IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baan v. Scotia Capital Inc.,*
2023 BCSC 565

Date: 20230412
Docket: S1810350
Registry: Vancouver

Between:

Hans Baan

Plaintiff

And

Scotia Capital Inc.

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Plaintiff:	G. Gregory
Counsel for the Defendant:	H. Parsons N. Pandey
Place and Date of Hearing:	Vancouver, B.C. August 12, 2022
Place and Date of Judgment:	Vancouver, B.C. April 12, 2023

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Introduction

[1] Hans Baan held two self-directed trading accounts with Scotia Capital Inc. ("Scotia Capital"). On January 17, 2018, Mr. Baan used Scotia Capital's online trading platform to sell shares in New Carolin Gold Corporation ("New Carolin"), a junior gold mining company. Mr. Baan did not own all of the sales that he sold. The sale put Mr. Baan's account in a negative position, and Scotia Capital bought shares on the market to make up for the shares he had sold that he did not own. Scotia Capital also sold Mr. Baan's other securities to make up for, in part, the resulting debt.

[2] Mr. Baan filed a notice of civil claim in which he alleged that Scotia Capital had wrongly converted his shares in New Carolin by selling them and providing him

with no benefit. He further alleged that Scotia Capital had been negligent in permitting him to sell the shares when it knew he did not own them. He claims damages for conversion and negligence.

[3] Scotia Capital filed a response to civil claim and a counterclaim. It denied that it had converted Mr. Baan's shares or been negligent in permitting him to sell shares he did not own. It relied on its iTRADE Terms as a full answer and defence to Mr. Baan's claims in both conversion and negligence. In its counterclaim, Scotia Capital sued Mr. Baan for the debt resulting from the shortfall in Mr. Baan's accounts, in the amount of $151,601.56, plus interest, as well as its actual legal costs and expenses, pursuant to the iTRADE Terms.

[4] Both parties filed applications for summary trial. They agree that all matters raised in both the notice of civil claim and counterclaim are suitable for disposition by way of a summary trial. I agree with the parties that the matter is suitable for summary trial.

[5] For the reasons that follow, I dismiss all of Mr. Baan's claims, and grant judgment to Scotia Capital on its counterclaim.

Suitability for Summary Trial

[6] The parties' consent to have this case disposed of by summary trial does not displace the court's obligation to exercise its discretion to determine whether the matter is suitable for summary trial.

[7] To determine whether a case is suitable for summary trial, the court will consider the following factors: (a) the amount of money involved; (b) the complexity of the matter; (c) the cost of taking the case forward to a conventional trial in relation to the amount of money involved; (d) the course of the proceedings; (e) the cost of the litigation and the time of the summary trial; (f) whether credibility is a critical factor in the determination of the dispute; (g) whether a summary trial may create unnecessary complexity in the resolution of the dispute; and (h) whether the application would result in litigating in slices: *Inspiration Management Ltd. v.*

McDermid St. Lawrence Ltd., [1989] B.C.J. No. 1003 (C.A.) at paras. 48–49; *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31.

[8] In its written submission, Scotia Capital submitted that this case was suitable for summary trial on the following grounds:

> (a) the amounts at issue are relatively low, and do not justify the costs and duration of a conventional trial;
>
> (b) this case involves the interpretation of standard form banking agreements executed by two sophisticated parties, and the application of well-known legal principles;
>
> (c) the course of this action has been relatively simple, uneventful, and has involved minimal interim applications;
>
> (d) there are no issues of credibility that cannot be resolved by reference only to the materials before the Court; and
>
> (e) the summary trial can fully dispose of all of the issues in this action, without "slicing" the litigation.

[9] I would add that neither party has conducted examinations for discovery, which reflects both the relatively simple nature of the case, and that there are no credibility issues that cannot be resolved by reference to the parties' affidavit materials.

[10] I agree with the parties that this case is suitable for summary trial, for the reasons submitted by Scotia Capital.

Facts

The Parties

[11] Mr. Baan is a businessman whose background includes owning and managing a heavy equipment parts sales company.

[12] Mr. Baan had a cash account and a Tax Free Savings Account ("TFSA") with Scotia Capital. He opened the cash account on October 29, 2002, and the TFSA on February 4, 2004 (the "Accounts"). He opened the Accounts to trade stocks online and to review his stock holdings. From the time he opened the Accounts until the events giving rise to this lawsuit, Mr. Baan logged-in frequently to review his stock

holdings and to execute trades. He states that he was, therefore, familiar with the iTRADE program in January 2018.

