

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

Citation: Re Mawji, 2020 BCSECCOM 59

Date: 20200220

Aly Babu Husein Mawji

Panel	George C. Glover, Jr.	Commissioner
	Suzanne K. Wiltshire	Commissioner

Decision date February 20, 2020

Appearing
Deborah Flood For the Executive Director

Abbas Sabur For Aly Babu Husein Mawji

Decision

I. Introduction and Background

- [1] On October 1, 2018, the executive director of the Commission sent a notice (Notice) to the Respondent, Aly Babu Husein Mawji, advising the Respondent that the executive director was applying for orders under sections 161(6)(a) and 161(1) of the *Securities Act*, RSBC 1966, c. 418 (Act).
- [2] The Respondent received with the Notice a certified English translation of the German language version of a decision (Appeal Decision) of the German Federal Court of Justice (Appeal Court) on appeal from the decision (District Court Decision) of the District Court Stuttgart, Germany (District Court), a copy of section 161 of the Act and copies of several prior decisions of this Commission (collectively, Notice Materials). By decision dated June 26, 2019 (*Re Mawji*, 2019 BCSCCOM 228) (Preliminary Decision), the panel ruled on certain preliminary issues raised by the Respondent. These included the decision to admit into evidence additional documents (Additional Evidence) tendered by the executive director subsequent to the delivery of the Notice Materials to the Respondent.
- [3] The Additional Evidence consisted of the District Court Decision (in the original German language), a certified English translation of the first four pages of the District Court Decision and the Appeal Decision in the original German language.
- [4] In a letter dated August 8, 2019, the Commission set out hearing dates in January 2020 to hear submissions on any further preliminary matters and on the merits of the application (Application) set out in the Notice.
- [5] The executive director supplemented the Notice Materials and Additional Evidence with an affidavit (Supplemental Affidavit) of a Commission staff member dated December 5, 2019 that:

- provided information concerning the Respondent’s British Columbia residence and date of birth,
 - confirmed that the German language versions of the District Court Decision and the Appeal Decision were received by Commission staff from BaFin, the federal financial regulatory authority in Germany,
 - provided details of the certified English language translations of the District Court Decision and the Appeal Decision, and
 - confirmed that the Notice Materials, the Additional Evidence and the supplemental materials attached as exhibit “A” to the Supplemental Affidavit had been provided to the Respondent or his counsel.
- [6] As the Supplemental Affidavit including Exhibit “A” contained evidence relevant to the Application and the Respondent made no objection, the panel entered the Supplemental Affidavit into the record.
- [7] In a letter dated January 13, 2020, counsel for the Respondent advised the Commission, “I am instructed to advise that [the Respondent] will not be defending this proceeding further.” The Respondent further communicated to the Commission Hearing Office that, subject to the executive director taking another view, the oral hearing was not required and the matter could proceed in writing.
- [8] The executive director agreed that a hearing in writing was appropriate. Neither the Respondent nor the executive director filed any further submissions beyond those filed earlier in these proceedings.
- [9] In a related matter, the Ontario Securities Commission issued a decision (*Mawji (Re)*, 2019 ONSEC 39) in December, 2019, where the Respondent was permanently banned from trading or purchasing securities, holding the office of director or officer of any issuer or registrant, becoming or acting as a registrant or promotor and prohibiting the Respondent from relying on exemptions contained in Ontario securities laws.
- [10] The Preliminary Decision sets out some of the background as follows:
- [5] The Notice states that the executive director is making the application “based on your conviction for securities misconduct in Germany”.
- [6] The Notice sets out that: “On October 12, 2012, the District Court Stuttgart, Germany (the District Court) convicted you of illegal market manipulation and sentenced you to three years and two months in prison.”
- [7] The Notice then summarizes the key findings of the District Court that resulted in conviction. These findings were derived from a number of passages cited from the written decision (the Appeal Decision) of the German Federal Court of Justice (the Appeal Court) issued on December 4, 2013, after an appeal to that court.

