SUPREME COURT OF NOVA SCOTIA

Citation: Saturley v. CIBC World Markets Inc., 2013 NSSC 300

Date: 20130926
Docket: Hfx No. 305635
Registry: Halifax

Between:

Fredrick Thomas Saturley

Plaintiff

v.

CIBC World Markets Inc.

Defendant

Judge:	The Honourable Justice Michael J. Wood
Heard:	April 4-5, 10, 12, 16-17, 19-20, 23-26, 30, 2012 May 1-4, 7-9, 14-16, 2012 October 1-4, 9-11, 15-18, 22-25, 29-31, 2012 November 1, 20-21, 2012 December 17-18, 2012, in Halifax, Nova Scotia
Final Written Submissions:	March 31, 2013
Written Decision:	September 26, 2013
Counsel:	George W. MacDonald, Q.C., Jack Graham, Q.C. and Kiersten Amos, for the plaintiff Michael S. Ryan, Q.C., John A. Keith, Christy L. Sandles and Jack K. Townsend, for the defendant

By the Court:

INTRODUCTION

[1] There is a high degree of regulation in the investment industry in Canada; however, its success requires continuing public trust and confidence. Individual advisors and investment firms must always conduct themselves in accordance with the principles of honesty and integrity. Clients place their financial lives in the hands of their advisor and rely on them to protect their interests and provide recommendations that are appropriate for their circumstances.

[2] Many of the regulations which have developed for the financial services industry are designed to protect clients and ensure that advisors act within carefully delineated limits.

[3] For most investment clients, advisors are required to have clear instructions on quantity and price before entering an order for the purchase or sale of a security on their behalf. The order must be entered as soon as possible after receipt of instructions. It is the client who manages their account based upon recommendations from the advisor. The advisor is not permitted to make decisions with respect to quantity, price or timing of order placement, unless they hold a specific licence permitting this and the client has entered into the necessary account agreement. If the advisor is managing the account without the proper licence or account agreement, they are said to be exercising unauthorized

discretion. Such behaviour may result in an advisor being subject to significant employment or regulatory sanction.

[4] Fredrick Saturley has been an investment advisor for more than 20 years. He joined CIBC Wood Gundy ("CIBC WG") in 2001. By 2004, he was the top revenue producer in the Halifax office and one of the highest fee generators in Canada. Through this performance he received significant financial benefits and status. His income grew to more than a million dollars a year.

[5] In the fall of 2008, the world financial markets crashed and so did Mr. Saturley's career at CIBC WG. He was fired in December, 2008 after CIBC WG concluded that he had engaged in unauthorized discretionary trading.

[6] Mr. Saturley sued for wrongful dismissal shortly after he was fired and CIBC WG defended on the basis that his discretionary trading justified termination for cause. Mr. Saturley also alleged that CIBC WG had intentionally interfered in his economic relationship with his clients because of the manner in which his employment was terminated and the information which was provided to regulatory authorities.

[7] This litigation has been long and difficult for all parties. It has already generated nine reported decisions on issues such as scope of production and sufficiency of pleadings. The trial encompassed 45 sitting days between April and December, 2012. There were many evidentiary rulings made through the course of the hearing.

[8] After carefully considering all of the evidence, as well as the able submissions of all counsel, I have concluded that I must dismiss essentially all of Mr. Saturley's claims for the reasons which follow.

OVERVIEW OF EVENTS LEADING TO TERMINATION

[9] Frederick Saturley was a very successful investment advisor with a large and profitable portfolio. His clients were happy with the financial performance of their accounts. They were loyal and trusted him to look after their affairs. Many referred family or friends to Mr. Saturley.

[10] Mr. Saturley's success was due, in part, to a relatively unique investment strategy which he implemented for many of his clients. It involved trading in option contracts to generate cash flow. For some clients, this meant relatively high trade volumes as a result of contracts being bought, sold and closed out.

[11] The large volume of client trades was something CIBC WG was aware of. In the spring of 2007, it prompted a review which was inconclusive with respect to whether there had been discretionary trading by Mr. Saturley. Concern was expressed by CIBC WG that client orders might not have been entered as promptly as they should have and, as a result, an additional assistant was hired for Mr. Saturley to help with the trade entering process. That individual was Michael Cowan.

[12] Mr. Cowan ultimately obtained a licence which permitted him to receive client instructions and place orders, but not to provide advice. Mr. Saturley was also assisted by Michelle Harris, who was unlicenced. Ms. Harris could perform administrative functions and interact with clients, however, she was not able to accept client instructions and enter orders.

[13] Mr. Saturley was well aware of the importance of avoiding discretionary trading and knew that it was considered to be a very serious issue by CIBC WG. In the spring of 2008, Mr. Saturley initiated the application process to obtain a licence which would permit him to operate portfolio management accounts. This would allow him to trade on a discretionary basis in accordance with client instructions and a managed account agreement. This application process was never completed with CIBC WG as a result of the problems which arose in the fall of 2008.

[14] Many of Mr. Saturley's clients traded in option contracts. An option contract can be either a "put" or a "call". The seller of the option contract is paid a premium, which is determined by market demand. The contract will include a price at which the underlying security is to be bought or sold, which is referred to as the strike price. The contract will also have a specified expiry date. One contract represents 100 shares of the underlying security.

[15] A "put" option gives the purchaser the right to sell the underlying security to the seller at the strike price within the contract term. If the market price of the security falls below the strike price, the holder will exercise the option and require

the seller to buy the shares at that price (which will be higher than the current market price).

[16] The seller of a "put" option may decide to buy the contract back and thereby "close out" their obligations prior to the expiry date. The cost of doing so will be determined by market demand.

[17] A "call" option is the opposite of a "put". It gives the buyer the right to purchase the underlying security from the seller at the strike price within the specified time. A "call" contract will be exercised when the market price rises above the strike price (at which time the seller is required to sell the shares at a price which is below the current market).

[18] It is not necessary that the potential seller of the security under an option contract actually own it at the time the option is entered into. If they do own the security, then the contract is referred to as a "covered" option. If the shares are not owned by the potential seller, then it is a "uncovered" option. Mr. Saturley's clients sold both covered and uncovered option contracts.

[19] Mr. Saturley utilized a unique and complex option strategy for many of his clients. He referred to it as a "strangle". It involved selling both "put" and "call" options on the same security, with the same expiry date and strike prices that bracketed the current market price for the shares. Ideally, the market price would stay within the bracketed range and neither option contract would be exercised before their expiry. This would result in the client keeping the premium for both

options without incurring any liability to buy or sell the underlying shares. It was not unusual for Mr. Saturley's clients to have multiple strangles in their portfolio at any given time.

[20] Mr. Saturley would monitor the market price for the underlying security and would manage his client's risk by recommending the buyout of one side of the strangle, if the market price seemed to be moving in a direction where the option might be exercised. Ideally, the cost of the buyout and closing of the contract would be less than the total premiums received by the client on the initial strangle so there would still be an overall profit on the combined transactions.

[21] With uncovered "call" options and with "put" contracts, there is always a risk that the client might be required to complete the contract if the option is exercised. With a "put" contract, this could oblige the client to buy a significant amount of the subject security at a price greater than the current market price. With an uncovered "call", they could be forced to purchase the stock at the current market price in order to complete their obligations under the option contract to sell it at the lower strike price. This would trigger an immediate loss.

[22] Brokerage firms, such as CIBC WG, require that clients have sufficient assets in their account to cover the potential liability should option contracts be exercised. The clients can provide coverage for these liabilities by having adequate cash or share value in their account. With shares, a formula is used to determine what value should be attributed to them for purposes of covering the potential future liability. The amount calculated for the value of the account is

referred to as “margin”. Since margin depends upon the value of the client portfolio, it will change as the market prices of securities in the portfolio change.

[23] Margin is a very important component of Mr. Saturley’s strangle strategy. The more margin that a client has, the larger the number of option contracts that can be sold, and premium revenue generated. Mr. Saturley was able to calculate available margin for client accounts and would do so from time to time, particularly when looking at the potential impact of transactions that he was recommending. CIBC WG retained a third party for purposes of performing margin calculations which was referred to at trial as “ADP”. The ADP margin calculation was available to Mr. Saturley online when he was reviewing client accounts. It was recalculated on a daily basis. The ADP figure was the one used by CIBC WG for determining a client’s margin position.

[24] In 2008, Mr. Saturley’s strangle strategy focused primarily on selling options for an emerging markets fund which traded under the symbol “EEM”. He selected this because it was a diversified fund which he believed would not have a high degree of volatility. This is an important criteria for his strangle strategy because he wanted to minimize the risk that the market price would move outside of the bracketed range resulting in the exercise of either the “put” or “call” option contract.

[25] In late July, 2008, EEM shares underwent a three for one stock split, which meant that the holders of each EEM share received three of the new shares. The value of each of these new shares was one-third of the old share value. This was

significant because ADP did not take the stock split into account when calculating margin availability for CIBC WG clients. The overall result was that clients who held EEM option contracts had an inflated calculation of available margin. For CIBC WG, this issue primarily affected clients of Mr. Saturley, as they were the only ones trading in EEM options.

[26] The EEM margin calculation error had two practical impacts on Mr. Saturley's clients. First, since the available margin was overstated, they were able to acquire a greater number of option contracts than if the proper amount had been reported. The second was that as markets declined in the fall of 2008, the shrinking margin did not trigger a response by CIBC WG as early as it would have if the correct calculation had been done. When an account falls offside on its margin calculation, the brokerage will ask the client to correct the imbalance. This request is referred to as a margin call. When a client receives a margin call, they are required to cover the deficiency by injection of cash or liquidation of securities.

[27] The 2008 market decline had a disastrous effect on Mr. Saturley's clients who were engaged in the EEM strangle strategy. As an illustration, Marie Aisthorpe sold 20 EEM "put" contracts on May 21, 2008, with an expiry date of December 20, 2008 and a strike price of $110.00. This generated a premium of $4,879.97. On the other side of the strangle, she sold 20 EEM "call" contracts on the same date, expiring on December 20, 2008, at a strike price of $190.00. The premium generated on that transaction was $3,859.97. According to Ms.

Aisthorpe's month end financial statements, the value shown for the put contracts was as follows:

Date	**"Put" Contract**
May 30, 2008	($ 4,480.00)
June 30, 2008	($ 6,900.00)
July 31, 2008	($ 6,900.00)
August 31, 2008	($ 8,600.00)
September 30, 2008	($ 30,200.00)

[28] For reasons that will be discussed further, on October 14, 2008, the 20 EEM "put" contracts were closed out at a cost to Ms. Aisthorpe of $85,850.00. This illustrates the problems experienced by many of Mr. Saturley's clients, some of whom saw most, if not all, of their investments wiped out over the space of a few weeks. Mr. and Mrs. Saturley were similarly affected. They lost more than $1.7 million in their personal accounts.

[29] During the week of October 6, 2008, the magnitude of the problems for Mr. Saturley's clients were becoming apparent. Because of the downswing in the markets, the CIBC WG credit office began issuing margin calls to some clients. When this happens, the investment advisor is notified and asked to make arrangements with the client to bring the account back into compliance with the firm's requirements. On October 8, 2008, Mr. Saturley received an e-mail notification from the credit office advising him that there were margin calls on 54

client accounts. This was unusual and Mr. Saturley began to panic. He calculated margin requirements for a number of clients and concluded that ADP had failed to properly account for the EEM stock split which had taken place in July, 2008. Mr. Saturley recognized that this meant that the available margin for clients had been overstated.

[30] Also on October 8, Mr. Saturley spoke with Mr. John Sawler, who was the son of one of his largest clients. He told Mr. Sawler that their family investments were not doing well. He sent information to Mr. Sawler showing that the account was down by about $4.7 million. Mr. Sawler testified that he was shocked and demanded that Mr. Saturley develop a strategy to mitigate the losses.

[31] On October 9, 2008, Mr. Saturley advised the CIBC WG branch manager, Per Humle, of his conclusion that the ADP margin calculation was wrong. Mr. Humle passed this information on to CIBC WG head office and, by October 10, 2008, they had confirmed the error.

[32] Per Humle indicated to Mr. Saturley that despite the calculation error, clients were still required to cover the margin call by providing cash or liquidating stock. On the morning of October 10, 2008, Mr. Saturley recommended to Mr. Humle that the best way to limit the financial damage to clients was to close out all of the EEM "put" options. Mr. Humle's response was that if Mr. Saturley felt that this was the right course to take, he should make this recommendation to clients. Mr. Saturley instructed his assistant, Michael Cowan, to close out all of his clients' EEM December and January "put" contracts.

[33] Mr. Humle and Mr. Saturley had several discussions on October 10 concerning the large number of margin calls for his clients. Mr. Humle felt that Mr. Saturley seemed very stressed and agitated. It was Mr. Humle's impression that Mr. Saturley was looking for someone to give him advice about what to do. Mr. Humle says that he told Mr. Saturley to contact clients and advise them of the margin call which needed to be addressed. Mr. Humle also spoke to another CIBC WG employee, Herb Levine, about Mr. Saturley and the large number of margin calls which had to be handled. Mr. Levine expressed the view that Mr. Saturley was not doing well and was mentally unable to continue on. Mr. Humle made notes of a number of discussions he had that day, including the one with Mr. Levine.

[34] Also on October 10, Mr. Saturley told Mr. Humle that if the margin calculation had been done correctly, his clients would have been subject to margin calls much earlier and would have moved their investments out of the market before the disastrous drop in value.

[35] Mr. Saturley spoke with Mr. Sawler early on the morning of October 10. He told him about the margin error and said that if it had not occurred the Sawlers would have been out of the market sooner and avoided their huge losses. He went on to advise that they had a claim for compensation against CIBC WG and that he would provide evidence to support them if needed.

[36] At 11:00 a.m. on October 10, Mr. Saturley went to the premises of Oakwood Terrace in Dartmouth. Oakwood Terrace Foundation was one of his most significant clients. Their account had plummeted in value and was the subject of a margin call.

[37] Mr. Saturley was extremely emotional at the Oakwood Terrace meeting and broke down in tears. He told the executive committee members that there had been an error in calculating the amount of available margin, which resulted in them having more leverage than they should have. He said that he had discovered the problem on October 8 and if there had been no error, Oakwood would have been out of the market in early September. Mr. Saturley offered to calculate the cost of the error and said that he was prepared to testify against CIBC WG if requested. The possibility of a class action against CIBC WG was discussed at the meeting.

[38] On Saturday, October 11, Mr. Saturley and his wife went into the CIBC WG office. Mr. Saturley said the purpose of the visit was to get some client files for his review. While he was in his office, his wife went into Mr. Humle's office and found his handwritten notes made the previous day. The reference to the conversation with Mr. Levine indicated that Mr. Saturley "was done". Mrs. Saturley showed the document to her husband and both interpreted it to mean that Mr. Saturley was finished as an investment advisor at CIBC WG. They took a photocopy of the notes before they left the office.

[39] On Sunday, October 12, Mr. Saturley sent a detailed e-mail to Mr. Humle, which he copied to senior management of CIBC WG, as well as the president of CIBC. In that e-mail he reviewed the margin error and said that if proper calculations had been done the accounts would have been subject to margin deficit in early September, at which time the option positions would have been closed out, rather than in October when the market was lower. He advised that his clients wanted to hold their positions until CIBC WG made a decision on compensation, and that if they were not compensated in full, they would go public with their concerns. Mr. Saturley recommended full restitution to the clients and that all positions which had been closed out on Friday be reopened.

[40] On Thanksgiving Monday, October 13, Mr. Saturley began recording telephone calls and meetings with CIBC WG representatives because of concerns that he was being set up to take responsibility for the losses which had been suffered. On that day he was not feeling well and went to the hospital emergency department where he was diagnosed as suffering from exhaustion and stress. Mr. Saturley was put off work by his doctor for the balance of the month of October due to illness.

[41] On the evening of October 13, Mr. Saturley spoke to Mr. Sawler again. He told him that he expected to be fired but did not explain why. They discussed the compensation issue and Mr. Saturley said that he was looking out for the interests of his clients. The next day Mr. Saturley told Mr. Sawler that another client, Gayle Crooks, was leading a client group to deal with CIBC WG concerning the losses.

[42] During the week of October 14 - 18, 2008, Mr. Humle and Mr. Levine contacted Mr. Saturley's clients to recommend closing out their option contracts. During this period, clients contacted Mr. Saturley at home. In some cases, they questioned Mr. Saturley about the advice they were receiving from CIBC WG to close out their option positions. There were discussions between Mr. Saturley and clients with respect to the margin calculation error and the implications. By the end of that week, CIBC WG had decided that it did not want clients to receive mixed messages and directed Mr. Saturley not to have any further client contact. If any clients called him, he was told to have them contact Mr. Humle. Mr. Saturley's remote access to the CIBC WG office systems was suspended during his medical leave.

