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

Citation: Re Bai, 2018 BCSECCOM 156 Date: 20180511

Roy Ping Bai, also known as Ping Bai, and RBP Consulting

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Gordon Holloway	Commissioner

Hearing Dates April 11, 2018

Submissions Completed April 19, 2018

Date of Findings May 11, 2018

Appearing
James Torrance
David Hainey — For the Executive Director

Roy Ping Bai — For Roy Ping Bai and RBP Consulting

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 February 6, 2018 (2018 BCSECCOM 60) are part of this decision.

[2] We found that Roy Ping Bai and RBP Consulting perpetrated a fraud on nine investors in the aggregate amount of $1,401,000 contrary to section 57(b) of the Act.

[3] RBP is a general partnership comprising Bai and his wife as the partners. As a general partnership, the partners are jointly and severally liable for certain obligations of the partnership. Bai's wife was not personally a respondent in the Notice of Hearing in this matter and no wrongdoing was asserted against her. Accordingly, in making our finding of liability, we highlighted that we did not make any inferred finding of liability under section 57(b) against Bai's wife.

[4] The executive director provided written and oral submissions on the appropriate sanctions for the respondents' misconduct.

[5] Bai, although provided with an opportunity to provide written submissions on sanction prior to the oral hearing, did not provide written submissions in advance of the oral hearing date. Bai attended the oral hearing on behalf of himself and RBP. He advised the panel that his principal reason for attending was to express his disagreement with our liability findings and to maintain his rights to appeal those findings. However, he also expressed that he did not think that he was comfortable providing oral submissions in English. We gave the respondents a further opportunity, following the oral hearing, to provide written submissions on the appropriate sanctions in this case. The respondents did not avail themselves of this opportunity.

II. Position of the parties

[6] The executive director submitted that the following sanctions were appropriate in the circumstances:

a) with respect to Bai:

i) broad, permanent, market prohibitions;
ii) an order under section 161(1)(g) of the Act in the amount of $1,291,000; and
iii) an order under section 162 of the Act in the amount of $1.4 million.

b) with respect to RBP, broad, permanent, market prohibitions.

III. Analysis

A. Factors

[7] 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.

[8] 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:
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> - 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

[9] Previous decisions of this Commission have repeatedly held that fraud is the most serious misconduct found in the Act (see *Manna Trading Corp. Ltd. et al.*, 2009 BCSECCOM 595). It is the most serious misconduct owing to the deceit that will have been perpetrated upon investors and fraud requires that the respondent have had the requisite mental intent (or *mens rea*) with respect to his or her misconduct.

[10] This case is at the upper end of the scale of fraudulent misconduct that the Commission oversees in terms of the deceit perpetrated on investors.

[11] Investors were told that their funds were to be invested in foreign exchange trading and that their returns were to be derived from the respondents' efforts in this regard. In reality, only a small portion of investor funds was invested in the manner represented to the investors. The remainder was either paid to investors by the respondents as purported returns in furtherance of the respondents' deceit or the investors' funds were simply pocketed by the respondents and used by Bai on his and his wife's personal expenses – many of which were lavish by any standards.

[12] Finally, the respondents, in addition to their misappropriation of investor funds, then carried out an extensive campaign of deceit, which was designed to forestall investors from seeking the return of their funds and from learning of the respondents' misappropriation of their investments. The level of dishonesty in this case was extreme.

Harm suffered by investors and the enrichment of the respondents

[13] The investors as a whole have lost the difference between the gross amounts they invested with the respondents and the amounts returned to some of them by the respondents – being $1,291,000.

[14] We also heard testimony from investor witnesses during the hearing of the significant impact of the loss of their investments on their financial circumstances and on certain of their personal relationships.

[15] The amount of the respondents' enrichment is significant and quantifiable.

[16] RBP directly obtained all of the funds ($1,401,000) from the investors that were derived from the respondents' fraudulent misconduct and it was enriched by the proceeds of these investments.

[17] However, RBP and Bai were really one and the same. According to Bai's own testimony, although RBP was a general partnership of which he and his wife were the partners, he was the sole participating partner in the partnership, carried out all its activities and was its sole mind and management. Bai had complete control of RBP's bank accounts.

[18] It is clear that RBP was really the alter ego of Bai and that Bai indirectly was enriched by the funds provided by the investors.

Aggravating or mitigating circumstances

[19] There are no aggravating or mitigating circumstances in this case.

Participation in our capital markets and fitness to be a registrant or a director or officer

[20] The respondents represent a significant risk to our capital markets.

