

2010 BCSECCOM 684

Sung Wan (Sean) Kim

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken David J. Smith Shelley C. Williams	Vice Chair Commissioner Commissioner
Date of hearing	November 8, 2010	
Date of Decision	December 14, 2010	
Appearing	Douglas B. Muir	For the Executive Director

Decision

I Introduction

- ¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.
- ¶ 2 In an amended Notice of Hearing issued June 1, 2010, the executive director alleges that Sung Wan (Sean) Kim committed fraud contrary to section 57 of the Act. The Commission extended, until this decision is rendered, temporary orders against Kim issued by the executive director in October 2009. The temporary orders prohibit Kim from trading or purchasing securities or exchange contracts and from engaging in investor relations activities, and suspend his registration.
- ¶ 3 Kim did not appear at the hearing. The executive director entered his evidence at the hearing on November 8 and on November 19 filed submissions on both liability and sanction.
- ¶ 4 The executive director seeks permanent orders under sections 161(1) and 162 against Kim prohibiting him from:
- trading or purchasing securities,
 - acting as a director or officer of any issuer,
 - acting as a registrant, investment fund manager or promoter

2010 BCSECCOM 684

- acting in a management or consultative capacity in connection with activities in the securities market, and
- engaging in investor relations activities.

¶ 5 The executive director also asks that Kim be ordered to pay disgorgement in the amount of not less than \$13,670,635, and to pay an administrative penalty of \$26 million.

II Background

Summary

- ¶ 6 Kim was the president and sole director of Cirplus Futures Inc. which was registered with the Commission as an exchange contracts dealer and later as a restricted dealer. Kim was registered with the Commission as a salesperson, and later as a dealing representative, restricted to exchange contracts.
- ¶ 7 Cirplus was an introducing broker and used a dealer registered under the Act as its carrying broker.
- ¶ 8 Kim took \$15.7 million from 36 investors, all residents of British Columbia but for one resident of Korea. He targeted members of the Korean religious community.
- ¶ 9 Kim set out to steal the investors' money. He lied to them about how their funds would be invested and the returns they would earn. He forged letters purportedly from the British Columbia Securities Commission falsely stating that the BCSC was actively engaged in the oversight of Cirplus' business. He falsified investor account statements, and made them appear to be from the carrying broker.

Facts

- ¶ 10 Between January 2007 and July 2009 Kim, through Cirplus, entered into investment agreements with 36 investors, who gave him \$15,739,967. Banking records show that investors paid \$13.7 million to Kim personally.
- ¶ 11 Kim promised some investors that their funds would be traded in futures and options through accounts at the carrying broker. The agreements promised returns of 5% per month (60% annually). Agreements with other investors promised annual returns from investments in US treasury bills ranging from 26% to 44%.
- ¶ 12 The accounts did not exist. The funds were not invested in futures and options trading nor in US treasury bills. Instead, the funds went into Kim's personal bank account.

2010 BCSECCOM 684

- ¶ 13 Kim gave some investors a forged letter and other investors a forged memorandum, both purportedly from the BCSC. The forged letter stated that the investor's account was under the supervision of the BCSC and that all transactions in the account were reported to the BCSC. The forged memorandum told investors about changes to the "fund transferring schedule".
- ¶ 14 In an email to investors, Kim claimed Cirplus had provided a report to the BCSC on its accounts and transactions. He also said orally and in emails to investors that the BCSC monitored Cirplus' bank accounts and was auditing it. He said the BCSC had levied a fine or penalty against Cirplus and had required it to change its payout schedule to investors.
- ¶ 15 Kim gave investors forged Cirplus account statements that showed fake profits, using fake account numbers purportedly at the carrying broker. Two investors testified that the fake profit reported on these forged account statements prompted them to invest more with Kim.
- ¶ 16 All of these statements were false.
- ¶ 17 Almost all investors received no returns and all of them lost their principal.

