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

Citation: Re Davis, 2016 BCSECCOM 214 Date: 20160622

**Larry Keith Davis**

| | | |
|---|---|---|
| **Panel** | Suzanne K. Wiltshire | Commissioner |
| | George C. Glover, Jr. | Commissioner |
| | Don Rowlatt | Commissioner |
| **Hearing Dates** | February 1, 2, 5 and 9, 2016 | |
| **Submissions Completed** | May 9, 2016 | |
| **Date of Findings** | June 22, 2016 | |

**Appearing**

| | |
|---|---|
| Olubode Fagbamiye | For the Executive Director |
| Patricia A.A.Taylor | For Larry Keith Davis |

## 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 March 13, 2015 (2015 BCSECCOM 93), the executive director alleged that the respondent Larry Keith Davis perpetrated fraud contrary to section 57(b) of the Act when:

a) he told an investor on two separate occasions that she could purchase through him shares of FormCap Corp., a Nevada company trading in a U.S. over-the-counter market;

b) he did not own any FormCap shares when he twice purported to sell FormCap shares to the investor, or at any subsequent time;

c) he did not spend the investor's funds, totalling $7,000, to acquire FormCap shares but spent the funds on his own personal expenditures; and

d) he did not return the investor's funds when she asked him to do so, but continued to deceive her by claiming that her investments were in shares tied to the stock market,

still sound and intact but not liquid, and guaranteed she would never lose her principal amount of $7,000.

[3] At the beginning of the hearing, the executive director withdrew the separate allegation of conduct contrary to the public interest with respect to the respondent's conduct described in the Notice of Hearing.

[4] During the hearing, the executive director called two witnesses, a Commission investigator and the investor ("WM"), tendered documentary evidence and made written submissions.

[5] The respondent and his wife both testified at the hearing and the respondent also tendered documentary evidence and made written submissions.

## II. Background

[6] The respondent is resident in British Columbia and at the relevant time was working in investor relations using the name Bravo International Services (Bravo). He has never been registered under the Act.

[7] WM was a neighbour and friend of the respondent and his family. She had almost no prior investment experience and was not a knowledgeable investor.

*Respondent's Relationship with FormCap*

[8] In 2009 the respondent began doing investor relations work for some companies. His involvement with these companies was through an individual ("Mr. B") with whom he had had a casual relationship on and off over a number of years. One of these companies was FormCap.

[9] The respondent had no agreement with FormCap to provide investor relations services and received no remuneration from FormCap. He obtained information relating to FormCap from Mr. B and from public sources.

[10] The respondent testified that Mr. B arranged for the respondent to be remunerated for his work in relation to FormCap by the transfer of FormCap shares to him from existing shareholders. In January 2011 that remuneration by share transfer ended. By April 2011 the respondent had sold all the FormCap shares he had previously received.

[11] The respondent testified that in early June 2011, Mr. B told him FormCap was planning a reorganization and share consolidation on a 1-for-10 share basis. Mr. B indicated the consolidation would take place in August or September 2011. Mr. B also told him that he would arrange for a million FormCap shares to be transferred to the respondent from other existing shareholders for his ongoing investor relations work concerning FormCap which would result in the respondent having 100,000 FormCap shares post-consolidation. The respondent said as a result he continued to provide investor relations services relating to FormCap.

[12] While the respondent may have believed, based on past experience, that Mr. B would arrange to have FormCap shares transferred to him from other shareholders for the FormCap investor relations work the respondent was doing in 2011 and later, there was no evidence of any enforceable agreement by Mr. B to do so.

[13] In an April 2014 telephone conversation, followed by an email exchange, with a Commission investigator, Mr. B stated that: he did not recall that he had offered any FormCap shares to the respondent; and, while he had recommended the respondent to FormCap and other companies as someone to do investor relations work for them, he was not involved in any arrangements or discussions between the respondent and those companies.

[14] In the final result, the respondent never received any FormCap shares after January 2011.

[15] In July 2011 FormCap announced that it had approved a consolidation of its shares on a 1-for-10 share basis by which shareholders would receive one share for every ten shares tendered.

