SUPREME COURT OF NOVA SCOTIA
Citation: Matheson v. CIBC Wood Gundy., 2014 NSSC 18

Date: 20140121
Docket: Syd. No. 317830
Registry: Sydney

Between:

Donald Matheson and Carolyn Matheson
Applicants

v.

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

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	September 10, 11, 12 and 16, 2013, in Sydney, Nova Scotia
Final Written Submission:	Applicants' Brief, September 25, 2013 Respondent's Brief, September 30, 2013 Applicants' Reply Brief, October 7, 2013
Counsel:	George W. MacDonald, Q.C. and Jane O'Neill, for the Applicants Michael S. Ryan, Q.C., John A. Keith and Jack K. Townsend, for the Respondent

By the Court:

A. Facts

Summary

[1] The applicants, Donald Matheson and Carolyn Matheson, are investors who held a number of investment accounts with CIBC World Markets Inc., carrying on business as CIBC Wood Gundy ("CIBC").

[2] The Mathesons lost a substantial part of their investments between July 24th, 2008 and November 30, 2008. They claim that they suffered damages as a result of an error made by CIBC in the calculation of the available margin in their investment accounts. The Mathesons allege that the error prevented them and their investment advisor, Frederick Saturley, from making sound investment decisions during that period.

[3] Liability is not in issue. CIBC has admitted that it is responsible for the error. The issue is damages. The parties disagree on the proper method for compensating the Mathesons. CIBC's position is that the Mathesons were fully compensated for the error in November 2008 when the bank reversed certain trades in their accounts and reimbursed them more than $643,000.00. CIBC takes the position the Mathesons should only be compensated for the portion of their portfolio that relied on margin calculations, and says the compensation provided in November 2008 represented a reversal of trades that required margin. It is the Mathesons' position that the only way to compensate them for CIBC's error is to put them back in the position they were in before the error occurred. They claim that this will require that all investment decisions they made, including those that did not require a margin account during the error period, be reversed. The Mathesons' position is that their investment advisor would not have made the recommendations he did had he known the true state of their margin account.

[4] In summary, the applicants seek to have all losses in their account for the error period reversed, despite the market having suffered a meltdown as a result of the credit crisis originating in the United States during that period. CIBC takes the position that it has adequately compensated the Mathesons for their losses and that any further losses are a result of this market meltdown.

[5] This matter proceeded as an application in court. Affidavits of Donald and Carolyn Matheson, Frederick Saturley, Per Humle and experts Richard Croft and Eric Kirzner were filed. All of the affiants were cross-examined during the hearing.

Options Trading and Margin Availability

[6] During the time the Mathesons' accounts were managed by Mr. Saturley, they held diversified portfolios of equities and cash, and sold covered and uncovered option contracts in their unregistered accounts. Mr. Saturley describes his strategy at para. 13 of his affidavit:

> 13. Throughout my career in the investment industry, I have used an investment strategy which involves trading in options, buying of a diversified set of securities with a purpose of increasing capital and dividend income while managing risk level, and cash flow investing by selling option contracts on select securities.

[7] To best understand Mr. Saturley's trading strategy and its applicability to the error made by CIBC, it is useful to look at a basic summary of the technicalities of options trading and the meaning of margin.

[8] Richard Croft, an expert who provided evidence on behalf of the Mathesons gave the following explanation of options trading at p. 29 of his report:

> An option contract grants the holder the right to buy or sell an underlying security (i.e. **equity** or **index**) at a certain price (**strike** or **exercise** price) for a specific time period **(expiration)**...
>
> There are two types of option contracts; **calls** and **puts**. A call option grants the holder the right to buy the underlying security. A put option grants the holder the right to sell the underlying security...
>
> The cost of an option is referred to as the option's **premium** and is quoted on a per share basis. Because an option contract is exercisable into 100 shares of the underlying security, the actual cost of an option is calculated as the quoted share price multiplied by 100 shares.

> Investors who buy options pay the premium and are granted a right to either buy (call) or sell (put) an underlying security for a specific period of time. Investors who **write** (i.e. sell) options receive a premium and assume an obligation to either deliver shares (i.e. short call) or purchase shares (i.e. short put) for a specific period of time.

[9] In his report, Mr. Croft went on the explain that options can be "covered" or "uncovered". Whether an option is "covered" or "uncovered" depends on whether the writer (or seller) owns the underlying security. That is, an investor who sells a covered call owns the underlying security. If called upon, the seller simply delivers the stock that he or she already owns to the option holder. An investor who sells an "uncovered" option (sometimes referred to as "naked"), does not own the underlying security. The implication is that if the market price of the security rises above the strike price, and should the option holder exercise his or her rights under the contract, the writer would have to go into the market to purchase the underlying security at the existing market price and then deliver it to the option holder at a lower price. In most circumstances the writer would suffer a loss. Trading in options requires a margin account.

[10] The following excerpt from the Croft report provides a useful definition and explanation of margin:

> **Margin** is the available collateral within an investors' account that can be used to secure a loan from the broker. Effectively margin is the difference between the market value of a security and the loan amount a broker will make available to a client.
>
> For example, assume XYZ a publicly traded blue chip company is trading at $100 per share and can be margined at 70% of its market value. If the investor holds 100 shares of XYZ in a margin account the total value of the account is $10,000 (100 shares of XYZ multiplied by $100 per share = $10,000). Based on the 70% loan value the broker can make available $7,000 in capital that the investor can use to buy additional securities.
>
> The **available margin** (i.e. collateral) is "marked-to-the-market" daily. Mark-to-the-market means that the brokerage firm calculates the available margin based on the closing market value of the securities within the account.

In this example, if XYZ were to close at $90 per share the available margin would decline to $9,000. The loan value associated with that account would be reduced to $6,300 (ie., 70% of $9,000 = $6,300).

Maintenance margin is the unencumbered equity - i.e. securities and/or cash - in an account that can be used as collateral to guarantee obligations embedded in short uncovered option positions.

For example; assume investor "A" has sold one six month XYZ 100 put option to investor "B" at a price of $10 per share. The sale of the XYZ put option obligates investor "A" to buy 100 shares of XYZ at $100 per share from investor "B" until the option expires in six months.

To secure that obligation , investor "A" is required to at all times maintain "**minimum maintenance margin**" in the account. If investor "B" were to exercise his option he could "put" 100 shares of XYZ to investor "A" at $100 per share. Investor "A"would then be obligated under the terms of the option contract to buy 100 XYZ shares at $100 per share for a total purchase price of $10,000. It is for that reason that investor "A" must have access to sufficient capital to conclude the trade.

The minimum margin requirement (MMR) is also marked-to-the-market daily based on the outstanding obligations being guaranteed by the investor.

The formula for calculating the MMR for short uncovered option positions is the greater of;

1. Option Premium plus (+) 30% of the value of the Underlying Security less (-) any amount that the Option Strike Price is out-of-the-money.

2. Option Premium plus (+) 5% of the underlying security's market price.

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

[12] Because the Mathesons were trading in options they were required to maintain a margin account.

The Margin Error

[13] CIBC agreed by way of settlement agreement with the Investment Industry Regulatory Organization of Canada ("IIROC") that it had misstated and made an error in margin. In particular, para. 18 of the settlement agreement states:

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

[14] The details of the margin error will be set out in more detail below.

The Mathesons' Investment History

[15] In order to understand the circumstances that led to this application it is helpful to review the background facts. The Mathesons had a number of investment accounts with CIBC dating back to the mid 1990's. Up until the late fall of 2006 Michael MacPhee was their investment advisor. Mr. MacPhee left CIBC and the Mathesons sought a new investment advisor to manage their assets.

[16] A friend had recommended Frederick Saturley and the Mathesons contacted Per Humle, the Halifax branch manager of CIBC to inquire about Mr. Saturley. Shortly thereafter, the Mathesons met with Mr. Saturley to discuss his proposal for managing their assets at CIBC. Following this meeting the Mathesons decided to keep their accounts under management by CIBC with Mr. Saturley. Each of the Mathesons had an investment account and an RRSP account. They signed agreements with CIBC, as well as each signing a Power of Attorney to the other in relation to these accounts.

[17] Mr. Matheson regularly monitored account balances, investment performance and available margin online through the CIBC website. He also met with Mr. Saturley every 30 days to review his and his wife's investment and RRSP accounts.

[18] The investment strategy applied by Mr. Saturley, on behalf of the Mathesons and apparently other clients, was to hold a diversified portfolio of various assets and write option contracts against the stock holdings (referred to as “a covered writing strategy”).

