ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Optam Holdings Inc., 2015 ABASC 996 **Date: 20151229**

Optam Holdings Inc., Infinivest Mortgage Investment Corporation, and Wade Robert Closson

Panel:	Stephen Murison Richard Shaw, QC Fred Snell, FCA
Representation:	Garner Groome Peter Verschoote for Commission Staff Steven Fix for the Respondent(s)
Submissions Completed:	23 November 2015
Decision:	29 December 2015

I. INTRODUCTION

[1] Alberta Securities Commission (**ASC**) staff (**Staff**) alleged that Optam Holdings Inc. (**Optam**), Infinivest Mortgage Investment Corporation (**Infinivest**) and Wade Robert Closson (**Closson**) (together, the **Respondents**) traded and distributed securities illegally (contrary to sections 75 and 110, respectively, of the *Securities Act* (Alberta) (the **Act**)), that Closson made misleading or untrue statements and engaged in fraudulent conduct (contrary to sections 92(4.1) and 93(b), respectively), and that all of this conduct was also contrary to the public interest.

[2] The Respondents, voluntarily and with the benefit of independent legal advice, executed a Statement of Admissions (the **Statement**). In the Statement, the Respondents admitted to the misconduct alleged by Staff, except in respect of Closson's alleged breach of section 92(4.1) of the Act. Staff effectively withdrew that allegation, considering it essentially to be subsumed in other Statement admissions.

[3] At the hearing we received evidence (including the Statement) and heard submissions from counsel for Staff and for the Respondents concerning the allegations, the Statement, and the parties' shared position as to appropriate orders.

[4] The parties agreed that we should proceed to consider and decide on both the merits of the allegations and appropriate orders. This is that decision.

II. BACKGROUND

[5] We summarize here the pertinent facts, largely derived from the Statement, which we accept as accurate.

[6] Closson, who lives in or near St. Albert, Alberta, was an officer and director of Optam and Infinivest (both Alberta corporations). Infinivest "was ostensibly in the business of mortgage lending as a mortgage investment corporation". Either (these were presented in the Statement as alternatives) Closson administered that ostensible business through Optam, or "the investment funds were provided to Optam through Infinivest and other entities controlled by" Closson. Investors also apparently "transfer[red] registered accounts to Closson's control" via Infinivest.

[7] From 1 January 2009 to 2 April 2013 Closson raised a total of some $10.8 million for Optam and Infinivest from as many as 125 investors (all these dates and figures were presented in the Statement as approximations). In exchange, investors received either "promissory notes issued by Closson and Optam" in what the Statement called the **Optam Scheme** (a term we also adopt), or preferred shares in Infinivest (the **Infinivest Scheme**). Investors in the Optam Scheme were to earn a return (generally, 18% annually) from the profits of the purported mortgage investment operation to which their pooled money was supposedly directed, while investors in the Infinivest Scheme were to receive dividends from the same purported operation. (We refer to the Optam and Infinivest Schemes together as the **Schemes**, and to the raising of money under both Schemes as the **Money-Raising**.)

[8] Closson authorized, permitted or acquiesced in the Schemes, and solicited or acquiesced to the sales of promissory notes and shares issued in the Schemes "continually and regularly with the expectation of remuneration or compensation".

[9] In the course of the Money-Raising Closson made "material representations to investors", namely that their money would be used to fund mortgages and be secured by real estate, and that Closson's "fees" and "interest payments to investors" were to be paid "from income generated by" the mortgages.

[10] The reality was different. After approximately mid-August 2008, and thus throughout the Money-Raising period mentioned above, investor money was not used to fund any mortgages and (aside from one or two early exceptions in the Optam Scheme) investments under the Schemes were not "secured by any encumbrance on any real estate in favour of the investors". Instead, Closson diverted money to "uses not authorized by investors", including using "approximately $5.6 million" of new investor money to pay returns to other investors, applying "approximately $3.9 million" for projects "outside the scope of the express or implied purpose of the investments", and removing "at least approximately $800,000 for his own use".

