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

Citation: Re Furman, 2019 BCSECCOM 107 Date: 20190403

William Wade Furman

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing Dates	November 5 and 7, 2018	
Submissions Completed	February 8, 2019	
Date of Findings	April 3, 2019	
Appearing		
Nicholas Isaac	For the Executive Director	

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] On March 12, 2018, the executive director issued a notice of hearing against the respondent (2018 BCSECCOM 644) alleging that the respondent committed fraud contrary to section 57(b) of the Act when he raised approximately $452,000 from investors and:

(i) falsely claimed that he was a successful, licensed day-trader who could generate high returns from that activity;

(ii) promised investors that he would invest their funds in his day-trading activities but, instead, used a portion of the funds for purposes unrelated to that activity; and

(iii) provided investors with fabricated monthly reports and forged account statements.

[3] The number of alleged contraventions of section 57(b) by the respondent is not clear in the notice of hearing. However, during the hearing, the executive director clarified that he was alleging 12 contraventions of section 57(b) by the respondent for total proceeds of at least $452,000.

[4] During the hearing, the executive director called six witnesses, a Commission investigator and five investors, tendered documentary evidence and made written and oral submissions.

[5] We find that the respondent was provided the notice of hearing pursuant to section 180 of the Act. However, the respondent did not attend the hearing in person nor was he represented by counsel at the hearing. He did not tender any evidence or provide any written or oral submissions, nor did he attend the hearing of the oral submissions on liability.

[6] Following the hearing of the oral submissions on liability, the executive director provided further written submissions on a question that arose during the hearing of oral submissions – what are the ramifications of a deceit made to an investor after an investment has already been made? These further written submissions were unsolicited by the panel. A copy of these submissions were mailed to the last known address of the respondent and he was provided with an opportunity to reply. No further submissions were received from the respondent.

[7] These are our findings with respect to the liability of the respondent relating to the allegations in the notice of hearing.

II. Background

The respondent

[8] The respondent was a resident of Mission, British Columbia during the period relevant to the allegations in the notice of hearing. The respondent has never been registered in any capacity under the Act.

[9] In 2012, the respondent was on social assistance. The evidence indicates that he voluntarily withdrew from social assistance in order to start a business in the capital markets. However, during a portion of the relevant period, the respondent was also employed at a dairy.

[10] The respondent incorporated a British Columbia company in February 2012 called Liquidus Holdings Inc. (Holdings). Holdings was dissolved in August 2015. In June 2012, the respondent incorporated another British Columbia company called Liquidus Capital Inc. (Capital). Capital was dissolved in November 2015. The respondent was a director of both Holdings and Capital. The only other director of both Holdings and Capital was the respondent's cousin (DF).

[11] Between April 2012 and June 2014, the respondent induced ten investors (who made a total of 12 investments in the aggregate amount of $452,000) to acquire securities in one or both of the two corporations described above. All but one of the investments were consummated by an investor entering into a subscription agreement to acquire shares of one of Holdings or Capital. The other investment was consummated by the investor entering into an agreement titled an "Independent Traders Agreement". The terms of that agreement are difficult to decipher from a legal perspective. However, one of the investors testified that the substance of that investment was, for all practical purposes, the same as for the investments governed by the subscription agreements.

[12] DF was responsible for introducing some of those investors to the respondent and then, latterly, the purported success of the respondent's investment scheme led the initial investors to introduce some of their friends and family members to the respondent as prospective investors. Two of the investors were the respondent's co-workers at the dairy.

[13] Of the ten investors, five testified during the hearing on behalf of a total of six investors (as one of the witnesses also testified on behalf of a corporation that was one of the investors). Three of the remaining four investors spoke to commission investigators during the investigation of this matter and notes of those conversations were entered as evidence during the hearing. None of the information in the notes was supported by affidavit evidence so the contents of the notes must be given less weight in our proceedings than the evidence of the investors who testified. In this case, the information contained in the notes of the interviews with the three investors, with respect to the representations made to them by the respondent, was generally consistent with the evidence given by the five persons who testified.

[14] Given the consistency of the oral and documentary evidence with respect to the representations that were made to nine of the investors, we are able to infer that similar representations were made to the tenth investor.

[15] There were some differences in the testimony of the five investor witnesses (and in the notes of the conversations with Commission investigators with the other three investors) as to exactly what representations (both orally and in written promotional materials prepared by the respondent) were made, or given, to them by the respondent about his background in the capital markets. However, all were generally told that the respondent had a long history in the capital markets and had a proven track record of generating excellent returns (backed by documentation that purported to show trading accounts or summaries of trading histories in which the respondent had generated returns of 100% or more). Some, but not all, of the investors gave evidence that they were told that the respondent was licensed or registered with the securities regulatory authorities.

