# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Securities Commission) v. Byer,* 2023 BCSC 119

Date: 20230110
Docket: S1711300
Registry: Vancouver

Between:

**British Columbia Securities Commission**

Plaintiff

And

**Daniel Eric Byer**
**Malcolm Cameron Boyd Stevenson**
**Preston Pinkett II**

Defendants

Before: The Honourable Mr. Justice Gomery

## Oral Reasons for Judgment

In Chambers

| | |
|---|---|
| Counsel for the Plaintiff: | A.T. Paczkowski |
| Counsel for the Defendant Malcolm Stevenson: | G. Douvelos |
| No other appearances | |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>January 10, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 10, 2023 |

## Introduction

[1] **THE COURT:** In February 2008, in a lengthy written decision, the British Columbia Securities Commission determined that Malcolm Stevenson and the other defendants had defrauded investors through an investment scheme that was a Ponzi scheme. It found that they had breached the *Securities Act*, R.S.B.C. 1996, c. 418 and made consequential orders. The Commission ordered Mr. Stevenson to pay to the Commission

> … any amount obtained, or payment or loss avoided, directly or indirectly, as a result of his contraventions of the Act, which we find to be not less than $5,530,389.

[2] The Commission further ordered Mr. Stevenson to pay an administrative penalty of $1.5 million.

[3] Mr. Stevenson had participated in the proceeding before the Securities Commission in its early stages, though he did not attend the hearing. He did not pay the judgment. He did not seek to appeal or set aside the decision.

[4] Pursuant to s. 163 of the *Securities Act*, on March 3, 2008, the Commission filed its decision with the court making it a judgment of the court.

[5] In December 2017, anticipating the expiration of the limitation period for proceedings on the 2008 judgment, the Commission commenced this action seeking judgment against Mr. Stevenson in the entire amount owing on the 2008 judgment.

[6] The notice of civil claim was not served and the Commission obtained an order renewing it and then a substitutional service order. Having satisfied the requirements of the substitutional service order, the Commission applied for and obtained a full judgment against Mr. Stevenson on June 25, 2019. The default judgment was pronounced by Master Tokarek, following a hearing in chambers. Inclusive of interest that had accrued on the 2008 judgment, Mr. Stevenson was ordered to pay to the Commission $9,500,850.59.

[7] Since February 2022, the Commission has been negotiating with Mr. Stevenson through his counsel in an attempt to obtain from him documents pertaining to his financial affairs and conduct an examination in aid of execution. Finally, in November 2022, the Commission delivered a notice of application seeking orders in this regard. On December 13, 2022, Mr. Stevenson cross-applied for an order setting aside the default judgment pronounced by Master Tokarek. The applications have come on for hearing together.

[8] The fundamental issue is whether the default judgment should be set aside. If it stands, Mr. Stevenson concedes that he must disclose his financial affairs to the Commission and attend an examination in aid of execution.

## Legal framework

[9] In considering an application to set aside a default judgment, the court must consider the following factors articulated in *Miracle Feeds v. D.& H. Enterprises Ltd*. (1979), 10 B.C.L.R. 58 (County Court):

> 1. That [the defendant] did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
> 2. That [the defendant] made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
> 3. That [the defendant] has a meritorious defence or at least a defence worthy of investigation; and
> 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant.

[10] The fundamental issue is whether it is in the interests of justice that the default judgment be set aside. The *Miracle Feeds* factors are considerations that are, in most cases, the appropriate indicators of whether it is in the interests of justice that the judgment be set aside: *Andrews v. Clay*, 2018 BCCA 50 at paras. 28 and 29. Concerning the third factor of the existence of a defence worthy of investigation, the burden is on the defendant and the defendant cannot establish that there is such a defence simply by asserting it: *Andrews* at para. 32.

[11] While it is only one factor among others, it is difficult to imagine a case in which an application to set aside a default judgment could succeed in the absence of a defence worthy of investigation. It cannot be in the interests of justice that a judgment be set aside if the inevitable outcome of a trial process involving delay and expense would be the same.

