

Citation: 2014 BCSECCOM 91

**Oriens Travel & Hotel Management Corp.,
Alexander Anderson and Ken Chua**

Securities Act, RSBC 1996, c. 418

Hearing

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| Panel | Suzanne K. Wiltshire | Commissioner |
| | Judith Downes | Commissioner |
| | Audrey T. Ho | Commissioner |

Hearing Dates September 9, 10 and 12, 2013

Submissions Completed November 27, 2013

Date of Findings March 13, 2014

Appearing

Veda Kenda For the Executive Director

Owais Ahmed For Ken Chua

Stephen O'Neill For Alexander Anderson

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.
- ¶ 2 In a notice of hearing issued December 19, 2012 (BCSECCOM 485), the executive director alleged that:
- the respondents, Oriens Travel & Hotel Management Corp., Alexander Anderson and Ken Chua, contravened section 61(1)(a) of the Act by distributing securities of Oriens to three British Columbia resident investors for proceeds of \$US58,500 without filing a prospectus;
 - in distributing the Oriens securities, the respondents breached the terms of a cease trade order to which Oriens was subject; and

- Chua and Anderson made misrepresentations to the investors contrary to section 50(1)(d) of the Act when they failed to advise them about the existence of the cease trade order.

II Background

A The Respondents

- ¶ 3 Oriens was incorporated in Nevada in 2001. Oriens' shares are quoted on the Pink Sheets in the United States.
- ¶ 4 Oriens' executive offices are in Las Vegas, Nevada. Its principal business operations office was located in Richmond, British Columbia.
- ¶ 5 Oriens describes itself as being in the business of hotel management and development and operating an online travel reservation system.
- ¶ 6 Pure Hotels Canada Limited was a wholly-owned boutique hotel brand of Oriens.
- ¶ 7 Oriens has never been registered to trade in securities and has never filed a prospectus under the Act.
- ¶ 8 Chua is the president and chief executive officer of Oriens. Anderson is the secretary of Oriens. Neither Chua nor Anderson have been registered in any capacity under the Act.
- ¶ 9 Oriens is a reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* (formerly, BC Instrument 51-509) and, as such, is required to file financial statements in British Columbia.
- ¶ 10 On January 20, 2009, a cease trade order was issued against Oriens for failure to file the financial statements required under BCI 51-509.
- ¶ 11 Chua and Anderson received a copy of the Cease Trade Order.
- ¶ 12 On October 5, 2010, there was a meeting at Oriens' Richmond offices attended by Chua, Anderson and the three investors, Investor A, Investor B and Investor C, at which the investors each entered into a share subscription agreement to purchase one million Oriens shares for \$US19,500 and a stock option agreement.

B. The Investors

Investor A

- ¶ 13 Investor A is a British Columbia resident who has been a real estate agent in British Columbia for 27 years.

- ¶ 14 Investor A and Chua knew each other in high school but had met only occasionally in the eight or nine years prior to their first meeting regarding Oriens in June 2010.
- ¶ 15 Investor A and Chua met about 15 times between June and October 5, 2010. At the meetings, Chua discussed the possibility of Investor A introducing clients to Oriens and gave him information regarding Oriens' business.
- ¶ 16 Investor A had no prior relationship with Anderson. He met with Anderson two times between June and October 5, 2010.
- ¶ 17 Investor A's realty company signed an independent agent agreement with Oriens and Investor C on September 9, 2010. The agreement dealt with the terms on which Investor A and Investor C would provide referrals of potential clients to Oriens.
- ¶ 18 Investor A also signed a stock option agreement dated October 5, 2010 with Oriens in which he represented he was "a partner in the Companies (sic) expansion through qualified agents into the Hotel business in the Peoples Republic of China".
- ¶ 19 Investor A introduced three clients to Oriens, none of whom had subsequent business dealings with Oriens.

Investor B

- ¶ 20 Investor B is a British Columbia resident.
- ¶ 21 Investor B had no relationship with Chua or Anderson prior to his first meeting with Chua in the summer of 2010.
- ¶ 22 Investor B met with Chua approximately four or five times and Anderson only once prior to his October 5 purchase of Oriens shares. At the meetings, Chua discussed the possibility of Investor B introducing clients to Oriens and gave him information regarding Oriens' business.
- ¶ 23 Investor B did not sign the Independent Agent Agreement signed by Investor A and Investor C.
- ¶ 24 Investor B signed a stock option agreement dated October 5, 2010 in the same form as that signed by Investor A.
- ¶ 25 After his purchase of Oriens shares, when Investor B was in China on other business he made inquiries into whether the Pure brand could be registered in China.

