NOVA SCOTIA COURT OF APPEAL
Citation: ***CIBC Wood Gundy v. Matheson***, 2015 NSCA 22

Date: 20150306
Docket: CA 427111
Registry: Halifax

Between:

CIBC World Markets Inc./Marches Mondiaux CIBC Inc.
carrying on business as CIBC Wood Gundy

Appellant

v.

Donald Matheson and Carolyn Matheson

Respondents

Judges:	Beveridge, Scanlan and Bourgeois, JJ.A.
Appeal Heard:	November 26, 2014, in Halifax, Nova Scotia
Held:	Appeal granted, cross-appeal dismissed, with costs, per reasons for judgment of Bourgeois, J.A.; Beveridge and Scanlan, JJ.A. concurring
Counsel:	John A. Keith, Q.C. and Jack Townsend, for the appellant/respondent by cross-appeal
	George W. MacDonald, Q.C. and Jane O'Neill, for the respondent/appellant by cross-appeal

Reasons for judgment:

INTRODUCTION

[1] Donald and Carolyn Matheson were long time clients of CIBC Wood Gundy ("CIBC"), holding significant investments with that company. In the late summer and early fall of 2008, the Mathesons sustained losses in their CIBC Investment accounts. During this same time frame, there was an acknowledged misstatement by CIBC of the level of "margin" available to the Mathesons in relation to certain portions of their portfolio.

[2] Flowing from the misstatement of margin availability, in November of 2008 CIBC Wood Gundy voluntarily reimbursed the Mathesons for losses sustained in those accounts for which margin was available. The reimbursement was in excess of $643,000.00. The Mathesons said the sums reimbursed were inadequate to properly cover their damages arising due to the margin misstatement. They brought an application in court seeking compensation for what they alleged was the full extent of their losses. The matter was heard over four days in September 2013.

[3] A decision was rendered by the Honourable Justice Arthur W.D. Pickup on January 21, 2014 (reported at 2014 NSSC 18). Although there was divided success in terms of the issues advanced, the Mathesons were awarded a total of $287,855.61. These funds represented a "clawback" applied by CIBC to the reimbursement, which the hearing judge found was inappropriate. CIBC brought an appeal, with the Mathesons subsequently launching a cross-appeal. Given their dual roles as both appellant and respondent, for simplicity the parties will be referred to as "the Mathesons" and "CIBC".

BACKGROUND

Factual background

[4] The Mathesons each filed affidavits as did their investment advisor, Mr. Fredrick Saturley. All were cross-examined at the hearing below. Expert evidence was adduced on behalf of the Mathesons from Mr. Richard Croft, who was cross-examined on his filed report. CIBC relied upon an affidavit from Mr. Per Humle, Manager of the Halifax branch of CIBC at the relevant time, and also an expert report from Mr. Eric Kirzner. Both were cross-examined.

[5] The evidence and factual background is thoroughly reviewed by the application judge in his decision. Most notably, he ably provided an explanation of the particular investment strategy utilized by Mr. Saturley on behalf of the Mathesons. For the purposes of this appeal, it suffices to say that the strategy involved trading in uncovered options, which required an investor to maintain a margin account with the investment company. The application judge explains "margin" as follows:

> [11] In summary, margin is the amount of credit made available to an investor by a financial institution to cover the exposure created by uncovered options. The margin indicates how much the investor can borrow before having to dip into his or her own resources to cover the underlying exposure. Thus, it is important for an investor to know the amount of margin in his or her account at all times.

[6] The Mathesons held a diversified portfolio with CIBC, with most of their investments not requiring margin availability. The Mathesons did however, hold a number of accounts in the iShares MSCI Emerging Markets Index, which were margined. The application judge referenced those investments requiring margin as "EEM" accounts, with the balance of the portfolio being referenced as "non-EEM" accounts. CIBC did, through its on-line services, provide investors utilizing margin accounts the value of available margin on a daily basis.

[7] There is no dispute that on July 24, 2008 the above-noted index underwent a 3:1 stock split that was not immediately reflected in the margin availability reported to the Mathesons and other investors. In a settlement agreement finalized June 6, 2011 with the Investment Industry Regulatory Organization of Canada ("IIROC"), CIBC acknowledged the error, described as follows at ¶ 18 of the agreement:

> 18. As a result of the above, from July 24, 2008 (the date of the EEM stock split) until the error was identified on October 9, 2008, the reported margin requirement on the EEM option positions held in 137 client accounts was too low by a factor of 3. This prevented the proper monitoring [of] the margin requirements for the affected client accounts. Equity positions in the accounts remained correctly calculated. Proper monitoring of the margin available in client accounts was important given the strategy employed in the accounts.

[8] The above agreement was approved by an IIROC hearing panel on June 17, 2011 (see [2011] IIROC No. 38). None of the individual clients appeared as parties to that agreement.

[9] Mr. Humle described CIBC's earlier response to the margin error. At ¶ 16 of his corrected affidavit sworn September 20, 2013, he deposed:

> 16. The Respondent then investigated and determined the cause of the margin error. After notice to the Applicants and in accordance with the terms and conditions of the account agreements, the Respondent then cancelled all of the uncovered EEM option positions in clients' accounts open as of and after July 24, 2008 . . .The following amounts were repaid into the Mathesons' accounts as a result of these cancellations:
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> (a) $303,170.25 in Account 500-300-2325; and
>
> (b) $343,948.78 in Account 273-008-5525.
>
> There was no uncovered option trading in Accounts 550-252-3110 and 550-251-1511 as they were RRSP accounts. Therefore, there were no cancellations or corresponding reimbursement.

[10] There is no dispute that, as referenced by Mr. Humle, the total reimbursement of $647,119.03 deposited into the Mathesons' accounts in November, 2008 did not reflect any losses sustained by the Mathesons in the "non-EEM" portions of their portfolio, but only from those in the EEM accounts.

The decision under appeal

[11] The application judge began his analysis by identifying the causes of action advanced by the Mathesons in their originating documents. They alleged (i) breach of fiduciary duty; (ii) negligence; (iii) breach of contract and (iv) negligent misrepresentation. In his decision, the application judge systematically considered each of these claims.

[12] After reviewing the law and evidence, the application judge found that CIBC did not owe a fiduciary duty to the Mathesons. In the alternative, if such duty was found to exist, the Mathesons failed to present evidence to establish a breach of that duty (¶ [53] through [58]). The application judge's findings in relation to the claimed breach of fiduciary duty have not been challenged on appeal.