[13] Scotia iTRADE is a division of Scotia Capital. It was formerly known as ScotiaMcLeod Direct Investing. Scotia iTRADE is an online self-directed investment brokerage platform, which allows customers to buy and sell stocks, bonds, mutual funds and other investments at their own self-direction, and without the advice of a broker or investment advisor.

Account Agreements

[14] When he opened the Accounts, Mr. Baan completed New Client Application Forms and provided "Know Your Client" information to Scotia Capital, including information regarding his financial circumstances, investment knowledge, objectives, time frames and risk tolerance. In the Know Your Client documents, Mr. Baan indicated that he had a high level of knowledge with respect to mutual funds, fixed income and stocks, and a moderate knowledge of margin, options, and short sales. He indicated his overall investment experience was moderate

[15] In the New Client Application Forms, Mr. Baan acknowledged, among other things, that:

> 2. I have read, understand, and agree to the terms of your Account Agreement and the other sections in the Terms and Conditions brochure that apply to this account, and to the Declaration of Trust, if applicable.
>
> […]
>
> 5. My shareholder communication instructions are to be followed. I understand that these elections apply to all securities held in this account.
>
> […]
>
> 9. I acknowledge that ScotiaMcLeod Direct Investing does not provide recommendations to me and does not accept any responsibility to advise me on the suitability of any of my investment decisions or transactions. I acknowledge that I am responsible for my investment decisions, as well as for any profits or losses that may arise, and ScotiaMcLeod Direct Investing will not consider my financial situation, investment knowledge, investment objectives and risk tolerance when processing orders place by me.

[16] In the New Client Application Forms, Mr. Baan also elected to be a non-objecting beneficial owner of any securities he held in the Accounts, meaning that he elected to personally receive all security holder materials for the securities he held in the Accounts. As a result, Mr. Baan was entitled to personally receive notices of annual general meetings (and related materials, such as information circulars) in respect of each of the companies for which he held securities in the Accounts.

[17] Mr. Baan also entered into various written agreements regarding the Accounts. The Account Agreements include the Scotia iTRADE Relationship Disclosure Document and Terms and Conditions, which were provided to Mr. Baan when the Accounts were opened.

[18] The iTRADE Terms included the following:

> Scotia iTRADE will not provide any advice or investment recommendations to you and will not be responsible for making a suitability determination of trades when accepting orders from you. You, as a client, alone are responsible for your own investment decisions and Scotia iTRADE will not consider your financial situation, investment knowledge, investment objectives and risk tolerance when accepting orders from you.

[19] The iTRADE Terms also include the following acknowledgment and agreement in s. 2.2:

> THE CLIENT HEREBY ACKNOWLEDGES AND AGREES THAT HE/SHE UNDERSTANDS THAT THE INCIDENCE OF TECHNICAL DIFFICULTY AND THE RISK OF INACCURACY IS AN INHERENT PART OF TRANSACTING VIA THE INTERNET, AND THE CLIENT ASSUMES THE RISK AND RESPONSIBILITY AS PROVIDED IN THE AGREEMENTS BELOW AND OF MONITORING THE ACCOUNT TO ENSURE THAT ERRORS, IF THEY OCCUR, ARE REPORTED TO SCOTIA iTRADE IMMEDIATELY FOR CORRECTION.
>
> THE CLIENT ACKNOWLEDGES AND AGREES THAT HE/SHE HAS READ AND UNDERSTOOD, AND AGREES TO BE BOUND BY, THE PROVISIONS OF THE AGREEMENTS BELOW THAT LIMIT THE LIABILITY OF SCOTIA iTRADE FOR ANY DAMAGE CAUSED THROUGH TECHNICAL ERRORS AFFECTING THE SCOTIA iTRADE SERVICE, AND THAT PLACE THE RESPONSIBILITY FOR MONITORING THE ACCOUNT ON THE CLIENT.

[20] Under s. 4, Mr. Baan agreed to promptly pay all indebtedness when due. “Indebtedness” is defined as follows:

> For the purpose of this agreement, the term "indebtedness" at any time means all indebtedness of the Client to Scotia iTRADE as set out in any statement of account or other communication sent by Scotia iTRADE to the Client and includes interest on any credit extended to the Client and the reasonable costs of collection of payment owed to Scotia iTRADE, together with legal fees associated therewith. The Client will promptly pay all indebtedness due to Scotia iTRADE as a result of any reduction or cancellation of any margin facility. The Client agrees to pay for all securities purchased on the day of settlement.

[21] Under s. 6, Mr. Baan pledged all of his securities as continual collateral security for an indebtedness that might arise.

