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Securities
Commission

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Citation: Kitmitto (Re), 2020 ONSEC 22

Date: 2020-08-20

File No. 2018-70

**IN THE MATTER OF
MAJD KITMITTO, STEVEN VANNATTA, CHRISTOPHER CANDUSSO, CLAUDIO
CANDUSSO, DONALD ALEXANDER (SANDY) GOSS, JOHN FIELDING AND
FRANK FAKHRY**

**REASONS FOR DECISION ON A MOTION
(Rule 29 of the Ontario Securities Commission *Rules of Procedure and Forms*
(2019) 42 OSCB 9714)**

Hearing: July 31, 2020

Decision: August 20, 2020

Panel: M. Cecilia Williams Commissioner and Chair of the Panel

Appearances: Katrina Gustafson For Staff
Matthew Britton

Andrew Guaglio For Majd Kitmitto
Ian Smith

Christopher Kostopoulos For Steven Vannatta

Janice Wright For Frank Fakhry
and
Agent for Christopher Candusso and
Claudio Candusso

John Picone For Donald Alexander (Sandy) Goss

Frank Addario For John Fielding
Lynda Morgan

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REASONS FOR DECISION ON A MOTION

I. OVERVIEW

- [1] The merits hearing in this proceeding was scheduled to begin on September 1, 2020.
- [2] Due to the COVID-19 pandemic the Commission has suspended in-person hearings until further notice, and hearings are being conducted either in writing, by teleconference or by videoconference.
- [3] At the final interlocutory attendance on July 31, 2020, Staff advised that all parties, except Goss, have reached an agreement regarding the presentation of evidence for some of Staff's witnesses. The agreement includes Staff presenting the evidence of their three investigators by affidavit and the adjournment of the start of the hearing to October 5, 2020.
- [4] After considering the parties' submissions, I ordered that:
 - a. a further attendance in this proceeding be scheduled for August 7, 2020 by teleconference;
 - b. the merits hearing dates scheduled for September 1, 2, 3, 4, 8, 9, 10 and 11 are vacated and the previously ordered merits hearing dates remain as scheduled to be heard by videoconference;
 - c. Staff shall serve affidavits for Staff's investigator witnesses on the respondents by September 11, 2020; and
 - d. Staff shall file affidavits for Staff's investigator witnesses by September 25, 2020.
- [5] I advised that my reasons for that decision would follow. These are my reasons.

II. ANALYSIS

- [6] The issues I need to decide are:
 - a. is a motion for an adjournment required in this instance;
 - b. do the parties need to meet the Rule 29(1) test that there are "exceptional circumstances" if they have agreed amongst themselves to adjourn the start of a merits hearing; and
 - c. if the parties do need to establish that the circumstances are "exceptional", have they done so in this case?

A. Is a motion for an adjournment required in this instance?

- [7] Rule 29(2) of the Commission's *Rules of Procedures and Forms*¹ provides that a party seeking an adjournment shall file and serve a motion.
- [8] The parties' proposed approach involves the adjournment of eight days of the merits hearing from September 1, 2020 to October 5, 2020. However, no motion for an adjournment was brought. I asked the parties to address why a motion was not necessary in this instance.

¹ (2019) 42 OSCB 9714 (the **Rules**)

- [9] Staff's position is that such formality should be dispensed with in circumstances where the parties have agreed to the revised merits hearing schedule.
- [10] Fakhry agrees with Staff's position. Goss submits that their proposed approach does not involve an adjournment; rather it involves vacation of dates with the agreement of the parties.
- [11] Fielding's position is that the vacation of dates to allow Staff to provide a portion of its evidence by affidavit represented an agreed approach to address some of the respondents' concerns about the merits hearing format. If a formal motion for adjournment were to be required to approve this agreed approach, the likely result would be a contested motion for adjournment of the merits hearing until an in person hearing would be possible.
- [12] The objective of the Rules, as set out in Rule 1, is to ensure that Commission proceedings are conducted in a just, expeditious and cost-effective manner.
- [13] While the parties to a proceeding may have views about how a proceeding should be conducted, it is important to remember that the Panel has an overarching responsibility to ensure that the objectives of the Rules are met.
- [14] The Commission encourages cooperation and collaboration among parties to ensure that proceedings before the Commission are fair and efficient. However, the fact that the parties have agreed on a course of action does not mean the Rules do not apply nor does it relieve the Panel of its responsibilities.
- [15] In this circumstance, I agree that a motion for an adjournment is not required. As is set out in Rule 3, a panel can waive the requirements in the Rules. The merits hearing is scheduled to commence in a month. The scheduling of a motion for an adjournment, when there is no dispute among the parties about the timing, would be unnecessarily burdensome as it would require the parties to prepare and file motion materials while continuing to prepare for the hearing itself. More importantly, for the reasons set out below, the adjournment in this instance is unlikely to cause a delay in the overall proceeding and is intended to contribute to the efficiency of the hearing.
- [16] Therefore, I conclude that a waiver of the requirement for a formal motion for an adjournment is consistent with the objective of ensuring this matter is conducted in a just, expeditious and cost-effective manner.