[19] Mr. Saturley also had the Mathesons selling uncovered put option contracts, which generated additional premium income. This strategy involved writing (selling) a “put” and corresponding “call” against the same underlying security. This is referred to as “strangle strategy”. In the latter part of 2008, the vast majority of the Mathesons’ uncovered options positions were written on the investment fund iShares MSCI Emerging Markets Index ("EEM") as recommended by Mr. Saturley. It should be noted that these option contracts required the Mathesons to have a margin account with CIBC to cover any losses. The remainder of the Mathesons’ diversified portfolio did not have such a requirement as it did not involve options trading.

The Decline in Value of the Mathesons’ Investments

[20] On Saturday, October 4, 2008 Mr. Matheson noticed a significant drop in his accounts online and attempted to reach Mr. Saturley. On Monday, October 6, 2008, Mr. Matheson was able to reach Mr. Saturley and raised the issue of the drop in his accounts. He also attempted to verify that Mrs. Matheson’s accounts were showing a similar drop and to solicit investment advice on what action should be taken to prevent further losses.

[21] At that time, Mr. Matheson understood that the margin available in his and his wife’s accounts had dropped below the range he preferred to have, and he was advised by Mr. Saturley that by liquidating some of their assets the available margin in their accounts would improve. The Mathesons agreed to liquidate some assets into cash by selling mutual funds. Mr. Matheson called Mr. Humle to express his concern and distress over the losses in their accounts. He again spoke with Mr. Saturley on October 8, 2008. As Mr. Saturley was unable to explain the continuous decline in their accounts the Mathesons decided to liquidate the remaining assets in their accounts into cash by closing options and selling stock.

The Decision to Liquidate

[22] There is conflict in the evidence between the Mathesons and Mr. Saturley as to whether the decision to liquidate the balance of their unregistered accounts on October 8, 2008 was solely a decision of the Mathesons, or rather a decision taken in consultation with Mr. Saturley. Mr. Matheson gave the following discovery evidence on this issue, found at Exhibit 6, p. 126:

> Q. All right. Did Saturley give you any advice about liquidating your entire accounts?
>
> A. He ... you mean on the 8th?
>
> Q. Yeah.
>
> A. He agreed.
>
> Q. He agreed you should sell everything.
>
> A. He ... well, we talked about it and I ... and he couldn't give me the answer, so I said, are we going to lose more money, and he couldn't answer that. So I said, well, should we sell, and he said, fine, we'll sell. That's what worried me. He wasn't giving me any confidence in being there.
>
> Q. So that's my point. You sold on his recommendation, is that correct?
>
> A. Both. Both agreement.
>
> Q. You put the question to him should we sell and he said yes.
>
> A. Yeah.

[23] In his evidence, Mr. Saturley seems to suggest that Mr. Matheson "instructed" him to liquidate the accounts. He stated at para. 34 of his corrected affidavit:

> 34. On or about October 8 and 9, 2008, the markets were continuing to decline and I again spoke to Donald regarding his accounts and the declining margin available. At that time, Donald expressed his desire to get out of the market and liquidate his remaining assets in all accounts into cash.

[24] On cross-examination Mr. Saturley confirmed to CIBC's counsel that Mr. Matheson instructed him on behalf of himself and Mrs. Matheson to liquidate their accounts:

> Q. You were instructed by Donald Matheson on behalf of himself and his wife to liquidate their accounts before you were aware of the error, correct?
>
> A. Correct.

[25] I prefer the evidence of Mr. Saturley on this issue and accept that the Mathesons instructed him to liquidate their accounts on October 8, 2008. I take comfort in the fact that in reviewing the Mathesons' account statements that are found at Exhibit 13, to the affidavit of Donald Matheson, the trades associated with the liquidation were indicated as being "unsolicited". This is also reflected in Mrs. Matheson's affidavit. The fact that the liquidation trades were "unsolicited" means that they were initiated by the Mathesons and is consistent with Mr. Saturley's evidence.

[26] Furthermore, at the time Mr. Matheson was very concerned about the losses in his account and was concerned that he did not receive any advice on what to do from Mr. Saturley. His decision to liquidate the accounts would be consistent with this concern and with the lack of advice from Mr. Saturley.

[27] This finding that the Mathesons made the decision to liquidate their accounts on October 8, 2008 is relevant to the issue of reliance which will be discussed in detail later in this decision.

Discovery of the Margin Error

[28] The Mathesons were advised by Mr. Saturley on October 9, 2008 that he believed there had been an error in the calculation of margin available in their accounts in relation to the EEM investment fund. Mr. Matheson phoned Mr. Humle who confirmed that there had been an error. He was assured by Mr. Humle that he and Mrs. Matheson would be fully reimbursed for any losses in their accounts caused by an error by CIBC.

[29] After October 10, 2008 the Mathesons were unable to contact Mr. Saturley and were advised by CIBC he was on disability leave. Mr. Humle assumed management of their accounts. They spoke with him several times in October 2008, after the error, and were advised that CIBC was working on a solution.

[30] On October 20, 2008 the Mathesons requested that assets in their registered accounts be transferred out of CIBC to Manulife.

[31] According to Mr. Matheson, in November 2008, CIBC cancelled, without notice, all EEM options in the Mathesons' accounts that were bought between February 18, 2008, and October 10, 2008. The Mathesons were advised that the error in the margin account was caused because of a 3:1 stock split in the EEM which occurred on July 24, 2008, which resulted in an overstatement of available margin in their accounts.

[32] According to Mr. Humle, CIBC investigated and determined the cause of the margin error and, in accordance with the terms and conditions of the account agreements, cancelled all uncovered EEM option positions in the Mathesons' accounts open as of and after July 24, 2008.

[33] The following amounts were repaid to the Mathesons' accounts by CIBC as a result of these cancellations.

i. $303,170.25 in account 500-300-2325 (Donald Matheson); and

ii. $343,948.78 in account 273-008-5525 (Carolyn Matheson).

[34] According to Mr. Humle there was no uncovered option trading in the RRSP accounts, and therefore there were no cancellations or corresponding reimbursements.

The Evidence of Mr. Saturley

[35] Frederick Saturley's evidence confirmed he was the Mathesons' investment advisor from December 2006 to October 13, 2008. He met with Mr. and Mrs. Matheson around late November 2006 to present them with a proposal for managing their assets at CIBC. He explained that his investment strategy used a

mixture of covered and uncovered option contracts. Subsequent to the meeting the Mathesons decided to keep their assets at CIBC and to engage Mr. Saturley as their investment advisor.

[36] Each of the Mathesons signed the necessary paperwork to open investment and RRSP accounts at CIBC in late December 2006. The Mathesons each had an investment margin account for the purpose of options trading. Mr. Saturley explained that allowable margin rates are prescribed by regulatory standards to be applied to a client's asset mix held at the investment firm. At CIBC, margin was reported and determined as calculated by ADP Broadridge ("ADP"), a company that supplied so-called "backroom" accounting functions.

[37] The margin calculation was made available to Mr. Saturley and to his clients. In his affidavit Mr. Saturley stated:

> 22. Monitoring available margin in client accounts was a key tool that I used and relied upon to manage the investment strategy and client investment risk exposure.
>
> 23. The amount of margin available in a client's accounts influenced the recommendations and investment advice that I would give for actions taken going forward.

[38] Mr. Saturley stated that between December 2006 and October 2008, both Donald and Carolyn Matheson held options contracts in the EEM investment fund on his recommendation. He described EEM as an index fund composed of 325 companies which mirrored the S&P Index.

[39] Mr. Saturley confirmed that he received a call from Donald Matheson on October 6, 2008, regarding his accounts and voicing concerns with what was happening in the market. He said he advised Mr. Matheson to liquidate some of his assets into cash to improve the available margin in both of the Mathesons' accounts. The Mathesons followed Mr. Saturley's advice and liquidated some of their assets.

[40] On October 8, 2008, the markets continued to decline and Mr. Saturley again spoke with Donald Matheson. At that time, he stated Mr. Matheson

expressed the desire that he and Mrs. Matheson get out of the market and liquidate their remaining assets into cash.

[41] Late in the afternoon of October 8, 2008, Mr. Saturley discovered an error in the calculation of margin related to a 3:1 stock split within EEM on July 24, 2008, which was not accounted for the in the calculation of available margin. The effect of the margin calculation error was to overstate the amount of margin available to the Mathesons by up to threefold. The available margin reported in clients' accounts, including the Mathesons', was incorrectly stated from July 24, 2008, until October 9, 2008 when the error was confirmed by ADP. This period will be referred to as the "error period". Mr. Saturley states in his affidavit:

> 38. As a result, I relied upon incorrect Margin information when advising Donald and Carolyn on their investments during the period of July 24, 2008 to October 9, 2008.

