2012 BCSECCOM 399

Samuel Richard Allaby,
Gaia Equity Investments, and Midas Group Holdings Ltd.

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
Submissions completed	June 27, 2012	
Date of Decision	October 15, 2012	
Appearing		
Jeremy Gellis	For the Executive Director	

Decision

I Introduction

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

¶ 2 In a Notice of Hearing issued March 17, 2012 the executive director alleges that Samuel Richard Allaby, Gaia Equity Investments, and Midas Group Holdings Ltd. made misrepresentations with the intention of effecting a trade in a security, contrary to section 50(1)(d) of the Act, and in so doing contravened section 57(a).

¶ 3 None of the respondents appeared at the set-date hearing. We granted the executive director's application that we conduct the hearing in writing and that we deal with both liability and sanction concurrently. None of the respondents entered evidence or filed submissions.

II Background

¶ 4 Allaby was a resident of British Columbia at the relevant time, and sole director of Midas. Midas is a British Columbia company. Gaia is not incorporated in British Columbia but described itself to potential investors as a subsidiary of Midas.

¶ 5 In March 2011 a Commission staff investigator, in the course of a routine search of the electronic media, discovered this posting on the Vancouver Craigslist website:

> "Risk-Free Investing. Earn Up to 9.83% MONTHLY
>
> Gaia Equity leads the world in renewable energy projects in developing countries. Backed by the World Bank and IMF, Gaia pays up to 9.83% monthly interest with contractual guarantee. This is no risk, worry-free investing. Invest with Gaia; help the planet, help yourself."

¶ 6 Posing as an investor, the Commission staff investigator replied to the posting by email, asking for an application form.

¶ 7 The investigator received an email response purportedly from "Dr. Adam Reitman" (identified on Gaia's website as its "chief investment strategist") attaching a form of investment agreement. In his response Reitman said,

> "Interest rates are guaranteed, with principal returned at the maturity of the investment. We offer flexible short and longterm [*sic*] investment plans to suit small or large clients. Please choose a plan from the website".

¶ 8 The "Investment Plans" section of the Gaia website stated that investment returns "are 100% guaranteed" and offered three plans:

- Junior Partner, offering 5.73% monthly with a 30-day term
- Senior Partner, offering 7.15% monthly with a 180-day term
- Corporate Partner, offering 9.83% monthly with a 360-day term

¶ 9 These returns translate to non-compounded annualized returns of 69%, 86% and 118%, respectively.

¶ 10 The investment agreement directed potential investors to deposit funds by wire transfer to an account in Midas' name at a Vancouver branch of a Canadian chartered bank. Allaby was the sole signatory on the account.

¶ 11 Gaia also told potential investors (on its Craigslist posting, on its website, or in the form of investment agreement) these things:

- leading Wall Street investment firms, hedge funds, and multinational insurance companies have trusted Gaia to manage their assets

- investors have committed over $4.2 billion to Gaia and enjoyed returns averaging 257% per annum since 2008
- it partnered with the World Bank and IMF to raise money for green energy projects in developing nations, "maintaining direct involvement and partial oversight" in those projects
- investors could visit Gaia's offices and meet its managers "face to face" at its "head office in Vancouver, British Columbia"
- an investment in Gaia would be safer than it would be in any FDIC-insured bank, and there would be "absolutely no risk"

¶ 12 All of these statements were untrue. Gaia's address is a mail drop. There is no office there for investors to visit and no Gaia managers for them to meet.

¶ 13 Neither does Gaia have any investors or any funds under management, nor does it raise capital for green energy projects or have any other business, as is clear from exchanges between Gaia and Commission staff.

¶ 14 Commission staff sent an email to Gaia stating that it and Midas "appear to be violating the requirements of the Securities Act". Gaia responded:

> "We don't currently have any investors, no money in our bank acct, and we don't do any trading. So that's that."

¶ 15 In response, Commission staff sent an email stating that Gaia is distributing securities, informing Gaia that staff were proceeding with enforcement action, and suggesting Gaia call staff or come in to meet them. Gaia responded:

> "You're wasting your time, and frankly I could care less. Maybe you guys are just bored. As I said, we have no investors, no funds, and we don't trade or conduct any business. The website is a social experiment. Enforce away, just another waste of taxpayer dollars."

III Findings

A "Security"

¶ 16 There can be no contravention of either section 50(1)(d) or 57(a) unless the instrument involved is a security as defined in the Act.

¶ 17 Section 1(1) defines "security" to include "an investment contract".

¶ 18 An investment contract is an investment of money in a common enterprise with profits to come from the efforts of others. (See *SEC v. W. J. Howey Co.* 328 U.S.

293 (1946), *SEC v. Glen W. Turner Enterprises, Inc.* 474 F. 2d 476 (1973), *Pacific Coast Coin Exchange v. Ontario Securities Commission,* [1978] 2 S.C.R. 112.)

¶ 19 The investment offered by Gaia required an investment of money. The investors' profits were to come from the efforts of persons other than themselves. The evidence is clear that once they deposited their funds, the investors' role would have been passive – any profits were to come from Gaia's investment management efforts. The commonality that is required by the cases cited above would have existed between Gaia and the investors.

