COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2015/CLE/gen/01979

BETWEEN

THE ONTARIO SECURITIES COMMISSION

Plaintiff

AND

WAYNE LAWRENCE PUSHKA

First Defendant

AND

BONNIEBLUE INC.

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Brian Moree QC with Kevin Moree for the Plaintiff**

Gail Lockhart-Charles with Rhyan Elliott for the First Defendant

Tanya Wright for the Second Defendant

15 January 2019, 16 January 2019, 17 January 2019, 12 March 2019 and 29 January 2020

JUDGMENT

WINDER J.

Introduction

1. This is the decision following the trial of a preliminary issue. The issue which was tried was the following:

   Whether the Court has jurisdiction to entertain the action or claim for enforcement of the Canadian orders referred to in paragraphs 47(a) through (d) of the Statement of Claim ("the Canadian Orders") in that the Canadian Orders are or stem from orders of the Ontario Securities Commission, an agency of the Government of Ontario made in the exercise of its "public interest jurisdiction" under s. 127 of the Ontario Securities Act to impose sanctions to prevent breaches of Ontario Securities law and, as such, the action or claim for enforcement of the Canadian Orders involves the direct or indirect enforcement of the penal, revenue or other public laws of Ontario, Canada.

Facts and Background

2. This action arose out of proceedings undertaken in Canada by the Ontario Securities Commission (OSC), an agent of Her Majesty in right of Ontario, wherein certain decisions (sanctions) were made adverse to the First Defendant (Pushka). On 23 August 2013, a panel of Commissioners, based on the merits of a complaint made by the OSC, found that Pushka had breached provisions of the Ontario Securities Act (the Canadian Act). On 8 August 2014, the same panel of Commissioners, following a hearing, determined that Pushka should be sanctioned. In addition to sanctions relative to his ability to continue trading in securities, the following sanctions (the Sanctions Order) were imposed on Pushka. Paragraphs (h), (i), (j) and (k) of the Sanctions Order provides:

   ...

   h) Pursuant to paragraph 9 of subsection 127(1) of the [Canadian Act], Crown Hill Capital Corporation (CHCC) and Pushka jointly and severally pay to the Commission an administrative penalty of CAD$1,875,000;

i) Pursuant to paragraph 10 of subsection 127(1) of the [Canadian Act], CHCC and Pushka jointly and severally disgorge to the Commission amounts obtained by them as a result of their non-compliance with Ontario securities law in the amount of CAD$18,237,047;

j) Pursuant to subsection 127(1) and (2) of the [Canadian Act], CHCC and Pushka jointly and severally pay CAD$300,000 of the costs incurred by the Commission in connection with the investigation and hearing of this matter; and

k) The amounts referred to in paragraphs (h) and (i) above of this Order shall be designed for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) and (ii) of the [Canadian Act]." ("the Sanctions Decision")

(Emphasis added)

3. The Sanctions Order was filed in the Ontario Superior Court on 13 August 2014 and in accordance with the provisions of the Canadian Act was deemed to be an Order of the Ontario Superior Court. The various decisions against Pushka were the subject of appeals in Canada and those appeals have all been concluded against Pushka and in favor of the OSC.

4. The OSC claims that in the period between the initial finding against Pushka in August 2013 and the determination of the appropriate sanction in August 2014, Pushka removed from the Canadian jurisdiction, over CAD$13.5 million. CAD$4,550,000 of these funds, they allege, were transferred to The Bahamas and the balance to a trust company in Liechtenstein. It is alleged that property in Lyford Cay Bahamas, in the name of the Second Defendant (Bonnieblue) was purchased by Pushka from the funds removed from Canada.

5. This action was commenced by the OSC by Writ of Summons (Amended) in 2015 seeking to enforce the Order of the Ontario Superior Court with respect to the OSC's sanctions decision. The prayer for relief at paragraph 47 of the Statement of Claim seeks the following:

   (a) Payment of the sum of CAD$18,237,047 pursuant to the Canadian Order;
   (b) Payment of the sum of CAD$2,175,000 pursuant to the Canadian Order;
   (c) Payment of the sum of CAD$15,000 pursuant to the Divisional Court Order;

(d) Payment of the sum of CAD$2,500 pursuant to the Ontario Court of Appeal Order;

(e) A declaration that Mr. Pushka is liable to account to the Commission for the sum of CAD$20,412,047 or any other sum as this Honourable Court thinks fit;

6. The claim against Bonnieblue is in the nature of a tracing claim.

7. After the commencement of this action, on 13 September, 2018, Staff of the OSC made a recommendation for the allocation of funds collected in The Bahamas. This recommendation was reviewed and approved by two Vice-chairs of the OSC on 19 September, 2018. According to the allocation, save for cost orders, all funds collected as a result of this action would be paid to harmed investors.

