



Capital
Markets
Tribunal

Tribunal
des marchés
financiers

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Citation: *Bridging Finance Inc (Re)*, 2023 ONCMT 24
Date: 2023-06-21
File No. 2022-9

**IN THE MATTER OF
BRIDGING FINANCE INC., DAVID SHARPE, NATASHA SHARPE and
ANDREW MUSHORE**

**REASONS FOR DECISION
(Clause 25.0.1(a) of the
Statutory Powers Procedure Act, RSO 1990, c S.22)**

Adjudicators: Russell Juriansz (chair of the panel)
Timothy Moseley
Sandra Blake

Hearing: By videoconference, May 23, 2023

Appearances: Brian Greenspan For David Sharpe
Melissa MacKewn
Naomi Lutes
Alexandra Grishanova
Lawrence Thacker For Natasha Sharpe
Jonathan Chen
Mari Galloway
Johanna Braden For Staff of the Ontario Securities
Mark Bailey Commission
Erin Pleet For the receiver of Bridging Finance Inc.
No one appearing for Andrew Mushore

REASONS FOR DECISION

1. OVERVIEW

- [1] On May 24, 2023, we dismissed motions by the respondents David Sharpe and Natasha Sharpe to stay this proceeding because of abuse of process.¹ These are our reasons for that decision.
- [2] The abuse the Sharpes allege is that in 2021, the Commission filed the Sharpes' compelled testimony in court, in an application for the appointment of a receiver, without first obtaining from the Tribunal an order under s. 17 of the *Securities Act*² (the **Act**) authorizing disclosure of that testimony. The Tribunal found that the Commission ought to have obtained such an order.³
- [3] Under the court order appointing the receiver, the application record, including portions of the compelled testimony, was published on the receiver's website and later in the media. The Sharpes say that it was unnecessary to include the compelled testimony in the application record. The Sharpes submit that it will be impossible for them to have a fair hearing in this enforcement proceeding against them, and that continuing this proceeding would bring the Commission's enforcement regime and the administration of justice into disrepute. They say that this abuse of process justifies a stay.
- [4] We dismissed the motions because the Sharpes failed to persuade us that continuing this proceeding would prejudice either the Sharpes' right to a fair hearing or the integrity of the justice system.

¹ *Bridging Finance Inc (Re)*, (2023) 46 OSCB 5020

² RSO 1990, c S.5

³ *Sharpe (Re)*, 2022 ONSEC 3

2. ISSUES

[5] A stay of proceedings is a drastic remedy. To justify a stay, the Sharpes were required to show:

- a. that prejudice to their right to a fair hearing, or to the integrity of the justice system, will be “manifested, perpetuated or aggravated” through the conduct of the hearing or by its outcome;
- b. that there is no alternative remedy capable of redressing the prejudice; and
- c. if there is still uncertainty about whether the first two criteria justify a stay, that we should balance the interests in favour of granting a stay (*e.g.*, denouncing misconduct and preserving the integrity of the justice system) against the interests in having a decision on the merits of this proceeding.⁴

[6] We conclude that no prejudice will be manifested, perpetuated or aggravated by continuing with and completing this proceeding. First, the public availability of the compelled evidence does not prejudice the Sharpes’ right to a fair hearing. The merits hearing panel can address that potential prejudice by alternative remedies. Second, this is not one of those rare exceptional cases in which having a hearing, even a fair one, would offend society’s sense of justice.

3. ANALYSIS

3.1 Have the Sharpes established that their right to a fair hearing would be prejudiced?

[7] We begin by assessing whether the Commission’s filing the Sharpes’ compelled testimony in court would prejudice their right to a fair hearing. The Sharpes assert that fairness of the hearing will be affected by “witness tainting.” They rely on the fact that after their compelled testimony was made public, the OSC conducted 17 interviews with a further 11 witnesses. Six of these witnesses are expected to testify against them at the merits hearing. The Sharpes assert that it may be presumed that these witnesses had access to the Sharpes’ compelled

⁴ *R v Babos*, 2014 SCC 16 (**Babos**) at para 32

testimony. They say that these witnesses may, or at least will appear to, tailor their testimony at the hearing using their knowledge of the Sharpes' compelled testimony.