*First Investment*

[16] WM testified that the respondent told her in June 2011 that he was working on a deal and there was an investment opportunity for WM but the respondent did not give her the name of the company in which she would be investing.

[17] WM sold the only securities she had for proceeds of $985. With those proceeds and money from her bank account she obtained a money order payable to the respondent for $4,000 on June 17 and gave it to the respondent for investment in the opportunity.

[18] The respondent deposited the money order to his personal bank account on June 20. At the time the account was in overdraft in the amount of $1,859.64, resulting in the deposit bringing the account into a positive balance of $2,140.36.

[19] By June 23, the respondent had spent an additional $931.26 of the funds deposited on personal expenditures, including utilities, entertainment, groceries and pharmacy, and cash withdrawals, leaving a positive balance of $1,209.10. By July 14, the account was again in overdraft with all of the funds deposited having been spent by the respondent on personal expenditures.

[20] On June 24, the respondent issued a receipt to WM on Bravo letterhead for the $4,000 received from WM in reference to "attached Share Exchange Agreement for, FormCap Corp".

[21] The document referred to in the Bravo receipt was identified by both the respondent and WM as the document dated June 24, 2011 and entitled "Stock Purchase Agreement" that was entered into evidence. We refer to this document as the SPA.

[22] The respondent was the author of the SPA having printed it from his home computer. While WM was present on June 24, he filled it in, signed it and had his wife witness his signature. WM did not sign the agreement at that time because the respondent did not tell her to sign it and there was no place indicated for her to sign.

[23] WM testified that the respondent skimmed through the SPA to provide a quick explanation to her. It was at this point she first learned that FormCap was the name of the company in which she was investing and became aware that her $4,000 investment would turn into 40,000 shares of FormCap in August or September 2011.

[24] The SPA was later amended by hand at the insistence of WM on May 17, 2013, to reflect the addition of her second investment.

[25] The terms of the SPA (prior to its amendment to reflect the second investment):

- Identify the respondent as the seller and are premised on the seller being "the record owner and holder of the issued and outstanding shares of the capital stock, ('FormCap Corporation'), a Nevada Corporation, which is consolidating its issued capital stock on a 1 new share for 10 old shares".

- Identify WM as the purchaser

- Provide that in consideration of the purchase price set forth in the agreement: the seller "shall sell, convey, transfer and deliver to the Purchaser certificates representing such stock"; and, the certificates shall be delivered by the seller to the purchaser "…upon the closing of the transactions contemplated by this Agreement ("Closing"), shall be held on or about AUG/SEPT/2011, or date and time as the parties hereto may otherwise agree".

- Set out the seller's representations and warranties, including that he is "the lawful owner of the stock, …"

- Provide that the SPA and any written amendments to it constitute the entire agreement and supersede all prior agreements and understandings between the parties with respect to WM's purchase of the FormCap shares.

- In Exhibit "A" to the SPA entitled "Amount and Payment of Purchase Price":

  (a) with reference to consideration, set out the purchase price as being $4,000;

(b) with reference to payment provide:

> The Purchase Price shall be paid as follows: I. The sum of shares to be delivered by the Seller upon the completion of the Corporation's consolidation of its shares.
>
> Agreement:
>
> The sum of 40,000 FRMC shares to be delivered to Purchaser upon closing.

*FormCap Abandons Consolidation*

[26] By October 17, 2011 FormCap had determined to abandon the proposed 1-for-10 share consolidation and disclosed this publicly. The respondent knew the 1-for-10 share consolidation was not proceeding but did not convey this information to WM.

[27] The respondent testified that FormCap then entered a "grey period" which was ongoing at the time of the second investment, because the company had no money and was unable to complete its financial statements. The respondent did not convey this information to WM.

*Second Investment*

[28] In April 2012, the respondent told WM another opportunity had become available to purchase FormCap shares, there was a short window of time to invest and other investors were investing more funds.

[29] WM testified that even though the respondent had not yet delivered to her the FormCap shares for her first investment, she had complete trust in the respondent and found the opportunity to increase her investment attractive.

