

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)**

– AND –

IN THE MATTER OF WESLEY WILLIAM ROBINSON and DRR900306 NS LTD.

REASONS FOR DECISION ON A MOTION

Hearing	In writing	
Decision	January 25, 2021	
Panel	Valerie Seager Michael Deturbide Ken Wheelans	Chair Commissioner Commissioner
Submissions	Jenny Pick	Counsel for the Director of Enforcement of the Nova Scotia Securities Commission
	Brian Awad, Q.C.	Counsel for Wesley William Robinson and DRR900306 NS Ltd.
	Wesley William Robinson	For himself and DRR900306 NS Ltd.

I. BACKGROUND

- [1] Wesley Robinson and DRR900306 N.S. Limited (Respondents) brought a motion requesting (i) the postponement of the hearing referred to below; and (ii) an order extending the current cease trade order issued July 27, 2020 (the Temporary Order), which was set to expire on February 26, 2021.
- [2] Pursuant to an Amended Notice of Hearing dated December 22, 2020 a hearing (the Hearing) was scheduled to commence on February 10, 2021, at which time the Commission was to consider the Amended Statement of Allegations of the Director of Enforcement (Director) dated September 18, 2020 and decide whether it is in the public interest to make
- (a) an order pursuant to section 134 of the Act in relation to the Respondents in a manner to be determined by the Commission;
 - (b) an order pursuant to section 135 of the Act that the Respondents pay an administrative penalty in an amount to be determined by the Commission;
 - (c) an order pursuant to section 135A of the Act that the Respondents pay costs in connection the investigation and conduct of the proceedings before the Commission; and
 - (d) such other orders as the Commission considered appropriate.

The Hearing was scheduled to take place on six days over three weeks.

- [3] On January 5, 2021 the Panel received correspondence from Mr. Brian Awad, Q.C., the Respondents' counsel, advising that the Supreme Court of Nova Scotia had on December 8, 2020 issued an order (the Court Order) in the matter *Good AI Capital GP, LLC v. Wesley Robinson et al.* (Hfx No. 502294), pursuant to an *ex parte* motion and the common law test for Mareva injunctions, restraining the Respondents from dealing with their assets, subject to the terms of the Court Order. Mr. Awad stated that due to the Court Order, the Respondents were requesting a postponement of the Hearing because they were unable to prepare for it since, for example, they were unable to pay legal counsel without being in contempt of the Court Order and were focused on dealing with the Court Order.
- [4] The Director provided the Panel with submissions regarding Mr. Awad's request on January 6, 2021. The Director opposed the postponement but also proposed new dates for the Hearing in the event that the Panel decided to grant a postponement.
- [5] Although Mr. Awad's request did not fully comply with Part 11 of Rule 15-501 – *General Rules of Practice and Procedure*, given the circumstances of the request the Panel agreed to waive the formal requirements of the Rule and proceed with the motion.

[6] In the interests of expediency, the Panel heard the motion as a written hearing. Mr. Awad and/or Mr. Robinson were asked to provide a written reply to the Director's submissions by 5:00 p.m. on January 20, 2021. The Panel asked that the following matters be addressed in their reply:

- (a) what steps the Respondents have taken since the Court Order was entered to address the matter (ideally by affidavit evidence);
- (b) how long a postponement the Respondents were seeking and their position on the Director's alternative submission regarding new dates; and
- (c) whether the Respondents would attend and be self-represented at the Hearing, whether adjourned or not.

[7] In response to the Panel's request, Mr. Robinson provided a brief email submission. No further submission was received from Mr. Awad or any other counsel on behalf of the Respondents.

[8] On January 25, 2021, the Panel issued an order postponing the Hearing and extending the Temporary Order, with written reasons to follow. The following are those reasons.

II. ISSUE TO BE CONSIDERED

[9] The issues before the Panel were (i) whether the Hearing should be postponed as a result of the Court Order and, if so, for how long; and (ii) if the Hearing is postponed, whether the Temporary Order should be extended to correspond with the new Hearing date.

III. POSITIONS OF THE PARTIES

A. RESPONDENTS

[10] The Respondents submit that due to the Court Order they are unable to prepare for the Hearing since they are unable to pay legal counsel without being in contempt of court. Additionally, Mr. Robinson advised the Panel that he would not be attending the Hearing if it was not postponed and, if the Hearing was postponed, he could not say for certain that he would attend it because his focus would continue to be on reimbursing the complainants. This may not leave him with funds to pay a lawyer and he would not attend the Hearing without a lawyer.

