2015 BCSECCOM 59

The Falls Capital Corp., Deercrest Construction Fund Inc., West Karma Ltd. and Rodney Jack Wharram

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Hearing dates	April 7, 8, 9, 11, 14, 15, 16, October 28, November 13 and 21, 2014	
Date of Findings	February 11, 2015	
Appearing		
Paige Leggat (April 7-9, 11, 14-16, October 28, 2014) Olubode Fagbamiye	For the Executive Director	
Rodney Wharram	For the Respondents	

Findings

I Introduction

¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

II Allegations

¶ 2 In a temporary order and notice of hearing issued June 14, 2013 (2013 BCSECCOM 220), the executive director alleges that:

a) the respondents breached section 57(b) of the Act by:

(i) raising $9.4 million for two related real estate development projects and only advancing $3.95 million of the funds raised to the developer of the projects; and

(ii) using approximately $500,000 of the funds raised for Rodney Wharram's personal expenses; and

b) Wharram breached section 168.1(1)(a) of the Act when he told Commission investigators in March 2013 that:

(i) he had not raised money from investors during 2013; and

(ii) he was not currently trying to raise funds from investors.

¶ 3 During the hearing, the executive director called nine witnesses: a Commission investigator; six investors in the real estate projects promoted by the respondents; Mr. Fr, who gave evidence about repairs to a jeep paid for by Wharram; and Mr. M, who gave evidence about an investment that Wharram's wife made.

¶ 4 Wharram represented the corporate respondents at the hearing. The respondents called one witness, Mr. F, who gave evidence regarding certain aspects of the bankruptcy proceedings of the developer of the real estate projects. Wharram did not testify.

III Background

¶ 5 Wharram is a resident of British Columbia. He has never been registered in any capacity under the Act.

¶ 6 The corporate respondents, The Falls Capital Corp., Deercrest Construction Fund Inc. and West Karma Ltd., have never been registered in any capacity under the Act and have never filed a prospectus under the Act.

¶ 7 Wharram was the President and a director of Falls, Deercrest and West Karma. There is no dispute among the parties that Wharram was the directing mind of Falls, Deercrest and West Karma and carried out all material transactions on their behalf.

¶ 8 West Karma owned 40% of the Class A shares of Falls.

¶ 9 Blackburn Developments Ltd. was a developer of a recreational property (The Falls) in Chilliwack, British Columbia. The development was to include residential units, spa, winter club (ice rink and curling center), retail and commercial space and enhancements to an existing golf course.

The Falls Capital Corp. investments

¶ 10 In 2007, Wharram began to raise funds through Falls to lend to Blackburn.

¶ 11 Falls promoted and sold its securities using two offering memorandums (Falls OMs), one dated October 15, 2007 and the other dated October 15, 2008. The Falls OMs are nearly identical in their terms.

¶ 12 The Falls OMs offered investors an opportunity to acquire units at a price of $100 per unit. Each unit comprised one Class B non-voting share of Falls (priced at $1) and a 5% bond issued by Falls (priced at $99). The minimum offering amount was 500 units ($50,000) and the maximum offering amount was 520,000 units ($52,000,000).

¶ 13 Generally, the Falls OMs set out the following use of proceeds:

> The majority of the proceeds of this Offering will be loaned to meet its [Falls] financial contribution obligations pursuant to four joint venture agreements to facilitate the funding of The Falls…

¶ 14 The four joint venture entities are The Falls Resort Hotel & Spa Ltd., The Falls Resort Boutique Hotel Ltd., The Falls Resort GNC Ltd., and The Falls Winter Club Ltd.

¶ 15 Notwithstanding this description of the use of proceeds in the Falls OMs, Wharram, in his compelled interview with Commission staff, acknowledged that, at some point in time after the offerings commenced, offering proceeds began to be provided directly to Blackburn and not the four joint venture entities.

¶ 16 The Falls OMs provide that West Karma would promote and sell the offering. In return for promoting and selling the offering, West Karma was to receive 13.4615% of all funds provided to the joint ventures. The Falls OMs say that the joint venture entities would pay West Karma after Falls advanced them funds.

¶ 17 Notwithstanding this provision in the Falls OMs, Falls paid this amount directly to West Karma from investor funds. West Karma was responsible for all of its costs associated with marketing and promoting the offering and would be responsible for paying any commissions to third parties.

¶ 18 The executive director says that Falls raised a total of $5,442,400 from investors. This number was derived from three subscriber lists and other documents Wharram supplied the executive director on behalf of the respondents.

¶ 19 Each list Wharram provided to the executive director confirmed the total investment was $5,442,400. In his compelled interview with Commission staff he confirmed this was the total Falls raised.