[11] The Schemes continued at a time when Closson "knew or ought to have known" that one or more of himself, Optam and Infinivest was "insolvent or on the cusp of insolvency". That was not disclosed to investors, and the Respondents each declared bankruptcy near the end of the Money-Raising period.

[12] In respect of the Schemes, none of Closson, Optam or Infinivest was registered to sell securities, there was no prospectus or offering memorandum, and no effort was made to qualify investors or otherwise comply with the conditions of any prospectus or registration exemptions under National Instrument 45-106 *Prospectus and Registration Exemptions* (now named *Prospectus Exemptions*) or National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**).

[13] Investors in the Schemes received some payments of dividends, interest and principal; many reinvested with Optam or Infinivest, such that "almost all of the principal" invested in the Schemes "remains outstanding to the investors".

III. ANALYSIS

A. Illegal Trades and Distributions

[14] Section 75 of the Act prohibited trading in securities without registration, until legislative changes in September 2009 narrowed the registration requirement (in the context relevant here) to those engaging in or holding oneself out as engaging in "the business of trading" in securities. Section 110 prohibits distributions of securities without a prospectus.

[15] The Act broadly defines a "security" to include any share, "note or other evidence of indebtedness" or "investment contract" (section 1(ggg)). We therefore find (consistent with the Respondents' admission in the Statement) that the promissory notes and shares sold in the Schemes were securities.

[16] A "trade" includes any sale of a security for valuable consideration, as well as any act in furtherance of such a sale (section 1(jjj) of the Act). A trade in a security not previously issued is a "distribution" (section 1(p)). Indicia of being in the business of trading in securities include carrying on that activity with repetition, regularity or continuity, or with the expectation of remuneration (section 1.3 of the Companion Policy to NI 31-103 offers guidance on this topic). Accordingly, in selling promissory notes and shares in the course of the Schemes, each of the Respondents was both trading and distributing securities (as they admitted); we so find. The prospectus requirement under section 110 of the Act therefore applied. So too did the registration requirement under section 75, before the mentioned legislative change but also after, given the admitted continuity and regularity of the trading and the expectation of remuneration or compensation.

[17] In the absence of registration and a prospectus, the Respondents would have had to establish that they relied on available exemptions from those requirements. Staff acknowledged that such exemptions appeared to have been available in some cases – but not in all. The Respondents admitted this.

[18] It follows, and we find (consistent with the admissions in the Statement) that the Respondents each contravened sections 75 and 110 of the Act.

B. Fraud

[19] The elements of fraud in the sense of section 93(b) of the Act were 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).

[20] Closson's false representations to the investors as money was being raised, and his undisclosed diversion of their money to unauthorized purposes, were both acts of deceit. These acts put investors' pecuniary interests at risk; indeed, it appears that most of the money they invested has been lost. We find that the *actus reus* of fraud is established.

[21] We are in no doubt that Closson knew at the time that his false representations were such, and that investor money was being diverted (without disclosure) to unauthorized purposes, including for his own personal use. We therefore find that he had subjective knowledge of his deceitful acts.

[22] The risk of resulting harm to investors' pecuniary interests would, in our view, have been obvious to anyone in Closson's position at the time. We therefore conclude that he had subjective knowledge of that.

[23] Accordingly, we find that the *mens rea* of fraud is also established.

[24] From this it follows, and we find, that (consistent with the Statement) Closson engaged in a course of conduct relating to securities that perpetrated a fraud on investors in breach of section 93(b) of the Act.

C. Conduct Contrary to the Public Interest

[25] Illegal trading and distribution deprives investors of two core protections mandated by the Act: prospectus disclosure and registrant involvement. In the circumstances here, the Respondents' illegal trades and distributions were clearly contrary to the public interest. We consider it self-evident that fraud is also contrary to the public interest.

[26] It follows, and we find, that (consistent with the Statement) the Respondents' misconduct found above was contrary to the public interest.