8. As indicated above, the Canadian Orders were made pursuant to Section 127 (1) of the Canadian Act, which provides:

> **Orders in the public interest**
> **127** (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> 1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
> 2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
>
> 2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.
>
> 3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
> 4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
> 5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering

memorandum, proxy solicitation or any other document described in the order,

i. be provided by a market participant to a person or company,

ii. not be provided by a market participant to a person or company, or

iii. be amended by a market participant to the extent that amendment is practicable.

6. An order that a person or company be reprimanded.

7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.

8.1 An order that a person resign one or more positions that the persons holds as a director or officer of a registrant.

8.2 An order that a person is prohibited from becoming or acting as a director or officer of a registrant.

8.3 An order that a person resign one or more positions that the person holds as a director or officer of an investment fund manager.

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance. 1994, c. 11, s. 375; 1999, c. 9, s. 215; 2002, c. 22, s. 183 (1); 2005, c. 31, Sched. 20, s. 8; 2010, c. 26, Sched. 18, s. 35 (1).

9. Paragraph (k) of the Sanctions Order provided that the administrative penalty and the sums disgorged be designated by the OSC pursuant to section 3.4(2)(b)(i) and (ii.) of the Canadian Act. Section 3.4(2)(b)((i) and (ii) provides:

Fees

3.4 (0.1) The Commission may collect and enforce the payment of such fees as may be prescribed by the regulations. 2009, c. 18, Sched. 26, s. 3.

Authority re income

(1) Despite the *Financial Administration Act*, the fees payable to the Commission under this or any other Act, the revenue from the exercise of a

power conferred or the discharge of a duty imposed on the Commission under this or any other Act, and the investments held by the Commission do not form part of the Consolidated Revenue Fund and, subject to this section, shall be applied to carrying out the powers conferred and duties imposed on the Commission under this or any other Act. 1997, c. 10, s. 37.

Exceptions

(2) The Commission shall pay into the Consolidated Revenue Fund money received by the Commission pursuant to an order under paragraph 9 or 10 of subsection 127 (1) of this Act or paragraph 9 or 10 of subsection 60 (1) of the *Commodity Futures Act* or as a payment to settle enforcement proceedings commenced by the Commission, other than money,

(a) to reimburse the Commissioni, for costs incurred or to be incurred by it; or

(b) that is designated under the terms of the order or settlement,

(i) for allocation to or for the benefit of third parties, or

(ii) for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets. 2002, c. 22, s. 178; 2004, c. 31, Sched. 34, s. 2 (1); 2012, c. 8, Sched. 55I., s. 2.

Same

(2.1) The Minister may establish guidelines respecting the allocation of money received by the Commission pursuant to an order described in subsection (2) or money received by the Commission as a payment to settle enforcement proceedings commenced by the Commission. 2004, c. 31, Sched. 34, s. 2 (2).

Non-application of *Fines and Forfeitures Act*, designation under subs. (2) (b)

(2.2) Subsection 2 (2) of the *Fines and Forfeitures Act* does not apply to a fine recovered for a contravention of Ontario securities law or Ontario commodity futures law that is designated in accordance with clause (2) (b). 2019, c. 7, Sched. 55, s. 3.

Surplus

(3) When ordered to do so by the Minister, the Commission shall pay into the Consolidated Revenue Fund such of its surplus funds as are determined by the Minister. 1997, c. 10, s. 37.

10. At trial the OSC called Ms Helen Daley as its expert witness. Krista Martin Gorelle, Associate General Counsel for the OSC, also gave evidence on its behalf. Pushka called Joseph Groia as his expert witness. Bonnieblue did not call any witnesses. Both expert witnesses were deemed experts by the Court.

11. Bonnieblue adopts and advances a case similar to Pushka. Reference in this decision to the submissions of Pushka ought to be taken to include the submissions of Bonnieblue.

Analysis and Discussion

12. The preliminary issue for determination in this case centers on the application of what has become known as the *exclusionary rule*. The statement of the rule is to be found at Rule 3(1) in ***Dicey, Morris and Collins on The Conflict of Laws (15th ed)*** which states:

> English Courts have no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or (2) founded upon an act of state.

13. I accept the modern statement of the exclusionary rule as expressed by the New South Wales Court of Appeal in the case of ***Evans v European Bank Ltd [2004] NSWCA 82.*** The facts of the case were summarized as follows: A group of US residents perpetrated credit card frauds on a large scale in the US. Their vehicle was a Vanuatu company, Benford which deposited funds in an account in its own name with European Bank, a Vanuatu bank. European Bank then deposited funds in an account in its name with Citibank in Sydney. The US Federal Trade Commission applied to the California courts under the Federal Trade Commission Act for the appointment of a receiver of the persons and companies involved in the fraud, including Benford. The court appointed Mr Evans as receiver and he applied to the Equity Division in New South Wales for the recovery of the funds from Citibank. The judge found that the action was to enforce a foreign penal or public law. The judge also rejected the argument that European Bank was constructive trustee for Benford of the deposit with Citibank. The receiver appealed.

