COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20150304
Docket: CA42715

IN THE MATTER OF THE *SECURITIES ACT*
R.S.B.C. 1996, c. 418

Between:

Manjit Sihota and Perminder Sihota

Appellants

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: a decision of the British Columbia Securities Commission dated March 13, 2015 (2015 BCSECCOM 96)

Oral Reasons for Judgment

Counsel for the Appellant:	A.C. Luchenko
Counsel for the Respondents:	L.T. Doust, Q.C. and D. Hainey
Place and Date of Hearing:	Vancouver, British Columbia February 26, 2016
Place and Date of Judgment:	Vancouver, British Columbia March 4, 2016

[1] **FENLON J.A.**: Manjit Sihota and Perminder Sihota seek leave to appeal the decision of the British Columbia Securities Commission (the "Commission") made on March 13, 2015 (2015 BCSECCOM 96). That decision imposed sanctions on them for contraventions of the *Securities Act*, R.S.B.C. 1996, c. 418 [the *Act*]. The Sihotas do not appeal from the earlier liability decision.

Background

[2] The Commission Panel found the appellants guilty of contravening s. 57(a) of the *Act* by orchestrating a complex, predatory and highly deceptive market manipulation scheme that targeted unsophisticated investors. The Panel found that the appellants manipulated the market for OSE Corp. ("OSE") shares in a sophisticated and extensive way. In addition to the appellants and other respondents, the scheme involved 17 secondary participants, as well as the Phoenix Group, to facilitate the creation of the pool of victim investors and a number of brokerage firms to carry out the manipulation.

[3] The Panel found that the Phoenix clients who purchased OSE shares were generally unsophisticated and vulnerable investors facing financial difficulty. Many were referred to Phoenix by collection agencies or creditors for debt management advice. Phoenix arranged for them to unlock their locked-in retirement accounts and put the money into self-directed investment accounts to generate higher returns on their investments. Phoenix advised many clients to invest in OSE shares. The appellants were found to have paid large commissions (as high as 28%) to the Phoenix Group each time it arranged for a Phoenix client to buy OSE shares. By the conclusion of the manipulation, Phoenix investors had suffered losses of at least $7.1 million.

[4] The Panel found that the market manipulation scheme orchestrated by the appellants had three distinct phases:

> (1) the initial share accumulation phase between May and December 2007, whereby the appellants acquired control of the OSE board and a dominant

share position in OSE at $0.10 to $0.17 per share through two private placements of OSE shares and warrants;

(2) the price increase and maintenance phase between December 2007 and January 2008, whereby the appellants dominated trading and manipulated OSE's share price to a high near $1.50 by trading through brokerage accounts held by them or various secondary participants and other respondents; and

(3) the price maintenance and share liquidation phase between January 2008 and March 2009, whereby the appellants liquidated their positions in OSE and made over $7 million in profits with the other respondents by selling a large number of OSE shares to unsuspecting buyers, including clients of Phoenix.

[5] The Panel found that Mr. Sihota – who had a long business, personal and family connection to the "mastermind" of the scheme (Mr. Poonian) – was actively and extensively involved in the market manipulation. In particular, the Panel found that he actively contributed to the manipulation by acting as a director and president of OSE, receiving OSE shares and trading them in his personal accounts, signing cheques issued to the Phoenix Group to pay commissions for inducing Phoenix clients to purchase OSE shares, as well as making and receiving numerous payments of funds used to fuel the manipulation.

[6] The Panel found that Mrs. Sihota also had a relationship with the Poonians. Although she was found to be the least directly involved in the conduct of the market manipulation relative to the other respondents, the Panel concluded that Mrs. Sihota was involved in repeated and extensive activities relating to the manipulation.

[7] The Panel made a number of public interest orders in its Sanctions Decision prohibiting the Sihotas from being directors and officers, and from participating in numerous investor relations and management activities. No issue is taken with those orders.

[8] The Sihotas, with the other respondents, were also ordered to jointly and severally pay approximately $7.3 million under s. 161(1)(g) of the Act. In addition, Manjit Sihota was ordered to pay an administrative penalty under s. 162 of $3.5 million; Perminder Sihota was ordered to pay $1 million under that provision.

[9] The Sihotas raise the following grounds of appeal, alleging that the Panel erred in law:

> 1. With respect to the disgorgement order by making a joint and several order against the appellants and others for disgorgement under s. 161(1)(g) of the *Act* without an evidentiary basis or findings to establish that the appellants received any of the funds ordered disgorged or were otherwise enriched.
> 2. With respect to the administrative penalty:
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> a. by interpreting s. 162 of the *Act* as permitting it to order Manjit Sihota to pay the Commission an administrative penalty of $3,500,000; and
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> b. interpreting s. 162 of the *Act* as permitting it to order Perminder Sihota to pay to the Commission an administrative penalty in the amount of $1,000,000.