[13] The application judge dismissed the Mathesons' claim for breach of contract (¶ [59]). That finding has not been challenged on appeal. Similarly, the

Mathesons' claim of general negligence was dismissed. After reviewing the law with respect to when claims arise in negligence for pure economic loss, the application judge determined the Mathesons' claim did not fall within the recognized category of "negligent performance of a service" (¶ [60] through [67]). As will be discussed further below, this particular finding was challenged within the Mathesons' Notice of Cross-Appeal but not in their submissions to this Court.

[14] It is the fourth cause of action, negligent misrepresentation, and the application judge's conclusions with respect to this cause of action, which go to the heart of both the appeal and cross-appeal.

[15] The application judge began his analysis by considering the requirements to establish a claim for negligent misrepresentation. He noted as follows:

> [68] The test for a claim in negligent misrepresentation has five requirements, set out in *Queen v. Cognos Inc.*, [1993] 1 SCR 87:
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> i. There must be a duty of care based on a "special relationship" between the representor and the representee.
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> ii. The representation in question must be untrue, inaccurate, or misleading.
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> iii. The representor must have acted negligently in making said misrepresentation.
>
> iv. The representee must have relied, in a reasonable manner, on said misrepresentation.
>
> v. The reliance must have been detrimental to the representee in the sense that damages resulted.

[16] Noting that only the elements of reliance and causation of damages were engaged in the matter before him, the application judge proceeded to address first whether the Mathesons had proven reliance upon the margin misstatement in making their investment decisions. He approached this task by considering the non-EEM accounts separately from the EEM accounts.

[17] After reviewing the law with respect to the burden to establish reliance, and reviewing the evidence offered on behalf of the Mathesons, the application judge concluded as follows with respect to the non-margined balance of the portfolio:

> [102] There is a general lack of evidence tendered by the Mathesons to meet their burden of showing reliance with respect to the non-EEM portion of their accounts. Not only is there a lack of evidence to support the Mathesons' position on reliance, the evidence indicates the contrary, that there was a lack of reliance.

> [103] The burden on the Mathesons is to show that during the error period they relied on CIBC's misstatement of their margin availability and that this reliance was detrimental and resulted in damages.
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> . . .
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> [105] I agree with CIBC's argument that specific evidence of reliance is lacking. The Mathesons allege in their post-hearing brief that they relied "entirely" or "absolutely" upon Mr. Saturley. Mr. Matheson's evidence indicates that Mr. Saturley "reviewed the Mathesons' accounts" with him on a monthly basis. There is no evidence as to the form of this review nor is there any evidence that Mr. Saturley made recommendations on investment decisions during these reviews. There is also no evidence that margin availability played a role with respect to the non-EEM accounts during this review …

[18] Having found a general lack of evidence with respect to the Mathesons' reliance on the margin statements in relation to the non-EEM accounts, the application judge then considered whether reliance was established in relation to the EEM accounts. He concluded that the payment by CIBC relating to the EEM accounts, as well as the subsequent settlement agreement with IIROC were sufficient to establish reliance. He explains his conclusion in this regard as follows:

> [111] In determining whether the Mathesons have met their burden of proving reliance on CIBC, it is necessary to distinguish between the EEM option trades, which required margin, and the balance of their investment portfolio. I am satisfied that the Mathesons have met their burden of proving reliance in respect of the EEM transactions. That CIBC cancelled all of the EEM transactions in their accounts for the relevant period and provided reimbursement is obviously an acknowledgement of their error and of the Mathesons' reliance on CIBC. CIBC also acknowledged liability by way of settlement agreement with IIROC. …

[19] CIBC submits the application judge erred in finding the Mathesons met their burden of establishing reliance on the margin misstatements in relation to the EEM accounts. As will be discussed below, it is not necessary to address this issue to fully dispose of the appeal and cross-appeal before us.

[20] Having considered the issue of reliance, the application judge turned to damages. It is on this point that the parties pressed differing views as to where the burden fell, and, as will be seen later herein, is the determinative issue before this Court. The application judge appeared to accept the law to be as advanced by CIBC. He explained the burden of proof as follows:

> [114] The *Queen v. Cognos Inc.* test for negligent misrepresentation requires that the plaintiff demonstrate reliance and that the reliance resulted in damages; the reliance must have been detrimental in the sense that damages resulted from it. I am satisfied that there are three steps to this element:
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> i. The Mathesons must prove, on the balance of probabilities, that the reliance on the representation was to their detriment and resulted in damages.
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> ii. If they do, the Mathesons are entitled to be restored to their original position. The Mathesons are required to prove on a balance of probabilities what that position is.
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> iii. Once the Mathesons have proven the above two elements, the onus switches to CIBC to prove that the Mathesons would have acted in the same way or in another specific way regardless of the misrepresentation.

[21] The application judge found the Mathesons failed to adduce sufficient evidence to establish detrimental reliance on the margin misstatement as it related to their non-EEM accounts. He explained:

> [118] In this case, the Mathesons argue that their reliance affected their entire investment strategy; it was not limited to a single transaction. The difficulty with the Mathesons' position is that they do not causally connect reliance to a course of action foregone, with a corresponding loss.
>
> [119] There is no evidence before me as to what the Mathesons would have done differently had it not been for the misrepresentations. They seek to shift this burden to CIBC. I am satisfied that in a case of negligent misrepresentation, the plaintiff bears the burden of proving what they would have done differently but for the misrepresentation. If they do not meet this burden, their claim must fail. The Mathesons have failed to prove what they would have done if accurate margin information had been provided during the error period. That is, they must show what they would have done "but for" the error.

[22] And further, also in considering the non-EEM accounts, he wrote:

> [126] CIBC argues the Mathesons have not pointed to a specific transaction and indicated that they would not have gone through with it but for the error; rather they seem to suggest that they would have done "something differently in their accounts to preserve their wealth if they had been in receipt of accurate margin information during the error period". They have offered no evidence as to what these alternative actions were. They have not adduced any evidence, in the affidavits of Mr. Saturley, nor through Mr. Croft's report, to establish what they would have done but for the error. I am satisfied that they have failed to cross the threshold necessary to shift the burden to CIBC. As CIBC argues, it is difficult to disprove something that has not been proven in the first place.

