



## TABLE OF CONTENTS

1.	OVERVIEW .....	1
2.	BACKGROUND.....	1
3.	PRELIMINARY MATTER – RESPONDENTS’ REQUEST TO ADJOURN THE MERITS HEARING.....	3
4.	EVIDENCE .....	4
	4.1 Credibility and reliability of witnesses.....	4
5.	ANALYSIS.....	6
	5.1 Introduction .....	6
	5.2 Fraud .....	7
	5.2.1 <i>Actus Reus</i> .....	7
	5.2.2 <i>Mens Rea</i> .....	13
	5.2.3 Conclusion.....	15
	5.3 Section 129.2 of the <i>Act</i> .....	15
	5.4 Conduct contrary to the public interest.....	15
6.	CONCLUSION.....	16

## REASONS AND DECISION

### 1. OVERVIEW

- [1] These are our reasons for finding that the respondents, CIM International Group Inc. (**CIM**) and Jiubin Feng, breached the *Securities Act*<sup>1</sup> (the **Act**) by perpetrating a securities fraud. The respondents raised funds from investors to be used exclusively to develop a specific real estate project, but then misapplied investor funds for purposes other than what was disclosed in the offering documents which ultimately caused investors to suffer significant losses.
- [2] Between December 2017 and November 2018 (the **Material Time**), CIM was a public Ontario corporation involved in the development of several real estate projects. Feng was its principal directing mind. In 2018, CIM raised \$10 million by issuing secured debentures. The CIM board of directors' resolution authorizing the offering, the offering documents and subscription agreements provided to investors, and the in-person representations, all stipulated that CIM would use the net proceeds of the offering to finance a specific real estate project.
- [3] We find that a significant portion of the net proceeds was not used to develop the stipulated real estate project but was instead directed back to CIM by unsecured loans or invested in or loaned to other real estate projects controlled by Feng.
- [4] We conclude that the respondents engaged in a course of conduct relating to securities that they knew perpetrated a fraud on the investors contrary to s. 126.1(1)(b) of the *Act*.

### 2. BACKGROUND

- [5] Feng is a real estate developer who became the CEO and Chairman of CIM's board of directors in 2016 through the reverse takeover (**RTO**) of a small mining company listed on the TSX Venture Exchange.
- [6] Feng had immigrated to Canada from China with a PhD in structural engineering. Prior to coming to Canada, Feng worked in real estate development but had no

---

<sup>1</sup> RSO 1990, c S.5

experience operating a public company. As CEO and Chairman of CIM, Feng shifted the business of CIM from mining to real estate development. Following the RTO, CIM's only significant business activity was making investments in or loans to real estate projects controlled by Feng.

- [7] In Autumn 2017, CIM embarked on a proposed secured bond offering (the **Proposed Offering**). CIM announced the Proposed Offering by press release dated December 6, 2017, with the first \$10 million of proceeds to be loaned to Bayview Creek (CIM) LP (**Bayview Creek LP**), a real estate project controlled by Feng, to finance the development of townhouses at 10747 Bayview Avenue in Richmond Hill, Ontario (the **Bayview Creek Project**). Feng and other CIM representatives started meeting with potential investors commencing in December 2017. The Proposed Offering did not proceed once CIM was advised in January 2018 that Bayview Creek LP could not obtain the required consent for the second mortgage that was to secure the loan under the Proposed Offering.
- [8] On February 1, 2018, CIM's board of directors approved moving ahead with a new debt financing with a revised security package. Rather than a second mortgage, the loan from CIM to Bayview Creek LP would be secured by a negative pledge, covenant and undertaking (that would register a second mortgage on a triggering event) (the **Proceeds Loan**). CIM's board of directors then also approved the issuance of secured debentures in order to raise funds for the Bayview Creek Project. The debentures were secured by units of another Feng controlled project owned by CIM.
- [9] Between February 6 and August 2, 2018, CIM raised \$10 million through the sale of three-year secured debentures, paying 13.5% interest per year semi-annually (the **Offering**), to 36 investors in Ontario, Hong Kong and the United Kingdom.
- [10] Offering documents for the CIM debentures and all but one of the subscription agreements completed by CIM investors stipulated that CIM would use the net proceeds to make the Proceeds Loan to Bayview Creek LP to finance the Bayview Creek Project.
- [11] CIM made the Proceeds Loan to Bayview Creek LP in tranches between February 7 and August 8, 2018. Bayview Creek LP delivered seven debentures to CIM to record each tranche of the Proceeds Loan. Each Bayview Creek debenture

provided that the principal bore interest at an annual rate of 20%, payable semi-annually.