[8] The Notice states that the Appeal Court denied the appeal except for setting aside certain findings (relating to forfeiture) that are not directly relevant to the matters before us. The Notice states that the Appeal Court “affirmed the conviction for illegal market manipulation and upheld the sentence of the District Court”.

[9] The Notice then sets out the executive director’s submissions supporting the application and the orders he seeks under section 161(1). The orders sought against the respondent are permanent market bans.

II. Applicable Law

[11] The applicable sections of the Act are as follows:

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

(b) that ...

(ii) the person or persons named in the order, ...

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

(c) that any or all of the exemptions set out in this Act, the regulations or a decision do not apply to a person;

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer or registrant,

(ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

(iii) is prohibited from becoming or acting as a registrant or promoter,

(iv) is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, or

(v) is prohibited from engaging in investor relations activities; ...

(6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person

(a) has been convicted in Canada or elsewhere of an offence

(i) arising from a transaction, business or course of conduct related to securities or exchange contracts, or

(ii) under the laws of the jurisdiction respecting trading in securities or exchange contracts

....

[12] The Commission's Hearings Policy (Policy 15-601), provides as follows regarding applications under section 161(6) of the Act:

3.1 Power – If another securities regulatory authority in a hearing or under a settlement sanctions a person or a court makes a securities related finding against a person, the Commission may make orders against the person under section 161(1) of the Act after providing an opportunity to be heard under section 161(6).

3.2 Procedure – In these circumstances, the executive director sends the person notice of an application to the Commission for orders under section 161(1) of the Act. The notice includes the record and any submissions and gives the person a reasonable time to make written submissions. The Commission considers the record and all submissions and makes its decision.

[13] Generally, proceedings under section 161 of the Act are conducted in writing.

III. Analysis and Decision

[14] The first issue we must address is whether the executive director has established that the Respondent's conduct falls within the scope of section 161(6) of the Act, i.e. has the Respondent:

been convicted in Canada or elsewhere of an offence

(i) arising from a transaction, business or course of conduct related to securities or exchange contracts, or

(ii) under the laws of the jurisdiction respecting trading in securities or exchange contracts,

....

[15] We have reviewed the submissions and evidence provided by the parties, including the Supplemental Affidavit provided by the executive director. It is abundantly clear from English language translations of the District Court Decision and the Appeal Decision that the Respondent is the person who was convicted of market manipulation relating to securities in Germany

- [16] It is also clear from the evidence that the conduct of the Respondent as described in the District Court Decision and the Appeal Decision involved multiple transactions in shares (securities) of a company, and the course of conduct described in those decisions relates to securities, including promotion of the shares of the company in question and selling of the shares at an artificially inflated price.
- [17] It is also clear, as outlined in pp. 9-10 of the Appeal Court Decision, that the Respondent was convicted in Germany by the District Court of illegal market manipulation, in contravention of applicable German laws, including the relevant provisions of their Securities Trading Act and Market Manipulation Definition Regulation.
- [18] Finally, the Appeal Court upheld the conviction of the Respondent (except for setting aside certain findings irrelevant for our purposes) and confirmed the prison sentence of three years and two months imposed on the Respondent by the District Court.
- [19] Based on the foregoing, we find that the executive director has satisfied his onus to establish the necessary elements of the application of section 161(6) of the Act. The Respondent is a person who has been convicted in Germany of an offence arising from a course of conduct related to securities, or under the laws of Germany respecting trading in securities. The facts before us fall squarely within the scope of section 161(6)(a) of the Act.
- [20] The second issue we must address is whether it is in the public interest to make the orders sought by the executive director under section 161(1) of the Act.
- [21] We note that the penalty meted out to the Respondent following his conviction in Germany was a significant prison sentence. The Commission does not have the authority to mete out a penal sanction in the present circumstances. Similarly, the Commission does not have the authority in these circumstances to impose an administrative penalty pursuant to section 162 of the Act nor to order the Respondent under section 161(1)(g) to “pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;”.
- [22] Accordingly, the Notice sets out that the executive director is only seeking certain market prohibition orders under section 161(1) against the Respondent.
- [23] As outlined by the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 SCR 132, at paras. 36, 39 and 56, any orders we may make must be in the public interest which requires that they must be protective, preventative and intended to be exercised to prevent future harm.
- [24] In *Re Eron Mortgage Corporation*, [2007] 7 BCSC Weekly Summary 22 and in numerous other decisions, the Commission identified factors to consider when deciding whether market prohibitions should be imposed on a respondent and, if so, which ones.

