines**) to which a hearing panel should refer when determining how to exercise its discretion in sanctioning.

[55] Applying this guidance, the Panel rejected Dwyer's submission that his misconduct was not serious because it was unintentional, did not involve deceit, and had been condoned by Judd. The Panel found that this was contrary to its findings in the Merits Decision, and instead agreed with Staff that the misconduct was "extremely serious". Dwyer failed to recognize that seriousness because he maintained throughout the merits proceedings that he had Judd's permission to make the impugned trades and that there was no conflict of interest.

[56] The Panel acknowledged Dwyer's lack of a prior disciplinary record, but again agreed with Staff that as an experienced registrant who was required to be aware of and comply with all regulatory requirements, Dwyer ought to have known better than to have conducted himself as he did.

[57] Concerning the harm suffered by the client, the Panel noted Staff's argument that KM's estate suffered potential harm because KM's assets were invested and potentially exposed to market risk while the estate was settled instead of being maintained in cash. Although the harm did not manifest itself because the transactions were eventually reversed, the Panel observed that the Guidelines suggest that even the risk of harm can be taken into account when determining sanction.

[58] As for the benefit Dwyer received, the Panel noted that commissions were generated. However, it acknowledged that the benefit to Dwyer was only temporary because the commissions were later reversed.

[59] The Sanction Decision then set out several factors Dwyer argued should be considered mitigating by the Panel:

- the length of time that had elapsed since the MFDA investigation began in September 2018;
- his assistance and cooperation during the proceedings;
- that he took additional training and engaged in remedial activities since these events, including training in ethical conduct;

- his compliance with regulatory requirements since these events, as attested to in the letters from his new employer; and
- his financial situation, as he contended that a suspension or a large fine could drive him into bankruptcy.

[60] The Panel rejected Dwyer's delay argument, finding that it was unsupported by any legal authorities and that he had not been subjected to undue delay in any event. It also agreed with Staff that Approved Persons are required to cooperate with MFDA investigations, and only exceptional assistance and cooperation – which the Panel did not find that Dwyer provided in this case – should be considered mitigating.

[61] The Panel did not expressly address the effect of Dwyer's additional training or compliance since commencing work at Global, but indicated that it had taken Dwyer's financial circumstances into account in determining the size of the fine to be imposed and ordering that he could pay both the fine and costs in installments. It also noted the fact that Dwyer had become licensed to sell insurance since leaving Investors Group and could earn income from that, since the MFDA sanction would not apply to his ability to conduct business in that capacity.

[62] The Panel listed the six cases that Staff had cited as comparable decisions made in similar circumstances. Five of them resulted from settlement agreements between the Approved Person and the MFDA, while the sixth was based on an agreed statement of facts where the respondent did not contest Staff's penalty submissions. The sanctions in those cases ranged from no suspension to a two-year suspension, and fines from $3,500 to $22,500. In one case, the respondent was also ordered to complete an ethics course.

[63] Although the facts of these cases were different and either settlements were reached or sanction was not contested (which would have mitigated the sanctions imposed), the Panel said it found them sufficiently similar to provide guidance.

[64] In view of the foregoing, the Panel concluded that a three-month suspension was necessary to reflect the seriousness of Dwyer's misconduct and to effect both specific and general deterrence. It also found that the period of close supervision was necessary to protect the public, and noted that in any event, Dwyer had indicated that he was open to continuing supervision because he found that the supervision he had received to date was a positive experience. The Panel summarized:

> This sanction is in keeping with the MFDA's purpose to enhance investor protection and strengthen public confidence in the Canadian Mutual Fund industry by ensuring high standards of conduct on the part of Members and Approved Persons. We find it is a necessary sanction in order to prevent future misconduct by [Dwyer], deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

IV. THE APPEAL

A. Issues and Relief Sought

[65] Dwyer filed his notice of appeal to the ASC (the **NOA**) in the form of a letter from his counsel dated May 11, 2022. It raised two issues. First, that the three-month suspension imposed against Dwyer was contrary to the public interest and contrary to the interests of his clients, who

relied on him and did not wish to replace him. Second, that the Merits Decision was wrong in fact and law because it did not adequately consider or address the Guide.

[66] According to the NOA, the Guide "would have provided for the impugned transaction to occur, without the need to mulct Mr. Dwyer". The NOA further suggested that:

> Even of [sic] the [Guide] does not assoilzie Mr. Dwyer's conduct, the fine and costs, on top of a lengthy suspension of three months, are unjustified and are certainly disproportionate to the perceived harm that was argued by MFDA Counsel, and the opprobrium attached to same.

[67] In his written appeal submissions (the **Dwyer Submissions**), Dwyer articulated the same issues in a different manner:

> a. Did the learned MFDA Panel err in finding miscount [sic]? *Scilicet*: Did the internal policies of [Investors Group] excuse the conduct of Mr. Dwyer? If so, Mr. Dwyer should be assoilized [sic] *en toto*, if not? [sic]
>
> b. Was the punishment ultimately handed down by the Panel too harsh, and is this an error in law?

[68] Dwyer conceded that in the Merits Decision, the Panel preferred Judd's evidence over his as to whether Judd gave him permission to proceed with the trades, and that this finding is owed "great deference". Accordingly, he stated that that finding "is not the basis for this [A]ppeal". Instead, the narrow issue is whether the Panel proceeded on an incorrect principle or overlooked material evidence regarding the Guide. In his submission, the Panel failed to give the Guide due consideration.

[69] The Dwyer Submissions stated that Dwyer seeks an order striking the finding that he violated the MFDA's Rules and directing that the penalties and costs he has paid to date be returned to him. In the alternative, Dwyer asked that we reduce the penalties and costs due to delay in the proceedings and what he described as "[t]he unnecessary suspension" of his "ability to trade". He acknowledged that while "in some respects the damage is done" because he has already served his suspension, he submitted that if we find the suspension was unwarranted in the circumstances, we should reduce the fine and costs to "make amends".

[70] In Staff's written submissions, Staff requested that we dismiss the Appeal. They set out the issues to be determined as follows:

> a. Did the MFDA Panel err in finding misconduct, and in particular:
>
> i. What deference should be given to the MFDA Panel regarding its findings of fact and assessment of credibility?
>
> ii. What was the relevance of [Investors Group's] internal policy regarding transactions occurring following the death of a client on the finding of misconduct?
>
> b. Did the MFDA Panel err in its assessment of the appropriate penalty to be imposed as a consequence of the misconduct, and in particular:
>
> i. Was the penalty reasonable?

ii. Is any consideration about the reasonableness of the suspension imposed on Mr. Dwyer moot because he has already served that suspension?

c. Was there inordinate delay in this proceeding and if so, did it cause significant prejudice to Mr. Dwyer and if so, what is the proper remedy?

[71] The question of deference to the Panel is addressed below in our discussion of the standard of review to be applied. Otherwise, we generally agree with Staff's articulation of the issues, which generally accords with Dwyer's. However, we would state them as follows:

1. Did the Panel err in finding that Staff proved the allegation in the NOH despite the provision in s. 10.2 of the Guide?

2. Was the sanction imposed by the Panel reasonable in the circumstances (including the alleged delay), and is the analysis affected by the fact that Dwyer has already served the three-month suspension?