14. The exclusionary rule was summarized in the headnote of ***Evans*** as follows :

> Domestic courts would not enforce the revenue or penal laws of a foreign state nor enforce the interests of a foreign government which arose from the exercise of powers peculiar to government. Whether or not the

enforcement of a statute constituted a governmental interest of the relevant kind depended upon the scope, nature and purpose of the provisions being enforced and the substance, not the form of the proceedings or the identity of the applicant.

15. According to ***Speligman CJ***, who delivered the decision of the court:

> [37] The exclusionary rule under consideration in the present proceedings has long been held to apply to laws of a foreign state classified as either revenue or penal laws and, in more recent times, has extended to a further, but indeterminate, category of 'foreign public laws'. However, as the joint judgment in the High Court in the Spycatcher case noted: 'The expression "public laws" has no accepted meaning in our law.' ((1988) 165 CLR 30 at 42, 78 ALR 449 at 456). The High Court expressed a preference for characterising the relevant laws in terms of 'governmental interests', which it identified in terms of: 'claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government' (165 CLR 30 at 42 and see at 44, 78 ALR 449 at 456 and see 458). The test that the court applied in the circumstances of the case before it involved a classification of the relevant proceeding as an assertion of a 'governmental interest' (165 CLR 30 at 47, 78 ALR 449 at 460).
> [38] The concept of 'governmental interest', understood in terms of 'powers peculiar to government', encompasses both of the previous well-established categories, ie revenue laws and penal laws, and also identifies the particular kind of 'other public law' which may also fall within the exclusionary rule.
> [39] In the Spycatcher case, the court referred to the identification of the basis of the exclusionary rule by Lord Watson in Huntington v Attrill [1893] AC 150 at 156 in terms of the principle that all crimes are local. (See the Spycatcher case 165 CLR 30 at 41, 78 ALR 449 at 456.) The joint judgment went on, however, to express a preference for the formulation of Judge Learned Hand in Moore v Mitchell (1929) 30 F(2d) 600, which it said differed from that given by Lord Watson in Huntington v Attrill. Judge Learned Hand said (Moore v Mitchell (1929) 30 F (2d) 600 at 604):
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> > 'To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor ... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.'
>
> [40] The joint judgment in the High Court went on to refer with approval to comments of a similar character by Kingsmill Moore J in Peter Buchanan Ltd v McVey [1954] IR 89 at 106–107. (Also reported at [1955] AC 516 at 528–529.) His Honour expressed the rule in terms of a refusal to enforce 'the governmental claims (including revenue claims) of a foreign State'. (See

the Spycatcher case 165 CLR 30 at 43, 78 ALR 449 at 457.) This reference to 'governmental claims' appears to be the origin of the formulation 'governmental interests' adopted in Spycatcher.

[41] This identification of the basis of the principle appears to accord with the views of Lord Keith of Avonholm in Government of India, Ministry of Finance (Revenue Divn) v Taylor [1955] AC 491 at 511, [1955] 1 All ER 292 at 299 where his Lordship identified an explanation for the rule in terms of: '... an assertion of sovereign authority by one State within the territory of another ... is (treaty or convention apart) contrary to all concepts of independent sovereignties'. Lord Goff of Chieveley expressed an inclination to agree with this basis for the exclusionary rule. (See Re State of Norway's Application (No 1 and 2) [1990] 1 AC 723 at 808, [1989] 1 All ER 745 at 760.) Lord Denning MR expressed the principle in the same terms. (Attorney General of New Zealand v Ortiz [1984] AC 1 at 20–21, [1982] 3 All ER 432 at 457.) This is also the formulation favoured by the learned authors of Dicey and Morris The Conflict of Laws (13th edn, 2000), paras [5–019] and [5–030]. The learned authors adopt the following formulation at [5–030]: 'The expression "other public law" refers to all those rules (other than penal and revenue laws) which are enforced as an assertion of the authority of central or local government.'

[42] The various formulations—'governmental interests' or 'governmental claims' or 'the exercise of powers peculiar to government' or 'an assertion of sovereign authority' or 'an assertion of the authority of government'—each identifies a specific and limited range of statutory provision which falls within the exclusionary rule. The identification of a public interest protected by legislation does not constitute sufficient grounds for the application of the exclusionary rule. Any statute can be characterised as in some manner serving a public interest. A more limited range of public laws is involved in the exclusionary rule. Insofar as it remains appropriate to distinguish penal, revenue and 'other public laws', the latter must be read down in the manner suggested.

[43] In the Spycatcher case, the High Court was concerned with a particular kind of governmental interest, ie the maintenance of national security. In this context it repeated the formulation of 'the exercise of powers peculiar to government' in the following passage ((1988) 165 CLR 30 at 44, 78 ALR 449 at 458):

> '[T]here are some claims in which the very subject-matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and a prejudice to the relationship between its sovereign and the foreign sovereign. These risks are particularly acute when the claim which the foreign State seeks to enforce outside its territory is a claim arising out of acts of that State in the exercise of powers peculiar to government in the pursuit of its national security.'