IV. APPROPRIATE ORDERS

A. Parties' Recommendation

[27] The Respondents and Staff jointly asserted that, given the Respondents' admitted misconduct, it would be in the public interest to order against each of Optam, Infinivest and Closson a parallel array of permanent market-access bans, together with (against Closson alone) a permanent director-and-officer ban as well as a $1 million administrative penalty. The parties also jointly submitted that it would be appropriate for us to order Closson to pay $30,000 of the investigation costs.

B. Sanctions and Costs-Recovery Generally

[28] The ASC recently summarized the purposes, principles, factors and considerations relevant to sanctions and cost-recovery orders (*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:
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> - 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.

[29] Parties' joint recommendations concerning sanctions and cost-recovery orders do not bind a hearing panel, but they carry considerable weight. 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. Analysis

1. Sanctions

(a) Seriousness of the Misconduct

[30] As suggested above, the registration and prospectus requirements are fundamental elements of our securities regulatory regime. The registration requirement requires the involvement, in investment transactions, of registrants knowledgeable about the securities being sold and the circumstances, investment objectives and risk tolerances of the particular investor.

A prospectus is meant to assist a prospective investor in making informed investment decisions by providing reliable, material disclosure about an offering. The Respondents' contraventions of these requirements deprived investors of these core protections. This, clearly, was serious misconduct.

[31] Fraud is obviously serious misconduct, probably the most serious category addressed by the Act. In this case, Staff rightly observed that Closson's conduct exhibited "a high degree of deceit and dishonesty".

[32] This factor argues for significant sanctions against each of the Respondents.

(b) Respondents' Recognition of Seriousness of the Misconduct

[33] The Respondents' admissions in the Statement, and the significant sanctions that they (with Staff) propose, persuade us that the Respondents recognize the seriousness of their misconduct.

[34] In our view, this moderates the need for specific deterrence and therefore argues for some moderation in sanction.

(c) Respondents' Characteristics and History

[35] There was no evidence that any of the Respondents had previously been sanctioned for capital-market misconduct. As such, one potentially aggravating factor is absent here.

[36] That said, Closson is an educated man, and he has experience in the capital market – almost five years' history as a registered mutual fund salesman. From that, he (and, through him, the two corporate Respondents of which he was an officer and director) must have understood that the capital market is regulated and that those raising capital must adhere to the relevant laws. That illegal trading and distributions were nevertheless conducted argues for significant sanctions against all the Respondents, delivering both specific and general deterrence.

[37] This conclusion is reinforced in the case of Closson by his fraudulent conduct. Defrauding investors is obviously wrong, and surely apparent to anyone irrespective of their education, experience or regulatory history.

(d) Benefit Sought and Obtained

[38] The Respondents sought to benefit from their illegal trades and distributions, and Closson also from his fraudulent activity. They all did benefit, substantially, by improperly raising millions of dollars and diverting much of that to unauthorized uses, including considerable sums for Closson personally.

[39] This factor indicates that significant sanctions delivering strong messages of specific and general deterrence are warranted.

(e) Harm Done

[40] Many investors – up to 125 – were exposed to serious harm by the Respondents, and "almost all" of the large amount invested (or reinvested) remains outstanding.

[41] The consequences to individual investors – financial and emotional – can well be imagined. We received into evidence two written statements from investors, which we accept as truthful. One attested to a loss from which "we will never be able to recover". The other spoke of "a great deal of emotional stress and many, many sleepless nights", doubtless connected to the investor having had to sell a home and relocate to a mobile home in a different community.

[42] In addition to such tangible and direct harm, there is a foreseeable harm to the capital market generally, in that other potential investors who learn of what the Respondents' investors have endured may themselves lose confidence in our capital market and become reluctant to invest, to the detriment of businesses seeking to raise capital within the law.

[43] This factor also argues for significant sanctions against each of the Respondents, delivering rigorous specific and general deterrence.

