

IN THE MATTER OF

THE SECURITIES ACT, 1988, S.S. 1988-89, C. S-42.2

AND

IN THE MATTER OF

FRED LOUIS SEBASTIAN
(referred to as the "Respondent")

DECISION

Hearing Held: June 8, 2015

Before: Paul Robinson, Chairperson
Peter Carton
(referred to as the "Panel")

Appearances: Dallas Smith on behalf of the staff ("FCAA staff" or "Staff") of the
Financial and Consumer Affairs Authority of Saskatchewan (the
"Authority")

No appearance by the Respondent or anyone on his behalf

Date of Decision: July 23, 2015

Preliminary Matters:

[1] The Chairperson of the Authority initially appointed Paul Robinson, Peter Carton and Justice Eugene Scheibel to the Panel. Because of an urgent and unavoidable commitment, Justice Scheibel resigned from the Panel prior to the hearing.

[2] Shortly before the hearing, counsel for the Panel received emails from the Respondent concerning his appearance at the hearing. The Panel reviewed these emails prior to the commencement of the hearing noting that the Respondent had been advised several days in advance that the hearing would be proceeding on June 8, 2015 as planned. Pursuant to subsection 9(15) of *The Securities Act, 1988 (S.S. 1988-89 c. S-42.2)* ("The Act"), the Panel determined that the hearing should proceed in the absence of the Respondent or anyone on his behalf.

Background:

[3] In a Statement of Allegations dated December 2, 2014, FCAA Staff allege that, in and around 2012, Sebastian met with an elderly resident of Saskatchewan (the "Investor") who he advised to invest in a company called E-Debit Global Corporation ("E-Debit"). FCAA staff allege that Sebastian told the Investor that if she invested with him, he would double or triple her money in a very short time. FCAA staff also allege that Sebastian told the investor not to tell her family about the investments, so that she could surprise them later with the money she had made.

[4] In the Statement of Allegations, FCAA staff allege that between July 9, 2012 and August 8, 2012, the Investor provided Sebastian with five cheques totaling \$47,000 to make investments in E-Debit on her behalf. FCAA staff further allege that Sebastian deposited these cheques into his personal bank account and used the funds for his own use and benefit. At some time later in 2012, in response to a request for documentation from the Investor's children, Sebastian provided four promissory notes totaling \$50,000 to the Investor. The promissory notes promised to repay the entire \$50,000 to the Investor on December 31, 2012. All of the notes were signed by Sebastian. The promissory note dated July 9, 2012 for \$20,000 was personally guaranteed by Douglas MacDonald, CEO of E-Debit at the time.

[5] In the Statement of Allegations, FCAA staff allege that Sebastian's actions contravened sections 27(2)(a), 27(2)(b), 44(2), 55.1(b) and 58(1) of *The Act*.

[6] At the hearing, FCAA staff asked the Panel to consider whether it is in the public interest to make the following orders:

- (a) pursuant to clause 134(1)(a) of *The Act*, all of the exemptions in Saskatchewan securities laws do not apply to Sebastian, permanently;
- (b) pursuant to clause 134(1)(d) of *The Act*, Sebastian shall cease trading in any securities or exchange contracts in Saskatchewan, permanently;
- (c) pursuant to clause 134(1)(d.1) of *The Act*, Sebastian shall cease acquiring securities for and on behalf of residents of Saskatchewan, permanently;
- (d) pursuant to clause 134(1)(e) of *The Act*, Sebastian shall cease giving advice respecting securities, trades or exchange contracts in Saskatchewan;
- (e) pursuant to clause 134(1)(h)(i) of *The Act*, Sebastian shall resign any position that he holds as a director or officer of an issuer, a registrant or an investment fund manager;

- (f) pursuant to clause 134(1)(h)(ii) of *The Act*, Sebastian is prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, permanently;
- (g) pursuant to clause 134(h)(1)(iii) of *The Act*, Sebastian shall not be employed by any issuer, registrant or investment fund manager in any capacity that would entitle him to trade or advise in securities;
- (h) pursuant to clause 134(1)(h.1) of *The Act*, Sebastian is prohibited from becoming or acting as a registrant, an investment fund manager or a promoter, permanently;
- (i) pursuant to section 135.1 of *The Act*, Sebastian shall pay an administrative penalty to the Financial and Consumer Affairs Authority of Saskatchewan, in the amount of \$75,000 ; and
- (j) pursuant to section 135.6 of *The Act*, Sebastian shall pay financial compensation to each person or company found to have sustained financial loss as a result, in whole or in part, of Sebastian's contraventions of *The Act*, in an amount to be determined; and
- (k) pursuant to section 161 of *The Act*, Sebastian shall pay the costs of or relating to the hearing in this matter.