B. Standard of Review

[72] As Dwyer observed at the Appeal Hearing, the parties were in agreement that based on past jurisprudence from the ASC and other Canadian securities commissions, the applicable standard of review for this matter is reasonableness, unless one of the "Five Factors" set out in *Re Canada Malting Co.*, 1986 LNONOSC 224, applies. In *Canada Malting* (at p. 7 (QL)), a panel of the Ontario Securities Commission (**OSC**) held that it would only interfere in an SRO panel's decision on appeal or review if it found that:

a. the SRO proceeded on an incorrect principle;
b. the SRO erred in law;
c. the SRO overlooked material evidence;
d. new and compelling evidence was presented to the panel on appeal that was not presented to the SRO; or
e. the SRO's perception of the public interest conflicted with that of the OSC.

[73] If one of the "Five Factors" applies, then the standard of review is correctness. If none of the "Five Factors" applies, deference will be given to the SRO decision as long as it was reasonable (*Re Hemostemix Inc.*, 2017 ABASC 14 at para. 150).

[74] As Staff pointed out in their written submissions, in *Re O'Brien*, 2020 ABASC 160 (at para. 44), an ASC panel said that in assessing reasonableness, it was guided by certain considerations set out by the relevant case authorities, including the decision of the Supreme Court of Canada (**SCC**) in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

- whether "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived", since a decision, taken as a whole, "may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that [we find] compelling" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras. 55-56);

- we [should] consider the evidence that was before the [SRO] Panel, but "refrain from 'reweighing or reassessing the evidence'" (*Vavilov* at paras. 106, 125; *Housen* [*v. Nikolaisen*, 2002 SCC 33] at paras. 22-23);

- that "where a factual finding is grounded in an assessment of credibility of a witness", the [SRO] Panel had the "overwhelming advantage" of having seen the witnesses testify (*Housen* at para. 24);

- that "[r]easonableness is a deferential standard" and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47); and

- that fact-findings and inferences drawn from facts are "only unreasonable when they are completely unsupported by any evidence on which that particular fact could have been found" (*Lum v. Council of the Alberta Dental Assn. and College, Review Panel*, 2015 ABQB 12 at para. 120; *Housen* at 22).

[75] ASC panels hearing appeals from SRO decisions have adopted the *Canada Malting* approach when exercising their broad appellate jurisdiction under the applicable appeal provisions in the Act. Section 73 of the Act states in part:

> (1) . . . a person or company directly affected by a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized . . . self-regulatory organization . . . may appeal that direction, decision, order or ruling to the [ASC].
>
> (2) Section 36 applies to an appeal made under this section.

[76] Section 36(3) of the Act provides that on an appeal, an ASC panel may:

> (a) make any decision that the person who heard the matter in the first instance could have made and substitute the [ASC's] decision for the decision of that person;
>
> (b) confirm, vary or reject the decision;
>
> (c) direct the person whose decision is being appealed to re-hear the matter.

[77] The Act authorizes us to reject an SRO tribunal decision in whole or in part and substitute our own decision, but we will not do so simply because we may have reached a different decision than the SRO if the matter had been before us in the first instance (see, e.g., *Re Lamontagne*, 2009 ABASC 490 at para. 42; *Hemostemix* at para. 61; *Re Botha*, 2021 ABASC 11 at paras. 42-43). As both parties acknowledged in argument, Canadian securities commission panels have expressly recognized the specialized expertise of SRO hearing panels and deferred not only to their credibility findings, but also to the factual determinations central to their expertise, including matters of sanction. For example, in *Botha* (at para. 48), the panel stated, ". . . the MFDA has specialized expertise in the standards of conduct expected of those under its oversight, and in the interpretation and application of its own rules."

[78] This is consistent with the decision of the Alberta Court of Appeal (**ABCA**) in *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98. The ABCA observed that failing

to show deference to the tribunal below "would undermine the integrity of the first level of the disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision" (at para. 33). Moreover, despite the breadth of the powers in s. 36, s. 73 indicates that we are to hear appeals, "not to re-conduct the entire proceeding *de novo*" (*ibid.* at para. 34).

[79] In summary, unless we find that intervention is warranted because one of the "Five Factors" is present, we will show deference to the Merits Decision and the Sanction Decision and interfere only if we find one or both unreasonable (*Hemostemix* at paras. 62-63; *Lamontagne* at paras. 42-43). In reviewing for reasonableness, we are mindful of the considerations listed in *O'Brien* and cited above, and also apply the additional guidance in *Yee* concerning review of a decision made by a tribunal of first instance (at para. 35). As explained in *Re Eisenberg*, 2022 ABASC 22 (at para. 99):

> Among other principles, the ABCA [in *Yee*] stated that an appeal tribunal "is entitled to apply its own expertise and make findings about what constitutes professional misconduct", although it should still have regard for the views of the tribunal below (at para. 35). Consistent with *Canada Malting*, the ABCA also noted that, "where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so", and should ensure that the decision below "properly protects the public and the reputation of the profession" (*ibid.*).

C. Arguments of the Parties

1. Dwyer

(a) Merits Decision

[80] Dwyer submitted that the Panel gave too little attention to the Guide's impact on this case apart from its brief conclusions that there was no evidence he ever consulted or relied on the Guide in deciding to proceed with the trades, and no evidence that he ever discussed the Guide with Judd or that Judd told him the trades could be approved because of the provisions in the Guide. In Dwyer's submission, these conclusions were in error.

[81] Dwyer acknowledged that he did not know about the Guide at the relevant time, and that Judd testified that he had never seen it before, either. Judd also testified that Schroeder did not mention it when he called her for advice on March 29, 2018. In addition, Dwyer pointed out that because Investors Group's Compliance Department did not get back to Judd as promised on April 9, 2018, its internal legal group's view of the effect of the Guide was unknown. He therefore relied on the evidence given by Amy Molnar (**Molnar**), a member of Investors Group's estates department, who explained at the Merits Hearing that s. 10.2 of the Guide permits a one-time trade after a client's death if the client gave written instructions prior to death. Molnar agreed on cross-examination that where the client was represented by an attorney pursuant to a Power of Attorney, those instructions could be given by the attorney instead.

[82] Given the Guide's requirement for written instructions, Dwyer acknowledged that none were in evidence. In response, he raised concerns about missing documents and disclosure. He cited Judd's testimony that Investors Group often made mistakes with paper records and that he knew Dwyer sent KM's account documents to head office several times. Dwyer also relied on an email he sent to Judd on March 6, 2018 advising that Investors Group's head office had "lost the paperwork completely" and that he did not have copies of everything he originally submitted. In

addition, he cited an email from Judd's assistant that suggested it was not uncommon for head office to lose documents.

[83] Although Judd had testified that he did not know specifically what was in the package Dwyer sent to head office, Dwyer testified that it included a cover letter, the account opening applications, signed transfer forms, a copy of the Trustee Order, SE's identification, and a copy of the notes Dwyer had made of SE's trade instructions on what he described as one or more "blue sheets", signed by SE prior to KM's death. However, when Dwyer received the MFDA's disclosure in this proceeding, the cover letter and blue sheets were missing. He said he did not raise the issue of missing documents earlier (such as during his investigative interview with Staff) because he did not turn his mind to their significance until he became aware of the Guide in May 2021.

[84] A portion of the document package was attached as an exhibit (the **Document Exhibit**) to the affidavit West swore in support of Staff's case at the Merits Hearing (the **2021 West Affidavit**). The Document Exhibit did not include a cover letter or blue sheets, and Dwyer pointed out that it was clearly missing several numbered pages. He also argued that there was other evidence proving that at least the cover letter had existed at one time: the application form referred to it in a note under "Special Instructions" that read, "P.O.A. – see Cover Letter". He contended the onus should not have been on him to provide the documents because he did not have care or control of any client files after Investors Group terminated his employment in July 2018. In his submission, the regulator has the onus to provide disclosure and to investigate or determine if any documents are missing, and the MFDA failed to do so.