- [12] Between February 7 and November 14, 2018, approximately \$3.39 million of the Proceeds Loan was used for non-Bayview Creek expenses, which included unsecured loans from Bayview Creek LP back to CIM and investments in or unsecured loans to other real estate projects controlled by Feng.
- [13] CIM had originally borrowed funds from Bayview Creek LP shortly after the RTO was completed in 2016 and continued to borrow funds from Bayview Creek LP in 2017 and 2018, including the Proceeds Loan. By June 30, 2019, CIM's debt to Bayview Creek LP was nearly as large as Bayview Creek LP's debt to CIM under the Proceeds Loan, and Feng caused CIM and Bayview Creek LP to offset their indebtedness to each other. This offset of debts reduced Bayview Creek LP's interest obligations to CIM.
- [14] CIM was unable to pay interest to investors without the interest payments from Bayview Creek LP on the Proceeds Loan. CIM defaulted on interest payments owing to investors commencing on December 16, 2019. In 2019, the units held by CIM in another Feng controlled entity that were provided as security for the CIM debentures were valued at \$1 due to a lawsuit. Also in 2019, a second mortgage was registered on the Bayview Creek property to secure a loan made by Feng on behalf of Bayview Creek LP, contrary to the series of pledges and covenants made by Bayview Creek LP for the Proceeds Loan.

### **3. PRELIMINARY MATTER – RESPONDENTS' REQUEST TO ADJOURN THE MERITS HEARING**

- [15] On the eve of the start of the merits hearing, the panel received a written request from the respondents to adjourn the merits hearing so the parties may discuss the possibility of settlement. The respondents indicated that a two-to-three-week adjournment was necessary in order to have meaningful discussions.
- [16] Staff of the Ontario Securities Commission (**Staff**) opposed the adjournment, citing Rule 29(1) of the Tribunal's *Rules of Procedure and Forms*, which states that every merits hearing shall proceed on the scheduled date unless a party satisfies the panel that there are exceptional circumstances requiring an adjournment.

[17] Staff advised it did not believe there was a reasonable prospect of settlement in this case and submitted that a respondent's bare hope that the matter may settle does not constitute exceptional circumstances.

[18] The standard set out in Rule 29(1) is a high one that reflects the important objective set out in Rule 1 that Tribunal proceedings be conducted in a "just, expeditious, and cost-effective manner".

[19] We were not persuaded that there were any exceptional circumstances warranting an adjournment, as there was not a reasonable prospect of settlement, the respondents were prepared to proceed with the merits hearing, and there would be significant delay should the merits hearing need to be re-scheduled.

[20] We dismissed the respondents' request and proceeded with the merits hearing as scheduled.

#### **4. EVIDENCE**

[21] Staff called three witnesses at the merits hearing: Louisa Fiorini, a Senior Investigator in the Enforcement Branch of the Commission, RP, who as the former President and director of CIM was one of its directing minds between May 2017 and March 2018, and an investor (**JH**). The respondents called Feng as their only witness.

##### **4.1 Credibility and reliability of witnesses**

[22] In assessing the credibility and reliability of witnesses, the Tribunal has accepted the guidance that "the most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case."<sup>2</sup>

[23] We may accept some, all or none of a witness's evidence and we may find the evidence of a witness credible in some respects but not in others.