[22] In relation to any indebtedness Mr. Baan might have in the Accounts, the iTRADE Terms provide in s. 7 that:

> … Scotia Capital Inc. may at any time and from time to time without notice or demand to the Client: (a) apply monies held to the credit of the Client in any other account with Scotia iTRADE to eliminate or reduce Indebtedness; (b) sell, contract to sell or otherwise dispose of any or all of the Securities held by Scotia iTRADE for the Client and apply the net proceeds therefrom to eliminate or reduce Indebtedness; (c) purchase or borrow any Securities necessary to cover short sales or any other sales made on the Client's behalf in respect of which delivery of certificates in an acceptable delivery form has not been made…

[23] Section 7 of the iTRADE Terms further provides that:

> Any and all expenses (including any legal expenses) reasonably incurred by Scotia Capital Inc. in connection with exercising any right pursuant to this section 7 may be charged to the Account. The Client shall remain liable to Scotia Capital Inc. for any deficiency remaining following the exercise by Scotia Capital Inc. of any or all of the foregoing rights and agrees that the rights which Scotia Capital Inc. is entitled to exercise pursuant to this section are reasonable and necessary for its protection having regard to the nature of securities markets, including in particular, their volatility.

[24] Section 16 of the iTRADE Terms provide that use of the iTRADE platform is subject to a number of terms and conditions. These include at s. 16(d) that the client:

> …authorizes and directs Scotia iTRADE to accept all Transactions, order and instructions for Client's Account(s) using the Scotia ITRADE Service and the Client shall be solely responsible for the accuracy of any instructions and associated communications.

[25] They also include at s. 16(e) that Scotia Capital does not make, and is not liable for, any representation, warranty or condition concerning iTRADE, including that the information and data available on iTRADE is “up-to-date, accurate, in sequence, reliable, complete or suitable for any purpose”.

[26] They further include at s. 16(f) that Scotia Capital is not liable for “any loss or damage resulting from technical problems that may arise” on iTRADE.

[27] The relationship between the parties is governed by the Account Agreements. The relationship is, as submitted by Scotia Capital, purely contractual. Scotia Capital provided the iTRADE platform to Mr. Baan. Mr. Baan was entitled to use the platform to place orders to buy and sell securities on stock exchanges at his own direction and at his own risk. Mr. Baan paid a fee, at present $9.99 per trade, for each transaction.

Mr. Baan’s History of Trading New Carolin Shares

[28] Mr. Baan made his first iTRADE purchase of what would later come to be called New Carolin Gold Corporation shares on or about March 29, 2011. New Carolin shares were always listed on the TSX-V under the symbol “LAD”. New Carolin shares were always denominated in Canadian dollars on the TSX-V; their value of course changed from time to time.

[29] Mr. Baan purchased and sold New Carolin shares through iTRADE 12 times between February 10, 2012 and October 19, 2017. He never traded New Carolin shares in that period other than with the symbol LAD, in Canadian dollars, and on the TSX-V.

[30] As of October 19, 2017, Mr. Baan held 752,270 shares of New Carolin in the Accounts.

New Carolin Consolidates its Shares

[31] On October 27, 2017, New Carolin issued a Notice of Annual General Meeting (the "AGM Notice"), which notified its shareholders that New Carolin's Annual General Meeting ("AGM") would be held on December 15, 2017.

[32] On November 21, 2017, New Carolin issued an Information Circular, which set out the business to be conducted at the December 15, 2017 AGM (the "Information Circular"). The Information Circular stated, among other things, that the shareholders would vote on a special resolution at the AGM to consolidate the common shares of New Carolin on the basis of ten pre-consolidation shares for one post-consolidation share of New Carolin (the "Share Consolidation Resolution"). Mr. Baan was entitled to vote on the Share Consolidation Resolution.

[33] Since Mr. Baan was a non-objecting beneficial owner, New Carolin was required to mail a copy of the Information Circular directly to him . The Information Circular has also been publicly available on www.sedar.com ("SEDAR") since November 21, 2017. SEDAR is a publicly available database that posts information about publicly traded securities.

[34] At the December 15, 2017 AGM, the shareholders of New Carolin approved the Share Consolidation Resolution, with the actual consolidation to take effect at a later date.

Mr. Baan Attempts to Sell his New Carolin Shares Pre-Consolidation

[35] On Monday, December 17, 2017 (the first day that the markets were open following the Friday, December 15, 2017 New Carolin AGM), Mr. Baan placed a sell order for all of his shares of New Carolin at $0.40 per share, with a "good through" date of December 29, 2017 (the "Sell Order"). The Sell Order was placed through iTRADE on the TSX-V under the symbol LAD.

[36] On December 18, 2017, New Carolin issued a press release, which announced that the shareholders of New Carolin approved the Share Consolidation Resolution (the "First Press Release"). The First Press Release has been available

on the internet through SEDAR and other publicly available websites since December 18, 2017.

