

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

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: November 26, 2014, in Halifax, Nova Scotia

Subject: Negligent misstatement - causation

Summary: The Mathesons were long time clients of CIBC Wood Gundy (“CIBC”). In the late summer and early fall of 2008, the Mathesons sustained losses in their CIBC Investment accounts. During the 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. In November of 2008, CIBC voluntarily reimbursed the Mathesons for losses sustained in those of their accounts for which margin was available. The Mathesons asserted that the re-imburement was inadequate, and should have been applied to all of their portfolio, including those investments which did not require a margin account be maintained.

Before the application judge and this Court, the Mathesons argued that case authorities had established a modified “but

for” test of causation. They asserted this modified test, once they had established reliance, served to switch the burden to CIBC to dispel causation. The application judge rejected the notion of a modified “but for” test of causation, and on that basis rejected the Mathesons’ claim that they were entitled to damages in relation to the non-margined portion of their portfolio.

The application judge did find however, that the Mathesons were entitled to recover certain “clawback” damages, being adjustments which CIBC had deducted from the voluntary payment made in November of 2008. CIBC appealed this finding. The Mathesons advanced a cross-appeal, in relation to the application judge’s failure to apply the modified “but for” analysis to their entire portfolio.

- Issues:**
- (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?

Result:

The Court of Appeal dismissed the Mathesons’ cross-appeal. The application judge correctly determined that there was no basis for a modified “but for” test of causation, and that the burden remained on the Mathesons to prove that the misstatement caused their losses. The application judge determined that they failed to do so, noting the lack of evidence adduced by them.

The Court of Appeal allowed CIBC’s appeal. Having correctly determined the Mathesons bore the burden of establishing causation as a necessary element of the tort of negligent misrepresentation, and having noted the paucity of evidence of causation, the application judge erred by proceeding to award “clawback” damages. In effect, he reversed the burden to CIBC to disprove causation, seemingly applying the very approach he had properly rejected.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 28 pages.