[24] We find Staff's Senior Investigator to be a credible witness and we accept her evidence. The investigator introduced the findings of Staff's investigation and introduced documents obtained and the financial analysis conducted by Staff. We

---

<sup>2</sup> *Springer v Aird & Berlis LLP*, 2009 CanLII 15661 at para 14

are able to assess and determine the import of the documents introduced and to accept, reject or modify the financial analysis conducted by Staff as necessary.

[25] We also find Staff's remaining two witnesses, RP and JH, to be credible and reliable.

[26] RP was a director and the president of CIM from approximately May 2017 (when he was hired by Feng) until his resignation in March 2018 and was previously registered with the Commission when he worked for an investment advisor in the early 2000s. RP remained a director of CIM after his resignation as president until the summer of 2018. During the merits hearing, RP demonstrated a clear understanding of his obligations as a witness. Where there may have been some inconsistencies during aspects of his testimony, they were inconsequential, and did not undermine our overall assessment of RP's credibility. RP's evidence was generally consistent and supported by documentary evidence and the larger circumstances of the case.

[27] JH was a Hong Kong investor in CIM who invested \$1 million in CIM debentures. JH advised that her sister invested \$3 million in CIM debentures. JH studied economics, worked in banking, owned an insurance brokerage and a restaurant and indicated she had some knowledge of securities. She was introduced to CIM by her accountant. JH's testimony was largely related to what she had been told by Feng in early 2018 in a few different settings related to her proposed investment in the Bayview Creek Project. JH also acted as a referral agent and earned \$200,000 in referral fees by referring multiple investors to CIM – a fact that we find has no bearing on the reliability of her testimony.

[28] We consider JH's credibility together with Feng's as their respective testimonies stand in stark contradiction.

[29] We find JH's testimony to be credible and Feng's testimony to suffer from a range of deficiencies. While at times JH was unable to remember some specific details of her interactions with Feng, we do not find this to be unusual, and her recollection of substantive matters discussed with Feng appeared to us to be strong. Feng's testimony, on the other hand, was inconsistent with earlier statements he had made to Staff in material aspects, inconsistent with RP's testimony in important respects, and his main assertions do not accord with

reasonable likelihood. His assertion that the transcripts of his earlier interviews with Staff were inaccurate also damages his credibility.

[30] We note in our analysis below where inconsistencies in witness testimony require a credibility finding on our part.

## **5. ANALYSIS**

### **5.1 Introduction**

[31] One of the main purposes of the *Act*, as stated in s. 1.1, is to protect investors from unfair, improper or fraudulent practices.

[32] In this case, Staff alleges that the respondents committed securities fraud after raising \$10 million through the sale of debentures to 36 investors in Ontario, Hong Kong and the United Kingdom. Staff alleges that the respondents represented to investors that their investments would be loaned to Bayview Creek LP and used to finance the Bayview Creek Project but ended up diverting approximately \$3.39 million of the Proceeds Loan back to CIM or to other Feng controlled projects without the investors' knowledge or approval. Staff further alleges that Feng as a directing mind of CIM authorized, permitted or acquiesced in CIM's fraudulent conduct and that the respondents engaged in an activity that was contrary to the public interest.

[33] The following questions are before us:

- a. Did the respondents directly or indirectly breach s. 126.1(1)(b) of the Act by engaging or participating in acts, practices, or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on persons or companies?
- b. If CIM breached s. 126.1(1)(b) of the Act, is Feng deemed to have not complied with Ontario securities law pursuant to s. 129.2 because he authorized, permitted or acquiesced in the non-compliance?
- c. Did the respondents engage in an activity that was contrary to the public interest?

[34] For the reasons that follow, we find that Staff has established a. above, and we find it unnecessary to consider b. and c. as a result.

## 5.2 Fraud

[35] Section 126.1(1)(b) of the *Act* provides:

A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

...

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

[36] The allegation of fraud in this case is focused on the respondents' and Bayview Creek LP's use of the Proceeds Loan for purposes contrary to what CIM investors were told.

[37] The term "fraud" is not defined in the *Act*. The parties agree, and previous Tribunal decisions have held, that the definition in the Supreme Court of Canada's decision in *R v Theroux*<sup>3</sup> applies. Accordingly, fraud consists of the following elements:

- a. the *actus reus*, which is an act of deceit, falsehood or some other fraudulent means, and deprivation caused by that act; and
- b. the *mens rea*, which is subjective knowledge of the act, and subjective knowledge that the act could result in the deprivation of another.