[16] The witnesses all testified that they were told by the respondent that:

a) their funds would be invested (through one or both of Holdings or Capital) in the respondent's day trading activities; and

b) the respondent's investing strategy, while involving some risk, was safer than other, similar, trading strategies because he closed out his trading positions into cash on a daily (or at least regular) basis.

[17] Each of the three investors who spoke with Commission investigators confirmed that they were told by the respondent that he was a successful day trader and that their invested funds would be invested for that purpose.

[18] Commission investigators obtained banking records for four accounts held by Holdings and Capital. All of the funds from the 12 investments described above were deposited into one of the four accounts.

[19] Notwithstanding that there were two separate companies and the written marketing materials prepared by the respondent and provided to the investors suggested that the business activities and trading strategies within Holdings and Capital would be different, that was not the case. Investor funds advanced for the purpose of acquiring securities in Holdings and Capital were all eventually intermingled (and not segregated) in the respondent's trading activities.

[20] The banking records of the two companies establish that, of the $452,000 raised from investors, the respondent transferred $229,000 into trading accounts. The remaining $223,000 was used for purposes unrelated to trading in securities, primarily on the respondent's personal living expenses and loan repayments.

[21] The respondent deposited the funds that were used for trading into four accounts with three different firms. Commission investigators obtained records of the trading activity within two of those three firms (accounting for approximately $181,000 of the $229,000 in total deposited into trading accounts).

[22] Those trading records disclose that the respondent was an extraordinarily unsuccessful trader and that, during the relevant period, the respondent managed to lose all but $4,000 of the $181,000 deposited into the trading accounts.

[23] Notwithstanding that, the investors who testified confirmed that they received documents which purported to be account statements. Those account statements purported to show their investments growing significantly; in most cases, the statements showed returns of over 100%.

[24] The account statements were purportedly from one of the firms in which the respondent maintained one of his trading accounts. When Commission investigators contacted the firm as to whether they had issued the account statements, the firm confirmed that they had not and did not maintain accounts for any of the investors. All of the account statements were forgeries and fabrications.

[25] Commission investigators were able to obtain account statements from some, but not all of the investors who did not testify during the hearing. Those account statements were consistent in form and purported returns with those received by the investors who testified.

[26] In the summer of 2014, one of the investors asked the respondent to withdraw a portion of his investment. The respondent then proceeded to provide a series of excuses as to why the withdrawal could not happen, including:

a) that the withdrawal request had triggered a 30-day hold on funds under a money laundering law;

b) that the respondent and his company were undergoing a review by Canada Revenue Agency; and

c) that the auditor for the respondent's companies had received compliance reports from a variety of securities regulatory authorities but that all of the companies' funds were being held in cash while awaiting completion of an audit process.

[27] One of the investors sought to verify the excuses that the respondent provided. They contacted the accounting firm that was purportedly completing the audit and found out that the respondent's companies were not clients of the firm.

[28] Shortly thereafter, the respondent cleared out his office and largely ceased communicating with the investors.

[29] However, on January 8, 2015, one of the investors received an email from the respondent, which contained the following (set out verbatim):

> I wish I could talk to you Dale, as well as, all the other people I caused such unforgiveable pain too. But the Police took my computer and phone and told me I'm not to talk to anyone.
>
> I'm not going to attempt to explain myself, or make excuses for what has happened, cuz ultimately it doesn't matter nor is it relevant. I was responsible for your hard earned money and savings and like a complete idiot with serious mental issues I lost control, blew up and created a ridiculous mess of lies while hurting a lot of people that I cared about.
>
> …

> I don't expect you to believe anything I am writing is genuine, why would you …. I lied to you …. I am so incredibly sorry for the pain, disruption and financial loss I caused you, it was never what I set out to accomplish, I can only hope that deep down you know that this was nothing of what I envisioned or intended, not in a million years. I made terrible decisions, while I was becoming more and more of a mess and needed serious mental help ….

III. Analysis and Findings

A. Applicable law

Standard of Proof

[30] 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 (at para. 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.

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

[32] 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 Security

[33] Section 1(1) defines "security" to include "(a) a document, instrument or writing commonly known as a security", "(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person", "(d) a bond, debenture, note or other evidence of indebtedness, share, stock..." and "(l) an investment contract."

Fraud

[34] 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.

