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

Citation: Re Bai, 2018 BCSECCOM 60 Date: 20180206

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	September 11, 12, and 13, 2017 November 3, 2017	
Submissions Completed	November 24, 2017	
Date of Findings	February 6, 2018	

Appearing

James Torrance David Hainey	For the Executive Director
Roy Ping Bai	For Roy Ping Bai and RBP Consulting

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 January 6, 2017 (2017 BCSECCOM 5), the executive director alleged that the respondents, between February 1, 2012 and December 31, 2013, perpetrated a fraud against nine investors, contrary to section 57(b) of the Act, in the aggregate amount of approximately $1.4 million.

[3] During the hearing, the executive director called four witnesses - a Commission investigator and three investors, tendered documentary evidence and provided written and oral submissions. The respondent, Roy Ping Bai, testified on behalf of himself and RBP Consulting, tendered documentary evidence and provided written and oral submissions.

II. Background

The respondents

[4] Bai was a resident of Vancouver and West Vancouver, British Columbia during the period relevant to the allegations in the notice of hearing.

[5] RBP Consulting is a general partnership of which Bai and his wife were the only partners.

[6] In an interview with Commission staff under oath, Bai confirmed that he was the sole operating and controlling mind of RBP Consulting and that his wife did not participate in its operations or in decisions relating to its business.

Forex investments

[7] In addition to the oral testimony, the evidence in the hearing included copies of letter agreements with nine different investors (in certain cases there was more than one letter agreement with a specific individual), banking records of both of the respondents and records of the respondents' foreign exchange trading accounts.

[8] Except as will be discussed below, the evidence from all of the above sources is generally consistent with respect to the following findings:

- Bai (whether this was through RBP Consulting or directly) commenced receiving funds from certain of the investors prior to the period relevant to the notice of hearing;
- some of the investments that were made prior to the relevant period were "rolled over" or reinvested with Bai and/or the partnership during the period relevant to the notice of hearing;
- all of the investors were told (orally and in letter agreements documenting their investments) that their funds were to be invested by Bai (or the partnership) in foreign exchange trading;
- the letter agreements were generally on letterhead of RBP Consulting;
- the investors were promised high rates of return (generally 5% per month or 30-60% per annum);
- from February 17, 2012 through December 18, 2013, the respondents received a total of $1,530,000 in funds for investment, inclusive of the amounts re-invested from the earlier period; and
- between February 15, 2013 and July of 2014, a total of approximately $129,000 was deposited by the respondents into foreign exchange trading accounts.

[9] Bai, in his evidence, did not dispute, and indeed acknowledged the truth of, almost all of this evidence. However, Bai did attempt to contradict some aspects of this evidence including the following:

- he testified that he had lost all of the investors' money (without specifying how the money had been lost);
- he said that one of the investments, in the amount of $50,000, was made in the name of his ex-wife and that this was not an investment but was, instead, a way for him to get funds to his ex-wife and son;
- he says that each of the remaining eight investors (i.e. excluding his ex-wife) provided the respondents with their invested funds prior to executing the letter agreement which documented their respective investment arrangements (which

included the express written representation as to foreign exchange trading use of the invested funds).

[10] Bai further testified that none of the investors' funds were used to pay returns to previous investors, return invested funds to earlier investors or on the personal living expenses of Bai and his wife. We do not accept this testimony as it is directly and specifically contradicted by other compelling evidence submitted by the executive director.

[11] The executive director tendered documentary evidence from the respondents' bank accounts to show that the remainder (after deducting the $129,000 that was deposited into foreign exchange trading accounts) of the investors' funds were used to pay purported "returns" to investors on their previously invested funds, to repay earlier invested funds and on personal living expenses for Bai and his wife.

[12] The banking and foreign exchange trading account records made clear that the investors' funds were not "lost" through the respondents' trading or other investment activities. As noted above, it is clear that most of the investors' funds were used for purposes other than investing in foreign exchange trading.

[13] Although there were additional funds in the respondents' bank accounts at the commencement of the period relevant to the allegations in the notice of hearing, these funds were far less than the amounts expended on matters other than investment in foreign exchange trading by the respondents during the relevant period. We find that the funds (over and above the $129,000) were not invested in foreign exchange trading and were used for other purposes.

[14] We also do not accept Bai's evidence that the $50,000 that was documented as an investment by Bai's ex-wife was not a "real" investment. There was evidence of the deposit of these funds into an account of RBP Consulting. This arrangement was documented with a letter agreement in the same manner as all of the other investments.

[15] We find that the total amount invested by the nine investors was $1,530,000.

