

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Dhanani, 2018 BCSECCOM 31

Date: 20180117

Ayaz Dhanani
(also known as Azim Virani, Michael Lee, Alex Nebris,
Paul Dhanani, Samuel Ramos and Rahim Jiwa)

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| Panel | Nigel P. Cave Judith Downes Gordon Holloway | Vice Chair Commissioner Commissioner |
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Hearing date November 30, 2017

Submissions Completed November 30, 2017

Date of Decision December 7, 2017

Date of Reasons January 17, 2018

Appearing
David Hainey For the Executive Director

Brigeeta C. Richdale For Claimant C
Jessica L. Lewis

Claimant D For herself

Reasons for Decision

I. Introduction

- [1] These were applications under section 15.1 of the Act, brought by four claimants (Claimant A, Claimant B, Claimant C and Claimant D), for payments out of funds obtained by the Commission in respect of an order against Ayaz Dhanani under section 161(1)(g) of the Act.
- [2] Each of Claimant A, Claimant B, Claimant C and Claimant D filed an application for payment from funds held by the Commission pursuant to section 15.1 of the Act.
- [3] During the hearing, the executive director filed a report and a recommendation with respect to the claims made by the four claimants, tendered additional documentary evidence and provided written and oral submissions. Claimant C tendered documentary evidence, made an oral statement and provided written and oral submissions in respect of

his application. Claimant D gave oral testimony, tendered additional documentary evidence and provided oral submissions in respect of her application.

- [4] On December 7, 2017, having heard the applications, we granted the applications of Claimant A, Claimant B, and Claimant C (all or in part) and we dismissed the application of Claimant D.
- [5] These are our reasons with respect to the decisions we made on December 7, 2017 with respect to the four applications described above.

II. Background

Procedural history

- [6] On December 4, 2014, the executive director issued a notice of hearing against the respondent (2014 BCSECCOM 486).
- [7] On October 22, 2015, the executive director issued an amended notice of hearing against the respondent alleging that the respondent perpetrated a fraud contrary to section 57(b) of the Act (2015 BCSECCOM 390).
- [8] On May 30, 2016, this panel found that Dhanani perpetrated a fraud on each of Claimant A, Claimant B and Claimant C in the collective amount of \$188,000 in contravention of section 57(b) of the Act (2016 BCSECCOM 179).
- [9] On December 16, 2016, this panel issued a sanctions decision against Dhanani, pursuant to which we ordered (among other things) that Dhanani, under section 161(1)(g) of the Act, pay to the Commission \$188,000 (2016 BCSECCOM 413).

History of funds held by Commission

- [10] In our findings, we determined that Investor C was asked by Dhanani to make out a bank draft (in the amount of \$120,000) in the name of a third party. That bank draft, via several intermediaries, was ultimately deposited into a bank account of that third party on December 30, 2014.
- [11] On April 15, 2015, the bank account of the third party to which Investor C's bank draft had been deposited was frozen pursuant to a freeze order issued by the Commission. As at April 15, 2015, the frozen account contained funds significantly in excess of the amount of Investor C's bank draft.
- [12] On February 10, 2017, the third party sent \$120,000 to the Commission pursuant to the terms of an agreement between the third party and the Commission. The terms of that agreement included:
- a) an acknowledgement by the third party that the \$120,000 should be returned to investors that were victims of Dhanani's misconduct;
 - b) a release by the third party of any interest in the \$120,000; and

- c) an agreement that the \$120,000 was being paid to the Commission in partial satisfaction of the Commission's order against Dhanani pursuant to section 161(1)(g) of the Act.

[13] No further funds have been obtained by the Commission in respect of the section 161(1)(g) order made against Dhanani.