Evidence:

[7] FCAA staff called two witnesses at the hearing, Harvey White (White) an investigator with the FCAA and Douglas MacDonald (MacDonald) a longtime friend and business associate of Sebastian. In conjunction with the testimony of the two witnesses, FCAA staff provided the Panel with two exhibit books which contained copies of the exhibits entered into the official records. One of the exhibit books contained an audio tape of an interview White conducted with the Investor in early in May 2015. FCAA staff also provided the Panel with a binder containing copies of six legal decisions they considered pertinent. Subsequent to the hearing, FCAA staff provided the Panel with a Brief of Fact and Law.

Testimony of Harvey White

[8] White testified that he was assigned to this file in the summer of 2013. During the course of this investigation White interviewed the Investor and her family, received documents from various banks and interviewed MacDonald. White interviewed the Investor on two occasions, once shortly after being assigned the file and a second time in May 2015. The first interview was not recorded and her family was present. At the second interview the Investor was placed under oath and interviewed without her family being present. White testified that the Investor's memory of events had deteriorated somewhat between the first and second interviews but that her account of the material events was consistent. White's testimony

included information provided by the Investor in the two interviews as well as information gathered in other aspects of the investigation.

[9] White testified that Sebastian's mother was a resident of the same retirement residence as the Investor and she introduced her son to the Investor. Sebastian subsequently befriended the Investor and regularly visited her to play cards. After a time, the Investor made small loans to Sebastian.

[10] White further testified that Sebastian presented himself as a successful businessman and introduced the Investor to an opportunity to invest in E-Debit. The Investor was never entirely certain what the investment was but Sebastian claimed that she could double or triple her money within a few months. Sebastian further advised the Investor not to tell her family about the investment but to wait until the returns were received so that she could pleasantly surprise them.

[11] The Investor subsequently wrote five cheques to Sebastian that she believed would be invested in E-Debit on her behalf;

- Cheque 1, dated July 9, 2012 in the amount of \$20,000, the memo section containing the notation "LOAN – E-Debit + GLOBAL CORP.";
- Cheque 2, dated July 12, 2012 in the amount of \$10,000, the memo section containing the notation "LOAN TO 7323252 ALBERTA LTD";
- Cheque 3, dated July 17, 2012 in the amount of \$7,000, the memo section containing the notation "LOAN-101105507 SK. LT.";
- Cheque 4, dated July 25, 2012 in the amount of \$5,000, the memo section containing the notation "INVESTMENT";
- Cheque 5, dated August 8, 2012 in the amount of \$5,000, the memo section containing the notation "INVESTMENT E-DEBIT".

Each of these cheques was deposited into Sebastian's personal bank account.

[12] White testified that the Investor advised him that she did not write any of the notations in the memo section of the cheques. Since the cheques were deposited to Sebastian's personal bank account, FCAA staff argued that the notations must have been made by Sebastian.

[13] Bank records obtained by White showed that of the \$47,000 in cheques deposited to the bank account of Fred and Eva Sebastian; \$17,000 was transferred to Westsphere Systems, \$7,300 was for a bank draft to 732352 Alberta Ltd. and the remainder was used for a variety of personal purchases.

[14] White further testified that in response to requests for documentation of the transactions by the Investor's children, Sebastian provided four promissory notes for the funds provided to him by the Investor. The first three promissory notes were in amounts corresponding to the first three cheques and were dated accordingly. The fourth note dated August 8, 2012 was made out for \$13,000, presumably to cover cheques 4 and 5 and other sums owed to the Investor by Sebastian. All of the promissory were due December 12, 2012 with no interest. All of the promissory notes were signed by Sebastian and the promissory note in the amount of \$20,000 was personally guaranteed by Douglas MacDonald, CEO of E-Debit Global Corporation.