[30] WM made a second investment of $3,000 for 30,000 FormCap shares. The investor paid the amount to the respondent in cash at his request after telling him she could not obtain a money order as he had earlier indicated to be his preference.

[31] WM testified she again thought she was buying FormCap shares from the respondent through Bravo. At that time, she opened a brokerage account at a brokerage firm that the respondent suggested so that the FormCap shares she was purchasing could be deposited there.

[32] The respondent did not give WM a share purchase agreement or receipt at the time to confirm her second investment of $3,000 for 30,000 FormCap shares. This later became a concern to WM.

[33] Subsequent to the second investment, FormCap restructured and commenced a proposed 1-for-50 share consolidation on August 10, 2012.

*SPA Amendment*

[34] In a March 27, 2013 email exchange WM asked the respondent for documentation for her investments of $7,000. WM apparently could not find her copy of the SPA at that time.

[35] In an April 4, 2013 email exchange WM asked the respondent to repay her $7,000 investment. The respondent replied, "Your investment in FormCap resulted in you becoming a shareholder, your original paper work that you misplaced reflected that fact. therefore You and me and all the other shareholders are stuck and will have to wait for FormCap to get its act together." The respondent added he had always guaranteed her investment so she would never lose her principal amount of $7.000. Further on he stated "…your investment is still sound And intact just not liquid at this time."

[36] On April 6, 2013, WM emailed the respondent that she had found the SPA for the first investment, but had no documentation for her second investment. She reiterated that she wanted her money back as soon as possible.

[37] On April 20, 2013 WM explained she needed money and asked for repayment of the $3,000. In reply, the respondent, after saying the markets remained soft and nothing was going forward, said the money was not available.

[38] In an email the next day, WM said she realized the $4,000 was not liquid but she wanted her $3,000 back now. The respondent emailed in reply that WM had invested twice in the same company and therefore it was all one and the same and no funds were then available. WM responded that she would be expecting repayment of the $3,000.

[39] On April 23, 2013 the respondent by email rejected WM's request for a refund, stating "There are no payments of any kind in this investment instrument…We both know there were no discussions between us pertaining to any future payments in writing or verbal. …this is an investment that is in the form of shares that are tied to the stock market, if you recall, I had you open an account with a brokerage firm in Vancouver". He added that WM should not panic as all was fine with her investment.

[40] By reply email on April 25, 2013, WM asked "Shouldn't the securities be in my account?" The respondent replied "…you will receive your shares once the certs are issued…". WM responded "That seems to be a long time for certificates."

[41] The respondent emailed that he would call her to explain and WM in reply requested that he provide answers to her questions by email. The respondent replied that WM should just refer back to their emails. An exchange of emails of the same tenor continued into the next day.

[42] On May 13, 2013 the email correspondence resumed with WM's request that the respondent return her $7,000 or she would have to pursue regulatory avenues. She also questioned the legitimacy of the original transactions.

[43] The respondent replied on May 15 that everything outlining the investment was in the SPA that WM had recently found and WM could bring her paperwork over and he would go through it once again. As for the requested return of the $7,000, the respondent advised WM nothing had changed.

[44] On May 17 WM talked to the person handling the brokerage account she had opened at the respondent's suggestion. That individual suggested WM meet with the respondent to get him to revise the original SPA to reflect that the total investment was now $7,000.

[45] WM then sent two emails to the respondent asking him to meet her at the neighbourhood pub to alter the SPA. But the respondent did not appear.

[46] Taking a witness with her, WM then went to the respondent's home. The original SPA was amended by striking out the purchase price of $4,000 and replacing it with $7,000 and by striking out 40,000 as the number of shares to be delivered and replacing that number with 70,000. As well, a handwritten statement "Revised to show $7,000.00 on May 17, 2013" was added at the end of the SPA followed by the signature of the respondent and the witness and below that the signature of WM.

*Subsequent Events*

[47] The respondent sent a further email to WM on May 26, 2013 in which he made reference to her fitting the description of the "investor from hell".

[48] WM then contacted the Commission by telephone on May 28 and after that advised the respondent by email that she had done so. Having learned WM had spoken to the Commission, the respondent replied "this has nothing to do with the BCSC" and stated "You don't own these shares….I do…. you have been told that many times."

[49] On May 29, 2013 WM again asked the respondent to return her money.

[50] On June 4, 2013 WM filed a written complaint with the Commission.

[51] WM never received any FormCap shares.

[52] WM pursued the respondent for the repayment of her $7,000 in Small Claims Court and eventually succeeded in getting the return of her funds from the respondent in two payments paid into court in the fall of 2015.

[53] At the hearing the respondent admitted that he did not own any FormCap shares in June 2011when WM made her first investment of $4,000 and he entered into the original SPA, or in April 2012 at the time of WM's second investment of $3,000, or in May 2013 when he later signed the amendments to the SPA to reflect WM's second investment.

[54] The respondent testified that he never received any FormCap shares as promised by Mr. B even though he continued to provide some investor relations services relating to FormCap into 2014.

## III. Positions of the Parties

[55] The executive director's position is that the respondent breached section 57(b) of the Act by purporting to sell FormCap shares to WM when he did not own FormCap shares and that in doing so the respondent knowingly put WM's pecuniary interests at risk.

[56] The respondent denies that he perpetrated a fraud within the meaning of section 57(b).

[57] The respondent argues that:

a) The agreement between the respondent and WM was partly oral and partly written. The oral agreement was made prior to June 17, 2011 when WM delivered $4,000 to the respondent. The written portion of the agreement is set out in the SPA.

b) The oral agreement was that the respondent was selling WM his future interest in FormCap shares and that if he received the shares as promised by Mr. B after the consolidation, he would share his position with WM.

c) It was a term of the oral agreement between the parties that if the respondent did not receive FormCap shares as promised by Mr. B, the respondent would pay WM her money back.

[58] The executive director argues the evidence does not support the respondent's position that there was an oral agreement or understanding between the respondent and WM that supplemented or supplanted the SPA, because:

a) The SPA states the respondent owns the FormCap shares which he purports to sell to WM.

b) The respondent's own correspondence, actions and testimony contradict his position as to the existence of such an oral agreement.

## IV. Analysis and Findings

### A. Applicable Law

#### *a) Standard of Proof*

[59] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held at paragraph 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.

[60] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

***b) Fraud***

[61] Section 57(b) of the Act 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

[62] Section 1(1) of the Act defines security to include "a … share, stock…".

[63] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the following elements of fraud from *R. v. Theroux*, [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).

**B. Analysis**

*Conduct Relating to Securities*

[64] FormCap shares are securities as defined in the Act.

[65] The respondent engaged in conduct relating to securities when he purported to sell shares of FormCap to WM.

*The "Agreement"*

[66] The respondent's argument that the entire agreement included both the alleged oral agreement or understanding and the written SPA rests on the respondent's testimony.

[67] The respondent testified that after learning from Mr. B there was to be a 1-for-10 share consolidation, he told WM there would be a consolidation, that he would get 100,000 shares and he was prepared to forward sell her up to 40,000 of the shares he would receive based on the 1-for-10 consolidation of the shares. The respondent also testified that WM agreed to such terms.

[68] We do not consider the respondent's testimony in this regard to be credible.

[69] The respondent's testimony contradicts the straightforward and credible testimony of WM that she had no specific information as to the nature of the investment until she saw the SPA on June 24, 2011 and for the first time learned she would receive shares of a company called FormCap. We accept WM's testimony that the respondent did not explain there were any conditions to be met before she would get her FormCap shares nor did he explain anything about a consolidation at the time he briefly explained the SPA to her before giving her a copy of it on June 24, 2011. Based on that explanation, her understanding was that she was purchasing 40,000 FormCap shares through the respondent and would receive her shares in August or September 2011.

[70] The respondent's testimony cannot be reconciled with the circumstances surrounding the second investment in April 2012. The respondent admitted he knew by that time that FormCap had abandoned the previously proposed 1-for-10 share consolidation in October 2011 and described the company at that time as continuing to be in a "grey period" because it had no money and had been unable to complete its financial statements. This was information that the respondent admitted he did not convey to WM.

[71] The respondent's testimony is inconsistent with statements the respondent made in his email communications with WM in March through May 2013 to the effect that:

a) Her investment in FormCap had resulted in WM becoming a shareholder, and the SPA reflected that fact.

b) The investment was "still sound and intact just not liquid at this time".

c) The investment was in the form of shares tied to the stock market and, if WM recalled, he had her open an account with a brokerage firm in Vancouver.

d) As to why the securities were not in WM's account, "…you will receive your shares once the certs are issued…".

e) Everything outlining the investment was in the SPA that WM had recently found.

f) And finally, the respondent's statement, "You don't own these shares…I do".

[72] The respondent's testimony as to the existence of a collateral "oral agreement" is also inconsistent with the provisions of the SPA which the respondent prepared. The SPA is premised on the respondent being the owner of the FormCap shares. In the SPA the respondent represents and warrants that he is the owner of the FormCap shares being sold to WM. The SPA also provides that it is the entire agreement between the parties and supersedes all prior agreements and understandings between the parties with respect to WM's purchase of the FormCap shares.

[73] We reject the respondent's testimony and argument as to the existence of a collateral "oral agreement". We find the terms of the agreement between the respondent and WM as to WM's two investments are those set out in the SPA as amended.

*Actus Reus*

[74] The respondent represented to WM that he owned the FormCap shares he was purporting to sell her when he did not. As late as May 28, 2013 he continued to represent to WM that he owned the FormCap shares even though the 1-for-10 share consolidation had been abandoned in October 2011 and he had never received any FormCap shares following the eventual 1-for-50 share consolidation which commenced in August 2012. This falsehood is the prohibited act.

[75] The prohibited act caused deprivation to WM's pecuniary interests. The British Columbia Court of Appeal, in *R. v. Abramson*, [1983] B.C.J. No. 1305, confirmed that the payment of money as part of an investment was sufficient to establish deprivation for the purpose of fraud. In *Re Streamline Properties* 2014 BCSECCOM 263, the Commission followed *Abramson*.

[76] While WM eventually obtained the return of the monies she had invested, it was only after she had expended considerable time and effort pursuing their return by various means, finally achieving success in late 2015 through the Small Claims Court's processes.

*Mens Rea*

[77] While the respondent may have believed at the time of the first investment that he would acquire FormCap shares following the initially proposed 1-for-10 share consolidation through Mr. B, the respondent knew at that time that he did not own any FormCap shares. Yet he proceeded to sell FormCap shares he did not own to WM. Shortly, thereafter, he spent WM's funds on personal expenditures.

[78] By the time of the second investment, the respondent not only knew he did not have any FormCap shares to sell to WM but also knew the previously proposed FormCap share consolidation had been abandoned and the company was having serious financial difficulties. Yet, he proceeded to agree to sell WM another 30,000 FormCap shares which he did not own on the same terms and conditions. When she sought the return of these funds, he rejected her request saying there were no funds available and continued his deceit by telling WM that the investment was in the form of shares tied to the stock market.

[79] The respondent thus knew at the time of each investment of the prohibited act and that the prohibited act could have as a consequence the deprivation of WM by putting the monies she had invested with him at risk.

*Conclusion*

[80] We find that the respondent perpetrated fraud on WM in the aggregate amount of $7,000 contrary to section 57(b) of the Act.

[81] We direct the parties to make their submissions on sanction as follows:

| | |
|---|---|
| By July 15, 2016 | The executive director delivers submissions to the respondent and to the secretary to the Commission. |
| By July 29, 2016 | The respondent delivers response submissions to the executive director and to the secretary to the Commission.<br><br>Any 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 August 8, 2016 | The executive director delivers reply submissions (if any) to the respondent and to the secretary to the Commission. |

June 22, 2016

**For the Commission**

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr
Commissioner

Don Rowlatt
Commissioner