[21] We must be careful not to consider those who mount a significant and sometimes forceful defence to allegations brought against them as unremorseful or as dangerous to the capital markets simply by virtue of the statements made or positions taken in defence of allegations. However, Bai's own testimony suggested that he lacks any appreciation of the deceitful nature of his misconduct. According to his testimony, he was entitled to utilize funds provided by investors in any manner that he deemed appropriate. In addition, Bai's behavior during the relevant period demonstrated his ongoing and sustained failure to recognize his misconduct. Having misappropriated significant sums from investors for his own enrichment, he then engaged in a series of lies about his business, carried out over a two year time period, designed to hide his misconduct. Bai admitted that he had been deceitful but purported to justify that deceit by stating that he was trying to buy time to find a way to repay investors.

[22] We find that Bai is at the upper end of the spectrum of respondents with respect to the risks that they pose to our capital markets. His conduct is woefully short of that expected of registrants and directors and/or officers of public companies. Our orders must reflect this.

Specific and general deterrence

[23] The sanctions that we impose must be sufficiently severe to establish that both the respondents and others will be deterred from fraudulent misconduct.

[24] Our orders must also be proportionate to the misconduct of the respondents.

Previous decisions

[25] The executive director directed us to three recent decisions of this Commission as guidance in determining the appropriate sanctions in this case: *Re Nickford*, 2018 BCSECCOM 57, *Re EagleMark*, 2017 BCSECCOM 42 and *Re The Falls Capital Corp.*, 2015 BCSECCOM 422.

[26] In *Nickford*, the respondent was found to have fraudulently misappropriated approximately $318,000 of funds from investors for her personal use, including gambling. The respondent was found to have an aggravating factor in that her record keeping fell far short of that expected from people raising money in our capital markets. The panel ordered broad, permanent, market prohibitions against the respondent, an order in the amount of approximately $318,000 (being the amount of the respondent's enrichment from her misconduct) and an administrative penalty in the amount of $300,000.

[27] *The Falls* involved a fraud through which the respondents misappropriated $517,500 of investor funds. The individual respondent took investors' funds from business bank accounts and used the funds on personal expenses. He used corporations that he controlled to carry out the fraud. He also made false statements to Commission investigators. The individual respondent received lifetime market prohibitions, was ordered to pay $517,500 under section 161(1)(g) and was ordered to pay an administrative penalty of $500,000.

[28] In *EagleMark,* the two individual respondents, Lian and Keller, were found to have committed fraud, contravened a cease trade order and contravened a temporary order. Keller was also found to have traded in securities without being registered to do so. They raised funds from 315 investors, ostensibly to assist a company to resolve outstanding legal and financial impediments and become an issuer in good standing. Instead, Lian spent $2.4 million of the investors' funds for matters unrelated to attempting to resolve the company's issues. Lian also engaged in a subsequent campaign to hide his earlier misappropriation of funds. Lian and Keller received lifetime market prohibitions and were ordered to pay administrative penalties of $2.4 million each. Lian was also ordered to pay $2.4 million under section 161(1)(g).

[29] The executive director says that the misconduct of the respondents in each of these cases is similar to that of Bai in the case before us, in that the fraudulent misconduct was one of misappropriation of investor funds for personal use. He says that they are also similar in that the cases generally do not involve respondents with significant aggravating or mitigating circumstances. Finally, he says that these cases differ in terms of the quantum of the fraud but that they generally support the notion that an order under section 162 that approximates the dollar amount of the fraudulent misconduct is appropriate in the circumstances.

[30] We agree with the executive director that these decisions are helpful guidance in the sense that the nature of the misconduct of the respondents in this case is similar to that of the respondents in each of the case cited above. We are not of the view that there should be a direct correlation between the dollar amount of the fraud and the amount of an order under section 162. The dollar amount of the fraudulent misconduct (and the related investor harm) is one significant factor in these cases but it is only one factor among many. Our orders must be appropriate and proportionate for each respondent and each circumstance.

C. Analysis of appropriate orders

Market prohibitions

[31] The executive director has asked for permanent market prohibitions against the respondents.

[32] The misconduct in this case is similar, if not more serious, to that of the respondents in the cases set out above - all of which resulted in the respondents receiving permanent market prohibitions. Given the severity of the misconduct in this case and the extreme risk that the respondents pose to our capital markets, we find permanent market prohibitions to be appropriate in the circumstances.

Section 161(1)(g) orders

[33] The executive director submits that we should make an order under section 161(1)(g) of the Act against Bai in the amount of $1,291,000 (being the amount of the funds invested by the investors with the respondents less the amounts repaid to investors as either purported interest payments or as a return of a portion of the amount invested).

[34] The executive director submits that although we could make an order under section 161(1)(g) against RBP it would not be in the public interest to do so. He says that financial sanctions made against RBP, a general partnership, could potentially be borne by Bai's wife, who was not found to have contravened the Act, and that that is not in the public interest.

[35] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *Spyru* at paras 131-132:
>
> > [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
> >
> > [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[36] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

> 1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e. by ensuring the person does not retain the "benefit" of their wrongdoing.

2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s.157 compliance proceedings in the *Act*.