[43] During the week of October 14-18, 2008, CIBC WG established a working group of senior management employees to oversee the margin calculation error and determine the course of action to be followed with respect to potential compensation.

[44] In mid-October, formal written complaints were received from three clients (Pace, Sceles and Sawler). On October 15th, a group of clients led by Gayle Crooks met with representatives of CIBC WG and demanded compensation for losses arising from the EEM error. There were ongoing communications with Ms. Crooks on the compensation issues and, ultimately, a class action was commenced against CIBC WG seeking compensation for the EEM margin error, with Ms. Crooks as the representative plaintiff.

[45] During the latter half of October, 2008, Mr. Humle had many conversations with clients concerning their accounts, some of whom asked about the margin calculation error. Many were concerned with the losses in their accounts and had questions about what should be done. The nature of the working relationship between the clients and Mr. Saturley was often discussed.

[46] The CIBC working group had regular meetings by telephone starting around October 16, 2008. The initial focus was to deal with Mr. Saturley's clients who were affected by the margin calculation error. Mr. Humle participated in the meetings and provided an update with respect to his discussions with clients.

[47] On October 28, 2008, Mr. Saturley presented a note from his doctor indicating that he was able to return to work for up to two hours per day until November 21, 2008. He was advised by CIBC WG that the investigation into EEM option activity was ongoing and that he should remain on leave until this was completed. As of October 29, the items being considered by the working group included the possibility of a class action by investors, risk to the firm's reputation and suitability of the EEM option trading strategy for Mr. Saturley's clients.

[48] As of the end of October, 2008, CIBC WG had decided to address the margin calculation issue by reversing all EEM option trades in client accounts which had taken place after the stock split in July 2008. Clients were informed of this decision, and the process of reviewing accounts and cancelling the individual

trades took place through the month of November, 2008. This resulted in a total cost to CIBC WG of approximately $38 million.

[49] As part of the investigation, CIBC WG examined Mr. Saturley's strangle strategy for EEM option trading. They considered whether clients were aware of the associated risks as well as the suitability of the investments for them. They assessed Mr. Saturley's monitoring of the strategy and whether it was adequate. Mr. Humle reported that in some of his discussions with clients, there were "red flags" that suggested Mr. Saturley might have been exercising discretion with respect to the option trading.

[50] In November, 2008, the Compliance Department of CIBC WG became involved to investigate Mr. Saturley's dealings with the three clients who had made written complaints. They also considered other clients where Mr. Humle had reported indications of possible discretionary trading. William Lyons and Lee Morita were the representatives of the Compliance Department most directly involved in this investigation. The Compliance review included specific transaction records for the clients in question, as well as a broader examination of Mr. Saturley's trading practices. Mr. Saturley's telephone and e-mail records were also reviewed.

[51] Mr. Saturley was requested to attend an interview in Toronto with Compliance Department representatives on November 14, 2008. He was advised that the interview would cover the three written complaints, as well as his general business and trading practices. At his request, he was allowed to read the

complaint letters in advance of the meeting, but was not given copies. He was not given access to any other CIBC WG files or records, despite his request for this.

[52] By this time, the CIBC WG working group had obtained Mr. Saturley's employment file from the human resources department, and had asked the Compliance Department to determine if there was any evidence of discretionary trading. The working group was considering the possibility of Mr. Saturley returning to work under strict supervision. This would include the requirement for branch management to approve all trades in advance and the recording of his client telephone calls.

[53] After the November 14 meeting, Mr. Saturley followed up by e-mail on several issues, including the client complaints and transactions which had taken place on July 25 and August 20, 2008. These trading dates had been raised during the interview because they had high transaction volumes. Mr. Saturley had been asked how he was able to obtain the necessary client instructions and still process the orders in the required time. On July 25 trades were entered in over 100 client accounts and on August 20 it was more than 40. Mr. Saturley's e-mail also responded to the suggestion made at the meeting that Mr. Bennett of Oakwood Terrace had reported that Mr. Saturley was given discretionary authority over their account.

[54] Following the e-mail exchange with Mr. Saturley, Mr. Humle was asked to meet with Mr. Cowan to discuss his role on the high volume trading days. Mr. Humle reported back to the working group that he has spoken to Mr. Cowan, who

advised that he did not remember any days on which he contacted a large number of clients on Mr. Saturley's behalf. At most, it would have been 10 - 20 clients.

[55] By November 21, 2008, the Compliance Department had prepared an initial version of their investigation report. According to this draft, five clients had indicated to the branch manager that Mr. Saturley exercised discretion in their accounts.

[56] The CIBC WG Working group decided to have further client interviews carried out by representatives of the Compliance Department. Mr. Morita conducted these interviews by telephone in late November. At this stage, the working group was considering their options with respect to Mr. Saturley. They felt that their two primary choices were to have him return on strict supervision, or terminate his employment. The ultimate decision would depend upon the further client interviews by Mr. Morita and a final interview with Mr. Saturley.

[57] Mr. Morita's telephone interviews with six clients were completed by the end of November. On December 3, a further interview of Mr. Saturley took place. It was conducted by Mr. Morita and Mr. Humle was in attendance. Mr. Saturley was advised of the information obtained from the client interviews and asked about how trades in these client accounts were handled. Mr. Saturley flatly denied taking discretion in any of the client accounts and disagreed with some of the information provided to Mr. Morita by the clients. Mr. Morita and Mr. Saturley discussed the 2007 practice review and its outcome. Mr. Saturley maintained that he had specific client approval prior to entering every trade.

[58] Shortly after the interview with Mr. Saturley, the CIBC WG working group convened a conference call. At that time, Mr. Morita summarize the information obtained from the investigation including the client calls and the interview with Mr. Saturley. He did not express an opinion on whether Mr. Saturley had engaged in discretionary trading.

[59] After discussing the information from the Compliance Department investigation and Mr. Saturley's trading practices, the working group unanimously decided to terminate his employment for cause because of discretionary trading in client accounts. Shortly after the call was concluded, Mr. Morita and Mr. Humle met with Mr. Saturley and informed him that he was being fired because of discretionary trading.

EVIDENTIARY ISSUES

[60] There were many evidentiary disputes which arose through this proceeding. Most were dealt with by way of direction or decision from the bench during the trial. A few required more reflection and resulted in formal decisions. (See for example, 2012 NSSC 226 and 2012 NSSC 389). Several evidentiary issues merit specific comment in my decision.

[61] Both parties produced extensive document books which were marked as exhibits. The agreement reached with counsel was that any document referred to

by a witness would be considered to have been proven for admissibility purposes unless the other party objected at or immediately after that witness's testimony.

[62] Following the trial, counsel identified several hundred documents in the exhibit books which had not been proven and; therefore, were not to be considered as part of the trial evidence. I have ignored all of those documents for purposes of this decision.

[63] There was significant hearsay evidence introduced by both parties. Most of it involved what clients of Mr. Saturley said to CIBC WG during their investigation. It was agreed that none of this evidence was being entered for its truth, but only to explain what actions were taken as a result.

[64] For example, testimony from Mr. Humle that a client of Mr. Saturley's had explained to him how their account was handled is not admissible to show whether there was discretionary trading in that account. It could be used to explain the rationale for CIBC WG's subsequent decisions.

[65] I have ignored all such hearsay evidence for purposes of determining whether discretionary trading occurred. My decision is based upon the witnesses' trial testimony and the admissible exhibits.

FIS and Avotus Records

[66] During the trial, I determined that the FIS trading records tendered by CIBC WG should be admitted as real evidence. In my decision on that issue, I indicated that the weight to be given to the evidence would be determined at the end of the trial after considering all of the other trial evidence, as well the submissions of counsel (2012 NSSC 226).

[67] CIBC WG also tendered telephone records for their Halifax office for the period from January, 2007 through October, 2008. During trial, I concluded that the records had been adequately authenticated to be admitted as evidence. As with the FIS records their reliability and the inferences, if any, to be drawn from them was left for my determination at the conclusion of the trial (2012 NSSC 389).

[68] With respect to the FIS records, these were used by counsel for both parties in their examination of witnesses. The witnesses who authenticated the document and in particular, Mr. Archer, testified about the changes in some of the data which was imported. He also explained which information was omitted from the data incorporated in the trial exhibits. For purposes of this litigation, the client name, user identification, security particulars and date of the order entry are the most significant fields. I am satisfied that the exhibits accurately record this data for the relevant trades.

[69] In determining whether Mr. Saturley had instructions for a given trade, I have considered whether there is evidence of client contact at, or shortly before, the time that the trade was entered. Counsel for Mr. Saturley argued that if an order was amended after entry, the original details would not appear in the court exhibit. While that may be so, the entry time and date, client name, user name and security details would be accurate. There was no evidence to suggest that any relevant orders were, in fact, amended after being entered.

[70] Although I have not done a comparison of all trades in all accounts, I note that the FIS records appear to correspond with the entries in the client account records which were admitted by agreement. Neither counsel raised any apparent inconsistencies between these documents. I am satisfied that the FIS records, which were entered as exhibits, contain accurate information with respect to the orders which were entered in the client accounts identified in those exhibits.

[71] The CIBC WG telephone records were entered in electronic format. Like the FIS data, they were provided by a third party which had been retained by CIBC WG to record and archive the information. Unlike the FIS records, the evidence indicated an increased chance of inaccuracy as a result of human intervention. For example, in the initial version of the report provided to CIBC WG, a gap in the data was identified. Once this was brought to the attention of the third party provider, a further review was done, and the missing information located. In addition, during the cross-examination of the authenticating witness, counsel for Mr. Saturley pointed out several other small inconsistencies between the initial report provided and the final version.

[72] CIBC WG tendered the telephone records to establish if phone calls were made to or from Mr. Saturley's clients at the times trades were entered. In order to draw an inference that a call was not made because of the absence of a telephone record, I need to be satisfied with respect to the reliability of these exhibits. There were a number of instances where other documents made reference to phone calls being made to clients, which in turn, were reflected in these trial exhibits.

[73] Based upon the testimony of the authenticating witnesses and a comparison with other trial exhibits, I am satisfied that these records accurately capture information with respect to telephone calls being made from or received at various extensions in the CIBC WG Halifax office.

[74] Counsel for Mr. Saturley made a number of arguments with respect to why these exhibits may not refer to a specific client telephone call, such as the use of toll free numbers and the absence of identifying information on incoming calls. I will deal with these arguments when I consider the specific allegations of discretionary trading for the identified clients.

Witness' Credibility

[75] Both parties submitted that some of the witnesses called by the other were not credible. Assessing the reliability and credibility of witness' testimony can be a complex process. It involves examining the witnesses' evidence in light of the

testimony of other witnesses and the documentary exhibits. A judge should also consider whether explanations offered make sense in all of the circumstances.

[76] The witnesses' demeanour while they are testifying is relevant, but a judge must be cautious not to attach undo weight to it. Testimony in court is usually an extremely stressful experience that is foreign to the witness. As a result, they may exhibit behaviour that could be interpreted as being evasive or an indication of a lack of candour.

[77] The employees of CIBC WG who testified had their credibility challenged primarily in relation to their objectivity during the investigation of Mr. Saturley and the ADP margin error, as well as with respect to whether relevant documents had been withheld from disclosure. Much of these witnesses' activities during the investigation were at least partially documented in e-mail communication and minutes of meetings. In addition, Mr. Saturley recorded most significant interviews and phone calls that he was involved in. I found the evidence of all of these witnesses to be reliable and credible. Their testimony remained consistent despite vigorous cross-examination and was in accord with the documentary record. The CIBC WG actions during the investigation appeared quite reasonable given the volatile situation which was unfolding.

[78] Mr. Saturley's credibility is crucial to the central issue which I must decide and that is, whether he exercised discretion with respect to client accounts. All instructions were verbally given by clients with a few minor exceptions when e-mail was used. Mr. Saturley said that he had instructions from all clients prior to

placing every trade. A number of clients could not recall providing such instructions to Mr. Saturley and others said that it did not happen.

[79] I do not believe that Mr. Saturley was a credible witness. His testimony was contradicted by multiple clients and he offered explanations which were not believable. I will provide a number of illustrations.

[80] Mr. And Mrs. Saturley went to the CIBC WG office on Saturday, October 11, 2008 and took some handwritten notes from Mr. Humle's office. Mr. Saturley said that his wife had gone into Mr. Humle's office to look out the window at a condominium project which was being built on Barrington Street and that the notes caught her eye because they apparently referred to him. The reference in the notes to him is relatively obscure and would not have been apparent if one glanced quickly at the document. In addition, Mr. Humle's office was right next to Mr. Saturley's and would not have afforded any better view of the condominium site. It is far more likely that Mr. and Mrs. Saturley had decided to look in the branch manager's office to see what they could find, given the margin error issue which had blown up the previous week.

[81] In his cross-examination, Mr. Saturley denied telling clients that the margin error was CIBC WG's responsibility and that he would provide evidence to support their claims. The minutes prepared by Oakwood Terrace for the meeting with Mr. Saturley on October 10 indicate that this is precisely what he said to them. In addition, Mr. John Sawler testified that Mr. Saturley told him the same

thing earlier that morning and in a second call on October 12. Mr. Sawler made notes with respect to both of those conversations shortly after they took place.

[82] There were a significant number of telephone records entered in evidence for the purpose of showing that there was no contact between Mr. Saturley and particular clients before trades were entered. When there was no record to establish a call which should have taken place Mr. Saturley offered implausible explanations. One was that he might have called the client from a hotel room phone to set up meetings even though he had his cell phone with him and was using it to call other people. He also suggested that he might have called clients from friends' houses when he was socializing with them.

[83] The exhibits included many spreadsheets which were prepared by Mr. Saturley or Mr. Cowan. These set out particulars of option and share transactions which correspond very closely with actual trades entered in client accounts. Mr. Saturley said that these were recommendation documents which were reviewed with clients and formed the basis of their instructions. The CIBC WG theory is that these documents were never shown to or discussed with clients and were simply internal summaries of trades to be entered in client accounts. Mr. Saturley said that in most cases these recommendation documents were mailed to clients. Mr. Saturley's testimony about what happened next was inconsistent. He said that clients would call he or Michelle Harris to confirm that they wished to enter the trades shown on the recommendation sheet. When it was pointed out to him that the markets would have changed in the time period when the recommendations were in the mail, he said that he would speak with clients and update them on what

had happened before entering the orders. This evidence seemed tailored to reflect the fact that Ms. Harris was not authorized to give advice to clients which would have been necessary if the information in the spreadsheets had changed.

[84] There are several problems with Mr. Saturley's evidence concerning the spreadsheets. The first is that the assistant branch manager, Ms. Chantegreil, said that she reviewed all outgoing mail to ensure it met corporate standards and never saw any such documents. None of the client witnesses remembered getting these in the mail from Mr. Saturley, and most said that they had never seen them before. Several clients kept copies of all documents received from CIBC WG in a file at home and brought their entire original file to court. None of these files included copies of the recommendation documents.

[85] Mr. Saturley's description of the use of the spreadsheets is not consistent with the bulk of the trial evidence. It is far more likely that these were internal documents prepared by Mr. Saturley and his team for purpose of tracking trades to be entered.

[86] Mr. Saturley said that he obtained verbal instructions from all clients prior to entering trades. Mr. Levy and Mr. Sceles both testified that they provided e-mail instructions and the exhibits confirm this. Mr. Saturley was not disciplined or fired for accepting e-mail instructions contrary to CIBC WG policy, but this calls into question the veracity of his testimony that he always had verbal instructions from clients.

[87] CIBC WG had a clear written policy prohibiting the sharing of user ID's and passwords. Mr. Saturley's evidence was that he interpreted the policy to permit sharing with other staff members such as Ms. Harris and Mr. Cowan. He said that when orders were placed under his code, but there was no record of client communication with him, it was probably done by Ms. Harris or Mr. Cowan. This explanation cannot be reconciled with the clear language of the written policy. It appears as if Mr. Saturley is again trying to explain how client trades were made without any apparent client contact with him.

[88] In addition to the substantive problems with Mr. Saturley's evidence, his demeanour on the witness stand also caused me concern. On multiple occasions he paused for an inordinately long period of time before answering what seemed to be a very simple question. In cross-examination, he would occasionally ask for a question to be repeated because he did not understand it or ask for an explanation of what was meant. In some of these cases, it was difficult to believe that Mr. Saturley did not comprehend what was being asked. I accept that Mr. Saturley was being careful in providing his answers but, in my view, his behaviour went beyond what seemed reasonable in the circumstances. It appeared as if he was not trying to recall particular events, but rather was thinking about what his answers should be in light of the issues in the litigation.