### 5.2.1 Actus Reus

[38] The Tribunal has repeatedly held that an unauthorized diversion, or misuse, of investor funds is an act, practice or course of conduct that constitutes "other fraudulent means" for the purposes of a fraud analysis.<sup>4</sup> "Other fraudulent means" is determined objectively, by reference to "what a reasonable person would consider to be a dishonest act".<sup>5</sup>

---

<sup>3</sup> [1993] 2 SCR 5 (*Theroux*)

<sup>4</sup> *First Global Data Ltd (Re)*, 2022 ONCMT 25 (*FGD*) at paras 360-361

<sup>5</sup> *Theroux* at p 14

[39] The “deprivation” of the *actus reus* element is established by proof of:

- a. actual loss to the victim;
- b. prejudice to the victim’s economic interest; or
- c. risk of prejudice to the economic interests of a victim.<sup>6</sup>

[40] We emphasize that a risk of prejudice, without actual loss, may be sufficient to establish deprivation.<sup>7</sup>

**5.2.1.a The respondents told investors the proceeds would be used to develop the Bayview Creek Project**

[41] The offering documents that define the terms of the Offering (i.e., CIM’s board resolution, a confidential offering memorandum, term sheets and subscription agreements) state that CIM would use the money raised by the debentures to finance the Bayview Creek Project. The term sheet, which is attached to and forms part of the subscription agreement, explicitly states that “The net proceeds of [this] Offering will be used by the Corporation as a loan (the “Loan”) to Bayview Creek (CIM) LP (the Bayview Creek LP) to finance the Bayview Creek real estate project located at 10747 Bayview Avenue, Richmond Hill, Ontario (the “Property”)”.<sup>8</sup> These documents were reviewed by and/or signed by Feng, the principal directing mind of CIM. In addition, CIM’s marketing material relating to the Offering, including a press release and PowerPoint presentation, provided descriptions of the Bayview Creek Project and stated that the proceeds would be used to develop the project.

[42] The respondents do not contest this. In his testimony, Feng did not address the import of the language in the documentation; he merely stated what he claimed his subjective understanding was – that he believed that he and CIM were authorized to use investor funds to make loans to or investments in other Feng-controlled real estate projects in addition to the Bayview Creek Project.

[43] There were oral representations made to investors about the use of investor funds in addition to the documentation. We heard evidence at the merits hearing

---

<sup>6</sup> *Theroux* at p 13-14

<sup>7</sup> *Theroux* at p 14

<sup>8</sup> Exhibit 1, Affidavit of Louisa Fiorini affirmed August 4, 2022, at para 69

that investor meetings were conducted in both English and Mandarin (Feng's native language) with interpreters present. RP testified that he told investors in the English portion of investor meetings that the money raised by investors would be used to finance the Bayview Creek Project.

- [44] JH testified that, in the portion of a meeting with her conducted in Mandarin, and at dinners with her and Feng in attendance, she and her family were told, repeatedly, that their investments would go "100% to Bayview Creek". She was shown a PowerPoint presentation about CIM and its projects that stated that the proceeds would be used for the Bayview Creek Project and was told how the secured debentures would work.
- [45] The respondents called no evidence contradicting the testimony of RP and JH that these oral representations were made at the investor meetings. Feng's testimony was that he did not know what investors were told as he was not present at the meetings when the Offering was discussed, other than to greet them at the door. We find that representatives from CIM, including CIM's CFO, orally represented to JH and other investors that the proceeds would be used for the Bayview Creek Project.
- [46] We do not accept the respondents' submission that we should disregard the statements JH attributed to CIM's CFO because Staff did not call him as a witness at the merits hearing. The *Statutory Powers Procedure Act*<sup>9</sup> permits us to admit and consider the statements attributed to CIM's CFO and we do so, noting those statements are not necessary for our findings but provide additional support for them.
- [47] Furthermore, we find that Feng made the same oral representations. We accept the testimony of JH that Feng assured her, repeatedly, that the money she was investing would be used to finance the Bayview Creek Project and reject Feng's testimony that he did not do so. JH also alerted the panel to WeChat messages between her and Feng to the same effect (though we acknowledge that these messages were not produced during the merits hearing and are of limited value).