3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).

4. The "amount obtained" must be obtained *by that respondent, directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include the use of a corporate *alter ego*, use of other person's accounts, or use of other persons as nominee recipients.

[37] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[38] RBP clearly directly obtained the benefit of the full amount of the funds that were obtained by the respondents' fraudulent misconduct.

[39] Therefore, we could make an order against RBP for the $1,401,000 obtained by SBC from its contravention of the Act.

[40] As noted above, RBP was really the alter ego of Bai. This is true by virtue of Bai's own evidence (supported by the other documentary and oral evidence in the hearing) that he was the sole participating partner in the partnership. He also controlled all of the partnership's bank accounts. We have no difficulty finding that Bai indirectly obtained the full benefit of the $1,401,000 obtained from the investors by virtue of the respondents' fraudulent misconduct.

[41] Therefore, we could make an order against Bai for the $1,401,000 obtained by RBP from the respondents' contravention of the Act.

[42] However, in determining the appropriate quantum of any order (against either respondent) under this section it would also be appropriate to take into account the portion of the gross amount of the funds raised from the fraudulent misconduct that have been returned to the investors. The evidence supports a finding that, in aggregate,

$110,000 (of the $1,401,000) was returned to certain of the investors. Therefore, we find that we could make an order against either or both of the respondents in the amount of $1,291,000.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[43] There remains only the question whether it is in the public interest for us to make a such an order against Bai and/or RBP.

[44] We find it to be in the public interest to make such an order against Bai in all of the circumstances. As noted in *Poonian*, the purpose of an order under section 161(1)(g) is to deter misconduct by removing the benefit from the wrongdoer. This is exactly the circumstance of this case. Bai has benefited from his misconduct and he should have that benefit removed.

[45] The circumstances of an order against RBP are much more complicated. There are public interest arguments in favour and against making an order against a general partnership under section 161(1)(g) where not all of the general partners have been found to personally have contravened the Act. Without directing any criticism to the parties in this hearing (as the issue had little pragmatic importance in the circumstances of this case), that issue was not fully canvassed in the submissions of the parties and we would defer resolution of that issue to another case. In the case before us, the executive director did not ask for an order under section 161(1)(g) against RBP and, as RBP was really the alter ego of Bai and we are making an order under section 161(1)(g) against him, we find it to be in the public interest, in this instance, not to make an order under section 161(1)(g) against RBP.

Administrative penalties

[46] The executive director asked for an order under section 162 in the amount of $1.4 million against Bai. For similar reasons to those expressed above with respect to an order under section 161(1)(g), the executive director did not seek an order under section 162 against RBP. For similar reasons to those set out above, we do not find it necessary in the circumstances of this case to make an order under section 162 against RBP.

[47] Bai's misconduct in this case was serious and reflects a level of dishonesty near the upper end of the cases that the Commission deals with. He represents a serious and significant risk to our capital markets. For reasons of specific and general deterrence, a significant financial sanction under section 162 is warranted.

[48] Bai's misconduct is most similar to that of Lian in *EagleMark* in that in addition to the misappropriation of investor funds, both of them engaged in sustained and concerted efforts of deceit to hide their earlier fraudulent misconduct. Bai's sanction should be more similar to that of Lian than the respondents in *The Falls* and *Nickford* (although the quantum of Bai's misconduct was less than that of Lian).

[49] During the hearing, Bai testified. During that testimony, Bai alluded to his limited current financial circumstances. Bai complained that he did not have the funds to repay

investors and that he was forced to live in modest circumstances compared to his previous lifestyle. However, that testimony did not constitute evidence of the totality of Bai's current or future income or assets. Therefore, we really have no concept of Bai's ability to pay any financial sanction imposed upon him.

[50] Having considered the previous decisions of this Commission cited to us, the serious and significant misconduct and related harm to investors in this case and the risk that Bai represents to our markets, we find it to be in the public interest and proportionate to make an order against Bai in the amount of $1 million.

D. Orders

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

(a) under section 161(1)(d)(i), Bai resign any position he holds as a director or officer of an issuer or registrant;

(b) Bai is permanently prohibited:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;
(ii) under section 161(1)(c), from relying on any of the exemptions set out in the Act, the regulations or a decision;
(iii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
(iv) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;
(v) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
(vi) under section 161(1)(d)(v), from engaging in investor relations activities;

(c) Bai pay to the Commission $1,291,000 pursuant to section 161(1)(g) of the Act;

(d) Bai pay to the Commission an administrative penalty of $1,000,000 under section 162 of the Act; and

(e) RBP is permanently prohibited:

(i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;
(ii) under section 161(1)(c), from relying on any of the exemptions set out in the Act, the regulations or a decision;
(iii) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(iv) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(v) under section 161(1)(d)(v), from engaging in investor relations activities.

May 11, 2018

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Gordon Holloway
Commissioner