## Analysis

### Did Mr. Stevenson wilfully or deliberately fail to defend the Commission's claim?

[12] Mr. Stevenson was not personally served with the notice of civil claim. The substitutional service order provided for service by an advertisement in a newspaper and a notice posted in the court registry. He swears that he never received personal notice of the action against him and that he did not deliberately fail to defend the action. I find that he did not wilfully or deliberately fail to defend.

### Did Mr. Stevenson make application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of it, or has he given an explanation for any delay?

[13] Mr. Stevenson was personally served with an appointment for an examination in aid of execution on January 19, 2022. He retained his present counsel, Mr. Douvelos, who entered into correspondence with counsel for the Commission. By letter dated February 14, 2022, Mr. Douvelos questioned whether the notice of civil claim had been served. He was provided with the relevant materials, including the default judgment and the substitutional service order by return. As I have already noted, Mr. Stevenson only applied to set aside the default judgment by a notice of application filed 10 months later on December 13, 2022.

[14] The application to set aside the default judgment was not made as soon as reasonably possible. Mr. Stevenson was in a position to make the application in late February or early March of 2022. He had at hand all the necessary information and was represented by counsel.

[15] Mr. Stevenson's only explanation for his delay in bringing the application is an assertion that he has been ill. The evidence of his illness takes the form of two notes from his family physician provided in May and June 2022, in explanation of his failure to attend for his examination in aid of execution. One of these notes refers only to an acute incapacitating medical emergency. The other says that he has difficulty sitting for any length at time. Taken at its highest, this evidence falls short of a good explanation for the delay in bringing the application from March into December 2022.



**Has Mr. Stevenson established that he has a meritorious defence or at least a defence worthy of investigation?**

[16] In its 2008 decision, the Commission provided the following synopsis of its findings against Mr. Stevenson and his co-defendants:

> 8 The respondents misappropriated millions of dollars of investors' money through their promotion and sale of a sham investment scheme.
>
> 9 Stevenson, Pinkett and Byer started the investment scheme. The investment vehicle was IFC.
>
> 10 The scheme involved a minimum investment of $100,000. The respondents told investors that their investment would remain on deposit at a US bank in Virginia, and would be within their control at all times. They told the investors that their investment was not at risk and that they could withdraw their funds at any time on short notice.
>
> 11 The respondents promised investors a return of 6% per month. They told investors that this was possible through IFC's "asset growth program". The respondents told investors that, under the program, IFC leveraged the investors' money, used the leveraged amounts to buy "1st Tier medium term bank notes" at a discount, and then sold the notes at a profit.
>
> 12 All these statements were lies, and Stevenson, Pinkett and Byer knew it. Not only did the asset growth program not exist, expert testimony shows that it would be impossible for it to exist. In fact, the IFC investment scheme was a Ponzi scheme – the respondents used the funds of later investors to make the promised payments to earlier investors – set up by Stevenson, Pinkett and Byer for the sole purpose of enriching themselves.
>
> 13 Stevenson, Pinkett and Byer took over $12.7 million of investor money for their own use.
>
> 14 At least 143 investors are known to have invested in the scheme, of which 89 are British Columbians. The British Columbia investors

> collectively invested over $23.3 million in the scheme and received payments totalling just under $10.3 million.

[17] The Commission further found that Mr. Stevenson had withdrawn at least $5,530,389 from a pooled account through which the sham investment scheme was administered.

[18] These findings constitute, at the least, cogent evidence against Mr. Stevenson. He has not sought to call any of them into question in his affidavit sworn for this application.

[19] Mr. Stevenson was the subject of a criminal prosecution for fraud contrary to s. 380(1) of the *Criminal Code* arising from his involvement in the sham investment scheme. In 2014, he pleaded guilty and was sentenced on a joint recommendation of the Crown and his counsel to five years, eight months' imprisonment before receiving credit for time served. The reasons for sentence are reported at 2014 BCSC 464.

