



Ontario
Securities
Commission

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

- AND -

**IN THE MATTER OF
LANCE KOTTON AND TITAN EQUITY GROUP LTD.**

**REASONS AND DECISION
(Subsection 127(8) of the *Securities Act*)**

Hearing: November 18, 2016

Decision: December 7, 2016

Panel: Timothy Moseley Commissioner

Appearances: Pamela Foy For Staff of the Commission
Anna Huculak

No one appeared for Lance Kotton or Titan Equity Group Ltd.

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REASONS AND DECISION

I. OVERVIEW

- [1] When considering repeated requests to extend a temporary cease trade order, what factors should the Ontario Securities Commission (the "**Commission**") take into account in assessing the public interest?
- [2] On November 6, 2015, the Commission granted the request of Enforcement Staff of the Commission ("Staff") that a temporary order be issued pursuant to subsection 127(5) of the *Securities Act* (the "**Act**")¹ against Lance Kotton and Titan Equity Group Ltd. (the "**Respondents**"). The order (the "**Temporary Order**") was issued based upon Staff's representations to the Commission that the Respondents may have engaged in, and may have been continuing to engage in, breaches of Ontario securities law, including fraud.
- [3] The Temporary Order was extended pursuant to subsection 127(8) of the Act three times (on November 19, 2015, December 15, 2015 and April 14, 2016) with the Respondents' consent. On October 12, 2016, Staff requested a further six-month extension. The Respondents did not consent but expressly declined to object. At that hearing, I repeated concerns raised by a different panel of the Commission at the April 14 hearing; namely, that a long time had elapsed since the Temporary Order was first issued, and Staff had not yet initiated an enforcement proceeding by filing a Statement of Allegations. I extended the Temporary Order to November 21, 2016, and I adjourned the hearing to November 18 to give Staff a full opportunity to address these concerns.
- [4] At the November 18 hearing, the Respondents did not appear, and Staff advised that it had not heard from the Respondents since before the October 12 hearing. Staff addressed the concerns referred to above and renewed its request for an extension of the Temporary Order to April 21, 2017. I reserved my decision and in the meantime ordered that the Temporary Order be extended pending the release of this decision or other order of the Commission.
- [5] My concerns persist. While the decision of whether, and if so when, to file a Statement of Allegations is a matter of discretion for Staff, and not ordinarily the subject of review by this tribunal, and while I engage in no such review in this matter, the Commission is charged with deciding upon each request for extension of a temporary order whether it is in the public interest to do so. For the reasons set out below, I conclude that under the current circumstances, including the status of the investigation, it is in the public interest to extend the Temporary Order for only two months.
- [6] For clarity in these reasons, I refer generally to any proceeding initiated by the filing of a Statement of Allegations as an "**Enforcement Proceeding**" and any proceeding initiated by the issuance of a temporary order pursuant to subsection 127(5) of the Act, with one or more extensions of the cease trade provisions in the temporary order, as a "**TCTO Proceeding**".

II. BACKGROUND

- [7] At the relevant time, Kotton was the owner and the directing mind of the respondent Titan Equity Group Ltd. ("**Titan Equity**"). Kotton, along with Titan Equity and related

¹ RSO 1990, c S.5.

entities (collectively, the “**Titan Group**”) were in the real estate investment, acquisition and development business.

- [8] In its original request for the Temporary Order, Staff said it appeared that the Respondents:
- a. without an available exemption, engaged in, or held themselves out to be in, the business of trading in securities without being registered and contrary to subsection 25(1) of the Act;
 - b. without an available exemption, traded in securities, where such trades constituted distributions of securities, in circumstances in which no preliminary prospectus or prospectus was filed, contrary to subsection 53(1) of the Act;
 - c. perpetrated a fraud by misappropriating funds for Kotton’s personal use, contrary to section 126.1 of the Act; and
 - d. made misleading statements to investors, contrary to section 126.2 of the Act.
- [9] On November 13, 2015, one week after the Commission issued the Temporary Order, the Commission applied to the Superior Court of Justice for an order pursuant to section 129 of the Act appointing a receiver over the assets of Kotton and the Titan Group (the “**Receivership Application**”).² In support of that application, the Commission cited the following, among other things:
- a. the Titan Group had issued securities to finance the acquisition and development of various properties;
 - b. Kotton and Titan Equity had solicited the public to invest in those securities;
 - c. as of November 2015, more than \$30 million had been raised from investors in the securities;
 - d. the Respondents had engaged in and continued to engage in various breaches of securities law;
 - e. the Respondents were insolvent and could not repay investors;
 - f. there was a history of mismanagement of the investments;
 - g. there was a concern that the Respondents would improperly dissipate assets; and
 - h. Kotton appeared to have benefitted personally from investor monies.
- [10] On November 16, 2015, the Court granted the Commission’s request and appointed Grant Thornton Limited as Receiver.