[89] On the issue of discretionary trading, to the extent that Mr. Saturley's evidence is in conflict with the client witnesses, I accept the clients' evidence over his. The clients' description of the interactions with Mr. Saturley were reasonable and consistent with the documentary evidence including telephone records and e-

mails. Mr. Saturley's evidence that he always had verbal instructions was simply not believable in the circumstances.

Adverse Inferences

[90] Michael Cowan was the subject of much testimony during the trial, but he was never called as a witness. He was initially hired in the spring of 2007 to assist Mr. Saturley in processing the trading volumes. Mr. Saturley testified that Mr. Cowan was probably involved in communicating with clients for purposes of obtaining the necessary instructions in advance of trades being entered. He also said that many of the trades shown on the FIS records under his user name were probably entered by Mr. Cowan using Mr. Saturley's password.

[91] Mr. Saturley's testimony left the impression that a reasonably significant portion of the required client contact may have been through Mr. Cowan. The client witnesses who were called by CIBC WG were questioned about their knowledge of and interaction with Mr. Cowan.

[92] Mr. Cowan left his employment with CIBC WG after Mr. Saturley was fired. He resumed work with Mr. Saturley in the fall of 2010 when Mr. Saturley established his new investment advisory business, TurnPointe Wealth Management Inc. and has been employed there since that time. He was initially included on Mr. Saturley's witness list, but was not called by either party at trial.

[93] CIBC WG argues that an adverse inference should be raised against Mr. Saturley due to his failure to call Mr. Cowan as a witness to explain his role in obtaining client instructions and entering trades. The response of Mr. Saturley is that there was no need for him to call Mr. Cowan, as there was no burden on him to disprove discretionary trading. As the employer, the burden was on CIBC WG to prove its allegation of cause. Counsel for Mr. Saturley says that this required them to call evidence with respect to any potential source of client instructions, including Mr. Cowan.

[94] The circumstances in which a court might draw an adverse interest from failure to call a witness were considered by Saunders, J., as he then was, in *Scotia Fuels Limited v. Lewis* 102 N.S.R. (2d) 12. Justice Saunders summarized the applicable principles at paras. 23-25:

> 23 For reasons known only to himself, Lewis did not visit his apartment to either personally inspect the furnace or confer with the workmen. The only technician who both saw the unit and testified about his inspection was the plaintiff's burner mechanic, David Jacobs. It is telling that no employee from Bremners was called to testify on behalf of the defendant. Surely if the defendant would have the court believe that a plumber told him on December 9, 1989 that the source of the problem was the furnace and not the plumbing then the person who actually came to such a conclusion ought be called.
>
> 24 Such a failure leads me to draw an adverse inference against the defendant. It is well recognized that where a party or a witness fails to present evidence, which was in the power of the party or witness to give, then such failure justifies the court in drawing the inference that the evidence would have been unfavourable to the party to whom the failure was attributed. (See for example *Murray v. Saskatoon,* [1952] 2 D.L.R. 499, at pp. 505-506). In particular the learned author in *Wigmore on Evidence*, 3rd edition, Volume 2, pp. 162ff:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby by elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.

25 In *Levesque v. Comeau et al,* [1970] S.C.R. 1010, the plaintiff sued for damages allegedly suffered while a passenger in her husband's car while it was stationary at an intersection and rearended by the defendants' vehicle. The plaintiff alleged she suffered from deafness as a result of her injuries. She only called the physician who had examined her one year after the accident. The evidence disclosed that she had been examined by several other doctors who saw her prior to the examination by the physician who was called to testify. In delivering the majority judgment, Pigeon, J. concluded that only the plaintiff could have produced this evidence before the court and its absence meant that the court could draw an adverse inference.

> In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case... Under the circumstances, her testimony and that of her husband respecting her good state of health before the accident could properly be considered insufficient evidence for the purpose of excluding the other possible causes of the deafness.

[95] Before considering whether an adverse inference should be drawn from the failure of Mr. Cowan to testify, I will comment on Mr. Saturley's position with respect to the burden on CIBC WG. I do not agree that the defendant must call evidence to exclude every possible method by which client instructions might have been communicated through other employees of the branch. If trades are entered by Mr. Saturley, and there is no evidence that he spoke with the client, that is sufficient to raise an inference that he did not have instructions and was, therefore, exercising discretion. In that situation, Mr. Saturley has a practical

burden of providing some explanation for why this inference should not be drawn. Failure to do so is at his peril.

[96] In this case, Mr. Saturley offered a number of explanations, including that Mr. Cowan might have been obtaining client instructions and entering trades. Posing this as a possibility, of course, does not prove that Mr. Cowan was doing so for any particular trade. To the extent that Mr. Saturley argues that there is evidence to support the theory that instructions were coming through Mr. Cowan, I think that an adverse inference should be drawn from his failure to have his employee testify to this effect. I can infer that Mr. Cowan would not have provided this corroboration had he been called as a witness.

[97] To put it colloquially, Mr. Saturley cannot have his cake and eat it too. To the extent that he says that Mr. Cowan took client instructions and entered orders under Mr. Saturley's name, he should have called him to provide that evidence.

Disclosure

[98] This litigation has involved disputes over the sufficiency of disclosure by both parties from the very beginning. There have been multiple pre-trial motions dealing with these issues. This continued throughout the trial,with counsel for Mr. Saturley cross-examining each CIBC WG witness about what documents they may have had, who they were provided to and when.

[99] There are examples where both parties did not include materials in their initial litigation disclosure which were subsequently disclosed. In some cases they had not been found and, in others, they were incorrectly categorized as irrelevant. None of this strikes me as particularly unusual given the wide ranging issues in this litigation and the huge volume of potential documents.

[100] I am not satisfied that there are any remaining undisclosed documents relevant to the central issues in this case. There have been extensive motions and discovery examinations which should have unearthed these materials if they had existed.

[101] Some of the questions put to CIBC WG witnesses by counsel for Mr. Saturley may have implied that documents helpful to Mr. Saturley's defence had been intentionally destroyed or withheld. I do not believe there is any basis for such a suggestion. The Regional Director for Eastern Canada for CIBC WG, Wilhelmina Ditchfield, was aggressively cross-examined on the disclosure issue and I found her evidence to be truthful. She candidly acknowledged some disclosure problems which were subsequently rectified.

[102] None of the disclosure issues which arose during trial have any impact on the factual and legal issues which needed to be determined.

ADEQUACY OF THE INVESTIGATION AND BIAS

[103] Mr. Saturley argues that the investigation carried out by CIBC WG in October and November, 2008 was unfair and the outcome was predetermined. He says that CIBC WG had decided early on to fire him because of his role in identifying the EEM margin error. There are many aspects to this allegation and, as a result, the events unfolding during that time frame need to be examined.

[104] Once the EEM error came to light in mid October, CIBC WG immediately began an investigation in order to determine what had happened and deal with the large number of clients whose savings had been decimated. The general approach was to recommend that clients close out all of their option positions in order to stop the bleeding. CIBC WG then needed to consider the impact of the EEM error and whether the losses were the result of poor investment advice from Mr. Saturley, inadequate supervision by CIBC WG, or decisions made by the clients themselves. During the early stages of this process, CIBC WG management did not consider Mr. Saturley's employment status beyond recognizing that he was out of the office on medical leave.

[105] As of October 10, 2008, it was quite reasonable for Mr. Saturley to be concerned about whether his employment with CIBC was in jeopardy. His clients who were engaged in the strangle strategy using EEM option contracts had suffered millions of dollars in losses over the space of several weeks. Many were subject to margin calls which required them to inject further cash or liquidate

investments. As their investment advisor, Mr. Saturley should have been worried about his clients and how they might react.

[106] Within a few hours of being advised of the margin calls by the credit department, Mr. Saturley had carried out calculations and identified the ADP error. He also concluded that if margin had been properly calculated, many of his clients would have been subject to margin calls before the catastrophic decline in the markets. He took the position with clients and CIBC WG that if he had received earlier margin calls, he would have recommended that clients get out of the EEM strangle strategy completely, which meant that they would have avoided the disastrous market drop in September and October 2008.

[107] When Mr. Saturley first notified Mr. Humle of the ADP error, it was Thursday, October 9, 2008. Mr. Humle passed this information on to CIBC WG management. On the morning of Friday, October 10, 2008, Mr. Saturley sent an e-mail to Mr. Humle which recommended closing out all client EEM "put" contracts in order to limit the financial damage. This makes perfect sense when the market is falling, as a decline in the price of EEM increases the potential exposure to clients on these contracts. Mr. Humle concurred with that advice and Mr. Saturley began closing out contracts that day with the assistance of Mr. Cowan.

[108] Later in the morning of October 10, Mr. Saturley met with the executive of Oakwood Terrace Foundation, which was one of his largest clients. In an emotional meeting, Mr. Saturley informed them of the margin calculation error. He also explained that if the margin had been properly calculated, there would

have been a margin call in September and he would have recommended that Oakwood close out the EEM option contracts at that time, thereby avoiding the loss of $2.6 million. He indicated that he had documentation to illustrate the error and CIBC WG's responsibility for it, and said he would calculate the exact cost to them. Mr. Saturley advised that he and his assistants would provide any support that Oakwood needed, including testifying against CIBC WG. The possibility of a class action was discussed. With the exception of the reference to the class action, this is essentially the same offer which Mr. Saturley had made to John Sawler earlier that morning.

[109] On October 11, 2008, which was the Saturday of the Thanksgiving weekend, Mr. Saturley and his wife went into the office so that he could obtain additional client files for review. Mrs. Saturley went into Mr. Humle's office and reviewed some of the personal notes on his desk. One of those included the following:

> Discussed F.S. margin calls with H.L. - he was concerned about F.S. clients and stuff. Felt F.S. was done.

[110] Mr. Saturley was shown the note by his wife and interpreted it to mean that he was going to be fired. He took a copy but did not discuss this with anyone. The author of the note, Mr. Humle, said it reflected a comment by Mr. Levine that he was concerned about Mr. Saturley's emotional health based upon the events of Friday, October 10. In light of Mr. Saturley's breakdown at the Oakwood meeting on October 10, I think Mr. Humle's explanation is perfectly reasonable. Two days

later, Mr. Saturley was put off work by his doctor for the balance of October as a result of stress and emotional exhaustion.

[111] By October 12, Mr. Saturley had spoken to approximately ten clients, including Oakwood and Mr. Sawler. He reported in his e-mail sent to Mr. Humle that evening that clients did not want to close out their option positions and wished to continue to hold them until they received a decision from CIBC WG. This was contrary to the position expressed to Mr. Humle on October 10th that the EEM "put" contracts should be closed out to stem the losses. The October 12 e-mail included the following:

> I have been in contact with a number of very upset and distraught clients. They have informed me that, unless they are compensated in full, they will seek to make public knowledge of the financial damage they have suffered.
>
> I understand that ADP is responsible for the calculation of margin and it is my recommendation that ADP, in combination with CIBC Wood Gundy undertake to provide full restitution to clients. Quick and decisive action is required to minimize any further damage.

[112] The next day, Mr. Humle spoke to Mr. Saturley by telephone and indicated that CIBC WG was not going to reinstate the client positions which had been closed out on Friday. He said that the plan was to limit the client losses and then determine responsibility for those losses. Mr. Saturley was advised that the entire situation would be considered including the strategy, its suitability, branch supervision, and whether those responsible included Mr. Saturley, the firm and the client. Mr. Saturley said that he had already prepared detailed calculations

showing how client losses could have been avoided if they had exited the market on an earlier date.

[113] During the week of October 14-18, 2008, Mr. Humle spent significant time contacting Mr. Saturley's clients and recommending that they close out all of the option contracts and not continue with the strangle strategy. Client complaint letters appeared that week, and in addition, a group of clients led by Gayle Crooks, met with management representatives of CIBC WG. They demanded that their losses be reversed by reinstatement of their account positions to September 3, 2008. Mrs. Saturley had also sent an e-mail to Mr. Humle enquiring about a resolution for the losses in her account resulting from the margin error.

[114] It is apparent that by this point Mr. Saturley had concluded that a significant dispute between his clients and CIBC WG was a distinct possibility. He had decided that he would side with the clients and assist them in advancing their claims if needed. That is what he told Oakwood and Mr. Sawler on October 10. Mr. Saturley also felt that he and his wife had a claim against CIBC WG for $1.7 million in losses in their personal accounts.

[115] While they were trying to sort out the nature and extent of the margin error problem and find a potential solution, CIBC WG management decided that Mr. Saturley should no longer be involved in client communications. They were concerned about mixed messages being presented and also recognized that Mr. Saturley was placed on a medical leave by his doctor. In light of information coming from clients that Mr. Saturley appeared to be having discussions with them

about the margin issue, CIBC WG's responsibility for the losses and potential solutions, that seems like a very reasonable decision.

[116] Through the latter part of October 2008, significant time was spent reviewing individual client files in order to determine how each of them may have been impacted by the margin calculation error. Management assessed branch supervision practices and responded to complaints and concerns from clients. By the end of October, a decision had been made to reverse transactions in client accounts involving EEM options which had been entered after the stock split in July, 2008. The process of cancelling each of these transactions took time and was completed during November, 2008. Mr. And Mrs. Saturley's account was the last to be adjusted and this took place in December.

[117] Through the course of dealing with clients in October, 2008, Mr. Humle received information which suggested to him that Mr. Saturley may have been engaged in discretionary trading. He passed this information on to the working group dealing with the EEM issue. Mr. Saturley says that Mr. Humle is biased against him and, as a result, the information which he provided to the working group was not accurate. His argument is that Mr. Humle was attempting to divert responsibility from himself with respect to the EEM error. Another indication of Mr. Humle's alleged bias was his belief that Mr. Saturley probably knew of the EEM margin error somewhat earlier than the date on which he reported it.

[118] Mr. Humle was cross-examined vigorously by Mr. Saturley's counsel. I listened carefully to his answers, particularly in response to suggestions that he

was unfair or biased in the way he approached the investigation of Mr. Saturley's practices. I found Mr. Humle to be forthright in his answers and professional in his demeanor. He continues to believe that Mr. Saturley probably knew of the error prior to October 9, 2008. In light of Mr. Saturley's familiarity with margin calculations and the importance of margin in his option strangle strategy, it is understandable that Mr. Humle might reach this conclusion. Whether his belief is correct is not a fact in issue in this litigation and I express no comment on it. The important point is that I saw no evidence that this opinion, in any way, undermined Mr. Humle's objectivity in his approach to Mr. Saturley and the investigation.

[119] Mr. and Mrs. Saturley surreptitiously recorded many phone calls and meetings with Mr. Humle. In listening to these recordings, I observed that Mr. Humle was always polite and gave no indication of any animosity towards Mr. or Mrs. Saturley during these interactions.

[120] Mr. Saturley makes the point that Mr. Humle reported "red flags" concerning possible discretionary trading when no clients were complaining about that in any of their correspondence with CIBC WG. The simple answer is that clients were very happy with the returns that Mr. Saturley had achieved for them in the past. They may well have wanted Mr. Saturley to manage their account with little, if any, involvement on their part. The lack of formal client complaints is not of great assistance in determining whether discretionary trading took place.

[121] Mr. Saturley's theory that he was really being fired for blowing the whistle on the EEM margin error, rather than discretionary trading is not substantiated by

any evidence. I have listened to the CIBC WG witnesses who participated in the investigation and the decision to terminate, including their cross-examination by Mr. Saturley's counsel. I have also read their internal e-mails, minutes of meetings and draft investigation reports. I have listened to recordings of Compliance Department interviews with Mr. Saturley. There is virtually no reference to the EEM error in any of the documents or discussions relating to his performance or the concerns over discretionary trading. To the extent that it comes up at all, it is simply part of the background showing how Mr. Humle came to have telephone calls with so many clients and to provide a context for the complaint letters which were received.

[122] The issue of potential discretionary trading was not some sort of smoke screen designed to impede discovery of the EEM error as the true reason for firing Mr. Saturley. If that had been the case, I would have expected to find some indication of this amongst the large volume of evidence which was produced at trial.

[123] Around the beginning of November, 2008, the attention of the CIBC WG working group turned to the issue of discretionary trading. Mr. Saturley claims that during this period he was treated improperly because he was not given notice of his employer's concerns and a fair opportunity to respond. In particular, he focuses on the interviews with representatives of Compliance on November 14, 2008 and December 3, 2008. Despite his requests, he was not given any written materials in advance or access to any of his files, with the exception that he read the three client complaint letters just before the November 14 interview. This lack

of notice and access to documents was a specific strategy decision by the Compliance staff at CIBC WG. They wanted to obtain a spontaneous response from Mr. Saturley rather than give him advance notice and an opportunity to think about his answers.

