Capital Markets Tribunal
Tribunal des marchés financiers
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Citation: *Stableview Asset Management Inc (Re)*, 2022 ONCMT 14
Date: 2022-06-20
File No. 2020-40

IN THE MATTER OF

STABLEVIEW ASSET MANAGEMENT INC. and COLIN FISHER

REASONS FOR DECISION ON A MOTION

(Rule 28 of the *Rules of Procedure and Forms*)

Adjudicator:	Tim Moseley	
Hearing:	By videoconference, April 27, 2022	
Appearances:	Johanna Braden Sarah McLeod	For Staff of the Ontario Securities Commission
	Brendan F. Morrison Sarah Bittman	For Colin Fisher
	No one appearing for Stableview Asset Management Inc.	

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REASONS FOR DECISION ON A MOTION

1. OVERVIEW

[1] In this proceeding, Staff of the Ontario Securities Commission alleges that Stableview Asset Management Inc., a registered investment fund manager, portfolio manager and exempt market dealer, and its principal Colin Fisher, committed numerous breaches of Ontario securities law by improperly investing client funds, among other things.

[2] With the merits hearing approaching, Staff served three draft affidavits containing the intended testimony of three of Staff's witnesses, all of them members of Staff – two accountants in the Commission's Compliance and Registrant Regulation Branch and one accountant in the Enforcement Branch. Staff did this as required by an order of the Tribunal[1] that provided Fisher an opportunity to review the draft affidavits before they were filed with the Tribunal, and to determine whether there were any portions to which Fisher objected.

[3] Fisher objected to the entire contents of one affidavit on the ground that its contents were irrelevant. He objected to various portions of the other two affidavits, because the particular portion was irrelevant, or was improper opinion evidence, or was improper commentary on the evidence of others.

[4] After reviewing the draft affidavits and the parties' written submissions, and hearing the parties' oral submissions, I issued an order[2] providing that, for reasons to follow, certain portions of the affidavits were inadmissible at the merits hearing. These are my reasons for that decision.

2. ANALYSIS

2.1 Introduction

[5] Staff and Fisher agreed that the Statement of Allegations in an enforcement proceeding defines the issues,[3] and that it therefore determines relevance.[4] The

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[1] *Stableview Asset Management Inc (Re),* (2022) 45 OSCB 1449

[2] *Stableview Asset Management Inc (Re),* (2022) 45 OSCB 4681

[3] *Pushka v Ontario (Securities Commission)*, 2016 ONSC 3041 at para 82; *Solar Income Fund Inc (Re)*, 2021 ONSEC 2 (***Solar***) at para 16

[4] *Khan (Re)*, 2013 ONSEC 36 at para 34; *Solar* at para 23

test of relevance is a low threshold, but in order to be relevant, proposed evidence must have some tendency to influence the likelihood of a proposition for which it is advanced.[5]

[6] The above principles must be observed carefully, in order to ensure that respondents receive proper notice of the case against them.[6]

[7] My decision on this motion about what evidence would be admissible is determined by what would be relevant at the merits hearing only. Evidence that is irrelevant at the merits hearing but that would become relevant at the sanctions and costs hearing, if there is one, is not admissible at this stage. Therefore, I cannot accept Staff's submission that relevance can be determined by the specific sanctions that Staff intends to seek if a sanctions and costs hearing occurs.

[8] The Statement of Allegations in this case presents the following central questions (a list that might change at a merits hearing depending on the parties' submissions and witnesses, but that would still be governed by the Statement of Allegations):

a. What investment parameters and restrictions applied to the ways in which Stableview could invest client funds, either because those parameters and restrictions were imposed by law, or because they were communicated to clients?

b. How did Stableview invest the funds, and did those investments conform to applicable parameters and restrictions?

c. If there were changes to the above, did Stableview communicate those to its clients?

d. Did Stableview receive consulting fees from a third party, and if so, were those permitted, did they constitute an impermissible conflict of interest, and were they disclosed to Stableview's clients?

e. What was the extent of Fisher's involvement and interest?