¶ 20 We find that the investment that Gaia offered through Craigslist and to the Commission staff investigator was an investment contract, and accordingly was a security.

B Misrepresentation

¶ 21 Section 50(1)(d) says that "A person . . . with the intention of effecting a trade in a security, must not . . . make a statement that the person knows, or ought reasonably to know, is a misrepresentation."

¶ 22 Section 1(1) of the Act defines "trade" to include "a disposition of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of" a disposition of a security for valuable consideration.

¶ 23 Section 1(1) of the Act defines "misrepresentation" to include "an untrue statement of a material fact" and "an omission to state a material fact that is . . . necessary to prevent a statement that is made from being false or misleading . . . ." That section also defines "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value" of the security in question.

¶ 24 Gaia's untrue statements would be reasonably expected to have a significant effect on the value of the security offered by Gaia. The value of any security is inextricably linked to the risk associated with it. What Gaia told potential investors and the Commission investigator was important to the assessment of risk:

- Gaia's current portfolio;
- its experience in money management;
- whether it had a viable business;
- whether it had a credible business presence; and

- the risks associated with promised annualized returns ranging from 69% to 118%.

¶ 25 In addition, the returns Gaia offered through Craigslist and to the Commission investigator are impossible to achieve in the absence of significant risk, and indeed are impossible to achieve on a sustained basis through legal means, as this Commission has found in previous cases (see *International Fiduciary Corp SA*, 2008 BCSECCOM 107 at para. 45; *Manna Trading Corp. Ltd*., 2009 BCSECCOM 426 at para. 101).

¶ 26 As Midas' sole director, Allaby was its, and Gaia's, sole directing mind and will. There is no doubt that Allaby, and thereby Midas and Gaia, knew the statements were untrue. He, and they, had to have known that everything Gaia represented was false.

¶ 27 We find that Gaia made blatant and serious misrepresentations. Did it do so with the intention of trading in securities?

¶ 28 An offering of securities using the internet is *prima facie* evidence of an intention to trade. Here, Gaia did not only that – it responded to the Commission investigator's inquiry by providing her with a form of investment agreement and directing her to its website to choose an investment option. The investment agreement contained instructions on where and how to send funds. In our opinion, this is evidence that Gaia intended to trade securities and we so find.

¶ 29 We find that Gaia contravened section 50(1)(d).

C Manipulation

¶ 30 The executive director also alleges that Gaia contravened section 57(a). Section 57 says:

> "57 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
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security . . . , or
>
> (b) perpetrates a fraud on any person."

¶ 31 The executive director says that Gaia's misrepresentations about its sophisticated investor clients and having $4.2 billion under management "contributes to a

misleading appearance of trading activity" and is consequently a contravention of section 57(a). The executive director says that the language of section 57(a) "captures more than a situation where publicly listed securities are exchanged without changes in beneficial ownership".

¶ 32 We disagree. The language of section 57(a) speaks of "a misleading appearance of trading activity in, or an artificial price for, *a security*" [our emphasis]. This is meaningful only in the context of market misconduct by wrongdoers who manipulate the price and trading volume of a publicly-traded security. The concepts of artificial price and misleading trading volumes are relevant only in the context of public securities markets.

¶ 33 Here, there is no evidence of market manipulation, nor is it alleged. In our opinion, Gaia's misrepresentations about the extent of its trading generally as part of its money management business, as serious as they are, do not constitute conduct prohibited by section 57(a).

¶ 34 The executive director did not allege fraud in contravention of section 57(b). The Commission investigator did not actually send funds to Gaia, nor is there evidence that any other investor did so. The dishonesty was present, but not the deprivation.

¶ 35 That said, Gaia attempted fraud. We have found that Gaia, in making its misrepresentations, did so with the intention of trading securities. Clearly, had anyone invested in Gaia, their pecuniary interests would have been put at risk. Gaia lied about everything of any significance to an investor. The returns offered were impossible to achieve through legal means. An investor's money would have gone to a bank account controlled exclusively by Allaby.

D Liability of Midas and Allaby

¶ 36 Gaia describes itself as a subsidiary of Midas. It is not incorporated in British Columbia and its name as disclosed on its website does not contain any of the suffixes normally associated with incorporated entities. If not incorporated, Gaia would appear not to be a legal entity distinct from Midas, but merely a trade name, brand, or division.

¶ 37 If Gaia is an incorporated entity, it is, by its own representation, a subsidiary of Midas, and we find it reasonable to conclude that it is a wholly-owned subsidiary.

¶ 38 Either way, Midas is responsible for Gaia's conduct. If Gaia is merely an *alter ego* for Midas, its conduct was Midas' conduct. If Gaia is a wholly-owned subsidiary of Midas, Midas directed and controlled Gaia's conduct. The findings we have made against Gaia are therefore also findings against Midas.

¶ 39 Allaby is the sole director of Midas.