[23] CIBC takes no issue with the above conclusions reached by the application judge. In fact, it submits that his analysis should have ended at this point. By proceeding further to assess damages for the "clawback", CIBC submits the application judge erred and proceeded to ignore the very principles he had identified and correctly applied earlier in the decision. As his analysis in this regard is not lengthy, it is helpful to outline it here in its entirety:

> [131] As stated above, I have found that the Mathesons relied on the misstated margin availability with respect to the EEM trades. They are entitled to be put back into the position they were in before the error. CIBC has offered evidence through Mr. Humle that this is what CIBC did, by reimbursing the Mathesons for these errors. The reimbursement was in the amounts of $303,170.25 in account #500-300-2325, and $343,948.78 in account #273-008-5525. These figures were arrived at by a calculation that CIBC referred to as the Matheson's "net loss". Simply put, CIBC arrived at the net loss by cancelling EEM trades during the error period, and then deducted from these losses any gains made prior to the error period on the EEM accounts. The period that they used for the net loss calculation was from approximately February 2008 until the end of the error period.
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> [132] One of the issues raised by the Mathesons is the "clawback" of transactions prior to the error period which were deducted from the EEM losses to arrive at the "net loss". There was no comment by Eric Kirzner on this issue. This deduction made prior to the error period has not been adequately justified, addressed or explained by CIBC in its evidence. With respect, their position makes no logical sense. CIBC was presumably compensating the Mathesons for the losses during the error period. How can this affect premiums paid and actions taken prior to the error period? Included in the Croft report is a calculation of the amount that was clawed back by CIBC from the Mathesons related to EEM trades made prior to July 24, 2008. The amount of such clawbacks can be found in the November account statement for the Mathesons which is in the Donald Matheson affidavit.
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> [133] The clawback with respect to Mr. Matheson's account is $133,379.19 US. Using the currency adjustment rates as of that date, 1.2299, the clawback was $164,043.06 CDN. These amounts have been asserted by the Mathesons in their submissions and have not been challenged by CIBC. To put the Mathesons into the position they were in prior to the EEM error would require a reversal of the amounts deducted by CIBC prior to the error date. There was no justification for the clawback of premiums earned prior to the error period. Therefore, I award the amount of $164,043.06 to Donald Matheson as additional damages to put him back in the same position he was prior to the error period in respect of the EEM trades.
>
> [134] The amount of clawback by CIBC with respect to Mrs. Matheson's account is $100,668.80 US. Applying the same conversion rate of 1.2299, the

> loss would be $123,812.55 CDN. There being no challenge to this amount I will use it for the purposes of determining damages. There being no evidence as to why these amounts prior to the error period would be clawed back, logically Mr. Matheson would be entitled to have this amount awarded as damages. I order the amount of $123,812.55 payable to Carolyn Matheson as damages.

[24] As a final issue, the application judge considered and declined the Mathesons' request for compound interest.

POSITIONS ON APPEAL AND CROSS-APPEAL

[25] In its Notice of Appeal, CIBC put forward several detailed grounds of appeal. In its written and oral submissions, CIBC condensed these into four questions. At ¶ 53 of the "Factum on behalf of the Appellant", CIBC poses these as follows:

> (a) Did Justice Pickup err by awarding the Mathesons damages which they only claimed in respect of their unsuccessful cause of action for breach of fiduciary duty?
>
> (b) Did Justice Pickup misapply (or fail to apply) the legal test for causation in determining whether the Mathesons had sustained any losses in connection with their EEM investments?
>
> (c) Did Justice Pickup err in his assessment of the Mathesons' damages by failing to determine what they would have done with their EEM investments "but for" the Error and by failing to compare this sum to their actual post-Error position to determine whether CIBCWG owed them any additional compensation?
>
> (d) Did Justice Pickup err in assessing the Mathesons' damages in connection with the "claw back"?

[26] CIBC wants this Court to reverse the application judge's decision awarding damages in relation to the clawback. It also seeks to have returned the costs paid to the Mathesons following that decision. In the alternative, CIBC requests this Court re-calculate the amount of the clawback, submitting such should result in a substantially smaller damage award to the Mathesons.

[27] In their Notice of Cross-Appeal, the Mathesons put forward the following grounds of appeal:

> (1) The Application Judge erred in law by failing to find that the Appellant negligently performed a service;

(2) The Application Judge erred in law by finding that the Respondents were required to provide evidence of what they would have done in their investment accounts had the Appellant not negligently misstated the margin requirement in their accounts between July 24, 2008 and October 9, 2008;

(3) The Application Judge erred in law by misapprehending the evidence when he found that the Appellant's erroneous margin calculation did (not) (sic) include and affect the Respondents' entire investment account and not simply the EEM options. In the alternative, the Application Judge erred in law by misapprehending the evidence when he found that the Appellant's erroneous margin calculation did not affect all uncovered options.

(4) The Application Judge erred in law by failing to award the Respondents'(sic) compound interest for losses in their investment accounts.

[28] In their "Factum of the Respondent/Appellant by Cross-Appeal", the Mathesons re-state the above grounds as live issues before this Court. They proceed however, to purportedly present together the first three grounds as being "interwoven". As neither the subsequent written or oral submissions made on behalf of the Mathesons address the issue of CIBC negligently performing a service, that particular issue will not be addressed. As will be seen further herein, the result of my analysis also renders it unnecessary to consider the Mathesons' submissions regarding the failure of the application judge to award compound interest.

[29] The Mathesons seek an order compelling CIBC to pay damages reflective of the value of their entire investment portfolio as of July 24, 2008, immediately prior to the margin misstatement being made, based on Richard Croft's calculations.

[30] Although both parties have articulated several grounds of appeal, both acknowledged in the course of their oral submissions that there is one central and determinative issue to this appeal and cross-appeal - causation. Both parties agree that the "but for" test of causation applies, however, they disagree with respect to whether it is modified in circumstances involving negligent misstatement in the investment context. As noted earlier, the Mathesons' portfolio contained margined, and non-margined accounts. Interestingly, each party asserts the application judge was correct when addressing one form of investment, but incorrect with respect to the other.

ISSUES

[31] Notwithstanding both parties raising additional issues, both the appeal and cross-appeal can be disposed of by answering the following two questions:

1) Did the application judge err in his identification of the appropriate test of causation?

2) Did the application judge err in his application of the principles of causation to the evidence before him?