III. ANALYSIS

A. Introduction

- [11] Subsection 127(8) of the Act provides:

...the Commission may extend a temporary order under paragraph 2 of subsection (1) [the authority to issue a cease trade order] for such period as it considers necessary if

² *Ontario Securities Commission v. Lance Kotton et al.*, Court File No. 15-11178-00CL.

satisfactory information is not provided to the Commission within the fifteen-day period [beginning with the issuance of the original order].

- [12] Once Staff has met its initial burden in support of the issuance of a temporary order, subsection 127(8) shifts the onus to a respondent to provide satisfactory information, absent which the Commission "is justified in extending a temporary cease trade order."³ In this case Staff met its burden. The Respondents have adduced no information. The Commission would therefore be justified in extending the Temporary Order. The question is whether it should.
- [13] As the Commission has previously held, a temporary cease trade order is "an extraordinary remedy", and the authority to issue this extraordinary remedy exists because it is "essential that the Commission be able to act quickly, at an early stage of an investigation, to protect investors from harm. [emphasis added]"⁴ The description of a temporary cease trade order as an extraordinary remedy recognizes that the order may include certain of the potentially significant sanctions set out in subsection 127(1) of the Act without the need for a Statement of Allegations, a merits hearing, or a sanctions hearing.
- [14] The justification for this extraordinary remedy may decline over time as an investigation progresses. In deciding whether to further extend a temporary order, the Commission must have regard to the relevant circumstances as they exist at the time of the request and must determine what the public interest comprises in the context of the TCTO Proceeding. That requires the Commission to balance numerous factors. I now address each of the factors that I consider to be relevant in this case.

B. The Respondents' position

- [15] The Respondents were originally represented by counsel in the TCTO Proceeding but counsel withdrew in March 2016. The Respondents consented to the six-month extension of the Temporary Order on April 11, 2016. Before the October 12 hearing, they said that they did not object to the further six-month extension sought by Staff.
- [16] The October 12 order was served on the Respondents by email. Staff has no information as to why the Respondents failed to communicate with Staff regarding the November 18 hearing.

C. Complexity of the investigation

- [17] The record supports Staff's strenuous submission that the investigation is complex, especially because of difficulties involved in gaining access to evidence given the apparent volume of documents in the custody of law firms and the resulting questions of privilege. I accept Staff's assertions that Staff is working diligently on this challenging matter and that the investigation is progressing more slowly than it might otherwise, through no fault of Staff.

D. The investor protection purpose of the Temporary Order

- [18] In exercising its authority under section 127, the Commission must have regard to the twin purposes of the Act set out in section 1.1, one of which is investor protection. As the Supreme Court of Canada has held, the purpose of the section 127

³ *Shallow Oil & Gas Inc.* (2008), 31 OSCB 2007 ("Shallow Oil") at para 36.

⁴ *Shallow Oil* at para 33.

public interest jurisdiction is “protective and preventive, intended to be exercised to prevent likely future harm to Ontario’s capital markets”.⁵

- [19] A temporary cease trade order can protect the interests of investors who contributed funds to the assets that are the subject of the proceeding, since the investors’ chances of recovery may be improved by a temporary order that limits the respondents’ ability to deal with the assets. The order can also protect the interests of investors more broadly, *i.e.*, any investors in the capital markets, by reducing the risk of harm that would result if the Respondents were permitted to trade generally. I consider each type of interest separately.

1. Investors in the Titan Group

- [20] The web page established by the Receiver with respect to this matter (the “**Receiver’s Web Page**”, to which Staff directed me),⁶ the documents posted on that page, and evidence submitted to the Commission by Staff, demonstrate that the Receiver in co-operation with Staff has taken steps to dispose of assets in an effort to preserve funds for investors and creditors.
- [21] Unfortunately, in this case, the prospects of investors recovering funds from either of the Respondents are grim. In the words of the Receiver in early September, 2016, “it does not appear that there will be funds available for distribution to investors/creditors of... Kotton...[and] Titan Equity...”.⁷
- [22] The investor protection purpose that initially justified the Temporary Order has all but evaporated as far as the Titan Group investors are concerned.