[85] In view of the foregoing, Dwyer urged us to conclude that on a balance of probabilities, the blue sheets and cover letter existed at one time and complied with the requirements of the Guide, but Investors Group lost them in February or March 2018. He pointed out that in the Merits Decision, the Panel did not comment on the issue of whether the documents existed as he claimed, and argued that his testimony on the point should be believed because the Panel's adverse credibility finding against him was limited to his evidence that Judd gave him permission to proceed with the trades. He also discounted any suggestion that he should have called SE as a witness at the Merits Hearing to testify that he gave instructions in writing, arguing that this was not determinative, and that in light of the lapse of time and SE's lack of sophistication, SE may not have remembered what he signed several years ago anyway.

[86] In response to the Panel's conclusion that no one was aware of or relied on the Guide at the relevant time and therefore nothing turned on it, Dwyer submitted that it does not matter if he specifically relied on it – as long as he complied with its requirements, he should have been exonerated. He analogized the situation to the principle that ignorance of the law is no excuse: just as it is accepted that a person is guilty if they break a law even if they were unaware of the law, it should also be accepted that they can rely on an exculpatory provision even if they were unaware of it. Moreover, he argued, it was Judd's obligation to be aware of the Guide, because it was Judd's responsibility as Branch Manager to ensure that Investors Group's business was carried on in compliance with its requirements.

[87] Dwyer also submitted that s. 10.2 of the Guide is mandatory, as it uses the word "will" rather than "may" – i.e., it states that "[o]ne-time (non-periodic) transfers, purchases and/or redemption requests *will* be acted on if the request was initiated, signed and dated by the deceased

prior to death" (emphasis added). As KM's attorney under the Trustee Order, SE stood in her place as the client, and according to Dwyer, SE gave the necessary written instructions to proceed with the transaction. Therefore, Dwyer argued, it was improper for Judd to have instructed him not to proceed with the trades, and for Investors Group to have reversed the transactions later.

[88] Dwyer further argued that we should consider whether the effective date of KM's death was the date she actually died, March 23, 2018, or the date that her death was confirmed with the death certificate, April 3, 2018. In his submission, it should be the latter, and that would affect the analysis of whether he made trades that were not permitted because the client had died. In that regard, Dwyer relied on the testimony given by MFDA investigator West. While she said she could not comment on the operation of Investors Group's internal policies and procedures or whether Dwyer had followed them, she acknowledged that if KM had actually been alive and Dwyer had failed to follow SE's instructions to make the impugned trades, the MFDA might have investigated him for that.

[89] Finally, Dwyer argued that we should give the 2022 West Affidavit very little weight because the information it contains is neither new nor compelling: the information was known to the MFDA at the time of the Merits Hearing, and it would not have changed the Panel's decision. It attached as an exhibit all of the numbered pages of the Document Exhibit, but still does not include the cover letter or blue sheet(s). Dwyer submitted that it was "problematic for the MFDA" that the affidavit does not provide any explanation as to why the Document Exhibit was not produced in its entirety in the first place.

(b) Sanction Decision

[90] Concerning the sanction imposed against him, Dwyer submitted that it was excessive and disproportionate in the circumstances. He cited *Eisenberg* (at paras. 130-131):

> [130] The *Canada Malting* test sets out errors in principle and errors in law as two separate factors that may warrant intervention on review or appeal of an SRO decision. In practice, however, the two may overlap and can be difficult to distinguish. In the context of sentencing for criminal offences, the [SCC] suggested that errors of law are a subset of errors in principle (*R. v. Friesen*, 2020 SCC 9 at para. 26):
>
> > Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" [citations omitted].
>
> [131] In *Northern Securities*, an OSC panel observed (at para. 78):
>
> > When determining sanctions to be imposed on a respondent, an SRO (and the Commission) must apply the principle of proportionality. That means that the sanctions imposed must be proportionate to both the specific conduct of the respondent, and to the particular circumstances of the respondent including, for instance, the size of the respondent and the impact sanctions may have. **The failure to impose proportionate sanctions constitutes an error in principle or in law within the meaning of *Canada Malting*.** [emphasis added; see also *Re Magna Partners Ltd.*, 2011 LNONOSC 605 at para. 61]

[91] Dwyer referenced several factors he argued were relevant to his position that the sanction imposed by the Panel was too severe:

- the Panel's finding that his misconduct was "extremely serious" when it was actually at the low end of the range of seriousness because both the transactions and his commissions were easily reversed, there was no complainant, and the Guide contemplated a scenario such as this;

- the Panel's conclusion that he had exposed his client to unnecessary risk, as the investments he made were conservative and lower risk than others that he could have made, and there also could have been harm to the estate if he had left the funds in cash;

- the Panel's mischaracterization of the client as vulnerable when the affected client was KM's estate, not KM;

- the Panel's failure to give appropriate weight to his efforts to improve himself by becoming a certified financial planner and a certified health insurance specialist, and his work toward obtaining his chartered life underwriting, Canadian accredited insurance brokers, and Canadian accredited insolvency restructuring designations;

- the Panel's finding that he had failed to acknowledge the seriousness of his conduct;

- the Panel's failure to indicate what weight it had placed on the evidence of his financial circumstances, other than to allow him to pay his fine and costs in installments;

- the Panel's conclusion that he was deceptive, given that West and Judd had each acknowledged that Dwyer was transparent with them about what had occurred, both at the relevant time and during his investigative interview. In his submission, if he had wanted to be deceptive, he would not have told Judd about SE's call on March 23, 2018, nor would he have gone to collect a copy of KM's death certificate – he would simply have stayed silent; and

- the Panel's failure to take into account his compliance with the Guide as a mitigating factor in sanctioning even if it found that the Guide did not provide him a defence on the merits.

[92] Dwyer argued that the Panel erred in suspending him, especially by imposing a suspension longer than the one month sought by Staff. In his submission, including a suspension made the total package of sanctions unreasonable and disproportionate, and therefore contrary to the public interest. As he was already under close supervision, the public was protected and it was unnecessary to add a suspension. In suggesting that a three-month suspension was necessary to reflect the seriousness of his misconduct and achieve specific and general deterrence, Dwyer argued that the Panel erred by exaggerating the seriousness of the circumstances and putting disproportionate weight on deterrence.

[93] Dwyer acknowledged that he did not seek a stay of the Sanction Order and that he has already served the suspension. He explained that this was due to financial concerns, and the fact that there was no guarantee his application for a stay would succeed. He maintained that his Appeal from the suspension order is not moot, as the test for mootness in a regulatory matter is not the same as the test for mootness in a criminal matter. In the regulatory context, he submitted, a wrongly-imposed suspension order can still be addressed with costs, and he would still benefit from having the suspension "expunged" from his disciplinary record.

[94] Dwyer also raised the issue of delay in the MFDA proceedings, which the Panel failed to treat as mitigating despite the fact that it resulted in added expense and anxiety for him and his family. Although it was Staff's position that the matter proceeded in accordance with certain benchmarks established by the Canadian Securities Administrators (**CSA**) (discussed further below), Dwyer pointed out that those benchmarks are approximately 20 years old. Accordingly, he urged us to consider whether they remain relevant and reasonable.

[95] Dwyer noted that the Panel stated that no authority on the issue of delay had been raised and that there was no inordinate delay, but shortly after the Sanction Decision was issued, the SCC released its decision in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29. He cited several of the SCC's comments about the importance of expeditious and efficient decision-making in administrative proceedings, as well as its tests or criteria for assessing whether a delay is inordinate, affected the fairness of the hearing, or otherwise amounted to an abuse of process such that a remedy (including a reduction in sanction or a variation of the costs award) is warranted.