(f) Risk Were Misconduct Unsanctioned

[44] By their misconduct, the Respondents (as admitted) successfully raised significant amounts of money from many investors, much of which were diverted by Closson to "several unauthorized purposes", including sizeable amounts for his own use. Were the Respondents to escape sanction, their example might foreseeably entice others (or, indeed, the Respondents themselves) to repeat the misconduct – harming yet other investors, and the capital market generally.

[45] This factor, again, warrants the imposition of significant sanctions delivering both specific and general deterrence.

(g) Mitigating Factors

[46] There was no evidence of the Respondents having done anything that would undo the financial and emotional harm caused to their investors. No mitigation lies there.

[47] However, it was apparent (and expressly acknowledged by Staff) that the Respondents were cooperative in the investigation. Their admissions, and joint position with Staff, avoided the need for a potentially lengthy contested hearing. All of this, according to Staff, freed Staff resources for redirection to other matters and obviated a potential burden on investors who might otherwise have been called on to provide evidence. This, in our view, merits recognition through some moderation in sanction.

(h) Outcomes in Other Proceedings

[48] Although seldom very helpful as a specific guide in sanctioning because of the diversity of factual circumstances, decisions in other proceedings can give a flavour of the types and combinations of sanctions and (at least in a very general sense) of the magnitudes of sanction that have been found reasonable in response to proved misconduct.

[49] To that end, Staff drew our attention specifically to *Re Cloutier*, 2014 ABASC 170. There, in connection with a capital-raising operation similar in magnitude to that here, an individual found liable for (among other things) illegal trades and distributions and fraud was

sanctioned with an array of permanent market-access bans and a $1 million administrative penalty. Although not determinative, this supports the parties' position that their joint proposal on sanctions here is reasonable.

(i) Conclusion on Sanctioning Factors

[50] In the result, we find that this case warrants significant sanctions, sufficient in breadth and extent to deliver clear and robust deterrence, both to the Respondents and others.

[51] The jointly proposed market-access bans would be broad in scope and (as mentioned) permanent in effect. The administrative penalty would fall considerably short of what might be permitted under the Act (given the multiple admitted contraventions), but taking into account the mentioned appropriateness of some moderation in sanction in light of the recognition of the seriousness of the misconduct and the cooperation with Staff, we consider the proposed quantum adequate. There was no evidence to suggest that any of the proposed sanctions would be disproportionate or crushing to any of the Respondents; the fact that they proposed these sanctions indicates the contrary.

[52] In the result, we are satisfied that the joint proposal for sanctions is reasonable, and we consider corresponding orders to be in the public interest.

2. Cost-Recovery

[53] This is a case in which, in our view, costs should be recovered. However, the Respondents' cooperation is both relevant and highly significant; we consider that it should be recognized through an order for less than complete cost recovery.

[54] We accept as reasonable the parties' joint proposal on this issue. (In so doing, we note that it would present a notable difference from the outcome in *Cloutier* – a difference in our view fully justified by the mentioned cooperation evident here.) Accordingly, we consider that an order corresponding to that proposed by the parties would be appropriate.

V. CONCLUSION

[55] For the reasons discussed, we order as follows:

- under section 198(1)(a) of the Act, all trading in or purchasing in respect of any security or derivative of Optam or Infinivest must cease, permanently;

- under sections 198(1)(b) and (c), the Respondents are each permanently prohibited from trading in and purchasing all securities or derivatives, and all exemptions contained in Alberta securities laws do not apply to them, permanently;

- under sections 198(1)(e.1), (e.2) and (e.3), the Respondents are each permanently prohibited from 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), Closson must immediately resign all positions he holds as, and he is permanently prohibited from becoming or acting as, a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- under section 199, Closson must pay an administrative penalty of $1 million; and

- under section 202, Closson must pay $30,000 of the costs of the investigation.

[56] This proceeding is concluded.

29 December 2015

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Richard Shaw, QC

"original signed by"
Fred Snell, FCA