[124] There was a belief among CIBC WG management that Mr. Saturley had been communicating with clients even though he had been directed not to do so. This was based upon information being received by Mr. Humle from clients. The Compliance interviewers decided not to give Mr. Saturley copies of the complaint letters because they were worried that he might contact those clients to discuss their complaints.

[125] Prior to the November 14 interview, Mr. Saturley was permitted to read the complaint letters, but was not given copies. He was advised that the purpose of the meeting was to discuss the client complaints as well as his general business and trading practices. The interview involved Mr. Saturley, Bill Lyons and Lee Morita and lasted approximately four and a half hours.

[126] In addition to the three client complaints, Mr. Saturley answered questions concerning his understanding of discretionary trading, his discipline history, as well as the risks associated with his option strangle strategy. Mr. Saturley described how he would receive instructions and confirmed that he would speak with clients before placing an order, through some combination of phone calls, meetings and e-mails. Mr. Saturley indicated that any e-mail instructions would be confirmed by telephone before they were acted upon. He confirmed that he

never exercised any discretionary authority for any client, even if the client had requested it. He said to do so would be to put his "neck in a noose".

[127] The discussion at the November 14 meeting included several days on which there were very large trade volumes in client accounts over a relatively short period of time. Mr. Saturley was asked to describe how he could have managed all of the required client contact and still processed the orders in a timely fashion. He outlined how he and his assistant, Michael Cowan, would coordinate that process. A few days after the interview took place, Mr. Saturley provided, by e-mail, additional information and explanation concerning the topics discussed at the meeting. With respect to the client complaints and his trading practices, Mr. Saturley indicated that with access to his files, he could likely provide a more detailed response; however, his general position was clear that he never engaged in discretionary trading.

[128] The final interview by Compliance took place on December 3, 2008. Mr. Saturley was told that the meeting would deal with further information that had been obtained by Compliance from interviews with clients. Mr. Saturley was not given any information, in advance, concerning what the clients may have said.

[129] During the December 3 interview, which was conducted by Mr. Morita, there was a general discussion concerning what constitutes discretionary trading. As in the earlier interview, Mr. Saturley confirmed that he did not engage in discretionary trading for any clients at any time. He was told about the Compliance interviews with Robert Cooke, Oakwood Terrace, Kerry Burgess,

John and James Sawler and Steven Pace. Mr. Saturley provided his response to the information obtained from each of the clients and confirmed that he did not engage in discretionary trading.

[130] It is clear to me that if Mr. Saturley had been provided with additional particulars concerning the information obtained by the Compliance investigation prior to his interviews, he might have been able to give more detailed responses to the questions being asked. CIBC WG adopted a strategy of non-disclosure in order to obtain spontaneous responses from Mr. Saturley. This practice could mean that an employee is not in a position to give comprehensive answers to specific concerns. In such a situation, the employer may make a disciplinary decision without having all of the facts. If that were to occur, an employee might successfully challenge a termination for cause by providing reasonable explanations for the alleged misconduct.

[131] The approach taken by CIBC WG with Mr. Saturley carried some risks. On the one hand, the employer was concerned that advance notice would give Mr. Saturley an opportunity to talk to clients and provide prepared answers. On the other hand, it meant that Mr. Saturley might be unable to provide information which could ultimately satisfy the CIBC WG concerns. In my view, either approach is open to an employer, although non-disclosure leaves open the possibility that a fired employee might successfully sue for wrongful dismissal. That is the chance taken by CIBC WG in this case, and I must consider whether they have met the burden of proving just cause, in light of the more complete

information now being provided by Mr. Saturley. For reasons outlined in more detail elsewhere in this decision, I believe that they have.

[132] In my view, there was no bias on the part of the CIBC WG employees who carried out the client interviews and investigation. The failure to provide Mr. Saturley with advance notice of allegations, prior to being interviewed, does not prevent CIBC WG from attempting to prove just cause for his termination.

DISCRETIONARY TRADING

[133] The primary focus of the trial was whether CIBC WG was able to meet the burden of establishing that Mr. Saturley improperly exercised discretion in managing client accounts. Twelve clients were identified as ones where discretion was alleged. CIBC WG claimed that Mr. Saturley generally exercised discretion in these client accounts, which I took to mean that he was managing them with only limited direction from the clients. In their evidence and submissions, CIBC WG focused on sample transactions, rather than dealing with every single item found in the client account statements.

[134] There was a similar pattern of evidence relied upon by CIBC WG with respect to each client. The FIS trading records and account statements were used to establish when orders were placed. The documentary evidence reliably provides this information. The date and time of placement establishes the window within which client instructions must have been obtained. Once an investment advisor receives client instructions, they are required to enter the order as quickly

as possible. Failing to do so could be an indication of the exercise of time discretion.

[135] CIBC WG produced telephone records for Mr. Saturley's home, his cell phone and his office extension. In addition, they produced records for the office extensions of Ms. Harris and Mr. Cowan and, in some cases, client home and cellular telephones. The purpose of this evidence was to show an absence of any telephone communication during the period when instructions should have been received.

[136] CIBC WG also called the subject clients as witnesses (with the exception of Dr. Chehil, whose discovery examination transcript was filed, and David Rhind) to describe their dealings with Mr. Saturley. In some cases, they testified about trips or other events which would have precluded them from having a conversation with Mr. Saturley at the relevant time.

[137] Through this evidence, CIBC WG argued that they had established on a balance of probabilities that each client did not communicate instructions to Mr. Saturley within a reasonable period immediately before the particular trade order was entered. In these circumstances, this would at least amount to the exercise of time discretion on the part of Mr. Saturley since he was the one determining when the order was entered. For some trades, it might go further and establish that the client never provided instructions on the other details of the order.

[138] Most of the transactions referred to by CIBC WG were option contracts and frequently they were part of the strangle strategy, which meant that there were matching orders placed at the same time. For these securities, it would be necessary for the client to provide instructions with respect to the subject shares, the number of contracts, the strike price for both the put and the call, and the month of expiry. According to the FIS records, almost all of the transactions in question were identified as "solicited", which means that they were based upon recommendations by Mr. Saturley to the client, which makes sense given the complexity of the strangle strategy. Mr. Saturley confirmed this when he described his normal trading practices.

[139] I will now consider the evidence in relation to each of the clients for whom discretionary trading is alleged:

Marie Aisthorpe

[140] Ms. Aisthorpe lived in Newfoundland and in March, 2007 her husband died suddenly, leaving her with two young children to care for. In June of 2007, she received the proceeds of her husband's insurance policy and, on the recommendation of a friend, decided to invest it with Mr. Saturley. Her initial deposit to her CIBC WG account was in excess of $600,000.00.

[141] Her first face-to-face meeting with Mr. Saturley was on July 3, 2007, at which time she signed various account documents. The meeting lasted thirty or

forty minutes and she was very emotional. She wanted Mr. Saturley to have "carte blanche" in everything related to her investments.

[142] She spoke to Mr. Saturley's secretary (Michelle Harris) four or five times a year on administrative issues. She never discussed trades with her. She did not know who Michael Cowan was and could not recall any contact with him in 2007 or 2008. Over those two years, she believes she met with Mr. Saturley three or four times and spoke to him by telephone three or four times, for a maximum of eight contacts over two years. She said that she never called Mr. Saturley to discuss trades. In cross-examination, Ms. Aisthorpe did not change her evidence concerning the extent of her contact with Mr. Saturley in 2007-2008.

[143] Ms. Aisthorpe described Mr. Saturley as her "godfather" who looked after her family. Mr. Saturley did not bother her and she did not bother him. She had no interest in discussing investments with Mr. Saturley.

[144] On the morning of August 13, 2007, twenty-five trades were entered in Ms. Aisthorpe's account, ten of which were option contracts. The next day, she took her family to Nova Scotia for a two week vacation. She does not recall any telephone calls with Mr. Saturley concerning the trades entered on August 13, 2007.

[145] The Avotus telephone records for August 13 do not show any calls from the extensions for Mr. Saturley or Ms. Harris to Ms. Aisthorpe. Mr. Saturley's extension shows several incoming calls prior to the time at which the trades were

placed; however, the telephone number of the person initiating the call is not identified in those records. Ms. Aisthorpe' home telephone records do not show any call to Mr. Saturley, although if she telephoned his toll free number it would not be included in the information provided by the Bell Aliant witness. Ms. Aisthorpe testified that she did not provide Mr. Saturley with her cell phone number until October, 2007.

[146] On the morning of October 22, 2007, Mr. Saturley entered orders for five option contracts on behalf of Ms. Aisthorpe. That afternoon, Mr. Saturley sent Ms. Aisthorpe an e-mail, indicating that he had tried to call her but her voice mail was full and asking her to give him a call at her convenience. She responded shortly after 3:00 p.m., providing him with her cell phone number and indicating that she had been out. She testified that she is certain that she did not speak to Mr. Saturley prior to that e-mail exchange. The Avotus telephone records show a thirty second call to Ms. Aisthorpe's home telephone number from Mr. Saturley's extension at 11:10 a.m. on October 22. This is immediately after the last of the five option orders was placed at 11:08 a.m. on that date.

[147] The telephone records are consistent with Mr. Saturley's e-mail indicating that an attempt had been made to call Ms. Aisthorpe on October 22, and that it was not successful. Given that the recorded length of the call was thirty seconds, it is very unlikely that any substantive discussion could have taken place, and it is more likely that this was an unsuccessful attempt that was put through to voice mail. In any event, it was not made until after the trades had taken place. As a

result, Mr. Saturley did not obtain instructions from Ms. Aisthorpe prior to entering the October 22 orders.

[148] On December 24, 2007, Mr. Saturley entered in excess of 150 trades for various clients, including seven for Ms. Aisthorpe, five of which were option contracts. These orders were placed shortly before noon. Ms. Aisthorpe testified that she was working on a job site until mid-afternoon that day and then went home to prepare for Christmas. She does not recall any discussions with Mr. Saturley concerning the orders placed on that date. The Avotus records for Mr. Saturley's extension show five outgoing calls, none of which are to Ms. Aisthorpe, and four incoming calls prior to the orders being placed.

[149] I find it highly unlikely that Ms. Aisthorpe would have initiated a call to Mr. Saturley on her cell phone from a job site on Christmas eve and not recall having done so. In any event, I am satisfied that she only would have called if she had received some request to do so. There is no evidence of any telephone call from Mr. Saturley or Ms. Harris which might have prompted a return call. I am satisfied that Mr. Saturley did not obtain instructions from Ms. Aisthorpe on December 24, 2007 prior to placing the seven orders on that date.

[150] In February, 2008, Mr. Saturley entered twenty-nine orders in Ms. Aisthorpe's account on four different days. Seven orders were placed the day before Ms. Aisthorpe's daughter's birthday. She has no recollection of any discussions with Mr. Saturley relating to these trades.

[151] In April, 2008, she went to Cuba on vacation for two weeks. She stayed at the Gander Hotel on April 1 and left the next day. During this vacation she turned off her cell phone. On the morning of April 4, 2008, Mr. Saturley entered orders for two option contracts in Ms. Aisthorpe's account. She testified that she did not discuss any trades with Mr. Saturley while she was away on vacation. I am satisfied that Mr. Saturley did not obtain timely instructions from Ms. Aisthorpe prior to placing the trades on April 4, 2008.

[152] In October, 2008, Ms. Aisthorpe took a trip to Florida for ten days and was there on October 6, which is her birthday. At 8:28 a.m. on that date, Mr. Saturley entered an order for an option contract in Ms. Aisthorpe's account. According to Ms. Aisthorpe's cell phone bill for October, 2008, she made nine telephone calls from Florida to Canada while she was on vacation, none of which were to Mr. Saturley's office or any other location in Nova Scotia. None of Mr. Saturley's office extension, home telephone and cell phone records show any call made by him to Ms. Aisthorpe while she was in Florida. I am satisfied that he did not have timely instructions from her prior to placing the trade of October 6, 2008.

[153] According to the FIS records in 2007 and 2008, there were more than forty sessions when orders were placed by Mr. Saturley in Ms. Aisthorpe's account. Most of these involved several orders being entered at the same time. In some cases there were multiple sessions in one day. For example, on August 13, 2007, fifteen orders were placed starting at 10:15 a.m., and at 11:17 a.m. another seven orders were entered. Mr. Saturley could not have received Ms. Aisthorpe's instructions for all of the trades entered on August 13, 2007 at the same time or

else he would have been exercising time discretion by failing to enter the second batch of orders for an hour. This means that he would have to have had two separate discussions with Ms. Aisthorpe that day.

[154] If Mr. Saturley was not engaged in discretionary trading, he would have had in excess of forty consultations with Ms. Aisthorpe concerning trading instructions in 2007-8. I accept Ms. Aisthorpe's evidence that this did not take place, and that the amount of contact was less than half of the required interactions. I am supported in this conclusion by the specific examples noted above where Mr. Saturley did not discuss trading instructions with Ms. Aisthorpe. In addition, there is a dearth of telephone records that correspond with the trading sessions. I accept that it is possible that Ms. Aisthorpe may have made a call to Mr. Saturley on the toll free number, and that this might not have generated a record in either phone system. I do not believe that she would have initiated any of those trading calls on her own, and she would have been prompted to contact Mr. Saturley only if asked to do so by he or Ms. Harris. There is virtually no evidence of any such communication proceeding the trading sessions.

[155] I am satisfied that CIBC WG has proven that Mr. Saturley generally exercised discretion in managing Ms. Aisthorpe's account.

Sandra Saunders (Britten)

[156] Ms. Saunders was a music teacher, who began dealing with Mr. Saturley after she and her husband separated. During 2007 and 2008, she taught at the

Maritime Conservatory of Music, as well as Acadia University. She also conducted music lessons at her home.

[157] Ms. Saunders testified about her normal teaching schedule. For the most part, this schedule was constant although there would be changes from time to time. In her direct examination, she was referred to several trades in her account where she indicated that she would normally have been giving lessons at the time of the trade. In cross-examination, she acknowledged that for several of these trades, there was nothing in her calendar to indicate that she was teaching even though there were such entries on other dates.

[158] Ms. Saunders had difficulty remembering dates and even years. For example, she was not sure what year she stopped teaching at Acadia.

[159] Ms. Saunders said that she probably had two to three phone calls with Mr. Saturley each year. She could not recall if Mr. Saturley called her to discuss investments. It was her hope to have little involvement in the day-to-day management of her account. She would not have made decisions on what to buy because she had no knowledge. She felt that Mr. Saturley was looking after her investments and that she made no decisions. Mr. Saturley did not make any recommendations to her, but rather made the decisions with respect to the investments to be made in her account.

[160] On cross-examination, Ms. Saunders acknowledged that her recollection of dates was very poor and, therefore, could not say whether there was a discussion

with Mr. Saturley on a particular date. If Mr. Saturley had started to discuss investments with her, she would have told him not to bother.

[161] According to the FIS records, there was not a lot of activity in Ms. Saunders' account, particularly in comparison with other clients. In 2008, there were approximately twenty-five trades spread out over nine trading sessions.

[162] Given Ms. Saunders' memory difficulties and her lack of interest in discussing her account or receiving recommendations from Mr. Saturley, it is quite possible that there were discussions and recommendations from Mr. Saturley that she simply does not remember. Her evidence that there could not have been discussions with Mr. Saturley because of her normal teaching schedule was undermined to some extent in cross-examination.

[163] Ms. Saunders' evidence that she received no recommendations from Mr. Saturley and made no decisions concerning her account seems somewhat inconsistent with her testimony that she would initiate meetings with him from time to time. It seems logical that the purpose of the meeting would have been to discuss her account and that in its context Mr. Saturley would have provided advice and recommendations. Ms. Saunders may well have told him to go ahead with whatever he thought she should do, which would amount to approval of the recommendations being made.

[164] In light of the relatively low volume of trading and the unreliability of Ms. Saunders' evidence, I am not satisfied that CIBC WG has met the burden of

proving on a balance of probabilities that Mr. Saturley exercised general discretion over Ms. Saunders' account.

D. K. Chehil

[165] Dr. Chehil did not testify at the trial; however, I gave CIBC WG permission to use his discovery transcript pursuant to *Civil Procedure Rule 18.20(4)* as a result of his inability to testify due to poor health. In considering what weight to give to his discovery evidence, I have kept in mind that he was eighty years old at the time and was observed by his daughter to be anxious about the examination. He was not represented by legal counsel and the questioning by counsel for CIBC WG was extremely leading. If CIBC WG had called him as a witness at trial, I would not have permitted them to phrase their questions in that manner.

