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

Citation: Re Davis, 2016 BCSECCOM 375 Date: 20161107

Larry Keith Davis

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Hearing Date	September 2, 2016	
Submissions Completed	September 2, 2016	
Date of Decision	November 7, 2016	

Appearing

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

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings of this panel on liability made June 22, 2016 (2016 BCSECCOM 214) are part of this decision.

[2] The panel found that the respondent perpetrated fraud on an investor in the aggregate amount of $7,000 contrary to section 57(b) of the Act.

II. Position of the Parties

A. Executive Director

[3] The executive director seeks the following orders against the respondent:

- permanent orders prohibiting the respondent from participating in the capital markets and from acting as a director, officer or registrant under sections 161(1)(b)(ii), (c), and (d)(i), (ii), (iii), (iv) and (v); and
- an administrative penalty of $25,000 under section 162 of the Act.

[4] The executive director is not seeking an order under section 161(1)(g) of the Act for an amount obtained through contravention of the Act because the respondent eventually

returned to the investor $7,000, being the amount of the investor's funds invested with the respondent.

B. Respondent

[5] The respondent submits that the sanctions should be proportional.

[6] The respondent argues that, based on all of the evidence, no orders should be made against him.

[7] In particular, he says that the sanctions should recognize that the investor believed that if she did not receive shares, she would receive her money back. Therefore, he argues, upon the repayment of her funds, there was no deprivation and no breach of the Stock Purchase Agreement. The respondent submits that these facts are in mitigation of the findings made against him.

[8] The respondent submits that, in the event the panel orders market bans against him under section 161, the panel has examples of other cases where carve-outs were given, citing *Samji (Re)*, 2015 BCSECCOM 29 and *Michaels (Re)*, 2014 BCSECCOM 457, and cases where the market bans were time limited.

III. Analysis

A. Factors

[9] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

[10] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,

- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

B. Application of the factors

Seriousness of the conduct

[11] Fraud is the most serious misconduct prohibited by the Act. It violates the fundamental investor protection objectives of the Act and harms both investors and the integrity of our capital markets.

[12] In this case, the respondent purported to sell the investor shares he did not own on two separate occasions. She trusted him and initially believed, as the respondent argues, that if she did not receive her shares, she would get her money back. But when the investor asked in the spring of 2013 for the return of her funds, the respondent continued the deceit saying her investment had resulted in her becoming a shareholder and that her investment was in the form of shares tied to the stock market and was still sound and intact but not liquid.

[13] While the amount involved in this case is relatively small, the respondent's initial and ongoing deceit is misconduct properly characterized as falling within the most serious misconduct prohibited by the Act.

Harm suffered by the investor

[14] While the investor was successful in eventually recovering her $7,000 investment, she had to expend considerable time and effort to do so.

[15] The respondent now submits that he would have repaid the investor earlier, but he did not do so when she initially requested the return of her monies in March 2013 or thereafter of his own volition.

[16] It was only in late 2015 pursuant to proceedings brought by the investor in the Small Claims Court that the respondent repaid the investor her funds. In the intervening period she was deprived of the use of her funds.

[17] Eventual repayment pursuant to civil proceedings does not negate the deprivation caused by the fraud perpetrated by the respondent.

[18] The investor was negatively impacted in other ways by her investing experience with the respondent. She testified that she has not invested since this experience, has lost trust in people and has had to seek counselling over the experience.

Enrichment

[19] The respondent was enriched personally. He treated the funds as his own and used them within a short time of their receipt to pay his personal expenses.

Aggravating or mitigating factors

[20] The respondent argues upon his repayment of the investor's funds there was no deprivation and no breach of the Stock Purchase Agreement and that these "facts" mitigate the findings against him.

[21] However, the respondent's argument ignores certain of the panel's findings on liability, and is an attempt by the respondent to reargue liability, a course that is not open to him.

[22] We have however considered whether or not the repayment of the investor's funds is a mitigating factor for the purpose of sanctions.

[23] The executive director submits the repayment may have been relevant if an order under section 161(1)(g) were being sought but repayment is not relevant to other potential sanctions.

[24] We agree with the executive director's submission that, in the circumstances of this case, the eventual repayment of the funds pursuant to proceedings brought by the investor in the Small Claims Court is not a mitigating factor.

[25] The respondent also argues that he did not attempt to conceal his conduct and attended interviews at the Commission when summonsed, presumably intending this to be a mitigating factor.

[26] We agree with the executive director's submission that not hindering the investigation and the hearing process is not a mitigating factor. See *Streamline Properties Inc. (Re)*, 2015 BCSECCOM66 at paragraph 27.

[27] There are no aggravating factors.

Past conduct

[28] The respondent argues that he has a lengthy and unblemished history in the capital markets.