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[5] *R v J-LJ*, 2000 SCC 51 at para 47

[6] *Anderson (Re)*, 2004 ONSEC 13 at para 25

f. What is the status of the receivership of Stableview?

[9] With those issues in mind, I now consider the three draft affidavits.

2.2 Affidavit of Trevor Walz

[10] Trevor Walz is a Senior Accountant in the Commission's Compliance and Registrant Regulation Branch.

[11] Walz's draft affidavit describes:

a. introductory details, including:

i. his experience, employment with the Commission and professional qualifications;

ii. the Commission's Compliance and Registrant Regulation Branch, its responsibilities and activities; and

iii. how he became involved in this matter;

b. terms and conditions that were imposed on Stableview's registrations and that were in effect until Stableview was placed under receivership, and how those terms and conditions came to be imposed; and

c. Walz's experiences in assisting with the administration of the terms and conditions, including:

i. discussions with Fisher about his living expenses;

ii. the communication (if any) by Fisher of the terms and conditions to Stableview's clients;

iii. requests for redemptions from the two pooled funds managed by Stableview; and

iv. an alleged attempt by Fisher to use money from one fund to make loans to the other two funds managed by Stableview.

[12] Fisher submitted that all of Walz's testimony was irrelevant. I agreed and ruled that none of it was admissible at the merits hearing, except for a portion of paragraph 9 that referred to the existence of terms and conditions placed on Stableview's registration.

[13] There is no allegation in the Statement of Allegations that would make relevant the process of how the terms and conditions came to be in place. Similarly, there is no allegation that would make relevant Walz's experiences in administering those terms and conditions.

[14] The Statement of Allegations refers to the terms and conditions only once, explicitly or otherwise. Paragraph 7 of that document states that in 2019, Staff in the Compliance and Registrant Regulation Branch conducted a compliance review of Stableview and identified what in their opinion were numerous deficiencies. The terms and conditions resulted.

[15] There is no other reference in the Statement of Allegations, even indirectly, to the terms and conditions. Even the reference mentioned above is completely disconnected from the alleged contraventions of Ontario securities law. There is, for example, no allegation that either of the respondents violated any of the terms and conditions, or that Fisher engaged in any misconduct in his interactions with the Commission or its Staff.

[16] That last point is central to my response to Staff's submission that without Walz's evidence, the panel will not have the whole story about what transpired between Staff and the Respondents over this time period. Staff's submission may well be correct. But even if so, Staff will not have been impeded from proving the case that it has alleged. The scope of the "story" is defined by the Statement of Allegations and its role of giving proper notice to the respondents. A mere mention of the terms and conditions does not make those terms and conditions relevant unless there is some explanation in the Statement of Allegations as to why they are relevant. This Statement of Allegations contains no such explanation.

[17] My view about Walz's evidence extends to the brief references to the inter-fund loans mentioned in paragraph [11](c)(iv) above. In his draft affidavit, Walz referred to a request he received from the funds' custodian about the payment of management fees associated with different funds. According to Walz, the custodian advised Staff that Fisher had approved a loan from one fund to two other funds for the purpose of paying management fees. However, Walz describes this as part of an "attempt" by Fisher to use money from one fund to

lend to the other funds. As Fisher submits, Walz's evidence appears to address contemplated transactions that were not ultimately completed. His evidence therefore did not relate to the allegations in the Statement of Allegations about loans that were actually made.

[18] On that point, I note that another of Staff's affiants, Sherry Brown, describes the inter-fund loans that were made and provides a transaction summary to support the related allegation. Fisher made no objection to that evidence (except to the extent that part of it purported to repeat what was in Walz's affidavit). Brown's affidavit describes the inter-fund loans directly, with support, and is not entangled in the administration of the terms and conditions, which is an irrelevant context, as I have explained above.