[37] On December 21, 2017, Mr. Baan modified the Sell Order, increasing the offer price to $0.80 per share, and making it good through to January 31, 2018.

[38] On January 15, 2018, New Carolin issued a second press release, which announced that the consolidation of New Carolin's share capital would become effective as at the opening of the market on January 16, 2018, and that every ten shares of New Carolin would be consolidated into one share (the "Second Press Release"). The Second Press Release has been available on the Internet through SEDAR and other publicly available websites since January 16, 2018.

[39] On January 16, 2018 at 6:45 a.m., the TSX-V cancelled Mr. Baan's Sell Order due to the pending consolidation of the shares of New Carolin.

[40] Prior to the opening of the market on January 16, 2018, Scotia Capital restricted the symbol LAD from online trading through iTRADE.

[41] The effect of the consolidation of the share capital of New Carolin resulted in Mr. Baan holding 75,227 shares of New Carolin, instead of 752,270, as at the opening of the markets on January 16, 2018.

[42] Mr. Baan's Accounts continued to show that he owned 752,270 shares of New Carolin on January 16, 2018. Scotia Capital has not provided any explanation for why the number of shares was not updated immediately in accordance with the share consolidation.

Mr. Baan Sells New Carolin Shares That He Did Not Own

[43] On January 16, 2018, Mr. Baan attempted to place an order to sell 752,270 shares (instead of the consolidated 75,227 shares) of New Carolin as LAD on iTRADE. Scotia Capital has provided documentation that indicates that immediately following Mr. Baan's attempt, he was met with an error message reading "[y]our Account does not hold sufficient shares of this security".

[44] Mr. Baan says in his first affidavit that when he tried to sell the shares, initially the sale did not work. He says that, upon reviewing Scotia Capital's documents, he sees that he might have received an error message, but he does not recall. He says that "given the value of the LAD stock, I obviously wanted very much to complete the sale".

[45] I infer from Mr. Baan's statement that, given the value of the stock, he wanted to complete the sale, that Mr. Baan wanted to find a way to profit from the significant increase in the value of New Carolin's stock due to the consolidation. In light of that desire, he likely paid little heed to the error message he received.

[46] I find that Mr. Baan did receive an error message when he attempted to sell the New Carolin shares on January 16, 2018 that read "[y]our Account does not hold sufficient shares of this security."

[47] Undeterred by this error message, Mr. Baan made several attempts to sell shares of New Carolin as LAD on January 16 and 17, 2018 in excess of the quantity that he owned. Each attempt failed. Each time, he was met with a rejection by the iTRADE system and an accompanying warning message indicating that "[y]our Account does not hold sufficient shares of this security".

[48] Finally, on January 17, 2018, Mr. Baan placed a sell order on iTRADE for 752,270 shares of New Carolin through an over-the-counter ("OTC") exchange denominated in U.S. Dollars under the symbol LADFF. In doing so, Mr. Baan sold 752,270 shares of New Carolin despite the fact that he only owned 75,227 shares at the time due to the share consolidation. This is the only instance during the history of Mr. Baan's operation of the Accounts in which he traded shares of New Carolin as LADFF on an OTC exchange or in any U.S. Dollar denomination. Up until that point, Mr. Baan traded New Carolin shares exclusively under the symbol LAD on the TSX-V in Canadian Dollars.

[49] Scotia Capital submits that this sell order under the symbol LADFF was an intentional decision by Mr. Baan to circumvent the system restriction on LAD. It

further submits that, at the time, Mr. Baan knew or ought to have known about the share consolidation, and that he only owned 75, 227 shares of New Carolin, not the 752,270 he sold.

[50] Scotia Capital says that when a user of the iTRADE platform searches for a price quotation to buy or sell a stock or other equity, the user must select a quotation from a Canadian or U.S. market. If the user selects a Canadian quotation, then the iTRADE website will display the price and stock symbol for the applicable Canadian exchange (*e.g.*, the TSX or TSX-V). If the user selects a U.S. quotation, then the iTRADE website will display the price and stock symbol for the applicable U.S. exchange. If the stock is not traded on a U.S. exchange (*e.g.*, NYSE or NASDAQ), then the U.S. OTC market price and symbol will be displayed.

[51] Scotia Capital further says that when a user of the iTRADE platform initiates the sale of shares held in Canadian Dollars on a U.S. exchange or U.S. OTC market, iTRADE will display a warning in red text that the trade involves a foreign currency exchange since the sale requires the conversion of Canadian Dollars to U.S. Dollars.