B. THE DIRECTOR

[11] The Director opposed the Respondents' motion. There is a pressing public interest in resolving this matter and the Respondents have not demonstrated sufficient reason to delay the hearing in the interest of fairness.

- [12] The Director submits that whether to grant a postponement is a discretionary decision that requires a balancing exercise in fairness. There are a number of factors that may be relevant to a decision to grant a postponement. Those factors are discussed in *Juniper Fund Management Corp., Re*, 211 CarswellOnt 13030 (*Juniper*).
- [13] The Director submits that of primary relevance to the Respondents' request is the potential prejudice to the Respondent's right to a fair hearing if the postponement is not granted and the potential prejudice to the public interest in finality, investor protection and the integrity of the financial markets if it is.
- [14] The Director submits that concerns about the effect of a postponement on the integrity of the capital markets are not allayed by extension of the Temporary Order. The Director intends to prove that the Respondents have contravened the Temporary Order and that the Respondents' dealings with certain individuals as set out in the Amended Allegations pertain to the same dealings underlying the Court Order.
- [15] The Director acknowledges that the Respondents dispute that their activities engage securities laws, which is an unresolved question to be dealt with at the Hearing. The Director submits that the Respondents and the Director disagree as to what compliance with the Temporary Order requires and it is critical that this issue be resolved to ensure any harmful contraventions of securities laws by the Respondent come to an end.
- [16] The Director acknowledges that the Court Order puts the Respondents and their counsel in a difficult position but submits that this difficulty is of the Respondents' own making as it flows directly from the issuance by the Respondents of a promissory note – an “evidence of indebtedness” – contrary to the Temporary Order.
- [17] The Director submits that the Respondents have had opportunity to prepare for and participate in the Hearing since well before the Court Order was issued in December 2020. The Court Order is not limited in time and the length of time needed by the Respondents to address the Court Order is unclear. A postponement may do little more than delay the hearing without benefit to any party.
- [18] The Director submits it would be in the public interest and would not be unfair to the Respondents to deny the requested postponement. Choosing not to participate at the Hearing because of an inability to pay counsel, resulting from the Respondents' own actions, would be the Respondents' decision. The Respondents are entitled to be represented by counsel at their discretion but there is not a right to counsel *per se*.
- [19] The Director submits that should the Panel find that the postponement is in the public interest, the postponement be granted for as brief a time as possible to

accommodate the interests of fairness while ensuring the hearing proceeds expeditiously.

IV. LAW AND ANALYSIS

A. Law

[20] As the Director has noted, whether to grant a postponement is a discretionary decision that requires balancing the Respondents' right to a fair hearing if the postponement is not granted against the potential prejudice to the public interest if the postponement is granted.

[21] In *Juniper, supra*, the Ontario Securities Commission discussed factors relevant to considering a request for an adjournment¹ which were, at that time, set out in the *Rules of Procedure* of the Ontario Securities Commission. Factors relevant to the decision may include:

- whether granting or denying the adjournment would prejudice any party;
- the amount of notice of the hearing date that the requesting party received;
- the number of any previous adjournment requests made and by whom;
- the reason provided to support the adjournment request;
- the cost to the Commission and to other parties of rescheduling;
- evidence that the party made reasonable efforts to avoid the need for the adjournment; and
- whether the adjournment is necessary to provide an opportunity for a fair hearing.

[22] While neither the Act nor Rule 15-501 *General Rules of Practice and Procedure* explicitly address factors relevant to a postponement request, the Panel accepts that the factors listed in *Juniper* are useful guideposts for the Panel's exercise of discretion in this request.

B. Analysis of Factors

1. Notice

[23] The dates for the Hearing were set by consent of both parties at a pre-hearing conference on July 27, 2020. The Director submits that the Respondents have had ample notice of the case to meet and they had opportunity to prepare for the hearing before the Court Order was issued. However, the request for a

¹ We use the term "postponement" as the Hearing has not begun, whereas an "adjournment" is granted once a hearing has begun. However, we believe the analysis is the same in either case.

postponement arises because of an intervening event – the Court Order – which has negatively affected the Respondents’ ability to continue to engage counsel and to prepare for the hearing. Should the Respondents not be able to resolve the situation in short order, they will have only two months before the Hearing commences to prepare for it themselves, rather than through counsel.

2. Previous Postponements

[24] No previous postponements have been requested by either party.