Procedural matters related to section 15.1 proceedings

- [14] On February 23, 2017, pursuant to section 7.2 of the *Securities Regulation*, the Commission issued a press release and posted a notice on its website notifying the public that it had received \$120,000 as partial satisfaction of the section 161(1)(g) order made against Dhanani and that a claim could be made against such funds by applying to the Commission.
- [15] On April 19, 2017, Claimant A filed a Form 12-901F with the Commission. Claimant A seeks a payment of \$13,800 as compensation for losses she incurred as a result of Dhanani's misconduct.
- [16] Claimant A was one of the three investors who we found, in our findings, to have been the victim of Dhanani's fraudulent misconduct and we found that her investment loss was \$13,800.
- [17] On March 12, 2017, Claimant B filed a Form 12-901F with the Commission. Claimant B seeks a payment of \$55,000 as compensation for losses he incurred as a result of Dhanani's misconduct.
- [18] Claimant B was one of the three investors who we found, in our findings, to have been the victim of Dhanani's fraudulent misconduct and we found that his investment loss was \$55,000.
- [19] On April 19, 2017, Claimant C filed a Form 12-901F with the Commission. Claimant C seeks a payment of \$120,000 as compensation for losses he incurred as a result of Dhanani's misconduct.
- [20] Claimant C was one of the three investors who we found, in our findings, to have been the victim of Dhanani's fraudulent misconduct and we found that his investment loss was \$120,000.
- [21] Importantly for these applications, in our findings, we also noted that the evidence established that the funds held in the third party's frozen bank account could be traced to Claimant C's investment with Dhanani.
- [22] On February 27, 2017, Claimant D filed a Form 12-901F with the Commission. Claimant D seeks a payment of \$100,000 as compensation for losses she incurred. Claimant D was not one of the three investors who we found, in our findings, to have been the victim of Dhanani's fraudulent misconduct.

- [23] Claimant D testified and provided certain documents in support of her submission that she was the victim of fraudulent misconduct carried out by Dhanani that was very similar to that committed against each of Claimant A, B and C. She testified that her losses arising from her dealings with Dhanani were \$140,000.
- [24] Other than as described above, there have been no other applications for compensation from any other party under section 15.1 of the Act.
- [25] On September 15, 2017, the executive director sent notice to each of the four applicants setting out his position with respect to each of their applications and providing them with 30 days to advise the Commission of whether they would like an opportunity to be heard with respect to their applications under section 15.1 of the Act.
- [26] Claimants A and B responded to the Commission that they agreed with the executive director's position with respect to their applications and they did not request and opportunity to be heard.
- [27] Claimants C and D responded to the Commission that they did not agree with the executive director's position and requested an opportunity to be heard on their applications.

III. Law and Analysis

Law

- [28] Section 15.1 of the Act provides:
- (1) The commission must notify the public in accordance with the regulations if the commission receives money from an order made under section 155.1(b), 157 (1)(b) or 161(1)(g).
 - (2) A person may make a claim to money referred to in subsection (1) by submitting an application in accordance with the regulations within 3 years from the date of the first notification made under subsection (1).
 - (3) If the commission receives an application under subsection (2), the commission may, in accordance with the regulations, pay to the applicant all or a part of the amount claimed.
- [29] The regulations passed in respect of Section 15.1 provide:
- 7.1 In this Part:
- "eligible applicant"** means a person who
- (a) suffered pecuniary loss as a direct result of misconduct that resulted in an order for which the commission gave notice under section 7.2,

- (b) did not directly or indirectly engage in the misconduct that resulted in the order, and
- (c) has not been denied a claim under section 7.4 (6);

7.4 (1) If the commission determines that an applicant is an eligible applicant in respect of an order, the commission may make a payment to the eligible applicant from money received from the order.

(2) When determining the amount to be paid to an eligible applicant, the commission must consider the following:

- (a) the amount of money received from the order;
- (b) the loss suffered by the eligible applicant;
- (c) the losses suffered by all eligible applicants;
- (d) any other information the commission considers appropriate in the circumstances.

(3) When determining an applicant's loss for the purposes of this section, the commission must not include any amount claimed by the applicant in respect of a loss of opportunity, including interest on any loss, and must consider the following:

- (a) whether the applicant received or is entitled to receive compensation from other sources for the loss arising from the misconduct that resulted in the order;
- (b) whether the applicant benefitted from the misconduct that resulted in the order;
- (c) the results of any hedging or other risk limitation transactions made by the applicant.

(4) The commission may prorate payments among eligible applicants if, having considered the matters under subsection (2), the commission determines that the money the commission received from the order is insufficient to pay the claims of all eligible applicants.