[44] <u>The determination of whether or not the enforcement of a particular statute will constitute a 'governmental interest' of the relevant kind must turn</u>

on the scope, nature and purpose of the particular provisions being enforced and the facts of the case. In the Spycatcher case, the interest of the state in the integrity of its security services was plainly on one side of the line. The present proceedings raise a combination of public and private interests of a completely different character.

[45] Contemporary jurisprudence requires such issues to be determined in accordance with the substance and not the form of the proceedings. This was explicitly held in the joint judgment in the Spycatcher case where the court said (165 CLR 30 at 46, 78 ALR 449 at 459):

> 'For the purposes of the principle of unenforceability under consideration the action is to be characterized by reference to the substance of the interest sought to be enforced, rather than the form of the action.'

See also the authorities referred to by Heydon JA in Damberg v Damberg [2001] NSWCA 87 at [167], 4 ITELR 65, 52 NSWLR 492 to which may be added United States of America v Inkley [1989] QB 255 at 265–266, [1988] 3 All ER 144 at 150.

. . .

[49] Insofar as this passage places exclusive weight on the identity of an applicant in proceedings, it must now be read in the light of contemporary jurisprudence which emphasises matters of substance over those of form.

. . .

[51] In Loucks the court concluded that the statutes were not penal for the purposes of the exclusionary rule of private international law. Cardozo J said (at 198):

> '[T]he question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law. A statute penal in that sense is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interests of the whole community to redress a public wrong ... The purpose must be, not reparation to one aggrieved, but vindication of the public justice.'

Again, the reference to the identity of the applicant would not be determinative today.

. . .

[62] Statutes can be classified as a 'public law' even though they do not constitute the assertion of the 'governmental interests of a foreign State', (as contained in Palmer J's proposition (e) based on the Spycatcher case) or 'the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity' (in Purchas LJ's proposition (4) ([1989] QB 255 at 265, [1988] 3 All ER 144 at 150), which appears to be derived from a statement of Lord Keith of Avonholm in Government of India v Taylor [1955] AC 491 at 511, [1955] 1 All ER 292 at 299 which I have quoted above at para [41]).

(emphasis added)

16. ***Evans*** was cited with approval in the UK Court of Appeal decision in ***United States Securities and Exchange Commission v Manterfield [2009] EWCA Civ 27, [2009] 2 All ER 1009.*** In ***Manterfield***, the Court of Appeal considered whether it would permit the United States Security and Exchange Commission (SEC) to obtain interim freezing orders to support the enforcement of Massachusetts proceedings. In Massachusetts, the SEC had obtained a disgorgement order and a civil monetary penalty pursuant to the relevant US legislation. The Massachusetts proceedings arose as a result of complaints that the defendants before the US Court were involved in an ongoing fraudulent investment scheme involving sales to investors in Taiwan of limited partnership interests in an unregistered fund. The SEC alleged that the funds underlying assets were worthless life insurance policies. The principal argument was that the US orders were penal and attracted the exclusionary rule.

17. ***Sir Charles Gray*** (sitting as the judge of the High Court) stated that in order to determine if the US proceedings were penal, he was required to look at the particular provision of the SEC proceedings under which the orders sought to be enforced was made. ***Sir Charles Gray*** stated at paragraph 35 as follows:

> Although the proceedings are technically civil proceedings and not part of the US criminal code I have to focus on the particular provisions relied on in the US proceedings and ask myself whether those provisions are properly to be characterised as "penal". (see Attorney General of New Zealand v Ortiz per Ackner LJ at 33, and Barakat at para 108). The answer is that the relief sought in the proceedings against Mr Manterfield in the United States is hybrid in the sense that it claims what seem to be criminal penalties, albeit described as "civil monetary penalties", as well as the disgorgement of what are described as the "ill-gotten gains" of Mr. Manterfield and his partner, and the distribution of such moneys to investors in their scheme in accordance with the plan of distribution to the order of the District Court.
>
> *(emphasis added)*

18. On the question of whether *"the SEC by its application under section 25 was seeking to enforce either directly or indirectly a penal or other public law of a foreign state?"*, the Court of Appeal in ***Manterfield*** held at paragraph 24, that

> *[O]nce a judgment had been obtained, the court would look to see what part was being sought to be enforced. If, in reality, that part of the judgment was,*

in substance, a claim for damages which in England might have been brought in a civil case, the fact that it was all part of a judgment in a criminal case would not bring it within r 3. It was the substance of what was being sought to be enforced which was important for the purposes of the rule. The substance of what the SEC would seek to enforce, if they prevailed in the action, and in relation to which they sought to preserve the assets, was the disgorgement of what they alleged to be the proceeds of fraud. It also intended to seek orders, which would provide for the same to be returned to the investors. The judge had been right that such a judgment, if obtained, would not fall foul of r 3.