[96] With reference to the criteria in *Abrametz*, Dwyer argued that this was not a complex or technical matter. Although he acknowledged that part of the delay (approximately two months) was due to the COVID-19 pandemic and could not be blamed on either party, he submitted that Staff had not provided any valid reasons for the length of time it took to resolve the matter: approximately four years from start to finish. He submitted that this was manifestly unfair and affected hearing fairness. Not only did Judd acknowledge that his memory of the details of the events in question may have faded, but as Dwyer argued in the context of the Merits Decision, important evidence was lost.

[97] Dwyer further submitted that the delay caused him prejudice. His professional life was "on hold", and even after he found another Member to sponsor his registration, his income and financial circumstances were greatly diminished. In addition, the proceedings put such a strain on his marriage that he and his spouse separated. He was also sanctioned by the FP Canada Standards Council, a body that certifies and sets standards for professional financial planners. Its sanctions included suspending him from using his certified financial planner designation for six months and requiring him to take additional continuing education. It also ordered him to pay costs of $3,500.

[98] In view of the foregoing, Dwyer submitted that the appropriate remedy would be for this panel to reduce the financial penalty imposed by the Panel, as well as its costs order. He denied that he had failed to raise the issue of delay in a timely manner, as he did so in an August 15, 2018 email to Staff that stated:

> My express intention is to have you fully understand the infraction and mitigating factors, and conclude the inquiry as quickly as possible so that I may begin the licensing process at another firm. To essentially get my life back.

[99] He further pointed out that even the Panel chair acknowledged his desire for a speedy resolution when setting a timetable for written submissions, stating:

> I think it's clear, Mr. Dwyer, that no one wants to delay the resolution of this matter and we understand that it's important for you to have it resolved as soon as possible, making sure that we don't take any shortcuts and don't sacrifice any fairness to you.

[100] Dwyer's counsel acknowledged that he did not press the issue of delay before the Panel, but that was because he was concerned about alienating the Panel members before they decided the case. He denied that his failure to put delay on the record earlier is fatal to Dwyer's claims of delay in his submissions before us.

[101] Specifically concerning costs, Dwyer argued that his agreement with Staff's sum of $20,000 was conditional on a fine of $3,000 and no suspension order. He had indicated to the Panel that a larger fine plus a $20,000 costs order would "cripple" him, and the addition of a suspension would impede his ability to generate the income to pay the fine and costs.

2. Staff

(a) Merits Decision

[102] Staff disagreed with Dwyer's assertion that the Guide provided him with a defence to the allegation proved at the Merits Hearing.

[103] First, they argued, the Guide is irrelevant because it does not address the allegation, which specifically concerned Dwyer's persistence in processing trades from which he stood to earn substantial commissions despite his Branch Manager's direction not to because of the client's recent death. They submitted that the requirement to comply with a Branch Manager's instructions and advice is critical to the MFDA's regulatory regime, citing *Re Gentile & Brinson*, 2015 LNCMFDA 193 (at para. 186; see also paras. 187-188):

> A branch manager is an important and integral part of the MFDA regulatory regime. The branch manager is not only the eyes and ears of the Member, he/she is vested with a critical responsibility towards ensuring that the Member's business is carried on in accordance with all of the regulatory requirements and that the clients of the Member are afforded all of the protections of that regime.

[104] Second, Staff emphasized that s. 10.2 of the Guide is specifically limited to trades initiated, signed, and dated by the deceased client before death. It does not address trades in situations where the client is represented by an attorney (under a Power of Attorney), a guardian, or a trustee, nor does it address Judd's concern that SE lost his authority to provide trade instructions as soon as KM died. Moreover, Staff argued, there was no evidence at the Merits Hearing apart from Dwyer's testimony – which the Panel did not believe – that SE had signed and dated any written trade instructions. In that regard, Staff relied on:

- the 2022 West Affidavit, in which West deposed that she asked Investors Group to conduct a further search of its files but it still did not find any blue sheets or other written trade instructions; in addition, Investors Group advised her that no client

signatures were required for the trades in KM's accounts (which we assume was meant to suggest that it was unlikely Dwyer obtained any signatures);

- the full copy of all of the pages of the Document Exhibit, which was attached to the 2022 West Affidavit but still did not include any evidence of written instructions; and

- the fact that Dwyer could have called SE to testify at the Merits Hearing and verify that he had signed written instructions, but failed to do so. Staff submitted that it was speculative for Dwyer to suggest in argument that SE was unsophisticated and would not have been able to give that testimony.

[105] Concerning Dwyer's argument that s. 10.2 of the Guide is compulsory, Staff argued that there was no evidence to support that interpretation. In their submission, the section is not binding and would not be applicable in all circumstances.

[106] Staff also disagreed that the Panel failed to consider the Guide in arriving at its decision. The Panel expressly did so, but simply found that the Guide did not answer the allegation in the NOH because there was no evidence that either Dwyer or Judd were aware of it or relied on it. In other words, the Panel did not overlook the Guide – its relevance was simply not accepted. In Staff's submission, that conclusion was within the range of reasonable outcomes available to the Panel based on the facts and applicable law.

[107] Accordingly, Staff submitted that Dwyer failed to establish that the Panel erred in finding him guilty of misconduct, and that there are no grounds to overturn or vary that finding.

(b) Sanction Decision

[108] Staff pointed out that at the Sanction Hearing, they sought a penalty of at least one month's suspension and a fine of at least $25,000, leaving the Panel to go beyond those submissions if it considered a more severe penalty more appropriate. They emphasized that at the time, Dwyer agreed with the costs order sought by Staff, and maintained that $20,000 was a reasonable amount given the number of pre-hearing appearances, the six-day hearing, and the requirement for multiple sets of written submissions. Staff therefore submitted that the Panel's costs order should not be disturbed.

[109] Staff further argued that Dwyer has failed to demonstrate that the suspension and fine were excessive or disproportionate, especially when compared to the orders imposed for similar conduct in other cases. Staff relied on the Panel's findings that Dwyer's misconduct was very serious, and that he had been deliberately deceptive, acted contrary to his Branch Manager's directions, and put his own interests ahead of his client's interests.

[110] Staff contended that the Panel was uniquely positioned as an expert tribunal to determine the sanction, and that as a result we should not interfere with it lightly. In their submission, the Panel properly took into account the Guidelines and the fact that the comparable cases cited at the Sanction Hearing were settlements or agreements on facts, which usually result in a more moderate sanction than would be imposed after a contested hearing. The Panel also properly took into account the evidence of Dwyer's strained financial position and imposed a lower fine than sought

by Staff, but increased the length of the suspension to reflect the seriousness of the misconduct and the need for deterrence.

[111] Staff also argued that because Dwyer has already served both the suspension and the period of strict supervision imposed by the Panel, any argument about them is moot and we can no longer vary them. As a result, any ruling on their appropriateness would have no practical effect. Staff relied on two ABCA decisions about mootness in the criminal law context, in which two sentence appeals were dismissed as moot because the sentences had already been served: *R. v. Shaw*, 2015 ABCA 300 (leave denied [2015] S.C.C.A. No. 108), and *R. v. Janvier*, 2018 ABCA 343. Similarly, Staff pointed out that in *Lamontagne*, an ASC panel declined to consider a question about the date the appellant's suspension should commence because the suspension had already been served and the issue was therefore moot (at para. 49).

