



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

**IN THE MATTER OF THE
*SECURITIES ACT, RSO 1990, c S.5***

- AND -

**IN THE MATTER OF
MARK ALLEN DENNIS**

REASONS AND DECISION

Hearing: In writing

Decision: May 3, 2016

Panel: Timothy Moseley Commissioner and Chair of the Panel

Submissions by: Clare Devlin For Staff of the Commission

No submissions received on behalf of Mark Allen Dennis

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REASONS AND DECISION

I. OVERVIEW

- [1] The respondent Mark Allen Dennis ("**Dennis**") was registered in various capacities under the *Securities Act*¹ (the "**Act**") from December 2003 to January 2010.
- [2] Dennis misappropriated the funds of numerous clients, as a result of which several proceedings ensued:
- a. a proceeding initiated in 2011 before a hearing panel of the Investment Industry Regulatory Organization of Canada, as a result of which Dennis was ultimately subject to a fine of \$1.45 million and other sanctions;
 - b. a trial in the Superior Court of Justice, following which Dennis was convicted on one of three counts of theft by conversion and, in July 2014, sentenced to a term of imprisonment of two years less a day, with probation to follow (the "**First Criminal Proceeding**"); and
 - c. guilty pleas by Dennis to ten counts of theft by conversion, as a result of which Dennis was sentenced in February 2015 to a term of imprisonment of 42 months (the "**Second Criminal Proceeding**").
- [3] Enforcement Staff of the Ontario Securities Commission ("**Staff**" of the "**Commission**") asks the Commission to order, pursuant to subsection 127(1) of the Act, that:
- a. trading in any securities or derivatives by Dennis cease permanently;
 - b. the acquisition of any securities by Dennis be prohibited permanently;
 - c. any exemptions contained in Ontario securities law not apply to Dennis permanently;
 - d. Dennis resign any positions that he holds as director or officer of any issuer, registrant or investment fund manager;
 - e. Dennis be prohibited permanently from becoming or acting as an officer or director of any issuer, registrant or investment fund manager; and
 - f. Dennis be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.
- [4] In seeking the order, Staff relies upon paragraph 1 of subsection 127(10) of the Act, which provides that an order under subsection 127(1) may be made in respect of a person who has been convicted of an offence arising from a course of conduct related to securities.
- [5] For the reasons set out below, I find that Dennis was convicted of offences arising from a course of conduct related to securities, and that it is in the public interest to make the order requested by Staff.

¹ RSO 1990, c S.5.

II. PRELIMINARY MATTERS

- [6] On September 30, 2015, the Commission issued a Notice of Hearing (the “**Notice of Hearing**”), naming Dennis as the sole respondent, in relation to a Statement of Allegations filed by Staff on September 28, 2015. The Notice of Hearing fixed October 27, 2015, as the date of a hearing at which the Commission would consider whether it was in the public interest to make the order referred to in paragraph [3] above.
- [7] The Notice of Hearing indicated that at the October 27 hearing Staff would apply to continue this proceeding in writing.
- [8] On October 23, Dennis sent an email to Staff in which he advised that he did “not object to the hearing being held by way of writing.”
- [9] Dennis did not appear at the October 27 hearing. At the hearing, I granted Staff’s application to proceed in writing. I ordered that Staff deliver its written materials by November 5, 2015, and that Dennis deliver his responding materials, if any, by December 4, 2015.²
- [10] Staff served and filed its materials as required. Those materials included written submissions and a hearing brief comprising a number of documents. I have marked the following documents as exhibits in this proceeding:
- a. Indictment sworn September 18, 2014, re: Mark Allen Dennis (Exhibit 1);
 - b. Agreed Statement of Fact re: Mark Allen Dennis (Exhibit 2);
 - c. Transcript of the Guilty Plea and Sentencing Proceedings dated February 5, 2015, in the Superior Court of Justice before the Honourable Justice Parayeski in the matter of *Her Majesty the Queen v. Mark Allen Dennis* (Exhibit 3);
 - d. Indictment sworn October 16, 2012, re: Mark Allen Dennis (Exhibit 4);
 - e. Transcript of Charge to the Jury dated May 1, 2014, in the Superior Court of Justice before the Honourable Justice Whitten in the matter of *Her Majesty the Queen v. Mark Allen Dennis* (Exhibit 5);
 - f. Transcript of Verdict by Jury dated May 2, 2014, in the Superior Court of Justice before the Honourable Justice Whitten in the matter of *Her Majesty the Queen v. Mark Allen Dennis* (Exhibit 6);
 - g. Transcript of the Reasons for Sentence dated July 18, 2014, in the Superior Court of Justice before the Honourable Justice Whitten in the matter of *Her Majesty the Queen v. Mark Allen Dennis* (Exhibit 7);
 - h. Investment Industry Regulatory Organization of Canada Decision and Reasons re: Mark Allen Dennis dated June 3, 2011 (Exhibit 8);
 - i. Ontario Securities Commission Reasons for Decision dated July 31, 2012 (Exhibit 9); and
 - j. Section 139 Certificate re: Dennis dated June 5, 2015 (Exhibit 10).