[15] A handwritten note from Sebastian to the Investor, dated January 7, 2013, was introduced into evidence. In the note Sebastian stated that '... we will have your funds (\$49,400.00) back to you very shortly'.

[16] White testified that Sebastian has not made any payments to the Investor. He further testified that the cheques to Sebastian represented a significant portion of the Investor's assets and the loss of funds had resulted in significant economic hardship. White also testified that the Investor had stated to him that she was embarrassed by her actions and he concluded that she had suffered a significant loss of self-esteem as a result of this incident.

[17] White testified that Sebastian has never been registered as an "adviser" or as a "dealer" pursuant to the Act, that no preliminary prospectus relating to the distribution of securities was filed nor was a receipt received for same and that no reports have been filed with the Authority pursuant to section 6.1 of National Instrument 45-106 (NI 45-106) *Prospectus and Registration Exemptions* claiming any of the exemptions in NI 45-106 in relation to the distribution of securities by Sebastian.

Testimony of Douglas MacDonald

[18] MacDonald testified that he was a longtime friend and business associate of Sebastian and during the relevant time was President and CEO of E- Debit. He further testified that 723352 Alta. Ltd. is a company used by himself, Sebastian and a small group of others for investment purposes and Westsphere Systems is a wholly-owned subsidiary of E-Debit.

[19] MacDonald testified that E-Debit shares trade on the over the counter market, that he regularly reviews E-Debit's records, is familiar with nearly every E-Debit shareholder and to the best of his knowledge the Investor had never had investments in E-Debit or any of its subsidiaries. He testified that he first became aware of the Investor when Sebastian told him that the Investor was a long-time family friend who had loaned him money. MacDonald testified that both he and E-Debit had helped out Sebastian in the past by lending him money and on this basis he personally guaranteed the promissory note. MacDonald further testified that he was prepared to honour his guarantee.

[20] MacDonald also testified that the \$17,000 draft to Westphere Systems and the \$7,300 draft to 732352 Alberta Ltd. were to repay personal loans incurred by Sebastian and were not investments made on behalf of the Investor.

Decision of the Panel:

[21] Staff contended that the promissory notes provided to the Investor were created by Sebastian to conceal the actual transactions between Sebastian and the Investor and/or to justify Sebastian's use of the Investor's funds. The Panel believes that a more likely explanation is that Sebastian, after being confronted by the Investor's sons, created the promissory notes as a delaying tactic to mollify the sons and avoid further confrontations with them. These explanations are not mutually exclusive and both may be correct. Regardless of whether only one or both of these interpretations is correct, it is clear to the Panel that Sebastian led the Investor to believe she was making an investment and was not simply making loans to a friend. In so doing, Sebastian took action in the furtherance of the sale of securities to the Investor thereby engaging in the business of trading and advising in securities.

The Panel heard evidence from White that Sebastian was not registered as a dealer or an advisor at the relevant times. Thus the Panel has concluded that Sebastian has contravened clauses 27(2)(a) and 27(2)(b) of *The Act*; acting as a dealer and adviser without being registered to do so.

[22] Staff alleged that the trading in securities would have related to securities that had not previously been issued and would have been distributions under the Act. Since no preliminary prospectus was filed or receipts issued for such distribution, Staff contended that Sebastian contravened subsection 58(1) of the Act. It was never established what securities of E-Debit the Investor believed she was investing in. Both White and MacDonald testified that E-Debit common shares are traded on the over the counter market so it is possible that the Investor believed she was investing in the common shares. Sebastian was not represented at the hearing to dispute FCAA staff's allegation but to her credit, counsel for FCAA staff conceded in oral argument that "a breach of this section may not have been made out". The Panel has concluded that Staff has not established that Sebastian contravened subsection 58(1) of *The Act*.

[23] White testified that Sebastian advised the Investor that he would double or triple her money in a short period of time if she invested her funds with him. The Panel determined that when Sebastian made this promise, he had given an oral undertaking relating to the future value of a security with the intention of effecting a trade in that security and thereby contravened subsection 44(2) of *The Act*.