¶ 20 The respondents now say that this number could be wrong, however they point to no evidence to suggest that Falls raised a different amount.

¶ 21 We find $5,442,400 to be the total amount Falls raised from investors.

¶ 22 In July of 2009, Wharram withdrew $75,000 from a West Karma bank account and used that money towards purchase of a house for himself.

¶ 23 The $75,000 had been transferred into the West Karma account from a Falls bank account, immediately prior to Wharram's withdrawal of the $75,000.

¶ 24 The respondents submit that the $75,000 Wharram took from the West Karma account for his house purchase was a loan and was subsequently repaid. In support of this submission, the respondents pointed to a cheque and to banking records submitted into evidence by the executive director. However, Wharram did not testify and the respondents did not lead any evidence to identify the cheque or the banking records as a repayment of this amount. Nor was there evidence to suggest that any of this money was repaid to Falls.

¶ 25 We find that the $75,000 was not repaid to Falls.

Deercrest Construction Fund Inc. investments

¶ 26 In 2009, Wharram, through Deercrest Construction Fund Inc., began to raise funds to develop townhomes at The Falls development and a new clubhouse for the golf course.

¶ 27 Deercrest promoted and sold its securities under two offering memoranda (Deercrest OMs), one dated March 2, 2009 and the other dated March 2, 2009 – Amended March 31, 2010. The Deercrest OMs were nearly identical in their terms.

¶ 28 Under the Deercrest OMs, Deercrest offered investors the opportunity to acquire $1,000 bonds offering a 12% interest rate. The minimum offering amount was 500 bonds ($500,000) and the maximum offering amount was 12,000 bonds ($12,000,000).

¶ 29 Generally, the Deercrest OMs describe the use of proceeds of that offering as follows:

> [Deercrest] is raising funds pursuant to this Offering for the purpose of lending the majority of the funds raised hereunder to Deercrest Resort and Clubhouse Ltd (referred to herein as "DRCL or the Developer"). [Deercrest] will seek to achieve its principal investment objective by lending funds to DRCL.

¶ 30 Notwithstanding this description of the use of proceeds from the Deercrest OMs, Blackburn was the developer of the townhomes on the Deercrest properties and Deercrest advanced proceeds from the offering directly to Blackburn.

¶ 31 The Deercrest OMs also describe that Deercrest would establish an interest reserve. This is a portion of the offering that Deercrest would reserve to ensure payment of certain of its interest payment obligations to investors. The interest reserve was to be kept in a segregated account. Notwithstanding the description of this interest reserve in the Deercrest OMs, the interest reserve funds were not kept in a segregated account by Deercrest.

¶ 32 West Karma was also involved in the Deercrest offering. The Deercrest OMs are inconsistent in their description of the role of West Karma in the offering and payment of commissions.

¶ 33 One section of the Deercrest OMs says that West Karma was to be responsible for paying any commissions associated with the sale of the bonds.

¶ 34 Another section of the Deercrest OMs says that 10% of the loans were to be paid to Deercrest for payment to Deercrest Resort and Clubhouse Ltd. of commissions on sales. How this 10% payment would then find its way to West Karma (if this was the intended structure) was not explained in the Deercrest OMs or elsewhere in the evidence.

¶ 35 Wharram, in his compelled interview, stated that 10% of the offering was paid to West Karma as reimbursement for commissions and that at some point it was agreed by Blackburn that the commission amount would be increased to 12%.

¶ 36 The executive director says that Deercrest raised a total of $3,953,000 from investors. Wharram also provided three separate investor lists for Deercrest to the executive director. Each list confirmed the total investment was $3,953,000. Further, in his compelled interview with Commission staff, he confirmed this as the total amount raised by Deercrest.

¶ 37 The respondents now suggest that this number could be wrong. They did not lead any evidence to suggest that a different amount was raised.

¶ 38 We find that Deercrest raised $3,953,000 from investors.

¶ 39 In August of 2009, approximately $130,000 was transferred from Deercrest bank accounts into a West Karma account. Wharram then withdrew $170,000 from that account which he used towards purchase of a house.

¶ 40 The respondents acknowledge that the $130,000 transferred to West Karma accounts has never been returned. The respondents submit that this was a loan that Wharram intended to repay.

¶ 41 We find that the $130,000 was not repaid to Deercrest.

¶ 42 During 2009, Wharram also used money in Deercrest's bank accounts for personal expenses as follows:

a) $240,000 to lend to his wife, who used those funds to invest in a grocery store; and

b) $24,000 to purchase a ring for his wife.

