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

Citation: Re Havenplex, 2017 BCSECCOM 21 Date: 20170124

Havenplex Holdings Ltd. and Patrick Aaron Dunn

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing dates	March 7, 2016	
Submissions Completed	November 30, 2016	
Decision date	January 24, 2017	

Appearing

Anjalika Rogers	For the Executive Director
Patrick J. Sullivan Taylor Veinotte Sullivan	For Havenplex Holdings Ltd.

Reasons for Decision

I. Introduction

[1] This is a hearing under sections 161(1) and 162 of the *Securities Act*, BCSC 1996, c. 418.

[2] The executive director issued a notice of hearing in respect of the respondents on August 24, 2015 (2015 BCSECCOM 320).

[3] In the notice of hearing the executive director alleged that:

a) Havenplex distributed securities, having an aggregate purchase price of $105,000, to two investors without a prospectus and without an exemption from so doing, in contravention of section 61 of the Act;

b) Dunn distributed securities, having an aggregate purchase price of $55,000, to two investors without a prospectus and without an exemption from so doing, in contravention of section 61 of the Act; and

c) Dunn engaged in unregistered trading in securities, contrary to section 34 of the Act, when he sold securities to the two investors.

[5] On March 3, 2016, the executive director and Dunn entered into a settlement agreement and, on the same date, the executive director filed a notice of discontinuance in these proceedings with respect to all of the allegations against Dunn.

[6] Therefore, the only remaining allegation in this proceeding is that Havenplex distributed securities to two investors in contravention of section 61 of the Act.

[7] During the hearing, the only evidence that was entered by the parties was an Agreed Statement of Facts dated March 3, 2016.

[8] During the hearing, Havenplex admitted liability.

[9] Following the hearing, the parties asked for, and received, a significant adjournment of proceedings in order to give Havenplex an opportunity to repay the two investors their subscription amounts for the securities that they purchased. This did not occur and this proceeding was resumed.

[10] The executive director and Havenplex both provided written submissions on the issues of liability and sanction. The parties were provided with an opportunity to make oral submissions but neither chose to do so.

[11] These are our findings on liability and our decision on sanction.

II. Background

Agreed Statement of Facts

[12] The Agreed Statement of Facts between the executive director and Havenplex states:

Background

1. Havenplex is a British Columbia company that was seeking financing to build Cherrywood Estates, a seniors' housing complex in Creston, B.C. Cherrywood Estates was Havenplex's only project.

2. Havenplex has never filed a prospectus under the Act.

Misconduct

3. In the fall of 2013, Havenplex received $55,000 from the sale of its promissory notes (Havenplex Promissory Notes) to two investors, Investor A and Investor B.

4. In February of 2014, Investor B invested a further $50,000 in Havenplex through Havenplex's President.

5. Havenplex relied on the private issuer exemption under the Act to distribute Havenplex Promissory Notes to Investors A and B. In fact, Investors A and B were not accredited and did not otherwise qualify for the private issuer exemption.

6. By distributing Havenplex Promissory Notes to Investors A and B without an exemption and without filing a prospectus, Havenplex engaged in a $105,000 illegal distribution contrary to s. 61 of the Act.

III. Applicable Law

a) Standard of Proof

[13] 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:

> 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.

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

[15] 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.

IV. Analysis and Findings

Admissions

[16] In this case, Havenplex has admitted liability. It did so during the hearing and reaffirmed this admission in its written submissions. Havenplex was represented by counsel and we have no reason to question this admission.

[17] Therefore, we find that Havenplex contravened section 61 of the Act when it distributed securities having an aggregate value of $105,000 to two investors without a prospectus and without an exemption from so doing.

V. Sanctions

a) Positions of the parties

[18] The only sanction that the executive director seeks against Havenplex is an order under section 161(1)(g) that Havenplex pay to the Commission the $105,000 it obtained from the two investors in contravention of section 61 of the Act.

[19] The respondent concedes that an order under section 161(1)(g) is appropriate in the circumstances. However, Havenplex submits that it continues to make efforts to return to the two investors their subscription amounts and, in the event that it does so, it is concerned that any such payments be netted against any disgorgement order.

b) Factors

[20] 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.

[21] 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.

c) Application of the Factors

[22] We have considered all of the factors described above, to the extent practicable with the limited factual background that we have before us.

[23] There is no dispute that the two investors have been harmed and have lost their subscription proceeds.

[24] The executive director concedes that there is no evidence that the subscription proceeds were used in any manner that was inconsistent with the investors' expectations nor is there any evidence that their funds were used for the personal gain of any of the directors or officers of Havenplex. In fact, there is no evidence before the panel of what was done with the subscription proceeds.

[25] There is no evidence before us of the status of the investors' investment in Havenplex.

[26] Havenplex does not take issue with the executive director's request for a disgorgement order, other than to urge that our order not result in Havenplex having to repay the investors twice, as Havenplex purportedly continues to make attempts to repay the investors' subscription proceeds.

[27] The issue of "double recovery" by the investors is addressed, in part, by the provisions of the regulations that apply to applications from victims for payments from funds obtained by the Commission under section 161(1)(g). Those provisions make clear that one of the factors in determining a payout is whether the victim has, in some other way, received restitution.

[28] It is within Havenplex's and the executive director's ability to avoid Havenplex making a "double payment" through the payment and enforcement mechanisms that the parties undertake with respect to the repayment of investors and collection of amounts required to be paid to the Commission under a section 161(1)(g) order. Further, an order under section 161(1)(g) can be varied under section 171 if there is a change in circumstances that warrants such a variance. A repayment of funds directly to investors may represent such a change in circumstances. Therefore, we do not think that the possibility of direct repayment of the investors by Havenplex should deter us from making an order under section 161(1)(g) or that that order should be modified in any form from our usual orders under this section.

[29] The executive director has directed us to the decision in *SPYru Inc.*, 2015 BCSECCOM 452 as support for making an order under section 161(1)(g). We have considered that decision in making our order in this case.

[30] Given that:

a) the respondent concedes that a section 161(1)(g) order is appropriate in the circumstances;

b) Havenplex obtained $105,000 from the two investors in contravention of section 61 of the Act; and

c) we have no evidence as to how the subscription proceeds were used by Havenplex,

we think it to be in the public interest and consistent with the principles of general and specific deterrence to make an order under section 161(1)(g) against Havenplex in the amount of $105,000.

[31] Even though none were requested by the executive director, we also considered whether further sanctions were appropriate in the circumstances. In particular, we considered whether any market prohibition orders against the respondent under section 161(1) were appropriate. We had no evidence of the status of the corporate respondent or of other possible securityholders. We are therefore unable to assess the impact of any such orders

on third parties. The evidence of Havenplex's contraventions of section 61 is limited, other than its role in actually issuing the securities. For all of these reasons, we were unable to conclude that further orders would be required in the public interest.

VI. Summary

[32] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that Havenplex pay to the Commission $105,000 pursuant to section 161(1)(g) of the Act.

January 24, 2017

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Suzanne K. Wiltshire
Commissioner