- [8] While this may be so, it is also worth observing that witnesses could have come to know the content of the Sharpes' compelled testimony in other ways. They may have come to know it when the Sharpes' compelled testimony was made public in the separate proceeding in which Staff sought and obtained temporary cease trade orders against Bridging Finance Inc. and others. As well, s. 17(6)(b) of the Act permits an investigator to disclose compelled testimony while examining a witness.
- [9] The Sharpes will have ample opportunity at the hearing to test witnesses' testimony, exploring whether and how they learned of the Sharpes' compelled testimony and, if so, whether that knowledge improperly influenced their testimony in some way. Issues of credibility of this nature are routine in many hearings.
- [10] We conclude that the possibility that witnesses may have had access to the Sharpes' compelled testimony as a result of the breach does not prejudice the Sharpes' right to a fair hearing.

3.2 Have the Sharpes established that proceeding with the hearing will offend society's sense of justice, warranting a stay?

- [11] The Sharpes correctly submit that even where a fair hearing is possible, some state conduct is so troublesome that the court or tribunal must distance itself from the conduct to not be seen as condoning the impugned conduct.⁵ As the Supreme Court of Canada has said, "There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare."⁶
- [12] We discuss below the circumstances that lead us to conclude this is not one of the rare cases in which a stay should be ordered.

⁵ *Babos* at para 38

⁶ *Canada (Minister of Citizenship & Immigration) v Tobias*, 1997 CanLII 322 (SCC) at para 91

3.2.1 The impugned conduct took place in a different proceeding

- [13] As we pointed out in our earlier disclosure decision,⁷ the conduct that the Sharpes rely upon to allege abuse, *i.e.*, making their compelled testimony public by filing it in a court proceeding, did not take place in this proceeding. In its March 30, 2022, decision, the Tribunal rejected OSC Staff’s argument that the filing of the compelled testimony in the receivership proceeding was permitted by s. 17(6) of the Act. Staff had argued that the Court application was “in connection with” the proceeding before the Tribunal. The basis of the Tribunal’s decision was that the receivership proceeding was a different proceeding to which s. 17(6) did not apply.
- [14] Employing the same reasoning, we reject the Sharpes’ submission that this proceeding is sufficiently connected to the receivership proceeding that they may claim a stay in this proceeding because of misconduct in the receivership proceeding. The presiding judge in the receivership proceeding would have jurisdiction to deal with misconduct in that proceeding.
- [15] The Sharpes rely on illegality they say constitutes conduct which shocks the conscience of the community and is detrimental to the proper administration of justice. They rely on *R v Creswell*⁸ to submit that a stay of proceedings is available where it can be demonstrated that illegality in the investigation that led to the charges shocks the community’s conscience and would be detrimental to the administration of justice. However, this is not a case in which state actors improperly obtained evidence and the court is asked to denounce the improper conduct by excluding the evidence. It is beyond dispute that the OSC obtained the Sharpes’ compelled testimony in full compliance with the Act. The Sharpes’ complaint is about what the Commission later did with that evidence. They complain about the filing of properly obtained evidence in the receivership application without first applying for a s. 17 order. *R v Creswell* therefore does not apply.
- [16] The Sharpes explain that their failure to seek a remedy in the proceeding in which the improper disclosure took place was because the damage had been

⁷ *Bridging Finance Inc (Re)*, 2023 ONCMT 8 at para 22

⁸ 2000 BCCA 583

irreparably done once media accounts of the compelled testimony were published. We note that the already published media accounts did not stop David Sharpe from seeking an order sealing the compelled testimony at the hearing to extend the cease trading order, which request was heard after the receivership proceeding.

[17] We consider it salient that the Sharpes did not seek a sealing order or any other redress in the receivership application.

3.2.2 There is no evidence of bad faith on the part of OSC Staff

[18] The Sharpes have not tendered any evidence of bad faith on the part of OSC Staff. The Sharpes' attempts to uncover some indications of bad faith have been contentious in earlier hearings in this proceeding. We dismissed their motion for disclosure and their request to summons OSC Staff as fishing expeditions hoping to uncover such evidence without first laying a proper foundation.⁹

[19] We decline to draw an adverse inference of bad faith on the part of OSC Staff because they did not provide sworn testimony on which cross-examination could be conducted explaining their decision not to seek a s. 17 order before filing the compelled evidence in the receivership application. On the record before us, we are satisfied that the OSC, consistent with its position in other cases, did not seek a s. 17 order because it considered that such an order was not required. OSC Staff stated that to the Vice-Chair of the OSC on April 30, 2021, on the initial request for a temporary order, and reiterated that view in an email dated May 12, 2021, to David Sharpe's counsel. OSC Staff took the same position before the Court of Appeal for Ontario in an unrelated case. In ruling that the OSC Staff was wrong in its interpretation in the Tribunal's March 30, 2022, decision, the Tribunal agreed the question was "novel". All that can be said is that OSC Staff took a position on a novel question of law that the Tribunal ruled was mistaken.