[112] In response to Dwyer's delay argument, Staff submitted that Dwyer did not establish an inordinate delay in the proceeding, or that any delay caused him such significant prejudice that there was unfairness or an abuse of process. They noted that he only raised the issue of delay for the first time at the Sanction Hearing, and did not provide any evidence or case authority in support of his position even when the Sanction Hearing resumed after a few weeks' adjournment.

[113] Like Dwyer, Staff relied on the SCC decision in *Abrametz*. The SCC declined to impose time limits for administrative proceedings as they had in the criminal context in *R. v. Jordan*, 2016 SCC 27, and therefore Staff argued that the approach to administrative delay in the SCC's earlier decision, *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, still applies. In *Blencoe*, the SCC considered two ways in which delay could constitute an abuse of process: the first where delay has impacted a respondent's ability to make full answer and defence and thus has affected hearing fairness, and the second where there is no prejudice to hearing fairness but inordinate delay otherwise amounts to an abuse of process.

[114] In respect of the first category, Staff argued that Dwyer neither asserted nor produced evidence in support of any claim of procedural unfairness, nor made any claim that delay affected his ability to defend the allegation in the NOH. Therefore, only the second category may have been relevant to this proceeding, but Staff submitted that the facts do not support a finding that there was an abuse of process when the test from *Blencoe* (reiterated in *Abrametz*) is applied.

[115] To provide the context for assessing whether there was any delay and, if so, the length of the delay and the reasons for it, Staff set out the procedural background of this matter in detail:

- June 19, 2018: MFDA Staff first became aware of Dwyer's conduct by way of a report filed by Investors Group;
- July 24, 2018: Staff opened their file;
- July 24 to October 30, 2018 (98 days): the matter was under review by the MFDA's Case Assessment group, during which time Case Assessment Staff requested information from Investors Group and from Dwyer, and received voluminous documentation in response;
- October 30, 2018: the file was escalated to the MFDA's Investigations group;
- October 30, 2018 to October 25, 2019 (360 days): Investigations Staff reviewed all of the information collected by Case Assessment; issued additional requests for

information from Investors Group and from Dwyer; conducted interviews of Dwyer, Bisson, and Judd on February 27, 2019, June 12, 2019, and June 27, 2019, respectively; and investigated the conduct of Investors Group and its supervisory staff;

- October 25, 2019: the investigation was complete and the matter was escalated to the MFDA's Litigation group;
- October 25, 2019 to August 20, 2020 (300 days): Litigation Staff reviewed all of the information collected during the investigation and drafted a notice of hearing;
- August 20, 2020: Staff issued the NOH;
- October 29, 2020: the parties made their first appearance in the matter and discussed the possibility of resolution without the need for a hearing; the matter was adjourned by agreement to November 30, 2020 to allow time for further discussions;
- November 30, 2020: the parties made their second appearance; a schedule was agreed upon for the disclosure of documents, and another appearance was scheduled for February 1, 2021;
- February 1, 2021: the parties made their third appearance; by agreement, the Merits Hearing was scheduled for May 17-20, 2021;
- May 17, 2021: although Staff was ready to proceed, Dwyer requested an adjournment for reasons related to the COVID-19 pandemic; the adjournment was granted and the Merits Hearing was rescheduled by agreement for July 26-29, 2021;
- July 26 to 29, 2021: the Merits Hearing proceeded; on the last day, the Panel requested further written submissions from the parties concerning a legal issue that is not relevant to this Appeal;
- August 23, 2021: by agreement of the parties, Staff provided their further written submissions;
- September 3, 2021: by agreement of the parties, Dwyer provided his further written submissions;
- January 20, 2022: the Panel issued the Merits Decision;
- January 24, 2022: the parties agreed on a schedule for the exchange of written submissions on sanction, and the Sanction Hearing was set for March 3, 2022;
- March 3, 2022: the Sanction Hearing proceeded, but it was adjourned to give Dwyer the opportunity to file additional evidence and submissions on certain points;
- March 23, 2022: the Sanction Hearing resumed, and the Panel issued its sanction order;
- April 11, 2022: following discussions between counsel, the parties agreed on a form of order and submitted it to the Panel for signature;
- May 16, 2022: a copy of the signed sanction order was provided to Dwyer; and
- July 6, 2022: the Panel issued the Sanction Decision.

[116] Based on this information, West deposed in the 2022 West Affidavit that all stages of the proceeding up to the issuance of the NOH were completed within the benchmark periods established and approved by the CSA and effective as of July 1, 2005. The benchmarks provide that:

- 80% of all cases should be reviewed by the Case Assessment group and closed or escalated within 120 days of the date the case was opened;
- 80% of all cases that are escalated to the Investigations group should be closed or escalated within 365 days of the date the case was escalated to Investigations; and
- 80% of all cases should be closed, settled, or the subject of a notice of hearing within 300 days of the date the case was escalated to the Litigation group.

[117] The benchmarks implicitly recognize that up to 20% of all cases will exceed one or more of these time periods, usually due to the size and complexity of the matter or the nature of the issues that arise. Staff denied that the benchmarks are out of date, arguing that they remain similar to the norms applied by other regulators.

[118] Staff also relied on comments made in *Re Application 20210107*, 2021 BCSECCOM 394 (at para. 54) (appealed on other grounds, *sub nom. Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279), concerning the investigation phase, prior to issuance of a notice of hearing:

> Investigations often include phases where significant amounts of documents and related information are collected, followed by periods which might look like inactivity to those outside of the investigation but which include significant analytical work by investigators, including work which might lead to further rounds of information collection. To find that the investigation has been "inactive" based solely on outside appearances of inactivity, when the total duration of the investigation is not beyond the norm, would be speculation.

[119] In this regard, Staff noted that a considerable amount of time often passes between the date they send an information request to a third party and the date the third party replies, which is not typically within their control.

[120] While Dwyer asserted otherwise, Staff denied that this was a simple case, especially as it was a fully contested proceeding and there were significant conflicts between Dwyer's and Judd's evidence that Staff had to investigate and the Panel had to resolve to arrive at its Merits Decision. The Panel issued that decision less than five months after the parties' additional written submissions on the merits, which Staff argued was an "entirely reasonable timeframe given the evidence, testimony, and submissions that the MFDA Panel had to consider". The Sanction Hearing commenced less than one-and-a-half months later, and the sanction order came into effect immediately on issuance on March 23, 2022. In Staff's submission, that marked the end of the proceedings even though the Sanction Decision was not issued until later.

[121] Staff calculated that one year, seven months, and three days passed between the date the NOH was issued on August 20, 2020 and the date the sanction order was issued on March 23, 2022. In their submission, this was a reasonable amount of time and did not constitute inordinate delay given that there were three pre-hearing appearances (including one at which an adjournment was agreed upon to give the parties time to discuss resolution) and an adjournment at Dwyer's request due to COVID-19. During that time, the Panel had to consider five sets of written submissions, three affidavits with exhibits, and the *viva voce* evidence of four witnesses.

[122] While Dwyer had argued that he suffered prejudice, in Staff's submission, he failed to establish that any alleged prejudice was caused by delay in the proceeding and not by the fact of

the proceeding itself. They pointed out that MFDA investigations are kept confidential, and therefore there was no prejudice to Dwyer during the investigation period because the public would not have known that he was under investigation or why. He was not in "legal jeopardy" until the NOH was issued in August 2020. He was re-registered as a mutual fund dealing representative by September 1, 2020, and even before that, he was able to find work in the insurance industry. Since he did not meet his burden to show that he suffered significant prejudice due to inordinate delay, he cannot establish that there was an abuse of process that would warrant a remedy.