¶ 43 The respondents say that the $240,000 taken from Deercrest accounts and loaned to Wharram's wife was also a loan from Deercrest to Wharram that was subsequently repaid.

¶ 44 The respondents pointed to a cheque from the co-owners of the grocery store and to West Karma banking records in support of their submissions regarding repayment of the $240,000 loan. The respondents submitted no evidence to identify the cheque (or the related banking records) referred to as a repayment of a loan and there was no documentation to show how West Karma repaid this amount to Deercrest (even if it were a repayment as suggested by the respondents).

¶ 45 We find that the $240,000 was not repaid to Deercrest.

¶ 46 The respondents submit that the $24,000 taken to purchase the ring could have been a commission owing to Wharram or a reimbursement by Deercrest of other funds owing to him. They provided no evidence in support of this submission.

¶ 47 The respondents did not submit that this amount had been repaid. We find that the $24,000 was not repaid to Deercrest.

Bankruptcy proceedings

¶ 48 The investor witnesses testified that interest payments were made on the Falls and Deercrest bonds until the end of 2010.

¶ 49 In February 2011, Blackburn was granted protection from its creditors and in March 2012 a receiver was appointed over its affairs.

¶ 50 During 2011, Falls, Deercrest and West Karma filed claims against Blackburn in its bankruptcy proceedings.

¶ 51 Wharram signed and filed the claims on behalf of each of Falls, Deercrest and West Karma. The claim by West Karma does not form part of the allegations and we have not considered it.

Falls claims

¶ 52 The claim filed by Falls against Blackburn, directly, was for $2,189,301.42; with respect to the joint venture entities (where the funds then were paid over to Blackburn), their claims against Blackburn were for a total of $113,031.33. The total of all of these claims was $2,302,332.75.

¶ 53 During his interview, under oath, with Commission staff, Wharram confirmed that Falls provided these amounts to Blackburn. Notwithstanding this confirmation and the evidence that Wharram previously signed and filed these claims, the respondents now say that these amounts are wrong.

¶ 54 The respondents submit that Falls paid other amounts on behalf of Blackburn that are not contained within this figure. They point to cheques submitted by the executive director and suggest that these were examples of such payments. There are three problems with these submissions.

¶ 55 First, the respondents submitted no evidence as to the nature of these payments, nor were the cheques properly identified.

¶ 56 Second, even if such evidence had been submitted, there was no evidence whether such amounts were included in the $2.3 million submitted in the Blackburn bankruptcy proceedings.

¶ 57 Third, commission staff reviewed bank records of Falls and reconciled (very nearly, but not exactly) the amounts claimed in the bankruptcy proceedings with the bank records.

¶ 58 In the end, the respondents' submissions on this point amount to nothing more than supposition, without compelling evidence to support them.

¶ 59 We find that Falls provided $2.3 million, directly and indirectly, to Blackburn.

Deercrest claims

¶ 60 The claim filed by Deercrest against Blackburn in the bankruptcy proceedings was for $1,636,000. In his interview with Commission staff, under oath, Wharram confirmed that this was the amount that he provided to Blackburn on behalf of Deercrest. The respondents also question the accuracy of this number on a similar basis as described above regarding Falls claims.

¶ 61 They submitted no evidence to suggest that this number was incorrect. For all of the reasons set out above, we find the $1.636 million amount claimed by Deercrest to be the amount provided by Deercrest to Blackburn.

¶ 62 Mr. F, who was another large creditor in the Blackburn bankruptcy proceeding, testified for the respondents. His evidence was that he was advised by the President and owner of Blackburn to lower his claims in the bankruptcy proceedings. Mr. F lowered one of his claims. He said that he was aware that some other creditors were asked to lower their claims as well. He did not know if any of Falls, Deercrest or West Karma was asked to lower its claims or if it did lower its claims. We have no evidence that they did.

¶ 63 As a consequence, Mr. F's evidence is not directly relevant to the issue of the respondents' bankruptcy claims.

¶ 64 Although Mr. F's evidence was not tendered with this explanation from the respondents, the panel presumed that his evidence was tendered to have us infer that their claims were lowered from the actual amounts provided to Blackburn. We decline to make this inference. Mr. F provided no insight why he was asked to lower his claim or why he chose to do so. Lowering a claim amount in a proceeding of this type seems counter-intuitive to achieving the best possible financial outcome. As such, we can draw no general inference why claims would be lowered or that Falls and Deercrest had in fact lowered their claims in the Blackburn bankruptcy.

Sale of the Falls claims

¶ 65 In September 2011, Falls sold its creditor claims against Blackburn to a third party for $64,000.