[52] Scotia Capital says that when Mr. Baan initiated his sell order for 752,270 shares of New Carolin in U.S. Dollars through an OTC market, the iTRADE website would have displayed a foreign exchange warning in red text before he was able to complete the trade. Further, when Mr. Baan decided to initiate his sell order in U.S. dollars on an OTC market, the iTRADE website would have displayed "LADFF" as the symbol of the stock being traded.

[53] Mr. Baan denies that he circumvented the iTRADE platform to sell LADFF shares rather than LAD shares. He says that he does not know how he would even do such a thing. He says that at no point did the iTRADE platform ask him to select the exchange on which to trade shares. He notes that when he made this sell order, the iTRADE platform confirmed it was processing the sale, and that he did not receive any error messages at this point. He says that that at no time on January 17-19, 2018 did iTRADE inform him that he had sold LADFF rather LAD shares. He

also notes that, when he made the sell order, he received a pop-up notification saying that the sale would be in US dollars, and that he continued with the sale. He says that he did not receive any other notifications or warnings, and does not believe that there were any.

[54] Mr. Baan pleaded in his notice of civil claim that he was unaware of the share consolidation when he placed the order. Mr. Baan does not state in any of his three affidavits whether he was aware of New Carolin's share consolidation when he successfully placed the sell order for 752,270 shares. He says that he saw the value of the shares was high and so he wanted to sell them. He says he did not pay any attention to the number of shares he owned. He says he wanted to sell all of his shares, and that he did not intend to sell any shares he did not have.

[55] I find that Mr. Baan knew or ought to have known about the share consolidation, and that he knew or ought to have known the fact that he only owned 75,227 New Carolin shares at the time he eventually made the successful sell order. I reach that conclusion on the basis of the following evidence:

- the issuance and publication of the AGM Notice and the Information Circular, both of which would have been sent to Mr. Baan;
- the timing of Mr. Baan's December 17, 2017 Sell Order, which was placed the first day that the markets were open following the December 15, 2017 AGM;
- the issuance and publication of the First Press Release;
- the issuance and publication of the Second Press Release;
- the cancellation of Mr. Baan's Sell Order by the TSX-V on January 16, 2018; and
- Mr. Baan's repeated attempts to sell New Carolin as LAD on iTRADE on January 16 and 17, 2018, in the face of the resulting error

> messages which I have found he received that clearly told him he did not have sufficient securities to make the trade.

[56] Mr. Baan is an experienced self-directed trader. He made repeated attempts to sell the New Carolin shares and was met with repeated error messages that told him he did not have sufficient shares for the sale he was trying to make. I do not accept that in all those attempts he would have noticed the share price, but not the number of shares he owned and was asking to sell. Even if he had not noticed the number of shares he owned initially, the repeated error messages would have put him on notice that he was trying to sell more shares than he owned, and that he should investigate further. Both parties accept that Mr. Baan had never traded New Carolin shares as LADFF on an OTC exchange or in any U.S. Dollar denomination until this sale, and that until this point, Mr. Baan traded New Carolin's shares exclusively under the symbol LAD on the TSX-V in Canadian Dollars. Nonetheless, it is apparent that Mr. Baan figured out how to trade New Carolin shares as LADFF on an OTC exchange in U.S. Dollars, and knowingly did so, given the pop-up notification he acknowledges receiving saying the sale would be in U.S. dollars, and that he continued with the sale after receiving that notification.

[57] I conclude that Mr. Baan knowingly sought to sell shares of New Carolin that he knew, or at a minimum ought to have known, he did not own.

Scotia Capital's Actions After the Sale

[58] In order to fulfil Mr. Baan's sale of 677,073 shares of New Carolin that he did not own, Scotia Capital began, on or about January 18, 2018, to purchase shares of New Carolin at the prevailing market price, which put the Accounts into a negative balance of approximately $177,300.

[59] Starting on or about January 22, 2018, Scotia Capital sold the remaining securities held by Mr. Baan in the Accounts at the prevailing market rates to reduce the negative balance in the Accounts. After completing those sales, the outstanding shortfall in the Accounts was $151,601.56. Pursuant to the terms of the Account

Agreements, interest has been accruing on that amount at the rate of prime plus 1.55% since the shortfall arose.

[60] Scotia Capital says that as a result of Mr. Baan's circumvention of the restriction on LAD and his sale of 677,073 shares of New Carolin that he did not own, Mr. Baan has caused Scotia Capital to incur costs and expenses (including legal fees to investigate and pursue Scotia Capital's counterclaim).

[61] Scotia Capital has made demands to Mr. Baan to pay the shortfall, but Mr. Baan has failed or refused to pay any amounts to Scotia Capital. The shortfall remains outstanding.