3. Reason for Postponement

[25] The Respondents have asked for the postponement due to the impact of the Court Order on their ability to prepare for the proceeding, including their ability to pay legal counsel. The Director submits that this is a difficulty of the Respondent’s own making and argues that the Court Order is designed to ensure the moving party in that proceeding is repaid funds provided to the Respondents.

[26] The Director’s argument assumes the facts underlying the Court Order and the Hearing have been proven. That is not the case. The Court Order is an interlocutory remedy which, while typically issued only in extraordinary circumstances, does not mean that the allegations underlying the order have been proven. The Court Order is designed to prevent the dissipation of assets before a matter has been heard and a judgment on the merits rendered. Likewise, the facts alleged in the Amended Allegations have not yet been tested in a Hearing. The Director submits that the Temporary Order has been violated but acknowledges that is the very issue in question for the Hearing. The Panel does not accept that a postponement should be denied on the basis of an assumption of the truth of allegations that form the very basis for the proceedings.

4. Costs of Rescheduling

[27] No submissions were made by either party as to the costs or inconvenience resulting from rescheduling the Hearing and the Panel gives no weight to this factor.

5. Reasonable Efforts to Avoid Rescheduling

[28] The Court Order was issued on December 8, 2020 and the motion for a postponement was sent to the Panel on January 5, 2021. The Hearing was scheduled to commence on February 10, 2021. The Respondents provided no information, despite an invitation to do so, as to the efforts they have made to address the financial situation created by the Court Order or a proposed timetable for moving forward. The Panel accepts that it may have been difficult, in all of the circumstances, to address the impact of the Court Order prior to the scheduled commencement date of the Hearing. The circumstances would not, however, justify an indefinite postponement and the Respondents are expected to make diligent efforts to address the situation on a timely basis.

6. Prejudice/Fair Hearing

- [29] The Respondents have indicated that as a result of the Court Order they are unable to pay legal counsel to prepare for the hearing and would be unrepresented at the hearing. In addition, they are tasked with dealing with the financial fallout of the Court Order. The result is that the Respondents have two months to prepare for the Hearing on their own, without the benefit of counsel, while at the same time dealing with the implications of the Court Order.
- [30] The Director submits that the Respondents have failed to comply with the Temporary Order but acknowledges that the Respondents and the Director disagree as to what compliance with the Temporary Order requires. The Director submits that this unresolved question is why delaying this matter is prejudicial to the public interest.
- [31] The Director notes that a central issue to the Hearing is whether the Respondents' activities engage securities laws. This is a complex matter involving questions of fact and law. The Respondents have indicated that they are not currently in the position to continue to be represented by counsel. The Panel is of the view that the Respondents would be prejudiced by abruptly and unexpectedly being without counsel two months prior to the commencement of the Hearing and that this prejudice outweighs any prejudice to the public interest caused by a time-limited postponement.
- [32] The Panel is further of the view that in the circumstances, it would be unfair to the Respondents to require them to proceed with the Hearing on an unrepresented basis when the circumstances creating that situation occurred only two months before the scheduled commencement date of the Hearing. The Panel is of the view that in the interests of fairness it is reasonable to provide the Respondents with the opportunity to get their financial affairs in order, engage counsel to continue with the Hearing or prepare to represent themselves at the Hearing.
- [33] The Director submits that should the Panel find a postponement is in the public interest, any postponement granted should be for as brief a time as possible to accommodate the interests of fairness while ensuring the Hearing proceeds expeditiously. The Panel agrees with this submission. The Respondents indicated in their email that they do not intend to appear at the Hearing, even if rescheduled, if they are not represented by counsel. That is their choice. While the Panel is of the view that in the interests of fairness the Respondents have been granted additional time to deal with the implications of the Court Order, that additional time cannot be indefinite. An indefinite postponement is inappropriate and contrary to the interests of the public. While the Commission must balance the interests of fairness to unrepresented parties, there is no absolute right to representation, and it is up to the Respondents to use the additional time granted to them to their best advantage.

V. CONCLUSION

[34] As set out in the Panel's order dated January 25, 2021, the Hearing is postponed until April 19, 2021 at which time it will be held on the dates and at the times set out in the Order, disclosure shall be made by the Director and the Respondents as set out in the Order and the Temporary Order is extended until the earlier of (i) the date on which a hearing is held and the decision rendered; and (ii) May 4, 2021.

DATED at Halifax, Nova Scotia, this 10th day of February, 2021.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "Valerie Seager"
Valerie Seager
Chair

(signed) "Michael Deturbide"
Michael Deturbide
Commissioner

(signed) "Kenneth Wheelans"
Kenneth Wheelans
Commissioner