[166] The circumstances surrounding Dr. Chehil's discovery examination has lead me to conclude that I should put diminished weight on his evidence. By this, I mean that I will try to discern the underlying intent of Dr. Chehil's answers in the context of the entire examination, rather than rely on the specific terminology used by counsel for CIBC WG in the propositions which were put to him in the form of questions.

[167] My assessment of Dr. Chehil's evidence is that he had regular meetings with Mr. Saturley. As a baseline, they met every second month, and more often if the situation warranted. Mr. Saturley would make recommendations to him and he would approve it. Generally, he left the details of individual transactions to Mr.

Saturley. For example, he left it completely to Mr. Saturley to determine how many option contracts to buy or sell and at what price. The first information that he would have about the particular details of an option contract was when he received his monthly account statements. If Mr. Saturley stayed within the general parameters of their regular discussions, Dr. Chehil was satisfied that he could make whatever decisions were suitable.

[168] Dr. Chehil was managing a number of investment accounts for himself and his family. He was the one responsible for providing instructions to Mr. Saturley with respect to all of these accounts. According to the FIS records, there were fifty-five trading sessions on the Chehil accounts in 2007-2008. This would have required fifty-five separate contacts for purposes of providing instructions to Mr. Saturley. It is apparent that there could not have been that many face-to-face meetings in light of Dr. Chehil's testimony. That leaves the possibility of telephone calls which Dr. Chehil acknowledged did occur from time to time. This description does not suggest a frequency of calls sufficient to cover all of the required trading contact; however, a more detailed examination is needed.

[169] Between September 10, 2007 and October 1, 2007, Mr. Saturley entered orders on the Chehil accounts on nine different occasions. I am satisfied that if Mr. Saturley had instructions from Dr. Chehil for each of these trading sessions, the majority of those instructions would have come by way of telephone rather than face-to-face meetings. The first order in the sequence was entered by Mr. Saturley at 4:00 p.m. on September 10, 2007. According to the Avotus records, phone calls were being made to and from Mr. Saturley's office. There were no

outgoing calls to Dr. Chehil and the last incoming call prior to the time of the trade was at 2:00 p.m. and it lasted one minute. Even if the call was from Dr. Chehil, Mr. Saturley should have entered the order sooner than two hours later.

[170] The next series of trades were entered on September 21, 2007, beginning at 1:41 p.m. According to the Avotus records, there were calls being made to and from Mr. Saturley's office extension. None of the outgoing calls are to Dr. Chehil. There is an incoming call at 1:32 which lasts for one minute, which could conceivably be Dr. Chehil although that does not seem to be much time to provide instructions on four option contracts.

[171] On September 24, 2007 at 9:39 a.m., Mr. Saturley entered another order in the Chehil account. According to the Avotus records, there are no outgoing calls to Dr. Chehil prior to the order being placed, and there is a one minute and twenty-four second call incoming at 9:18 a.m.

[172] The next trade took place on September 25, 2007 when Mr. Saturley entered two orders starting at 12:23 p.m. According to the Avotus records, there were calls being made to and from Mr. Saturley's extension and none of the outgoing calls were to Dr. Chehil. The only incoming call of any length prior to the placement of the orders was for three minutes and thirty-eight seconds at 11:37 a.m. If this was Dr. Chehil, the order probably should have been entered sooner than 12:23 p.m.

[173] There were two trades entered by Mr. Saturley on September 26, 2007 at 11:26 a.m. There were calls being made to and from Mr. Saturley's extension that day; however, none were to Dr. Chehil prior to placement of the order. The only incoming call of any length was for twelve minutes and six seconds at 10:36 a.m. which is fifty minutes before the order was entered.

[174] Mr. Saturley entered a trade on behalf of Dr. Chehil on September 28 at 9:43 a.m. There was also a series of five trades entered at 2:44 p.m. that date. According to Mr. Saturley's Outlook calendar, there was a scheduled appointment with Dr. Chehil at 11:00 a.m. that day. According to the Avotus records, there were no calls made to or from Mr. Saturley's extension prior to the first trade being entered, other than a four second incoming call. The only incoming call in the hour proceeding the second group of trades lasted forty-four seconds. There were no outgoing calls to Dr. Chehil.

[175] Mr. Saturley entered three trades on the Chehil accounts on October 1, 2007. Two were entered starting at 11:03 a.m. and one at 12:43 p.m. According to the Avotus records, there were calls being made to and from Mr. Saturley's extension on that date. None of the outgoing calls were to Dr. Chehil. The last incoming call prior to the first trade was at 9:42 and lasted eighteen minutes. The last incoming call prior to the second trade was at 11:55 a.m. for three minutes and thirty seconds.

[176] When I consider this sample time period in light of Dr. Chehil's testimony, it seems quite unlikely that all of these trades were specifically authorized by Dr.

Chehil. Although there may be undocumented meetings, on the one day when Mr. Saturley's Outlook calendar shows a scheduled meeting with Dr. Chehil, the two trading sessions do not correspond with the time of the meeting. Even if the meeting time had been changed and it corresponded with one of the trading sessions, there would still have to have been a second contact by way of telephone to authorize the remaining trades. On the other days when trades were placed, there was activity on Mr. Saturley's extension and, on many days, this included calls to his home phone number. There is not a single reference to an outgoing call to Dr. Chehil and so any phone authorization would have to have been initiated by Dr. Chehil himself. None of the incoming calls correspond very closely with the trade times. They are generally an hour or more in advance and in some instances of very short duration. Although Mr. Saturley indicated that he would sometimes speak to clients on his cell phone, I do not believe that he did so while he was sitting in his office, particularly since he had been told by CIBC WG earlier in 2007 that he should use his work telephone for client contact.

[177] When I consider the results of the sample trading period, as well as Dr. Chehil's testimony concerning the frequency of contact with Mr. Saturley and his testimony that he left it to Mr. Saturley to determine the number of contracts and the price to be paid, I am satisfied that Mr. Saturley generally exercised discretion with respect to the Chehil accounts during the period 2007-2008.

Roy Hersey

[178] Mr. Hersey is sixty-five years old and in 2007-2008 spent most of the year at his home in New Westminister, British Columbia. He also owned a home in Digby, Nova Scotia where he would spend time each year. When he came east, he would also stay at his partner's cottage in upstate New York.

[179] In 2007-2008, he was in British Columbia from December until June, at which time he went to New York State until August and then on to Digby. When he was in Digby, he would spend time at his camp.

[180] Mr. Hersey's evidence was not precise with respect to dates. It is clear that during 2007-2008 he spent December to June at his home in British Columbia. He then travelled east and visited his partner in upstate New York, arriving in Digby at some point during the summer. Although he said that he spent a month in Digby, he also referenced the fact that he spent time hunting at his camp in Nova Scotia, and that the hunting season lasted from late October to December. It would appear that he spent more than a month in Nova Scotia, and likely began the return trip to British Columbia in mid to late fall.

[181] Mr. Hersey had telephones in both his Nova Scotia and British Columbia residences, as well as a cell phone. He used his cell phone for all long distance calls, as well as when he was travelling and at his hunting camp in Nova Scotia (although he would turn it off when he was actually hunting).

[182] Mr. Hersey also had an e-mail account which he checked sporadically. In Digby and British Columbia, he would use public internet sites to check his e-mail. When he was in New York, he did not check it at all.

[183] Mr. Hersey had dealt with Mr. Saturley for many years. His normal practice was that Mr. Saturley would recommend investment products and Mr. Hersey would accept that advice. Although he felt that he understood the information Mr. Saturley gave him as part of the recommendations, at trial Mr. Hersey was unable to explain how option contracts worked.

[184] In 2007-2008, Mr. Hersey met Mr. Saturley once in each year while he was in Nova Scotia. The meetings were in Mr. Saturley's office. During these meetings, Mr. Saturley reviewed his investments and recommended changes. Mr. Hersey agreed with those recommendations. When he was not in Nova Scotia, he would speak to Mr. Saturley on his cell phone. Either he would initiate the call to Mr. Saturley or Mr. Saturley would call him.

[185] Mr. Hersey said that he had no involvement in running his account between meetings with Mr. Saturley. Michelle Harris was Mr. Saturley's assistant and he would call her to set up an appointment or to deal with documentation. He did not discuss trading with her. He does not know who Michael Cowan is.

[186] When he called Mr. Saturley, he would use the telephone number on his business card or the toll free number. He did not call Mr. Saturley at home.

[187] Mr. Hersey's cell phone records were introduced in evidence. According to these, he was in Digby during October and November, 2007, since all of the calls were initiated from Digby. The first call which was initiated from British Columbia is on November 30, 2007.

[188] There were a number of trades entered by Mr. Saturley in Mr. Hersey's account in October, 2007. On October 23, orders for nine option contracts were entered by Mr. Saturley, beginning at 11:56 a.m. According to Mr. Hersey's cell phone records, he called the CIBC WG toll free number at 8:36 that morning. An incoming call at that time is found in the Avotus records for Ms. Harris' extension. Mr. Hersey also called the toll free number at 9:56 a.m. on October 24 and there was a corresponding entry in Avotus at Ms. Harris' extension. Although the Avotus records do not identify the number for the incoming call, I am satisfied that these were the calls placed by Mr. Hersey because of the corresponding time stamps.

[189] The Avotus records show a call from Mr. Saturley's extension to Mr. Hersey's cell phone on October 23 at 12:12 p.m. which lasted one minute and six seconds. This call is made in the middle of the order entering process. Five option contracts were placed prior to the call and four afterwards. Although this call could certainly have been for purposes of obtaining instructions for the four contracts which were subsequently placed, it could not cover the proceeding five contracts. Mr. Hersey's call several hours earlier, which was routed to Ms. Harris' extension and lasted less than a minute, could not have provided instructions for

the five trades placed by Mr. Saturley at noon. I am satisfied that Mr. Saturley exercised discretion with respect to the trades placed prior to the telephone call to Mr. Hersey's cell phone at 12:12 p.m.

[190] On November 6, 2007, twenty option contracts were entered in Mr. Hersey's account between 11:27 a.m. and 11:42 a.m. Half were entered by Mr. Cowan and the others by Mr. Saturley. Mr. Hersey's cell phone records show that the only call which he made that day was at 1:09 p.m. The Avotus records show many calls to and from Mr. Saturley's extension on November 6th . None of the outgoing calls are to Mr. Hersey. There was an incoming call at 11:25, which lasted three minutes. As with other such calls, the number of the person calling is not identified. It is obviously not Mr. Hersey calling from his cell phone. It is possible that this was a call initiated by Mr. Hersey from his home telephone in Digby. The records for that account were provided; however, according to the Bell Aliant witness, they would not record calls made to toll free numbers. Although I cannot exclude the possibility that Mr. Hersey initiated a call for purposes of providing instructions to Mr. Saturley from his home phone in Digby, that seems very unlikely. First of all, four minutes is not much time to receive recommendations and make decisions with respect to that number of option contracts. Secondly, Mr. Hersey's evidence was that he used his cell phone to call Mr. Saturley and there are examples when he did this in his phone records.

[191] I would note that Mr. Saturley's home telephone records show three calls to Mr. Hersey on the evening of November 6 at 8:25, 8:26 and 8:27. One was to Mr.

Hersey's Digby home number and two to his cell phone. All were less than one minute in duration.

[192] In December, 2007, Mr. Hersey was in British Columbia according to his testimony as well as his cell phone records. Various trades were entered in his account by Mr. Saturley during that month. Mr. Hersey did not call Mr. Saturley at all during December on his cell phone, which is the method he would have used. If he had called the toll free number, there would still be a reference in his cell phone records as was the case for October 23 and 24. I have reviewed the Avotus records for the extensions of Ms. Harris and Mr. Saturley on the trade dates, as well as Mr. Saturley's cell phone and home phone records. There is no reference to any calls made to Mr. Hersey during that month.

[193] I am satisfied that Mr. Saturley exercised discretion and did not have timely instructions in relation to the multiple trades which he entered in Mr. Hersey's account on December 12, 13 and 27, 2007.

[194] According to Mr. Hersey's evidence, as well as his cell phone records, he remained in British Columbia until early June, 2008. This is also consistent with his testimony at trial when he said that he left for his trip east in June.

[195] According to Mr. Hersey's telephone records, he made three calls to Mr. Saturley in January, 2008, none of which were on January 22 when two trades were placed in his account by Mr. Saturley. Mr. Saturley entered trade orders on three different dates in February, 2008 and there was no record of any telephone

communication with Mr. Hersey in the Avotus records or Mr. Saturley's home telephone records. His cell phone records for this period were not included in the exhibits.

[196] By late July, 2008, Mr. Hersey was in Digby. On July 29, Mr. Saturley entered sixteen orders in his account. There is no reference to any telephone communication surrounding this trading, although Mr. Hersey had indicated that he visited Mr. Saturley at his office once that year to review his investments. The only other trade entered that summer was on August 18 for a mutual fund. Given the possibility that the July 29 trading may have been as a result of a face-to-face meeting, I am not prepared to conclude that CIBC WG has met the burden of proving that this was a discretionary trade.

[197] Overall I am satisfied that there are a number of examples where Mr. Saturley exercised discretion over Mr. Hersey's account during the period 2007-2008, and that this is sufficient to prove the allegation of a general exercise of discretion.

Wayne Levy

[198] Mr. Levy resides in Prince Edward Island and is retired from a thirty-seven year career with the Canadian Imperial Bank of Commerce. He is familiar with option trades and could be described as a knowledgeable investor. He kept copies of all documents received from CIBC WG.

[199] In his initial discussions with Mr. Saturley, they agreed on a strategy of writing covered calls which meant that he would sell call options on stock that he owned. If these options expired without being called then Mr. Levy said Mr. Saturley had instructions to automatically sell a new option. He left it to Mr. Saturley to decide on the number of contracts and the strike price.

[200] Mr. Levy said he did not get any recommendations from Mr. Saturley on options because the strategy had already been agreed upon. He estimated that he spoke to Mr. Saturley by telephone ten to fifteen times over 2007-2008. He did not see any written spreadsheet recommendations from Mr. Saturley.

[201] Mr. Levy described travelling to Saskatchewan with the P.E.I. golf team in August, 2007. He left on August 10, 2007 and returned early on August 15. He did not have any communications with Mr. Saturley concerning trading during that time period.

[202] Mr. Levy regularly reviewed his account online and if he saw that a call option had expired and a new one had not been sold, he would send an e-mail to Mr. Saturley and it would be done.

[203] He has never heard of Michael Cowan and did not deal with him.

[204] Mr. Levy was an avid golfer and had a regular game with a group of friends every week during the season. He maintained a record of his scores and was able to confirm the dates on which he golfed. There were two occasions when trades

were placed in his account during the time when he believes he was golfing. He did not take his cell phone with him and would have not discussed trading with Mr. Saturley from the golf course. It is possible that he may have spoken to him from home before he left.

[205] On July 30, 2007, there was an e-mail exchange between Mr. Levy and Mr. Saturley. It was initiated by Mr. Levy who was asking for advice about whether to reinvest $58,000.00 in cash which was in his RRSP account. Mr. Saturley's e-mail response was to recommend the purchase of seven different stocks for a total cost of $56,500.00. Mr. Saturley's e-mail included the following statement:

> The market was down sharply last week. Putting the cash to work now should be fine with the covered options set up.

[206] Mr. Levy responded by e-mail at 2:42 p.m. on July 30 and said:

> Sounds good to me Fredrick.

[207] At 10:14 a.m. on July 31, 2007, Mr. Saturley entered the orders for the stock purchases approved by Mr. Levy by e-mail the previous day. At 12:14 p.m. on July 31, Mr. Saturley entered orders for covered call options on the newly purchased shares. These option contracts are not referenced in the e-mail exchange of July 30. The Avotus phone records for Mr. Saturley's extension show calls made to and from that phone on both July 30 and 31. None are made to Mr. Levy. The last incoming call to Mr. Saturley's extension prior to the placement of the covered call options which lasted longer than a minute was at 10:39 and its

duration was one minute and twelve seconds. I do not believe that this was a call from Mr. Levy to obtain recommendations and provide instructions for the purchase of the options. In any event, it was almost two hours prior to the orders being placed which would likely amount to time discretion.

[208] I am satisfied that the option transactions entered on July 31, 2007 are an example of Mr. Saturley exercising discretion with respect to the sale of covered options. The e-mail exchange corresponds with Mr. Levy's description of his relationship with Mr. Saturley. Mr. Saturley was responsible for determining the particulars of the covered call options to be sold and, in fact, he was to do so without further instruction or discussion with Mr. Levy.