[42] As to the specific effect of the error, Mr. Saturley states:

> 46. During the period of July 24, 2008 to October 9, 2008, I would not have given the investment advice or made the investment recommendations to Donald and Carolyn that I did had the correct margin information been available to me.
>
> 47. As a result of the error, I believe Donald and Carolyn suffered losses in their Accounts that they would not have suffered had the correct margin information been available to me.
>
> 48. As a result of actions taken to liquidate their assets into cash to respond to the declining margin, Donald and Carolyn incurred currency exchange losses and lost income from dividends earned on securities which were sold.

[43] On cross-examination Mr. Saturley confirmed that he was instructed by the Mathesons to liquidate their accounts before they became aware of the margin error.

[44] On redirect-examination Mr. Saturley volunteered that Mr. Matheson had a margin "comfort level" of $250,000. I note that there was no direct evidence from either Donald Matheson or Carolyn Matheson that they directed CIBC to not allow

the margin availability in their accounts to go below $250,000. The affidavits do contain vague references to Mr. Matheson having a preferred level of margin, or a level he was comfortable with, without attributing any numeric value. For example, at paras. 24 and 25 of Mr. Matheson's affidavit, he stated:

> 24. In late September 2008, I was considering buying property and I called Mr. Saturley to discuss my Account and available margin in my Investment Account to determine whether I had enough surplus margin available to withdraw cash from my Investment Account for this purchase.
>
> 25. I was advised by Mr. Saturley that, at that time, my Investment Account had sufficient surplus margin available to accommodate a withdrawal of funds without causing the available margin to fall below my preferred level.

[45] I find there is no direct evidence of the Mathesons requiring a minimum margin availability limit of $250,000, but there is evidence that there was a comfort level amount which the Mathesons desired to maintain. Having so found, I am not satisfied that any issue in this proceeding turns directly on whether there was a minimum margin requirement by the Mathesons. For the most part, the minimum margin requirement, if any, would apply to options trading, as a margin account was necessary only for the Mathesons to engage in option trading.

[46] Per Humle was the manager of the Halifax branch of CIBC at the relevant time. Mr. Humle confirmed that the Mathesons signed account agreements for investment and RRSP accounts with CIBC, and gave each other Powers of Attorney in relation to their accounts.

[47] Mr. Humle said that Mr. Saturley used the EEM fund to implement his strategy of selling uncovered puts and calls. He confirmed that on October 8, 2008 CIBC became aware that the margin in client accounts had been overstated since July 24th, 2008. Mr. Humle lists the following actions taken by CIBC in his affidavit:

> 16. The Respondent then investigated and determined the cause of the margin error. After notice to the Applicants and in accordance with the terms and conditions of the account agreements, the Respondent then cancelled all of the uncovered EEM option positions in clients' accounts open as of and after July 24, 2008. At no time did the Applicants complain or refuse that

cancellation and reimbursement. The following amounts were repaid into the Matheson's accounts as a result of these cancellations:

(a) $303,170.25 in Account 500-300-2325; and

(b) $343,948.78 in Account 273-008-5525.

There was no uncovered option trading in Account 550-252-3110, as it was an RRSP account. Therefore, there were no cancellations or corresponding reimbursement.

[48] CIBC was fined by IIROC and entered into a settlement agreement respecting clients such as the Mathesons affected by the CIBC error.

[49] Relevant provisions of the settlement agreement are set out in paras. 1, 17 and 18.

SETTLEMENT AGREEMENT

I. Introduction

1. IIROC Enforcement Staff and the Respondent, CIBC World Markets Inc., consent and agree to the settlement of this matter by way of this settlement agreement ("the Settlement Agreement").

...

17. Following the OCC change to the method in which options contracts are adjusted for stock splits, Broadridge implemented a corresponding change on its US system but for its Canadian system the change was left on a list of changes to be implemented in the future. The failure to implement the change on the Canadian system was not discovered by the Respondent until October 9, 2008.

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

> available in client accounts was important given the strategy employed in the accounts.

[50] As a result of this settlement, the Mathesons were reimbursed as set out earlier. CIBC takes the position that no further compensation is payable. The Mathesons seek to expand the compensation payable by CIBC beyond the EEM trades to the whole of their investment portfolio held at the time. In summary, they are seeking a reimbursement of all losses in their non-EEM investments which were incurred during the error period.

B. The Appropriate Cause of Action

What is the proper cause of action?

[51] The main issues to be determined in this proceeding are causation and damages. The causes of action alleged by the Mathesons are not clearly defined in their submissions. In its post-hearing brief, CIBC counsel put it this way:

> 3. As a preliminary point, the Mathesons' Post-Hearing Brief stitches together various legal propositions relating to discrete and unique causes of action. Thus, the Brief begins with cases relating to fiduciary duty and ends with cases relating to the measure of damages based in the context of negligent misrepresentation. There are also statements suggesting negligence. It is necessary to isolate and clearly distinguish the various causes of action alleged in the pleading and stringently consider the law applicable to each separate claim.

[52] The Mathesons assert four causes of action in their originating documents: (i) breach of fiduciary duty, (ii) negligence, (iii) breach of contract and (iv) negligent misrepresentation.

Breach of Fiduciary Duty

[53] The Mathesons say that CIBC breached its duty to give them accurate information that was required for them to be able to make informed investment decisions during the error period. In *National Bank Financial Ltd. v. Potter,* 2013 NSSC 248, Warner J. provides a guide in determining whether a fiduciary relationship exists between an investment advisor and a customer:

> 213 The relationship between an investment advisors [sic] and their clients is one of agent and principal, but the precise nature of the duties owed by an investment advisor to his or her principal depends on the circumstances. Most investment advisor-client relationships fall in the middle of a spectrum between the investment advisor as a mere "order taker" and the investment advisor as a fiduciary (*Kent v May* (2001), 298 A.R. 71 (QB) at paras 51 to 53, aff'd (2002), 317 A.R. 281 (CA)). A fiduciary relationship is not presumed and must be established based on evidence (*Elderkin v Merrill Lynch, Royal Securities Ltd,* (1977), 22 N.S.R. (2d) 218, 1977 CarswellNS 184 at 34; *Hodgkinson v Simms*, [1994] 3 S.C.R. 377, 1994 CarswellBC 438 at paras 44, 135).
>
> ...
>
> 215 While not every investment advisor-client relationship will rise to the level of a fiduciary one, it is helpful to consider the test for finding a fiduciary relationship in order to place the relationships in question on the relevant spectrum. In *Hunt v TD Securities Inc*. (2002), 229 D.L.R. (4th) 609; 2003 Carswell 3141 at para 40 (ONCA), leave to appeal to the SCC refused 2004 CarswellOnt 1610, the Ontario Court of Appeal interpreted the Supreme Court of Canada's decision in *Hodgkinson* as disclosing five factors to consider when determining whether a fiduciary relationship exists:
>
> i) Vulnerability - the degree of vulnerability of the client that exists due to such things as age or lack of language skills, investment knowledge, education or experience in the stock market.
>
> ii) Trust - the degree of trust and confidence that a client reposes in the advisor and the extent to which the advisor accepts that trust.
>
> iii) Reliance - whether there is a long history of relying on the advisor's judgment and advice and whether the advisor holds him or herself out as having special skills and knowledge upon which the client can rely.
>
> iv) Discretion - the extent to which the advisor has power or discretion over the client's account.
>
> v) Professional Rules or Codes of Conduct - help to establish the duties of the advisor and the standards to which the advisor... will be held.

[54] While CIBC agrees that these comments are helpful in determining whether a fiduciary relationship exists between an investment advisor and a customer, it disagrees with the Mathesons’ application of the factors to the facts of this case.

[55] The Mathesons say they relied on CIBC. Although CIBC acted as a portfolio manager and although they did not give CIBC the authority to conduct a trade, they say that they relied absolutely on CIBC's margin availability calculation and were completely vulnerable when that calculation was incorrect. CIBC counters there is no evidence of vulnerability on the part of the Mathesons. They were not of advanced age, they had been investing since at least the 1990's, and they had two years of experience with options trading before the market decline of 2008. CIBC notes that in the "Know Your Client Form" they listed their investment knowledge as "good".

[56] CIBC says there is no evidence before the court as to the degree of trust and confidence the Mathesons placed in Mr. Saturley, and there is a scarcity of evidence as to the degree to which they relied upon him.

[57] As to the Mathesons' allegation of "absolute" reliance, CIBC says this is contradicted by the evidence that Mr. Matheson carried out unsolicited trades. Moreover, Mr. Matheson instructed Mr. Saturley to liquidate his unregistered accounts on October 8, 2008, because of his perception of the losses he was sustaining in his accounts.