(5) A prorated payment made to an eligible applicant must be determined in accordance with the following formula:

$$\frac{A \times B}{C}$$

Where

- A = the amount of money the commission received under the order,
- B = the loss suffered by the eligible applicant, and
- C = the losses suffered by all eligible applicants.

7.6 The commission may make a payment to an eligible applicant, including a partial or installment payment, before the period described in section 15.1 (5) of the Act has expired.

[30] The Commission set out some general principles to consider in determining applications to pay out funds pursuant to section 15.1 of the Act in *Re Alexander*, 2017 BCSECCOM 78 at paras 25-27:

25. We ... adopt the following guidelines for future applications under section 15.1 of the Act:

1. although a duty of fairness applies in any administrative proceeding, in this case, if the procedural requirements set out in the Act and the regulations are met, the duty of fairness is fulfilled;
2. applications under section 15.1 are not generally determined with a view to the public interest (unlike many other provisions of the Act which expressly require the Commission to take the public interest into consideration when making an order or taking some other step);
3. a Commission panel considering an application under section 15.1 should apply the test of whether the evidence, on a balance of probabilities, supports granting the application;
4. Commission panels should apply the same test on an application under section 15.1 to release funds prior to the expiry of the three year notice period, although they may take into account additional factors including:
 - a) the number of potential eligible applicants who have not made claims as at the application date;
 - b) the amount of money paid by respondent(s) pursuant to a section 161(1)(g) order, relative to the losses of the potential eligible applicants;
 - c) the amount requested to be paid out in the application (i.e. whether it is a request for a partial or a full payout);
 - d) the amount of time remaining in the three year notice period; and
 - e) any evidence that potential eligible applicants have received notice of the process for application and that they have affirmatively elected not to apply.

26. In general, our role, as a Commission panel, is similar to that of a judge in a bankruptcy proceeding. In that role, we must:

- ensure that the procedural requirements of the Act have been met;
- where there is a substantial number of claimants, ensure that the Commission's administrative procedures for vetting those claims are appropriate;
- provide a forum whereby disputes over claims may be heard; and

- make orders for payments where we are satisfied that the evidence, on a balance of probabilities, warrants such an order.

27. Similarly, the executive director, who is responsible for administrative oversight of the vetting of applications, plays an important role by making recommendations to the panel (wherever possible) in much the same manner that a trustee in bankruptcy makes a recommendation for payment out of court based on their administrative oversight of the claims process.

Position of the Parties

[31] The executive director submitted that:

- a) Claimant D did not meet the definition of an “eligible applicant” under section 7.1 of the regulations and was not entitled to any payout under section 15.1 of the Act;
- b) Claimants A, B and C were all eligible applicants and that the Commission should order a distribution of the funds held by the Commission to each of them *pro rata* to the quantum of their losses arising from Dhanani’s fraudulent misconduct; and
- c) Claimants A, B and C represent the totality of possible eligible applicants in respect of the funds held by the Commission, and therefore, the Commission should order that the payments, derived under subparagraph (b) above, be made prior to the expiry of the three year notice period contained under section 15.1(2) of the Act.

[32] As noted above, although they did not appear at the hearing, we have correspondence from Claimants A and B confirming their agreement with the executive director’s submissions.

[33] Claimant C submitted that:

- a) Dhanani committed three distinct acts of fraud against each of Claimant A, B and C, that the funds in the third party’s trust account could be traced to the act of fraud against him (i.e. Claimant C) and that Claimant A and B were not eligible applicants in respect of the \$120,000 recovered from the third party’s trust account;
- b) he has a proprietary interest in the funds held by the Commission and that that interest could be supported under a number of legal theories including constructive trust or equitable tracing; and
- c) even if we reject the arguments in subparagraphs (a) and (b) above, under the factors that we must consider in making our orders as set out in section 7.4(2)(d) of the regulations to section 15.1, we should take into account that the funds held by the Commission can be traced directly to his investment with Dhanani, without any comingling of funds, and should, therefore, not be distributed on a *pro rata* basis among the claimants.