19. ***Manterfield*** was followed in this jurisdiction in the Supreme Court case of ***KPMG Inc. v L. Jeffrey Pogachar et al* 2010/CLE/gen/00176.** In ***Pogachar***, the plaintiff, who had been appointed a receiver, had sought the enforcement of an Ontario Superior Court Order based upon decisions of the OSC. The Order contained a disgorgement order as in the instant case. According to ***Barnett CJ*** (as he then was) at paragraphs 44-47:

> 44. Finally, the Defendants submit that the Court should refuse to give the Plaintiff relief as it is seeking to enforce the penal orders of a foreign Court. The Orders of the OSC are, they say, penal in nature e4Court refused to give effect to the order of the SEC. In that case, the Court was considering an application seeking orders to prevent the further commission of offences against the federal laws of the USA. That is not the case in this action. In this action, the Plaintiff is seeking to recover monies obtained from the companies in breach of Pogachar and Lombardi fiduciary obligations to the companies.
>
> 45. In **United States Securities and Exchange Commission v Manterfield [2008] EWHC 1348** the Defendant together with another director set up a company as a means to defraud investors in a hedge fund. The investors were told that the Fund's assets would be used to acquire a portfolio of life insurance policies in the life settlement market. The SEC's case was that the two of them materially misled investors about Lydia's operations, and misappropriated millions of dollars of investors' funds. The SEC alleged that Mr. Manterfield received US$ 2.35 from the company. On 12th April 2007 the SEC filed a complaint against the company and the Defendant. The SEC then brought an action in the UK seeking freezing orders against assets of the Defendant. Sir Charles Gray sitting as a Judge of the High Court continued the injunction and rejected the argument that the Courts should not grant the injunction on the ground that it would be enforcing the penal laws of another country. He expressly considered the Schemmer decision and said:

"However in Barakat, the Court of Appeal commented at paragraph 109 of its judgment that the judge in Schemer appeared to have overlooked the fact that a provision found within a law which contains criminal sanctions such as penalties or forfeiture does not mean that the provision itself is penal in nature. The Court of Appeal in Barakat further pointed out that the Receiver in the case of Schemmer had not been appointed to enforce the penal provisions of the Act <u>but rather to preserve and recover the property of the company</u>. It seems to me that an analogy can be drawn between an act of a receiver appointed by a foreign state to preserve and receive the property of a company, and the act of the SEC in the present case in applying for a freezing order."

46. The decision of Sir Charles Gray was expressly approved by the Court of Appeal who dismissed an appeal from his order freezing the assets.

47. In my judgment this case must be considered in a similar manner. The Plaintiff is not seeking to enforce penal sanctions imposed by the OSC but rather is seeking to recover monies belonging to the companies.

(emphasis added)

20. The OSC says that the amount ordered to be disgorged stems directly from the amounts wrongfully obtained by Pushka and which indicates that the disgorgement order was made in response to the activity found to be in non-compliance with Ontario securities law. They cite the fact that a disgorgement Order was sought in an amount greater than that which was ordered but the hearing panel specifically reduced the amount. They also say that this was done so as to connect the disgorgement amount with the termination fees which were paid directly as a result of Mr. Pushka's misconduct and out of the pockets of unit holders. Reliance is placed on the Sanctions Decision and paragraphs [122], [126] and [127], which state:

> [122] The fact that CHF unitholders did not suffer direct financial losses (except as referred to in paragraph 125 below) does not mean, however, that unitholders of CHF did not suffer harm as a result of the breaches by CHCC of its fiduciary duty. As discussed in the Merits Decision, unitholders were exposed to substantial financial and other risks as a result of the Fairway Loan and the Citadel Acquisition (see paragraph 377 of the Merits Decision and the discussion commencing at paragraph 524 of the Merits

Decision). For instance, we stated in the Merits Decision with respect to the Citadel Acquisition that:

> [528] If the unitholders of the Citadel Funds voted to terminate the Citadel Management Agreements, the relevant Citadel Funds would have been obligated to pay CHF (assuming that CHF was holding the rights in those agreements) aggregate termination fees of approximately $16 million (based on Pushka's statement at the CHCC Board meeting on June 22, 2009; see paragraph 443 of these reasons). Those termination fees were substantially less than the $28 million paid by CHF for the acquisition of the rights to the Citadel Management Agreements. Pushka advised the CHCC Board that terminations of those agreements were unlikely. Nonetheless, they were a real risk given the controversial nature of the proposed mergers from the perspective of the Citadel unitholders and the material changes that were proposed to be made to the rights of Citadel unitholders, including increased management fees, through the mergers ...

...

[126] As noted above, the CHCC Note was reduced by the difference between the market price of units purchased by CHF pursuant to its normal course issuer bid and the NAV of those units. CHF used its own assets to acquire the units pursuant to its normal course issuer bid. Any "profit" from those purchases was a CHF asset. By reducing the amount of the CHCC Note in this manner, CHCC appropriated a CHF asset and applied that asset to reduce the debt of CHCC to CHF.

[127] Accordingly, there was real investor harm, and potential harm, as a result of CHCC's breaches of its fiduciary duty.