---

<sup>9</sup> RSO 1990, c S.22, s 15

RP also testified that Feng attended nearly all meetings with potential investors and communicated with them in Mandarin.

[48] We find that CIM raised \$10 million from investors through a private placement of three-year debentures with the promise to use the net proceeds to finance the Bayview Creek Project. We find, further, that Feng, along with other CIM representatives, including RP, made oral representations to investors that their investments would be used to finance the Bayview Creek Project.

#### **5.2.1.b The money was misapplied**

[49] The documentary evidence presented at the merits hearing, including bank statements, loan agreements and financial statements, show that the respondents diverted a portion of the Proceeds Loan (that had been made by CIM to Bayview Creek LP) from Bayview Creek LP (i) back to CIM, and (ii) to other real estate projects Feng controlled.

[50] Staff provided evidence that indicated that Bayview Creek LP used a portion of the Proceeds Loan (approximately \$3.39 million) to:

- a. make loans back to CIM;
- b. make transfers to CIM Port McNicoll LP to pay project debts;
- c. make loans to the Valleyview Garden Project;
- d. make loans to the Victoria Harbour Golf Club Community; and
- e. make loans or investments in the Hwy 7 Project.

[51] We do not intend to discuss the real estate projects above in any detail other than to confirm that they were projects controlled by Feng.

[52] Staff arrived at the \$3.39 million figure by reviewing the Bayview Creek LP bank account between February 7 and November 14, 2018. November 14, 2018, was selected as the end-point of the review period as this was the first time the bank account reached a negative balance, indicating that all of the investor funds had been dispersed. By adding the bank account's opening balance at the beginning of the review period (\$743,310) with other, non-Proceed Loan deposits into the account (\$3,842,703.23), and then subtracting the total non-Bayview Creek expenses (\$7,973,139.19), the resulting shortfall (\$-3,387,125.96) represents

the amount of CIM investor funds that were used to pay for non-Bayview Creek expenses.

- [53] Feng does not contest that the funds from the Proceeds Loan were used for these other purposes. He submits the funds were used in a manner consistent with his understanding of their intended purposes, and in advancing that submission, he points out that the funds were used with the knowledge and approval of RP, CIM's CFO, and CIM's board of directors. In fact, Feng, in his testimony, itemized and confirmed the various amounts that were expended from the Bayview Creek bank account and said he authorized all of these amounts to go out from the Bayview Creek LP bank account to these entities.
- [54] We find that approximately \$3.39 million of the Proceeds Loan was diverted from the Bayview Creek Project to CIM and to other real estate projects controlled by Feng. We find that Fiorini's testimony was straightforward in this regard. Absent any evidence to the contrary, which was not adduced, any amount that left the Bayview Creek LP bank account and went to CIM or to a different real estate project is not an expense related to financing the Bayview Creek Project. We also find it illogical that if, as Feng submits, the Proceeds Loan was intended for multiple real estate projects, the Proceeds Loan would be deposited entirely to the Bayview Creek LP bank account and then parsed out to other projects. No explanation was provided for why the money was not deposited directly to the bank accounts of the other projects if that was the intention.
- [55] Finally, with respect to the monetary figure provided by Staff, we reject the respondents' submission that the review period of the Bayview Creek LP bank account was flawed because the account never reached a zero balance. We see no reason to doubt Staff's calculations and as Staff submits, if necessary, we can simply subtract the balance of \$1,794.63 (the amount the respondents argue was remaining in the account as of November 13, 2018) from the shortfall amount, resulting in a negligible change to the amount allegedly diverted.