¶ 26 Investor B introduced one client to Oriens who had no subsequent business dealings with Oriens.

Investor C

¶ 27 Investor C is a British Columbia resident.

¶ 28 Investor C had no relationship with Chua or Anderson prior to her first meeting with Chua in May or June 2010.

¶ 29 Investor C met with Chua approximately 10 to 20 times and Anderson two to three times between May/June and October 5, 2010. At the meetings, Chua discussed the possibility of Investor C introducing clients to Oriens and gave her information regarding Oriens' business.

¶ 30 Investor C and Investor A signed the Independent Agent Agreement.

¶ 31 Investor C also signed a stock option agreement dated October 5, 2010 in the same form as that signed by Investor A and Investor B.

¶ 32 Investor C introduced between five and ten clients to Oriens, none of whom had subsequent business dealings with Oriens.

¶ 33 Investor C testified she did a significant amount of work for Oriens but did not testify as to what she considered "significant".

III Analysis and Findings

A The Issues

Illegal Distribution

¶ 34 Section 61(1) says ". . . a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and the executive director has issued receipts for them.

¶ 35 Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

¶ 36 The respondents do not contest that they sold Oriens shares to the investors, the Oriens shares are securities, the sales were distributions under the Act or that no prospectus was filed in connection with the distributions.

¶ 37 The issue is what prospectus exemptions, if any, were available to the respondents in connection with the distributions.

Breach of Cease Trade Order

- ¶ 38 The Cease Trade Order ceases all trading in Oriens securities until Oriens files the required records and the executive director revokes the order. Effectively, it prohibits all trades in Oriens securities in British Columbia, including the sale of Oriens securities to the investors which took place on October 5, 2010 at Oriens' Richmond, British Columbia office and any subsequent trades by the investors of those securities in British Columbia.
- ¶ 39 Chua admitted that he breached the Cease Trade Order when he sold Oriens shares to the investors. He submitted there are mitigating factors to be addressed at the sanctions stage of the hearing.
- ¶ 40 Anderson admitted that the distribution of Oriens shares was a breach of the Cease Trade Order. However, he submitted he should not be held responsible for the breach.
- ¶ 41 The issue is whether Anderson distributed Oriens shares to the investors in breach of the Cease Trade Order.

Misrepresentation

- ¶ 42 Section 50(1)(d) of the Act says a “person . . . while engaging in investor relations activities or with the intention of effecting a trade in a security, must not . . . make a statement that the person knows, or ought reasonably to know, is a misrepresentation.”
- ¶ 43 Section 1(1) defines “misrepresentation” as “an untrue statement of a material fact” or “an omission to state a material fact that is (i) required to be stated, or (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.”
- ¶ 44 Section 1(1) defines “material fact” as a fact about a security “that would reasonably be expected to have a significant effect on the market price or value” of a security.
- ¶ 45 The issue is whether Chua and Anderson made misrepresentations to the investors contrary to section 50(1)(d) of the Act when they failed to advise the investors of the existence of the Cease Trade Order.

B Discussion

Prospectus Exemptions

General

- ¶ 46 In *Solara Technologies Inc. and William Dorn Beattie* 2010 BCSECCOM 163, the Commission confirmed:

- it is the responsibility of a person trading in securities to ensure the trade complies with the Act whether by filing a prospectus or by using an available exemption; and
- a person relying on an exemption has the onus of proving the exemption is available.

¶ 47 The Commission also stated that it is unlikely a person will be able to prove an exemption was available at the time of a trade if it does not have documentation to prove it made a proper determination to that effect.

¶ 48 There is little evidence the respondents made any inquiry or proper determination of the availability of any exemptions at the time the Oriens shares were sold to the investors.

Accredited Investor Exemption

¶ 49 Section 2.3 of National Instrument 45-106 *Prospectus and Registration Exemptions* removes the prospectus requirement if the purchaser is an accredited investor. The investors testified they did not qualify as accredited investors at the time of their investment in Oriens shares. We find that the prospectus exemption under section 2.3 of NI 45-106 was not available for the distribution of Oriens shares to the investors.

