

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

Citation: Re Lim, 2017 BCSECCOM 319

Date: 20171023

David Tuan Seng Lim and Michael Mugford¹

Panel	Nigel P. Cave Audrey T. Ho Don Rowlatt	Vice Chair Commissioner Commissioner
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Hearing Date September 22, 2017

Submissions Completed September 22, 2017

Date of Decision October 23, 2017

Appearing

Derek Chapman For the Executive Director
Joyce Johner

Owais Ahmed For David Tuan Seng Lim

Stephen B. Jackson For Michael Mugford

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 on June 5, 2017 (2017 BCSECCOM 196) are part of this decision.
- [2] We found that both David Tuan Seng Lim and Michael Mugford contravened section 57(a) of the Act in respect of the common shares of Urban Barns Foods Inc.
- [3] The parties provided written and oral submissions with respect to the appropriate sanctions for the respondents' misconduct.
- [4] This is our decision with respect to sanctions.

II. Position of the Parties

- [5] The executive director sought the following orders:

¹ The original style of cause in this matter was David Tuan Seng Lim, Michael Mugford and EuroHelvatia Trustco S.A. now known as EHT Corporate Services S.A. In our findings on liability made on June 5, 2017, we found that EHT did not contravene the Act. Therefore, the style of cause has been amended to refer only to the remaining respondents for whom sanctions must be determined.

- a) broad, permanent market prohibitions (with limited exceptions) against both Lim and Mugford;
 - b) an order under section 162 of the Act that Lim pay to the Commission \$1.2 million; and
 - c) an order under section 162 of the Act that Mugford pay to the Commission \$700,000.
- [6] Lim submitted that the following orders were appropriate in the circumstances:
- a) subject to the exceptions noted in subparagraphs b) and c) below, market prohibitions not exceeding six years;
 - b) that he not be required to resign any position that he currently holds as, nor be prohibited in the future from being, a director or officer of an issuer or a registrant;
 - c) that he be allowed to trade or purchase securities for his own account and for an RESP account at a registered dealer, provided that he first provide that dealer with a copy of the Commission's decision on sanctions in this matter; and
 - d) an order under section 162 of the Act that he pay to the Commission \$200,000.
- [7] Lim provided an alternative suggested order to that set out in paragraph 6b) and c) above. His submission was that he be allowed to act as a director or officer of any issuer in which he and/or his immediate family members own all of the outstanding shares. Further, in oral submissions, counsel for Lim suggested that the exception in subparagraph c) above, should also allow Lim to trade or purchase securities on behalf of any issuer in which he and/or his immediate family members own all of the outstanding shares.
- [8] Mugford submitted that the following orders were appropriate in the circumstances:
- a) subject to the exception noted in subparagraph b) below, market prohibitions not exceeding eight years;
 - b) that he be allowed to trade or purchase securities for his own account (including an RRSP account and a TFSA account) and for an RESP account, all in both US and CDN dollars, at a registered dealer, provided that he first provide that dealer with a copy of the Commission's decision on sanctions in this matter; and
 - c) an order under section 162 of the Act that he pay to the Commission \$60,000.
- [9] The executive director did not seek any orders under section 161(1)(g) of the Act.

III. Analysis

A. Factors

- [10] 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.

[11] 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

- [12] Contraventions of section 57(a), or market manipulations, share two significant similarities with fraudulent misconduct. Like fraud, a contravention of section 57(a) requires a finding of intent on the part of the respondent and some element of deceit (i.e. creating a misleading appearance of trading activity in, or an artificial price for, a security). As a consequence, a market manipulation is one of the most serious misconduct contemplated by the Act.
- [13] In this case, the seriousness of the respondents' misconduct was exacerbated by the extent to which they orchestrated their affairs such that their activities were concealed by the use of offshore accounts and third parties, including trustees and other intermediaries.
- [14] However, the evidence also demonstrated that, as between the two respondents, there was a clear differentiation in the seriousness of their misconduct owing to their differing contributions to the market manipulation.
- [15] Although we found that both were principals under an agreement that set out the basic structure of the manipulation, we also found that Lim played a far more significant role than Mugford in carrying out the "pump and dump" manipulation of the Urban Barns shares.

[16] Lim was largely responsible for putting in place the offshore funding structure and paying for the “tout sheet” marketing campaign that was at the heart of the manipulation. Lim, as a registrant, was also able to start the initial volume of purchasing activity through accounts of his clients. As set out in our Findings, Mugford’s role, while not insignificant, was clearly less than that of Lim. Our sanctions recognize this difference in the seriousness of the misconduct, as between Lim and Mugford.