STANDARD OF REVIEW

[32] The standard of review to be employed by this Court is well established. In **Can-Euro Investments Ltd v. Industrial Alliance Insurance and Financial Services Inc.**, 2013 NSCA 76, Fichaud, J.A. succinctly explained:

> [25] This Court applies (1) correctness to an issue of law, including an extractable legal point from an issue of mixed fact and law and (2) palpable and overriding error (meaning an error that is both clear and determinative) to an issue of either fact or mixed fact and law with no extractable legal error. [citations omitted]

[33] In **Awalt v. Blanchard**, 2013 NSCA 11, the Court was asked to consider very similar issues to those presently before us. Bryson, J.A. articulated the standard of review as applied to those issues as follows:

> [9] The trial judge's identification of the test for causation is reviewed on a correctness standard. However, his application of that test to a given set of facts is reviewed on a palpable and overriding standard (*MacIntyre v. Cape Breton District Health Authority*, 2011 NSCA 3, at ¶ 63; *Holland Carriers Ltd. v. MacDonald*, 2012 NSCA 47, at ¶ 14).

ANALYSIS

Did the application judge err in his identification of the appropriate test of causation?

[34] As outlined above, the application judge found that it was incumbent upon the Mathesons to prove not only that they had relied upon the margin misstatement, but they also had the burden of proving their resulting damages. To

do so, they were required to prove what they would have done differently but for the negligent misstatement.

[35] The Mathesons submit the application judge's statement of the law was incorrect. Their argument is encapsulated in their written submissions ("Factum of the Respondent/Appellant by Cross-Appeal") as follows:

> 34. … The Mathesons request that this Court find that it is sufficient for the Mathesons to have proven (which they did) that margin availability was a factor when making all investment decisions. Having met that burden, the burden should then shift to CIBC to demonstrate that the Mathesons would not have done anything differently in their accounts had they had the proper calculations.
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> . . .
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> 39. The Application Judge wrongly found that the Mathesons were required to provide evidence to demonstrate exactly what they would have done had they not been making investment decisions based on incorrect information. This position is contrary to the case law and it is impossible to provide such evidence when dealing with complex investment decisions that are based on ever-changing circumstances and an interwoven, but diversified portfolio.
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> . . .
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> 41. To illustrate why the Application Judge's approach is unworkable, the court should consider what that "evidence" would look like. The Mathesons could have presented a hypothetical portfolio, recreated with the best of hindsight. That hypothetical portfolio may have shown that the Mathesons would have made significant gains in the accounts during that period. Had they done so, CIBC would have asked the Court to disregard that evidence as self-serving and unreliable.
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> 42. Instead, the case law requires that the Mathesons demonstrate that they relied on incorrect information in making decisions, which they did. The burden then shifts to CIBC to demonstrate that they did not do anything differently in light of that incorrect information.

[36] The Mathesons' basic premise is that once they established reliance on the margin misstatement, there was no further requirement for them to call evidence as to what actions they may have taken but for that negligent misstatement. They submit CIBC bore the burden of proving their conduct in terms of the management of their portfolio would have been the same, even in the absence of the margin error. As CIBC called no evidence in this regard, the Mathesons take the view

they were entitled, based on the proven reliance, to the value of their entire portfolio as if liquidated prior to the margin misstatement on July 24, 2008.

[37] CIBC for the most part, submits the application judge correctly articulated the principles of causation and in particular, the "but for" test. As will be discussed in detail in relation to the second issue, it is in the application of the principles to the evidence, where CIBC submits the application judge went astray.

[38] In its written submissions, CIBC puts forward the following view of the principle of causation:

> 67. As Justice Iacobucci noted at para. 33 of *Queen v. Cognos Inc.*, the fifth requirement of the test for negligent misrepresentation is that the plaintiff's reliance on the misrepresentation must have been detrimental in the sense that damages resulted. This requirement incorporates a fundamental component of any tort claim; namely, that the plaintiff must prove that the defendant's negligent conduct caused them to suffer damages. Specifically, the claimant must prove what would have happened "but for" the defendant's wrongful act, that his actual position following the commission of the tort was less advantageous and that the defendant's act therefore caused him to suffer a compensable loss. If he fails to meet this threshold, his claim must fail.
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> *Queen v. Cognos Inc.*,[1993] 1 SCR 87, Book of Authorities, Tab 15, para. 33.
>
> 68. Jamie Cassels notes as follows on this issue in *Remedies: The Law of Damages:*
>
> The plaintiff may recover only damages that are caused by the defendant's wrong, and the onus of proof of this causal connection is upon the plaintiff. The test for proving causation is the "but for" test – that the loss would not have occurred but for the defendant's breach of duty …
>
> In addition to proving that the defendant caused the loss, the plaintiff must also establish the extent or quantum of the loss . . .In contract cases, damages are measured by the economic benefit to the plaintiff had the contract not been breached. This requires the plaintiff to prove not only what he or she has directly lost as a result of the breach, but also what benefits might have been obtained had the defendant not breached. This involves the construction about what would have happened but for the breach. The same is true in tort cases. Damages are assessed by determining what would have happened but for the tort.
>
> Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2000), Book of Authorities, Tab 21, pp. 289-290.

> See also Lewis N. Klar, *Tort Law*, 5th ed. (Toronto: Carswell, 2012), Book of Authorities, Tab 22, p. 450.

> 69. This basic principle applies with equal force in the context of a claim for negligent misrepresentation.
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> *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, leave to appeal refused [2004] SCCA No. 428, Book of Authorities, Tab 1. Para. 177.

[39] Applying the above to the case at hand, CIBC submits:

> 74. Thus, in order to succeed on their claim for negligent misrepresentation, the Mathesons bore the burden of proving what they would have done with their investments – including the EEM options – but for the Error. Put slightly differently, they needed to prove what they would have done with their portfolio if they had been given accurate margin information during the Error Period.

[40] There was no issue taken with the application judge having adopted the test for a claim in negligent misrepresentation as stated in **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87, or on his focus upon the last two elements thereof – reliance and causation. As such, I begin by addressing the issue of whether the application judge identified the correct test for causation in the circumstances before him. As often is the case, it is helpful to start with general principles.

[41] The element of causation in negligence has been addressed on numerous occasions by the Supreme Court of Canada, most recently in **Clements v. Clements**, 2012 SCC 32. Although that particular decision is often cited as confirmation of when the "material contribution" test of causation is properly applied, the court's observations with respect to causation in tort generally are instructive.

[42] Writing for the majority, Chief Justice McLachlin noted:

> [6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.
>
> [7] Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care – a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the

> deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E.J. Weinrib, *The Idea of Private Law* (1995), at p. 156.
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> [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury.
>
> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.
>
> [11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. … [citations omitted]

[43] The general principles of causation in negligence apply to negligent misrepresentation. Professor Lewis N. Klar in *Tort Law*, 5th ed (Toronto: Carswell, 2012) explains at page 257 as follows:

> As with other actions based on negligence, it must be proved by the plaintiff that it suffered damage as a result of the defendant's breach of its duty. Generally this has not proved to be a problem in the negligent statement area. However, if a plaintiff fails to show that it suffered damage as a result of its reliance on the defendant's statement, its action will fail.