[58] I am satisfied for all of these reasons CIBC did not owe the Mathesons a fiduciary duty. If I am wrong, and CIBC did owe a fiduciary duty, I am not satisfied that there is any evidence of CIBC betraying the trust of, or being disloyal to, the Mathesons. There must be some element of disloyalty or dishonesty, such as a conflict of interest, to find a breach of fiduciary duty, none of which are present here. The Mathesons have offered no evidence of disloyalty, betrayal or dishonesty by CIBC.

Breach of Contract

[59] The claim for breach of contract was not seriously argued by the Mathesons at the hearing or in their written submissions. In addition, no evidence was submitted in support of this cause of action. Accordingly, I find that CIBC is not liable for breach of contract.

Negligence

[60] CIBC argues that there is no evidence to support an allegation of negligence because there was no personal or physical injury to the Mathesons. CIBC asserts that this is a claim for pure economic loss, and observes that the category of cases which can sustain a claim for pure economic loss is limited. It also submits that the facts of this case do not fall within any recognized category other than negligent misrepresentation.

[61] Allen M. Linden and Bruce Feldthusen note**,** in *Canadian Tort Law*, 9th ed., at 448, that pure economic loss is governed by restrictive duties of care, and that the

> Supreme Court of Canada... has recognized five different categories of negligence claims for pure economic loss, each governed by its own special duty of care. The Supreme Court left open the possibility that new categories might emerge, but indicated that lower courts should exercise caution and not strain to create new categories**.**

[62] Linden and Feldthusen explain the five categories in the following terms:

> **1.** *Negligent Misrepresentation:* An investor relies on negligently prepared corporate financial accounts to invest in a company which subsequently goes bankrupt. Had the accounts been properly prepared, the bankruptcy would have been predictable. The investor sues the accountant.
>
> 2. *Negligent Performance of a Service:* A lawyer negligently draws a will in violation of the *Wills Act*, and in consequence the intended beneficiary is deprived of an inheritance. The frustrated beneficiary sues to recover the lost gift, even though the beneficiary had not been aware of the intended gift, and had not otherwise relied on it.
>
> 3. *Defective Products or Buildings*: A builder negligently constructs a home with faulty foundations. The home poses a risk of collapsing. The non-privity owner sues the builder for the cost of remedying the dangerous defect.
>
> 4. *Relational Economic Loss* (consequent on physical damage to a third party): A negligent ship captain allows his vessel to damage a railway bridge. The bridge is owned by the government, who recovers routinely in negligence for the physical damage to the bridge. A railway company sues to recover extra shipping

> expenses it incurred because it had to reroute its trains while the government bridge was being repaired.
>
> 5. *Independent Liability of Statutory Public Authorities*: A statutory public authority is given discretion to inspect a building construction. It either fails altogether to inspect, or inspects in a manner which the court finds unreasonable. As a result, a latent defect goes undiscovered. When the defect is discovered, the owner sues the authority to recover the cost of remedying the defect.

[63] The Mathesons have pleaded negligent misrepresentation as a separate cause of action. As a result their plea in negligence *simpliciter* would only be applicable if it fell within one of the other four categories, or if there was a basis for a claim in negligence *simpliciter* independent of the claim in negligent misrepresentation.

[64] I am satisfied that the categories of defective products or buildings, relational economic loss, and independent liability of statutory public authorities are not applicable. As to the fourth category, negligent performance of a service, the Mathesons claim that their losses were caused by erroneous information regarding their margin availability, or, to some extent, by advice that they would not have been given if Mr. Saturley had access to adequate margin information.

[65] Peter T. Burns and Joost Blom explain negligent performance of a service in the following terms in *Economic Interests in Canadian Tort Law* (Markham, Ont: LexisNexis Canada, 2009) at 376-377:

> Where a service takes the form of providing written or oral advice, or providing professional guidance, the question of liability to the person seeking the service or a third person who relies on the advice tends to be subsumed under negligent misstatement, a category where the parameters of the duty of care have been extensively considered in the case law. The "negligent performance of a service" category refers particularly to cases in which the harm to the plaintiff stems, **<u>not from the plaintiff's relying on the defendant's advice or guidance</u>**, but from the plaintiff's financial position being adversely changed as a result of the defendant's failure to perform competently a task that the defendant had undertaken to perform...
>
> [emphasis added]

[66] I am not satisfied that negligent performance of a service as a cause of action would apply in this instance. The thrust of the Mathesons' case is that they relied on CIBC's advice and guidance. As a result, their claim under this heading would be duplicative of their claim in negligent misrepresentation.

[67] This leaves the claim of negligent misrepresentation as the only remaining cause of action. What follows is a discussion of whether the Mathesons have made out that claim, and, in particular, whether they have established reliance and damages.

C. Negligent Misrepresentation

Did the Mathesons rely in a reasonable manner on representations made by CIBC as to the availability of margin?

[68] The test for a claim in negligent misrepresentation has five requirements, set out in *Queen v. Cognos Inc.*, [1993] 1 SCR 87:

i. There must be a duty of care based on a "special relationship" between the representor and the representee;

ii. The representation in question must be untrue, inaccurate, or misleading.

iii. The representor must have acted negligently in making said misrepresentation.

iv. The representee must have relied, in a reasonable manner, on said misrepresentation.

v. The reliance must have been detrimental to the representee in the sense that damages resulted.

[69] The first three requirements are not in dispute. The real dispute between the parties is whether the Mathesons did in fact rely on incorrect margin calculations in their investment decisions. The evidence of the Mathesons and Mr. Saturley is that they did rely on the incorrect calculations when making investment decisions. They say that margin availability affected investment decisions for the entire

portfolio and that Mr. Saturley would not have made the recommendations he did if he had the correct information.

[70] CIBC submits that there is no evidence from the Mathesons as to their trading decisions and how the error affected their decision-making process. In fact, CIBC led evidence that there were very few trades in the non-EEM accounts during the error period. CIBC describes a vacuum in the evidence provided by the Mathesons and suggests that there are numerous questions central to the issues of detrimental reliance and causation that remain unanswered, such as:

(a) Why was margin important or relevant to the Mathesons' strategy?

(b) What specific investment decisions were determined by margin and why?

(c) What specific investment decisions were made by the Mathesons during the Error Period, and what effect did margin have on those decisions, if any?

(d) When were specific investment decisions made during the Error Period, and what specific factors were taken into account?

(e) What specific investment decisions would not have been made but for the Error, and why?

(f) What would the Mathesons have done if they had the correct margin calculations and how would those decisions have differed from what was actually done, if at all?

[71] Moreover, CIBC argues that the Mathesons attempt to respond to some of these questions by raising an allegation that they directed CIBC to allow their available margin to drop below $250,000. As I have indicated, I am not satisfied that there is evidence to support this allegation, other than the evidence that the Mathesons had some "comfort level". The Mathesons also suggest that there was reliance on the basis that they were denied the opportunity to give their "informed consent to trading decisions during the error period". They say this justifies putting them in the position they would have been have if they had liquidated their entire portfolio on July 24, 2008. As will be explained, the theory of "informed consent" is unknown in the world of investment finance. Also, it bears close

resemblance to the "fraud on the market" theory, which Canadian courts have rejected.

[72] Finally, CIBC suggests that the real cause of the Mathesons' losses was the credit crisis in the United States which fuelled the market losses in Canada.

[73] I am satisfied the burden of proof is on the applicants to demonstrate that they relied on the negligent misrepresentation. Once the Mathesons have proved reliance, the burden will shift to CIBC to prove that the Mathesons did not in fact rely on the misrepresentation. (The basis for such a shift will be discussed below).

[74] Allen M. Linden describes the test for reasonable reliance in *Canadian Tort Law,* 9th ed (Markham: Butterworths, 2011) at 473:

> [Reliance] states a factual test for causation. Causation is a universal requirement that must be proved in all negligence cases. In this context, causation is normally proven by showing that the plaintiff relied on the statement. Thus, where a plaintiff in a negligence statement action fails to prove he in fact relied on the statement, the action will fail (even if it would have been reasonable to do so).

[75] G.H.L. Fridman notes three requirements for proving reasonable reliance in *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 591:

> The reliance that will be effective and found an action must be actual reliance. Therefore, it could not be asserted by the plaintiff in *Edwards v. Rebound Resources Inc.* that it relied on a representation by an environmental officer which occurred some years after the purchase of the slag stone which turned out to be defective. Nor will liability arise if reliance is only presumed to have occurred on the facts of the case. Hence the decision in *Kripps v. Touche & Ross Co.* that the defendant accountants would only be liable for any actual reliance on their opinions as contained in financial statements in a company's prospectuses that could be proved to have occurred on the part of the plaintiffs. Furthermore it must be shown that the plaintiff acted reasonably in relying on the statement made by the defendant. Hence in *Serendipity Ventures Ltd. v. White Rock (City)* where the plaintiffs relied on a statement by the city's staff on how to prepare a prospectus to receive favourable consideration for reasoning, such reliance did not entitle the plaintiffs to sue for negligent misrepresentation. It was not reasonable for the plaintiffs to rely on the staff's advice as an assurance that the plaintiffs' application would be approved by the council.