[34] Claimant D submitted that:

- a) she had contacted the Commission to make a complaint against Dhanani;
- b) she had assisted the Commission in its investigation against Dhanani;
- c) she was the victim of a similar fraudulent investment scheme to that carried out against each of Claimants A, B and C; and
- d) it would be fair and equitable for the Commission to include her, and any other victims of a fraudulent investment scheme carried out by Dhanani, in a *pro rata* distribution of the funds.

Analysis

[35] There was no dispute among the parties that the Commission complied with the public notice requirements of section 15.1(1) of the Act. Nor were there any issues raised to suggest that any of the applicants had failed to properly apply for payment of funds pursuant to section 15.1(2) of the Act.

[36] However, these applications raise the following issues:

- a) whether Claimant D is an eligible applicant under the definition of that term in section 7.1 of the regulations passed in respect of section 15.1 of the Act;
- b) whether, as submitted by Claimant C, Claimant C is the only eligible applicant; Claimant C challenges the submissions of the executive director that Claimants A and B are eligible applicants in respect of the funds held by the Commission;
- c) should the Commission look at issues of proprietary or other third party interests in the funds held by the Commission for distribution pursuant to section 15.1 of the Act; and
- d) how should we distribute the \$120,000 amongst the totality of eligible applicants (given that the funds held by the Commission are less than the totality of the losses of the eligible applicants).

1. Eligible applicants

[37] The definition of “eligible applicant” in section 7.1 of the regulations in respect of section 15.1 requires that a claimant must have suffered pecuniary losses as a direct result of the misconduct that led to the Commission’s order under section 161(1)(g) of the Act against a respondent.

[38] In this case, our order under section 161(1)(g) against Dhanani was made in respect of his fraudulent misconduct against Claimants A, B and C.

[39] While we are very sympathetic to the circumstances of Claimant D, in that she was apparently victimized by Dhanani in much the same way as the other claimants, there is simply no way to view her as an eligible applicant under the regulations. The alleged conduct that gave rise to her loss does not form part of the allegations in the notice of hearing, or the findings of fact in the liability decision. She is to be highly commended

for any efforts that she undertook to assist or aid the Commission in its investigation of Dhanani. However, her claim for funds under section 15.1 of the Act must be dismissed.

- [40] Claimant C's submission that Claimant's A and B should not be eligible applicants with respect to the funds held by the Commission is more complicated.
- [41] Claimant C submits that Dhanani committed three separate acts of fraud against each of Claimant A, B and C and that our order against Dhanani under section 161(1)(g) in the amount of \$188,000 should properly be viewed (or could have been made) as three separate orders under section 161(1)(g) in the amount of the investments made by each of the three claimants. Claimant C then suggests that the \$120,000 held by the Commission (that can be traced to his investment with Dhanani and which was not co-mingled with funds from the other two claimants) should properly be applied against the section 161(1)(g) order that would have been made against Dhanani for the singular act of fraud committed by him against Claimant C.
- [42] We do not agree with these submissions for a number of reasons.
- [43] First, the British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently considered the scope and purpose of section 161(1)(g) orders. In so doing, the court agreed with previous decisions of the Commission that compensation and restitution is not the purpose of these orders. These orders ensure that respondents do not retain the "benefit" of their misconduct.
- [44] Claimant C's submissions ask us to draw a direct connection between the misconduct carried out against him and our order against Dhanani under section 161(1)(g). We ordered that Dhanani pay \$188,000, and we have only received \$120,000. Claimant C's submissions require application of an approach to distribution of a sum collected in partial payment of a global order under section 161(1)(g) that is contrary to the scope and purpose of the section. The purpose of the 161(1)(g) order is to ensure that Dhanani does not retain the benefit of conduct contrary to the Act. If we were to make an order in the manner submitted by Claimant C, we would be using funds collected under section 161(1)(g) to specifically compensate one eligible claimant in priority over other equally eligible claimants.
- [45] Second, the approach suggested by Claimant C will be impossible to follow in many circumstances where a respondent's misconduct is not directed at a particular investor (i.e. market manipulations and misrepresentations often harm a broad range of investors from a single act of misconduct) or where a respondent's "benefit" from the misconduct does not directly match an investor's pecuniary loss.
- [46] Our order against Dhanani under section 161(1)(g) of the Act was made to strip him of the benefit of all of his fraudulent misconduct. The Commission has obtained \$120,000 in respect of that order and it is appropriate that each of Claimant A, B and C is an eligible applicant in respect of this amount.