[44] As noted earlier, the Mathesons' argument rests upon the proposition that the case law establishes a modified "but for" test in certain circumstances, most notably negligent misrepresentations in the investment context. In support of this assertion, the Mathesons rely upon a series of case authorities, starting with **Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.**, [1991] 3 S.C.R. 3. As will be explained herein, none of the authorities put forward by the Mathesons serve to create a modified "but for" test relieving a plaintiff from the

obligation to prove a defendant's negligent misstatement caused their sought damages.

[45] In **Rainbow**, a commercial catering company was the successful bidder in response to CN's tender to provide meals for their track crews. It was found that Rainbow had increased its original bid per meal based upon a representation made by CN as to the number of meals that would be required. After having been awarded the contract, 30% fewer meals were actually required. Rainbow suffered significant financial losses.

[46] Does the decision of the court in **Rainbow** support a switching of the traditional burden of proof as alleged by the Mathesons? In my view, it does not. It is helpful to review the analysis provided by the court. Writing for the majority, Sopinka, J. explained the proof of damages required at p. 14:

> The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made. In Fridman, *The Law of Torts in Canada*, vol. 2, the author says at p. 136:
>
> > What sort of economic loss is recoverable in an action for negligent misrepresentation is still to be resolved conclusively, although the accepted test seems to be restoration of the plaintiff to the position in which he would have been if the negligent misrepresentation had never been made. Some cases suggest that what the plaintiff can recover is what might be termed "out of pocket" expenses". In other words, he is entitled to be reimbursed for those costs and expenses which he has incurred and has expended in reliance on the misrepresentation.
>
> To the same effect is the statement in "Assessment of Damages for Misrepresentations Inducing Contracts" by D.W. McLauchlan (1987), 6 *Otago* L.R. 370, at p. 388:
>
> > It is axiomatic that the object of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Therefore, in a tort action the object is to put the plaintiff in the position he would have been in if the tort had not been committed.
>
> **What that position would have been is a matter that the plaintiff must establish on a balance of probabilities. In a case in which a material negligent misrepresentation has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, absent the misrepresentation, the plaintiff would not have entered into the transaction.**
> …

> Once the loss occasioned **by the transaction** is established, the plaintiff has discharged the burden of proof with respect to damages. **A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue.** It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negate all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?
>
> Although the legal burden generally rests with the plaintiff, it is not immutable. … Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such reversal **in this kind of case**. The plaintiff is the innocent victim of a misrepresentation which has **induced a change of position**. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says "Yes, but you would have assumed a position other than the *status quo ante*", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the *status quo ante*. [citations omitted, emphasis added]

[47] The court in **Rainbow** is not articulating a modified view of causation, rather applying the traditional "but for" test. It is key to appreciate that there, the evidence established that the plaintiff had entered into a specified transaction in reliance upon the defendant's negligent misrepresentation, and as a result, financial losses were incurred. The plaintiff Rainbow had, by virtue of the evidence advanced, established reliance, causation and damages. When the court speaks of the switching of the burden of proof, it is referencing the defendant's attempt to argue that the plaintiff would have entered into the same, or similar transaction even in the absence of a misstatement, in an attempt to limit or eliminate their ultimate liability in damages.

[48] There is very little difference in my view from the approach taken by Sopinka, J. in **Rainbow**, to the recent statement of the Chief Justice in **Clements**. Where causation can be definitively established or inferred because a transaction or other course of action followed a misrepresentation, the defendant has the opportunity to submit damages would have occurred in any event. The defendant carries the burden of establishing that on a balance of probabilities.

[49] In the matter before us, the Mathesons presented no evidence as to how the margin misstatement caused them to alter their investment strategy – there was no

transaction, or course of action that they pointed to that occurred or that they failed to take, as a result of CIBC's misstatement. As such, an inference of causation which often arises in such cases never arose.

[50] The Mathesons also cite **Chan v. GMS Datalink International Corp.**, [1998] B.C.J. No. 1550 as an example of where the modified "but for" test has been applied in a negligent misstatement case involving investors. A brief review of the facts in that case is helpful.

[51] The Chans were siblings searching for an investment opportunity. They had discussions with the Stanwoods, the principals of GMS Datalink International Corp. The Chans were provided with financial information relating to the fiscal health of the company, most notably a financial statement current as of April 30, 1993. The Chans subsequently entered into a shareholders agreement and share purchase agreement, which appendixed the financial statement. Under the agreements the Chans advanced $250,000 to GMS, primarily in the form of a shareholder loan.

[52] After the investment, it became known that the financial statement failed to disclose two outstanding accounts owed by a third company, CD Source, with which GMS had an ongoing commercial relationship. Those accounts were never paid and eventually written off as bad-debt, resulting in a loss in excess of $70,000. In 1997 GMS declared bankruptcy, with the Chans losing the funds they had invested.

[53] The crux of the case at trial was the impact of the non-disclosure of the CD Source accounts, and whether it gave rise to a successful claim by the Chans of an action for negligent misrepresentation. The court found that based on the evidence, there was a duty to disclose, and that the duty had been breached. Turning to consider whether the required element of reliance was established, the court found as follows:

> 61. I must therefore decide, after evaluating all the evidence including documents, expert reports, and oral testimony, whether the material misrepresentations which I have found to exist in this case were "such as would tend to induce the plaintiffs to act in reliance" upon them. If this is made out on the evidence, then I can draw the inference that the Chans relied upon those misrepresentations. It is then incumbent upon me to look at the defendants' case to see if this inference has been rebutted. Although it was elicited in examination-in-chief, and not in cross-examination, I will consider the portion of Mr. Chan's

> evidence which the defence has raised above, along with all the other evidence, in determining whether or not this onus has been met.
>
> . . .
>
> 63. I note that it is clear from that correspondence that Mr. Chan valued the company according to its profits so far. With his accounting background, he was careful to ask extensive questions about the accounting records of GMS until he had reached a comfortable level of knowledge.
>
> 64. I am satisfied that had the information on the aged CD Source accounts been disclosed, Mr. Chan would probably not have invested in GMS. I infer from his accounting background and his care in evaluating the financial circumstances of the company that such large, doubtful receivables would have influenced his decision. This is so particularly where the amount of the doubtful debt was actually higher than the profits for the period.
>
> 65. In the circumstances, it is up to the defendants to rebut this inference, and to prove on a balance of probabilities that Mr. Chan would have invested despite the aged receivables being disclosed. I do not find that they have met that onus. The suggestion that extraneous pressures would have caused Mr. Chan to invest under any circumstances was not supported by the evidence. The defendants also submitted that the Chans' 18 month delay in bringing this action supports the inference that they would have invested even if the CD Source accounts' status had been disclosed. I do not find that I am able to draw that inference.