[76] The question at this stage is whether the Mathesons in fact relied on the misrepresentation as to the available margin. If the Mathesons are successful, the burden will shift to CIBC to prove that the Mathesons did not rely on the misrepresentations. It may also be sufficient for the court to draw an inference of reliance. The British Columbia Court of Appeal provides some useful guidance in *Kripps v Touche Ross & Co.*(1977), 33 BCLR (3d) 254, [1997] 6 WWR 421, leave to appeal to the S.C.C. refused (1997), 102 B.C.A.C. 238, 225 N.R. 236:

> 88 Reliance is a question of fact. Where such a finding is based upon oral testimony, the assessment of witnesses, and decisions on credibility, it is a question which should be answered by a trial judge. Here, however, the trial judge heard no oral evidence but rather based his findings of fact on documents, on affidavit evidence, and on transcripts of cross-examination of various witnesses, including the plaintiffs. In these circumstances, and in the absence of any finding by the trial judge concerning reliance with respect to the misrepresentation about the mortgage arrears, it is open to this Court to make its own determination as to whether reasonable reliance has been proven. Moreover, it will be seen that, even with respect to the trial judge's finding of non-reliance by the plaintiffs on the loss provision, that conclusion is essentially a matter of inference from all of the circumstances. In my respectful view, this Court is in as good a position to draw, or to refuse to draw, the necessary inferences as was the trial judge.
>
> …
>
> 100 The defendant sought to distinguish these authorities on the basis that they were all cases where fraud was alleged and that no such rule or principle is to be found in cases where the claim is based on negligent misrepresentation. The defendant says that in cases of negligent misrepresentation, the burden of proving reliance never shifts to the defendant.
>
> 101 I am not persuaded that there is any merit in this distinction. Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many such cases, however, as the authorities point out, it would be unreasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.
>
> …

> 103 It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view that where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.

[77] The holding in *Kripps, supra,* that the misrepresentation is only required to be one factor has been consistently upheld in Canada. Warner J applied this principle in *National Bank Financial Ltd, supra*, at para. 691. See also *Barret v. Reynolds*, 1998 CarswellNS 333 (N.S.C.A.) at para.178.

[78] The authorities cited by the Mathesons do not support the proposition that the burden rests on CIBC to show that they would not have done something differently at this stage of the analysis. The Mathesons must still meet their burden first.

[79] In *Northey-Taylor v. Casey*, 2007 ABQB 113, aff'd 2008 ABCA 149, the plaintiff claimed negligent misrepresentation. At paras. 59 - 60 the judge found the plaintiff had in fact relied on the misrepresentation and that the detrimental reliance resulted in damages. Only then did the judge go on to consider whether the defendant had proved that the plaintiff would have entered into the transaction anyway.

[80] The burden as I have found is on the Mathesons to prove on a balance of probabilities that there was some positive reliance on the representations of CIBC. One particular difficulty is that the available case law normally deals with a single share purchase transaction. Here, the subject matter is not a single transaction (other than the EEM portion of the portfolio), but involves active management of an entire investment portfolio. It is therefore necessary, in my view, for the Mathesons to demonstrate that an accurate margin account availability statement was an essential factor to their entire investment strategy. If they can so prove, then they have met their burden with respect to reliance. However, at that point it will still be necessary for them to prove that the reliance resulted in the damages that they claim.

[81] Both Mr. Saturley and the Mathesons stated in their evidence that an accurate margin account was integral to their investment strategy. Mr. Saturley indicated in his affidavit that monitoring available margin in client accounts was a key tool that he relied upon to manage a client's investment strategy (para. 22). He also indicated that during the period July 24th to October 9th, 2008, he would not have given the advice or made the investment recommendations to the Mathesons that he did had the correct margin information been available to him (para. 46). Further, Mr. Saturley's evidence is that the Mathesons suffered losses in their accounts that they would not have suffered had the correct margin information had been available to him (para. 47). The Mathesons' evidence in their affidavits was to similar effect. These are very broad statements with no specificity as to what decisions were affected because of the error in the margin amount. How did the misstatement of the available margin affect the non-margin portion of the Mathesons' portfolio?

[82] The Mathesons suggest that their evidence, as well as that of Mr. Saturley, confirms that they did rely on incorrect margin calculations when making investment decisions for their whole portfolio.

[83] As to the importance of knowing the proper margin, Mr. Matheson made the following statements in his affidavit:

> 17. As was my standard practice, I would regularly monitor my Accounts balances, investment performance and available margin online through the CIBC website.
>
> 18. As was my practice with previous investment advisors, I requested that Mr. Saturley review Our Accounts with us every 30 days which he accommodated.
>
> ...
>
> 20. I was informed by my investment advisor, Mr. Saturley, and understood that monitoring the margin available in Our Accounts was a key tool used by Mr. Saturley to manage the investment strategy in Our Accounts and our investment risk exposure.
>
> 21. I was informed by my investment advisor, Mr. Saturley, and understood that the margin in Our Accounts influenced and impacted the

> recommendations and investment advice he would give regarding his investment strategy.
>
> ...
>
> 24. In late September 2008, I was considering buying property and I called Mr. Saturley to discuss my Accounts and available margin in my investment Account to determine whether I had enough surplus margin available to withdraw cash from my Investment Account for this purchase.
>
> 25. I was advised by Mr. Saturley that, at that time, my investment Account had sufficient surplus margin available to accommodate a withdrawal of funds without causing the available margin to fall below my preferred level.
>
> ...
>
> 49. I am advised by Mr. Saturley that, had he had the correct margin information, he would not have given the investment advice or made the investment recommendations to me that he did.
>
> 50. I am advised by Mr. Saturley that I suffered losses in my Accounts that I likely would not have suffered had the correct margin information been available to him.
>
> 51. I am advised by Mr. Saturley that, as a result of the error, we were forced to cover the currency exchange on the sale and purchase of all uncovered US options in Our Accounts.
>
> 52. I also believe that I lost dividend income on securities that were sold.

[84] Other than these broad statements there is no specific information supporting the conclusion that the margin error affected the portion of the Mathesons' portfolio that did not require margin.

[85] CIBC says that the Mathesons did not rely on Mr. Saturley. CIBC says that there is no evidence that Mr. Saturley made any recommendations on what investment decisions to make when he reviewed the Mathesons' accounts on a monthly basis, nor is there any evidence, if recommendations were made, what they were. CIBC indicates that the only references to reliance upon Mr. Saturley

by the Mathesons are in the excerpts from Mrs. Matheson's discovery evidence, which are to the effect that she relied entirely upon Mr. Saturley and her husband with respect to trading in her account:

> Q. Is it fair to say that you gave ... well, your husband has your power of attorney ... that you relied upon him to deal with Fred Saturley ...
>
> A. Yes.
>
> Q. ... and your accounts?
>
> A. Definitely.
>
> Q. And to the extent that there was activity in your accounts, was that activity as a result of dealings between your husband and Fred?
>
> A. Yes.
>
> Q. You had ... can you recall any occasion when you instructed Fred directly?
>
> A. Well, I spoke with ... he would, you know, review things with me. A lot of it was over my head, so, you know, I basically relied on Frederick, Wood Gundy, and my husband.

[86] CIBC points to evidence of Richard Croft, an expert retained by the Mathesons, on cross-examination, which it says confirms that Mr. Matheson made certain "unsolicited" transactions, requested by himself, without input from Mr. Saturley. An unsolicited transaction is one placed by a client and not initiated by the investment advisor.

[87] As well, CIBC says that the fact that Mr. Matheson's instruction to Mr. Saturley to liquidate the Mathesons' accounts on October 8, 2008, is proof that he did not rely entirely upon Mr. Saturley. All of these transactions were listed as "unsolicited".

[88] What is the evidentiary basis indicating that the Mathesons relied on the negligent misrepresentation made by CIBC as alleged? While I am satisfied that the Mathesons relied on the representation with respect to the EEM option transactions, and suffered damages which have been purportedly compensated by

CIBC by way of cash payment referred to earlier, I am not satisfied that is the case for the remainder of their portfolio. In support of my conclusion that the Mathesons have not met their burden of proving reliance with respect to the non-EEM portion of their accounts, I will consider the questions of "informed consent" and the general lack of supporting evidence.

i. Informed consent

[89] The applicants submitted an expert report by Richard Croft. Mr. Croft has a long history in the financial services industry. He began in 1975 as a registered investment advisor and has been licensed as an investment counselor/portfolio manager since 1993. Through his company, RN Financial Group Inc., Mr. Croft manages approximately $300 million on a discretionary basis for approximately 1400 families of individual investors. He has written articles for various publications, as well as writing and co-writing books on wealth management and serving as an expert witness on securities related issues.