Enrichment; harm to investors

[17] Although the evidence included trading records and account information that indicated the gross proceeds derived from the sale of shares of Urban Barns in certain accounts connected to the market manipulation, there was no information as to the specific enrichment of either of the respondents derived from those accounts.

[18] The respondents submitted that we also had no evidence of harm to investors arising from the misconduct of the respondents. This submission is correct only in the sense that we do not have evidence of a specific harm to a specific investor. In the general sense, the market manipulation relating to the securities of Urban Barns has caused significant harm to investors. The trading accounts connected to the market manipulation were the beneficiaries of approximately US\$4.8 million derived from the sale of Urban Barns shares during the relevant period. The Urban Barns shares that were sold from those accounts were essentially worthless immediately prior to the misconduct and were essentially worthless shortly after the misconduct ceased. This represents significant harm to the investing public.

Mitigating or aggravating factors; past conduct

[19] Neither Lim nor Mugford have a history of securities regulatory misconduct.

[20] However, it is an aggravating factor that Lim was a registrant at the time of his misconduct. In fact, Lim abused his role as a registrant to orchestrate one aspect of the manipulation – by having accounts of his clients create an initial demand for the Urban Barns shares following the commencement of the “tout sheet” marketing campaign. Registrants play a critical role in our capital markets as one of the “gatekeepers”. Instead of fulfilling his role as a gatekeeper, Lim abused the privilege of his registration to assist in his misconduct.

[21] The executive director cited this Commission’s decision in *Re Sungro*, 2015 BCSECCOM 281 (para. 29) in support of his submission that Mugford’s past history as a director and officer of public companies should be viewed as an aggravating factor.

[22] While we agree that a history of being actively engaged in our capital markets can be an aggravating factor, we do not see that Mugford’s history is a material aggravating factor in this case. Mugford’s misconduct did not arise in the context of his acting as either a director or officer of Urban Barns nor in any other issuer that played a material role in the market manipulation. As will be discussed below, Mugford’s conduct raises significant concerns with respect to his fitness to be a director or officer of an issuer; however, that is

different than concluding that his history in the capital markets is an aggravating factor in the circumstances of this case.

- [23] Finally, the executive director submitted that it is an aggravating factor that the market manipulation occurred in the junior capital markets.
- [24] Market manipulations of the type carried out by the respondents (a “pump and dump”) may be easier to carry out in the junior capital markets, but we do not see that a market manipulation in the junior capital markets represents an aggravating factor. Any market manipulation, carried out in respect of an issuer large or small, is one of the most serious misconduct contemplated under the Act.
- [25] However, the considerable efforts that the respondents undertook to carry out and hide their misconduct through various market intermediaries is an aggravating factor. It is perhaps axiomatic that market manipulations will often involve significant elements of attempts to disguise or hide that conduct. However, this case is striking in the extent to which Lim, in particular, utilized intermediaries in an attempt to disguise his misconduct. This included using Swiss trustees, a Marshall Islands’ trust and various intermediaries to both instruct and pay for the “tout sheet” marketing campaign.

Risk to our capital markets; fitness to be a registrant or a director or officer of an issuer

- [26] Participation in our capital markets is a privilege not a right.
- [27] Those who engage in market manipulation represent serious risks to our capital markets. Those who engage in market manipulation intend to deceive and harm the investing public.
- [28] In this case, Lim also abused, in a most serious way, his registration status to harm the investing public and our capital markets. He also used various intermediaries, including corporations to hide his misconduct. Lim represents a very significant risk to our capital markets. He has demonstrated a lack of fitness to participate in our capital markets, as a registrant or as a director or officer of an issuer.
- [29] Similarly, Mugford has experience as a director and/or officer of an issuer. He knew or should have known that the conduct he engaged in was harmful to the investing public and fell far below that expected of those responsible for the actions of a corporation. Mugford has also demonstrated a lack of fitness to participate in our capital markets as either a registrant or as a director or officer of an issuer.

Specific and general deterrence

- [30] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

- [31] The executive director provided two previous decisions of this Commission in support of

his requested sanctions in this case: *Re Sungro*, 2015 BCSECCOM 281 and *Re Poonian*, 2015 BCSECCOM 96.