Issues

[62] As already mentioned, there are two applications before the court:

a) Mr. Baan's summary trial application for judgment on his claims of conversion and negligence against Scotia Capital; and

b) Scotia Capital's summary trial application for judgment on its claim for contractual debt against Mr. Baan.

[63] The issues for determination are:

a) Did Scotia Capital commit the tort of conversion in selling Mr. Baan's shares?;

b) Was Scotia Capital negligent in relation to Mr. Baan's sale of the New Carolin sales that he did not own?;

c) In considering both of the first two issues, the court must determine whether the terms of the Account Agreements bar Mr. Baan's claims in conversion and negligence; and

d) Is Mr. Baan liable to Scotia Capital for the shortfall in his Accounts, contractual interest and legal expenses, pursuant to the terms of the Account Agreements?

Analysis

Mr. Baan's Conversion Claim Against Scotia Capital

[64] Mr. Baan alleges that Scotia Capital wrongfully converted his shares to its own use. He emphasizes that this is his primary claim against Scotia Capital. His claim in negligence is in the alternative.

[65] He claims damages based on the value of the shares Scotia Capital sold: $20,058.98 in New Carolin shares, and $25,698.44 in other shares, for a total of $45,557.42.

[66] There is no dispute that Scotia Capital did sell Mr. Baan's shares. The issue is whether it was entitled to do so.

[67] In *Nelson v. Gokturk*, 2021 BCSC 813 [*Nelson*] at para. 36, Madam Justice Tucker quoted from the decision of Mr. Justice Savage in *Selmaschuk v. Lui*, 2013 BCSC 765 at paras. 30–31 for the elements of the tort of conversion:

> [30] The tort of conversion requires the wrongful taking, using or destroying of goods or the exercise of control over them in a manner which is inconsistent with the title of the owner. There must be an intentional exercise of control over the right of the true owner: see the decision of Rouleau J. in *Shibamoto & Co. v. Western Fish Producers*, [1991] 3 F.C. 214 at para. 25, followed by Sewell J. in this court in *Jarvie v. Banwait*, 2013 BCSC 337 at para. 45.
>
> [31] *Clerk & Lindsell of Torts*, 20th Edition, at page 1115 lists seven principal ways in which conversion can occur: (1) when property is taken or received by someone who is not entitled to take it or receive it; (2) when property is wrongfully parted with; (3) when it is lost by a bailee in breach of the duty to the bailor; (4) when property is wrongfully sold; (5) when property is wrongfully retained; (6) when property is wrongfully misused or destroyed; and (7) when access by the owner of property is wrongfully denied. The learned authors do not suggest this is a closed list, but the circumstances here do not require any different analysis.

[68] As stated by the Court of Appeal in *Insurance Corp. of British Columbia v. Suska*, 2011 BCCA 51 at para. 9, conversion is a strict liability tort. It is no defence that the conversion was committed in all innocence as to the true ownership of the chattels in question. It is sufficient for the owner to show that the alleged tortfeasor

exercised control over the chattels in a manner inconsistent with his rights as the true owner.

[69] Given that Scotia Capital did sell Mr. Baan's shares, an act on its face inconsistent with Mr. Baan's rights as their owner, the question is whether Scotia Capital had a right to sell them.

Did Scotia Capital Have the Right to Sell Mr. Baan's Shares?

[70] Scotia Capital submits that the Account Agreements gave it the right to sell Mr. Baan's shares. If Scotia Capital did have the right to sell Mr. Baan's shares under the terms of the Account Agreements, then his claim in conversion will fail.

[71] This result is made clear by the decision of the Supreme Court of Canada in *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81 [*373409*], where the court stated at para. 9:

> An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession, and does not qualify as wrongful interference.

[72] Also at para. 9 of *373409*, the Court cited A. Grubb, ed., *The Law of Tort* (2002) at para. 11.170, for the proposition that no action lies in conversion for consensual interferences with chattels. Such consent may be express, as in a contract, or implied from the circumstances.

[73] Scotia Capital cites three cases in support of the proposition that Canadian courts have consistently enforced a self-directed brokerage's contractual right to liquidate securities in a trader's account where the account falls into a negative balance: *Turkson v. TD Direct Investing*, 2016 BCSC 732, upheld *Turkson v. TD Direct Investing*, 2017 BCCA 147; *Edwards v. BMO Nesbitt Burns Inc.*, 2010 BCSC 1108; and *Desjardins Securities Inc. v. Schellenberg*, 2014 MBQB 115 [*Desjardins*].