[90] The thrust of Mr. Croft's opinion is best reflected in the following paragraphs from the executive summary to his report:

> On July 24, 2008 the Plaintiffs held a significant uncovered short option position in iShares Emerging Markets Index Fund (symbol EEM). Specifically the Plaintiffs were short EEM put options that obligated the plaintiffs, in the event the puts were exercised, to buy shares of EEM at a specific price (referred to as the option's strike price). The obligation to buy EEM shares required the Plaintiffs to maintain sufficient collateral (i.e. minimum maintenance margin) to guarantee their ability to buy the EEM shares should the short puts be assigned.
>
> On July 24, 2008, there was a 3 or 1 stock split in the shares of EEM. The resulting stock split reduced the price of EEM shares by a factor of 3 (i.e. if EEM was trading at $105 per share pre-split the price would be reduced to $35 per share post split).
>
> The Options Clearing Corporation (OCC) provides rules that detail how Dealer Members calculate margin after a stock split. The intent is to ensure that clients are left with the same margin requirement and attendant obligations as existed prior to the stock split.
>
> The defendant failed to alter the share price multiplier and the number of shares deliverable against the outstanding EEM option positions. As a result, the

> Defendant understated the actual margin requirement and attendant leverage being employed by the Plaintiffs who were short EEM options.
>
> The amount of margin required was understated by as much as a factor of 3. As a result the Plaintiffs were making investment decisions based on erroneous information.
>
> The Defendant provided compensation for losses associated with the Plaintiffs EEM positions and reversed some Portfolio Partner Fees with resulting HST.
>
> The Defendant did not compensate Plaintiffs for losses in their investment portfolio that were a direct result of 1) excess unreported leverage caused by the miscalculation of margin and 2) generally erroneous information that diminished visibility making it impossible for the Plaintiffs to make informed decisions.

[91] In his report, Mr. Croft refers to the principle "informed consent" in the following terms at p. 5:

> The plaintiffs should reasonably expect that information provided by [sic] Defendant to be an accurate reflection of their current situation.
>
> The Plaintiffs cannot reasonably be expected to provide their investment advisor with informed consent if they are relying on erroneous information.

[92] As such, the Mathesons rely on a lack of "informed consent" with respect to decisions following the breach.

[93] Eric Kirzner was called as an expert by CIBC. Mr. Kirzner is a professor of finance and John H. Watson Chair in Value Investing at the Joseph L. Rotman School of Management, University of Toronto. He has expertise in investment suitability, asset allocation, investment characteristics of futures and option contracts, investment product knowledge, leverage strategies, quantification of investment losses, valuation of securities, brokerage account management and how investors make decisions, among other things.

[94] Mr. Kirzner was asked to provide an opinion on the Croft report, including commenting on the basis for any disagreement with Mr. Croft's conclusions or rationale for calculating losses due to the EEM error. In the event of disagreement, he was asked to comment on, *inter alia*, the following:

> (b) How would I determine or calculate the losses, if any, suffered in the Matheson accounts during the period July 24, 2008 through October 9, 2008 ("The Error Period") as a result of the EEM Error?
>
> In addition to the assumptions described below in Section 3, and for the purposes of this further question, you have also asked me to assume that: the Mathesons requested a $250,00 buffer of surplus margin remain in their account at all times; and the $250,000 surplus margin buffer would have been breached prior to October 8, 2008 had margin been calculated correctly.
>
> 2. On the basis of the $250,000 assumption would any of these assumptions alter or change my views on the quantum of damages incurred, if any during the Error Period?

[95] Mr. Kirzner suggested that the thrust of Mr. Croft's position, and the basis of his calculation, was the assumption that all trades executed in the Mathesons' accounts between July 24, 2008 and October 9, 2008, should not have occurred. He took the view that Mr. Croft's approach was based on a theory of "informed consent".

[96] Mr. Kirzner opined that he was aware of no principle in investment finance called "informed consent". In his words:

> ...The term "informed consent" is not a term used in finance - it seems to be a legal term normally used in medical malpractice suits. Mr. Croft seems to be inadvertently raising a legal-based "fraud on the market" theory argument that the trades shouldn't have happened because information provided was incorrect. I have never used or seen such a terms as "informed consent" in my experience as an expert or as an author on this topic...

[97] As a result, he considered Mr. Croft's position not supportable.

[98] I accept Mr. Kirzner's view that the principle of "informed consent" has not traditionally been applied in the investment advisor context. As CIBC points out in their submissions, the principle of "informed consent is similar to the "fraud on the market" theory that has been applied in the United States but rejected in

Canada. See *Meregon v. Philip Services Co.,* (2003) 13 B.L.R. 3d. 29; *Carom v. Bre-x Minerals Lt,* 41 O.R. (3d) 780.

[99] Consistent with this conclusion, Mr. Croft stated that he had pulled the theory of informed consent "out of the air". The exact question and answer on cross-examination was as follows:

> Q. You talk about informed consent in your report. Where did you get the phrase informed consent?
>
> A. It was an informed decision. There is a ah... there is a ... in my mind ... I mean, I don't know, I just pulled it out of the air. In my mind, an investor needs to make an informed decision, in order to make an informed decision and consent to a trade, ah... that's where it came from. I mean if it's a legal term, I have no expertise on that and don't profess to.

[100] Not only does Mr. Croft admit that his theory of informed consent, upon which the Mathesons rely, was "pulled out of the air", but he also admits that it is a legal term and that "I have no expertise on that and don't profess to".

[101] I am not satisfied this theory of informed consent as advanced by Mr. Croft on behalf of the Mathesons is valid and, therefore, find it of no assistance to the Mathesons in proving reliance.

ii. General Lack of Evidence

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

[103] The burden on the Mathesons is to show that during the error period they relied on CIBC's misstatement of their margin availability and that this reliance was detrimental and resulted in damages.

[104] On Mr. Matheson's instructions on October 8, 2008, Mr. Saturley closed out numerous open options and sold the securities in the Mathesons' unregistered accounts. As such, the Mathesons' holdings in these accounts were effectively

liquidated on that date, which was before they were made aware of CIBC's error. It is difficult to accept that the Mathesons relied on CIBC's margin calculation having already determined to withdraw from the market because of the impending losses apparently caused by the credit crisis in the U.S. Mr. Saturley learned of the error late October 8, and on Thursday, October 9, he reported the error to Per Humle. He apprised Mr. Matheson of the error on the same day, after Mr. Matheson had already liquidated the investments. It must be remembered that Mr. Matheson's evidence is that he regularly monitored his accounts, and that leading up to October 8, 2008, he became concerned enough that he decided to liquidate his and Mrs. Matheson's investments.

[105] I agree with CIBC's argument that specific evidence of reliance is lacking. The Mathesons allege in their post-hearing brief that they relied "entirely" or "absolutely" upon Mr. Saturley. Mr. Matheson's evidence indicates that Mr. Saturley "reviewed the Mathesons' accounts" with him on a monthly basis. There is no evidence as to the form of this review nor is there any evidence that Mr. Saturley made recommendations on investment decisions during these reviews. There is also no evidence that margin availability played a role with respect to the non-EEM accounts during this review. With respect, the events of October 8, 2008, when Mr. Matheson instructed Mr. Saturley to liquidate his accounts, contradicts the Mathesons' allegation of "entirely" or "absolutely" relying on Mr. Saturley's advice. In her cross-examination, Mrs. Matheson testified that she had no input into her investment decisions, but rather she relied on her husband and Mr. Saturley. Mrs. Matheson's evidence is that any decisions made in respect of her accounts were made between her husband and Mr. Saturley.

[106] Mrs. Matheson's evidence on this point was confirmed by Mr. Matheson on cross-examination. When counsel for CIBC suggested that Mrs. Matheson's accounts were managed by Mr. Saturley, he added, "and me". The exchange between counsel and Mr. Matheson was as follows:

> Q. Mr. Matheson, you also understood that your wife, Caroline Matheson, had accounts with CIBC Wood Gundy in 2007 - 2008?
>
> A. Yes.
>
> Q. And you also knew that the accounts that she had with CIBC Wood Gundy in 2007 - 2008 were being managed by Mr. Saturley?