- [32] The respondents submit that this Commission's decision in *Re Siddiqi*, 2005 BCSECCOM 575 is more analogous to the circumstances of this case and say that *Sungro* and *Poonian* are distinguishable.
- [33] In *Sungro*, three individual respondents were found to have contravened section 57(a) of the Act and, in addition, one of the three respondents was found to have made false or misleading statements to a Commission investigator. One of the individual respondents also had a significant aggravating factor in that he had a history of securities regulatory misconduct.
- [34] The panel imposed broad, permanent market prohibitions against each of the respondents in *Sungro*. There was also specific evidence as to the enrichment of two of the respondents arising from the market manipulation and orders were made against the two respondents under section 161(1)(g) in the amount of their enrichment. Finally, the panel considered each of the three respondents to be equally responsible for the misconduct and ordered administrative penalties (before consideration of the additional misconduct of providing false or misleading information) of \$700,000 against each of the respondents.
- [35] In *Poonian*, five individual respondents were found to have engaged in a market manipulation. There were no other findings of contraventions against any of the respondents.
- [36] The panel imposed broad, permanent market prohibitions against each of the respondents. The respondents were ordered to pay administrative penalties that varied between \$10 million (against the mastermind of the scheme) and \$1 million. The panel found that there were significant differences in the contributions to and the responsibility for the market manipulation and these differences were reflected in the relative magnitudes of the administrative penalties imposed against each of the five respondents.
- [37] In *Siddiqi*, the panel found that the individual respondent had engaged in insider trading and manipulation of the shares of a company. The market manipulation was short-lived, taking place over a one-month period and Siddiqi's enrichment was approximately \$33,000. The panel imposed an administrative penalty of \$60,000 (approximately twice the amount of Siddiqi's likely enrichment) and prohibited Siddiqi from trading, acting as a director or officer of an issuer and engaging in investor relations for a period of six years.
- [38] There is a marked difference in the magnitude of the sanctions imposed on the respondents in each of these three decisions.
- [39] The panel in *Sungro* noted that, after the decision in *Siddiqi*, the Act was amended to increase the maximum administrative penalty that could be ordered under section 162 (per contravention) from \$250,000 to \$1,000,000. The rationale that the panel employed

in *Sungro* to explain the substantially higher administrative penalty was based, in part, on this change in the legislation.

- [40] In *Poonian*, the market manipulation was carried out over a much longer time frame, targeted a victim group that was particularly vulnerable and resulted in substantially larger harm to investors (measured by the proceeds derived from the improper trading in the accounts connected to the market manipulation) and damage to our capital markets than in *Siddiqi* or *Sungro*.
- [41] In the current case, the market manipulation of the Urban Barns shares was carried out over an extended period and caused significantly more damage to our capital markets than in *Siddiqi* or *Sungro*.
- [42] As set out above, market manipulations have much in common with fraud and they represent some of the most serious misconduct contemplated by the Act. The nature of the sanctions in *Siddiqi* are not reflective of the sanctions that are currently ordered in cases where a respondent's misconduct is among the most serious contemplated by the Act. We do not view *Siddiqi* as determinative for an appropriate sanction for the type of misconduct carried out by Lim and Mugford.

C. Appropriate Orders

Market prohibitions

- [43] Lim and Mugford represent significant risks to our capital markets. They have acted with intent to harm the investing public and in a manner that is totally inconsistent with conduct acceptable for a registrant or a director or officer of an issuer. Broad, permanent market prohibitions against both of them are necessary and appropriate to protect our capital markets.
- [44] Although we are prepared to grant limited exceptions to these prohibitions for both Lim and Mugford, we are not prepared to allow Lim to act as a director or officer of any issuer whose securities are owned by anyone other than his immediate family members. Nor do we agree that he should be allowed to open an account and trade in securities through an issuer. Lim carried out his misconduct through the use of intermediaries, including trusts and corporations. It is appropriate in the matter before us to impose sanctions that include prohibitions that will prevent Lim from doing so again.
- [45] Our orders allow both Lim and Mugford to trade and purchase securities in accounts in their own name (including TFSAs, RESPs and RRSPs) through a registrant, so long as they provide a copy of this decision to the registrant. Lim is also allowed to be a director and/or officer of 104877 B.C. Ltd. and Monsoon Holdings Limited, provided that all of the securities of these two companies continue to be owned by Lim and his immediate family members.

Administrative penalties

- [46] Lim submits that we do not have the jurisdiction to make an order under section 162 of the Act against him in the amount requested by the executive director. He says that that

section of the Act allows us to impose a maximum penalty of \$1 million per contravention of the Act. He submits that our Findings set out only one contravention of section 57(a) against him.