[16] The respondents also prepared the following correspondence to the investors:

- a letter dated April 15, 2012 from the respondents that advised the investors that "our company" (we find that to be a reference to RBP Consulting) had decided to start the process to obtain a public listing of its securities;
- a letter dated April 29, 2013 from the respondents that advised investors that due to problems with their securities regulatory filings, the purported public listing would be delayed by approximately one year;
- a letter dated May 1, 2014 from the respondents to the investors that was titled a settlement notice and requested that each investor provide the respondents with a summary of the amounts he or she had invested and the amount that such investor believed he or she was owed by the respondents;

- a letter dated June 1, 2014 from the respondents that advised the investors that the settlement process would be delayed due to an impending tax audit;
- a letter dated June 4, 2014 from the respondents indicating to the investors that they would receive their original investment amount and promised returns on June 30, 2014; and
- a letter dated June 30, 2014 from the respondents to the investors which stated that the respondents had processed all of the paperwork to send each investor his or her funds by wire transfer and that the investors should expect to receive their funds on or about July 7, 2014.

[17] The evidence was incomplete as to whether every investor received every one of these letters. However, the three investor witnesses all testified to receiving all of this correspondence and there was further documentary evidence that confirmed that most of the other investors received most, if not all, of this correspondence.

[18] Bai, during his testimony and in his submissions, admitted that the substance of all of this correspondence was untrue and that these communications were made to give the respondents more time in order to try to pay back the investors.

[19] As noted above, there was evidence during the hearing that the respondents made payments to investors which were purported to be either repayments of previously invested funds or payments of returns on their investments. These payments, and their quantum, are not relevant to the question of liability. However, they may be relevant to the quantum of sanctions. We would expect to receive submissions from the parties, at that stage of these proceedings, with respect to these payments.

III. Analysis and Findings

A. Applicable Law

Standard of Proof

[20] 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.

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

[22] 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.

Definition of person

[23] Section 1(1) defines a "person" to include "an individual, corporation, partnership, party, trust, fund, association and any other organized group of persons and personal or other

legal representative of a person to whom the context can apply according to law".

Fraud

[24] Section 57(b) states

> A person must not, directly or indirectly, engage in or participate in conduct relating to securities . . . if the person knows, or reasonably should know, that the conduct
> . . .
> (b) perpetrates a fraud on any person.

[25] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the elements of fraud from *R. v. Theroux*, [1993] 2 SCR 5 (at page 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

Positions of the parties

[26] The executive director submits that:

a) the arrangements between the respondents and each of the investors was an "investment contract" within the definition of "security" under the Act;
b) RBP Consulting, as a partnership, can contravene section 57(b) of the Act as it is a "person", as defined, under the Act;
c) the evidence establishes that the respondents committed the *actus reus* of fraud (through the misappropriation of invested funds and through the respondents' subsequent untrue correspondence to investors) and had the requisite *mens rea* of fraud; and
d) the quantum of the fraudulent misconduct was the difference between the total amount raised by the respondents from the investors ($1,530,000) and the amount the respondents actually invested in foreign exchange trading ($129,000),

on the basis of which we should find that the respondents contravened section 57(b) of the Act.

[27] The respondents argued that the executive director failed to prove the tort of civil fraud as they submit that the investors were not induced to invest their funds with the respondents on the basis of any misrepresentations.

[28] The allegations in the notice of hearing are not based upon civil fraud. The allegations in the notice of hearing are that the respondents committed fraud in contravention of section 57(b) of the Act. As set out above, the legal test for these allegations is that set out in *Anderson* and not, as the respondents submit, that of the tort of civil fraud. However, we will address the substance of the respondents' submissions in the context of our analysis of the *actus reus* of the alleged fraud in this case.

[29] The respondents further argued that the evidence did not support a finding that any of the investors' funds had been used for purposes other than investing in foreign exchange trading. As noted above, we do not agree.

Security

[30] Each investor entered into an arrangement with the respondents (as evidenced by a letter agreement) whereby he or she would provide funds to the respondents and, in return, he or she was promised a return on those invested funds through the efforts of the respondents. The investors were not required to do anything to achieve the expected return, other than provide the initial investment of capital.

[31] The definition of "security" under the Act includes an "investment contract".

[32] The law relating to the interpretation of an investment contract is long settled. The Supreme Court of Canada in *Pacific Coast Coin Exchange of Canada v. Ontario Securities Commission*, [1978] 2 SCR 112 set out that an investment contract exists when a person invests money, in a common enterprise, where there is an expectation of profits to be derived from the efforts of a third party.

[33] All three of those elements are clearly present in the investment arrangements between the investors and the respondents. We find that the investors entered into investment contracts with the respondents, and as such, the respondents issued securities to the investors.

Person

[34] RBP Consulting is a general partnership where the partners are Bai and his wife. Under the common law, a general partnership is not a separate legal entity. To further complicate matters, the notice of hearing only makes allegations of fraudulent misconduct against the partnership and one of the partners (Bai) and not against the other partner (Bai's wife).