Close Personal Friend Exemption

Subsection 2.5(1)(d) of NI 45-106 removes the prospectus requirement if the investor is a close personal friend of a director or executive officer of the issuer. The investors testified they were not close personal friends of a director or executive officer of Oriens at the time of their investment in Oriens shares. We find that the prospectus exemption under subsection 2.5(1)(d) of NI 45-106 was not available for the distribution of the Oriens shares to the investors.

Consultant Exemption

¶ 51 Section 2.24 of NI 45-106 removes the prospectus requirement if the purchaser is a consultant of an issuer.

¶ 52 Section 2.22 of NI 45-106 defines “consultant” as a person that

“(a) is engaged to provide services to the issuer ..., other than services provided in relation to a distribution,

(b) provides the services under a written contract with the issuer..., and

(c) spends or will spend a significant amount of time and attention on the affairs and business of the issuer...”.

- ¶ 53 Both Chua and Anderson submitted that the investors were consultants of Oriens.
- ¶ 54 Investor A and Investor C were engaged to provide services to Oriens under the Independent Agent Agreement.
- ¶ 55 Investor A met with Chua only 15 times between June and October 5, 2010 which is less than once a week. Those meetings were either informational in nature or for the purpose of introducing potential clients.
- ¶ 56 Investor C said she did significant work for Oriens but the evidence regarding the services she provided does not support this. Investor C said she met with Chua between ten and 20 times between May or June and October 5, 2010 which at most is a little over once a week. Again those meetings were informational or introductory in nature.
- ¶ 57 The investors were each a party to a Stock Option Agreement in which they represented they were a partner of Oriens. Even if this representation could be construed as an engagement to provide services, the only services provided by Investor A and Investor C are as outlined above. As to Investor B, he met with Chua only four or five times prior to October 5, 2010 for the same purposes described above. His activities in China regarding registration of the Pure brand were inquiries only into the feasibility of such registration.
- ¶ 58 We find that as none of the investors spent a significant amount of time and attention on the affairs and business of Oriens, they did not qualify as consultants to Oriens at the time of their investment and the prospectus exemption under section 2.24 of NI 45-106 was not available for the distribution of the Oriens shares to the investors.

Business Associates Exemption

- ¶ 59 Subsection 2.5(1)(e) of NI 45-106 removes the prospectus requirement if the investor is a close business associate of a director or executive officer of the issuer.
- ¶ 60 Section 2.8 of the companion policy to NI 45-106 says that a “close business associate” is a person who has had sufficient prior business dealings with the director or officer to be in a position to assess their capabilities and trustworthiness. The Commission approved this interpretation in *Solara*.
- ¶ 61 Anderson said that the involvement of the investors with Oriens was that of close business associates. He relied in particular on the representation made by the

investors in the Stock Option Agreement that they were “partners” of Oriens. The investors testified they did not read or did not understand the terms of that agreement.

- ¶ 62 Regardless of the terms of the Stock Option Agreement or the investors’ understanding of them, one must look at the facts of the relationship. The investors had no business dealings with Chua or Anderson prior to their dealings regarding Oriens other than a referral made in the early 1990’s by Investor A to Chua of two potential customers for Chua’s car dealership. With respect to business dealings with Oriens prior to their share purchase, the investors had a limited role as a source of referrals of potential clients and had limited dealings with Chua and Anderson. These dealings were not such as to put the investors in a position to assess the capabilities and trustworthiness of Chua and Anderson. We find they did not qualify as close business associates at the time of their investment and that the prospectus exemption in subsection 2.5(1)(e) of NI 45-106 was not available for the distribution of the Oriens shares to the investors.

Employee Exemption

- ¶ 63 Section 2.24 of NI 45-106 removes the prospectus requirement if the purchaser is an employee of an issuer.
- ¶ 64 Chua submitted that the investors were employees of Oriens. In the absence of a definition of “employee” in NI 45-106, Chua cited the definition in section 1(1) of the *Employment Standards Act*, RSBC 1996 c. 113. This definition includes a person an employer allows to perform work normally performed by an employee. Chua said the investors were all providing services to Oriens that would normally be performed by an employee.
- ¶ 65 Section 1(1) of the *Employment Standards Act* also defines “employer”. The definition includes a person who has control or direction of an employee. Oriens did not have control or direction over the services of the investors under the Independent Agent Agreement or the Stock Option Agreement. As such, we find the investors were not employees of Oriens and the prospectus exemption under section 2.24 of NI 45-106 was not available for the distribution of Oriens shares to the investors.