¶ 66 The proceeds of this sale were deposited in a West Karma bank account and some of these proceeds were spent on personal expenses of Wharram and his family members. The total of these expenditures was $47,500. These expenditures included paying for work done on Wharram's father's jeep, a mortgage payment for Wharram and other personal expenses.

¶ 67 The respondents submit that Wharram repaid almost all of this amount and pointed to certain banking records filed by the executive director to support these submissions.

¶ 68 The banking records the respondents referred to in their submissions were not properly identified or explained by any evidence tendered by the respondents. The respondents simply submit that a record of a deposit into a West Karma bank account, subsequent to the expenditures, evidences a repayment by Wharram for these personal expenses.

¶ 69 These were submissions and not evidence – the panel is left to speculate whether such deposits were repayments. Additionally, these deposits by Wharram were made into a West Karma account, with no evidence of any subsequent transfer of such funds to a Falls account. We find that the $64,000 was not repaid to Falls.

False statements to investigators

¶ 70 Wharram attended a compelled interview, with Commission staff on March 12 and 13, 2013.

¶ 71 During that interview Wharram was asked:

> Q And that's the calendar year, okay. Have you raised any funds from investors in 2013?
>
> A No
>
> Q Are you currently trying to raise any funds from investors?
>
> A No

¶ 72 Mr. S testified that Wharram approached him in early 2013 about lending him some money in support of an effort by Wharram to resurrect the Deercrest project. Mr. S agreed to provide Wharram a short term loan. Banking records of West Karma indicate that $50,000 was deposited by Mr. S into a West Karma account on March 8, 2013.

¶ 73 Commission investigators also contacted two other investors who provided money to Wharram on a similar basis as that described by Mr. S. Banking records confirm that amounts were deposited by those two investors into a West Karma account on March 25, 2013 and April 10, 2013. A review of the West Karma banking records suggests that a fourth investor provided money in this manner on April 2, 2013. The total of these additional deposits was $440,000.

IV Analysis and Findings

A Standard of Proof

¶ 74 The Supreme Court of Canada decision in *F.H. v. McDougall,* [2008] 3 SCR 41, makes clear that in civil cases, including cases of fraud, there is only one standard of proof (para. 49):

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

¶ 75 This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

B Fraud

¶ 76 Section 57(b) of the Act states that:

> 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 perpetrates a fraud on any person.

1. Applicable law

¶ 77 In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal stated the following regarding fraud under the Act (at page 29):

> While proof in a civil or regulatory case does not have to meet the criminal law 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.

¶ 78 The *Anderson* decision cited the elements of fraud from *R. v. Theroux,* [1993] 2 SCR 5 (at page 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).

Allegations

¶ 79 The executive director alleges in the notice of hearing that

a) Falls, West Karma and Wharram breached section 57(b) by raising $5,442,400 from investors for investment with Blackburn, and only advancing $2,300,000 to Blackburn (paragraph 14(a) of the notice of hearing) and

b) Deercrest, West Karma and Wharram breached section 57(b) by raising $3,953,000 from investors for investment with Blackburn and only advancing $1,636,000 to Blackburn (paragraph 20(a) of the notice of hearing).

¶ 80 The executive director also alleges in the notice of hearing that

a) Falls, West Karma and Wharram breached section 57(b) by using most of the $64,000 derived from the sale of the creditor claims in the Blackburn bankruptcy proceedings for Wharram's personal expenses (paragraph 14(b) of the notice of hearing); and

b) Deercrest, West Karma and Wharram breached section 57(b) by using at least $394,000 of the funds raised from investors in Deercrest for Wharram's personal expenses (paragraph 20(b) of the notice of hearing).

¶ 81 The notice of hearing also contains the following in paragraph 9:

> Wharram used at least $75,000 of the Falls Investments towards the purchase of his residence.

¶ 82 It is unclear whether this paragraph is a separate allegation of a contravention of section 57(b). The executive director's written submissions suggest that this is intended as a separate allegation of fraud.

¶ 83 In their submissions the respondents questioned whether this was meant as a separate allegation of fraud, however, they responded to it as an allegation.

¶ 84 As this allegation was part of the misconduct described in the notice of hearing and as the respondents did address this issue in their submissions, we consider the respondents had notice of the allegation and consider it to be a separate allegation of fraud in the notice of hearing.

2. Fraud – not advancing a majority of funds raised to Blackburn

¶ 85 In general, the prohibited acts of the frauds alleged in paragraphs 14(a) and 20(a) of the notice of hearing are the failures to advance funds to Blackburn.