III Findings

- ¶ 18 Prior to October 23, 2007, section 57 of the *Securities Act* said:

"A person . . . must not, directly or indirectly, engage in or participate in a transaction or series of transactions relating to a trade in or acquisition of a security . . . if the person knows, or ought reasonably to know, that the transaction or series of transactions

...

(b) perpetrates a fraud on any person in British Columbia."

- ¶ 19 On October 23, 2007, the section was amended and now says:

"A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct

...

(b) perpetrates a fraud on any person."

- ¶ 20 The executive director submits that for the purpose of this hearing, the differences between the two versions of section 57 are immaterial. We agree.

2010 BCSECCOM 684

¶ 21 The British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 stated the following regarding fraud in the context of the *Securities Act*:

“29 Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.”

1. The Court cited the elements of fraud from *R. v Théroux*, [1993] 2 SCR 5 (at p. 20):

“. . . the actus reus of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim’s pecuniary interests at risk.

Correspondingly, the mens rea of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim’s pecuniary interests are put at risk).”

¶ 22 The evidence provides clear and convincing proof that Kim committed what *Théroux* describes as prohibited acts and that those acts caused deprivation.

¶ 23 The investment agreements Kim entered into with the investors were investment contracts, which fall within the definition of “security” in section 1(1) of the *Securities Act*. An investment contract is an investment of money in a common enterprise with profits to come from the efforts of others. (See *SEC v. W. J. Howey Co.* 328 U.S. 293 (1946), *SEC v. Glen W. Turner Enterprises, Inc.* 474 F. 2d 476 (1973), *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112.)

2010 BCSECCOM 684

- ¶ 24 The investment agreements required an investment of money. The investors' profits were to come from the efforts of persons other than themselves – the evidence is clear that once they deposited their funds, investors were not required to do anything else to earn their returns. The commonality that is required by the cases cited above existed between Kim and the investors.
- ¶ 25 We find that the investment agreements were investment contracts.
- ¶ 26 Kim did the following deceitful acts. He:
- lied to investors about how their money would be invested
 - lied to investors about the returns their funds would earn
 - gave investors forged BCSC documents
 - gave investors forged Cirplus account statements
 - lied to investors about what the BCSC did and was doing to Cirplus – that the BCSC was auditing it, supervised its accounts, ordered a penalty against it and changed its investor pay dates, and
 - lied to investors about Cirplus giving the BCSC a report on its accounts and transactions
 - signed the investment agreements, emailed or hand delivered to investors the Cirplus account statements, and emailed to investors the lies about the BCSC
- ¶ 27 Kim deprived investors of their money. He did not invest investors' funds as he promised – instead, he deposited them to his personal bank account.
- ¶ 28 The evidence provides clear and convincing proof that Kim had subjective knowledge of the deceit, and that it could have as a consequence the deprivation of others. It could not be otherwise. Kim knew that:
- there were no accounts used to invest the investors' money at the carrying broker
 - he was not investing the investors' money as he promised he would
 - the investors' funds could not earn the returns he promised
 - the purported BCSC documents were forgeries
 - the BCSC did not do the things described in the forged documents and, as a registrant, Kim knew that the BCSC never does the sort of things described in those documents
 - the prohibited acts deprived investors of their money – their drafts, cheques and transfers were made out to him personally and he deposited investors' money into his personal accounts
- ¶ 29 We find that Kim perpetrated a fraud on the investors, contrary to section 57 of the Act.