[19] As a general matter, opening the door to the evidence in Walz's affidavit would have significantly broadened the scope of, and lengthened, the merits hearing, as is evident from the breadth of Walz's affidavit. It is reasonable to expect that there would have been considerable cross-examination of Walz, and that Fisher would have felt it necessary to call a number of witnesses to rebut Walz's testimony, as Fisher indicated he would.

[20] Based on summaries of witnesses' anticipated evidence delivered by Fisher to Staff as required, Staff was concerned that some of Fisher's witnesses would testify about some or all of the issues set out in Walz's draft affidavit. Such summaries are not filed with the Tribunal, except where there is some dispute about the summary itself, or the timing of its delivery. I did not consider summaries from Staff or Fisher in determining this motion.

[21] To that point, however, where a respondent serves a witness summary that purports to foreshadow the introduction of evidence that is beyond the scope of the Statement of Allegations, that summary does not make relevant what would otherwise be irrelevant. The rules apply equally to Staff and respondents, and if during a hearing a respondent attempts to introduce evidence that is irrelevant, Staff's remedy is to object to its introduction at that time.

[22] In conclusion with respect to Walz's proposed testimony, it was not probative of any issue that would be before the merits hearing panel (other than the

existence of the terms and conditions). For these reasons, I granted Fisher's motion in respect of Walz's affidavit, except for that one portion.

2.3 Affidavit of Catherine Muhindi

2.3.1 Introduction

[23] Catherine Muhindi is an Accountant in the Commission's Compliance and Registrant Regulation Branch. Among other things, her affidavit described a compliance review of Stableview that the Branch conducted, and a subsequent interview of Fisher.

[24] Fisher submitted that portions of Muhindi's draft affidavit:

a. were irrelevant;

b. contained improper opinion evidence;

c. drew legal conclusions on issues to be determined by the Tribunal; and/or

d. improperly put forward the contents of an interview of Fisher with Compliance and Registrant Regulation Staff, which Fisher voluntarily attended, or a summary of the testimony he gave at that interview.

[25] I will address each category in turn.

2.3.2 Irrelevant evidence

[26] I ordered that the following portions of Muhindi's affidavit were inadmissible at the merits hearing, on the ground that they were irrelevant: the opening words of paragraph 25, the first sentence of paragraph 43, the opening words of subparagraph 43a, the opening words of paragraph 45, and the last sentence of paragraph 46. All of these recounted that Staff formed certain opinions or conclusions during the compliance review. The timing of when Staff arrived at those conclusions does not relate to an issue in this proceeding.

2.3.3 Improper opinion evidence

[27] Opinion evidence is generally inadmissible in proceedings before the Tribunal. An exception is made for properly qualified experts who give relevant opinion evidence that is outside the experience and knowledge of the Tribunal and that

would enable the Tribunal to appreciate the matters at issue due to their technical nature.[7]

[28] In this proceeding, Staff did not seek to call any expert evidence.

[29] Another exception exists to the general prohibition against opinion evidence. Staff indirectly cited the Supreme Court of Canada's decision in *R v Graat*[8] for the proposition that an exception may also be made in limited circumstances where a witness who has not been qualified as an expert:

a. has personal knowledge;

b. is in a better position than the trier of fact to form the opinion;

c. has the necessary experiential capacity to make the conclusion; and

d. gives the opinion as a compendious mode of speaking and could not as accurately, adequately and with reasonable facility describe the facts that they are testifying about.

[30] I do not accept that *R v Graat* applies here. In that case, the opinion evidence at issue was that of police officers who had observed the accused operating a motor vehicle, and who formed an opinion as to the accused's degree of impairment. In those circumstances, the experienced police officers were in a better position than the court to form an opinion about the accused's state at the relevant time. The same cannot be said about the kinds of opinions that Staff's witnesses expressed in their affidavits, *e.g.*, as to whether a fund was overly concentrated in a particular security. Such opinions in the context of this case are not admissible.