² *Re Dennis* (2015), 38 OSCB 9283.

[11] In this proceeding, Dennis did not deliver any materials and did not otherwise respond.

III. FACTUAL BACKGROUND

A. Introduction

[12] The facts that are relevant to this proceeding and described below are found in the documents referred to above.

B. The First Criminal Proceeding

[13] Following a trial by jury before the Superior Court, Dennis was found guilty of one count of theft by conversion relating to one former client. The client gave Dennis \$1.7 million to invest in commercial real estate. Dennis did not invest the funds in real estate. Instead, he used the funds for his own personal benefit or to make payments to other former clients.

[14] The sentencing judge noted the following:³

- a. as an investment advisor, Dennis abused his position of trust and authority;
- b. the conduct was "a horrific breach of that position of trust";
- c. Dennis was "a gifted, trusted financial investment advisor, a professional, who took advantage of [his] position and created not just financial loss but shame and trust issues for his victim"; and
- d. Dennis "still presents a risk ... he perceives himself as the victim. He is somewhat detached from the consequences of his behaviour."

C. The Second Criminal Proceeding

[15] Dennis's guilty pleas referred to in paragraph [2]c above related to his having accepted money from former clients, purportedly to invest those funds in commercial real estate secured by mortgages or in mortgages on commercial properties.

[16] Dennis did not invest the funds as he said he would. Instead, he used them for a variety of other purposes, including for his own personal benefit and for making payments to other investors.

[17] The sentencing judge found that Dennis had "used his position as an investment adviser to channel just under \$5,000,000 worth of client's money to his own use. He did this over a protracted period of time..."⁴

IV. ISSUES

[18] Paragraph 1 of subsection 127(10) of the Act provides that an order may be made under subsection 127(1) in respect of a person if the person "has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives."

³ Exhibit 7 at 3, 5 and 7.

⁴ Exhibit 3 at 41, lines 21-25.

- [19] Staff's application for an order pursuant to subsection 127(1), made in reliance upon subsection 127(10), therefore presents two issues:
- a. Did Dennis's convictions arise from transactions or a course of conduct related to securities?
 - b. If so, what sanctions, if any, should the Commission order against Dennis?

V. ANALYSIS

A. Did Dennis's convictions arise from transactions or a course of conduct related to securities?

- [20] I must first determine whether the transactions through which Dennis accepted funds, purportedly to invest those funds for the benefit of his clients, were "securities".
- [21] The term "security" is defined in subsection 1(1) of the Act to include an "investment contract". That term is not defined in the Act, but as the Supreme Court of Canada has held, an investment contract will be found where: (i) there is an investment of funds with a view to profit, (ii) in a common enterprise, and (iii) the profits are to be derived solely from the efforts of others.⁵
- [22] I now apply that three-pronged test to the facts of this case to determine whether the course of conduct related to securities.
- [23] With respect to the first prong, there can be no dispute in this case that Dennis's clients invested their funds with a view to profit. This was precisely the clients' objective in entrusting their funds to Dennis.
- [24] In describing the second and third prongs of the test to determine the existence of an investment contract, the Supreme Court of Canada held that:
- ...such an enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.⁶
- [25] In this case, each victim's role was limited to advancing the funds. Those individuals relied upon Dennis's promises as to how he would invest their funds and believed that he would manage the investments.

