ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Calmusky, 2016 ABASC 9 **Date: 20160112**

Randy Zenovi Calmusky

Panel:	Stephen Murison Richard Shaw, QC
Representation:	Peter Verschoote for Commission Staff Michael Loberg for the Respondent
Submissions Completed:	3 December 2015
Decision:	12 January 2016

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I. INTRODUCTION

[1] Randy Zenovi Calmusky (**Calmusky**) engaged in a course of conduct that perpetrated a fraud on investors. He admitted this, and that this conduct was contrary to section 93(b) of the *Securities Act* (Alberta) (the **Act**) and to the public interest. He and staff (**Staff**) of the Alberta Securities Commission (the **ASC**) jointly proposed a series of sanctions and a cost-recovery order against Calmusky.

[2] Calmusky, having received independent legal advice, voluntarily entered into an *Agreed Statement of Facts and Joint Submission on Sanction* (the **Statement**) with Staff in November 2015. The matter came to a hearing on 3 December 2015, at which we received the Statement in evidence and heard submissions from counsel for Staff and for Calmusky. Staff and Calmusky agreed that we should consider and decide on both the issues of culpability and appropriate orders in a single decision. This is that decision.

II. BACKGROUND

[3] We summarize the pertinent factual background, most of it derived from the Statement (which we accept as accurate).

[4] Calmusky resides in Calgary. He has not previously been sanctioned by the ASC.

[5] In or about October 2008 a company (910234 Alberta Ltd. (**910**)), of which Calmusky was sole voting shareholder, sole director, president and controlling mind, entered into an agreement to govern an interest-bearing loan (the **Loan**) to Lifestyle Homes Inc. (**Lifestyle**).

[6] 910 entered into Mortgage Sale and Servicing Agreements (**MSSAs**) with various investors (the **Investors**) between approximately 2008 and 2009. The MSSAs involved 910 selling Investors portions of the Loan, which 910 would continue to "administer and service" for their benefit. The Investors were to earn a specified rate of interest, which was less than what Lifestyle was to pay on the Loan. 910 was to benefit from that interest spread, and to recover various out-of-pocket expenses. The MSSAs were to mature and be fully repaid at the same time as the Loan. 910 was to remit money to the Investors promptly upon its receipt of any payments from Lifestyle in respect of the Loan.

[7] 910 advanced a total of $1,750,000 to Lifestyle under the Loan in April and May 2011. At least $1,093,600 of that was funded by the Investors. Calmusky's mother may have funded a further $40,000, but there was no evidence of Calmusky funding any of the Loan.

[8] Lifestyle repaid the Loan "in or around" the spring of 2012. $1,420,924.81 relating to this repayment made its way into a 910 trust account on 15 May 2012.

[9] However, "[r]ather than promptly remitting those funds to the Investors as required . . ., Calmusky caused $798,101.99 to be transferred . . . to his personal line of credit . . . that same day". On 29 May 2012 "Calmusky caused another $370,000 to be transferred from the [trust account] to his relatives", part to his mother and part to his brother. These transfers (the **Transfers**, totalling $1,168,101.99) were not disclosed to the Investors.

[10] Calmusky submitted (although there was no evidence before us) that he "rolled over" money repaid by Lifestyle into a separate $1.2 million loan to a different borrower, thereby carrying on 910's business – albeit admittedly not in accordance with the terms of the MSSAs.

[11] Calmusky "had subjective knowledge" of the undisclosed Transfers, and "he knew or ought to have known that [they] could deprive the Investors of some or all of their invested capital or increased the risk that some or all of such capital would be lost". The Transfers indeed "caused the Investors to lose some or all of their invested capital or increased the risk that some or all of such capital would be lost". The extent of the losses was not quantified, but Calmusky acknowledged in submissions that the Investors will not fully recover the money they invested.

[12] 910 went into receivership in December 2012. Bankruptcy followed in May 2013. Subsequent litigation culminated in an order (with Calmusky's consent) that he pay $966,319 to the receiver.