#### **5.2.1.c The misapplication caused deprivation**

- [56] The question in the *actus reus* stage of the analysis is whether the respondents caused deprivation in fact. Whether the respondents intended to cause

deprivation or honestly believed deprivation would not occur is considered in the *mens rea* stage of the analysis.

- [57] In *Theroux*, McLachlin J. (as she then was), writing for the majority of the court, said that the prohibited consequence of depriving another “may consist in merely placing another’s property at risk”.<sup>10</sup> She referred to Dickson J.’s (as he then was) earlier statement in *R v Olan*<sup>11</sup> that “...the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim caused by the dishonest act”.<sup>12</sup>
- [58] Previous panels of the Tribunal have applied this principle finding that the mere creation of a financial risk to another by a dishonest act is sufficient to establish deprivation.<sup>13</sup>
- [59] In this case, CIM was bound to use the Proceeds Loan to finance the Bayview Creek Project. CIM was not authorized to use the proceeds for other purposes. The documents setting out the terms of the Offering, CIM’s marketing materials about the Offering and oral representations made to investors by CIM’s directing minds clearly stated that the proceeds would be used to finance the Bayview Creek Project.
- [60] There is also no doubt that a significant portion of the Proceeds Loan was misapplied. The bank statements, loan agreements and CIM’s financial statements in the record show that a significant portion of the net proceeds of the Offering were used for CIM’s operating expenses and to make investments in or loans to real estate projects that Feng controlled other than the Bayview Creek Project.
- [61] We are satisfied that the mere diversion of funds to purposes for which they were not intended placed the investors’ investments at risk and constitutes deprivation. While no more is needed, we observe that funds secured by the CIM debentures were used to extend unsecured loans, that actual losses were incurred because some loans were not repaid, that interest payments on the

---

<sup>10</sup> at p 24

<sup>11</sup> [1978] 2 SCR 1175

<sup>12</sup> *Theroux* at p 15

<sup>13</sup> *Quadrex Hedge Capital Management Ltd (Re)*, 2017 ONSEC 3 at para 21

debentures were not made, and that the investors suffered capital losses. JH testified that she, her sister, and the other investors she referred to CIM all lost their entire investments.

[62] The respondents point to the "Risk Disclosure" section in the subscription agreements, submitting that investors were put on notice that they could lose their entire investment. This acknowledgment of risk does not apply to investments fraudulently misapplied. The investors undertook the inherent risks of investment on the basis that the funds would be invested as stipulated.

[63] We find that the respondents' misapplication of the Proceeds Loan caused deprivation. As a result, the *actus reus* component of the fraud test is met in this case.

### **5.2.2 Mens Rea**

[64] The *mens rea* element of the fraud analysis consists of subjective knowledge that one is undertaking a prohibited act and that that act could cause deprivation by depriving another of property or could put another's property at risk.<sup>14</sup> The Tribunal has confirmed that a fraud allegation against a corporation is established where the corporation's directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud.<sup>15</sup> A directing mind can be an officer, director or a person who authorized, permitted or acquiesced in the non-compliance.<sup>16</sup>

[65] The *mens rea* for fraud will be established if Feng "knowingly undertook the acts in question" and was "aware that deprivation, or the risk of deprivation, could follow as a likely consequence".<sup>17</sup> It is no defence for a respondent to maintain that they did not think the acts were wrong, or that they hoped that no deprivation would occur.<sup>18</sup>