¶ 86 The panel would have interpreted the specific prohibited acts alleged in the notice of hearing more broadly than what the executive director actually alleges in his written and oral submissions. Based on the evidence presented by the executive director, it appears that the prohibited acts alleged in the notice of hearing should relate to the fact that millions of investors' dollars invested in Falls and Deercrest were unaccounted for and were not invested in the projects. This would seem to be the basis for the prohibited acts.

¶ 87 The Falls OMs, the Deercrest OMs and the evidence of the investor witnesses in Falls and Deercrest all show that the purpose of the investment was to invest, in the case of the Falls, in the development of The Falls recreational project and, in the case of Deercrest, to invest in the development of townhomes and a new clubhouse at The Falls. There was no other use of proceeds suggested by the disclosure documents or from the testimony of the investors.

¶ 88 The executive director, however, in accordance with the wording in the Falls OMs and Deercrest OMs, says that the essence of the allegation is that the prohibited acts were the failures of the respondents to loan to Blackburn a "majority of the funds" they raised.

¶ 89 In his submissions, the executive director's counsel clarified that his conception of the issue is whether 50.1% of the proceeds were advanced to Blackburn.

¶ 90 Implicit in this is a concession by the executive director that a failure to prove that Falls and Deerecrest loaned less than 50.1% of the "proceeds" they raised to Blackburn would result in a dismissal of these allegations.

¶ 91 We are bound to consider the allegations before us in the notice of hearing, as clarified by the executive director's counsel.

¶ 92 We are left then with a mathematical exercise to determine if a "majority of proceeds" raised by each of Falls and Deercrest was advanced to Blackburn in the manner contemplated by the Falls OMs and Deercrest OMs, respectively. The principal concerns are what does "majority of proceeds" mean in the OMs and can we determine, with the requisite degree of certainty, if the respondents failed to advance sufficient amounts to Blackburn to satisfy this definition.

The Falls investments

¶ 93 The parties have two different interpretations of the mathematical calculation to determine whether the Falls advanced a "majority of proceeds". We do not think that either one is consistent with the Falls OMs.

¶ 94 The executive director argued that the reference in the Falls OMs to a "majority of proceeds" means greater than 50% of the $5,442,400 raised by Falls. He says that the $2,300,000 Falls advanced to Blackburn (and the four joint venture entities) represented only 42.3% of the proceeds and therefore Falls, West Karma and Wharram committed the prohibited act required as part of proof of fraud.

¶ 95 The respondents say a "majority of proceeds" calculation should be done after deducting expenses of the offering and after accounting for a working capital deficit that was to be repaid. The respondents also say that the expenses of the offering (i.e. the 13.4615% payable to West Karma) should be calculated on the gross amount raised and not on the amount paid to Blackburn.

¶ 96 The following is an excerpt from the Falls OMs describing the use of proceeds:

1.1 Net Proceeds

The net proceeds of this Offering of Units (the "Offering") and the funds that will be available to the Corporation after this Offering are as follows:

		Assuming Minimum Offering	Assuming Maximum Offering
A	Amount to be raised by issuance of this Offering	$50,000	$52,000,000
B	Selling commissions (10%)[1]	$0	$0
C	Working Capital Deficiency due to Offering costs	$62,985	$62,985
D	Net proceeds: D = A – (B + C)	$11,015	$51,961,015

Notes:

[1] *Selling commissions, if any, shall be paid by West Karma Ltd ("WKL").*

[2] Offering costs includes legal fees, accounting fees, printing expenses, and other third party costs. The Issuer has a working capital deficiency of $62,985 as at October 15, 2007. The working capital has been advanced by WKL, a related company, to the Corporation and will be repaid from the proceeds of this Offering.

As of the date of this Memorandum, WKL owns 40% of the issued and outstanding Class A shares of the Corporation. The Officers and Directors of the Issuer are also Officers, Directors and Shareholders of West Karma Ltd. **See Item 3.1 - Compensation Paid and Securities Held.**

1.2 Use of Net Proceeds

The available funds will be used as follows:

Description of intended use of available funds listed in order or priority	Assuming Minimum Offering	Assuming Maximum Offering
1. The majority of the proceeds of this Offering will be loaned to meet its financial contribution obligations pursuant to 4 joint venture agreements to facilitate funding of The Falls: Road to 2010 Development. **See Items 2.2.1 – The Joint Ventures and 2.2.3 – The Joint Venture Agreements**; and	$1,015	$50,200,000
2. To pay for all management, administration, marketing and operating expenses incurred by the Issuer in the conduct of its business. **See Item 2.9 - Material Agreements.**	$10,000	$1,761,015
Total	$11,015	$51,961,015

¶ 97 Later in the Falls OMs there is the following description of the amounts payable to West Karma:

> From the funds advanced to the Joint Ventures, the Joint Venture that receives such funds agrees to transfer 13.4615% of each Loan to [West Karma] as reimbursement for any and all costs and expenses [West Karma] incurs as a result of this Offering and, notwithstanding the amount of its actual costs, [West Karma] shall not be required to repay, refund or rebate any portion of this amount to the Joint Venture.