- [47] The executive director submits that we need only find that Lim carried out two contraventions of section 57(a) of the Act in order to make the requested order of \$1.2 million. He then posited several components of Lim's contribution to the market manipulation as separate contraventions of section 57(a). The executive director relied upon the decision in *Re McCabe*, 2014 BCSECCOM 512 (upheld in *McCabe v. British Columbia (Securities Commission)*, 2015 BCCA 176) in support of the proposition that a panel, at the sanctions stage, might determine that there were multiple contraventions of a single provision of the Act.
- [48] We agree with Lim's submissions on this point. The decision in *Re McCabe* is distinguishable. In *McCabe*, the respondent was found to have made misrepresentations. The evidence clearly set out multiple publications of the misrepresentations.
- [49] This case is different. The notice of hearing alleges that "...the Respondents engaged or participated in conduct relating to Urban Barns' shares that they knew, or reasonably, should have known, resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, Urban Barns shares, contrary to section 57(a) of the Act." While somewhat ambiguous, we find that this wording alleges one contravention of the Act.
- [50] More importantly, in our Findings we determined that the totality of the conduct of both Lim and Mugford, individually, resulted in their respective contraventions of section 57(a) of the Act. We did not find that one aspect of their conduct (e.g. paying for the "tout sheet" marketing campaign) in and of itself constituted a contravention of section 57(a) of the Act. The case was not argued in this manner, nor did we, as a panel, even turn our minds to the question of whether the separate components of Lim's behavior that the executive director now alleges to be contraventions of section 57(a) of the Act, might, in and of themselves, constitute a distinct contravention of section 57(a). We do not believe it appropriate to carry out that analysis at this stage in the proceedings. To be clear, in reaching this determination we are not making any commentary on whether it would be possible (or not) for there to be multiple contraventions of section 57(a) in respect of the same security, in similar circumstances, if it were alleged and argued in that manner. However, that was not the case before us.
- [51] Therefore, in the circumstances of this case, we find the maximum amount that we could order against Lim under section 162 to be \$1 million.
- [52] As noted above, our sanctions must reflect the differing contributions (as reflected in our findings) that Lim and Mugford made to the market manipulation of the Urban Barns shares.

- [53] We also received an affidavit from Mugford which set out that he is currently an undischarged bankrupt. The financial circumstances of a respondent must be considered for the purposes of specific deterrence but have no role with respect to general deterrence.
- [54] The circumstances of this case and the nature of the misconduct of Lim are most closely aligned with that of the respondents in *Sungro*. The most significant difference between the two being that the misconduct in *Sungro* was carried on for a shorter duration as the Commission was able to disrupt the market manipulation in its early stages in that case. However, Lim also had the aggravating factor of having been a registrant at the time of his misconduct. His administrative penalty should be larger than that imposed on the respondents in *Sungro*. After considering all of the circumstances and the need for specific and general deterrence, we find that an appropriate administrative penalty in light of Lim's conduct is \$800,000.
- [55] Mugford's contributions to the market manipulation were less significant than the three individual respondents in *Sungro* and less than that of Lim. As a result, an appropriate administrative penalty should be a lesser amount. After considering all of the circumstances, including Mugford's status as an undischarged bankrupt with limited means, and the need for specific and general deterrence, we find that an appropriate administrative penalty in light of Mugford's conduct is \$375,000.

IV. Orders

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

Lim

- a) Under sections 161(d)(i) and (ii) of the Act, that Lim resign any position that he holds as a director or officer of any issuers or registrant, and is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of an issuer whose securities are solely owned by him or his immediate family members (being: Lim's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law or brother or sister-in-law);
- b) under sections 161(1)(b), (c) and (d)(iii) to (v):
 - i. that Lim cease trading in, and is permanently prohibited from trading in or purchasing securities, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;
 - ii. any and all exemptions set out in the Act, the regulations or a decision permanently do not apply to Lim;
 - iii. that Lim is permanently prohibited from becoming or acting as a registrant or promoter;

- iv. that Lim is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 - v. that Lim is permanently prohibited from engaging in investor relations.
- c) Lim pay to the Commission an administrative penalty of \$800,000 under section 162 of the Act;

Mugford

- a) Under sections 161(d)(i) and (ii) of the Act, that Mugford resign any position that he holds as a director or officer of any issuer or registrant, and is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant.
- b) under sections 161(1)(b), (c) and (d)(iii) to (v):
- i. that Mugford cease trading in, and is permanently prohibited from trading in or purchasing securities, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;
 - ii. any and all exemptions set out in the Act, the regulations or a decision permanently do not apply to Mugford;
 - iii. that Mugford is permanently prohibited from becoming or acting as a registrant or promoter;
 - iv. that Mugford is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 - v. that Mugford is permanently prohibited from engaging in investor relations.
- c) Mugford pay to the Commission an administrative penalty of \$375,000 under section 162 of the Act.

October 23, 2017

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Don Rowlett
Commissioner