---

<sup>14</sup> *Theroux* at p 21

<sup>15</sup> *FGD* at para 347

<sup>16</sup> *Al-Tar Energy Corp (Re)*, 2010 ONSEC 11 at para 320

<sup>17</sup> *Theroux* at p 22

<sup>18</sup> *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 at para 217

### **5.2.2.a Subjective Awareness**

- [66] Staff submits that the evidence in this case clearly establishes that Feng was subjectively aware that:
- a. he made representations to investors that CIM investor funds were to be used to finance the Bayview Creek Project; and
  - b. CIM investor funds were not used exclusively to finance the Bayview Creek Project contrary to the representations he made to CIM investors.
- [67] During his testimony, Feng sought to portray himself as largely uninvolved in the Offering given his limited proficiency in English. He claims he trusted others involved with CIM to make sure things were done properly. Feng claimed he did not take part in meetings with investors, did not review CIM's press releases until their "final stages" and that he did not look over any marketing materials that were provided to investors. This is inconsistent with evidence provided by other witnesses in this hearing and does not accord with reasonable likelihood given Feng's involvement with CIM and its projects.
- [68] We reject Feng's testimony that he believed the loans were permitted. We find that Feng reviewed documents related to the Offering, had the benefit of a Mandarin interpreter explaining them to him, and understood their contents. JH testified, and we believe, that Feng assured her that her funds would be used for the Bayview Creek Project. To say otherwise would be inconsistent with the various documents he himself signed, such as Board resolutions and offering documents. Feng was aware that the Proceeds Loan was supposed to be used to finance the Bayview Creek Project and was similarly aware the funds were then used for other purposes.
- [69] Based on this evidence, we find that Feng was subjectively aware the Proceeds Loan was not used to finance the Bayview Creek Project. We also find that CIM is deemed to be subjectively aware of the fraudulent act given Feng was, during the Material Time, a directing mind of CIM and intimately involved with all its dealings.
- [70] We reject outright Feng's submission that he believed the expenditures from the Bayview Creek bank account were for the benefit of Bayview Creek. We infer

that the directing mind of CIM, as a sophisticated businessperson, subjectively understood that investments and loans carry an inherent risk. We find that Feng and CIM were subjectively aware that its misapplication of the net proceeds of the Offering could cause the investors deprivation by putting their property at risk for other than the stipulated purpose.

### **5.2.3 Conclusion**

[71] For these reasons, we find that both the *actus reus* and *mens rea* components of the fraud test are clearly established against the respondents. Therefore, the respondents have breached s. 126.1(1)(b) of the *Act*.

### **5.3 Section 129.2 of the Act**

[72] Section 129.2 of the *Act* is a “deeming” provision that attributes liability to directors and officers of a company where that company has been found to have breached Ontario securities law and Staff establishes that a director or officer “authorized, permitted or acquiesced” in the breach.

[73] Staff alleges that Feng authorized, permitted or acquiesced in CIM’s non-compliance with the *Act* and ought to be deemed to have not complied with Ontario securities law as a result. However, having found that Feng directly contravened s. 126.1(1)(b) of the *Act*, we find it unnecessary to consider separately any potential liability under s. 129.2 of the *Act* and we decline to do so.

### **5.4 Conduct contrary to the public interest**

[74] Finally, Staff alleges that, in addition to the contraventions of the *Act* outlined above, the respondents’ conduct was also contrary to the public interest and harmful to the integrity of the capital markets.

[75] As the Tribunal has previously noted,<sup>19</sup> the words “contrary to the public interest” do not appear in the *Act*. In this proceeding, Staff has not identified conduct, other than the alleged contraventions of the *Act*, that would warrant an order under s. 127 of the *Act*. As such, we dismiss this additional allegation against the respondents.

---

<sup>19</sup> *Solar Income Fund Inc (Re)*, 2021 ONSEC 2 at paras 70-76

**6. CONCLUSION**

- [76] We find that Feng and CIM caused Bayview Creek LP to transfer a significant portion of the Proceeds Loan back to CIM or to other real estate projects controlled by Feng, which was contrary to the representations Feng and CIM made to CIM investors, contrary to s. 126.1(1)(b) of the *Act*.
- [77] The parties shall contact the Registrar by 4:30 p.m. on April 5, 2023 to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Governance & Tribunal Secretariat, and that is no later than April 28, 2023.
- [78] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Tribunal, one-page written submissions regarding a date for the attendance. Any such submissions shall be submitted by 4:30 p.m. on April 5, 2023.

Dated at Toronto this 15th day of March, 2023

*"Cathy Singer"*

\_\_\_\_\_  
Cathy Singer

*"Sandra Blake"*

\_\_\_\_\_  
Sandra Blake

*"Russell Juriansz"*

\_\_\_\_\_  
Russell Juriansz