[31] After considering the parties' submissions, I ordered that the following portions of Muhindi's affidavit were inadmissible at the merits hearing, on the ground that they were improper opinion evidence:

a. the first sentence of paragraph 21, which expressed an opinion about the "situation";

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[7] *Paramount Equity Financial Corporation (Re)*, 2020 ONSEC 12 at para 5

[8] 1982 CanLII 33 (SCC), [1982] 2 SCR 819

b. the first sentence of paragraph 23, which expressed an opinion about how the respondents' conduct caused many of the deficiencies noted by Staff in the compliance review;

c. paragraph 24a, which summarized opinions set out elsewhere in the affidavit about the results of the impugned investments;

d. the first sentence of paragraph 43, which expressed an opinion about whether conflicts of interest had been disclosed (this portion was also irrelevant, as noted above);

e. the opening words of subparagraph 43a, which tied facts that were stated later in the subparagraph to Muhindi's conclusions about her review (this portion was also irrelevant, as noted above);

f. the opening words of paragraph 45, which tied an opinion that followed to conclusions reached by Staff in the Compliance and Registrant Regulation Branch (this portion was also irrelevant, as noted above); and

g. the last sentence of paragraph 46 (this portion was also irrelevant, as noted above) and the first sentence of paragraph 52, which expressed opinions about the significance of findings from the compliance review.

2.3.4 Legal conclusions on issues to be determined by the Tribunal

[32] I ordered that the following portions of Muhindi's affidavit were inadmissible at the merits hearing, on the ground that they were improper opinion evidence. However, with respect to these portions, the opinions were on issues that the Tribunal would be called upon to determine, and they purported to be based on facts contained in the impugned portion. In the order, I therefore provided that while Muhindi's opinion itself was inadmissible, Staff was entitled to adduce the underlying facts in support of a submission that the Tribunal ought to reach the same conclusion:

a. the second sentence of paragraph 21, which expressed an opinion about whether the relevant investment portfolios were overly concentrated in a single company's illiquid securities;

b. the second sentence of paragraph 23, which expressed an opinion about Fisher's role in the impugned investments;

c. the portion of paragraph 25 not already ruled inadmissible, which expressed opinions about whether the respondents breached investment parameters, whether Stableview was in a conflict of interest, and whether there was adequate support for a valuation of certain securities;

d. paragraphs 34 and 35, which expressed opinions about diversification and compliance with investment parameters;

e. the first and last sentences of paragraph 37, and the fourth sentence of paragraph 39, which expressed opinions about compliance with investment restrictions and parameters;

f. paragraph 41, which gave a subjective characterization of certain disclosure made by Stableview to its clients, and which gave a legal conclusion about the extent of written disclosure; and

g. the remainder of paragraph 45, which expressed an opinion about the adequacy of Stableview's support for a valuation, and about the liquidity of specified securities.

2.3.5 Fisher's voluntary interview before the proceeding was commenced

[33] Subparagraph 24b of Muhindi's affidavit referred to a summary, contained elsewhere in the affidavit, of a voluntary interview of Fisher conducted by Staff in the Compliance and Registrant Regulation Branch. I ordered that the subparagraph was inadmissible at the merits hearing because it was too broad and was not the most reliable source for knowing what Fisher said in that interview.

[34] Staff may, in accordance with the Tribunal's usual practice, seek at the merits hearing to introduce specific portions of the transcript. The merits hearing panel could then determine the admissibility of those portions in the context of the hearing. I note that in his written submissions Fisher undertook to testify at the hearing, which might obviate the need for any portion of the transcript to be introduced, except to impeach his credibility.[9]

[9] See, *e.g.*, *Donald (Re)*, 2012 ONSEC 26 at para 34

[35] For the same reasons, I ruled inadmissible paragraphs 54 and 55 of Muhindi's affidavit, which purported to summarize and characterize portions of Fisher's interview.