21. In response, Pushka (supported by the evidence of Mr. Groia) argues that in paragraph [195] of the Sanctions Decision the OSC held that it had the authority to order $53,806,738 disgorged, being the amount they say was received by CHCC as a result of its breach of the Act. Paragraph [213] of the Sanctions Decision, which breaks down the calculation of the $18,237,047 (which the OSC chose to be disgorged rather than the $53,806,738) does reflects that this amount (although not all) was designed to mirror the amount of termination fees and redemption fees paid by unitholders of the Fund. Paragraph [214] of the Sanctions Decision declared that:

"[t]he payment of termination fees by CIF or EIF, on the resignation of the CHCC substantially reduced the NAV (net asset value) of those funds. Accordingly, those fees came directly out of the pockets of unitholders."

The entire sums to be disgorged however, did not come out of the pockets of unitholders (as the OSC suggests in its submissions and supported by the evidence of Helen Daley) as it included a sum of $3,735,609 which was actually derived from a *"facilitation fee for arranging the resignation of CHCC"*. The $3,735,609 was paid by an unrelated entity, Artremis Investments Limited, and not the Fund (See paragraph [215] of the Sanctions Decision). Artemis Investments Limited acquired all or a substantial part of the assets of CHCC in January 2013, upon the approval (albeit delayed) of the OSC.

22. The OSC in my view, did not provide an adequate response to this argument that more funds were disgorged than were purportedly to be returned for investors. Further, even if all of the $18,237,047 had reflected losses to investors, what about the $1,875,000 in administrative penalties? It only emphasizes that of the $20,412,047 claimed in this action, at best, $14,501,438 could be considered the value of the harm to investors, albeit not direct financial loss.

23. The OSC argues that,

"[a]s the relevant portion of the Canadian Order are founded on the Canadian Act, the scope, nature and purpose of the relevant provisions of the statute along with the facts of this case establish that the enforcement of those orders does not amount to the enforcement of governmental interest of the relevant kind."

Additionally, they say that,

"[w]hen analyzing the substance of the relevant statutory provisions of the Canadian Act, the relevant portions of the Canadian Order and the allocation decision exhibited to the Gorelle Affidavit it is clear that the purpose of enforcing the relevant provisions of the Canadian Order is to

recover and facilitate the return of funds to investors harmed as a result of Mr Pushka's breaches of the Canadian Act."

I did not accept these submissions.

24. A cursory review of the Canadian legislation reflects that section 127 disgorgement orders and administrative penalties are not based upon any finding of loss or damage sustained by any person or thing. They are instead premised solely on non-compliance with Ontario securities law. In fact, this is expressly stated in the opening words of subsections 9 and 10 of section 127:

> 9. <u>If a person or company has not complied with Ontario securities law</u>, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.
> 10. <u>If a person or company has not complied with Ontario securities law</u>, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance....

25. Notwithstanding its submissions in these proceedings, the OSC itself in the Sanctions Decision, which was handed down at the time the sanctions (the subject of these proceedings) were imposed, expresses quite clearly that it was unconcerned with redressing any wrong to the individual when ordering the sanctions to be paid. Paragraphs [180] and [190] – [192] of the Sanctions Decision provide:

> [180] The disgorgement remedy is designed to (i) ensure that respondents do not obtain financial benefits from their non-compliance with Ontario securities law; and (ii) satisfy the goals of specific and general deterrence (see our general conclusions as to disgorgement commencing at paragraph 108 of these reasons).
>
> ...
>
> [190] We should order the amount of disgorgement that we find to be in the public interest in the circumstances. That means that we have the discretion to decide whether to order any disgorgement at all and whether, in fairness, there should be any deductions made from the gross amounts otherwise obtained by a respondent.
>
> [191] In addition to determining what amounts were "obtained" by a respondent, we must also determine whether those amounts were

obtained "as a result of the [respondent's] non-compliance" with Ontario securities law (within the meaning of subsection 127(1)10 of the Act). That requires us to determine the question of causation: were the particular amounts obtained as a result of the respondent's non-compliance with Ontario securities law? We discuss the issue of causation commencing at paragraph 197 below.

> [192] The Commission has accepted the general principle that a person should not benefit or profit from breaches of Ontario securities law (see the 25discussion commencing at paragraph 108 of these reasons). If CHCC is permitted to benefit financially from its breaches of fiduciary duty, others may not be deterred from similar misconduct, particularly when the potential financial benefits from such breaches can be so large.

There is no reference to restoring any person or company who may have been harmed by Pushka, only about punishing him for transgressing Ontario Securities laws and ensuring that he is not enriched thereby.

26. Recalling the dicta of ***Cardozo J*** in ***Louks,*** approved in paragraph 51 of ***Evans***, that the provision in penal if it

> *"awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interests of the whole community to redress a public wrong ... The purpose must be, not reparation to one aggrieved, but vindication of the public justice."*

In this case the purpose of the making of the Canadian Order is not reparation to anyone but vindication of the public justice.