[54] In **Chan**, nothing about the trial judge's findings, nor the authorities cited by him, give rise to a conclusion that a modified "but for" test of causation was endorsed or employed. The plaintiffs marshalled evidence which convinced the court that a negligent misstatement was made, it was relied upon by them in that they were induced to enter into the investment arrangement, and as a result they suffered quantified losses. This is not an example of a "modified" test, but rather, a scenario where the traditional "but for" test including drawing an inference of causation based on the available evidence, was met by the plaintiffs. The defendants then failed to meet the evidentiary burden of showing that the investment would have been made even if the misstatement had not occurred.

[55] The Mathesons point to a relatively recent Alberta decision as support for the existence of a modified "but for" test of causation. In **Northey-Taylor v. Casey**, 2007 ABQB 113, aff'd 2008 ABCA 149, the court was presented with a situation where plaintiffs had invested and allegedly sustained financial losses due to the provision of inaccurate information by the defendant. One set of plaintiffs were found to have invested $97,500 in contemplation of receiving 108,300 common shares in a company, Brier Resources Corporation. Similarly, a third

plaintiff was found to have invested $99,000 with the expectation of receiving 100,000 common shares. The plaintiffs did not receive shares as promised.

[56] The trial judge found that the plaintiffs believed the transactions were brokered, when in fact they were not. The trial judge accepted the evidence of the plaintiffs that they would not have made their respective investments if they had been aware the transactions were unbrokered. The analysis relevant to the issue before this Court is concise. The trial judge writes:

> *The reliance must have been detrimental to the representee resulting in damages.*
>
> **60** The reliance was detrimental because the Plaintiffs, on the strength of it, entered into a transaction thinking they had accurate information about its true nature. They lost the money they paid for shares they did not receive. The Taylors lost $97,500 and Mr. Gulka lost $99,000.
>
> **b) Would the Plaintiffs have participated in the transaction anyway?**
>
> **61** Counsel for the Defendants argued that the Plaintiffs would have proceeded with the subscription whether it was brokered or not brokered through Wolverton because both Mr. Taylor and Mr. Gulka had satisfied themselves that the investment was very exciting. Further, they were both trained and educated in the investment business to some extent and they wanted to be part of the transaction because they were purchasing shares at less than market value.
>
> **62** In *Schloss v. Koehler* [1977] A.J. 488 (S.C.T.D.)(varied: [1979] A.J. 550 (C.A.)), Bowen J. addressed this very argument. The Court of Appeal agreed with Bowen J. that the focus should not be on the allure of the transaction but the fact that the Plaintiffs were denied the chance to make an informed decision. The plaintiffs here were clearly denied that decision.

[57] The Court of Appeal upheld the trial judge's decision in **Northey**, but in doing so offered no further analysis in relation to the issues of reliance or causation.

[58] I do not view **Northey** as being of assistance to the Mathesons. It does not stand for the proposition that there is a modified "but for" test in cases of negligent misrepresentation in the investment context. Rather, it is another example of plaintiffs being required to prove reliance, causation and damages. Only after having done so, was it open to the defendants to attempt to prove that the plaintiffs would have invested even if they had been aware the transactions were unbrokered. This is simply an application of the long recognized right of a defendant, once a plaintiff has established the elements of negligent misrepresentation, to advance an argument that some or all of their losses would have resulted in any event.

[59] With respect to the trial judge's reference in **Northey** to the plaintiffs' inability "to make an informed decision", in my view, no significance should be placed thereon. In the case at hand, the application judge concluded that there was no doctrine of "informed consent" which would be applicable in the context of a negligent misrepresentation action. That aspect of his decision was not appealed.

[60] The Mathesons further rely on a recent decision of the British Columbia Supreme Court, **First Majestic Silver Corp. v. Davila**, 2013 BCSC 717 in support of the existence of a modified "but for" test. In their factum, the Mathesons submit that **First Majestic** stands for the proposition "that the burden of proving that the plaintiff would have done the same thing had the plaintiff known the true state of affairs is on the defendant and that burden is not discharged through speculation". (¶ 35 – Factum of the Respondent/Appellant by Cross-Appeal).

[61] As a preliminary observation, **First Majestic** involved a claim asserting a breach of fiduciary duty, not negligent misstatement. As such, it is difficult to accept that any principle cited therefrom could be viewed as a definitive statement impacting upon the test for causation in negligent misstatement. There, the defendant Davila had learned of an opportunity to acquire a mining operation while he was a director of First Majestic, also a mining company. He learned of this while he was acting on behalf of Majestic. Davila subsequently acquired the property personally. This conduct was found to be in breach of his fiduciary duties to First Majestic.

[62] In response to the defendant's assertion that the plaintiff's losses would have occurred even without the breach of fiduciary duty, the court quoted **Rainbow** with approval, asserting that the defendants bore the burden of establishing its losses, and they had not met that burden. Given the earlier analysis as to the applicability of **Rainbow**, there is no merit to the Mathesons' assertion that **First Majestic** supports the existence of a modified "but for" test of causation.

[63] As a final authority, the Mathesons rely upon a recent decision from this province, **National Bank Financial Ltd. v. Potter**, 2013 NSSC 248 (currently under appeal). At ¶ 38 of their factum, the Mathesons assert that a modified "but for" test was recognized and employed in that matter. They submit:

> 38. Warner J. in *National Bank Financial v. Potter* 2013 NSSC 248 … discussed the application of the "but for" test to securities cases. He explained that as long as the plaintiff was denied information necessary to make informed investment decisions, the "but for" test is satisfied.