¶ 98 Neither of the parties' submissions is consistent with the wording outlined above.

¶ 99 Contrary to the executive director's position, it is clear in the Falls OMs that some deductions were intended to be made from the proceeds.

¶ 100 Section 1.1 of the Falls OMs states that Falls would be paid $62,985 for working capital deficiency from the proceeds of the offer. Item 2 in Section 1.2 states that Falls would have its own operating costs (up to a maximum of $1.76 million in the maximum offering) that would not then be available for advance to the real estate development.

¶ 101 Item 1 under section 1.2 then suggests a "majority of funds" are to be advanced. The meaning of a majority of funds in item 1 of section 1.2 is difficult to discern. Whatever it means, it is different from the interpretation advanced by the executive director.

¶ 102 It is also clear that West Karma was to receive its payment from the joint ventures. This intended payment structure was not utilized for long but would suggest that the payments to West Karma should be calculated on the net funds advanced to Blackburn not on the gross proceeds raised. This is different from the interpretation advanced by the respondents.

¶ 103 We are left to determine what "majority of the funds" means in the context of the allegations and these Falls OMs. It is very difficult to discern the intent of the Falls OMs as they are poorly drafted and internally inconsistent.

¶ 104 The most logical interpretation is that a majority of funds would be advanced after the permissible deductions set out in section 1.1 and item 2 of section 1.2. The problem is that we are unable to determine the amount of permissible deductions.

¶ 105 The Falls OMs state that if $52,000,000 was raised from the offering, $1,761,015 of the available funds would be used for management, administration, marketing and operating expenses. There is no evidence and there were no submissions about what the permitted expenses of the Falls would be if only $5.4 million was raised. Nor is there any evidence to show how much of the funds raised was actually spent on expenses.

¶ 106 It is possible that the $1.76 million (or some large portion of it) in expenses were incurred by Falls, and that that was permitted under the Falls OMs.

¶ 107 As a consequence, since we cannot clearly determine what a "majority of proceeds" means in the context of the Falls OMs, we do not have clear and cogent evidence to find, on the balance of probabilities, that Falls, West Karma and Wharram committed the prohibited act of failing to advance "a majority" of the Falls proceeds to Blackburn, as alleged by the executive director.

¶ 108 We dismiss this allegation of a breach of section 57(b) by Wharram, West Karma and Falls.

The Deercrest investments

¶ 109 The Deercrest OMs are structured identically to the Falls OMs in their description of the use of proceeds with two exceptions.

¶ 110 First, the use of proceeds table makes it clear that funds were to be withheld for an interest reserve. It is clear that this was a permissible deduction from the funds to be advanced to the developer.

¶ 111 Second, the treatment of commissions was inconsistent throughout the Deercrest OMs. These two differences only add to the confusion over the appropriate way to interpret a "majority of funds".

¶ 112 For all of the reasons set out in paragraph 107 above, we find that we do not have clear and cogent evidence to find, on a balance of probabilities, that Deercrest, West Karma and Wharram committed the prohibited act of failing to advance "a majority of" the Deercrest proceeds to Blackburn, as alleged by the executive director.

¶ 113 We dismiss this allegation of a breach of section 57(b) by Wharram, West Karma and Deercrest.

3. Use of Falls and Deercrest funds for Wharram's personal expenses

¶ 114 The allegations in paragraphs 9, 14(b) and 20(b) of the notice of hearing, that Wharram fraudulently used money from the Falls and Deercrest for personal purposes, are more straightforward.

i) Prohibited act and deprivation

Money from the Falls used for personal purposes

¶ 115 The $64,000 from the sale of bankruptcy claims was deposited in a West Karma bank account and most of it was then spent on Wharram's personal expenses.

¶ 116 The respondents did not offer any explanation of why the funds were deposited in a West Karma bank account or why they were used for Wharram's personal expenses. The respondents submit that the money was a loan and has been repaid. They submit that on this basis there has been no breach of section 57(b) of the Act.

¶ 117 We have found that these amounts were not repaid. More importantly, repayment of any amount improperly taken is not relevant to the determination of whether the respondents committed a prohibited act.