[209] Another example where this occurred was in October, 2007. By e-mail sent at 5:00 p.m. on October 12, 2007, Mr. Saturley recommended that Mr. Levy purchase shares in seven companies. By e-mail Mr. Levy approved this recommendation after the close of markets on Friday, October 12, 2007. Mr. Saturley responded that he would place the orders on Monday when the markets were open, which he did.

[210] Although the e-mail exchange made no reference to options, Mr. Saturley immediately entered orders for the sale of covered calls on all of the shares once the purchase transactions were complete. The option contracts were entered starting at 10:57 a.m. on October 15. There was only one in-coming call which lasted longer than a minute made to Mr. Saturley's extension prior to the entry of the covered call options and it was at 10:14 with a duration of one minute and fifty

seconds. I believe that it is extremely unlikely that this was Mr. Levy calling to obtain recommendations and approve the covered call options. His evidence was that he gave Mr. Saturley blanket instructions to automatically process these transactions with discretion to determine the parameters, such as strike price and expiry date.

[211] Mr. Levy discussed a number of other occasions were trades were entered in his account which he did not believe were discussed with Mr. Saturley. For example, on November 5, 2007, he was at his brother's in Dartmouth and Mr. Saturley entered two trades in the account that afternoon. He does not recall discussing those with Mr. Saturley.

[212] In March, 2008, Mr. Levy and his wife were out of the country on a cruise and nine trades were placed in his account on the morning of March 28 when he was away. He did not have his cell phone with him on the cruise and has no recollection of discussing these with Mr. Saturley.

[213] In late January, 2008, a rather curious exchange occurred between Mr. Saturley and Mr. Levy. By e-mail sent on January 25, 2008, Mr. Levy requested certain specific covered calls be entered in his account. In his e-mail, Mr. Levy identified all of the necessary requirements for the options, including which shares, the strike price and expiry date. By e-mail sent at 12:52 p.m. on Monday, January 28, 2008, Mr. Saturley acknowledged his instructions and said that he would proceed. Beginning at 10:50 a.m. on January 29, 2008, Mr. Saturley entered a series of covered call contracts in Mr. Levy's account, none of which

were the ones that Mr. Levy had requested. They involved the same shares, but the strike price and expiry date was not the same. While it is possible that Mr. Saturley simply made a mistake, it seems more likely to me that he determined that it would be best to enter into different covered call contracts in light of the delay from the time of Mr. Levy's initial instructions. This would seem to be another example of Mr. Saturley exercising his own discretion with respect to a client's account.

[214] Although Mr. Levy clearly provided certain instructions to Mr. Saturley, particularly with respect to the purchase of shares, I am satisfied that he gave Mr. Saturley authority to exercise discretion concerning the selling of covered call contracts. Mr. Saturley, despite not being licenced to do so, accepted that authority and managed the account in that fashion. CIBC WG's allegation of the exercise of general discretion over Mr. Levy' account has been proven.

Thomas Mabey

[215] Father Mabey is a Catholic priest, retired from the faculty of the Atlantic School of Theology. He started dealing with Mr. Saturley in 1999. He met Michelle Harris to deal with administrative issues and has no recollection of any contact with Michael Cowan.

[216] Father Mabey met with Mr. Saturley at this office every three to four months. These meetings were set up at the initiative of Father Mabey. He recalls

receiving occasional calls from Mr. Saturley to discuss changes in his investments. These calls were not frequent.

[217] Father Mabey recalls discussions with Mr. Saturley concerning options, but cannot remember any specifics. He has not seen any documents like the written recommendation spreadsheets which were referred to at trial. He cannot recall any specific discussions with Mr. Saturley concerning trades in 2008.

[218] Father Mabey gave Mr. Saturley authority to make whatever investments he considered to be prudent.

[219] Father Mabey does not have specific recollections of any given meeting or phone call, nor the particular investments which were discussed. According to his evidence, there would have been approximately four face-to-face meetings between them from October, 2007 to October, 2008. The timing and frequency of these meetings would have been determined by Father Mabey. In addition to the meetings, there was some undetermined number of phone calls between them. Some of these would have been made by Mr. Saturley to him and some were initiated by Father Mabey.

[220] I have examined the FIS trading records for Father Mabey's account. Based upon the number of trading sessions between October, 2007 and October, 2008, there should have been twelve interactions between Father Mabey and Mr. Saturley for purposes of obtaining instructions. This total is not dramatically

different than what you would expect based upon the evidence of Father Mabey at trial.

[221] There are some references to meeting with Father Mabey in Mr. Saturley's Outlook calendar, but it appears that not all such meetings are documented there. The Avotus records indicate several calls made to Father Mabey, some of which occurred on trading days. We do not know when Father Mabey's calls to Mr. Saturley were made.

[222] In light of the relatively low number of contacts which should have taken place over the space of twelve months and the missing information concerning meetings and phone calls, I am not satisfied that CIBC WG has established discretionary trading in Father Mabey's account. His statement that he gave Mr. Saturley authority to make investments he considered appropriate is not sufficient by itself to prove unauthorized discretion. It is equally consistent with a situation where Father Mabey agreed with every recommendation proposed by Mr. Saturley without any real independent analysis on his part.

David Rhind

[223] Mr. Rhind did not testify at trial and therefore I have no direct evidence from him concerning the nature and extent of his dealings with Mr. Saturley. While it would be possible to compare FIS trading records with Avotus telephone records and conclude that the necessary contact did not exist, I am not prepared to do so. There are a number of ways that client instructions could have been

conveyed to Mr. Saturley which might not be captured by the documentary evidence. Since the evidentiary burden is on CIBC WG to prove unauthorized discretionary trading, I conclude that this allegation as it relates to Mr. Rhind must fail.

Albert Maroun

[224] Dr. Maroun is a retired Physics professor and a Roman Catholic priest. He has a home in Sydney, as well as a cottage in Big Pond, Cape Breton. Mr. Saturley was his investment advisor since 2004.

[225] Dr. Maroun had a significant amount invested with CIBC WG. For example, his account statement as of April 30, 2008 has a value of just under $2.5 million. His account statements show regular trading activity. In addition to buying and selling stocks, he sold options and participated in Mr. Saturley's strangle strategy.

[226] In order to appreciate the nature and extent of the contact required between Mr. Saturley and Dr. Maroun, it is useful to look at some of the trading activity in his account. Between October 1 and 4, 2007, there were thirteen trades entered which would have required four separate contacts. Between October 30 and November 8, 2007, there were thirty-six trades on five different days which would have required five contacts. In December, 2007, there were seventy-two trades in

eight trading sessions. Between February 13 and 22, 2008, twenty-nine trades were entered in eight separate sessions which would have required eight contacts.

[227] Mr. Saturley and Dr. Maroun described their interactions with respect to trading instructions very differently. Dr. Maroun said that Mr. Saturley had complete control of his accounts and that he took no role in trading. He left that to Mr. Saturley and did not approve any trades. He did not discuss any particular trades with Mr. Saturley and Mr. Saturley made decisions with respect to which securities to buy and at what price. Dr. Maroun testified that he had heard the name Michael Cowan but did not know who he was.

[228] Dr. Maroun said that when Mr. Saturley came to Sydney, they would have lunch and go over his account, and this would happen one or two times per year. Over the period of 2007 and 2008, he only spoke with Mr. Saturley by phone four to six times. These were only for purposes of arranging appointments and they never discussed trades. He was shown copies of spreadsheets with his name on them setting out recommended trades and said that he had never seen such a document prior to the trial.

[229] Mr. Saturley, on the other hand, said that Dr. Maroun approved all trades in advance. He said that recommendation sheets were mailed to him and he would call to approve those trades. Approximately twenty such recommendation sheets were included in the trial exhibits. Since the recommendations were mailed in advance of the trades taking place and the market prices for the securities were

constantly fluctuating, he would review the new price at the time Dr. Maroun called with instructions.

[230] Mr. Saturley also said that he met with Dr. Maroun when he was in Cape Breton, including at dinner parties hosted by other clients. He said that he would meet with Dr. Maroun after dinner to discuss his account and get instructions. Mr. Saturley said that he telephoned Dr. Maroun from his home as well as on his cell phone to discuss investments and to set up meetings.

[231] Copies of Dr. Maroun's home and cell phone records were entered in evidence, as were Mr. Saturley's home and cell phone accounts, as well as the Avotus records for his office. There are sporadic references to calls made by Mr. Saturley to Dr. Maroun, several of which appear to relate to meetings in Mr. Saturley's Outlook calendar. For example, on June 25, 2007, a call was made to Dr. Maroun's cell phone and a meeting is also shown in Mr. Saturley's appointment book. On February 22, 2008, a call was made from Mr. Saturley's office to Dr. Maroun's cell phone and on February 25, a meeting was scheduled with Dr. Maroun in Sydney. On September 8 and 9, 2008, calls were made from Mr. Saturley's cell phone to Dr. Maroun's cell phone and a meeting was scheduled for September 9.

[232] With one exception, there was no trading activity in Dr. Maroun's account on days where a meeting appears in Mr. Saturley's appointment book or Outlook calendar.

[233] If Dr. Maroun authorized trades at meetings, they must be ones which were not recorded in Mr. Saturley's appointment book or Outlook calendar. He says that there were such meetings, particularly associated with social events with Dr. Maroun. Mr. Saturley testified that one possible reason for the lack of any telephone records setting up these meetings was that he would place these calls from a hotel phone, rather than use his cell phone. I found this explanation completely implausible given that his cell phone records show constant use, even when he is out of the country. There are several examples where he appeared to call Dr. Maroun on his cell phone shortly before a meeting was scheduled. Mr. Saturley offered no reasonable explanation as to why he would choose to use a hotel phone for business purposes.

[234] Mr. Saturley said that written recommendations were mailed to Dr. Maroun, who then called to provide instructions. If Dr. Maroun called the toll free number, which he indicated that he did, it would not turn up on his home phone records and that would explain the absence of any entry in Dr. Maroun's phone records to corroborate the call. Dr. Maroun's testified that he never saw any of these written recommendations and did not call Mr. Saturley to provide trading instructions. There was also the testimony of Ms. Chantegreil, the assistant branch manager, who indicated that she reviewed all outgoing mail to ensure that it complied with CIBC WG requirements. When shown one of the written recommendations, she said she would not allow such a document to leave the office because it did not contain the necessary disclaimers. I do not believe that her review would have missed every recommendation sheet allegedly sent to Dr. Maroun. I am satisfied

that Dr. Maroun was never sent the recommendation sheets and, as a result, would not have been prompted to call Mr. Saturley with instructions.

[235] In addition to Dr. Maroun's evidence that he did not provide instructions to Mr. Saturley and simply left him to make decisions with respect to trading in his account, there were several specific dates when he said he had commitments that would have prevented him from having contact with Mr. Saturley at a time when the instructions must have been given. For example, on December 31, 2007, Dr. Maroun's appointment book indicated that he performed two funerals in Donkin and Glace Bay. In light of the timing of the funerals, he testified that he would have left home at 8:30 a.m. and not returned until 4:30 p.m. According to the FIS records, there were fifty-four trades entered in his account that afternoon. He said that he had no discussions with Mr. Saturley that day, and I am satisfied that he did not.

[236] On October 1, 2007, Dr. Maroun had medical appointments at 1:30 and 2:20 p.m. He said that he left home by 1:00 and was gone for two to three hours. Nine trades were entered in his account during the period when he was away from home at appointments. He did not discuss these with Mr. Saturley.

[237] On December 12, 2007, Dr. Maroun had appointments at 11:00, 1:00 and 2:00, and two trades were entered in his account at the end of the day. He would not have been home and did not discuss these with Mr. Saturley.

[238] On January 23, 2008, Dr. Maroun's appointment book indicated that he was at the Cedars Club after 3:00 p.m. A trade was entered in his account later that afternoon and he did not discuss it with Mr. Saturley.

[239] On March 17, 2008, Dr. Maroun had a 2:00 p.m. meeting at the Cedars Club. There were three trades entered in his account later that afternoon and he did not discuss these with Mr. Saturley.

[240] There were a number of other examples where Dr. Maroun indicated that he would not have been available to discuss trades with Mr. Saturley. There were also several series of days where there would have had to have been multiple contacts in order for proper instructions to have been given. He has no recollection of dealing with Mr. Saturley with that degree of frequency.

[241] I accept Dr. Maroun's testimony concerning the arrangements he made with Mr. Saturley for management of his account. To some extent there are documentary records that confirm his testimony. For example, there does not appear to be much, if any, trading activity associated with any of the face-to-face meetings found in Mr. Saturley's records. If trading instructions had been provided at those meetings, there should have been orders entered immediately following the meeting. Mr. Saturley's explanation for the lack of documented phone calls and the mailing of written recommendations are simply not credible.

[242] In light of the dramatically conflicting evidence between Mr. Saturley and Dr. Maroun, it is not surprising that Mr. Saturley attempted to challenge the

reliability and credibility of Dr. Maroun's testimony. As part of this, he called Ms. Mary Martin as a rebuttal witness. Ms. Martin was his client, as well as a friend of Dr. Maroun. She described two or three times a year having dinner with Mr. Saturley and Dr. Maroun where the two of them would have private discussions. She does not know what they spoke about. She also described an incident in which Dr. Maroun said that he felt Mr. Saturley had lied to him and would have to "pay for it". Dr. Maroun denied saying anything to that effect.

[243] Ms. Martin's evidence concerning the dinners was consistent with what Dr. Maroun had said. She was not able to give any evidence with respect to what was discussed in the private conversations between Mr. Saturley and Dr. Maroun. She also indicated that she was out of the country between December, 2007 and March, 2008 and, therefore, no dinners took place during that time frame. That was a period in which there was a fairly high level of trading activity in Dr. Maroun's account.

[244] With respect to Ms. Martin's evidence concerning Dr. Maroun's anger at Mr. Saturley, I do not believe that this undermines his credibility to any extent. It is obvious that all of Mr. Saturley's clients who suffered significant losses in the fall of 2008 were upset at what had happened. Some of them may well have felt let down by Mr. Saturley and CIBC WG. Ms. Martin, for her part, thinks that everyone at CIBC WG is a liar as a result of what she was told during that time frame. Whether or not Dr. Maroun said the words attributed to him by Ms. Martin, I do not think that he was on a vendetta to harm him by providing false testimony. I believe that Dr. Maroun was honest and straightforward in providing

his evidence concerning his dealings with Mr. Saturley in relation to trading instructions.

[245] I conclude that CIBC WG has proven that Mr. Saturley exercised general discretion in the management of Dr. Maroun's account.

Donna Moore

[246] Ms. Moore retired from nursing in July, 2006 to care for her husband who was suffering from severe dementia. He went into care on April 8, 2007 and died on June 18, 2010. After May 22, 2007, he was at the Mount Hope building, which is part of the Nova Scotia Hospital complex in Dartmouth.

[247] When her husband was at Mount Hope, Ms. Moore would typically visit him between 11:00 a.m. and 1:00 p.m. each day during 2007. She would also be there any time someone came to visit. By the summer of 2008, the frequency of her visits were reduced to three or four times per week.

[248] Ms. Moore and her husband had dealt with Mr. Saturley for a number of years. In 2007-2008, she met once or twice a year at Mr. Saturley's office to discuss investment strategy. She was familiar with the strangle strategy which Mr. Saturley was utilizing. Mr. Saturley made the decisions with respect to when to place orders and what expiry dates to select. He was responsible for picking the trades to be entered in her account and she had no involvement. She spoke to Mr.

Saturley by telephone no more than twice per year. She had no reason to call him and she never called him at home or on his cell phone.

[249] She did not see any of the written spreadsheets containing investment recommendations prior to commencement of the trial.

[250] Ms. Moore testified that she never discussed trades with Mr. Saturley by telephone. The only time she called him was to arrange a meeting. According to the FIS records on November 6, 2007, thirty-seven trades were entered in her account over three trading sessions. When she was asked about this, she said that she did not recall speaking to Mr. Saturley concerning these trades and she certainly would have remembered it given the minimal contact they had. She made a similar comment when referred to the twenty-seven trades which were placed over three days in February, 2008.

[251] On July 21, 2008, Ms. Moore was in Moncton with her mother who had undergone surgery on July 18. On that same date a trade was entered in her account. She did not discuss this with Mr. Saturley prior to the entry of the trade.

[252] According to the FIS records, there were twenty-three separate trading sessions in Ms. Moore's account over 2007 and 2008. Each of these would have required her to give specific instructions to Mr. Saturley. Ms. Moore says that she never discussed trades by telephone and only had one or two meetings per year with Mr. Saturley. The Avotus records show one or two calls a year made to Ms. Moore, which is consistent with her evidence concerning the frequency of contact.

She said that she never initiated calls to Mr. Saturley, except possibly to set up a meeting.