[24] FCAA staff alleged that Sebastian knowingly participated in a course of action relating to securities that perpetrated a fraud on a person contrary to clause 55.1(b) of *The Act* the relevant portion of which is as follows:

No person or company shall, directly or indirectly, engage or participate in any act, practice or course of action relating to securities or exchange contracts that the person or company knows or reasonably ought to know:

:

(b) perpetrates a fraud on any person or company.

The Supreme Court of Canada in *R. v. Theroux* [1993] 2 SCR 5,100 DLR (4th) 624 (S.C.C.) set out the tests for determining whether or not a fraud has occurred as: proving that an act of deceit or falsehood has occurred and that this act resulted in an actual loss or placing of the victim's pecuniary interests at risk; and determining that the perpetrator either knew that a fraud was being perpetrated or was reckless or willfully blind of the consequences of their conduct and the truth and falsity of their statements, and knew or reasonably ought to have known that the prohibited act would put the pecuniary interests of another at risk.

Staff cited the case of *Re: Axxess Automation LLC, Re* (2012), 35 OSCB 9019 (Ont. Securities Comm.) that was heard by the Ontario Securities Commission (OSC). In arriving at its decision the OSC adopted the definition of fraud as set out in the *Theroux* decision. It is important to note that the statutory provision interpreted by the OSC in *Axxess* is substantially identical to Section 55.1 of *The Act*.

Submissions made by staff also noted that the Saskatchewan Court of Queen's Bench has recently adopted the definition of fraud as set out in the *R. v. Theroux* decision in *R. v. Fast*, 2014 SKQB 84, 441 Sask R.23 (Sask Q.B.).

The tests to prove that a fraud has occurred as set out in *Theroux*, and as applied by the Saskatchewan Court of Queen's Bench in *Fast* and by the OSC in *Axxess* are easily met in the current matter. Sebastian solicited funds from the Investor by making exaggerated claims about the money to be made from investing in E-Debit, however he had no intention of investing the funds on her behalf. This was clearly deceitful. He obtained \$47,000 in this manner. White testified that the funds represented a significant portion of the Investor's assets and that the loss had caused her significant economic hardship. Sebastian designed the scheme, which involved only himself, to obtain money from the Investor and it is inconceivable that he would not have known it was fraudulent. Because of his association with the Investor over an extended period of time, Sebastian knew or should have known that this would result in severe financial consequences for her. For these reasons, the Panel determined that Sebastian engaged in a course of conduct in relation to securities that he knew or reasonably ought to have known, perpetrated a fraud on a person, contrary to clause 55.1(b) of *The Act*.

[25] The Panel also noted that, based on the evidence led, Sebastian may have contravened section 44.1 of *The Act* and engaged in unfair practice. FCAA staff did not include this possible contravention in the Statement of Allegations and the Panel has not made a determination in this matter.

[26] Sebastian's actions were not a minor technical violation of a complex act nor were they an innocent oversight. Rather they were a deliberate attempt to gain the confidence of a trusting, elderly individual with limited investment experience for the purpose of personal enrichment. He defrauded the Investor and in so doing contravened other provisions of *The Act*. He acted without conscience, not appearing to care that his actions would cause significant economic loss and emotional distress. He did not appear at the hearing to defend himself against the allegations. FCAA staff were not aware of any mitigating factors and none were presented on his behalf.

Based on arguments presented by FCAA staff and the evidence before it, the Panel has decided that the appropriate remedies are to attempt to restore the Investor to her previous financial position; permanently ban Sebastian from the securities industry in Saskatchewan; require Sebastian to pay an administrative penalty well in excess of the funds obtained from his illegal actions and require Sebastian to reimburse FCAA for the costs it has incurred because of his wrongful acts. In addition to attempting to undo the harm caused by Sebastian and prevent him from engaging in such behavior again, these remedies are meant to serve notice that there will be serious consequences for those committing similar offences in the future.

[27] In light of the foregoing, the Panel has determined that it is in the public interest to make the orders sought by FCAA staff without variation.

Dated this 23rd day of July 2015



Paul Robinson, Chairperson



Peter Carton, Panel Member