2. Proprietary interest claims

- [47] Claimant C submitted that under several theories of law (bankruptcy law, constructive trust or through equitable tracing) he had an enforceable interest in the \$120,000 held by the Commission.
- [48] Claimant C's submissions in respect of bankruptcy law stemmed, in part, from the decision in *Alexander*, in which the panel drew an analogy between proceedings in respect of section 15.1 applications and bankruptcy proceedings. In particular, the decision sets out that the role of the executive director in these proceedings is akin to that of a bankruptcy trustee and the role of the panel is akin to that of the court in a bankruptcy proceeding.
- [49] While we acknowledge and agree with what was said in *Alexander*, we do not agree with Claimant C that actual principles of bankruptcy law are applicable in determining claims made under section 15.1 of the Act.
- [50] The executive director submitted that our jurisdiction in respect of these applications is completely prescribed by the Act and the regulations. More particularly, he submitted that we do not have the authority to make an order that Claimant C has a proprietary interest in the funds (under any of the theories advanced by Claimant C) and that only a court could do so. Finally, the executive director submitted that the equitable principles that might lead a court to making such an order could, pragmatically, be taken into account by this panel in the applications, pursuant to subsection 7.4(2)(d) which allows us to take into account "any other information the commission considers appropriate in the circumstances".
- [51] We agree with the executive director's submissions on this issue in all respects.

3. Distribution of funds among eligible applicants

- [52] Claimant C says that if we are to apply equitable principles pursuant to section 7.4(2) we should allocate all of the \$120,000 to him because:
- a) the funds were never co-mingled with the other claimants' funds;
 - b) the funds can be traced to only one claimant, Claimant C; and
 - c) to deprive Claimant C of all of the funds would be inequitable because the funds were always his.
- [53] The executive director says that payments to the claimants on a *pro rata* basis as per his recommendation or as requested by Claimant C are both reasonable outcomes of the applications. However, he notes that section 7.4(4) of the regulations expressly contemplates a *pro rata* distribution if the funds held for payment by the Commission are less than the total claims of all of the eligible applicants. Further, he submits that a *pro*

rata distribution is consistent with the primary intention of section 15.1 of the Act which is to compensate all eligible participants.

- [54] We are sympathetic to the concerns of Claimant C. However, we agree with the submissions of the executive director on this point.
- [55] The regulations clearly contemplate distribution of funds on a *pro rata* basis where the funds held for payment are less than the total claims of all eligible applicants. It is clear that we may depart from this and could do so based upon facts or circumstances that are unique to the application and that we are asked to consider under section 7.4(2)(d). The issues raised by Claimant C are ones that we have considered under section 7.4(2)(d). However, his circumstances are not sufficiently unique and a *pro rata* distribution is not sufficiently inequitable for us to depart from the provisions of section 7.4(4). If we allowed for a tracing of funds to a specific investor it would almost always favour the most recent victims of misconduct. It is, to some extent, fate when funds are frozen or payments under section 161(1)(g) are made and from what source. It is equitable that all victims of misconduct share, on a *pro rata* basis, in the whims of that fate.
- [56] Claimants A, B and C represent the entirety of the possible claimants in respect of the funds held by the Commission. As a consequence, we ordered that the funds could be paid out prior to the end of the three year notice period under the Act.

IV. Conclusion

- [57] As a consequence, we made the following orders to:
1. grant the applications, in part, of Claimants A, B, and C, and order under section 15.1(3) of the Act that the executive director pay them, on a prorated basis, the Funds as follows:
 - (a) to Claimant A, \$8,771.18;
 - (b) to Claimant B, \$34,957.63; and

(c) to Claimant C, \$76,271.19.

2. deny Claimant D's application and claim to the Funds.

January 17, 2018

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Gordon Holloway
Commissioner