Isolated Trade Exemption

- ¶ 66 Section 2.30 of NI 45-106 says:

“The prospectus requirement does not apply to a distribution by an issuer of a security of its own issue if the distribution is an isolated distribution and is not made

- (a) in the course of continued and successive transactions of a like nature, and

(b) by a person whose usual business is trading in securities.”

¶ 67 Anderson submitted that the purchase of Oriens shares by the investors constituted a single trade. He said the investors were at all times acting as a group. He submitted they approached Chua together, negotiated together and signed subscription agreements together. He said Investor C paid for the shares purchased by Investor A and may also have paid or contributed to the purchase by Investor B. He argued all of the activities constituting the transaction occurred at the same time and the purchases were concurrent not successive.

¶ 68 The facts that all of the investors were present when the terms of the subscriptions were negotiated, all of the subscription agreements were signed at the same meeting and Investor C loaned Investor A the money to buy his shares do not make the purchases a single trade. The investors each purchased their Oriens shares under a separate agreement. While Investor C loaned Investor A money to buy his shares, she issued separate cheques for each of their subscriptions. Investor B provided a bank draft in payment for his shares. Separate share certificates were issued to each investor. While the purchases may have been concurrent, they were three separate trades.

¶ 69 With the issuance of stock options to the investors, there were also transactions in other securities of Oriens on that date.

¶ 70 We find that the prospectus exemption in section 2.30 of NI 45-106 was not available for the distribution of the Oriens shares to the investors.

Breach of Cease Trade Order by Anderson

¶ 71 Section 1(1) of the Act defines “trade” to include any act, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade.

¶ 72 A breach of the Cease Trade Order does not require Anderson to have a particular state of knowledge. Anderson simply needs to have made a trade in British Columbia of Oriens shares while the Cease Trade Order was outstanding.

¶ 73 Anderson was an officer of Oriens. He participated in the October 5 meeting with Chua and the investors which took place at Oriens’ Richmond, British Columbia office. There was evidence it was clear to all attendees that the purpose of the meeting was to sell Oriens shares to the investors. Anderson explained to the investors the “lock-up” provisions of the share subscription agreement which restricted sales of the Oriens shares in the two years following the share purchase. The liquidity of shares is an important factor in any share purchase decision.

¶ 74 We find Anderson’s activities at the October 5 meeting were acts, directly or indirectly, in furtherance of a trade in British Columbia and constituted a breach of the Cease Trade Order.

Misrepresentation

¶ 75 To establish that Chua and Anderson made a misrepresentation to the investors in breach of section 50(1)(d) of the Act, it must be shown that:

- Chua and Anderson were engaged in investor relations activities or had the intention of effecting a trade in a security in their dealings with the investors; and
- while doing so, Chua and Anderson made statements that they knew or ought reasonably to have known were misrepresentations.

¶ 76 The sale of Oriens securities to the investors took place at the October 5 meeting. At that meeting, Chua presented and signed the subscription agreements and the stock option agreements. Anderson explained the “lock-up” resale restrictions on the shares. We find that Anderson and Chua had the intention of effecting a trade in Oriens shares in their dealings with the investors at the October 5 meeting.

¶ 77 The Cease Trade Order prohibited the sale of the Oriens securities to the investors which took place at the October 5 meeting and any subsequent trades in those securities by the investors in British Columbia. The facts that a securities transaction is prohibited and there are restrictions on liquidity of those securities are facts that could reasonably be expected to have a significant effect on the value of those securities. We find the existence of the Cease Trade Order to be a material fact.

¶ 78 Chua and Anderson both had knowledge of the Cease Trade Order. Chua testified that it was only after the notice of hearing was issued that he learned from his legal counsel that the effect of the Cease Trade Order was that Oriens could not conduct any trades in British Columbia. Anderson did not testify. Chua and Anderson cannot rely on their failure to properly inform themselves of the effect of the Cease Trade Order as a defence to the allegation that they knew, or ought reasonably to have known, the omission to disclose the Cease Trade Order was a misrepresentation.

¶ 79 On examination by counsel for the executive director, all of the investors testified that neither Chua nor Anderson disclosed the Cease Trade Order at or prior to the October 5 meeting. They gave the same answers on cross-examination by counsel for the respondents. Each investor’s testimony was consistent and corroborated by the other investors. They also said that if they had known about the Cease Trade Order, they would not have purchased Oriens shares.