[25] In this matter, the executive director submitted that the following factors should be considered:

- (a) the seriousness of the Respondent's conduct,
- (b) the harm suffered by investors as a result of the Respondent's conduct,
- (c) the extent to which the Respondent was enriched,
- (d) the risk to investors and the capital markets posed by the Respondent's continued participation in the capital markets of British Columbia,
- (e) the Respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers, and
- (f) orders made by the Commission in similar circumstances in the past.

[26] The Respondent's conviction and sentencing in Germany demonstrates that market manipulation is a serious offence under German law. Similarly, the Commission has recognized in cases involving section 57(a) of the Act (the similar provision in the Act) that market manipulation may cause grave harm to both investors and issuers and calls into question the public's confidence in the integrity of the securities markets.

[27] As described in the District Court Decision and the Appeal Decision, the Respondent was an integral participant along with other persons in a covert and orchestrated manipulation of the market price of the subject company's shares by utilization of paid promotional materials not founded in fact and by failure to make critical disclosures of his ownership and sales of the shares.

[28] The market manipulation resulted in rapid increases of the prices for the shares of the company followed, after the sale of the Respondent's shares for a massive profit, by a precipitous decline in the share prices to near zero. No doubt innocent investors were severely impacted and likely the reputation and stability of the company in question suffered as well.

[29] According to the District Court Decision, the Respondent personally profited from the market manipulation in excess of €25 million.

[30] The risk the Respondent poses to the securities markets and investors is serious and palpable. The Respondent maintains significant connections in British Columbia. By playing a significant role in a large scale market manipulation, the Respondent has demonstrated that he has little or no concern for investors or for legitimate market participants.

- [31] Persons who wish to serve as directors, officers or advisors of issuers in British Columbia must have high standards of honesty, integrity and diligence. Persons such as the Respondent who have demonstrated deceit and dishonesty, a disregard for compliance with applicable laws and no concern for the necessity of markets that are honest and fair must be prohibited from serving as directors, officers or advisors in this jurisdiction.
- [32] The executive director submitted that in recent decisions of the Commission, such as *Poonian (Re)*, 2015 BCSECCOM 96 and *Lim (Re)*, 2017 BCSECCOM 319, which involved findings of market manipulation involving lesser amounts of profit to the respondents than occurred in this case, the Commission has ordered permanent bans under section 161(1) against those respondents.
- [33] Considering the evidence in this case and the application of the relevant *Eron* factors to that evidence, we have no hesitation in finding that the permanent market bans sought by the executive director against the Respondent are appropriate and required in the public interest.
- [34] Finally, we note that the Respondent raised other preliminary issues as outlined at paragraph 62 of the Preliminary Decision. We provided the Respondent the opportunity to address any further issues at the oral hearing originally scheduled for January 2020. The Respondent elected not to pursue these matters or defend this proceeding, and made no further submissions. We have reviewed and considered all the evidence and submissions filed by the parties, and we are satisfied, based on the record before us, that the executive director has met the onus under section 161(6)(a) and that there is no merit in these issues identified, but not pursued, by the Respondent.

IV. Orders

- [35] After having given the Respondent an opportunity to be heard, and considering the record and the submissions of the parties, and considering it to be in the public interest, we order that the Respondent:
- (a) under section 161(d)(i), resign any position he holds as a director, officer or advisor of an issuer or registrant;
 - (b) be 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.

February 20, 2020

For the Commission

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commissioner