[20] The situations in *Clark v Complaints Inquiry Committee*¹⁰ and *R v Y(X)*¹¹, upon which the Sharpes rely, are markedly different. In *Clark* the investigator

⁹ *Bridging Finance Inc (Re)*, 2023 ONCMT 8 and *Bridging Finance Inc (Re)*, 2023 ONCMT 19

¹⁰ 2012 ABCA 152

¹¹ 2011 ONCA 259

gathered information in a confidential investigation through his wife's email. Y(X) involved a serious breach of informer privilege. We do not find these cases helpful.

3.2.3 The improper disclosure in the receivership application does not offend society's standards to the extent a stay is warranted

- [21] The Sharpes submit that even absent a showing of bad faith we should grant their motion because unlawful actions by state actors may be sufficient to constitute an abuse of process warranting a stay.
- [22] We recognize, even in the absence of a showing of bad faith, that the OSC Staff's breach of its own governing legislation in the receivership application is a serious matter. However, the breach in this case is not so egregious that the mere fact of going ahead with this proceeding will be offensive and bring the system of justice into disrepute. We say that for several reasons.
- [23] First, it is significant that at the time OSC Staff disclosed the compelled testimony in the receivership proceeding, the version of the Act then in force permitted OSC Staff to disclose the compelled testimony in a proceeding before the Tribunal, including both the temporary order proceeding and this enforcement proceeding.
- [24] Second, the panel that dismissed¹² David Sharpe's request to preserve the confidentiality of the compelled testimony, in the temporary order proceeding, concluded that the public interest required the compelled testimony to be publicly available. That assessment makes it likely that the Tribunal would have granted a s. 17 order had OSC Staff sought one before it commenced the receivership application.
- [25] Third, after the events in this case took place and shortly after the Tribunal's March 30, 2022, decision, the legislature amended s. 17 of the Act. Section 17 now permits the OSC to file compelled testimony in a proceeding commenced under the Act, which would include a receivership application. Clearly, the amendment does not have retroactive effect or cure the OSC's breach. But like all legislation, it should be taken to reflect society's values. We consider the

¹² *Sharpe (Re)*, 2022 ONCMT 18

amendment to strongly indicate that the community's sense of fair play and decency has not been shocked by the filing of the compelled testimony in the receivership application in this case.

- [26] Fourth, we do not accept the Sharpes' contention that a decision not to stay the proceedings will pervasively undermine the administration of justice at the Commission. We do not accept that, unless the stay is granted, the public and those regulated under the Act will come to believe that the Commission will carry out its mandate with disregard for its governing legislation. We expect that the public and those regulated under the Act will view things as we do – that on this singular issue the OSC Staff proceeded on a mistaken interpretation of the version of s. 17 that was in force at the time.

3.3 Balancing the public interests

- [27] Assuming the Sharpes had established the first and second branches of the residual category are satisfied, we would determine that the interests in having a decision on the merits in this proceeding outweigh the interests in favour of granting a stay.
- [28] The Sharpes were registrants and the most senior leaders at Bridging, which managed investment vehicles focused on making short-term loans to borrowers. They are alleged to have defrauded institutional and retail investors out of millions of dollars through their dishonesty and deceit. It is alleged that they funnelled investor funds to themselves and Bridging, then concealed their wrongdoing from investors. It is also alleged that the Sharpes obstructed the Commission's investigation and destroyed, concealed and altered Bridging's records and in the case of David Sharpe, intimidated witnesses.
- [29] These are extremely grave allegations. If these allegations are true, there would be a great public interest in imposing significant sanctions, possibly including permanent removal from Ontario's capital markets to protect investors. We conclude that in the circumstances of this case, the public interest in proceeding overrides the interests in favour of granting a stay.

4. CONCLUSION

[30] For these reasons, we dismissed motions by the respondents David Sharpe and Natasha Sharpe to stay this proceeding because of abuse of process.

Dated at Toronto this 21st day of June, 2023

"Russell Juriansz"

Russell Juriansz

"Timothy Moseley"

Timothy Moseley

"Sandra Blake"

Sandra Blake