[35] 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. Position of the Parties

[36] The executive director submitted that:

a) the investments offered by the respondent in his two companies were "securities" under the Act;

b) the *actus reus* of fraud was committed by the respondent through the deceits committed by the respondent (and described in paragraph 2 above) and that those deceits led to both the risk of deprivation and actual loss by the investors; and

c) the respondent had the requisite *mens rea* for fraud in that he knew that all of the actions or representations described in paragraph 2 were deceits and would cause both the risk of deprivation and actual loss, all of which was essentially admitted by the respondent in his e-mail of January 8, 2015.

C. Analysis

[37] Section 57(b) of the Act requires that the conduct which perpetrates a fraud on any person is "conduct relating to securities or exchange contracts…"

[38] We find that each of the investments made by each of the investors was in a "security" as defined in the Act.

[39] We make that finding on the basis that the subscription agreements (covering all of the investments other than that governed by the Independent Traders Agreement) were agreements to acquire shares of one of the respondent's companies.

[40] Just as importantly, the structure of each of the investments (including that governed by the Independent Traders Agreement as the testimony before us was clear that that agreement governed a business relationship that was exactly the same as that set out in the subscription agreements) would satisfy the "investment contract" analysis set out in *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, [1978] 2 SCR 112, 1977 CanLII 37. That analysis requires a finding that a person invests money, in a common enterprise, from which the investor expects to profit, solely from the efforts of a third party. In this case, each investor provided money to the respondent (through

one of his two corporations) for the express purpose of the respondent using those funds to generate profits through his day-trading activities.

[41] We also find that the evidence demonstrates that the respondent:

a) deceived each of the investors about his prior history of success in trading in securities;

b) deceived certain of the investors about his status as a registrant (or similar status) with securities regulatory authorities;

c) represented to all of the investors that their funds would be invested in the respondent's day trading business but then misappropriated $223,000 of the investors' funds for purposes unrelated to those activities; and

d) created fictitious account statements that were provided to most, if not all, of the investors to show purported returns on investment that bore no relationship to the fact that the respondent lost almost all of the funds invested in his day trading activities within a short period of time after initial investment.

[42] The deceits set out in subparagraphs (a) through (c) above caused deprivation:

a) the respondent's lack of both a successful trading history and registration status created a risk of loss arising from the respondent's lack of knowledge and education with respect to our capital markets; and

b) actual loss of the investors' investments (as evidenced both by the diversion of a portion of the investors' funds from their intended use and the actual loss of investor funds that occurred through the respondent's trading losses).

[43] It may be that the ongoing (after the investments were made) deceits associated with the forged account statements also caused deprivation. The executive director's further written submissions set out that the deprivation element of fraud may be established if there is a risk of prejudice to the economic interests of the victim (see: *R. v. Gaetz*, 1992 CanLII 2509 (NS CA), affirmed [1993] 3 S.C.R. 645). He further submitted that deceits which are designed to prevent an investor from taking earlier steps to preserve their economic interests (even if no further funds are invested) may amount to deprivation.

[44] While we agree with the executive director's submissions on this point, we do not think that we need to analyze the evidence in this case to determine if the fraudulent account statements can be said to have prejudiced the economic interests of the investors, as we have already established the basis for deprivation caused by the respondent's deceits with respect to each investor. It may well be that the forged account statements did cause further deprivation for some, if not all, of the investors; however, for these purposes (and potentially for sanction purposes), it is sufficient to determine that these statements

continued and exacerbated the respondent's deceit with respect to each investor that received them.

[45] The respondent's email of January 8, 2015 establishes that the respondent had the requisite *mens rea* for fraud – he knew that he made fraudulent representations to the investors and that those fraudulent representations caused deprivation.

[46] Even without that email, the evidence establishes that the respondent had the requisite *mens rea*.

[47] The respondent was responsible for the bank and trading accounts of Holdings and Capital. He would have known that he was misappropriating a portion of the investors' funds.

[48] He would have known that he was neither registered with a securities regulatory authority nor had a successful track record within the capital markets. He also would have known about the almost immediate trading losses in the trading accounts.

[49] Therefore, we find that the respondent committed the *actus reus* of fraud and had the requisite *mens rea* for the offence of fraud.

IV. Conclusions

[50] We find that the respondent contravened section 57(b) of the Act in respect of 12 investments for total proceeds of at least $452,000.

V. Submissions on Sanctions

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

By April 25, 2019	The executive director delivers submissions to the respondent and to the secretary to the Commission.
By May 9, 2019	The respondent delivers 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 May 16, 2019	The executive director delivers reply submissions (if any) to the respondent and to the secretary to the Commission.

April 3, 2019

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Suzanne K. Wiltshire
Commissioner