[253] Ms. Moore displayed a good recollection of her dealings with Mr. Saturley, and understood how the strangle strategy better than most of the other client witnesses. I do not believe that she would have forgotten twenty-three points of contact with Mr. Saturley over two years in which she gave him trading instructions. More importantly, her evidence was that Mr. Saturley made the decisions concerning her account investments and that was the reason for the lack of contact. I accept her evidence as being reliable and, as a result, CIBC WG has established the allegation of general discretion with respect to the management of Ms. Moore's account.

Oakwood Terrace Foundation

[254] This organization was one of Mr. Saturley's largest client accounts. They had been clients of Mr. Saturley's at CIBC WG since 2003. They were governed by a board of directors and had established both executive and finance committees. Mr. Saturley regularly attended finance committee meetings.

[255] In 2007-2008, there were forty-four trading sessions in the Oakwood Foundation account which would have required an equivalent number of contacts with Mr. Saturley for purposes of providing instructions.

[256] Mr. Antony Taylor was the administrator at Oakwood since December, 2007. He was part of the finance committee and attended their monthly meetings. He also ran the weekly executive committee meetings and he kept their minutes. He had no authority to give trading instructions to Mr. Saturley which had to come from Messrs. Bennett, Schofield or Murray.

[257] During 2008, he met with Mr. Saturley in the spring, as well as September and the end of October. Mr. Saturley attended the quarterly investment strategy meetings. He recalls that the meetings with Mr. Saturley would be primarily about performance of the investments, rather than the investment strategy. Mr. Taylor cannot recall individual trades being discussed at meetings. It was up to the finance committee to decide the specifics of what to buy or sell.

[258] James MacDougall was the accountant at Oakwood since 2006. He was a member of the finance committee. He gave no instructions to Mr. Saturley with respect to trades. The quarterly meetings attended by Mr. Saturley were high level discussions about performance and not individual transactions. He does not recall any individual trade approvals being given.

[259] Albert Bennett is a member of finance, as well as the executive committee. Mr. Saturley would call him to suggest an investment and Mr. Bennett would discuss it with finance committee members and call him back. He was not authorized to make investment decisions by himself. The finance committee met every Tuesday from 11:00 to 3:00 and he would take Mr. Saturley's recommendations to the group at that time.

[260] Mr. Bennett recalls seeing spreadsheets containing investment recommendations. Mr. Saturley would call him at home or on his cell phone.

[261] Mr. Bennett said that he and Mr. Saturley may have discussed individual trades but he could not recall.

[262] Mr. Saturley said that he called Mr. Bennett at his home, at Oakwood and on his cell for purposes of obtaining instructions.

[263] Mr. Saturley attended periodic meetings at Oakwood to review the performance of the investment portfolio and to provide strategy recommendations. It is not clear if individual trades were specifically discussed at those meetings. In addition, he had a number of telephone calls with Mr. Bennett in which recommendations were given. Mr. Bennett cannot recall if specific individual transactions were discussed, but acknowledged that they may have been.

[264] Mr. Bennett's testimony left me with the impression that there was relatively regular contact with Mr. Saturley and it may have included discussions with respect to particular transactions. When I examined the Avotus records, they indicate relatively few calls made by Mr. Saturley to Mr. Bennett or Oakwood. There are clearly not enough recorded calls through the Avotus system to provide the necessary instructions for the trades which were done in the Oakwood account. There are entries in Mr. Saturley's cell phone records which would account for a few more calls, but still it would fall short of the necessary number of contacts.

Mr. Saturley's home telephone records do not record local calls and so there could have been undocumented calls which he made to Mr. Bennett or Oakwood.

[265] As previously noted, Mr. Bennett's testimony may be consistent with Mr. Saturley being given instructions for the trades entered in the Oakwood account over 2007 and 2008. He did not testify about the frequency of calls with Mr. Saturley and the telephone records do not seem sufficient to substantiate the required number of contacts; however, the majority of calls could have been made by Mr. Saturley from his home, in which case these would not be documented.

[266] Keeping in mind the burden of proof on CIBC WG to prove their allegations of cause, I am not satisfied that they have presented sufficient evidence to prove discretionary trading in the Oakwood Terrace Foundation account.

Sawler/Brookdale Holdings

[267] Harold and Kathleen Sawler were longstanding clients of Mr. Saturley's. They had a number of investment accounts with him in their personal names, as well as a holding company, Brookdale Holdings Limited. As of December 31, 2007, the total holdings in all accounts was approximately $10 million.

[268] Harold Sawler died in 2011 at the age of ninety-four. At the time of trial, Kathleen Sawler was seventy-five years of age and in declining health. For this reason she did not testify.

[269] James and John Sawler, sons of Kathleen and Harold Sawler, were called by CIBC WG as witnesses at trial.

[270] James Sawler lives in Dartmouth and was not active in managing his parents' accounts. This was being done by his parents and Mr. Saturley. He recalls one meeting that he attended between his parents and Mr. Saturley in the summer of 2008 and does not remember discussion of specific trades.

[271] John Sawler lives in Toronto. He had trading authority on his parents' accounts. Two or three times a year he would speak with Mr. Saturley about how the accounts were doing, but cannot recall the specific conversations. He had the impression that Mr. Saturley had trading authority on his parents' accounts.

[272] Mr. Saturley had helped set up a family trust and John Sawler spoke to Mr. Saturley about the investment strategy for the trust account.

[273] John Sawler testified that he saw some recommendation spreadsheets prepared by Mr. Saturley. He believes it was mainly in 2004 when option trading started in the Brookdale account. His father had day-to-day management of the account.

[274] In 2007 - 2008, his father's health was declining, especially with respect to mobility. He had previously suffered a stroke. His father was reluctant to speak on the telephone because of the stroke. He was unable to have a detailed financial discussion with him by telephone.

[275] CIBC WG did not call any evidence about the nature or frequency of meetings or telephone conversations between Mr. Saturley and Harold Sawler, who had been actively managing the account. Through the evidence of John Sawler, CIBC WG tried to create the impression that Mr. Sawler's health was such that it was unlikely he would have engaged in financial discussions with Mr. Sawler by telephone. While that might have been John Sawler's opinion, his testimony does not go terribly far in proving that fact. Mr. Saturley may have met in person with Mr. and Mrs. Sawler, and reviewed trades with them. Mr. Saturley did not provide much evidence concerning his dealings with the Sawlers, although the burden of proof did not lie on him.

[276] Over all, I am not satisfied that CIBC WG has met the onus of proving discretionary trading in the Sawler/Brookdale accounts.

Edgar Sceles

[277] Mr. Sceles is a chartered accountant and retired business management consultant. In 2003, he opened an account with Mr. Saturley at CIBC WG. He started trading in uncovered options in 2006.

[278] Mr. Sceles testified that Mr. Saturley recommended trades to him. These recommendations and Mr. Sceles' response would usually be by e-mail. There was an occasional telephone call that could have included trading instructions. In all likelihood, there was less than twelve telephone calls over the life of the

account. There were somewhere between four and six face-to-face meetings with Mr. Saturley.

[279] Mr. Sceles was referred to a number of e-mails setting out recommendations from Mr. Saturley. For example, on July 11, 2007 at 3:30 p.m., Mr. Saturley sent Mr. Sceles an e-mail recommending that he sell call options on three stocks which he owned. There was no recommendation with respect to strike price or expiry date. Mr. Sceles described this recommendation as being typical for Mr. Saturley. There was no evidence as to what response, if any, Mr. Sceles made.

[280] On Friday, August 8, 2008, there was another e-mail exchange between Mr. Sceles and Mr. Saturley. Mr. Saturley was recommending the sale of a strangle strategy involving EEM. Through the exchange, he provided a recommendation with respect to the expiry date, number of contracts and the spread for the strangle. There was no specific mention of the option premium but he said that $37,000 would be generated. At 4:56 p.m. on August 8, Mr. Sceles provided his e-mail instructions to proceed. At 1:00 p.m. on Monday, August 11, 2008, Mr. Saturley entered the options required for the strangle strategy at market price. Although Mr. Sceles' e-mail was sent at 4:56 p.m. on August 8, 2008, there was no information with respect to when Mr. Saturley actually received or read it, and so it is not clear if time discretion was being exercised by him.

[281] CIBC WG policy did not permit investment advisors to receive instructions by e-mail and it appears that Mr. Saturley was doing so; however, that is not the allegation of cause being advanced in this litigation. The fact that he might have

been receiving instructions by e-mail does not mean that Mr. Saturley was engaged in discretionary trading.

[282] The e-mail of August 8, 2008 from Mr. Saturley also made a general recommendation to sell more covered calls on Mr. Sceles' existing holdings for purposes of generating an estimated $10,000. No particulars such as strike price or expiry date were given. On August 11, 2008, Mr. Saturley entered a number of trades for option contracts in Mr. Sceles' account with a range of expiry dates which resulted in about $8,000 in income.

[283] Mr. Sceles testified that he was leaving for vacation on August 9, from which I infer that he had no further communications with Mr. Saturley about the trades which he authorized by e-mail on the August 8. There was no reason to speak with Mr. Saturley prior to the orders being placed since up to mid-September, 2008 Mr. Sceles said that all instructions had been given by e-mail.

[284] With respect to the EEM strangle implemented on August 11, I am satisfied that Mr. Saturley had instructions to enter the orders at market price even though this was not expressly stated in the e-mails. By contrast, no particulars of the covered call contracts were mentioned and so I am satisfied that Mr. Saturley exercised discretion with respect to those trades which were entered in Mr. Sceles' account on August 11, 2008.

[285] My impression from the testimony of Mr. Sceles was that, for the most part, he did provide instructions to Mr. Saturley for the trades entered into. In most

cases it was by e-mail. He monitored the investments in his account fairly closely and was in regular contact with Mr. Saturley. Without a complete record of Mr. Sceles' e-mail account, I cannot infer a lack of timely instructions for any particular trade with the exception of the covered call contracts entered by Mr. Saturley on August 11, 2008. It is clear from the e-mail exchange on August 8 and 11, as well as Mr. Sceles' testimony, that he did not give the required instructions on all of the elements of those orders.

JUST CAUSE FOR TERMINATION OF EMPLOYMENT

[286] Mr. Saturley vehemently denies taking discretion for any client at any time. As a fallback position, he says that if the court finds that CIBC WG can prove discretionary trading in some instances, this does not amount to cause for termination of his employment. He submits that, at most, it might justify a less severe form of discipline.

[287] There are three aspects to this alternative argument and they are as follows:

i) CIBC WG was aware of Mr. Saturley's trading authority and condoned it.

ii) Any examples of discretionary trading were not discovered until after Mr. Saturley was fired and cannot be relied upon by CIBC WG to justify his dismissal.

iii) Firing Mr. Saturley was not consistent with CIBC WG treatment of other employees who breached corporate policies.

Condonation

[288] Where an employee has engaged in misconduct, they may be able to avoid disciplinary consequences where they can show that the employer had condoned that conduct. Whether there has been condonation is a question of fact and the burden of proof lies on the employee. The British Columbia Supreme Court in *Nardulli v. C-W Agencies Inc.* 2012 BCSC 1686 considered the issue of condonation by an employer and outlined the applicable principles as follows:

> 304 Just cause may be rebutted by evidence of condonation by an employer. In *McIntyre v. Hockin* (1889), 16 O.A.R. 498 at 501-502 (C.A.), the Ontario Court of Appeal explained condonation:
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> > When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away. ... If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new. No doubt the employer ought to have a reasonable time to determine what to do, to consider whether he will dismiss or not, or to look for another servant. So, also, he must have full knowledge of the nature and extent of the fault, for he cannot forgive or condone matters of which he is not fully informed. Further, condonation is subject to an implied condition of future good conduct, and whenever any new misconduct occurs, the old offences may be invoked and may be put in the scale, against the offender as cause for dismissal.

> 305 The most common type of condonation is where an employer is aware of the employee's misconduct, but does nothing and continues to employ the employee: *Jalan v. Inst. of Indigenous Government et al.*, 2005 BCSC 590 at para. 74. But, as described in *Poirier v. Wal-Mart Canada Corp.*, 2006 BCSC 1138, condonation may take other forms:
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> > 49 Condonation may take various forms, such as a failure to address alleged misconduct ...
> >
> > 50 Condonation has also been found where, the employer fails to discipline other employees engaging in similar conduct (*Varsity Plymouth Chrysler (1994) Ltd. v. Pomerleau* (2002), 5 Alta. L.R. (4th) 187, 2002 ABQB 512); the employer provides the employee in question with favourable performance reviews (*Van Aggelen v. I.C.G. Liquid Gas Ltd.*, [1988] B.C.J. No. 2066 (S.C.); Geluch v. Rosedale Golf Assn., [2004] O.J. No. 2740, *supra*); or, the employer fails to warn the employee in question (*Baumgartner v. Jamieson* (2004), 37 C.C.E.L. (3d) 120, 2004 BCSC 1540; *Geluch v. Rosedale Golf Assn., supra*).
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> 306 Whether the employer has condoned the conduct of an employee is a question of fact. The employee bears the onus of proving condonation: *Connolly v. General Motors of Canada Ltd.* (1993), 50 C.C.E.L. 247 (Ont. Ct. Jus. Gen. Div.) at para. 40.
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> 307 The employee may meet this onus in the following ways: (i) adduce evidence that the employer intended to condone his misconduct; (ii) demonstrate that the evidence justifies inferring, as a finding of fact, that the employer intended to condone the misconduct; or (iii) show that, under all the circumstances, it would be "most unjust" to allow the employer to keep the employee in its employ for a long period of time and later rely on the misconduct as grounds for dismissal; a finding of condonation in the form of waiver or estoppel: *Connolly* at paras. 40-45, cited with approval in *Kennedy v. Canam Marketing Ltd.*, 2006 BCSC 1507 at paras. 31-32..

[289] CIBC WG oversaw the trading practices of investment advisors in a number of ways. The assistant branch manager, Christine Chantegreil, testified that each day she would review the daily commission run which was a summary of all trades

entered by licenced staff in the Halifax office on the prior day. The purpose was primarily to ensure that the trades were suitable for the clients. If she had any questions, she would raise them with the advisor and review the "Know Your Client" forms in the person's file to determine their risk tolerance.

[290] For some clients, a monthly review was also carried out. It would be requested by head office and would usually be triggered by a large number of trades in the account. This review required completion of a form by branch management and the advisor. It might involve branch management contacting the client to obtain information. According to CIBC WG policy, branch management is to have contact with each client at least once per year.

[291] In the spring of 2007, Mr. Humle completed a more detailed review of Mr. Saturley's portfolio, which included telephone interviews with 23 clients and discussions with Mr. Saturley. The issues dealt with were suitability of the strangle strategy, obtaining client instructions and timely entering of orders. Mr. Humle concluded that Mr. Saturley had spoken with clients before entering trades and that orders were placed as expeditiously as he was able to do although not always immediately after the client conversation.

[292] It is fundamental to a finding of condonation that the employee prove that the employer was aware of the misconduct. Here, there is no evidence that CIBC WG knew that Mr. Saturley was engaged in discretionary trading and permitted it to continue. CIBC WG takes the issue of discretionary trading very seriously and would not have condoned it if brought to their attention. This is indicated by the

testimony of Wilhelmina Ditchfield, as well as the Compliance Bulletin issued in June, 2006 which states:

DISCRETIONARY TRADING

Discretionary trading is one of the most common violations of industry rules and is considered to be a serious offence. The use of discretion by an Investment Advisor may create exposure from both a regulatory and civil litigation standpoint. Investment Advisors who exercise discretion may be subject to both internal and regulatory sanctions and disciplinary action.

There are many different types of discretion including:

- Security;
- Quantity;
- Price; and
- Time.

Each of the above noted elements of an order must be discussed with the client and agreed upon before the order may be executed. If it has been left up to the Investment Advisor to determine any one of these elements of the order without prior consultation with the client, discretion has been exercised. In order to avoid the use of discretion, all orders must be entered immediately and in accordance to the specific terms agreed upon with the client.

An Investment Advisor may only exercise discretion under the following conditions:

1. The client has opened a Simple Discretionary Account pursuant to the policies and procedures outlined in the CIBC Wood Gundy Compliance Manual;

> 2. The client has opened an IA Managed Account pursuant to the policies and procedures outlined in the Advisor Managed Account Guide.
>
> Each of these accounts has specific documentation requirements, investment restrictions, and supervisory obligations. For more information, contact Wealth Management Compliance.

[293] This Bulletin was given to Mr. Saturley by Mr. Humle in May, 2007 after a discussion about what activities might constitute discretionary trading.