III. ANALYSIS

A. Fraud: The Law

[13] Section 93(b) of the Act prohibits a person from "directly or indirectly . . . engag[ing] or participat[ing] in any act, practice or course of conduct relating to a security . . . that the person . . . knows or reasonably ought to know may . . . perpetrate a fraud on any person or company".

[14] The meaning of "fraud" in this context was discussed in *Re Capital Alternatives Inc.*, 2007 ABASC 79 (affirmed *sub nom. Alberta Securities Commission v. Brost*, 2008 ABCA 326) at para. 309:

> The term "fraud" is not defined in the Act. The gist of the meaning is not, however, difficult to discern. Johnston and Rockwell [in *Canadian Securities Regulation*, 4th ed., (Markham: LexisNexis, 2006)] point to the elements of fraud as enunciated at common law by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 27, which has been adopted in the context of securities regulation (for example, in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 [leave to appeal refused [2004] S.C.C.A. No. 81] at para. 27):
>
> > . . . 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. The Law Applied to the Facts

[15] The MSSAs were securities, qualifying as such under one or more categories set out in the definition at section 1(ggg) of the Act.

[16] The Transfers diverted money that was supposed to be remitted to the Investors. That (as well as the non-disclosure of the Transfers) establishes "prohibited acts" within the meaning of *Théroux*. As Calmusky admitted, the prohibited acts not only "increased the risk" of financial loss, but "caused deprivation to the Investors" – the loss of some of what they invested. The *actus reus* of fraud is thus proved.

[17] The *mens rea* of fraud is also established. Calmusky admitted that he "had subjective knowledge of" the prohibited acts and "knew or ought to have known" that deprivation of the Investors could be a consequence. This is entirely consistent with his having been the sole director, president and controlling mind of 910, and his having "caused" the Transfers to be made contrary to the terms of the MSSAs and without disclosure to the Investors.

[18] It follows, and we find, that Calmusky engaged in a course of conduct that he knew or reasonably ought to have known would perpetrate a fraud. In so doing, we find (as he admitted) that Calmusky contravened section 93(b) of the Act.

[19] We echo here the following comment from *Re Optam Holdings Inc.*, 2015 ABASC 996 (at para. 25): "We consider it self-evident that fraud is also contrary to the public interest". We therefore find that Calmusky (as he admitted) also acted contrary to the public interest.

IV. APPROPRIATE ORDERS

A. Joint Recommendation

[20] Calmusky and Staff jointly recommended that we order Calmusky to pay a $100,000 administrative penalty and impose on him a broad array of permanent market-access bans. On one aspect – the jointly-proposed director-and-officer ban – the parties clarified that it was meant to apply in respect of any issuer, registrant or investment fund manager, not only any with which Calmusky was currently serving (as the Statement wording implied.) The parties also jointly recommended that we order Calmusky to pay $15,000 of the costs of the investigation.

B. Sanctions and Cost-Recovery Orders

[21] The purposes and key principles, factors and considerations pertinent to sanctions and cost-recovery orders were addressed in *Re Allan*, 2015 ABASC 919 (at paras. 19, 20 and 24):

> Those who engage in capital-market misconduct can be sanctioned, in the public interest, under sections 198 and 199 of the Act. The purpose of such sanctions is not retrospective or punitive, but prospective, protective and preventative (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Appropriate sanctioning objectives include specific deterrence (to discourage future misconduct by a respondent) and general deterrence (to discourage similar misconduct by others): *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17. That said, sanctions "must be proportionate and reasonable for each [respondent]. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual [respondent]" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154).