2. Investors generally

- [23] On the record before me, it is difficult to imagine what meaningful contribution a temporary order will make at this juncture to the protection of investors generally. First, such an order would not be appreciably more deterrent than the co-existing Receivership Application and the Receiver’s activities. Second, all the Respondents’ assets are subject to the receivership. As the Receiver has found, the Respondents are insolvent. The Respondents have little or no ability to participate in the capital markets even absent an order. The Temporary Order therefore currently does little to protect investors generally. That may change if relevant circumstances change.

E. Transparency of Commission proceedings

- [24] At the October 12 hearing, I expressed the concern that a member of the public who sought to understand why the Temporary Order had been extended would find little readily available information. While the detailed affidavits submitted by Staff are part of the public record, these are not easily accessible, especially to impoverished investor victims (if any) or non-Toronto residents.
- [25] Staff offered three responses. First, Staff argued in written submissions filed prior to the hearing that the only purpose of a Statement of Allegations is to provide respondents with notice and particulars of the case they have to meet, and that notice to the public is not a purpose of the Statement of Allegations. Staff offered no authority for these propositions, and I reject them. I accept Staff’s oral submission that notice to respondents is the primary purpose of the Statement of Allegations.

⁵ *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42, quoting Laskin J.A. in the court below.

⁶ <http://www.grantthornton.ca/titan>

⁷ *Seventh Report of the Receiver*, September 2, 2016, at para 33. Posted on the Receiver’s Web Page.

However, a Statement of Allegations also serves the purpose of enhancing transparency of Commission proceedings. It may serve other purposes as well.

- [26] Second, Staff referred to the Receiver's Web Page. However, virtually all the content found there relates to the receivership itself, as opposed to a potential or existing proceeding before the Commission. Any material filed by the Commission (other than material dealing with a motion regarding privilege) dates to the commencement of the Receivership Application one year ago. While there are many facts common to both this TCTO Proceeding and the Receivership Application, the information available at the Receiver's Web Page makes no meaningful contribution to the transparency of proceedings before the Commission, and stands in stark contrast to the contribution that would be made by a Statement of Allegations filed by Enforcement Staff, which could then easily be found on the Commission's website.⁸
- [27] Third, Staff suggested that I issue an order that would grant the five-month extension requested and that would contain additional recitals, one of which would refer to "the affidavits of Staff in support of the Temporary Order and extensions thereof" being posted on the Commission's website. The Commission does not post affidavit material filed in proceedings on its website, and it would be unwise to establish that precedent in this proceeding.

F. Control over Commission proceedings

- [28] It is trite to say that a tribunal has the authority to control its own process. In reliance upon this authority and with the goal of ensuring the due administration of Ontario securities law, including avoiding delayed (and therefore denied) justice, the Commission has taken steps over the years to improve its processes and to promote fair and timely response to allegations of breaches of Ontario securities law.
- [29] Significant among these measures was the adoption, in January 2015, of the Commission's *Case Management Timeline for Enforcement Proceedings* (the "**Case Management Guideline**")⁹. This guideline, issued pursuant to the *Ontario Securities Commission Rules of Procedure*,¹⁰ assists with the just and expeditious disposition of Commission proceedings.
- [30] The Case Management Guideline is well suited to the management of Enforcement Proceedings, but is poorly suited to TCTO Proceedings. This is true in several respects, not least of which are the mechanisms available in Enforcement Proceedings that promote agreement on documents or other evidence, allow the narrowing of issues, and/or facilitate settlement of all or part of a proceeding.
- [31] I repeat the important principle set out at paragraph [5] above. It would be improper for the tribunal to oversee Enforcement Staff's investigation or the issuance of a Statement of Allegations other than in exceptional circumstances.¹¹ However, as appropriately conceded by Staff at the November 18 hearing, the length and status of an investigation are relevant considerations for the Commission when determining whether it is in the public interest to extend a temporary cease trade order. This is consistent with the Commission's interest in timely response to alleged breaches and expeditious progress toward a merits hearing.

⁸ http://www.osc.gov.on.ca/en/Proceedings_all-commission_index.htm

⁹ (2015), 38 OSCB 835.

¹⁰ (2014), 37 OSCB 4168.

¹¹ *Re Azeff* (2012), 35 OSCB 5159 at paras 211, 285-87.