¶ 118 We find that the taking of the sale of claims proceeds by West Karma and the use of the majority of those funds for personal purposes to be unauthorized and deceitful.

¶ 119 With respect to the $75,000 advanced from Falls to West Karma and then used by Wharram towards purchase of a house, the respondents submit that this was meant as a short term loan and that it was subsequently repaid.

¶ 120 Implicit in this submission is an admission that the funds did not pass from Falls to West Karma for any legitimate business purpose associated with the development.

¶ 121 We find that the taking of the $75,000 from Falls, its deposit into a West Karma account and subsequent use for Wharram's personal expenditures to be unauthorized and deceitful. We have found that actual or intended repayment is not relevant to a determination whether the respondents committed a prohibited act.

¶ 122 We find that Wharram, West Karma and Falls committed the prohibited act of deceit or other fraudulent means when $139,000 (the $75,000 for Wharram's home and the $64,000 sale of claims proceeds) were diverted from Falls to West Karma and then used for Wharram's personal expenses.

Money from Deercrest used for personal purposes

¶ 123 Similarly, with respect to the $130,000 advanced by Deercrest to West Karma and then used by Wharram towards purchase of a house, the respondents suggest that this was also meant as a short term loan. This also acknowledges that the money did not pass from Deercrest to West Karma for any legitimate business purpose associated with the development. We have found that this amount was not repaid to Deercrest and repayment is not relevant to a determination whether the respondents committed a prohibited act.

¶ 124 We find that the taking of the $130,000 from Deercrest, its deposit into a West Karma account and subsequent use for Wharram's personal expenditures to be unauthorized and deceitful.

¶ 125 With respect to the $240,000 loaned to Wharram's wife from the Deercrest accounts, the respondents submit that this was a permissible investment under the Deercrest OMs which state that the directors of Deercrest could reallocate funds from the net proceeds of the offering for sound business reasons. The respondents say that this loan to Wharram's wife was permissible under this provision.

¶ 126 We do not accept this submission. There is no disclosure in the Deercrest OMs about any investments other than an investment in real estate and, more specifically the townhomes and clubhouse at The Falls. This disclosure was confirmed by the investor witnesses who were consistent in their description of their understanding of what they were investing in – real estate development at The Falls. In addition, we do not accept that a reasonable investor would view a non-arm's length loan (with indeterminate terms) as a reallocation of proceeds for "sound business reasons".

¶ 127 The respondents also say that this amount was ultimately repaid. We have found that this amount was not repaid and, in any event, repayment is not relevant to a determination whether the respondents committed the prohibited act.

¶ 128 We find the taking of the $240,000 from Deercrest, its deposit into a West Karma account and subsequent use for Wharram's personal expenditures to be unauthorized and deceitful.

¶ 129 With respect to the $24,000 taken by Wharram to pay for a ring for his wife, the respondents submitted that that amount could have been funds that were owing to Wharram for commissions or for other reasons.

¶ 130 First, the respondents provided no evidence to support this submission. It is nothing more that conjecture.

¶ 131 Second, a commission owing to Wharram would be inconsistent with the structure of commission payments. Wharram advised Commission staff, in his compelled interview, that commissions were paid to West Karma and West Karma was responsible for paying commissions and other expenses of the offering.

¶ 132 We find that the taking of $24,000 from Deercrest for Wharram's personal expenses to be deceitful.

¶ 133 We find that:

a) Wharram, West Karma and Falls committed the prohibited act of deceit or other fraudulent means when $139,000 (the $75,000 for Wharram's home and the $64,000 sale of claims proceeds) were taken from Falls, deposited into a West Karma account and then used for Wharram's personal expenses;

b) Wharram, West Karma and Deercrest committed the prohibited act of deceit or other fraudulent means when $130,000 was taken from Deercrest, deposited into a West Karma account and then used for Wharram's personal expenses; and

c) Wharram and Deercrest committed the prohibited act of deceit or other fraudulent means when $265,000 was taken from Deercrest's bank accounts and used for Wharram's personal expenses.

ii) *Deprivation*

¶ 134 We find that the prohibited acts caused deprivation. The investors have lost all the money Wharram used for personal purposes. There is no evidence of repayment. Even if there were evidence of repayment, the prohibited acts put the investors' money at risk of deprivation, which meets the deprivation element of fraud as laid out in *Theroux, supra*.

iii) *Respondents' subjective knowledge of the prohibited acts and deprivation*

¶ 135 The evidence is clear that Wharram had subjective knowledge of the prohibited acts. He knew that funds were being diverted for personal expenses.