> 700 Case law applying the "but for" test in the securities context is consistent with the common sense approach to the "but for" test advocated by the Supreme Court of Canada. **This is important because investors will often be faced with arguments that they would have acted in a particular manner despite the defendant's breach; such arguments may be hard to dispel if the plaintiff is required to establish, with scientific exactitude and ignoring the benefits of hindsight, what he/she would have done.**
>
> 701 in *Northey-Taylor v Casey*, 2007 ABQB 113 (CanLII), 2007 ABQB 113 at para 62, additional reasons at 2007 ABQB 306 (CanLII), 2007 ABQB 306, aff'd 2008 ABCA 149 (CanLII), 2008 ABCA 149, the Court rejected the defendant stock broker's submission that the plaintiffs would have proceeded with the purchase even if they were adequately advised of the risk and held **"that the focus should not be on the allure of the transaction but the fact that the Plaintiffs were denied the chance to make an informed decision."** In *Chasins v Smith, Barney & Co*, 438 F.2d 1167 (2nd Cir. 1970), the United States Court of Appeals for the Second Circuit held that a stock brokerage firm's failure to disclose its market-making status, in a security that it recommended to a client, was a material non-disclosure sufficient to result in civil liability under the *Securities Exchange Act*. The Court reasoned that the focus was not on whether the firm sold the security at a fair price, **but whether it deprived the plaintiff of information that would have influenced his decision to purchase the security.**
>
> […]
>
> 703 There is substantial evidence linking Clarke's market manipulation to the collapse of KHI. The manipulation may not have been the only reason for KHI's collapse, but it was a fundamental factor, and at the very least, prolonged the time before there was an ultimate reckoning in the price of KHI. This prolongation allowed Barthe to be brought in and defrauded by the conspiracy between Clarke, Potter and Colpitts. **The market manipulation deprived Dunham and Weir of the information they needed to make informed decisions with respect to their portfolios.** (Emphasis appearing in factum)

[64] With respect, I disagree with the assertion made by the Mathesons that the court in **National Bank** employed a modified "but for" test. One only needs to read the paragraphs of Warner, J.'s decision omitted from the above quote to conclude otherwise. At ¶ [702] and [704] of his decision, Warner, J. notes:

> [702] In this case, the only Dunlop Client who was aware of Clarke's activities was Wadden, and he only learned of the 540 account at a later stage. It is true that Clarke did not generally advise the Dunlop Clients to purchase KHI, but **the evidence establishes that Dunham, at the very least, would have diversified his holdings "but for" the actions of Clarke, and the Weirs would have insisted on their January 19, 2001, e-mail instruction to sell "but for" the actions of Clarke**. These actions included deliberate refusals to execute sell orders and the creation of an artificial price and volume in the KHI shares. The evidence suggests that Weir, in particular, relied on this price and volume information in his decisions to not insist on selling at $5.00 at particular points.
>
> . . .
>
> [704] From the evidence of Clarke's market manipulation, which was a serious breach of the standard of care, even at the most basic level of an order taker, and the linkage between this manipulation and the losses suffered by the Dunlop Clients when KHI collapsed, it can be inferred that Clarke's wrongdoing probably did cause the losses suffered by Dunham, Weir and Barthe. **I find that "but for" Clarke's failure to disclose his market manipulation and ongoing conspiracy, Dunham and Weir would have liquidated their entire position in KHI, and Barthe would not have purchased any stock in KHI.** Subject to my finding respecting Barthe's last two installments in the private placement, I find that Clarke caused the losses experienced by these Plaintiffs. (emphasis added)

[65] The analysis in **National Bank** is of no help to the Mathesons, as it is yet another example of a court, in the investment context, applying the long-recognized "but for" test of causation, including inferences being drawn as permitted, from the evidence adduced by the plaintiffs. It is factually similar to the case at hand in the sense that there, investors suffered loss by not divesting themselves of shares. They asserted that they would have changed their course of action, if not for the misrepresentations of the defendant Clarke.

[66] Justice Warner was able to conclude from the evidence presented by the plaintiffs that they would have made different decisions relating to the KHI shares, but for the negligent misstatements of Potter. I agree entirely with the CIBC's characterization of **National Bank**, and why it is in fact detrimental to the position advanced by the Mathesons. Counsel for CIBC writes:

> 52. Thus, there is a substantial difference between the evidence of causation advanced by Dunham and the Weirs in *Potter* and the arguments or submissions being made by the Mathesons (without evidence) in the case at bar. Specifically, Dunham and the Weirs actually established what they would have done but for the investment advisor's actions. Put slightly differently, they were able to tie the investment advisor's conduct to a

> **specific** course of conduct foregone as a result of his actions – i.e. the liquidation of their holdings in KHI before the company collapsed. Conversely, the Mathesons have failed to tie the Error to any specific lost chance or foregone course of conduct. Rather, they have simply suggested that they would (but for the Error) have done "something" to preserve their wealth and protect themselves from the 2008 global economic downturn, without proving what that "something" actually would have been. As such, they – unlike Dunham and the Weirs – are unable to cross the "but for" threshold.

[67] The application judge rejected the Mathesons' argument that a modified "but for" test relieved them, once they had established reliance on the margin misstatement, from the traditional onus of advancing evidence to establish causation. The application judge determined the burden remained on the Mathesons to establish their losses were caused by their reliance on the margin misstatement. I am satisfied that the application judge articulated the correct approach to causation, namely the traditional "but for" test.

Did the application judge err in his application of the principles of causation to the evidence before him?

[68] Both parties submit that the application judge inconsistently applied the principles of causation in terms of his treatment of the EEM and non-EEM portions of the investment portfolio. Where I have found that the application judge was correct to reject a modified "but for" test of causation, the Mathesons' argument that such should have been applied to the non-margined portions of their portfolio must fail.

[69] What remains for consideration is CIBC's submission that the application judge, after correctly identifying the test for causation, ignored it in awarding EEM "clawback" damages to the Mathesons. CIBC's position in this regard is set out in their Counsel's "Factum on behalf of the Appellant" as follows:

> 80. The principles of causation and damages are inextricably interwoven in that the trier of fact's findings in respect of causation inform his findings as to whether the plaintiff has proved any compensable damages and (if so) their quantum:
>
> > The measure of damages is a function of the rules of causation. The rules that determine what losses the defendant is taken to have caused also define how those losses are measured. The usual principle for determining causation in tort is to ask what the plaintiff's position

> would have been if the defendant had not committed the tort. The plaintiff's loss is measured by comparing that position with the position the plaintiff actually occupies.
>
> Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) …

81. Thus, in determining whether CIBCWG was liable to pay the Mathesons any further compensation, Justice Pickup should have:

    (a) determined the position the Mathesons would have been in but for the misrepresentations – or, put slightly differently, what they would have done with their EEM investments if they had been supplied with accurate margin information during the Error Period;

    (b) compared that position to the position the Mathesons actually occupied following the Error and its aftermath. This latter position would, obviously, include the compensation CIBCWG remitted to the Mathesons in November 2008; and

    (c) awarded the Mathesons the difference (if any) between these two positions to the extent that the position they would have been in but for the Error was better than the position they actually occupied following the Error.