[29] As acknowledged by the executive director, the respondent has no prior regulatory history.

[30] A prior regulatory history would be an aggravating factor. The absence of a prior regulatory history is not a mitigating factor.

Continued participation in the capital markets and fitness to be a registrant or director

[31] While the aggregate amount of the respondent's fraud was not large, the misconduct perpetrated by the respondent was carried out over an extended period, involving the

purported sale of shares to the investor that he did not own on two separate occasions as well as ongoing deceit.

[32] The respondent's misconduct evidences that he represents a serious future risk both to investors and capital markets. He is not fit to participate in the capital markets or to act as a registrant, director or officer.

Specific and general deterrence

[33] The sanctions imposed must be sufficient to deter the respondent and others from engaging in future misconduct.

Previous orders by the Commission

[34] The executive director has referenced the following four cases as having similar circumstances to the matter before us.

[35] In *Re Dowlati,* 2015 BCSECCOM 255, the Commission found Dowlati committed fraud in the aggregate amount of $6,000 when he took $1,000 of an investor's original investment of $10,000 and used it to pay personal expenses and when he failed to inform the investor that Dowlati had lost or spent all of the investor's original investment at the time the investor gave him an additional $5,000 to invest. The Commission also found that Dowlati had engaged in unregistered trading in relation to the entire $15,000 invested, contrary to section 34 of the Act. The Commission imposed permanent market bans and ordered Dowlati to pay an administrative penalty of $30,000, as well as ordering payment under section 161(1)(g).

[36] In *Basi (Re),* 2011 BCSECCOM 573, the Commission found that Basi, a mutual fund salesperson, perpetrated fraud when he told an investor that he could buy certain shares below market price. The investor sent Basi $15,500 to buy shares and Basi spent $11,055 of the funds he received on personal expenses. The investor eventually recovered the $4,445 of her funds that had not been misappropriated. The Commission imposed permanent bans and ordered Basi to pay an administrative penalty of $100,000, as well as ordering payment under section 161(1)(g) of the amount not recovered.

[37] In *Dhala (Re),* 2015 BCSECCOM 336, the respondent took $38,250 from four investors purportedly to buy shares of a TSXV listed company that was conducting a private placement. Dhala spent all of the investors' funds on his personal expenses. One investor recovered $10,350 through civil proceedings and Dhala repaid $1,000 to another investor. The Commission imposed permanent bans and ordered Dhala to pay an administrative penalty of $100,000 in respect of the fraud, as well as $26,900 under section 161(1)(g). The Commission also ordered a separate administrative penalty with respect to Dhala's breach of another provision of the Act.

[38] In *Mesidor (Re),* 2014 BCSECCOM 6, the respondent took $32,280 from two investors, ostensibly for foreign exchange trading, spending $16,000 for personal expenses and returning $2,000 to the investors. He also prepared a false financial statement for his company that he gave to one of the investors. The Commission found that Mesidor

perpetrated fraud when he used $16,000 for purposes other than foreign exchange trading. The Commission imposed permanent bans and ordered an administrative penalty of $75,000, as well as ordering payment under section 161(1)(g).

[39] The respondent submits that none of the cases cited by the executive director is similar in meaningful ways to the facts in this matter and that it does not appear proportionality was considered in those cases.

[40] The preamble in *Eron* recognizes that the circumstances of each case are different and therefore the factors listed may not be exhaustive but are those that are usually relevant.

[41] These factors include orders made by the Commission in similar circumstances in the past.

[42] We disagree with the respondent's submission that "proportionality" is the overarching principle in determination of appropriate sanctions. But we do agree with the IIROC panel's description in *Re Northern Securities* 2012 IIROC 63 CanLII at paragraph 170, a case cited by the respondent with respect to proportionality, that deciding on appropriate sanctions in any case involves an exercise of judgment by the panel based on all relevant factors, including those listed in *Eron*, and comparing the circumstances in the matter under consideration with those in prior decisions.

[43] The four cases cited by the executive director as being comparable to the present case all concern sanctions for fraud involving relatively small amounts and one to four investors. They provide a suitable range of sanctions for the panel's consideration in relation to the specific circumstances of this matter and the factors relevant to this matter.

C. Appropriate Sanctions

Market bans

[44] In all four of the cases cited by the executive director as being comparable, the Commission ordered permanent market bans.

[45] Citing *Re Aviawest Resorts Inc. et al*, 2013 BCSECCOM 319 at paragraphs 88 and 106 to 109, the respondent argues that there are circumstances where orders under section 161 will not be made or will be time limited.

[46] *Aviawest* is not a comparable case. It involved illegal distributions and not fraud. As recognized by the Commission panel in that decision, it is also a unique case. While certain of the individual respondents were found liable with respect to the illegal distributions, the panel in that case concluded it was not necessary to make orders against any of those respondents. The panel described the conduct of those individual respondents as carrying "no whiff of dishonesty, of any intent to deceive" and concluded that their continued participation in the capital markets did not pose any threat to those markets or to investors, nor was there a need to issue orders to deter them from future misconduct.

[47] Such is not the case here. The respondent has been found liable for fraud, the most serious type of misconduct under the Act. As the executive director submits, even when smaller amounts are involved, fraud is serious intentional misconduct that involves dishonesty and deprivation.

[48] The respondent also points to the Commission's decision in *Eron* as one where orders other than permanent orders have been made in a fraud case, referring to the market bans ordered against the respondent Biller for a period of ten years.

[49] The respondent was unaware of any other cases involving fraud where less than permanent market bans were ordered.

[50] We note that in *Eron*, the Commission panel made clear that there was a difference in the culpability of Biller and that of the other respondents stating, "Although we found dishonesty with respect to some of Biller's conduct, we did not find that Biller had actual knowledge of all the wrongdoing at Eron." The Commission also found a number of mitigating factors, including Biller's actions after he became aware of Eron's problems and his work with Eron's professional advisers to help find a solution to those problems. Although concluding Biller's conduct demanded his removal from the markets for a substantial period of time, the Commission panel was not convinced that Biller was a permanent risk to the markets. The panel noted that Biller testified that he understood that he had acted wrongly, wished to take responsibility for his actions and had learned from the experience.

[51] In the present matter, there is only one respondent and he had full knowledge of the misconduct. There are no mitigating factors. The respondent has expressed no remorse and continues to mischaracterize and minimize his misconduct.

[52] For these reasons and those previously stated, we have concluded the respondent represents a serious future risk both to investors and capital markets. He is not fit to participate in the capital markets or to act as a registrant, director or officer. In keeping with similar circumstances in other cases of fraud, permanent market bans are appropriate.

[53] Accordingly, we are ordering permanent market bans. In doing so we have provided for an exception to permit the respondent to trade or purchase securities for his own account through a registrant if he gives the registrant a copy of this decision.

Administrative penalty

[54] In seeking an administrative penalty of $25,000, the executive director submits that the amount obtained by the respondent is not as important as the dishonest conduct. In this regard the executive director cites *Stiles (Re)*, 2012 BCSECCOM 383, a case involving internet solicitations where the Commission ordered a permanent market ban and an administrative penalty of $35,000 for conduct that the panel described as an "attempted fraud" in which there were misrepresentations but no investments were made.

[55] The respondent argues that there should be no administrative penalty because the $7,000 amount of the fraud is the lowest monetary amount the Commission has been asked to address and the funds were repaid.

[56] While the amount of the fraud is small, it is not as low as the $6,000 fraud found in *Dowlati*. A $30,000 administrative penalty was imposed in that case, but we note that Dowlati was also found to have engaged in unregistered trading in respect of the total $15,000 invested. We agree with the executive director's submission that as a result the administrative penalty should be somewhat less than that in *Dowlati*. Although we also note the administrative penalty assessed in *Stiles* was higher at $35,000 where misrepresentations were found but no monies invested, leading to the panel's description of the conduct as "attempted fraud". Thus, we see no need for a large discount from the penalty imposed in *Dowlati.*

[57] The amounts obtained by fraud in *Basi* ($15,500), *Mesidor* ($16,000) and *Dhala* ($38,250) are somewhat greater. As the executive director acknowledges, a smaller penalty than those ordered in these cases is warranted because the respondent's fraud was a lesser amount, his misconduct not as serious and there are no aggravating factors in the respondent's case.

[58] As previously discussed, we do not consider the eventual repayment to the investor of her $7,000 investment several years later pursuant to legal proceedings to be mitigating.

[59] We consider the need for specific and general deterrence calls for an administrative penalty in a significant amount given the nature of the misconduct.

[60] An administrative penalty of $15,000 is appropriate given the circumstances in this case and previous penalties ordered in the four cases having similar circumstances cited by the executive director.

IV. Orders

[61] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

1. under sections 161(1)(b)(ii), (c), and (d)(i), (ii), (iii), (iv) and (v),

    a) the respondent cease trading in, and is permanently prohibited from purchasing, securities; except the respondent may trade or purchase securities for his own account through a registrant if he gives the registrant a copy of this decision;

    b) any or all of the exemptions set out in the Act, regulations or a decision do not apply to the respondent;

    c) the respondent resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

d) the respondent is permanently prohibited from becoming or acting as a registrant or promoter;

e) the respondent is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and,

f) the respondent is permanently prohibited from engaging in investor relations activities.

2. under section 162, that the respondent pay to the Commission an administrative penalty of $15,000.

November 7, 2016

For the Commission

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner

Don Rowlatt
Commissioner