[123] Concerning Dwyer's argument about the weight we should give the 2022 West Affidavit because it was neither new nor compelling, Staff submitted that until Dwyer raised the issue of delay for the first time at the Sanction Hearing and then again in the Dwyer Submissions, they had no reason to provide evidence about the length of time that was taken to conclude the proceeding.

D. Analysis

1. Merits Decision

[124] As acknowledged by the parties, the issue to be determined on Dwyer's Appeal from the Merits Decision is a narrow one, and focuses on the Panel's treatment of the Guide.

[125] We have carefully considered the Merits Decision, the evidence, and the parties' submissions. We are not satisfied that any of the "Five Factors" set out in *Canada Malting* applies to warrant our intervention. No new and compelling evidence concerning the Guide was presented on appeal, and we did not consider the Panel to have misapprehended the public interest. Further, we do not find that the Panel proceeded on an incorrect principle or erred in law when it decided that the Guide was inapplicable to its determination of the allegation in the NOH. The Panel did not overlook the Guide or the material evidence associated with the Guide. It simply concluded that the Guide did not provide Dwyer with a defence because there was no evidence that he or Judd relied on it. Therefore, the Guide was given no weight.

[126] In our view, the Panel's findings in that regard were reasonable. While Dwyer took the position that the Panel did not give enough attention to the effect of the Guide, we consider the Guide irrelevant to this case. The allegation against Dwyer was limited to whether he breached MFDA Rules 2.1.1 and 2.1.4 by failing to follow his Branch Manager's directions and engaging in conduct that gave rise to a conflict of interest. It was not alleged that he breached the Guide or any other Investors Group policy or procedure.

[127] We consider inapt the analogy Dwyer attempted to draw when he argued that just as ignorance of the law would not provide him with a defence, ignorance of an available defence should not deprive him of the benefit of that defence. Dwyer's misconduct was that he deliberately acted in direct contravention of his supervisor's instructions. Even if one accepted for the sake of argument that s. 10.2 of the Guide rendered Judd's instructions incorrect or improper and Dwyer knew this at the time, he was not entitled to ignore those instructions and proceed as he wished. By his own admission, Dwyer was <u>not</u> aware of the Guide at the relevant time and therefore had no basis to consider the instructions incorrect or improper; regardless, he ignored them and did what he wanted.

[128] In that regard, it is Staff's analogy that is *apropos*: if Dwyer drove at 50 kilometres per hour down a street with a posted speed limit of 50 kilometres per hour, he would not be entitled to

ignore a police officer's signal to pull over for speeding. Even though he did not contravene any speeding laws, he was still required to pull over as directed by the officer. In the same vein, he was not entitled to ignore the directions of his supervisor. During the proceedings before the Panel, Dwyer's counsel suggested that Dwyer was "being punished for something that was permissible, that is[,] a one-time trade after a client [h]as died". With respect, that misses the point that what was really in issue was something impermissible: Dwyer's failure to follow his supervisor's instructions.

[129] Even if the Guide were relevant to the allegation, based on the evidence that was before the Panel, it was not clear that the Guide would have exonerated Dwyer. Section 10.2 does not address the circumstances of an incapacitated client represented by a trustee or guardian who gives trade instructions, but the client dies before the instructions are executed.

[130] Molnar gave evidence at the Merits Hearing that she believed a client's attorney under a Power of Attorney could give the required instructions on the client's behalf, but there is no evidence in the Record that SE ever held a Power of Attorney for KM. Rather, he was appointed as her trustee and guardian under the Trustee Order, which was issued pursuant to the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2. Powers of Attorney are different legal instruments governed by different legislation (the *Powers of Attorney Act*, R.S.A. 2000, c. P-20). Molnar was not asked if this would have affected her answer, and it does not appear that anyone considered how the operation of either act would have affected their interpretation of s. 10.2 of the Guide and its applicability in these circumstances.

[131] Moreover, even if it were determined that the Guide applied, apart from Dwyer's testimony, there was no evidence that SE signed and dated written instructions as required by s. 10.2. Dwyer argued that his evidence in this regard should be accepted because the Panel's adverse credibility finding against him was limited to his evidence on whether he had Judd's approval to proceed with the impugned trades. However, it is clear from the Merits Decision that this is not correct. The Panel set out law concerning both the applicable standard of proof and witness credibility and reliability, and observed that as the trier of fact, it was entitled to accept all, some, or none of a given witness's testimony – even if uncontradicted – because credibility and reliability must be assessed in the context of the other evidence and the overall circumstances of the case. The Panel therefore noted that it had "considered the evidence of each witness in the context of the totality of the evidence [that] was adduced in these proceedings" (Merits Decision at para. 115), and concluded that (*ibid.* at para. 116):

> **Overall**, . . . [Dwyer's] evidence was neither clear, cogent, nor credible. His evidence was not given in a straight forward [sic] manner but was instead rambling and at times inconsistent. [emphasis added]

[132] While the Panel then went on to discuss the reasons it preferred Judd's evidence on the issue "at the heart of these proceedings" (*ibid.* at para. 118) – i.e., whether Dwyer had approval to proceed – there was no indication that its view of Dwyer's credibility was confined to that issue. The Panel was aware that its conclusions in the Merits Decision largely depended on its assessment of the credibility of the witnesses. We consider the Panel's assessments to be reasonable and well-supported by the evidence, and they are entitled to our deference.

[133] Although Dwyer suggested that either Investors Group or the MFDA must have lost or failed to produce the written instructions that he said SE signed on one or more "blue sheets", there was simply no other evidence in the Record to support this contention. Dwyer pointed to the reference to a cover letter on at least one of KM's account application forms, but there is no indication what the cover letter may have said, and there are no references to "blue sheets" or any other signed and dated instructions. Dwyer's April 3, 2018 email to SE referred to "written instructions dated in January and approved and executed in February", but that is insufficient to establish the existence of instructions that would satisfy the requirements of the Guide.

[134] In addition, we agree with Staff that if Dwyer thought documents were missing from the disclosure he received, he could and should have raised it much earlier in the proceedings – at least when he became aware of the Guide and the potential significance of written instructions. We also agree with Staff that Dwyer could have called SE to testify at the Merits Hearing and verify that he had signed and dated written instructions. Dwyer is correct that his failure to call SE is not determinative of the issue, but Staff is also correct that Dwyer's argument that SE was unsophisticated and would not have been able to give that testimony if he had been called is speculative. Dwyer cannot rely on a lack of evidence to support his defence when he could have taken steps to address it.

[135] Two ancillary issues from Dwyer's submissions remain to be addressed. The first is his argument that we should give the 2022 West Affidavit very little weight, on the basis that it does not contain any new or compelling evidence and does not explain why the 2021 West Affidavit entered as an exhibit in the Merits Hearing did not include all of the pages of the Document Exhibit.

[136] We did not find it necessary to rely on anything in the 2022 West Affidavit to decide the Appeal, although it confirmed certain information with which we were already familiar, such as the stages of the MFDA's enforcement process – which is very similar to the ASC's – and the CSA enforcement benchmarks. Otherwise, the information in the 2022 West Affidavit was uncontentious or apparent from other evidence – for example, the dates certain steps in the case were taken and when (or whether) Dwyer raised the issue of delay or complained of missing disclosure. The affidavit came late in the proceeding because it responded to matters Dwyer did not raise until late.