A. And me.

[107] Further evidence that the Mathesons did not “rely entirely” on CIBC is that Mr. Matheson made some “unsolicited transactions”. As noted earlier, an unsolicited transaction is one initiated by a client. One example is in Mr. Croft’s evidence, where he pointed to evidence of such an unsolicited transaction in Mr. Matheson’s July 2008 account statement. It should also be remembered that when Mr. Matheson provided his instruction to Mr. Saturley to liquidate his accounts on October 8, 2008, all of these transactions were entered as unsolicited.

Conclusion on Burden

[108] Mr. Matheson was a successful businessman and he and Mrs. Matheson had acquired substantial assets. He had trading authority over his wife’s investment accounts. He made all the investment decisions for himself and Mrs. Matheson and communicated these instructions to Mr. Saturley. The “Know Your Client Form” indicates that his knowledge was good. It is also notable that during December 2006 and October 2008, while Mr. Matheson held cash and generated growth through a diversified set of blue chip stocks and mutual funds, he generated additional income by selling covered calls against these stocks. The Mathesons also generated additional income by selling uncovered or “naked option contracts”. This strategy is explained above and it is fraught with risk.

[109] During cross-examination of Mr. Croft by CIBC counsel, the following exchange took place:

Q. ...Mr. Croft do you agree with me that the strangle strategy which was employed in the Mathesons’ accounts is fraught with risk in a declining market?

A. I would agree with that.

[110] The market conditions at the time cannot be underestimated. During the error period, the market suffered an unprecedented reduction and the average portfolio lost approximately 30%, according to Mr. Croft on cross-examination:

Q. But there was a market decline?

A. There was a market decline, yes.

Q. A marked market decline starting September 15th?

A. Yes.

Q. And that marked market decline continued throughout the rest of September and into October?

A. Yes.

Q. It took some time for the market to reach above, is that correct?

A. Yes, I don't actually believe it reached the bottom until March of the next year.

Q. March of 2009. And would you agree with me that across the board that the decline the value of the market from September 15 to March of 2008 was somewhere in the vicinity of 30%?

A. That sounds about right.

[111] In determining whether the Mathesons have met their burden of proving reliance on CIBC, it is necessary to distinguish between the EEM option trades, which required margin, and the balance of their investment portfolio. I am satisfied that the Mathesons have met their burden of proving reliance in respect of the EEM transactions. That CIBC cancelled all of the EEM transactions in their accounts for the relevant period and provided reimbursement is obviously an acknowledgement of their error and of the Mathesons' reliance on CIBC. CIBC also acknowledged liability by way of settlement agreement with IIROC. The question is whether the payment/reimbursement by CIBC is the appropriate measure of the damages suffered by the Mathesons in respect of the margin/EEM portion of their account. I am not satisfied that it is and will address this issue under the damages portion of this decision.

[112] As to the non-EEM remainder of the Mathesons' portfolio, I am not persuaded that they have met their burden of proving reliance on CIBC for the reasons stated.

[113] In the event I am wrong in this determination, I will assume that the Mathesons have met their burden of proving reliance in relation to the whole of their portfolio and determine whether damages resulted from this reliance on the margin calculations. For the reasons which follow I am not so persuaded.

Have the applicants met their burden in proving that damages resulted from the reliance on the margin calculations?

[114] The *Queen v. Cognos Inc.* test for negligent misrepresentation requires that the plaintiff demonstrate reliance and that the reliance resulted in damages; the reliance must have been detrimental in the sense that damages resulted from it. I am satisfied that there are three steps to this element:

i. The Mathesons must prove, on the balance of probabilities, that the reliance on the representation was to their detriment and resulted in damages.

ii. If they do, the Mathesons are entitled to be restored to their original position. The Mathesons are required to prove on a balance of probabilities what that position is.

iii. Once the Mathesons have proven the above two elements, the onus switches to CIBC to prove that the Mathesons would have acted in the same way or in another specific way regardless of the misrepresentation.

[115] The Supreme Court of Canada summarized the principles relating to damages in negligent misrepresentation cases in *Rainbow Industrial Caterers Ltd v. Canadian National Railway*, [1991] 3 S.C.R. 3:

> 20 The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made…
>
> 22 What that position would have been is a matter that the plaintiff must establish on a balance of probabilities. In a case in which a material negligent misrepresentation has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, absent the misrepresentation, the plaintiff would not have entered into the transaction…

> 23 Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negative all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?
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> 24 Although the legal burden generally rests with the plaintiff, it is not immutable: see *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481, 3 D.L.R. (3d) 55; and *Snell v. Farrell*, [1990] 2 S.C.R. 311, 110 N.R. 200, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position." A tortfeasor who says "Yes, but you would have assumed a position other than the *status quo* ante," and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the *status quo ante*.

[116] In cases involving single transactions (such as entering into a contract in *Rainbow Industrial Caterers*, *supra*) , it is relatively simple to demonstrate that the reliance was to the detriment of the plaintiff and resulted in losses. It is important to note that the Supreme Court of Canada held that "the plaintiff should be entitled to say ‘but for the tortious conduct of the defendant, I would not have changed my position.'" In the present case, the Mathesons’ argument appears to be that “but for the tortious conduct of CIBC we would have changed our position.”

[117] The Nova Scotia Court of Appeal held in *Barrett v Reynolds* (1998), 170 N.S.R. (2d) 201, CarswellNS 333, application for leave to appeal to S.C.C. dismissed, 183 N.S.R. (2d) 198 (note), that the plaintiffs had proved detrimental reliance that resulted in damages and were therefore entitled to be put back in the position they were in prior to the misrepresentation:

> 182 The object of damages in negligent misrepresentation is to put the plaintiffs in the position they would have been in had the misrepresentation not been made: see *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1991] 3 S.C.R. 3 (S.C.C.) per Sopinka, J. at 14. The plaintiffs established that the misrepresentation was at least one of the factors inducing them to enter into the line of credit transaction and that they suffered damage as a result. That being so, damages are to be assessed on the basis that the plaintiffs would not have entered into the transaction unless the defendant proves that they would have done so on the same or different terms even if the misrepresentation had not been made: see *Rainbow, supra*, at 15-16; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) per LaForest, J. at 441-2.
>
> 183 The record before us shows that the Bank did not discharge this onus…

[118] In this case, the Mathesons argue that their reliance affected their entire investment strategy; it was not limited to a single transaction. The difficulty with the Mathesons' position is that they do not causally connect reliance to a course of action foregone, with a corresponding loss.

[119] There is no evidence before me as to what the Mathesons would have done differently had it not been for the misrepresentations. They seek to shift this burden to CIBC. I am satisfied that in a case of negligent misrepresentation, the plaintiff bears the burden of proving what they would have done differently but for the misrepresentation. If they do not meet this burden, their claim must fail. The Mathesons have failed to prove what they would have done if accurate margin information had been provided during the error period. That is, they must show what they would have done "but for" the error.

[120] In *Rollit v. Standard Life Assurance Co.*, [2000] O.J. No. 1123 (S.C.J.), the court found that the plaintiff had not met her initial burden of proving that the reliance resulted in her loss. The plaintiff claimed that she would have made different investment decisions and brought evidence to that effect. The court was not persuaded that she would have, and so the plaintiff had not discharged her burden. Therefore the burden did not switch to the defendant to show that the plaintiff would have done the same thing regardless of the misrepresentation.

[121] The question of whether the Mathesons have proved that their reliance was detrimental and that it resulted in losses necessarily involves a discussion of the content of their investment accounts, and whether the reliance resulted in damages

to these investments. To do so, it is necessary to separate the components of the Mathesons' investment accounts into the EEM account, and the remainder of the portfolio. The reason for this is two-fold. First, it was only the EEM and options trading that required margin. Secondly, CIBC has compensated the Mathesons for these losses. The Mathesons now seek compensation for the lesser in remainder of the portfolio during the error period.

Remainder of the Mathesons' Portfolio

[122] Although I have determined that the Mathesons have not met their burden of proving reliance on CIBC respecting the remainder of their portfolio I will go on to assume that they have proved reliance to determine whether they have met their further burden of proving this reliance resulted in damages.

[123] For the reasons which follow I am not satisfied that the Mathesons have met that burden.

[124] The Mathesons say the only fair and reasonable way to correct CIBC's error in relation to the remainder of their account (excluding the EEM trades) would be to put the portfolio back into the position it was on July 24, 2008.

[125] The evidence relied upon by the Mathesons as to causation is set out in of Mr. Saturley's corrected affidavit as follows:

> 22. The amount of margin available in a client's accounts influenced the recommendations and investment advice that I would give for actions taken going forward.
>
> ...
>
> 38. ...I relied upon incorrect Margin information when advising Donald and Carolyn on their investments during the period of July 24, 2008 to October 9, 2008.
>
> ...
>
> 46. During the period of July 24, 2008 to October 9, 2008, I would not have given the investment advice or made the investment recommendations to

> Donald and Carolyn that I did had the correct margin information been available to me.