[20] In an agreed statement of facts, Mr. Stevenson acknowledged that he had participated and supported an investment scheme that he accepts was the scheme with which this case is concerned. He acknowledged to the sentencing judge that he was a critical party to the fraud.

[21] On this application, Mr. Stevenson submits that there is insufficient evidence before the court to establish his default or that it involved a Ponzi scheme. He relies on *Terry v. Bryson*, 2014 BCSC 522, variate sub nom *International Fiduciary Corp., S.A. v. Bryson*, 2014 BCCA 433. This was a case in which Justice Myers in this Court declined to accept the Commission's 2008 decision as evidence against investors who had allegedly benefited from the scheme. Justice Myers reasoned that the defendant investors were not bound by the Commission decision because they were not parties to it and had no opportunity to participate in it, and it was not an abuse of process for them to say otherwise. The Court of Appeal upheld Justice Myers's decision on this point.

[22] Mr. Stevenson's position cannot be analogized to that of the successful defendants in *Terry v. Bryson*, because he was a party to the Commission's 2008 decision. He had a full opportunity to participate in the proceedings before the Commission and could have appealed its decision. It is not at all unjust that the Commission's findings should be taken as evidence against him in this proceeding.

[23] The Commission's findings quantify the claim against Mr. Stevenson. To the extent that there is imprecision in the quantification, they give him the benefit of the doubt.

[24] Mr. Stevenson has not established that he has a meritorious defence or even a defence worthy of investigation. On the material presently before the court, the claim against him is manifestly well-founded.

**Other considerations**

[25] Mr. Stevenson contends that the Commission proceeded improperly, because it should have served Mr. Stevenson's co-defendants with its material seeking an order against Mr. Stevenson or with its present notice of application against Mr. Stevenson. I do not agree that there was any obligation to serve the co-defendants in the circumstances.

[26] Mr. Stevenson contends that the Commission was or should have been aware of his address and could have served him personally. He points to evidence that the Commission was working in concert with a receiver, Mr. Terry, and submits that Mr. Terry's local counsel, Ms. Li, was aware of his residential address following his release from prison in 2014. He asks me to infer that the application for substitutional service was "designed to deliberately conceal and deprive him of his ability to defend the various claims against him without the merits underlying those claims from being decided."

[27] I decline to infer that the Commission fraudulently concealed its knowledge of Mr. Stevenson's whereabouts to obtain the substitutional service order and proceed against Mr. Stevenson without his knowledge. This suggestion is directly denied by

the Commission staffer responsible, Ms. Palmer. It is also highly improbable. Years passed between the Commission's communications with Mr. Terry and Ms. Li's communications with Mr. Stevenson, and the Commission's decision to seek a substitutional service order. The Commission had no reason to conceal anything. Its case against Mr. Stevenson was established by the 2008 decision and bolstered by Mr. Stevenson's criminal conviction on a guilty plea. I note that Mr. Stevenson has not applied to set aside the substitutional service order.

**Conclusion**

[28] I conclude that it is not in the interests of justice that the default judgment be set aside. Mr. Stevenson has delayed in bringing the application and, most importantly, does not have a defence worthy of investigation. I decline to find misconduct on the part of the Commission.

**Disposition**

[29] Mr. Stevenson's application to set aside the default judgment and for consequential relief is dismissed.

[30] The Commission's application is allowed. Mr. Stevenson will produce the documents described in paragraph 1 of the Commission's notice of application by January 28, 2023. Mr. Stevenson will attend for an examination in aid of execution as set out in paragraph 2 of the Commission's notice of application on a date that I will determine now.

[31] The Commission is entitled to its costs of these applications.

[32] Counsel, have you had an opportunity to discuss the date for the examination in aid?

[33] CNSL G. DOUVELOS: Yes, Justice, we've -- we've found the date of 21st of February.

[34] CNSL A. PACZKOWSKI: Yes.

[35] THE COURT: Very well. Then the order will go that Mr. Stevenson will attend for an examination in aid of execution on that date.

"Gomery J."