[137] As for the eight exhibits to the 2022 West Affidavit, five were duplicates of exhibits to the 2021 West Affidavit, and one – a letter from Dwyer's counsel announcing Dwyer's intention to re-register in the industry – simply confirmed other evidence. Another was Investors Group's December 5, 2022 response to Staff's inquiry about the alleged missing "blue sheets" or other written trade instructions and confirmed that if they existed, they could not be located. The final exhibit was a complete copy of the Document Exhibit, which confirmed that none of the pages missing from the partial copy attached to the 2021 West Affidavit included a cover letter or written instructions. We did not find anything improper about Staff's decision not to include all of the pages in the original exhibit. It is commonplace to identify the information truly relevant for a hearing, and it was clear from a cursory review that the pages originally withheld were either duplicative or irrelevant to the issues to be determined.

[138] The final issue raised in the Dwyer Submissions was the suggestion that the "effective date" of KM's death should be considered to be April 3, 2018 when her death was confirmed with a

death certificate, and not March 23, 2018 when she actually died and Dwyer first learned of it but ostensibly did not believe it. Dwyer did not press this argument forcefully, and we did not find it persuasive – especially in the absence of any evidence or authority that might support such an approach.

[139] In the result, we did not find any reason to interfere with the findings that Staff proved the allegation in the NOH on a balance of probabilities, and that Dwyer breached MFDA Rules 2.1.1 and 2.1.4. None of the "Five Factors" were engaged, and the Panel's conclusions were within the range of reasonable outcomes, including its treatment of the Guide.

2. Sanction Decision

[140] As set out in detail previously, Dwyer raised a number of arguments against the Sanction Decision. However, there is a preliminary issue as to whether his Appeal from the Sanction Decision is moot (at least in part) because he has already served the suspension and the period of strict supervision.

[141] The doctrine of mootness was addressed by the SCC in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (at para. 15):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[142] The SCC went on to recognize that courts may nonetheless exercise their discretion to consider a moot issue, and set out a two-part test for the determination (*ibid.* at paras. 15-17; see also *Janvier* at para. 7):

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic [i.e., whether there remains a live controversy]. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. … I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[143] In our view, there remains a live controversy between the parties because Dwyer has appealed from the whole of the Sanction Decision, and securities regulatory sanctions are generally considered as a "package" rather than as individual, unrelated elements. It is the combination and interplay of the constituent elements – the package as a whole – that is intended to achieve the overall sanctioning goals of specific and general deterrence. The elements work together, based on the circumstances of the case and the respondent. In *Re Kapusta*, 2011 ABASC 521, for example, an ASC hearing panel observed that a longer or more restrictive market-access ban might justify a lower administrative penalty and vice-versa (see para. 60). In *Re Wilby*, 2010 ABASC 271, a different ASC panel referenced "the importance of assessing a package of sanctions as a whole, not merely looking at isolated portions of a package" (at para. 36).

[144] The Panel clearly took the "package" approach, and the live controversy on this Appeal is whether the package as a whole was reasonable. It is true that we cannot set aside a suspension

that has already been served, but if we were to find the package ordered by the Panel unreasonable, a remedy would nonetheless be available by adjusting the monetary sanction.

[145] In any event, the result is the same regardless of our application of the mootness doctrine. We concluded that the Appeal from the Sanction Decision should be dismissed. There are several reasons for this conclusion.

[146] First, in our view, the sanction ordered by the Panel was not excessive or disproportionate. While Dwyer argued that his misconduct was not particularly serious because he was not deceptive, he did not really expose the client to any risk, and the client was not vulnerable, each of these assertions is directly contrary to the Panel's fact findings – findings that we generally consider reasonable and well-supported by the evidence. The one exception here concerns the client's vulnerability. It is clear from the Merits Decision that the Panel understood that once KM passed away, the client became her estate (see para. 165), but it is less clear in the Sanction Decision. At one point, the Panel referred to the client's vulnerability (see para. 57), but at another, it correctly referred to the estate as the client (see para. 70). Insofar as this detail impacted the Panel's conclusions on sanction, however, we do not consider it material enough to warrant our interference with the Sanction Decision.

[147] We agree that deliberate misconduct and deception are aggravating factors, as is the harm caused or, in this case, potentially caused to a client. The Panel recognized the presence of these factors and their significance in assessing the seriousness of Dwyer's misconduct, and it neither proceeded on an incorrect principle nor erred in law in doing so. Its conclusions in this regard were reasonable.

[148] Second, the Panel found that Dwyer did not recognize the seriousness of his misconduct, but it did not treat his lack of recognition as another aggravating factor. To the contrary, the Panel was clearly cognizant of the principles in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (leave denied [2014] S.C.C.A. No. 476), and the ABCA's caution that, "[i]t is not an aggravating factor that the respondent fails to 'plead guilty' or fails to express remorse" (*Walton* at para. 155). The Panel was aware that Dwyer's lack of recognition is a neutral factor – i.e., it is the absence of a potential mitigating factor. The Record discloses that Staff carefully argued this point at the Sanction Hearing, and while the Panel did not specifically cite *Walton* in the Sanction Decision, clearly it was mindful of the applicable principles (see Sanction Decision at paras. 63-69). It did not err in this regard, and we find its conclusions reasonable in light of its findings of fact.

[149] Third, we are not persuaded that the Panel erred by failing to give appropriate weight to the continuing professional development (**CPD**) Dwyer pursued after Investors Group terminated him, the evidence of his strained financial circumstances, or the effect of s. 10.2 of the Guide.

[150] It is true that the Sanction Decision does not mention the Guide, but that is not surprising given that in the Merits Decision, the Panel found the Guide irrelevant. We perceive no error or unreasonableness in omitting mention of the Guide for the same reasons that we found no error or unreasonableness in the Panel's treatment of the Guide in the Merits Decision. Dwyer was not aware of the Guide at the relevant time and cannot claim that he relied on it in acting as he did, even if his reliance was misplaced. Accordingly, it does not have a mitigating effect.

[151] The Sanction Decision does mention both Dwyer's CPD and his finances. In his written sanction submissions, Dwyer said that he had engaged in "remedial activity" (including additional training and course work), but he did not initially adduce evidence of that activity or rely on it during his oral argument on the first day of the Sanction Hearing. At the Sanction Hearing, however, the Panel was clearly interested in receiving submissions on whether it had the authority to order Dwyer to take an ethics course, and Staff advised that it was open to the Panel to do so. The Panel then requested evidence from Dwyer proving what courses he had taken, as well as evidence of his financial situation. It also asked Staff to obtain instructions about the nature of the ethics courses it could order, and adjourned the Sanction Hearing to give the parties time to provide what was requested.

[152] On the second day of the Sanction Hearing, Dwyer's counsel directed the Panel to Dwyer's affidavit evidence about the courses he took, and the Panel chair specifically asked him to point out the ethics courses. However, counsel did not make any submissions on how Dwyer's CPD should factor into the Panel's analysis.

[153] The Sanction Decision acknowledged the evidence – including the evidence of courses relating to ethics – but Dwyer is correct that the Panel did not clearly state how his CPD was assessed when it decided on the appropriate orders. Nonetheless, we are satisfied that the Panel was well aware of the pertinent evidence and took it into account – i.e., it did not direct Dwyer to take an ethics course as contemplated. The Panel was not required to explain exactly how each sanctioning factor or piece of evidence was weighed to arrive at its overall sanction order. As the SCC stated in *Re Cartaway Resources Corp.*, 2004 SCC 26 (at para. 64), sanction orders should be reviewed "globally".

[154] Turning to Dwyer's finances, we are of the view that the Panel did properly weigh the evidence of his financial circumstances. The Panel may not have articulated every aspect of its reasoning, but it stated that it took "[Dwyer's] arguments about his inability to pay into consideration in deciding the amount of the fine and by allowing him to pay the fine and costs, in installment payments" (Sanction Decision at para. 114). That was reflected in the order issued: the Panel cut the monetary penalty sought by Staff in half, provided for an installment payment plan, and increased the length of the suspension instead.