27. When this action began before the Bahamian Courts in 2015 the Order, which the OSC sought to enforce, was for the recovery of sums on its judgment from the Superior Court of Ontario. Under that order the OSC had a right to recover these sums and utilize them as they saw fit. There was no obligation to forward them to anyone, whether harmed investor or any other third party claiming against Pushka, Section 3.4(2) provided that the moneys could be allocated by the OSC:

    (1) to cover its costs and expenses incurred or to be incurred by it;

(2) for the benefit of third parties (doesn't specifically say harmed investors); or

(3) for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

Paragraph 15 of the Statement of Claim stated an intention to pay to harmed investors but clearly no obligation existed to do so. There it is provided:

> 15. Paragraph (k) of the Sanctions Decision also ordered that any recovery by the Commission of the amounts owed pursuant to the Sanctions Decision (other than the $300,000 ordered for costs) must be allocated to or for the benefit of third parties (e.g. harmed investors) or used by the Commission to educate investors.

Here in Paragraph 15, the OSC gives the example of a harmed investor suggesting others may benefit. Paragraph 15 also acknowledges the money could be applied to fund the OSC investor educational programs.

28. Notwithstanding what is suggested in paragraph 15 of the Statement of Claim it could not be said that this was a claim about the recovery of ill-gotten gain by Pushka which belongs to harmed investors so as to restore them. Pushka's principal argument is that these sanctions are in substance a penalty, as he has been condemned to pay these amounts, not because these were sums received by him or obtained by him, but because he was deemed to have not complied with the law. When we look at the Administrative Penalty, requiring Mr. Pushka to pay to the Commission the sum of $1,875,000, Pushka's argument is the only logical conclusion. Paragraphs [227] and [228] of the Sanctions Decision is unequivocal:

> [227] A disgorgement order alone is not sufficient deterrence because, as recognized by the Supreme Court of Canada, "this would encourage people in his [the fiduciary's] position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started" (*Hodgkinson, supra,* at para. 93). In this case, CHCC and Pushka were gambling with other people's money and benefited substantially from doing so. That is the most important factor in considering the imposition of administrative penalties in this matter.
> [228] In our view, simply ordering disgorgement of amounts obtained by CHCC is not sufficient deterrence. There must be administrative penalties

of a substantial amount in order to remove the economic incentive for misconduct and to deter others.

29. The evidence is that the Staff of the OSC has, subsequent to the commencement of the action, made a recommendation for the allocation of any funds it may receive by this action for harmed investors. The recommendation was subsequently approved by 2 Vice Chairs of the OSC. The first issue which arises from this recent activity is whether subsequent action by the OSC, which may change the nature of proceedings, have any impact on the claim since this was not the state of play at the date of the filing of the Writ. According to the evidence of Martin-Gorelle at paragraphs 26 and 27 of her witness statement:

> 26. As discussed at paragraphs 13 and 16 above, typically an allocation is not made until funds are received. I understand that it is important for this Court to understand what the Commission intends to do with any funds it may receive in respect of this matter should it be successful in the litigation.
>
> 27. I have discussed this matter with the Vice-Chairs of the Commission, Grant Vingoe and Timothy Moseley. They agreed that the priority is to return funds received in connection with this case to the Harmed Investors. They indicated that save for any cost orders made in the extant proceedings in Ontario, France and The Bahamas against Mr. Pushka and related entities, the Board will allocate any and all funds recovered through those proceedings to the Harmed Investors. We also discussed that, in the circumstances, it is likely that the only practicable way to effect such a distribution would be for the commission to seek to have a receiver appointed under section 129 of the Canadian Act. This would permit a receiver, under the supervision of the court, to carry out a claims process for the purpose of returning money to the Harmed Investors in this matter. Attached as Exhibit "A" is a copy of the Vice-Chairs' signed allocation to Harmed Investors in this matter assuming funds are collected in the litigation against Mr. Pushka.

It would seem to me that in as much as the substantive law governing a proceedings is fixed to be that at the date of the filing of the action so should the date for the assessment of the nature of the proceedings be fixed. To suggest otherwise would introduce uncertainties and the opportunities of parties to change the facts to suit specific goals and outcomes. Whether something is penal or otherwise ought not to depend on whether the State, as the judgment creditor and beneficiary of the funds, the subject of the judgment, decides (in its discretion) to

use them for a purpose which is not penal or public, namely restitution. Assessment of the proceedings and whether the Order of the Canadian Court is penal cannot, in my view, be a moving goalpost adjustable to suit the vagaries of the jurisdiction in which enforcement is sought.

30. In any event, I am not satisfied that the adjustments attempted by the September 2018 allocation achieves what appears to be the intended result of changing the proceedings to being one of restitution in nature. Firstly, the need to make the allocation confirms that:

    (1) prior to this the OSC had options as to the distribution of the funds (See paragraph 15 of the Statement of Claim which speaks of an allocation to harmed investors and education of investors); and
    (2) it was not intended purely for harmed investors at the time the Superior Court deemed the OSC decision an Order of the Ontario Court.