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

[127] The inherent difficulty in the Mathesons' argument that they should be put into the same position they were before the error period in relation to the whole of their investment account is that the bulk of their investments did not require margin. The Mathesons did not require margin to purchase their equities or mutual funds, and did not require margin for their covered calls. They only used margin to support Mr. Saturley's so called "strangle strategy" which he applied to their investments. However, these amounts have already been reimbursed as any, and all, uncovered options in the EEM open during the error period were absorbed by CIBC.

[128] The liquidation of the Mathesons' accounts on October 8, 2008, on the instruction of Mr. Matheson, cannot be attributed to the margin error because it took place before they became aware of the error. There is no evidence that the Mathesons made trading decisions in reliance on overstated margin during the error period. In fact, very few trades went through their accounts during the error period and for trades that required margin, even on the basis of Mr. Saturley's calculations, there was sufficient margin available. In summary, the Mathesons have offered no evidence to satisfy this court that they have met their burden. They have offered no evidence as to what they would have done differently or as to what opportunity the error deprived them of.

[129] Without such an evidentiary basis, the court would have to assume a complete loss the very second the error arose and then reverse each and every entry made during the error period. This approach assumes that the market

meltdown that was in effect during the time had no effect. From the evidence of Mr. Croft we know that most individuals lost approximately 30% of their portfolio.

[130] I dismiss the Mathesons' claim for damages relating to the remainder of their investment portfolio. I dismiss their claim to have each and every non-EEM option trade made in their account during the error period reversed as if it did not happen.

Losses from EEM Trades

[131] As stated above, I have found that the Mathesons relied on the misstated margin availability with respect to the EEM trades. They are entitled to be put back into the position they were in before the error. CIBC has offered evidence through Mr. Humle that this is what CIBC did, by reimbursing the Mathesons for these errors. The reimbursement was in the amounts of $303,170.25 in account # 500-300-2325, and $343,948.78 in account # 273-008-5525. These figures were arrived at by a calculation that CIBC referred to as the Mathesons' "net loss". Simply put, CIBC arrived at the net loss by cancelling EEM trades during the error period, and then deducted from these losses any gains made prior to the error period on the EEM accounts. The period that they used for the net loss calculation was from approximately February 2008 until the end of the error period.

[132] One of the issues raised by the Mathesons is the "clawback" of transactions prior to the error period which were deducted from the EEM losses to arrive at the "net loss". There was no comment by Eric Kirzner on this issue. This deduction made prior to the error period has not been adequately justified, addressed or explained by CIBC in its evidence. With respect, their position makes no logical sense. CIBC was presumably compensating the Mathesons for the losses during the error period. How can this affect premiums paid and actions taken prior to the error period? Included in the Croft report is a calculation of the amount that was clawed back by CIBC from the Mathesons related to EEM trades made prior to July 24, 2008. The amount of such clawbacks can be found in the November account statement for the Mathesons which is in the Donald Matheson affidavit.

[133] The clawback with respect to Mr. Matheson's account is $133,379.19 US. Using the currency adjustment rates as of that date, 1.2299, the clawback was

$164,043.06 CDN. These amounts have been asserted by the Mathesons in their submissions and have not been challenged by CIBC. To put the Mathesons into the position they were in prior to the EEM error would require a reversal of the amounts deducted by CIBC prior to the error date. There was no justification for the clawback of premiums earned prior to the error period. Therefore, I award the amount of $164,043.06 to Donald Matheson as additional damages to put him back in the same position he was prior to the error period in respect of the EEM trades.

[134] The amount of clawback by CIBC with respect to Mrs. Matheson's account is $100,668.80 US. Applying the same conversion rate of 1.2299, the loss would be $123,812.55 CDN. There being no challenge to this amount I will use it for the purposes of determining damages. There being no evidence as to why these amounts prior to the error period would be clawed backed, logically Ms. Matheson would be entitled to have this amounts awarded as damages. I order the amount of $123,812.55 payable to Carolyn Matheson as damages.

Are the Matheson entitled to compound interest on these amounts?

[135] There is authority to grant interest at ss. 41(i) and (k) of the *Judicature Act,* R.S.N.S. 1989, c. 240:

> 41 (i) in any proceedings for the recovery of any debt or damages, the court shall include in the sum for which judgment is to be given interest thereon at such rates as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> …
>
> (k) the court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> > (i) interest is payable as of right by virtue of an agreement or otherwise by law;
> >
> > (ii) the claimant has not during the whole of the prejudgment period been deprived of the use of money now being awarded, or

> (iii) the claimant has been responsible for undue delay in the litigation.

[136] One thread that runs through the cases dealing with interest is that some proof that compound interest is preferable to simple interest is required before the court may order compound interest, but the quality of proof is yet to be decided in Nova Scotia. In *Leddicote v. Nova Scotia (Attorney General),* 2002 NSCA 47, Saunders JA commented on the state of the law regarding compound interest awards in Nova Scotia:

> [95] The question of the quality or type of proof required to make a case for an award of compound interest has not yet been specifically addressed by this court. While not cited by counsel I did find what I believe are the two cases where an award of compound interest was reversed by this court. In *ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc. et al* (No. 3) 1992 CanLII 2452 (NS CA), (1992), 113 N.S.R. (2d) 1 Freeman, J.A,. with Matthews, J.A. concurring, and Jones, J.A., in separate reasons, concurring on this point, said at p. 26:
>
> > Interest
> >
> > [124] Mr. Justice Hallett awarded the plaintiff customers compound prejudgment interest; with respect, there is no evidentiary basis justifying more than simple interest. I would allow the appeal with respect to prejudgment interest in part: compound interest would be reduced to simple interest.
>
> [96] Justice Freeman's decision does not provide an analysis as to why he found the evidentiary foundation to be lacking or what type or quality of evidence might have justified an award for compound interest. When one refers back to the lengthy decision of Hallett, J. (as he then was) at trial, (1990), 97 N.S.R. (2d) 91 at 172 it is apparent that in awarding compound interest he did not reference the evidence but rather the text of the *Judicature Act*, specifically s. 38, now s. 41, reproduced earlier in these reasons. To his mind the statutory provisions justified the conclusion that the claimant had been deprived of the use of the money and the opportunity:
>
> > ...to earn interest on the award and on the interest earned from year to year. That being the case, it is logical that the plaintiffs be entitled to compound interest for the appropriate period. I awarded compounded prejudgment interest for the first time in *Hannah v.*

> *Canadian General Insurance Co.*, (1989), 92 N.S.R. (2d) 271; 237 A.P.R. 271, as it seems implicit in the wording of what is now s. 41(k) (ii) of the *Judicature Act* that deprivation of the use of the money is a relevant consideration from which it flows that the interest should be compounded annually although that had not been the practice. (Hallett, J., at §328, emphasis in original)

> [97] Two years later, Justice Hallett, by then sitting as a member of this court, in the case of *Guardian Insurance Co. of Canada v. Hartford Insurance Group* [1992] N.S.J. No. 504, citing *Associated Freezers, supra*, concluded:
>
> > Hartford is required to reimburse Guardian for the amount paid by Guardian to Hartford with pre-judgment interest as fixed by the trial judge but not compounded as there was no evidence to support a finding that compound interest should be paid. Evidence on this issue is required.
>
> [98] Because this specific question - that is the type and quality of proof required to justify a compounding of pre-judgment interest - was neither raised nor argued in the court below, I decline to decide the issue on this appeal. Before embarking on such an inquiry we should, in an appropriate case, have the benefit of a detailed record, comprehensive arguments and a thorough analysis of the authorities.

[137] The applicants seek pre-judgment compound interest of 10%. The amount is used by Mr. Saturley in his calculations. The Mathesons seek to rely on this evidence to establish 10% as a "reasonable rate".

[138] Other than Mr. Saturley's calculations, the Mathesons have not provided any evidence to support a claim for compound interest. I am not satisfied that a bare claim in Mr. Saturley's report that 10% compounded interest is a reasonable rate of return is sufficient, and, therefore, I decline to award compound interest. The Mathesons are entitled to the default rate of 5% simple interest on the award.

[139] The amount of $164,043.06 is to be paid to Donald Matheson and the amount of $123,812.55 payable to Carolyn Matheson. The Mathesons are entitled to the default simple interest rate of 5% but not compound interest. The remainder of the Mathesons claim is dismissed.

[140] I will hear the parties as to costs.

Pickup, J.