B. Do the parties need to meet the Rule 29(1) test that there are "exceptional circumstances" if they have agreed amongst themselves to delay the start of a hearing?

- [17] Staff's position is that if "exceptional circumstances" was a hurdle that needed to be addressed, then the circumstances did meet the standard under Rule 29(1).
- [18] Fakhry's position is that the Rule 29(1) test of "exceptional circumstances" is usually applied when an adjournment request by a party is contested. This case, in Fakhry's view, differs from a normal adjournment because the agreed approach reflects Staff's willingness to move forward in a way that takes into consideration the respondents' concerns about proceeding with a virtual hearing.
- [19] In addition, Fakhry submits that, similar to Goss's position reflected at paragraph [10] above, this situation is more akin to vacating dates than adjourning a hearing. Fakhry cited, as an analogous example, when a hearing cannot

continue as planned for a variety of reasons, such as witness availability, and dates are vacated.

- [20] I do not accept the proposition that the requirement to establish “exceptional circumstances” only applies where there is a contested motion to adjourn a hearing.
- [21] Rule 29(1) provides that “Every merits or sanctions hearing in an enforcement proceeding, and every hearing of a motion or application shall proceed on the scheduled date unless a Party satisfies the Panel that there are exceptional circumstances requiring an adjournment.” There is nothing in the language of the Rule to suggest that the need to establish “exceptional circumstances” is only in those instances where the parties are not in agreement.
- [22] The Rules require that the Panel needs to be satisfied that there are “exceptional circumstances” warranting an adjournment. The fact that the parties have agreed to delay the start of a hearing does not relieve the Panel of its Rule 1 objectives or the parties of their obligation to satisfy the Panel that the delay is warranted under Rule 29(1). In this instance, the request of the parties constitutes an adjournment as the start of the hearing is not proceeding as scheduled.

C. If the parties do need to establish that the circumstances are “exceptional”, have they done so in this case?

- [23] Having found that the test in Rule 29(1) applies I must now determine if the parties have met the threshold for “exceptional circumstances”.
- [24] The Commission has ruled that the standard set out in Rule 29(1) is a “high bar” that reflects the Rule 1 objective, that Commission proceedings be conducted in a “just, expeditious and cost-effective manner”.² This objective must be balanced against parties’ ability to participate meaningfully in the hearing and present their case.³
- [25] Staff’s position is that the circumstances are “exceptional”. Staff submits that while proceeding virtually is feasible, it is not ideal to be introducing all of the evidence through videoconference. The agreement arrived at with the respondents, in Staff’s view, is consistent with the objectives of the Rules as providing affidavit evidence for three investigator witnesses will greatly reduce the hearing time that needs to be dedicated to examination-in-chief of witnesses. Specifically, it eliminates eight days of live testimony without delaying the overall proceeding. Staff submits the time saved by eliminating those eight days is necessary to prepare, serve and file the very detailed affidavits for the three investigator witnesses in advance of the proposed first date of the merits hearing on October 5, 2020. In addition, in Staff’s view, it is not anticipated that this approach will delay the overall hearing as the remaining, previously scheduled dates remain in place.
- [26] Fakhry’s position is that, to the extent there is an exceptional test to be applied in this instance, the threshold is met by the pandemic and the creative response

² *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18, (2018) 41 OSCB 3512 at para 28; *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40, (2020) 43 OSCB 35 (**Money Gate**) at para 54

³ *Money Gate* at para 54

that the parties have arrived at in this instance to address concerns about proceeding with the merits hearing in a virtual format.

- [27] Generally, adjournments of merits hearings are only granted on an exceptional basis because they disrupt existing plans, consume resources unnecessarily, and/or (and often most significantly) delay the conclusion of the merits hearing. It is an exception when an adjournment effects no appreciable disruption.⁴
- [28] This proceeding is a complex, insider trading case involving multiple respondents and scheduled for 45 days that, of necessity due to the suspension of in-person hearings, is going to proceed, by videoconference.
- [29] The agreement to introduce the evidence of Staff's three investigators by affidavit will reduce the number of hearing days needed for testimony in-chief. Eliminating the eight initial days of the merits hearing to provide time to finalize, serve and file the affidavits is an efficient solution to allow the merits hearing to proceed. This approach is also not anticipated to delay the overall hearing, which will continue with the remaining, previously scheduled 37 days of merits hearing ending on December 11, 2020.
- [30] Therefore, I conclude that the circumstances are "exceptional" and the adjournment of the hearing to the previously scheduled date of October 5, 2020 is warranted.
- [31] There is one final point that warrants comment. The parties agreed to separate dates set for the serving and then filing of Staff's investigator affidavits, as reflected in my order dated July 31, 2020. While in the normal course the affidavits would be filed and served at the same time, I accepted this aspect of the parties agreed upon approach. The fact that the order contains a separation between the dates for service and filing of affidavit evidence was a procedural agreement of the parties in the unique circumstances of this case.

III. CONCLUSION

- [32] For the reasons stated above, I made the July 31, 2020 order.

Dated at Toronto this 20th day of August, 2020.

"M. Cecilia Williams"

M. Cecilia Williams

⁴ Paramount (Re), 2020 ONSC 7 at para. 21