⁵ *Pacific Coast Coin Exchange v Ontario (Securities Commission)*, [1978] 2 SCR 112 at 128.

⁶ *Ibid* at 129-30.

[26] These facts establish commonality between the investors and Dennis, in circumstances where the anticipated profits were to be derived solely from the efforts of others.

[27] The course of conduct underlying Dennis's conduct was, therefore:

- a. related to investments made with a view to profit,
- b. in a common enterprise between Dennis and the investors,
- c. where the profits were to be derived solely from the efforts of someone other than the investors.

[28] As a result, all three prongs of the test referred to above are satisfied. It follows that Dennis's convictions arose from transactions, and a course of conduct, relating to securities. The test prescribed by subsection 127(10) of the Act is satisfied.

B. If so, what sanctions, if any, should the Commission order against Dennis?

[29] Having found that the test in subsection 127(10) of the Act has been met, I must now determine what sanctions, if any, should be ordered against Dennis.

1. Legislative framework

[30] Subsection 127(10) of the Act does not itself empower the Commission to make an order; rather, it provides a basis for an order under subsection 127(1). The Commission must still consider whether it is in the public interest to make an order under subsection 127(1), and if so, what the order ought to be.

[31] The purpose of section 127 of the Act, and the principles that should "animate" its application, were reviewed by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*.⁷ In that decision, the Court held⁸ that "in considering an order in the public interest", the Commission shall have regard to both of the two purposes of the Act, as set out in section 1.1 of the Act:

- a. to provide protection to investors from unfair, improper or fraudulent practices; and
- b. to foster fair and efficient capital markets and confidence in capital markets.

[32] The Court then described the purpose of the section 127 public interest jurisdiction as being "neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets".⁹ Further, the Court held that section 127 orders are not punitive. Rather, their purpose is to:

...restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by

⁷ 2001 SCC 37 ("*Asbestos*").

⁸ *Ibid* at para 41.

⁹ *Ibid* at para 42, adopting the words of Laskin J.A. from the court below.

removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.¹⁰

2. Facts of this case

[33] With those purposes and principles in mind, I turn to a review of the facts cited above and consider their significance in light of those purposes and principles.

[34] In my view, each of the following facts is relevant to an assessment of the gravity of Dennis's conduct and the effects of that conduct on Dennis's victims (investors) and on confidence in Ontario's capital markets:

- a. as an investment advisor, Dennis exploited his relationship with his clients and breached their trust;
- b. Dennis used the funds for his own personal benefit, instead of investing the funds as he had promised his clients he would do;
- c. some of Dennis's victims were vulnerable and unsophisticated with respect to investments;
- d. the victims suffered significant losses;
- e. Dennis's misconduct took place over a lengthy period of time; and
- f. Dennis was motivated simply by greed.

[35] In this proceeding, there are no relevant mitigating circumstances. As noted above, Dennis neither appeared nor responded to Staff's submissions.

3. Conclusion

[36] Taken together, all of the facts listed above easily qualify Dennis's misconduct as among the worst possible abuses of the capital markets that an individual could commit upon numerous innocent and vulnerable victims. Dennis's misconduct was, to use the words of the Supreme Court of Canada in *Asbestos*, "so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets".

[37] Dennis's conduct engages both of the two purposes of the Act. Allowing him to participate in the capital markets would not offer sufficient protection to investors and would undermine confidence in the capital markets.

[38] In my view, it is in the public interest to remove Dennis from Ontario's capital markets permanently, and to issue the order requested by Staff.

VI. ORDER

[39] I will therefore issue an order that provides that:

- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Dennis cease permanently;

¹⁰ *Ibid* at para 43, citing *Re Mithras Management Ltd.* (1990), 13 OSCB 1600.

- b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Dennis be prohibited permanently;
- c. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to Dennis permanently;
- d. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Dennis resign any positions that he holds as director or officer of any issuer, registrant or investment fund manager;
- e. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Dennis be prohibited permanently from becoming or acting as an officer or director of any issuer, registrant or investment fund manager; and
- f. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Dennis be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.

Dated at Toronto this 3rd day of May, 2016.

"Timothy Moseley"

Timothy Moseley