¶ 136 Regarding the element of knowledge that the prohibited acts would cause deprivation or risk of deprivation, the respondents submit that they believed the money would be repaid in the case of the loans, or that Wharram was entitled to loan the money to his wife under the Deercrest OMs.

¶ 137 As noted above, we do not accept this submission as reasonable nor do we have evidence to support it - we only have unsubstantiated submissions.

¶ 138 In addition, a person's belief that money diverted through the prohibited act will be repaid, is irrelevant to the issue of whether that person had subjective knowledge of the deprivation. As set out in *Theroux* at page 19:

> The *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what her or she was doing, provides no defence….The personal feeling of the accused about the morality or honesty of the act or its consequences is

no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

¶ 139 Whether Wharram believed that many of these amounts were loans and that he would repay them is not relevant.

¶ 140 We find that Wharram had both the subjective knowledge of the prohibited act and the subjective knowledge of deprivation.

¶ 141 As Wharram was the directing mind of all of West Karma, Falls and Deercrest, we find that his subjective knowledge establishes the requisite subjective knowledge of the corporate respondents (for the prohibited acts and deprivation found as set out above).

Conclusion on fraud allegation of using funds for personal purposes

¶ 142 We find that:

a) Wharram, West Karma and Falls breached section 57(b) when they took $139,000 ($75,000 for the purchase of a home and $64,000 sale of claims proceeds) from Falls, deposited it with West Karma and then used it for Wharram's personal expenses;

b) Wharram, West Karma and Deercrest breached section 57(b) when they took $130,000 from Deercrest, deposited it with West Karma and then used it for Wharram's personal expenses; and

c) Wharram and Deercrest breached section 57(b) when they took $265,000 directly from Deercrest's bank accounts and used it for Wharram's personal expenses.

¶ 143 The notice of hearing contains a separate allegation that Wharram is liable for the fraud of the corporate respondents under section 168.2. As a result of the findings above that Wharram was directly involved and personally breached section 57(b), it is not necessary to separately consider whether Wharram would be indirectly liable for the corporations' breaches of section 57(b). As an aside, were it necessary, we would have found that Wharram was liable for the breaches of s.57(b) by the corporate respondents by virtue of section 168.2.

C False statements to an investigator

¶ 144 Section 168.1(1)(a) states a person must not,

> Make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

¶ 145 The executive director submits that Wharram lied to a Commission investigator when he gave the answers set out in paragraph 71 above during his compelled interview.

¶ 146 The Commission investigator was a person appointed under the Act, pursuant to a Commission investigation order dated June 29, 2012.

¶ 147 Wharram says that the statements are not false in that in the spring of 2013 he was attempting to obtain bridge loans to purchase the Deercrest project for a company that is not one of the respondents. He says that getting loans is not the same as raising funds from investors and that the questions were not specific as to which respondent they were referring to.

¶ 148 Implicit in Wharram's submission is a distinction that he appears to make between a loan and an investment. Under the Act there is no such distinction. In plain parlance, we do not see that distinction either. He was asked if he had raised funds from investors in 2013 and if he was intending to raise funds from investors. The truthful answer to both those questions was yes. Wharram said no.

¶ 149 In *Re Nuttall* 2011 BCSECCOM 521, at paragraph 44, the Commission said the following regarding materiality:

> The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.

¶ 150 In this case, Wharram's answers were the opposite of the truth, and therefore they were, in a material respect, false for the purpose of section 168.1(1)(a).

¶ 151 We find that Wharram breached section 168.1(1)(a).

V Summary of Findings

¶ 152 We find that:

a) Wharram, West Karma and Falls breached section 57(b) when they took $139,000 ($75,000 for the purchase of a home and $64,000 sale of claims proceeds) from Falls, deposited into a West Karma account and then used it for Wharram's personal expenses;

b) Wharram, West Karma and Deercrest breached section 57(b) when they took $130,000 from Deercrest, deposited into a West Karma account and then used it for Wharram's personal expenses;

c) Wharram and Deercrest breached section 57(b) when they took $265,000 directly from Deercrest's bank accounts and used it for Wharram's personal expenses; and

d) Wharram contravened section 168.1(1)(a) when he made false statements to Commission investigators.

VI Submissions on Sanction

¶ 153 We direct the parties to make their submissions on sanctions as follows:

By March 6, 2015	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By March 20, 2015	The respondents deliver response submissions to the executive director and to the secretary to the Commission. Either party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By March 27, 2015	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

¶ 154 February 11, 2015

¶ 155 **For the Commission**

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Judith Downes
Commissioner

Don Rowlatt
Commissioner