2010 BCSECCOM 684

IV Sanctions

- ¶ 30 The factors relevant to sanction are set forth in *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22 (see page 24).
- ¶ 31 Fraud is inherently serious. It strikes at the heart of market integrity. When that fraud is perpetrated by a registrant, the damage is even greater. In a calculated fraud stretching over two and a half years, Kim took investors' money and used it for his own purposes. That, and Kim's reprehensible forging of purported BCSC documents to advance his fraud, puts his misconduct at the top of the range of seriousness.
- ¶ 32 Kim was significantly enriched through his fraud. Of the \$15.7 million that he took from investors, bank records establish that at least \$13.7 million went to his personal bank account.
- ¶ 33 That investors were harmed is obvious. The 36 investors invested \$15.7 million, all of which was lost. Most investors gave Kim hundreds of thousands of dollars. One individual, who invested \$1.4 million, testified he is essentially bankrupt.
- ¶ 34 Kim abused the capital markets, and the authority of the Commission, to perpetrate a multi-million dollar fraud. His contempt of the Commission's authority is evidence that he is contemptuous of regulation and therefore poses a significant risk of harm to investors and the capital markets.
- ¶ 35 Kim's misconduct demonstrates that he is clearly unfit ever to participate in British Columbia's capital markets in any capacity.
- ¶ 36 There are no mitigating factors. The aggravating factors are that Kim:
- was a registrant, and the president and director of a registrant
 - used forged documents purportedly from the BCSC
 - targeted and victimized members of the Korean religious community
 - dissuaded investors from reporting to the Commission
- ¶ 37 The executive director cited *Thow* 2007 BCSECCOM 758, *International Fiduciary Corp.* SA 2008 BCSECCOM 107 and *Manna Trading Corp Ltd.* 2009 BCSECCOM 595 as appropriate decisions to consider in this case. We agree that these cases are applicable precedents.
- ¶ 38 We have made disgorgement orders under section 161(1)(g).
- ¶ 39 Some of Kim's misconduct occurred before that section was enacted in November 2007. In *Manna*, the Commission panel held that it could impose an order

2010 BCSECCOM 684

pursuant to section 161(1)(g) for conduct that predates its enactment provided it would not be unfair to do so.

- ¶ 40 The amendment came into force well before the executive director issued the original notice of hearing and the temporary order in October 2009. The amended notice of hearing followed in June 2010. Kim had ample notice of the orders that could be made against him.
- ¶ 41 In any event, much of Kim's misconduct happened after November 2007. For example, 64 investment agreements are dated after that, all the emails in issue were sent after that, and the forged purported BCSC letters are dated after that.
- ¶ 42 In our opinion, in these circumstances it is not unfair to make an order under section 161(1)(g) for all misconduct alleged.
- ¶ 43 That section says the Commission may make an order "that the person pay to the commission any amount obtained, or payment or loss avoided" as a result of that person's contravention of the Act.
- ¶ 44 The executive director asked for a disgorgement order against Kim based on the \$13.7 million that the evidence shows went to his personal bank account. However, in our opinion all of the money he took from investors ought to be subject to disgorgement because all of the funds invested were funds Kim "obtained" as a result of his fraud.
- ¶ 45 The seriousness and scope of Kim's misconduct requires that a significant administrative penalty be imposed. Under section 162, we can order that he pay an administrative penalty of up to \$1 million per contravention, which in this case could add up to hundreds of millions of dollars, given the number of investors, the multiples of investment agreements per investor, and the number of contraventions.
- ¶ 46 However, in the circumstances of this case, we think the administrative penalty should be determined based on a consideration of Kim's conduct as a whole. We have determined that Kim obtained \$15.7 million from investors. We think an administrative penalty of twice that amount is appropriate in the circumstances.

V Orders

- ¶ 47 Considering it to be in the public interest, we order:
1. under section 161(1)(b) of the Act, that Kim cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

2010 BCSECCOM 684

2. under section 161(1)(d)(i), that Kim resign any position he holds as a director or officer of any issuer;
3. under section section 161(1)(d)(ii), that Kim is prohibited permanently from acting as a director or officer of any issuer;
4. under section 161(1)(d)(iii), that Kim is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;
5. under section 161(1)(d)(iv), that Kim is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;
6. under section 161(d)(v), that Kim is prohibited permanently from engaging in investor relations activities;
7. under section 161(1)(g), that Kim pay to the Commission any amount he obtained, or payment or loss he avoided, directly or indirectly, as a result of his contraventions of the Act, in an amount not less than \$15,739,967; and
8. under section 162, that Kim pay to the Commission an administrative penalty of \$31.4 million.

¶ 48 December 14, 2010

¶ 49 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Shelley C. Williams
Commissioner