[294] It is apparent that CIBC WG management was aware of the nature and volume of trades being placed by Mr. Saturley, and in 2007 this raised concerns with respect to possible discretionary trading. After reviewing Mr. Saturley's practices, management was satisfied that Mr. Saturley had not behaved improperly, but implemented certain administrative changes to help him manage the volume of trades. The evidence falls far short of proving that CIBC WG had knowledge of and approved any discretionary trading.

Post-Termination Evidence of Cause

[295] As pointed out by counsel for Mr. Saturley, much of the evidence relied on at trial in support of the allegation of discretionary trading was not known at the time of termination. Examples include the telephone records for Mr. Saturley's clients and the extensions at the CIBC WG office. Some of the client testimony at trial included information which was unknown at the time the decision was made to fire Mr. Saturley. Many of the client witnesses were not interviewed by CIBC

WG during the fall of 2008 as part of the investigation which led to Mr. Saturley's termination. Counsel for Mr. Saturley argues that the employer cannot rely on this subsequently obtained information to prove just cause for termination.

[296] The issue of after-acquired cause was considered by Kelly, J. in *Miller v. Fetterly & Associates Inc.* [1999] N.S.J. 203. The applicable principles were outlined at paras. 46-49:

> 46 The parties do not dispute that a defendant can rely on after-acquired cause. The British Columbia Court of Appeal decision in *Carr v. Fama Holdings* (1989), 28 C.C.E.L. 30 (B.C.C.A.), is generally regarded as a leading authority on the issue of after-acquired cause. In *Carr, supra*, Wallace, J.A., at page 39, confirmed that an employer can wrongfully dismiss an employee and yet have its actions saved if it later discovers conduct which took place during the term of employment which would have justified dismissal for cause.
>
> 47 However, the parties are at odds as to whether the conduct of Mr. Miller after July 2nd, 1996, constitutes after-acquired cause. Mr. Miller submits that his actions were insufficient grounds to constitute grounds for dismissal had his actions been discovered at that time, and that his actions in copying the documents were motivated solely by self-preservation and not bad faith towards Fetterly & Associates Inc.
>
> 48 The comments of Ritchie J., in *Lake Ontario Portland Cement Co. v. Groner* (1961) 28 D.L.R. (2d) 589 (S.C.C.), at 598, are a useful guide in applying the 'after acquired cause' principle:
>
> > It may be, as Justice Morden says in the course of his judgment in the Court of Appeal, that the respondent's misconduct "was not incompatible with the proper discharge of the duties for which he was employed", but in my view it is not so much the misconduct itself as the fact that he was capable of it which justifies the respondent's dismissal. The respondent's own evidence disclosed to the directors that they, on behalf of the shareholders, had been depending for their technical information respecting the progress of the construction of this expensive project on the

> reports of a man who turned out to be capable of deliberately putting a false date on a document after it had been signed by the company's president and who was afterwards prepared to lie about his actions under oath. As was said by Lord Atkinson in *Federal Supply & Cold Storage Co. of South Africa v. Angehrn & Piel* (1910), 103 L.T. 150 at p. 151, "it is the revelation of character which justifies the dismissal."

49 As well, the comments of Malcolm MacKillop in his text, *Damage Control: An Employer's Guide to Just Cause Termination*, (Canada Law Book Inc., Aurora, 1997) with regard to the Groner case at pp. 133-4 are also useful in considering after acquired cause:

> Subsequent cases have made it clear that a dismissal can be justified where an employee acts in a manner that reveals a character trait, judgement and/or immaturity that is inconsistent with the employee's continued employment or is at odds with the faithful discharge of his duties. This will be particularly true where the employee occupies a senior, supervisory or management position and where the nature of the employer's business requires confidence and trust from its employees.

[297] Counsel for Mr. Saturley argued that the doctrine of after-acquired cause only applied where the misconduct involved some character flaw of the employee. He argued that it would not apply to general employee misconduct. I was not referred to any cases which expressly made that distinction. I am not satisfied that there is any reason to categorize the nature of the employee misconduct in deciding whether after-acquired cause can be relied upon. Even if I am wrong, Mr. Saturley's behaviour in engaging in discretionary trading and denying this to his employer during their investigation, would fall within the character flaw limitation, if it exists.

[298] CIBC WG is entitled to rely on evidence which they discovered after firing Mr. Saturley. It is not relevant that their investigation did not uncover this information in October and November, 2008.

Lesser Discipline

[299] Mr. Saturley's final alternative argument is that any discretionary trading should not have resulted in termination of his employment. That submission does not accord with the evidence or the serious nature of such activity.

[300] Mr. Saturley engaged in a significant degree of discretionary trading for multiple clients over many months. It was not just his delay in entering trade orders, although that was part of it. In some cases, such as Ms. Aisthorpe, Mr. Levy and Ms. Moore, he was deciding what securities to buy and when to close out option contracts.

[301] When Mr. Saturley was asked about discretionary trading in his interviews with CIBC WG Compliance in the fall of 2008, he made a blanket denial. I have concluded that this was not true. According to Ms. Ditchfield, one of the purposes of the December 3 interview was to see if Mr. Saturley was prepared to acknowledge his discretionary trading practices. If he was, then he might be allowed to return to work under strict supervision. Mr. Saturley chose not to admit the discretionary trading and a decision was made to fire him for cause.

[302] Mr. Saturley was well aware of the seriousness of discretionary trading. In August, 2004, he accepted a letter of reprimand and fine for discretionary trading. That letter stated:

> As you are aware the firm has conducted an investigation with respect to your handling of the account of Virginia Cameron. This review was conducted as a result of a complaint filed against you alleging unauthorized trading. Our review concluded that the trading activity in dispute was consistent with the client's stated objectives and risk tolerance and did conform to previous trading activity in the client's account. In addition you did discuss your proposed strategy and received approval from the client to proceed with the strategy during her absence. On this basis, the client's complaint was rejected. However, during our review you admitted to exercising time discretion during the client's absence. The firm has concluded that your actions demonstrated a lack of good judgment and violated both firm policies and industry regulations.
>
> Both CIBC Wood Gundy policy and industry regulations require that clients must specifically authorize each transaction in their accounts before the transaction is entered onto the books and records of the firm. In general, any situation in which the Investment Advisor determines the volume, security, price or timing of an order without prior discussion with the client may result in a discretionary trade. An Investment Advisor cannot engage in discretionary trading unless the client provides the appropriate written authorization and the account has been properly designated and accepted by the firm as a "discretionary" or "managed" account.
>
> Under the Code of Ethics and Conduct contained in the Conduct and Practices Handbook a Registered Representative is expected to comply with the following standards:
>
> - The RR should conduct himself or herself with integrity and dignity and act in an ethical manner in all dealings with the public, clients, employers and employees.
>
> - The RR should conduct himself or herself and should encourage others to practice the purchase and sale of securities in a professional and ethical manner that will reflect credit on the individual and on the profession of the Investment Advisor.

- The RR should act with competence and should strive to maintain and improve his or her competence and that of others in the profession.

- The RR should use proper care and exercise independent professional judgment.

In reviewing this matter we have taken into consideration as mitigating factors your years of service to the firm and your co-operation in this matter. In consideration of the circumstances, we are issuing you this Letter of Reprimand and Fine in the amount of $5,000. in order to impress upon you the seriousness of this matter.

We are confident that in the future you will perform your duties as an Investment Advisor in an exemplary manner that will reflect credit upon both yourself and CIBC Wood Gundy. However, any future violations of firm or industry guidelines will result in future disciplinary action, which may involve termination for cause.

[303] Mr. Saturley also received the 2006 Compliance Bulletin from Mr. Humle in May, 2007. In his November 14 interview, when asked if he exercised discretion over client accounts, Mr. Saturley denied it and said that it would be "putting his neck in a noose". It should have come as no surprise to Mr. Saturley that he would be fired if he was found to have engaged in discretionary trading.

[304] In light of the importance of trust and integrity in the financial services sector, it is easy to see why an employer such as CIBC WG would lose faith in an advisor's ability to continue as an employee where there has been discretionary trading, untruthful answers in interviews and a history of prior incidents.

[305] Counsel for Mr. Saturley pointed out one example of a CIBC WG employee, Michael Reid Ast, who negotiated a settlement which involved discipline short of termination where discretionary trading was admitted. This situation can be distinguished on a number of grounds. Mr. Ast admitted his wrongdoing and fully cooperated with the investigation, whereas Mr. Saturley has not. Mr. Ast also had no prior discipline record which is not the case for Mr. Saturley. As Ms. Ditchfield said, if he had admitted the discretionary trading in his interview of December 3, 2008, CIBC WG might have considered allowing Mr. Saturley to continue in his employment.

[306] Counsel for Mr. Saturley also argued that there were other CIBC WG employees who had breached corporate policies and were not disciplined. The primary example was where a non-options licenced individual made contact with Mr. Saturley's clients to recommend closing out their EEM "put" option contacts in October, 2008. This employee was acting on the instructions of the working group and so there would be no basis on which they could be subject to discipline. Whether this was appropriate from a regulatory perspective is not relevant to Mr. Saturley's claim for wrongful dismissal and I will not comment on that issue.

[307] There are several cases where investment advisors were fired for engaging in discretionary trading. (See, for example, *King v. Merrill Lynch Canada Inc.* [2005] O.J. 5028 (SC) and *Templeton v. RBC Dominion Securities Inc.* 2005 NLTD 130.)

[308] The decision to terminate Mr. Saturley's employment was reasonable in the circumstances and I see no basis on which a lesser discipline should be substituted.

SICK LEAVE BENEFITS

[309] Mr. Saturley alleges that he did not receive all of the benefits which he was promised when he went on sick leave in October, 2008. There was very little evidence called on this issue.

[310] Mr. Saturley testified that when he went on medical leave, he had a conversation with Mr. Humle which resulted in an agreement that he be paid an amount different from the normal short term disability calculation. Mr. Saturley testified that he was to be paid $83,234.00 per month based upon an average of his prior earnings. He says that he was not paid the proper amount for the time that he was off and is owed $50,597.00.

[311] Mr. Humle confirmed that an arrangement was reached with Mr. Saturley that the short term disability policy would not apply, and that his compensation while on medical leave would be based upon his average commission income. According to Mr. Humle, Mr. Saturley's commission calculation for the full month of October, 2008 was approximately $120,000.00, which was greater than the amount which he would have received if his commissions were cut off on the date he went on leave and he was paid the prorated disability amount. Since this benefited Mr. Saturley, he was entitled to keep the full commission income, but

was not paid any disability amount for that month. Mr. Humle said that Mr. Saturley received the agreed amount for the month of November, as well as a prorated amount for the first three days of December.

[312] It appears that the difference between the parties is whether Mr. Saturley was entitled to the prorated disability amount from October 15 - 31, 2008. There is no dispute that he was not paid this.

[313] Neither Mr. Humle nor Mr. Saturley were cross-examined with respect to their evidence on the disability payment issue. In addition, the CIBC WG disability policy was not introduced in evidence.

[314] Mr. Humle did not say that there was an agreement with Mr. Saturley that there would be an evaluation of commission income versus disability payment, nor did he explain why these were necessarily mutually exclusive. Presumably if Mr. Saturley had been able to work after October 15, he would have generated commission income. By not having the opportunity to do so, he has suffered a loss which was intended to be compensated by the disability payment.

[315] Although the evidence is far from clear, I am prepared to give Mr. Saturley the benefit of the doubt on the terms of the agreement reached with Mr. Humle. The fact that the employer, through Mr. Humle, did not document the arrangement is part of the problem and not something that Mr. Saturley is responsible for. I accept that Mr. Saturley is owed a further $50,597.00 in unpaid disability benefits for October, 2008.

INTENTIONAL INTERFERENCE WITH ECONOMIC INTEREST

[316] In addition to his claim for wrongful dismissal, Mr. Saturley alleges that CIBC WG should be liable to him for intentional interference with his economic interest. This is plead as a separate cause of action which is independent of the wrongful dismissal claim.

[317] In their pre-trial briefs, the parties agree that this tort has three essential elements, and these are:

1) An unlawful act or conduct.

2) Intention to injure or cause damage to the business of Mr. Saturley.

3) Economic loss caused by the unlawful act.

[318] I will not engage in a detailed analysis of the jurisprudence surrounding this tort as I believe I can dispose of Mr. Saturley's claim on the basis of the evidence presented.

[319] Mr. Saturley's position is that CIBC WG treated him in a fashion which would have allowed clients to perceive that he was responsible for their losses. He also alleges that the termination notice filed with the licencing body, IIROC, was

inaccurate and contained misrepresentations which led to unnecessary regulatory investigations.

[320] I am satisfied that CIBC WG conducted their investigations properly. I am also satisfied that their communications with clients, to the extent that this was in evidence, were appropriate in the circumstances. There was no evidence at trial from any clients that they were misled by something that CIBC WG told them. Mr. Saturley called no client witnesses to say that they were told by CIBC WG that he was responsible for their losses.

[321] The notice of termination filed by CIBC WG with IIROC on December 8, 2008 stated that he was dismissed for cause and indicated that there were three unresolved client complaints, as well as internal discipline matters. The internal discipline matters were described as follows:

> As the result of 3 client complaints (Comset numbers 364F6B, 89B895 and E2B66A) an internal review was performed regarding the trading practices of the IA. CIBC concluded that the IA had conducted discretionary trades in respect of at least 5 client accounts without having the proper approvals and documentation in place to handle such accounts on a discretionary basis. The IA was terminated for cause on December 3rd and this was filed as Comset number 3657F8. The IA has been previously disciplined by CIBC in 2004 (Comset number 5Y3JZP) for exercising time discretion in a client account.

[322] In light of my conclusions with respect to the allegations of discretionary trading, that portion of the notice referring to internal discipline issues is accurate. Mr. Saturley argued that the three client complaints had essentially been resolved, although formal letters were not sent out until the end of December, 2008. There

is no evidence whatsoever to suggest that the delay in sending out the resolution letters, and including the complaints in the termination notice, was done with the intent to harm Mr. Saturley and his business.

[323] Mr. Saturley testified that he was unable to find work with another brokerage house following his termination by CIBC WG. There is no evidence from any of those firms indicating why they chose not to hire Mr. Saturley. Most importantly, there is nothing to indicate that this was the result of anything said or done by CIBC WG.

[324] Mr. Saturley complained about the length of investigations carried out by IIROC, as well as the Nova Scotia Securities Commission, which delayed him setting up his own investment business. He presented no evidence to show that such delays were caused or contributed to by anything done by CIBC WG.

[325] Mr. Saturley has not proven any conduct on the part of CIBC WG that was done with the intent to damage his business interests or that resulted in such harm and I, therefore, dismiss this aspect of his claim.

DEFAMATION

[326] In his closing submissions, counsel for Mr. Saturley said that some of the conduct by CIBC WG amounted to defamation. This cause of action was not plead in Mr. Saturley's statement of claim and, as a result, I will not allow it to be advanced at the conclusion of trial. Despite this, I have considered the evidence

and do not believe that Mr. Saturley has proven any statements or conduct by CIBC WG that could be considered defamatory.

COUNTER-CLAIM

[327] As part of the terms of his employment, Mr. Saturley was given loans by CIBC WG on favourable terms. These were to be repaid over time out of bonuses; however, the full balance was due and payable if Mr. Saturley voluntarily resigned or was fired for cause. Since I have concluded that his firing on December 3, 2008 was justified, Mr. Saturley is required to repay those loans.

[328] The balance outstanding as of December 3, 2008 is $390,389.51. Under the terms of the loans, interest is to run from that date at a rate of prime plus two percent per annum. I will allow Mr. Saturley to set off against the principal amount of the loans, the balance of the disability benefit which should have been paid to him in the amount of $50,597.00.

[329] The net result on the counter-claim of CIBC WG is that it is entitled to payment from Mr. Saturley in the principal amount of $339,792.51, with interest at a rate of prime plus two percent from December 3, 2008.

CONCLUSION

[330] After a protracted and arduous litigation process, Mr. Saturley has been unsuccessful in proving his claims for wrongful dismissal and intentional

interference with economic interest. CIBC WG has met the burden on it to show that Mr. Saturley engaged in discretionary trading in certain client accounts. I am satisfied that this conduct amounts to just cause for termination of his employment.

[331] Mr. Saturley was successful on the minor claim for additional disability payments. CIBC WG is entitled to be paid the outstanding loans which had been advanced to Mr. Saturley. After crediting the disability payment, the net balance payable by Mr. Saturley to CIBC WG is $339,792.51, with interest at a rate of prime plus two percent from December 3, 2008.

[332] If the parties are unable to agree on costs, I would ask them to provide me with written submissions within sixty days of the date of this decision.

_____

Wood, J.