82. Justice Pickup failed to follow this process. Indeed, His Lordship could not have engaged in this analysis in light of his finding that the Mathesons had failed to adduce any evidence of (and had therefore failed to prove) what they would have done but for the Error. Again, this latter finding should have marked the end of his analysis and resulted in the dismissal of the Mathesons' claim for negligent misrepresentation.

[70] I agree with the position advanced by the CIBC that the awarding of damages based upon the evidentiary record before the application judge gave rise to a palpable and overriding error justifying appellate intervention. I will explain.

[71] Having dismissed the Mathesons' claims for breach of fiduciary duty, breach of contract, and negligent performance of a service, the only means of finding liability against CIBC rested in the lone remaining action of negligent misrepresentation. As such, the application judge had to be satisfied that the Mathesons had established the elements of that cause of action as outlined in **Cognos**. Having correctly rejected the modified "but for" test for causation, the application judge had to be satisfied on the evidence before him, that the Mathesons had not only relied on the misstatement, but that the reliance caused their losses.

[72] As noted earlier, the application judge structured his analysis by dividing the portfolio into EEM versus non-EEM holdings. The record discloses that the Mathesons however, did not describe the management of their portfolio according to those categories, but rather presented their evidence in a global fashion, applying it across the entirety of their holdings. As earlier referenced, the application judge found that the Mathesons' evidence was insufficient to establish the necessary element of causation as it related to the non-EEM accounts. It is helpful to repeat his findings:

> [118] In this case, the Mathesons argue that their reliance affected their entire investment strategy; it was not limited to a single transaction. The difficulty with the Mathesons' position is that they do not causally connect reliance to a course of action foregone, with a corresponding loss.
>
> [119] **There is no evidence before me as to what the Mathesons would have done differently had it not been for the misrepresentations**. They seek to shift this burden to CIBC. I am satisfied that in a case of negligent misrepresentation, the plaintiff bears the burden of proving what they would have done differently but for the misrepresentation. If they do not meet this burden, their claim must fail**. The Mathesons have failed to prove what they would have done if accurate margin information had been provided during the error period**. That is, they must show what they would have done "but for" the error.
>
> . . .
>
> [126] CIBC argues the Mathesons have not pointed to a specific transaction and indicated that they would not have gone through with it but for the error; rather they seem to suggest that they would have done "something differently in their accounts to preserve their wealth if they had been in receipt of accurate margin information during the error period". They have offered no evidence as to what these alternative actions were. **They have not adduced any evidence, in the affidavits of Mr. Saturley, nor through Mr. Croft's report, to establish what they would have done but for the error. I am satisfied that they have failed to cross the threshold necessary to shift the burden to CIBC**. As CIBC argues, it is difficult to disprove something that has not been proven in the first place.
>
> . . .
>
> [128] … There is no evidence that the Mathesons made trading decisions in reliance on overstated margin during the error period. In fact, very few trades went through their accounts during the error period and for trades that required margin, **even on the basis of Mr. Saturley's calculations, there was sufficient margin available. In summary, the Mathesons have offered no evidence to satisfy this court that they have met their burden. They have offered no**

> **evidence as to what they would have done differently or as to what opportunity the error deprived them of.**
>
> [129] **Without such an evidentiary basis**, the court would have to assume a complete loss the very second the error arose and then reverse each and every entry made during the error period. This approach assumes that the market meltdown that was in effect during the time had no effect. From the evidence of Mr. Croft we know that most individuals lost approximately 30% of their portfolio. [emphasis added]

[73] The application judge was clearly not impressed with the lack of evidence advanced by the Mathesons relating to the cause of their non-EEM losses. However, there was no other evidence, other than that described above. That evidence was found by the application judge to be utterly deficient, to establish causation with respect to the EEM portions of their portfolio. The paucity of evidence applied across the totality of the Mathesons' portfolio. There was no evidence of what actions the Mathesons either took or would have otherwise taken, if not for the margin misstatement.

[74] The application judge's EEM "clawback" analysis failed to recognize that it was the Mathesons' obligation to establish causation, and ignored his own earlier findings with respect to the lack of evidence. Rather, after concluding that the Mathesons had relied on the margin misstatement in relation to their EEM accounts, the application judge appears to have switched the burden to CIBC to establish why the payments made in November 2008 were appropriate, including to explain the rationale behind the applied "clawback".

[75] With respect, based on his own findings, there was nothing before the application judge which established the Mathesons had suffered **any** detriment due to their reliance on the margin misstatements. The application judge's reasons do not explain how, in light of his earlier evidentiary conclusions, that the very same evidence then was sufficient to establish causation, either directly or by way of inference.

[76] Although not explicitly stated in his reasons, the failure of the application judge to address the element of causation in the EEM "clawback" analysis may be rooted in what appears to be a misapprehension of the evidence. At ¶ [50] of his decision, the application judge concluded that the EEM payment had been made to the Mathesons "[as] a result of" the IIROC settlement. This begs the question of whether the application judge viewed the payment, if made pursuant to the IIROC

settlement, as somehow creating a basis upon which causation could be found or inferred. Such an approach would be flawed in my view.

[77] The record clearly establishes that the EEM payment to the Mathesons was made in November of 2008, with the IIROC settlement being reached over two years later in June of 2011. Further, there is nothing within the terms of the settlement agreement which addresses causation of damages, nor which could serve as an acknowledgment or pronouncement that the margin misstatement had caused any particular investor actual loss.

[78] If the Mathesons wished to establish that the funds received from CIBC in November of 2008 were inadequate, it was up to them to marshal evidence of reliance, causation and the quantification of their damages. If they did so, and their proven losses were greater than the reimbursement received, they would have been entitled to compensation. In my view, the application judge's analysis of the EEM "clawback" losses skipped from reliance directly to damages, without finding the necessary link of causation.

DISPOSITION

[79] I would allow CIBC's appeal. The application judge's award of EEM "clawback" damages should be set aside. As such, all damages paid by CIBC to the Mathesons pursuant to the decision below shall be returned. Costs awarded to the Mathesons should be reversed in favour of CIBC.

[80] I would dismiss the cross-appeal brought by the Mathesons.

[81] CIBC shall have costs of $9,000.00 inclusive of disbursements on this appeal.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.