    Secondly, and more significantly, the allocation arises as a result of the internal mechanism of the OSC, and not by way of the Court process affecting the Ontario Superior Court Order which is the subject to the claim. Prior to this allocation, Canadian Law Expert, Joseph Groia's at paragraph 60 of his expert evidence said that:

    > 60. I specifically disagree with paragraph 15 of the Statement of Claim herein to the extent that it suggests that the Commission has the authority or any intention to award any part of the disgorgement funds to harmed investors in this case. As noted elsewhere in this Report, the Commission has no jurisdiction to do that and has, on numerous occasions, clearly stated that that is not part of its mandate.

    The OSC's expert, Helen Daley, admits that the allocation is not an order and that there is nothing in the Act to prevent the Commission from approving a different recommendation at a later date, albeit unlikely.

31. The September 2018 allocation, in my view, does not and cannot change the flavor of the Ontario Superior Court Order. The September 2018 allocation is no more than an internal determination (or restriction) as to how the funds would be

allocated. Putting aside questions as to its timing, it is not a part of the Ontario Superior Court Order which deemed the Sanctions Order as an Order of the Ontario Court. It is a decision of the OSC, as judgment creditor, as to how it will spend the monies, it says, are due to it. There is no court order which obliges the OSC to pay to harmed investors any of the amounts sought to be collected. The evidence is clear that it may be changed, even though this may be unlikely. The mere fact of an allocation, giving options as to how the moneys which the OSC says are property of harmed investors, makes it clear that these are not moneys which belong to harmed investors.

32. This is not a case of recovery for the payment of moneys defrauded from investors as you would likely find in many of the cases. Certainly it was the case in ***Evans***, ***Manterfiled*** and ***Pogachar***. The moneys in this case were ordered by the Ontario Court order to be paid to the OSC to do with as it sees fit within the confines of Section 3.4(2)(b). Looking past the form (that is a decision stated to have been made in the public interest rather than for restitution) to the substance of the orders made in Canada, I find that it does not satisfy the ***Manterfield*** test. That test requires me to consider the question of whether this judgment is in substance a claim for damages which in the Bahamas the OSC might have been brought as a civil case.

33. There is also no allegation or suggestion that Pushka engaged in fraud of any kind. In ***Evans*** and ***Pogachar*** the allegations there were clearly based upon fraud. In both cases, all sums ordered to be paid were attributable to the loss of a private party who was entitled to the funds. In my view there is no relevant similarity with either ***Evans*** or ***Pogachar*** with the instant case. In ***Pogachar*** and ***Evans***, the Court in the respective countries appointed a receiver to recover the funds for the benefit of harmed investors. In fact, the receiver was appointed with respect to the corporate entities through which the fraud was perpetrated or for the persons and companies involved in the alleged fraud. ***Pogachar*** demonstrates that this jurisdiction was available to the OSC but it chose, whether intentionally or

otherwise, to pursue its public interest jurisdiction. Here the OSC is the beneficiary under the Superior Court Order in its own right. The lately filed evidence of Martin-Gorelle, speaks of the likelihood (not certainty) of a future application by the OSC to appoint a receiver, as ***this is the only practicable way to effect such a distribution [to harmed investors]***. It would seem to me that if the appointment of a receiver is the only way for such distribution to be made, this route ought to have been taken by the OSC at the outset, if in fact its purpose was the restitution of harmed investors.

34. The nature of the proceedings in Canada therefore, in my view, reflects a governmental interest of the relevant kind. In addition to the foregoing, I also note the following:

    (1) The Canadian Act provides that when ordered to do so by the Minister, the Commission shall pay into the Consolidated Revenue Fund such of its surplus funds as are determined by the Minister.
    (2) The Minister may establish guidelines respecting the allocation of money received by the OSC pursuant to an order made under the OSC's Section 127 public interest jurisdiction.
    (3) The Commission has not identified any individuals comprising the "harmed investors" to whom it has been recommended that funds be paid, nor has it quantified any amounts to be paid to such individuals pursuant to the recommendation.
    (4) Not only did the Sanctions Decision find that investors to whom the fiduciary duty was owed suffered no direct financial loss additionally, it found that in some instances investors benefited from the impugned transactions.

It is undeniable that the substance of what is being enforced is the Canadian securities legislation. The administrative penalty and the disgorgement order by the clear language of the securities legislation, the expressed statements of the OSC in making the order as well as Orders themselves, speak to punishment for the commission of offenses pursuant to Ontario Securities law. In my view, losses which may or may not have been incurred to third parties were incidental to the decision making process of the OSC.

Conclusion

35. In all the circumstances therefore I am satisfied that the appropriate finding relative to the preliminary issue is that the enforcement of the Canadian Orders involves

the direct or indirect enforcement of the penal, or other public laws of Ontario, Canada.

36. I will hear the parties on the question of costs.

Dated the 29th day of January 2020

Ian R. Winder

Justice