[74] Mr. Baan submits that the cases relied upon by Scotia Capital all dealt with margin accounts, rather than cash accounts such as he had, and are distinguishable

on that basis. Mr. Baan is correct that those cases dealt with margin accounts, and that his were cash accounts. In my view, however, that fact does not distinguish them from the present case. The basic proposition that these cases stand for is that the operation of all such trading accounts is governed by the terms of the contractual agreements that the parties entered into.

[75] The Account Agreements governing Mr. Baan's cash accounts clearly did give Scotia Capital the contractual right to sell his shares to cover the shortfall in his Accounts. I have already referred to s. 7 of the iTRADE Terms, which provides in part:

> … Scotia Capital Inc. may at any time and from time to time without notice or demand to the Client: (a) apply monies held to the credit of the Client in any other account with Scotia iTRADE to eliminate or reduce Indebtedness; (b) sell, contract to sell or otherwise dispose of any or all of the Securities held by Scotia iTRADE for the Client and apply the net proceeds therefrom to eliminate or reduce Indebtedness; (c) purchase or borrow any Securities necessary to cover short sales or any other sales made on the Client's behalf in respect of which delivery of certificates in an acceptable delivery form has not been made….

[76] Mr. Baan expressly authorized and consented to Scotia Capital doing as it did. Scotia Capital was entitled to purchase New Carolin shares on the open market to fulfill the sale of the 677,073 additional shares of New Carolin that Mr. Baan did not own. As a result, Mr. Baan became liable for the cost of purchasing the shares needed to fulfil his order, and thus became indebted to Scotia Capital. Pursuant to the iTRADE Terms, Scotia Capital was contractually authorized to sell securities in the Accounts to reduce the indebtedness that resulted from Mr. Baan selling shares that he did not own.

[77] On this basis, I conclude that Mr. Baan's conversion claim must be dismissed.

Mr. Baan's Claim in Negligence Against Scotia Capital

[78] As I understand Mr. Baan's negligence claim, he alleges that Scotia Capital was negligent in misinforming him about the number of New Carolin shares he had in his cash account, and in purporting to sell non-existent shares from his cash

account. The latter claim may be alternatively framed as Scotia Capital having been negligent in permitting him to sell New Carolin shares that he did not own.

[79] The parties' submissions with respect to Scotia Capital's alleged negligence focussed on whether Mr. Baan's claim was barred by the iTRADE Terms. I will begin my analysis of the negligence claim there.

[80] There are a number of iTRADE Terms which purport to limit or exclude Scotia Capital from liability. They begin with the client's acknowledgement and agreement that they:

> THE CLIENT HEREBY ACKNOWLEDGES AND AGREES THAT HE/SHE UNDERSTANDS THAT THE INCIDENCE OF TECHNICAL DIFFICULTY AND THE RISK OF INACCURACY IS AN INHERENT PART OF TRANSACTING VIA THE INTERNET, AND THE CLIENT ASSUMES THE RISK AND RESPONSIBILITY AS PROVIDED IN THE AGREEMENTS BELOW AND OF MONITORING THE ACCOUNT TO ENSURE THAT ERRORS, IF THEY OCCUR, ARE REPORTED TO SCOTIA iTRADE IMMEDIATELY FOR CORRECTION.
>
> THE CLIENT ACKNOWLEDGES AND AGREES THAT HE/SHE HAS READ AND UNDERSTOOD, AND AGREES TO BE BOUND BY, THE PROVISIONS OF THE AGREEMENTS BELOW THAT LIMIT THE LIABILITY OF SCOTIA iTRADE FOR ANY DAMAGE CAUSED THROUGH TECHNICAL ERRORS AFFECTING THE SCOTIA iTRADE SERVICE, AND THAT PLACE THE RESPONSIBILITY FOR MONITORING THE ACCOUNT ON THE CLIENT.

[81] Further, the iTRADE Terms provide that Scotia Capital does not make, and is not liable for, any representation, warranty or condition concerning iTRADE, including that the information and data available on iTRADE is "up-to-date, accurate, in sequence, reliable, complete or suitable for any purpose", and that Scotia Capital is not liable for "any loss or damage resulting from technical problems that may arise" on iTRADE.

[82] Mr. Baan does not dispute that the Account Agreements and iTRADE Terms are binding and enforceable. Rather, he submits that they do not capture Scotia Capital's alleged negligence in this case. In this regard he relies on *Tercon Contractors Ltd. v. British Columbia (Transportation & Highways)*, 2010 SCC 4 [*Tercon*] at para. 122, where the Court stated:

> The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis.

[83] Mr. Baan also relies upon the following extract from Geoff R. Hall in *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.:LexisNexis, 2012), at para. 7.10:

> … a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contract interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.