> The ASC in *Re Hagerty*, 2014 ABASC 348 (at para. 11) set out a non-exhaustive list of relevant sanctioning factors:
>
> - the seriousness of the respondent's misconduct and the respondent's recognition of that;
> - the respondent's characteristics and history, such as capital-market experience and any prior sanctions;
> - any benefit sought or obtained by the respondent, and any harm to which the capital market generally or investors were exposed by the misconduct;
> - the risk to investors and the capital market if the respondent were to go unsanctioned or if others were to emulate the respondent's misconduct; and
> - any mitigating considerations.
>
> . . .
>
> Section 202 of the Act contemplates orders for the recovery of costs of an investigation or hearing (or both). As stated in *Re Marcotte*, 2011 ABASC 287 (at para. 20):
>
> > A costs order is not a sanction, but rather a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[22] A hearing panel is not bound to adopt parties' recommendations concerning sanctions or cost-recovery orders. However, as observed in *Optam* (at para. 29):

> In general, a panel will be favourably disposed to issuing orders corresponding to what parties together urge, if the panel is satisfied that they fall within a range that is reasonable in all of the circumstances and consistent with the ASC's public-interest mandate (*Allan* at para 21).

C. Sanctioning Factors

1. Risk

[23] Were Calmusky's misconduct to go unsanctioned, we consider that the ease with which he was able to wrongfully divert Investors' money could serve as a dangerous example to others. We therefore perceive a compelling need for sanctions that will communicate a strong message of general deterrence.

[24] There is also a need for specific deterrence through sanctions sufficient to discourage Calmusky himself from repeating his misconduct. However, circumstances discussed below in connection with other factors diminish the extent of specific deterrence that we consider necessary in the circumstances.

[25] In all, this factor argues for significant sanctions.

2. Seriousness of the Misconduct

[26] Fraud has been described as "probably the most serious category" of misconduct addressed by the Act (*Optam*, at para. 31). Calmusky deceived the Investors, and in so doing he did them harm.

[27] Calmusky's misconduct was clearly serious. This argues for significant sanctions.

3. Recognition of Seriousness

[28] Calmusky appears clearly to recognize that his misconduct was serious. We find ample evidence of this in the unvarnished admissions set out in the Statement, and in his having joined with Staff in the sanctions proposal. Further confirmation might be inferred from his consent to the mentioned order that he pay the receiver a sum approaching $1 million.

[29] All of this in our view diminishes the need for specific deterrence. It does not, however, necessarily address the need for general deterrence.

[30] Accordingly, this factor warrants a tailoring of sanctions to reflect the diminished need for specific (but not general) deterrence.

4. Personal Characteristics and History

[31] As mentioned, Calmusky has not previously been sanctioned by the ASC. In some circumstances this might argue for moderation in sanction, but not here. The nature of Calmusky's misconduct was obviously wrong. No prior sanction was necessary to tell him that.

[32] No other aspects of Calmusky's history or characteristics were offered in respect of this factor. It is therefore neutral on the issue of appropriate sanction.

5. Benefit Sought or Obtained

[33] In submissions Calmusky described having indirectly "rolled over into another loan" some or all of the wrongfully diverted Investors' money. He acknowledged that this was not what the Investors had been promised, but he asserted that "it's not like [Calmusky] took the [money] and . . . fled the jurisdiction ". That may be so, but the fact that he could have behaved worse is hardly mitigation. Calmusky also asserted that he is now "fully destitute", and we were shown a statutory declaration setting out some details consistent with that self-description.

[34] Despite these submissions, it is clear that Calmusky intended to benefit, directly or indirectly through his company 910, when he wrongfully diverted money that should have gone to the Investors. It is also apparent that he did so benefit: he had the use of that diverted money, and applied it in ways not contemplated by or disclosed to the Investors.

[35] This factor argues for significant sanction.

6. Harm Done

[36] The Investors' money was put at risk by Calmusky's misconduct. Moreover, the Investors lost money due to Calmusky's fraudulent conduct. That loss was not quantified, and it may depend partly on the mentioned receivership (and perhaps on litigation or negotiations involving family members). Even so, Calmusky acknowledged in submissions that there will not be full recovery.

[37] This factor argues for significant sanction.

7. Mitigating Factors

[38] Calmusky stressed to us his current state of financial destitution. We do not consider that a matter of mitigation – it does nothing to alleviate the harm done. However, we accept that his current circumstances are likely instructive to Calmusky as an unpleasant consequence of his misconduct. As such, we consider his current financial state pertinent to the issue of future risk, and indicative of a diminished need for specific deterrence.