[35] This raises two questions:

a) can allegations be made against a general partnership in circumstances in which not all of the general partners are also named as respondents (for the same

misconduct)? and

b) how should we interpret the *mens rea* requirement of fraud (pursuant to section 57(b) of the Act) in the circumstances of a general partnership?

[36] The executive director submits that the definition of "person" in the Act provides a different outcome than might be achieved under the common law. He says that because the Act defines a "person" to include a partnership (without distinction between a general partnership versus other statutorily created partnerships which are clearly separate legal entities under law), RBP Consulting can be found liable for fraudulent misconduct under the Act, independently of any findings of fraud by one or more of the general partners. In other words, for the purposes of the Act, a general partnership is considered a distinct legal entity.

[37] The executive director further submits that the *mens rea* of a partnership should be determined in the same manner as the Commission determines the *mens rea* of a corporation (which is to consider whether the individual who is the "mind and management" of the corporation had the requisite *mens rea*).

[38] Finally, the executive director submits that the financial (and possibly other) legal implications of a finding that a general partnership is liable for fraudulent misconduct, on a general partner who was not also separately found to have carried out the misconduct and did not have the requisite *mens rea* for the contravention, can and should be assessed during the sanctions phase of a hearing. The executive director cites the decision in *W. Stevenson & Sons (A Partnership) and Julian Bick v. R.*, [2008] EWCA Crim 273 in support of this proposition.

[39] We agree with all of the executive director's submissions on these questions. We agree that the Act allows us to find a general partnership separately and distinctly liable for a contravention of the Act (separate and apart from any liability we may find regarding one or more of the partners).

Actus Reus

[40] The executive director submits that the deceit or the prohibited act in this case was the misappropriation of investor funds by the respondents. This deceit was then exacerbated by the respondents' subsequent falsehoods including those relating to going public, a delay in going public caused by problems with securities regulatory filings, and a tax audit.

[41] We agree with these submissions. The respondents clearly misappropriated most of the investors' funds and used them for purposes other than how the respondents represented to the investors that their funds would be used (i.e. investing in foreign exchange trading).

[42] As noted by the executive director, this deceit was then exacerbated and extended through the respondents' falsehoods, such as the subsequent statements about going

public, which were deliberately made to buy the respondents more time and prevent the fraud from being discovered.

[43] The respondents' various deceits clearly caused deprivation. The diversion of the investors' funds from investment in foreign exchange trading clearly put these funds at risk of loss. These funds have also actually been lost.

[44] The respondents submit that the investors invested their funds with the respondents prior to entering into the letter agreements which documented their investment arrangements. The respondents submit that the investors were therefore not induced to invest by the representation in the letter agreements that the funds were to be invested in foreign exchange trading.

[45] As noted above, whether the investors were "induced" to invest is not part of the legal framework for assessing fraud under section 57(b) of the Act as set out in *Anderson*. However, if we try to apply the respondents' submissions in the context of the test in *Anderson*, we view the submission to be that, at the time of taking the investors' funds, the respondents could do with those funds whatever they wished (i.e. that there was no misappropriation of the investors' funds).

[46] This submission was specifically contradicted by the oral testimony of the three witnesses who all testified that they were told by Bai that their funds would be used for foreign exchange trading. It is also contradicted by the letter agreements themselves. If the respondents were given funds to do with as they pleased, there would be no reason to enter into agreements which promised that the investors' funds would be used for foreign exchange trading purposes. The letter agreements were clearly intended to confirm the arrangements that led to the investors' payments to the respondents. We do not view the timing of the investment of funds versus the timing of entering into the letter agreements to be determinative of the allegations in the notice of hearing.

Mens Rea

[47] The evidence clearly establishes that the respondents had the requisite mental knowledge of the deceit and the deprivation.

[48] In this case, Bai and RBP Consulting are really one and the same. Bai told Commission investigators that he was the operating mind and management of the partnership and that his wife did not have an active role in it.

[49] Bai had direction and control over his and the partnership's bank accounts and the foreign exchange trading accounts. Therefore, he knew how much of the investors' money was being put into the foreign exchange trading accounts and how much was being put towards other uses. He also knew that spending investors' funds on his and his family's personal expenses or on paying earlier investors would both put the investors' funds at risk of loss and lead to actual loss.

IV. Conclusions

[50] We find that the respondents' fraudulent misconduct contravened section 57(b) with respect to nine investors for total proceeds of $1,401,000. In making this finding, and for greater certainty, we would highlight that we do not make any inferred finding of fraudulent misconduct under section 57(b) against Bai's wife personally.

[51] We direct the executive director and the respondents to make their submissions on sanction as follows:

By February 26, 2018	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By March 12, 2018	The respondents deliver their response submissions to the executive director and to the secretary to the Commission. 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 March 19, 2018	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission.

February 6, 2018

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Gordon Holloway
Commissioner