G. Longevity of temporary cease trade orders

- [32] Staff offered as precedents three temporary cease trade orders with longevity of seventeen months,¹² twenty-two months¹³ and thirty-three months respectively.¹⁴ I give those orders no weight, since all three are orders only, without reasons that would reveal the underlying circumstances or that would indicate whether the issue before me was addressed in those cases. Further, the three orders pre-date the implementation of the Case Management Guideline, which reflected the Commission's heightened interest in seeing proceedings concluded expeditiously.

H. Ability of Staff to amend a Statement of Allegations

- [33] Staff submits that it may be improper to file a Statement of Allegations before the investigation is complete, when Staff intends to amend the document to provide further particulars or otherwise.
- [34] Nothing prevents Staff from continuing an investigation after filing a Statement of Allegations. Staff routinely amends Statements of Allegations when it considers amendments to be necessary and appropriate. Often the amendments provide additional particulars and/or introduce new substantive allegations, including additional alleged breaches of Ontario securities law. In some cases, allegations are withdrawn. There is no rule, practice guideline, or decision of the Commission of which I am aware (and none was referred to by Staff) that would inhibit a good faith amendment of a Statement of Allegations during an Enforcement Proceeding.
- [35] I have no doubt that Staff continues to work hard, particularly to reconcile the flow of funds, a step that is often an important component to Staff's case at a merits hearing. However, the record suggests strongly that Staff is in a position to prepare a Statement of Allegations with reasonable particularity. Staff submitted sworn evidence in the Receivership Application more than one year ago in which a Senior Forensic Accountant in the Enforcement Branch of the Commission stated without reservation or qualification that the Respondents had engaged in and were continuing to engage in the breaches of Ontario securities law described above. Staff's factum, submitted to the Superior Court of Justice, was equally definitive. When this affidavit was discussed at the hearing before me, Staff did not retreat from the sworn evidence.

I. Balancing the considerations

- [36] Cases such as this one present an unavoidable interplay between a temporary order and the Enforcement Proceeding that almost always follows. Staff's clear discretion with respect to a Statement of Allegations cannot be disentangled from the Commission's obligation to decide whether it is in the public interest to extend a temporary order.
- [37] As discussed earlier, each of the many considerations reviewed above is relevant to an assessment of the public interest in the context of Staff's request. The relative weights of the considerations listed above do not remain static for the life of the investigation. In fact, the opposite is true.
- [38] As Staff observes, notice to the Respondents is not as compelling a consideration as it would be had the Respondents objected to Staff's request. Having said that, I am

¹² *Re Norshield Asset Management (Canada) Ltd.* (2006), 29 OSCB 4952.

¹³ *Re FactorCorp Financial Inc.* (2009), 32 OSCB 4052.

¹⁴ *Re Buckingham Securities Inc.* (2001), 24 OSCB 4558.

reluctant to attribute significant weight to the Respondents' non-objection, given that they are not represented by counsel in the TCTO Proceeding.

- [39] The investor protection purpose of the Temporary Order has diminished over time while the interests of transparency and control over the process continue to increase. The record demonstrates a thorough investigation that began no later than early July of 2015, and which has, according to Staff, enabled Staff to describe the most important elements of a Statement of Allegations. Such a document could be amended as necessary once issued. While Staff considers itself currently unable to file a Statement of Allegations that is as precise and particular as it would like, Staff's evidence in the Receivership Application and submissions in various hearings in the TCTO Proceeding give the clear impression that Staff fully intends to file a Statement of Allegations.
- [40] No alternative has been presented that would better achieve the important goals described above, and no prejudice to the Respondents has been identified that would result from the filing of a Statement of Allegations in the near future. Weighing all these considerations, I find that the time is very near when the Temporary Order ought not to be extended unless one or more relevant factors change sufficiently to cause that conclusion to change.

IV. CONCLUSION

- [41] For the reasons set out above, I decline to grant the five-month extension requested by Staff. I will issue an order that extends the Temporary Order by a further two months, to February 7, 2017, to permit Staff and the Respondents to consider these reasons. Staff should contact the Secretary's Office to arrange a hearing on or before that date, should Staff intend to seek a further extension of the Temporary Order.
- [42] I do not purport to, nor do I have the authority to, bind a future panel of the Commission whether I am a member of that panel or not. Having said that, I observe that if, two months from now, there are no changed circumstances other than the passage of time, and there are no novel and persuasive submissions, then the importance of transparency and the Commission's control over its process will have grown relative to the investor protection considerations. Under those circumstances, if they exist at that time, it will be more difficult for Staff to justify a further extension of the Temporary Order. If I were considering such a request, I would likely decline it.

Dated at Toronto this 7th day of December, 2016.

"Timothy Moseley"

Timothy Moseley