- ¶ 80 In his examination by his own legal counsel, Chua said that the terms of the share purchase were discussed at a meeting with the investors on October 4. He testified that he told the investors about the Cease Trade Order at that meeting. However, when asked what he said, he said he told them Oriens could not sell shares to British Columbia residents as his understanding of the Cease Trade Order was that Oriens could not trade with any British Columbia resident because Oriens stock was actively trading on an American exchange.
- ¶ 81 In cross-examination by counsel for the executive director, Chua said for the first time that at the October 4 meeting he put up the Oriens stock chart while discussing share prices. He said that there was a reference to the Cease Trade Order under the Oriens stock quote and that he clicked onto a screen that showed the British Columbia Securities Commission had issued the Cease Trade Order. Chua also said for the first time that he told the investors they could not sell their shares but the investors said it was not a problem as they could sell in Hong Kong. As Anderson did not testify, there was no corroboration of this testimony. Chua did not present any other evidence to support his testimony.
- ¶ 82 We do not find Chua's testimony regarding what he told the investors about the Cease Trade Order to be credible as his testimony changed and was internally inconsistent and uncorroborated.
- ¶ 83 We prefer the investors' testimony over Chua's and find that neither Chua nor Anderson disclosed the Cease Trade Order to the investors at or prior to the October 5 meeting.
- ¶ 84 We find that in presenting the terms of the share subscription agreement and explaining the "lock up" resale restrictions on the Oriens shares without disclosing that the Cease Trade Order prohibited the transaction in its entirety and any subsequent sales of those shares by the investors in British Columbia, Chua and Anderson omitted to state material facts necessary to prevent statements that were made from being false and misleading in the circumstances in which they were made. Consequently, we find Chua and Anderson made misrepresentations to the investors contrary to section 50(1)(d) of the Act when they failed to advise them of the existence of the Cease Trade Order.
- ¶ 85 Anderson submitted virtually all discussions among Chua and the investors were in Mandarin or Cantonese, he had no involvement in discussions regarding the addresses to be used in the subscription agreements and no reason to believe that the investors were British Columbia residents. Based on our findings above regarding the nature of the misrepresentations made by Chua and Anderson, Anderson's knowledge regarding the residency of the investors is not a defence to the misrepresentation allegation.

- ¶ 86 Chua submitted the notice of hearing is void on its face because it failed to particularize exactly what statement Chua made that was “false and misleading”. He said that the first time the statement was particularized was in the executive director’s written submissions on liability. Chua argued it was not open to the executive director to make allegations for the first time in its closing submissions. Chua did not provide any support for his argument.
- ¶ 87 The relevant allegation in the notice of hearing states that “Chua and Anderson failed to advise the investors about the existence of the Order, and thereby made misrepresentations to the investors, contrary to section 50(1)(d) of the Act”. We find there is sufficient detail in the notice of hearing to provide the respondents with notice of the case to be made. We find no merit in Chua’s argument.
- ¶ 88 Chua also submitted that for the failure to disclose the existence of the Cease Trade Order to constitute an omission to state a material fact that is required to be stated under the first branch of the definition of misrepresentation, there must be a legal requirement to make such disclosure. Chua stated that as the executive director did not present evidence as to the source of that legal requirement, any argument that the failure to disclose the existence of the Cease Trade Order constituted a misrepresentation must fail. Based on our above finding, it is not necessary to consider this argument.

IV Summary of Findings

¶ 89 We find that:

1. The respondents contravened section 61(1)(a) of the Act by distributing Oriens shares to the investors for proceeds of \$US58,500 without filing a prospectus and for which no exemptions were available.
2. In distributing the Oriens shares to the investors, the respondents breached the terms of the Cease Trade Order.
3. Chua and Anderson made misrepresentations to the investors contrary to section 50(1)(d) of the Act when they failed to advise them of the Cease Trade Order.

V Submissions on sanction

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

By April 3, 2014 The executive director delivers submissions to the respondents and to the secretary to the Commission

By April 24, 2014 The respondents deliver response submissions to the executive director, to each other, and to the secretary to the Commission

By April 24, 2014 Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission

By May 1, 2014 The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission

¶ 91 March 13, 2014

¶ 92 **For the Commission**

Suzanne K. Wiltshire
Commissioner

Judith Downes
Commissioner

Audrey T. Ho
Commissioner