[10] I turn first to the proposed ground of appeal relating to the disgorgement order.

Disgorgement Order

[11] As in the case of *Lathigee v. British Columbia (Securities Commission)*, the Panel adopted a broad interpretation of s. 161(1)(g), citing *David Michael Michaels et al.*, 2014 BCSECCOM 457. It found that it was not necessary to trace funds directly to individual respondents or to show that the funds were obtained or retained by them. It concluded:

> 83 While the respondents' roles in conducting the manipulation varied, each respondent was directly involved in and contributed to the manipulation.
>
> 84 It is therefore appropriate to make a single disgorgement order jointly and severally against all five respondents for the amount obtained as a result of their contraventions of section 57(a) of the Act.

[12] The appellants submit that nothing in the liability decision suggests that they obtained amounts of money as a result of the market manipulation. The Panel found the overall scheme was masterminded by Mr. Poonian.

[13] The Sihotas rely on the on the plain meaning of s. 161(1)(g) which they say supports a disgorgement order being made against "a person" in relation to an amount obtained as a result of their failure to comply with the *Act*, not anyone else's.

[14] The Sihotas argue that the decisions of the Commission are contradictory. Those decisions state a disgorgement order is used to compel a respondent to pay any amount obtained through their contraventions (the ill-gotten gains) but also assert the amount in question does not have to be obtained by a given participant in the contravention.

[15] The Sihotas rely on the Supreme Court of Canada's copyright decision in *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 87, and the dissenting reasons of a panel member in *Streamline Properties Inc. et al.*, 2015 BCSECCOM 66, and other cases. The Sihotas argue that a disgorgement order which exceeds the sum obtained by a respondent, either directly or indirectly, and makes him or her jointly and severally liable for a much larger sum is not authorized by s. 161(1)(g).

[16] The test for granting leave is well known and set out in the decision of *Sihota v. British Columbia Securities Commission*, 2013 BCCA 473, by Mr. Justice Tysoe at para. 11:

> The criteria for granting leave to appeal from a decision on a statutory appeal were stated in *Queens Plate Development Ltd v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109 – 110, Taggart J.A. (in Chambers) as follows:
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> … it seems a justice may have regard for one or more of the matters listed below:
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> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from
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> (b) whether the appeal is limited to questions of law involving:
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> (i) the application of statutory provisions...;

> (ii) a statutory interpretation that was particularly important to the litigant ...; or
>
> (iii) interpretation of standard wording which appears in many statutes
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
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> (d) whether there is some prospect of the appeal succeeding on its merits...; although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued.
>
> (e) whether there is any clear benefit to be derived from the appeal ...; and
>
> (f) whether the issue on appeal has been considered by a number of appellate bodies ....
>
> [case citations omitted]
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> * * *
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> [6] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254, Chief Justice Finch added the requirement at para. 9 that an applicant:
>
> … must satisfy the test found in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 (C.A.) at 143:
>
> > Whether the point on appeal is of significance both to the litigation before the court and to practice in general; whether the appellant has an arguable case of sufficient merit; the benefit to the parties of an appellate decision in practical terms; and, most importantly, whether the appeal will unduly hinder the progress of the action.

[17] For the reasons I have given on this issue on the application for leave in *Lathigee*, I am satisfied that the Sihotas have met the test for leave to appeal from the disgorgement penalty.

Administrative Penalties

[18] The Sihotas argue that the Panel erred in imposing the maximum penalty of $1 million for one contravention against Mrs. Sihota and $3.5 million against Mr. Sihota without specifying the exact number of contraventions for which they were being penalized. They say it was not open to the Panel to decide on a global administrative penalty for the five respondents before it and to simply apportion amounts according to relative culpability. The Sihotas argue that, in accordance with *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Panel must consider the relevant factors in relation to each individual.

[19] The notice of hearing in this matter alleged that the appellants conducted over 200 misleading trades contrary to s. 57(a), which affected hundreds of investors. Those are findings of fact. The particular acts of each respondent were identified and their relative culpability was determined. It cannot be said that the Panel failed to consider the appropriate factors:

- the amount involved;
- the number of violations;
- the number of investors deceived; and
- how serious the conduct was.

[20] The Panel saw this as egregious conduct which required penalties at the higher end of the range to achieve specific and general deterrence. The assessment of the amount of the penalty is a matter falling squarely within the expertise of the Commission. The complaints about the penalty do not in my view raise a substantial question of law or one that has a prospect of success.

[21] I would accordingly deny leave to appeal the administrative penalty orders.

[22] In summary, leave to appeal the disgorgement orders is granted. The balance of the application is dismissed.

"The Honourable Madam Justice Fenlon"