[155] This is consistent with the Guidelines, which note that, "[e]vidence of a *bona fide* inability to pay may result in the reduction or waiver of a fine, or in the imposition of an installment payment plan", while also cautioning that a respondent's ability to pay "is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary process" (at p. 5). In light of the Panel's assessment of the relevant sanctioning factors and the need to consider all of the parts of a sanction order globally, it was not unreasonable for the Panel to have exercised its discretion to effect deterrence by imposing a longer suspension to offset the reduced fine.

[156] The Panel made no reduction to the amount of costs sought by Staff, and Dwyer argued that he did not consent to that amount; rather, his acceptance of a $20,000 costs award was contingent on a fine of no more than $3,000 and no suspension that would impact his ability to pay. However, the Panel did not suggest that Dwyer consented to $20,000: they merely observed

that his counsel "did not dispute" Staff's request (Sanction Decision at para. 104). The Panel was not bound by either party's submissions on sanction or costs and did not need Dwyer's agreement to order the amount it thought appropriate. Given all of the steps that occurred in this proceeding – including a six-day oral hearing – we do not consider a $20,000 costs order unreasonable and decline to interfere with the Panel's discretion.

[157] We therefore conclude that considered globally, the sanction imposed against Dwyer was neither excessive nor disproportionate in the circumstances. We are satisfied that the Panel correctly set out and reasonably applied the relevant sanctioning principles. The result is commensurate with both the Panel's findings of fact and the comparable cases the Panel was provided – in five of the six cases, the hearing panels imposed both a suspension (ranging from one month to two years) and a fine (ranging from $3,500 to $22,500). Larger fines were typically paired with shorter suspensions and vice versa. In two of the cases, the panels specifically commented on the seriousness of a registrant disregarding the instructions of his Member firm (see *Re: Del Plavignano*, 2019 LNCMFDA 28 at para. 16; and *Re: Muhima*, 2019 LNCMFDA 2 at para. 18).

[158] We are also mindful that five of the six cases cited involved settlements, while the sixth involved agreed facts and uncontested penalty submissions. Such cases generally result in more lenient sanctions than cases where liability and sanction are both contested and taken to a full hearing.

[159] The final issue for our consideration is Dwyer's argument that the delay in bringing this matter to a conclusion should have been taken into account and considered as a mitigating factor that would justify a lower fine or costs order. As mentioned, both parties relied on the SCC's recent decision in *Abrametz*, which affirmed its approach to delay in administrative proceedings outlined in *Blencoe*. *Abrametz* was issued two days after the Sanction Decision, so it was not considered by the Panel.

[160] As alluded to by Staff, in *Abrametz*, the SCC explained that *Blencoe* described two ways in which delay may constitute an abuse of process: (i) where delay has compromised hearing fairness because a party's ability to answer the case against them has been impaired, as might occur if memories have faded or witnesses and other evidence are no longer available due to the passage of time; and (ii) where "delay that does not affect hearing fairness nonetheless amounts to an abuse of process", which should be assessed by applying a three-step test (at paras. 40-43, 72, and 101):

(i) determine if the delay was inordinate;
(ii) determine if the delay directly caused significant prejudice; and
(iii) if the delay was inordinate and directly caused significant prejudice, conduct a final assessment as to whether the delay is "manifestly unfair to a party or in some other way brings the administration of justice into disrepute", in which case it will constitute an abuse of process.

[161] The SCC cautioned that delay is not presumptively inordinate just because a process took considerable time; instead, "one must consider the time in light of the circumstances of the case" (at para. 50), as even a lengthy delay "may be justifiable when considered in context" (at para. 59). The relevant contextual factors include – but are not limited to – the nature and purpose of the

proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case (at para. 51; see also para. 101). The causes of the delay may include the conduct of the respondent, and the adjudicator should consider whether the respondent waived any or all of the delay, either explicitly or implicitly (at paras. 61 and 63). The SCC also explained that unfairness does not arise if the delay is "an inherent part of a fair process" (at para. 62), because "the requirements of procedural fairness sometimes slow the pace at which the proceedings progress" (at para. 65).

[162] Concerning the requirement for proof that the delay caused the respondent significant prejudice (e.g., "significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities"), the SCC noted that a distinction must be drawn between prejudice caused by inordinate delay and prejudice caused by the fact that there is a proceeding at all (see paras. 67-69). That said, it observed that the prejudice caused by the fact of the proceedings "can be exacerbated by inordinate delay" (at para. 68).

[163] The Panel acknowledged the parties' arguments about delay, but found that Dwyer "ha[d] not been subjected to undue delay" and implicitly rejected it as a mitigating factor (Sanction Decision at paras. 80-82 and 112). In our view, this was a reasonable conclusion. Dwyer did not establish that any delay in bringing this case to a conclusion resulted in hearing unfairness. He alleged that certain evidence had been lost – in particular, the "blue sheets" with SE's written, signed, and dated trade instructions – and that SE's memory would have faded such that there was no point in calling him as a witness. However, we were not satisfied that the instructions required by s. 10.2 of the Guide ever existed, and consider it speculative to assert that SE would have been unable to provide probative testimony.

[164] Dwyer is correct that the CSA benchmarks relied on by Staff are not determinative of whether there has been delay (see, e.g., *Re Popovich*, 2013 LNCMFDA 71 at paras. 13-14), but they nonetheless provide some guidance about the length of time securities enforcement proceedings should take. We carefully considered the procedural timeline set out by Staff in the context of the issues raised, the investigative steps taken, the number of appearances before the Panel following issuance of the NOH, the reasons for those appearances and their timing, the agreement of the parties to that timing, and the disruption generally attributable to the intervening COVID-19 pandemic. Like the Panel, we are not satisfied that there was delay in the prosecution of this case, much less inordinate delay.

[165] Dwyer argued that this was not a particularly complex or technical matter, but we do not consider it simple or straightforward, either. Novel circumstances were at issue, as well as conflicting evidence from the primary witnesses on the central issue. In addition, as an ASC hearing panel recently observed in *Re Cerato*, 2022 ABASC 56 (at para. 64):

> Certainly, the expectation is that a securities enforcement investigation should proceed expeditiously, but it should not be at the expense of a careful assessment as to whether further investigative or enforcement action is necessary and in the public interest.

[166] Staff are expected to conduct that assessment throughout their investigation and prosecution. Doing so requires the careful collection and review of evidence that may be voluminous. As pointed out in *Re Application 20210107*, this may take a relatively lengthy amount

of time that can appear to be inactivity to those who are not involved in conducting that ongoing assessment.

[167] Given our conclusion that there was no inordinate delay, it is not necessary for us to consider either the second or the third steps in the *Blencoe* test.

[168] Accordingly, we dismiss Dwyer's Appeal from the Sanction Decision.

V. CONCLUSION

[169] In summary, we were not persuaded that we should disturb either the Merits Decision or the Sanction Decision. We did not find any of the "Five Factors" to be present in either decision, and based on our review of the reasonableness of the decisions, we are satisfied that the Panel appropriately considered the evidence and the relevant authorities, and that its conclusions were reasonably supported. We may not have imposed identical sanctions if we had determined this case from the outset, but we are satisfied that the results in both decisions fell within the range of reasonable outcomes.

[170] The Appeal is dismissed.

[171] This proceeding is concluded.

April 11, 2023

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter

"original signed by"
Bryce Tingle, K.C.