[84] In his written submission, Mr. Baan asks the rhetorical question whether anyone could "say with a straight face that when Mr. Baan became bound by the exclusion clauses that the parties contemplated that the exclusion clauses would mean that after the Bank sold shares that Mr. Baan did not have it, could then visit that loss on Mr. Baan?". Mr. Baan submits that the answer to that question is surely not.

[85] For its part, Scotia Capital relies on *D2 Contracting Ltd. v. The Bank of Nova Scotia*, 2015 BCSC 1634 [*D2 Contracting*] at paras. 78–82, where the plaintiff was found to be bound by Scotiabank's standard form account agreement. In that case, the plaintiff was required to provide personal information to Scotiabank when opening his account. Once the account was created, he was deemed to have received, read, and signed various standard form account agreements that governed the accounts, which bound him to the agreements. In coming to its conclusion that the plaintiff was bound by those agreements, the Court noted at para. 78 that the plaintiff was "clearly experienced in business and banking and familiar with standard form agreements."

[86] Having determined that the agreement in issue in that case was binding, Madam Justice Dardi went on to consider if it was unambiguous and thus enforceable against the plaintiff. Relying on *Manor Windsor v. Bank of Nova Scotia*, 2011 ONSC 4515, she found that they were at para. 119.

[87] In my view, on their face, the relevant provisions of the iTRADE Terms expressly and unambiguously preclude Mr. Baan's claim that Scotia Capital was negligent, both in failing to ensure that the information about how many New Carolin shares he held was accurate, and in allowing him to place the sell order for shares in excess of what he owned. In entering into the Account Agreements, Mr. Baan assumed the risks inherent in trading over the internet, including that the information and data would not be up-to-date or reliable. Further, he accepted that Scotia Capital might not be liable should he suffer any loss or damage resulting from any technical problems that might arise.

[88] On this basis, I conclude that Mr. Baan's claims in negligence are barred by the terms of the Account Agreements and iTRADE Terms. I, therefore, dismiss his claims in negligence.

[89] It is, therefore, not necessary for me to consider whether Scotia Capital owed Mr. Baan a duty of care, failed to meet the applicable standard of care, or caused or contributed to this damages, and I decline to do so.

Is Mr. Baan Liable to Scotia Capital for the Shortfall in his Accounts, Contractual interest and Legal Expenses Pursuant to the Terms of the Account Agreements?

[90] In dealing with Mr. Baan's conversion claim, I have already referred to s. 7 of the iTRADE Terms, and found that it authorized Scotia Capital to buy New Carolin shares on the open market to fulfill the sale of the 677,073 additional shares of New Carolin that Mr. Baan did not own. As a result, Mr. Baan became liable for the cost of purchasing the shares needed to fulfil his order, and thus became indebted to Scotia Capital.

[91] Section 7 of the iTRADE Terms goes on to provide that:

> Any and all expenses (including any legal expenses) reasonably incurred by Scotia Capital Inc. in connection with exercising any right pursuant to this section 7 may be charged to the Account. The Client shall remain liable to Scotia Capital Inc. for any deficiency remaining following the exercise by Scotia Capital Inc. of any or all of the foregoing rights and agrees that the rights which Scotia Capital Inc. is entitled to exercise pursuant to this section are reasonable and necessary for its protection having regard to the nature of securities markets, including in particular, their volatility.

[92] In *Desjardins*, at paras. 90–93, the Court held that the plaintiff was contractually obligated to pay the shortfall in his accounts.

[93] In *Bakshi v. Shan,* 2013 BCSC 969, at para. 44, Madam Justice Brown held that parties are free to contract between themselves that a party will be entitled to a particular costs order, and that a contractual right to be indemnified by solicitor and client costs must be clearly and unequivocally expressed. The reasonable intention of the parties is to be determined on the basis of the language used.

[94] Pursuant to s. 7 of the iTRADE Terms, Mr. Baan is contractually obligated to pay Scotia Capital the shortfall in his cash account, interest accrued to date, and any expenses, including legal expenses reasonably incurred by Scotia Capital in exercising its rights under s. 7. That is what the parties clearly and unequivocally agreed to.

[95] The shortfall in the Accounts is $151,601.56. Contractual interest is owing on that amount at the rate of prime plus 1.55% from January 22, 2018 until the date of judgment. In addition, Mr. Baan is to pay Scotia Capital solicitor and client costs of this action, in an amount to be assessed by the Registrar.

Conclusion

[96] For the reasons I have given, I dismiss Mr. Baan’s action, and grant Scotia Capital’s counterclaim.

“L.M. Lyster J.”

LYSTER J.