[39] Staff acknowledged that Calmusky was cooperative in the investigation. It appeared that he had similarly cooperated in the mentioned receivership.

[40] Calmusky's admissions and his concurrence with Staff on appropriate orders obviated the need for a contested hearing. This meant, among other things, that Investors did not have to be summoned to testify, and that Staff resources could be applied to other enforcement matters.

[41] Finally, the mentioned consent order for payment to the receiver could ameliorate Investor losses, perhaps significantly (depending, of course, on the extent of Calmusky's compliance with the order). We observe that the circumstances here might justify a "disgorgement" order of similar magnitude, but the court-ordered payment would more likely assist the Investors.

[42] All of this we accept as mitigating in nature. This factor argues for moderation in sanction.

[43] Calmusky submitted that the admittedly inappropriate Transfers to family members related to money they had "advanced" to Calmusky, and that a court order is in place for payment of some $150,000 from them to the receiver. However, in the absence of evidence and a clear understanding of the circumstances and prospects of payment, this falls short of mitigating the harm done.

8. Outcomes Elsewhere

[44] We were directed to several decisions in other matters. Almost inevitably, none addressed circumstances exactly matching those here, but there were similarities in some instances in terms of the nature and scale of the misconduct, attributes of a respondent or perceived risk. None of the decisions cited directed us to any particular sanctioning outcome, but taken together they indicated that the sanctions jointly proposed here were not inconsistent with orders found to have been in the public interest in other cases.

9. Conclusion on Sanctions

[45] We conclude that this case warrants significant sanction, partly on grounds of specific deterrence (although there is a diminished need for that here) but primarily to send a strong message of general deterrence.

[46] Such sanctions in our view must remove Calmusky permanently from the capital market.

[47] There must also be a more-than-incidental direct monetary order, in the form of an administrative penalty; without that, we consider that the essential element of general deterrence would be lost. However, the warranted moderation in sanction can be reflected in the quantum of that monetary order. We think this would be accomplished by the jointly-proposed administrative penalty of $100,000; the amount is not inconsequential, but it is far below the $1 million maximum contemplated by section 199 of the Act.

[48] We are satisfied that the combination of permanent market-access bans and a $100,000 administrative penalty would be reasonable, and together provide appropriate protection and deterrence.

[49] Mindful that sanctions are not meant to punish or crush a respondent, we do not disregard Calmusky's self-depiction as destitute. However, financial circumstances can change. Given that Calmusky himself was among the proponents of the sanctions discussed (including the administrative penalty), we are satisfied that those sanctions are not disproportionate.

D. Cost-Recovery

[50] Nothing in the circumstances here indicated that Calmusky should be wholly relieved of responsibility for some of the investigation costs incurred. However, his cooperation in the investigation warrants an order for less than full cost recovery. We agree with the parties that the jointly-proposed order for recovery of $15,000 of the investigation costs is reasonable in the circumstances.

V. CONCLUSION

[51] For the reasons given, we order as follows:

- under sections 198(1)(b) and (c) of the Act, Calmusky must cease trading in or purchasing securities or derivatives, and all exemptions contained in Alberta securities laws do not apply to him, in each case permanently;

- under sections 198(1)(c.1), (e.1), (e.2) and (e.3), Calmusky is permanently prohibited from engaging in investor relations activities, advising in securities or derivatives, becoming or acting as a registrant, investment fund manager or promoter, or acting in a management or consultative capacity in connection with activities in the securities market;

- under sections 198(d) and (e), Calmusky must immediately resign all positions he holds as, and he is permanently prohibited from becoming or acting as, a director or officer (or both) of any issuer, registrant or investment fund manager;

- under section 199, Calmusky must pay an administrative penalty of $100,000; and
- under section 202, Calmusky must pay $15,000 of the costs of the investigation.

[52] This proceeding is concluded.

12 January 2016

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Richard Shaw, QC