2.4 Affidavit of Sherry Brown

2.4.1 Introduction

[36] Sherry Brown is a Senior Forensic Accountant in the Commission's Enforcement Branch. Her affidavit described, among other things, steps taken during the investigation that led to this proceeding.

[37] Fisher submitted that portions of Brown's draft affidavit:

a. were irrelevant;

b. drew legal conclusions on issues to be determined by the Tribunal;

c. improperly put forward the contents of an interview of Fisher with Compliance and Registrant Regulation Staff, which Fisher voluntarily attended, or a summary of the testimony he gave at that interview; and/or

d. were improper hearsay.

[38] I will address each category in turn.

2.4.2 Irrelevant evidence

[39] I ordered that the following portions of Brown's affidavit were inadmissible at the merits hearing, on the ground that they were irrelevant:

a. the opening words of paragraph 57, which referred to the compliance review report, which is not in issue in this proceeding;

b. in paragraph 57, the words "The Investigation showed", given that Staff's conclusions as a result of the investigation do not relate to an issue in this proceeding; and

c. for the same reasons applicable to Walz's affidavit, the first and second sentences of paragraph 94, which referred to Walz's proposed testimony.

2.4.3 Legal conclusions on issues to be determined by the Tribunal

[40] I ordered that the following portions of Brown's affidavit were inadmissible at the merits hearing, on the ground that they were improper opinion evidence. However, with respect to these portions, the opinions were on issues that the Tribunal would be called upon to determine, and they purported to be based on facts contained in the impugned portion. In the order, I therefore provided that while Brown's opinion itself was inadmissible, Staff was entitled to adduce the underlying facts in support of a submission that the Tribunal ought to reach the conclusion referred to in that portion of the affidavit:

a. paragraph 44, which expressed an opinion about compliance with investment parameters;

b. in paragraph 57, portions of the first and third sentences, which expressed an opinion about Fisher's culpability for an alleged breach and about the liquidity of a particular security and the financial health of that issuer;

c. the first sentence of paragraph 70, which expressed an opinion about the significance of various events in the chronology, and about the financial health of the issuer referred to above; and

d. the last sentence of paragraph 88, which expressed an opinion about the existence and degree of an alleged non-compliance with investment parameters.

2.4.4 Fisher's voluntary interview before the proceeding was commenced

[41] For the same reasons applicable to Muhindi's proposed testimony regarding the voluntary interview of Fisher, I ordered that the last sentence of paragraph 85, and subparagraphs 85a through 85d, of Brown's affidavit were inadmissible.

2.4.5 Hearsay evidence, and alleged breach of Staff's disclosure obligations

[42] Paragraph 108 of Brown's affidavit reported in dispassionate fashion information she said that Staff obtained from the receiver for Stableview regarding the extent of liquidation of the subject funds. Fisher submitted that I should rule that evidence as inadmissible hearsay.

[43] I dismissed Fisher's request. Section 15 of the *Statutory Powers Procedure Act*[10] permits the Tribunal to admit hearsay evidence. In my view, the question of whether that evidence should be admitted, and if so how much weight it deserves, are more properly questions for the merits hearing panel.

[44] Fisher also submitted that Staff had breached its disclosure obligations by providing this information at a late date. I could not accept this submission, at least on the basis of the record before me. It is not disputed that the receivership continues. It is only natural that there will be constantly evolving information from the receivership. Any complaint Fisher has about the timeliness of Staff's disclosure should, at this point, be addressed by the merits hearing panel.

3. CONCLUSION

[45] For the above reasons, I issued the order of April 29, 2022, ruling as inadmissible all of Trevor Walz's draft affidavit (except for the reference to the existence of terms and conditions) and those portions of Catherine Muhindi's and Sherry Brown's draft affidavits specified above.

Dated at Toronto this 20th day of June, 2022

"Timothy Moseley"

Timothy Moseley

[10] RSO 1990, c S.22