¶ 40 Section 168.2(1) says:

> "168.2 (1) If a person, other than an individual, contravenes a provision of this Act . . . [a] . . . director or agent . . . of the person who authorizes, permits or acquiesces in the contravention . . . also contravenes the provision . . . ."

¶ 41 The evidence establishes that Allaby controlled Midas', and therefore Gaia's, conduct. Allaby authorized, permitted and acquiesced in Midas' contravention of the Act. We find that Allaby contravened section 50(1)(d) under section 168.1(2).

IV Sanctions

¶ 42 The executive director seeks orders:

1. prohibiting permanently the respondents from trading securities;
2. prohibiting permanently the respondents from engaging in investor relations activities;
3. prohibiting Allaby permanently from acting as a director or officer of any issuer; and
4. requiring Allaby and Midas to pay an administrative penalty of $75,000.

¶ 43 In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified the 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."

Seriousness of the conduct; damage to markets

¶ 44 In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595 the Commission said (at para. 18), "Nothing strikes more viciously at the integrity of our capital markets than fraud." It is the most serious misconduct prohibited by the Act.

¶ 45 We have found that the respondents' conduct was an attempted fraud, and the orders we make in the public interest reflect that. Attempted frauds have the same potential to seriously impair the integrity and reputation of our markets as do actual frauds, especially if it were to appear that attempted frauds drew consequences significantly less serious than actual ones.

Enrichment; harm to investors

¶ 46 Since no actual investment was made, there was no enrichment and no investors were harmed.

Mitigating or aggravating factors

¶ 47 There are no mitigating factors. A consideration of aggravating factors is not relevant when the misconduct is already at the more serious end of the range.

Past conduct; risk to investors and markets

¶ 48 The respondents were warned twice about their illegal activities. Their response shows they have contempt for our system of securities regulation. Their attempted fraudulent conduct and their defiance of the regulatory system shows they present a significant risk to investors and markets.

Specific and general deterrence

¶ 49 The sanctions we impose must be sufficiently severe to ensure that the respondents and others will be deterred from engaging in similarly reprehensible conduct.

Previous orders

¶ 50 In previous decisions in fraud cases, the Commission has made permanent orders and imposed significant financial sanctions. We have considered these precedents in determining appropriate orders.

¶ 51 We have also considered the Commission's recent decision in *Stiles* 2012 BCSECCOM 383, in which the facts were similar to this. In *Stiles*, the Commission said:

> "48 The orders are of necessity less onerous than would apply in the case of an actual fraud because, for example, there is no investment on which to base an order for disgorgement. That said, it is worth remembering that the exercise of the Commission's jurisdiction in making orders under section 161(1) are protective and preventative, intended to prevent likely future harm to securities markets: Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132. It follows that when it comes to making protective and preventative orders in the public interest, those who attempt fraud are likely to find themselves under orders similar to those who actually commit it."

¶ 52 The same reasoning applies here.

Administrative penalty

¶ 53 In *Stiles*, the panel based the administrative penalty it imposed on the amount Stiles was prepared to accept from the investigators who were posing as investors. We cannot follow the approach in *Stiles* because there was no evidence as to the amount Gaia was prepared to accept from investors.

¶ 54 The executive director cited to us the Commission's decision in *Douglas Charles* 2011 BCSECCOM 574. In that case, the respondents used a professional-looking website (with content plagiarized from the legitimate websites of reputable firms) to entice investors. Two investors were contacted but did not bite. The panel imposed an administrative penalty of $100,000 jointly and severally against the four respondents in the case and said this:

> "13 The respondents' conduct was dishonest and predatory. That the BC-resident individuals did not take the bait does not diminish the seriousness of the respondents' misconduct. The public interest must be protected against schemes such as the respondents' advance-fee scheme."

¶ 55 In our opinion, *Douglas Charles* is a useful precedent in establishing an appropriate penalty in cases where the evidence establishes only attempted contraventions of the Act. The penalty we are imposing is greater than that imposed by the panel in *Stiles* – we note *Douglas Charles* was not cited to the panel in *Stiles*. The penalty we are imposing is less than that imposed by the panel in *Douglas Charles* because there is no evidence that Gaia targeted individual investors as was the case in *Douglas Charles*.

V Orders

¶ 56 Considering it to be in the public interest, we order:

1. under section 161(1)(b) of the Act, that Allaby, Midas and Gaia cease trading in, and are prohibited from purchasing, securities and exchange contracts, permanently;

2. under sections 161(1)(d)(i) and (ii), that Allaby resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

3. under section 161(1)(d)(iii), that Allaby is permanently prohibited from becoming or acting as a registrant or promoter;

4. under section 161(1)(d)(iv), that Allaby is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

5. under section 161(1)(d)(v), that Allaby, Midas and Gaia are permanently prohibited from engaging in investor relations activities;

6. under section 162, that Allaby, Midas and Gaia pay an administrative penalty of $50,000; and

7. that Allaby, Midas and Gaia be jointly and severally liable to pay the amount in paragraph 6.

¶ 57 October 15, 2012

¶ 58 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner