# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Miller v. RBC Dominion Securities Inc.,* 2023 BCCA 324

Date: 20230810
Docket: CA48248

2023 BCCA 324 (CanLII)

Between:

**Raymond Miller and Tauram Inc.**

Appellants
(Plaintiffs)

And

**RBC Dominion Securities Inc. and Bruce Crowle**

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated March 25, 2022 (*Miller v. RBC Dominion Securities Inc.*, 2022 BCSC 485, Victoria Docket S170149).

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| Counsel for the Appellants: | R.S. Margetts, K.C.<br>J.M. Aiyadurai |
| Counsel for the Respondents: | J.S. Forstrom |
| Place and Date of Hearing: | Victoria, British Columbia<br>June 21–22, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>August 10, 2023 |

**Written Reasons by:**
The Honourable Mr. Justice Voith

**Concurred in by:**
The Honourable Madam Justice Saunders
The Honourable Justice Marchand

***Summary:***

*The appellants were clients of the investment advisor respondents. At trial, they advanced a claim in contract and negligence against the respondents over the alleged mismanagement of two investment portfolios. The trial judge dismissed the claim in contract, but held that the respondents had breached the duty of care owed to the appellants—for a period from 2013 to 2015—arising from unilateral changes made to the risk profiles on certain regulatory Know Your Client ("KYC") forms. In supplemental reasons, the trial judge determined that the appellants had not suffered loss as a result of the respondents' breach, and dismissed their claim in negligence. The appellants appeal on numerous grounds, alleging that the trial judge erred by: (a) failing to consider the securities individually; (b) failing to give proper attention to the KYC forms; (c) failing to find the defendants liable for allegedly not following the appellants' investment instructions; (d) failing to award a remedy for the defendants' lack of notes; (e) considering defences that were not pleaded; (f) offsetting losses against gains; and (g) failing to address the appellants' lost opportunity to better invest their funds. Held***:** *Appeal dismissed. Most of the appellants' grounds of appeal take issue with findings of fact that are owed deference on appeal. The trial judge also made adverse findings of credibility against Mr. Miller that were determinative of numerous issues at trial, and that are also owed deference on appeal.*

**Reasons for Judgment of the Honourable Mr. Justice Voith:**

## 1. Introduction

[1] The respondent, Mr. Crowle, an employee of RBC Dominion Securities Inc. ("RBC"), acted as an investment advisor to the appellants, Mr. Miller and his holding company, Tauram Inc. ("Tauram"), for a period of approximately five years from March 2010 to September 2015. At trial, the appellants advanced numerous claims. Broadly speaking, those claims fell into two categories. First, the appellants claimed that Mr. Crowle failed to adhere to the investment objectives he had been provided, that he recommended securities that were higher risk than the appellants had authorized, and that he thereby caused them loss. Second, they asserted Mr. Crowle failed to follow their explicit instructions on different occasions, thereby again causing them loss. The judge dismissed each of these claims.

[2] The appellants have raised eight different grounds of appeal. The "Outline" they provided at the hearing of the appeal identified some twenty sub-issues. These issues overwhelmingly challenge the judge's findings of fact. In my view, for the

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reasons that follow, none of the issues raised have merit and I would therefore dismiss the appeal.

## 2. Background

[3] The trial occupied 16 days and involved significant detail. Much of that detail is not, for present purposes, relevant. The following background, which I will supplement as I address the specific issues the appellants have raised, is pertinent.

[4] Mr. Miller is a businessman who owns and manages commercial properties. His property development business is conducted through Tauram. Mr. Miller had existing investment accounts with CIBC Wood Gundy. In 2006, he opened two new accounts with RBC on behalf of himself and Tauram. The judge and the parties generally dealt with those two accounts as one and so too have I. Mr. Miller placed $250,000 in each account. It is common ground that the “Client Agreement Advisory Account” (the “Client Agreement(s)”) signed by each of the appellants on June 29, 2006 was, as its title suggests, an advisory account. This means that Mr. Crowle had no discretionary authority to independently initiate or undertake investment transactions on behalf of the appellants. Mr. Miller conceded that he had approved and authorized each of the many transactions that were undertaken in the appellants’ accounts.

[5] By March 2010, the amounts in the two accounts totalled approximately $385,000. The appellants accepted the losses suffered over the preceding four years were a result of market conditions and advanced no claim for them. Their initial RBC advisor left and, in March 2010, Mr. Miller agreed to work with Mr. Crowle. Mr. Crowle prepared a document described as a Portfolio Proposal (the “Proposal”), which captured the investment objectives Mr. Miller had described during a previous meeting and which recommended the appellants replace a number of securities they held. Mr. Miller agreed to the Proposal. Whether the investments Mr. Crowle recommended were consistent with the appellants’ stated investment objectives, as captured in the Proposal, was a significant issue at trial and is a central issue on appeal.

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[6] Other documents were relevant. In March 2010, Mr. Crowle prepared an initial “Know Your Client” or “KYC” form for each of Mr. Miller and Tauram, and he thereafter updated these KYC forms several times. KYCs are a regulatory requirement that, among other things, require a description of a client’s risk tolerance. The initial KYC forms for each of Mr. Miller and Tauram’s account had an “80% medium” and “20% medium-high” risk description. In late February 2013, Mr. Crowle prepared a revised KYC document for Mr. Miller’s account that increased its risk description to “15% medium”, “35% medium-high”, and “50% high”. In early August 2014, he again prepared revised KYCs that increased the risk description for both accounts to “100% high”. Mr. Miller did not see any of these KYC forms until they were produced during the litigation. The legal and other significance of the KYC forms was an issue at trial and remains an issue on appeal.

[7] In February 2012, Mr. Miller instructed Mr. Crowle to use “stop losses” for the appellants’ investments. Mr. Miller had seen a report on BNN, a business channel that focusses on investments and markets, which suggested “stop losses” can be used to preserve an investor’s capital. A “stop loss” instruction is an order to sell a security when the price of the security declines to a specified level. For example, if a client owns shares of X Co. that trade at $10, the client can place a stop loss order to sell X Co. shares when the price of a share falls below $8. Mr. Crowle’s purported failure to follow the appellants’ stop loss instructions grounds one of the issues on appeal.

[8] In April 2013, Mr. Miller—again based on an investment strategy he learned of through watching BNN—provided Mr. Crowle a broad instruction to sell his holdings and place them into a cash position. The strategy, known as “go away in May”, and described by the judge in the same terms, is based on the theory that stocks tend to drop in and after May of each year. Subscribers to the strategy sell their stocks in May, keep the value of those stocks in cash or low risk investments, and then buy back into the market after prices have dropped. Mr. Crowle did not execute Mr. Miller’s instructions fully and these events ground a further issue on appeal.

[9] In March 2015, Mr. Miller provided Mr. Crowle with a similar “go away in May instruction”. Again, Mr. Crowle did not fully execute these instructions. The 2015 “go away in May” events ground another issue on appeal.

## 3. The Reasons of the Trial Judge

[10] The trial judge issued four separate judgments. Two judgments were issued mid-trial, and were primarily related to the admissibility of two expert reports and other materials that had been filed. No issue arises from these judgments. One of the expert reports, authored by Mr. Holley and filed by the appellants, remains relevant.

[11] The judge’s primary reasons for judgment (the “Reasons”) address the issues raised at trial and are indexed at 2021 BCSC 1811. In the Reasons, the judge made numerous findings on a wide range of issues. One such finding was that Mr. Crowle had, commencing in 2013, breached his duty of care to the appellants by amending the relevant KYC forms to increase the risk description on the documents, without their knowledge or agreement. The judge asked for supplemental submissions to address the questions of what, if any, damages arose from that breach.

[12] The judge’s fourth judgment (the “Supplemental Reasons”), indexed at 2022 BCSC 485, addressed the parties’ supplemental submissions. In his Supplemental Reasons, the judge determined that Mr. Crowle’s breach had not caused the appellants any loss. That finding grounds other issues on appeal.

[13] The appellants’ Amended Notice of Civil Claim relied on numerous causes of action in respect of many discrete claims. The Reasons confirm that at the outset of the trial the appellants abandoned a claim for breach of fiduciary duty, a claim that Mr. Crowle and RBC had received third party commissions, and a claim for punitive damages. During the trial, the appellants also abandoned a claim for the “disgorgement of fees and profits”, arising from secret commissions the appellants had alleged the respondents received.

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[14] In his Reasons, the judge determined—after considerable discussion—that neither the KYC documents nor the Proposal formed part of the contract between the parties. In oral argument on appeal, the appellants submitted that these findings were at issue in the appeal. I do not consider this to be the case. The appellants' factum neither raises the issue as a ground of appeal nor does it otherwise develop the issue in any meaningful way. Accordingly, I do not intend to address this aspect of the Reasons further.

[15] The judge also dismissed a claim that Mr. Crowle used the appellants' "margin accounts to borrow to purchase securities without the plaintiffs' knowledge or authority". He did so because the claim was not pleaded. Nor was he satisfied the claim could succeed on its merits, including because he did not consider Mr. Miller's account of events to be credible. The appellants do not challenge these findings. However, the judge's adverse credibility findings in relation to Mr. Miller's evidence are pervasive, and remain relevant to several issues on appeal.

[16] With this backdrop, I turn to those specific aspects of the Reasons and the Supplemental Reasons that underlie the grounds of appeal raised by the appellants.

**i) The appellants' accounts were discretionary accounts**

[17] An earlier version of the appellants' claim included a pleading that the respondents engaged in unauthorized trading. The judge noted this was problematic because it suggested the appellants' accounts with the respondents were discretionary in nature rather than advisory. Further, in discovery Mr. Miller was unable to identify any trade where Mr. Crowle failed to communicate and confirm trading instructions. The appellants thereafter amended their claim to allege that "Mr. Crowle acted without Mr. Miller's "informed authorization…to purchase unsuitable investments". After the amendment, the judge identified the issue was no longer about "…the scope of Mr. Crowle's authority but the suitability of his advice": at para. 87.

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[18] The judge focussed on the 2006 Client Agreements because they were "the primary basis for the contract between the parties". The following subsection of those agreements is relevant:

> **1. NATURE OF ACCOUNT**
>
> …
>
> c) All investment decisions for the Account will be made as the result of joint consultation between the Client and the investment advisor of RBC DS assigned to the Account from time to time (the "Investment Advisor") but the Client will have exclusive authority to initiate transactions in the Account. *The Account is neither a discretionary nor a managed account and no discretionary authority will be accepted with respect to the Account.* Neither the Investment Advisor nor RBC DS holds itself out with respect to the Account as a portfolio manager with discretionary authority.
>
> [Emphasis in original.]

[19] The judge said (at para. 63): "[t]he evidence is that a discretionary account is one where the advisor can make some investment decisions while an advisory account (as here) is one where the advisor must obtain specific instructions for anything of significance in the account".

**ii) The Proposal**

[20] The judge did not accept that the Proposal was a contractual document. It was "a one-time document". It had "no regulatory basis". It was prepared by Mr. Crowle to "capture the investment objectives of the [appellants]" and it was "an important part of the evidence to be considered in deciding the investment objectives of the plaintiffs…": at para. 66.

[21] The real controversy was about the meaning and intended risk profile of the Proposal. The judge observed (at para. 74) that "each party accepts [the Proposal] as long as it is interpreted to say what each says it means". The Proposal was two pages long and included numerous investment objectives. The judge was required to determine the meaning of "moderate risk profile" in the Proposal in light of other stated objectives and the evidence of the parties. It was important to do so because the judge recognized (at para. 102) that "…an advisor is required to ensure that

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recommendations to a client are in keeping with the client's investment objectives…". The judge observed that "…a significant part of the argument in this case was about what meaning can be attributed to [the word moderate]": at para. 126.

[22] Though Mr. Holley's expert report provided a risk rating for each of the securities the appellants held over time, the judge chose, for various reasons, to assess the "overall risk" of the appellants' portfolios based on the Proposal.

[23] He did not accept significant parts of Mr. Miller's testimony. He did not accept that "moderate" was intended to mean "lower risk" or that "…the idea was to have a portfolio of low risk securities": at para. 131. He concluded that "moderate" generally meant "medium" though "moderate" portfolio could include some "high" risk securities: at para. 133. Further, though Mr. Holley had rated the risk of various securities as "medium/high, medium to medium/high and medium/high to high", he concluded that the differences between those terms were "unclear and unexplained" and that the "…common thread to them seem[ed] to be medium": at para. 141.

[24] Ultimately, the judge was satisfied that the "…risk rating of the Proposal was moderate in the sense of medium and the original securities purchased under the Proposal [were] consistent with that rating". The judge found there was no "…breach of contract or breach of the defendants' duty of care towards the plaintiffs" when these securities were purchased: at para. 144.

#### iii) The KYC forms

[25] The judge referred to the regulatory regime that governs the activities of investment advisors. For the purposes of the claim before him, he described the *National Instrument 31 – 103, Registration Requirements, Exemptions and Ongoing Registrant Obligations*, B.C. Reg 226A/2009 as the "primary regulatory mechanism for advisors": at para. 45. Section 13.2 of the *National Instrument* describes the requirements of the KYC process: an advisor is required to take reasonable steps to, for example, establish the identity of a client; establish whether the client is an insider of a reporting issuer; and, establish the creditworthiness of the client in

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certain circumstances. An advisor is also required, under s. 13.2(c), to ensure that they have sufficient information about, among other things, the client's investment needs and objectives, their financial circumstances, and their risk tolerance.

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[26] The judge accepted (at para. 47), based on various authorities, that the KYC process represents the "cardinal rule" for the client/investor relationship and that "…a violation of the regulations relating to KYC's is not actionable in court unless the violation has caused damage". He cited (at para. 71) the following authorities for the latter proposition: *Graham v. Wells*, 2015 BCSC 734 at paras. 70–74; *Brandt v. Moldovan*, 2013 BCSC 1218 at para. 95 [*Moldovan* BCSC], rev'd in part on other grounds, *Marlin Investments Inc. v. Moldovan,* 2014 BCCA 364 [*Moldovan* BCCA], citing *Junko v. Canaccord Capital,* 2012 ONSC 6966 at para. 52.

[27] The judge found (at para. 72) that KYC documents are created by an advisor and, in the case of RBC, "…the client neither participates in its preparation nor even necessarily knows about it".

[28] The KYC documents in this case are relevant because the appellants argue the risk tolerances described in them—rather than in the Proposal—narrowly and precisely circumscribed the appropriateness of the various investments Mr. Crowle was permitted to recommend to the appellants.

**iv) The 2013 "go away in May" claim**

[29] As described earlier, the appellants assert that in early April 2013, Mr. Miller provided Mr. Crowle with an instruction to liquidate their stocks. The email instruction Mr. Miller sent to Mr. Crowle indicated that he wanted the two portfolios "…brought down into as much of a cash position as necessary to protect the principal over the period of the next two months".

[30] The judge was of the view that "[i]n giving this broad instruction Mr. Miller misunderstood the nature of his advisory contracts with the defendants". As the Client Agreements stated, "no discretionary authority [would] be accepted with respect to the account": at para. 148.

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[31] The judge also found that though Mr. Crowle's memory was imprecise, he had told Mr. Miller "…something along the lines that he could not take the general instructions that Mr. Miller insisted on giving": at para. 166.

[32] Further, the judge did not accept significant parts of Mr. Miller's evidence in relation to this aspect of the appellants' claim. He did not, for example, accept that Mr. Miller believed Mr. Crowle had liquidated his account. He noted that RBC's records indicated Mr. Miller had looked at his online accounts 14 times between April 1, 2013 and June 30, 2013: at para. 154. He found that Mr. Miller followed the status of his accounts carefully and concluded that "…a cursory review of his account statements would have demonstrated to Mr. Miller there had been no liquidation in May or any time close to then". He found that "Mr. Miller had to have seen the absence of selling on his statements but he did nothing. The absence of the purchase of new securities to replace the sold ones had to have been equally obvious": at para. 155.

[33] In summary, the judge found it was not "…a breach of contract for Mr. Crowle to decline to follow instructions in 2013 that themselves would have been a breach of the contract between the parties …". Nor was it "…a breach of the duty of care owed by the defendants to the plaintiffs for the defendants to decline to act in a discretionary manner when the agreement was of an advisory nature": at para. 169.

#### v) The 2015 "go away in May" claim

[34] In the spring of 2015 Mr. Miller sought to use the "go away in May" strategy again. The evidence relating to the 2015 claim began with an email dated March 3, 2015 from Mr. Miller to Mr. Crowle asking that his personal and company accounts be liquidated into a cash position and, once liquidated, that the funds be placed into a short-term, no risk, interest-bearing investment. Mr. Miller's instructions stated that he was giving Mr. Crowle early notice of his intentions "so that [Mr. Crowle [would] have time to do the liquidation in a fashion that [would be to Mr. Miller's] advantage": at para. 171.

[35] Mr. Miller and Mr. Crowle thereafter had a series of email communications in which they discussed selling some securities and holding other securities for some further period of time. In each instance Mr. Crowle sought Mr. Miller's instructions.

[36] The judge found "…as with the 2013 incident…Mr. Miller mistakenly believed that he could simply give a general direction to Mr. Crowle who would do the best he could. However, this was not permitted by the Client Agreement[s]": at para. 196.

[37] Further, the judge found that "[i]t was the prevarication of Mr. Miller, his altered instructions and ultimately his decision to reverse the instruction to sell that slowed down and then halted any sale": at para. 192. Still further, the judge disbelieved relevant aspects of Mr. Miller's evidence.

[38] The judge concluded the respondents had not breached their contract with, nor the duty of care they owed to the appellants.

**vi) The "Stop Loss" claim**

[39] In this instance, Mr. Miller began his communications with a February 6, 2012 email in which he instructed Mr. Crowle "…to utilize stop losses for those investments I hold that are appropriate".

[40] The judge concluded that Mr. Miller's instructions again "…reflect[ed] a misunderstanding of the advisory nature of the contract the plaintiffs had with RBC": at para. 211.

[41] Further, the judge did not accept Mr. Miller's evidence. He concluded that it was "…simply not believable that Mr. Miller, from 2012 to 2015, would not have seen from the statements online (and the ones mailed to him) that the values of his stocks were changing and no stop losses were triggered". The judge found that "…if there had been blanket stop losses in place, there would have been a 'cascade' of sales and the plaintiffs would have received confirmation for each one": at para. 212.

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[42] The judge concluded that, in declining to follow Mr. Miller's instruction, Mr. Crowle did not breach either the 2006 Client Agreements or the duty of care owed by the respondents to the appellants.

**vii) The Supplemental Reasons**

[43] The judge found that Mr. Crowle's evidence about how the risk descriptions on the KYC documents increased over time was not "adequate or compelling". He accepted that Mr. Miller had not participated in the changes to the risk profiles on the KYC documents and, if asked, he would have opposed those changes. In his Reasons, the judge concluded that the respondents breached their duty of care to the appellants "…when they unilaterally changed the risk profile of the two investment accounts": at para. 268.

[44] In the Reasons, the judge (at para. 293) recognized that causation is an essential component of a claim in negligence: *Clements v. Clements*, 2012 SCC 32 at paras. 8, 15. He again emphasized that a regulatory breach does not, without loss, give rise to damages: *Brandt* at paras. 94, 104; *Graham* at para. 73. He observed that he had "…isolated a specific area in which the plaintiffs are entitled to damages if there has been a loss" and that none of the evidence before him addressed this narrow question: at paras. 305, 309. He therefore sought further submissions on the "narrow causation/damages issue" of what, if any, damages were caused "…by the defendants' failure to obtain the prior express instructions of the plaintiff[s] to significantly change the risk rating of their portfolios in 2013 and 2015": at para. 323.

[45] Following receipt of those further submissions the judge concluded, in the Supplemental Reasons, that the appellants had failed to prove they had suffered a loss as a result of the respondents' breach of duty of care and he dismissed their claim in negligence.

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## 4. Analysis

### i) Were Mr. Crowle's investment recommendations consistent with the Proposal?

[46] The appellants raise numerous purported errors under this first ground of appeal. They contend the judge erred in focussing on the Proposal rather than the KYC documents. They argue he erred in focussing on the risk profile of their portfolios rather than the individual securities in those portfolios. In a related vein, the appellants argue the judge failed to consider the suitability of each security purchased throughout the time the respondents acted for the appellants. They further argue the judge impermissibly departed from the evidence of Mr. Holley.

[47] The appellants' position for most of these issues on appeal is made difficult by various considerations, many of which—directly or indirectly—relate to the applicable standard of review. Additionally, the thesis now advanced by the appellants is not consistent with their pleadings. Mr. Miller's evidence in various material aspects was found to be not credible. There was also a significant lack of clarity in much of the evidence the judge was required to consider and his findings were based on the whole of that evidence.

[48] The relevant portion of the appellants' Amended Notice of Civil Claim, to which the judge referred, stated:

> 8. On or about March 10, 2010, Crowle, on behalf of RBC, created a portfolio profile for the Plaintiffs pursuant to which Crowle confirmed that, *inter alia*, the Plaintiffs required a moderate risk profile for their investments and that all investments must be of no greater than moderate risk unless authorized by the Plaintiffs in writing
>
> …
>
> 12. Without obtaining the Plaintiffs' informed authorization, the Defendants used the Plaintiffs' money to purchase unsuitable investments that were outside of the agreed-upon moderate risk profile. These investments, which were higher risk than moderate risk, lost value thereby causing financial loss to the Plaintiffs.

[49] The appellants' claim was therefore based on the Proposal and its goal of establishing a "moderate risk profile" for the appellants' portfolios. The Amended Notice of Civil Claim is notable because it makes no reference to KYC documents, it

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does not base the appellants' claim on those documents, nor does it reference the risk descriptions in them. The appellants' factum, conversely, now asserts that the judge's "findings about the risk of the Proposal are irrelevant", and focusses wholly on the risk descriptions in the relevant KYC documents. The Amended Notice of Civil Claim did include a general pleading that it was an implied term of the contract between the parties that the respondents would comply with "security laws and regulations and RBC policies", but, as noted earlier, the judge found that the KYC documents prepared by Mr. Crowle were not a part of the contract made between the parties.

[50] The appellants' factum similarly opens with the submission that "[t]he judge erred in finding no breach of duty arising from Crowle not adhering to the risk factors of 80/20 on the KYC forms". This too highlights the appellants' attempted shift in emphasis from the Proposal—which formed the bedrock of the judge's decision—to the KYC documents.

[51] Apart from the appellants' pleadings, a further factor supported the judge's emphasis on the Proposal. The Proposal was the product of a discussion between Mr. Miller and Mr. Crowle. It was a reasonably detailed document that described various investment objectives. It was delivered to Mr. Miller, then further discussed with Mr. Crowle, and ultimately approved by Mr. Miller. It was, the judge found, "…a one-time document generated by Mr. Crowle only for the Plaintiffs…": at para. 66. The KYC documents Mr. Crowle prepared in late March 2010, on the other hand, were never seen by Mr. Miller until after the litigation between the parties commenced. They included a risk allocation that was expressed differently from the description of risk in the Proposal. It fell to the judge to make sense of those differences.

[52] In making these findings the judge nevertheless recognized the regulatory and other significance of the KYC documents. He appreciated (at para. 53) that the "scope of [the respondents'] duty…can be shaped by the regulatory framework governing the[ir] relationship": *Moldovan* BCSC at paras. 90–92; *Moldovan* BCCA at paras. 15–16; *Refco Futures (Canada) Ltd. v. SYB Holdings Corp.*, 2004 BCCA 15

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at para. 87 citing *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 at 238-40,1992 CanLII 7478 (Ct Gen. Div), aff'd on appeal, 10 O.R. (3d) 574, 1992 CanLII 7730 (CA). And he used the KYC documents to help interpret the Proposal. However, the judge's primary task was to ascertain whether Mr. Crowle's recommendations were in keeping with the appellants' investment objectives. The judge found the focus of that enquiry, in the circumstances of this case, properly lay with the Proposal. That finding is entitled to deference.

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[53] The judge quoted the following portion of the Proposal (at para. 104):

> [RBC letterhead]
>
> Monday, March 08, 2010
>
> **Re: Portfolio Proposal - Ray MillerZTaurum [sic] Inc.**
>
> From our meeting we have developed the following profile of you as an investor. If any of our assumptions are not accurate, it may impact the final portfolio allocations.
>
> - You want your portfolio to grow within *a moderate risk profile.* *
> - With this portion of your overall portfolio you are *looking for growth.*
> - You are open to *taking advantages of market opportunities when appropriate.*
> - You do not currently require any income from your investments.
> - The funds to be invested are located in your Corporate and Cash accounts.
> - You are not overly pleased with mutual funds and are looking for some alternatives.
> - You are open to the idea of selling covered call options on some of your existing holdings
> - You want both accounts to be viewed as one entire portfolio.
> - If possible you would like to have the dividend paying securities held personally instead of being held in the corporate account.
>
> The investment decisions we have made for you have been entirely based on the above objectives.
>
> The overall portfolio breakdown we are suggesting would be as follows;
>
> 0% - Cash (Money Market)
>
> 0% - Fixed Income (Bonds)
>
> 68% - Canadian Equities/ETFs
>
> <u>22%</u> - Foreign Equities (all emerging markets - Zero US or Europe exposure)
>
> 100% - Total
>
> [Emphasis in original.]

[54] The judge's findings on the first issue raised by the appellants required him to consider the terms of the Proposal and what was meant by "a moderate risk profile". This required him to interpret the Proposal and to consider the evidence of the parties. That exercise resulted in findings that are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Gee v. Canada*, 2021 FCA 215 at para. 8; *Vanderberg v. Canada*, 2021 FCA 228 at para. 5.

[55] The Proposal included a list of 17 different securities that Mr. Crowle recommended. The next day, Mr. Miller emailed his authorization to proceed with what had been recommended and said "[o]f course I know next to nothing about the recommendations you have made".

[56] This latter statement is an appropriate entry to a reality the judge addressed throughout the trial. Simply put, on virtually every issue raised, Mr. Miller gave evidence that was not accepted by the judge.

[57] In relation to this first issue on appeal, the judge observed that the appellants "…attempted at various times to minimize Mr. Miller's experience with investing…": at para. 111. The judge found that Mr. Miller understated his background. He did not accept "the picture Mr. Miller [drew] of himself as the victim of Mr. Crowle manipulating him and his accounts": at para. 112. He found that Mr. Crowle's description of Mr. Miller's investment knowledge as a "… good working knowledge of the market and experience with various types of investments", as captured in the KYC documents Mr. Crowle prepared, was accurate: at paras. 110–112.

[58] The evidence accepted by the judge established that Mr. Miller watched business news regularly and "…obtain[ed] investment advice from various sources other than the defendants, including Wood Gundy…research materials and his sons": at para 16. He followed his investments carefully. The record revealed consistent and ongoing communications between Mr. Miller and Mr. Crowle. That record further revealed that Mr. Miller reviewed the status of his investments online over 1100 times over the five years he did business with the respondents.

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[59] Mr. Miller testified the meaning to be ascribed to “moderate risk” in the Proposal was “lower risk” and that the appellants’ portfolios were to be comprised of low-risk securities. He said he told Mr. Crowle he expected only modest returns, meaning a little better than bank interest. He said these basic parameters reflected the agreement he made with Mr. Crowle. The judge did not accept any aspect of this evidence. Instead he found that “Mr. Miller could have instructed Mr. Crowle to use low risk in the [P]roposal instead of moderate but he did not, presumably because he was also looking for growth”: at para. 131.

[60] The judge’s findings of credibility, on these issues and elsewhere in the Reasons, are entitled to deference: *R. v. Brunelle*, 2022 SCC 5 at para. 8; *R. v. G.F.*, 2021 SCC 20 at para. 81; *R. v. Plehanov*, 2019 BCCA 462 at para. 52.

[61] The next difficulty identified by the judge arose from the fact that there was “…considerable laxity in the characterization of investment risk in the industry…”: at para. 95. Aspects of this lack of precision were acknowledged by Mr. Holley who conceded that the risk ranking of individual securities “was not an exact science”, that risk ranking has a substantial subjective component, and that expressions such as “low”, “medium” and “high” were broad and relative terms.

[62] Additionally, the term “moderate risk”, found in the Proposal, was not used by either Mr. Holley or in the relevant KYC documents. Both used other terms to describe the risk classification of a security. Mr. Holley also used additional descriptors of risk not found in the KYC’s or other RBC documents. The judge further identified that the factors Mr. Holley used to rate investment risk were different from the approach to risk rating that was contained in the KYC documents.

[63] The judge considered other aspects of the Proposal, for example, its emphasis on “growth” and the appellants’ willingness to “take advantage of market opportunities when appropriate”. He did not accept the position of the appellants that the Proposal required “all investments [to] be of no greater risk than moderate risk unless authorized by the Plaintiffs in writing”: at para 136. Though Mr. Crowle subsequently had Mr. Miller sign disclaimers for certain high-risk securities, those

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disclaimers were for market exempt securities, that is, securities not listed on an exchange and exempt from prospectus requirements. RBC policy required investors wishing to purchase market securities to first execute a disclaimer acknowledging the investment risk of their exempt purchase.

[64] Ultimately, the judge found that the word "moderate" in the Proposal meant "medium". A medium risk portfolio could include both "low/medium" and "medium/high securities. He identified that Mr. Holley had agreed that a moderate risk portfolio could include some high-risk securities. The judge concluded that "[a] moderate risk portfolio with room for growth and to take advantage of market opportunities (as is the case here) suggests a portfolio that would be a bit more aggressive than a purely moderate/medium portfolio": at para. 142.

[65] The judge dealt with all of these issues in significant detail and they occupied some 45 paragraphs of the Reasons. It was for the judge to make sense of the extensive evidence he heard and significant deference is owed to his conclusions on these matters.

[66] The appellants argue that the judge made other errors. They contend he erred in assessing the risk profile of their portfolios broadly, rather than the risk profile of the individual securities that made up those portfolios. They say that the judge's approach was different from the evidence of Mr. Holley, and they suggest that the judge was somehow bound by Mr. Holley's evidence because it was the "only expert evidence" before him.

[67] The judge understood this issue. He identified that "Mr. Holley's opinion related to individual securities rather than the overall risk of portfolios": at para. 94. He also understood that the plaintiffs argued "these [were] essentially the same things". The judge, however, based on the whole of the evidence, disagreed. He referred to Mr. Holley's evidence in cross-examination "…that the risks of individual stocks and the risk of a portfolio are not synonymous": at para. 134.

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[68] Further, on cross-examination, Mr. Holley accepted that the risk associated with a portfolio of stocks could be influenced by considerations apart from the risk rating of the individual stocks in the portfolio. He accepted it was possible to design a portfolio to reduce risk by, for example, the strategic diversification of securities in different sectors or by hedging risk.

[69] As noted earlier, the judge also accepted Mr. Holley's evidence that a medium risk portfolio can include some high-risk stocks. Though the appellants argue that the judge took this aspect of Mr. Holley's evidence out of context, my review of the record does not support that contention.

[70] Further, the judge was not bound to accept Mr. Holley's evidence on any given issue. He was free to accept some, all, or none of that evidence: *R. v. Graat*, [1982] 2 S.C.R. 819 at 836, 1982 CanLII 33; *Hicks v. Belknap*, 2022 BCCA 292 at para. 47.

[71] One related contention remains. The appellants submit that the judge only considered the suitability of 21 out of the 47 securities that Mr. Holley had provided risk ratings for and that he "failed to provide a ruling on the suitability of 26 securities". The core of this submission revisits aspects of the issues I have already addressed. Thus, it is based on the need to address the risk rating of each security individually rather than the overall risk of the appellants' portfolios. It advocates rigid "consistency" with the "80/20" description found in the initial KYC documents. And it asserts that securities with a risk rating higher than "medium" are "unsuitable". For the reasons described earlier, the judge did not accept these submissions and his conclusions on these issues reveal no reviewable error.

[72] Having said this, though the appellants continue to focus on the suitability of individual securities, as opposed to their portfolios more broadly, the issue might more usefully be reformulated to assert that the judge failed to address the risk profile of those portfolios at different times. To be clear, the judge expressly considered the suitability of the Portfolios when they were established in both March 2010 and from February 2013 through to September 2015. The judge, however, did

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not expressly address the general consistency of the appellants' portfolios with the risk profiles described in the Proposal in the intervening period—that is the period between 2010–2013.

[73] Nevertheless, it is clear that the judge determined the respondents had satisfied the duty of care they owed the appellants. Thus, when the judge sought supplemental submissions from the parties—to address whether the respondents' unauthorized changes to the risk descriptions in the KYC documents had caused the appellants any loss—the appellants apparently attempted to revisit some of the issues they had raised earlier. In the Supplemental Reasons, he said this:

> [26] I begin by identifying the scope of the issue of damages here. As above, the plaintiffs say that the "implications" of the finding of breaches in 2013 and 2014 means that the damages for breaches before 2013 can be considered. A complete response to this submission is that, after a 16-day trial, the September 2021 judgment did not find any breaches before 2013. This is not an opportunity to reargue the plaintiffs' entire case.

[74] There is then no ambiguity about the judge's conclusions. Nor have the appellants called into question the sufficiency of the judge's reasons more broadly. Instead, they have focussed on the narrow issues I have identified and that the judge addressed.

[75] In my view, there is no merit to the various issues raised under this first ground of appeal.

#### ii) The failure to follow instructions

[76] The appellants have appealed the judge's dismissal of the 2013 and 2015 "go away in May claims" as well as their Stop Loss claim. Those various claims are similar in that each turned on an instruction Mr. Miller provided to Mr. Crowle and each was determined, at least in part, on the basis that the instruction Mr. Miller provided was inconsistent with the nature of the advisory Client Agreements he had with RBC. The judge also made adverse credibility findings on issues that were important to these claims. These issues, properly analyzed, do not raise any errors of law or principle.

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### *(a) The 2013 "go away in May" issues*

[77] The appellants challenge the judge's conclusions on this aspect of their claim on various grounds. They contend that "the judge's conclusion that Mr. Miller's <u>instructions to liquidate</u> were discretionary was an error of law because there was no evidence or opinion to support it" (emphasis added). They further emphasize Mr. Crowle's evidence that "if [Mr. Miller] told me to liquidate his portfolio, that's sufficient instructions".

[78] These submissions highlight the difficulty with this ground of appeal. Mr. Miller did not instruct Mr. Crowle to "liquidate" his portfolio. Instead, his April 3 email stated he "… wanted [his] portfolio brought down into as much of a cash position as necessary to protect the principal over the period of the next two months". That latter instruction, the judge found, was inconsistent with the advisory nature of the relationship between the parties. He disagreed that Mr. Miller's instructions "…were specific rather than vague": at para. 149.

[79] Further, though the appellants have accurately quoted a small portion of Mr. Crowle's evidence, they ignore other relevant evidence. Mr. Crowle testified that he did not have a discretionary license and was unable to provide discretionary services to clients. He testified that in order to complete an instruction he would have to know "the specific security, the quantity, the action, and the price". He confirmed Mr. Miller's April 3 email did not constitute "sufficient instructions" for him to act. He was expressly asked whether the instruction in the April 3 email was "sufficiently clear to authorize [him] to liquidate the account assets" and he responded that it was not.

[80] It was for the judge to consider the evidence before him and to make findings based on that evidence. There was ample evidence to support his findings.

[81] The appellants similarly point to a June 13, 2013 email which, they assert, indicates Mr. Miller believed his instructions had been followed. Here too, the appellants seek to rely on a sliver of the evidence before the judge. The judge referred to the June 13 email but he did not accept that Mr. Miller believed his

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portfolios had been liquidated. He explained his reasons for that conclusion in some detail and over several paragraphs. I have described some of those findings at para. 32 above.

[82] The judge also said:

> [158] I note that Mr. Miller testified that he gave the same liquidation instructions to Wood Gundy in April 2013 with respect to his two accounts there. The significance of this is that if Wood Gundy could do it, then so could the defendants….
>
> [159] In fact the situation at Wood Gundy was different than Mr. Miller described under oath….
>
> [160] It seems to me that I must conclude that Mr. Miller did not give instructions to Wood Gundy to liquidate his stocks there. That had largely happened over time in any event. Instead, Mr. Miller misstated what happened at Wood Gundy in order to support his position that the defendants in the subject claim should have liquidated his accounts.

[83] As I observed earlier, the reality is that the appellants' various claims relied on the evidence of Mr. Miller and significant aspects of his evidence were not accepted by the judge.

### *(b) The 2015 "go away in May" issues*

[84] The issues the appellants raise under this ground of appeal are similar to the issues they raise in their appeal of the judge's findings in the 2013 "go away in May" claim.

[85] This aspect of the appellants' claim occupies approximately 30 paragraphs in the Reasons. The judge carefully discussed various email communications between Mr. Miller and Mr. Crowle from March 3, 2015 to May 26, 2015. The initial March 3, 2015 email said:

> … Around the first week of April this year I will need my personal and company accounts to be liquidated into a cash position. I realize you will not like this but it has to happen. Once liquidated into cash, you can place the funds into into [sic] a short term no risk interest bearing investment. I assume you will not be charging for your services while the funds are in an interest bearing investment. The investment will be temporary, as I would guesstimate you will be able to reinvest the funds sometime in October or November of this year. I am advising you of this now so that you will have time to do the liquidation in a fashion that will be to my advantage. I will be

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> able to watch the liquidation online but would appreciate you letting me know when the liquidation is complete. Thanks in advance.
>
> (Emphasis added).

[86] In the ensuing months, Mr. Crowle and Mr. Miller exchanged several emails dealing with the liquidation of specific securities. Mr. Miller's May 26, 2015 email said:

> Guess I'm a little surprised I've anything to sell given we were supposed to be mostly in the cash position pursuant to previous instructions. Anyway, things have changed for the possible need for the cash as the project has been delayed. You can now start looking at getting back into the market when you see opportunities and softness….

[87] The judge made several findings and expressed the following conclusion:

> [196] In summary, as with the 2013 incident, it is clear that Mr. Miller mistakenly believed he could simply give a general direction to Mr. Crowle who would do the best he could. However, that was not permitted by the Client Agreement[s]. While an advisor is required to follow the directions of a client those directions must be consistent with the contract in place. An advisor cannot execute an instruction unauthorized by agreement between his firm and the client. In addition, the evidence for the 2015 incident is that Mr. Miller reversed his position and told Mr. Crowle not to liquidate everything. I am unable to find either a breach of contract or breach of the duty of care owed by the defendants.
>
> [Emphasis added.]

[88] The primary contention advanced by the appellants is that the judge erred in finding Mr. Miller reversed the instructions he had provided. The appellants say that Mr. Miller's emails, properly construed, related to a single security called Alaris. They point to various factors that they argue should, in combination, "have caused the judge to conclude that the instructions to liquidate were not reversed".

[89] This latter submission makes clear that the appellants again seek to revisit a finding of fact made by the judge. The submission also ignores the fundamental and underlying difficulty with the 2015 "go away in May" claim: the judge found it was not open to Mr. Miller to provide a general instruction to Mr. Crowle to "do the liquidation in a fashion that will be to my advantage". In any event, the finding they seek to challenge was simply an "additional" ground the judge relied on.

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[90] Furthermore, the judge reviewed several of the emails Mr. Crowle sent to Mr. Miller, between March and May. Those emails indicated Mr. Crowle was providing advice about whether specific securities could or should be sold, and he sought specific instructions from Mr. Miller in relation to each of those securities. Mr. Crowle had not acted in some sweeping way from the outset. It had to be patent to Mr. Miller that Mr. Crowle had not simply followed his initial March 3 instruction. Thus, when Mr. Miller in his May 26 email expressed "surprise" that he had anything left to sell, the judge said:

> [189] …In my view, that is, in turn, a surprising thing for Mr. Miller to say…he told Mr. Crowle on March 3, 2015 that he would be watching the liquidation of his accounts online and he would have seen the current state of his accounts.

[91] Ultimately, the judge did not accept that there was any clear and appropriate instruction from Mr. Miller, which Mr. Crowle then failed to execute. The judge's findings are entitled to deference.

### *(c) The Stop Loss issue*

[92] On February 6, 2012 Mr. Miller sent the following email to Mr. Crowle:

> I see my accounts are moving back close to their highs of last year. Considering there was quite a drop from those highs I would like to utilize stop losses for those investments I hold that are appropriate. You can email me or phone if you think we should discuss further….
> (Emphasis added).

[93] In their factum, the appellants submit that the judge erred in finding "that Miller was instructing Crowle to act in a discretionary capacity and that it was a blanket instruction that could not be acted upon. There is no evidence or law supporting this conclusion". They argue that Mr. Holley testified that stop losses could have been used for all but three of Mr. Miller's holdings. They further argue that there is no evidence to contradict Mr. Miller's version of events.

[94] Respectfully, this ignores or materially misapprehends the judge's findings, as well as a significant body of evidence in the record. The judge was well aware of Mr. Holley's evidence and he confirmed that Mr. Holley had opined that stop losses

could have "potentially been utilized" for all but three of the securities in the appellant's portfolios: at para. 204.

[95] The judge concluded that "…an advisor under an advisory account required specific instructions to sell or buy and…an instruction like 'I would like to utilize stop losses for those investments I hold that are appropriate' is problematic": at para. 207. He found it was neither a breach of the Client Agreements for Mr. Crowle "…to decline to apply his discretion in order to decide what securities were 'appropriate' for stop losses", nor was it "…a breach of the duty of care owed by the defendants to the plaintiffs for the defendants to not accede to the blanket February 2012 instruction": at para. 216.

[96] Ultimately, however, the judge's conclusions turned on a further and independent finding of fact. The judge said that Mr. Miller testified that Mr. Crowle telephoned him after receiving his email and "…according to Mr. Miller, they decided to use trailing stop losses. Mr. Miller testified that it was clear Mr. Crowle would put in place a stop losses strategy for all of his securities…": at para. 204. He testified "…his instruction was to place a stop loss on every 'appropriate' security in the two portfolios using a 10% reduction in price threshold": at para. 209. He testified he believed his general instruction to place stop losses on all his securities had been complied with and they had been continuously in place since February 2012. He said he only discovered this was not the case when he reviewed his statements in September 2015, after he closed his accounts: at para. 210.

[97] Mr. Crowle gave different evidence. The judge summarized his evidence as follows:

> [208] It is clear enough that Mr. Crowle attempted to dissuade Mr. Miller from using stop losses (which was an appropriate role for an advisor). But Mr. Miller was persistent and Mr. Crowle agreed to place a single stop loss. The price, volume and timing of that security were discussed as required by the advisory nature of the advisor/client relationship. Mr. Crowle testified that it looked like Mr. Miller wanted to try a stop loss to see how it worked (which he was entitled to do but with instructions consistent with the Client Agreement). Mr. Crowle placed the stop loss during the telephone conversation.

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[98] The judge addressed this fundamental inconsistency in the evidence of Mr. Miller and Crowle, respectively. He did not believe Mr. Miller and he said:

> [212] In any event, it is simply not believable that Mr. Miller, from 2012 to 2015, would not have seen from the statements online (and the ones mailed to him) that values of his stocks were changing and no stop losses were triggered. I agree with the defendants' description that, if there had been blanket stop losses in place, there would have been a "cascade" of sales and the plaintiffs would have received confirmation slips for each one. It may be recalled that Mr. Miller had the same problematic explanation to explain that he did not know the 2013 and 2015 liquidation instructions had been carried out.
>
> [213] If there had been stop losses in place there would also have been discussions with Mr. Crowle about purchasing replacement securities in order to maintain the value of the portfolio which would, again, have appeared on the account statements. Mr. Miller says he looked at his accounts to see if there had been any stop losses but he "could not make that determination." He does not explain why he did not ask why they were not in the statements.
>
> [214] I conclude that Mr. Crowle reluctantly placed one stop loss order, Mr. Miller knew about that order, there were no subsequent discussions about stop losses and no other stop losses were put in place. Mr. Miller had to have known there were no other stop loss orders because there was no related activity in his account for about three years. He knew this from his account statements, because there were no confirmation slips for sales and because there were no discussions of trades for replacement securities. The statement in the plaintiffs' notice of civil claim that the plaintiffs were not aware of the defendants' failure to utilize stop losses until or about 2015 cannot be correct.

[99] These findings of fact are entitled to deference and they are, in my view, dispositive of this ground of appeal.

#### _(d) The judge erred in finding Mr. Crowle did not owe the appellants a duty to clarify their instructions_

[100] This purported error pertains to each of the Stop Loss and the 2013 and 2015 "go away in May" claims. The appellants contend that the judge erred in "failing to find" that Mr. Crowle was required to explain the nature of the advisory agreement Mr. Miller had with RBC and that Mr. Crowle could not implement discretionary orders. They rely on *Varcoe* in aid of the submission that an investment advisor has an obligation, as the judge put it in his Reasons, "…to explain the rules of the road…including the limitations an advisor has under an advisory agreement to a client who requires that explanation": at para. 161.

[101] There are several difficulties with this submission: (a) it ignores that each of these claims was also dismissed on grounds that were unrelated to the discretionary nature of the appellant's accounts; and, (b) more importantly, the central submission is not faithful to the judge's reasons and the findings he made.

[102] The judge was mindful of *Varcoe* and he addressed the decision over several paragraphs. However, he found, for three distinct and independent reasons, that *Varcoe* did not support the result the appellants advocated.

[103] First, in the 2013 "go away in May" claim, the judge dealt at some length with a conversation Mr. Crowle had with Mr. Miller. The judge found:

> [166] On the facts Mr. Miller agreed that Mr. Crowle told him liquidating the portfolios was a bad idea and it is clear that Mr. Crowle opposed the liquidation of the plaintiffs' portfolios as proposed by Mr. Miller. I also find that Mr. Crowle said something along the lines that he could not take the general instructions that Mr. Miller insisted on giving. The result is that I conclude that, whether or not he was required to do so, Mr. Crowle explained what he could do and not do as an advisor.

[104] The appellants argue that the judge's finding is not supported by the record. While the judge recognized Mr. Crowle's evidence was imprecise, and the record reveals that aspects of his evidence were inconsistent, I am satisfied there was a sufficient basis for the judge's finding. Even if this were not so, the judge's two remaining findings are dispositive of this ground of appeal.

[105] First, the judge returned to Mr. Miller's investment knowledge. He reiterated that though "…Mr. Miller downplay[ed] his investment knowledge" he had a "…good knowledge of the industry…" from various sources: at para. 164. He found, as a fact, that "…Mr. Miller was not a client that required education about the basic elements of investing in an advisory account": at para. 165.

[106] Second, the judge found, as a fact, that Mr. Miller knew the two accounts he had with the respondents were advisory accounts because he had signed the Client Agreement for both accounts, and "…the nature of an advisory account was described simply and fully in those documents": at para. 164.

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[107] These findings are also relevant to both the 2015 “go away in May” claim and the Stop Loss claim. Each of these findings is entitled to deference.

[108] In my view, there is no merit to any of the numerous issues raised within the 2013 and 2015 “go away in May” or the Stop Loss grounds of appeal.

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### iii) Miscellaneous issues

#### *(a) Error in giving no remedy for failure to keep notes*

[109] This ground of appeal is based on Mr. Crowle’s failure to keep notes, even though RBC’s internal policies require an investment advisor to keep a record of conversations that have some material impact on an account. Such internal policies are required by Rule 38 of the Investment Industry Regulatory Organization of Canada’s *Dealer Member Rules* (repealed December 31, 2021). The appellants contend that the judge was somehow obliged to provide a remedy for Mr. Crowle’s breach of the RBC policy.

[110] The appellants rely on *Refco Futures (Canada) v. SYB Holdings*, 2001 BCSC 1037, at para. 82, where the court emphasized that “…[i]f a statutory regulation imposed for the protection of the public is to have any meaning, it must be enforced and obeyed”: at para. 82, citing *Varcoe* at 239; see also *Refco Futures (Canada) v. SYB Holdings*, 2004 BCCA 15 at para. 87. The appellants argue that if RBC’s policies are to be meaningful, the judge was required—in circumstances where there was a conflict between the evidence of Mr. Miller and Mr. Crowle—to draw an adverse inference against Mr. Crowle.

[111] The appellants also rely on *Morton v. Easton* (1995), 8 B.C.L.R. (3d) 53 at 62, 1995 CanLII 1227 (S.C.), where the court quoted the following passage from *Re Dickie* (1915-16), 23 B.C.R. 538 at 541-42 (C.A.):

> … I am putting both parties upon an equal ground of credibility. There runs through all the cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with the client, they must be able to [show] what that agreement is, and if it is not in writing, then it seems to be that the client’s statement must be accepted. If he makes an agreement, then let him make it in writing as a prudent solicitor with a client, disclosing all the facts and circumstances.

[112] With respect, the appellants' submissions are neither consistent with the authorities cited nor with the broader principles that govern when a judge may draw an adverse inference.

[113] To start with, the principle expressed in *Re Dickie* only pertains where the parties are on "an equal ground of credibility". The judge in *Morton* also referred, at paras. 62–63, to *Chang v. Lai* (26 August 1988), Vancouver No. C851996 (B.C.S.C.), where the parties were not on "equal ground" because "the client was not found to be a credible witness".

[114] As in *Chang*, the principle the appellants seek to rely on has no application. In most instances, Mr. Miller and Mr. Crowle were not on "an equal ground of credibility". Instead, the judge found, for reasons not generally challenged on appeal, that Mr. Miller was often not credible.

[115] The appellants also misapprehend the principles that govern when an adverse inference may be drawn in the civil context. These principles were recently reviewed in *Insurance Corp. of British Columbia v. Mehat*, 2018 BCCA 242, where this Court relied on the following passage from Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at 377:

> [86] In civil cases, an unfavourable inference <u>can be drawn</u> when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference <u>may be drawn</u> against the party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not supported.
>
> [Emphasis added.]

[116] Several matters arise from this passage. First, the circumstances where adverse inferences are typically drawn have little to do with the position being advanced by the appellants. Second, whether an adverse inference should be drawn in a particular instance is a discretionary decision made by the trier of fact: *Mehat* at para. 88; *Buksh v. Miles*, 2008 BCCA 318 at para. 33. Judges are not, as the

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appellants suggest, "bound" to draw an adverse inference: *Benheim v. St-Germain*, 2016 SCC 418 at para. 52; *Mehat* at para 89; *Thomasson v. Moeller*, 2016 BCCA 14 at para. 34; *Weeks v. Baloniak*, 2005 BCCA 193 at para. 12. Further, the decision of a judge on whether or not to draw an adverse inference is part of the "fact-finding process", and thereby owed deference on appeal: *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 72, leave to appeal to SCC ref'd, 38791 (16 January 2020); *Singh v. Reddy*, 2019 BCCA 79 at para. 22.

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[117] The judge appreciated Mr. Crowle did not have notes for many of his conversations with Mr. Miller. He addressed the issue and said:

> [81] Overall, Mr. Crowle's lack of documentation does not assist him but it is not particularly surprising that witnesses struggled to remember what happened 10 years ago. That is the benefit of proper notes which he does not have. I am satisfied there is a sufficient record to properly consider the plaintiffs' claim in respect of whether the defendants breached their duty of care.

[118] The judge thereafter considered each of the appellants' claims in light of the parties' evidence, as well as other objective evidence in the form of emails, investment records, and other documents. In my view, the manner in which the judge addressed Mr. Crowle's failure to maintain proper notes was appropriate and I see no merit in the appellants' submissions.

#### *(b) Error in considering defences not pleaded*

[119] The appellants submit the respondents did not plead that the instructions Mr. Miller provided in each of the Stop Loss, and 2013 and 2015 "go away in May" claims were discretionary. Rather, they argue that the respondents "pivoted to that argument at trial". The appellants say it was a legal error for the judge to entertain defences that were not properly pleaded.

[120] There are three difficulties with this ground of appeal. First, paras. 4 and 5 of Part 1 of the respondents' Response to Amended Civil Claim state:

> 4. Throughout the Material Period, in accordance with the Account Agreement, the relationship between the Defendants and the Plaintiffs was strictly that between client and advisor. The Defendants never agreed to

> "manage" any investment assets on behalf of the Plaintiffs. All investment decisions made in relation to these accounts were squarely discussed with and authorized by Miller.
>
> 5. During the Material Period Crowle offered recommendations and advice to the Plaintiffs respecting their accounts. The Defendants were not authorised to, and did not in fact, exercise any discretion with respect to investments made in the accounts of either Plaintiff.

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[121] Thus, the fact the agreements made between the appellants and respondents did not contemplate "discretionary" services was squarely raised. I do not consider that it was necessary for the respondents to repeat this plea in relation to each of the distinct claims the appellants advanced.

[122] Second, in paras. 15 and 16 of the Response, the respondents pleaded that "Miller did not instruct Crowle to liquidate the Plaintiff's investments" in either April 2013 or March 2015. In my view, this pleading puts the nature of the instruction Mr. Miller gave to the respondents in issue. It is also a pleading that is consistent with the judge's findings. As I noted earlier (at para. 79), Mr. Miller did not instruct the respondents "to liquidate his portfolio".

[123] Third, the appellants accept that the issue they now raise was not raised before the judge during the trial or in their closing submissions. A trial judge is only required to address the live issues that are raised by the parties: *R. v. Walker*, 2008 SCC 34 at para. 20; *R. v. Zsombor*, 2023 BCCA 37 at paras. 45–46; *Trans Mountain Pipeline ULC v. Mivasair*, 2023 BCCA 115 at para. 79.

[124] I would not accede to this ground of appeal.

**iv) Errors arising from The Supplemental Reasons**

[125] The Supplemental Reasons addressed the limited question of whether the appellants suffered any loss as a result of Mr. Crowle unilaterally changing the intended risk profile, on the relevant KYC documents, for Mr. Miller's portfolio in February 2013 and for both portfolios in August 2014. As the judge put it in the Reasons:

> [306] Did, for example, the change to 100% high risk in 2014 result in the plaintiffs suddenly taking on new securities with significantly higher risk? And did the securities purchased under the changed risk profiles in February 2013 and August 2014 result in losses to the plaintiffs?

[126] In response to the judge's request for further submissions, the respondents provided the following chart:

| Issuer | Risk Rating (Holley) | Bought | Cost | Sold/ redeemed | Sale Proceeds | Income/ dividends | Net gain/(loss) |
|---|---|---|---|---|---|---|---|
| ***After Feb 2013:*** | | | | | | | |
| Star Portfolio Corp. | med | Mar 2013 | $58,350.00 | May 2013 | $60,247.50 | $750.00 | $2,647.50 |
| Int'l Forest Products | med/high | Sept 2013 | $48,000.00 | Dec 2013 | $49,800.00 | N/A | $1,800.00 |
| Marrett High Yield | med | Nov 2013 | $49,910.00 | Jun 2015 | $3,534.00 | $48,608.00 | $2,232.00 |
| Aston Hill VIP Inc. Fund | low/med to med | Mar/Jun 2014 | $50,965.00 | Sept 2014 | $53,769.65 | $685.00 | $3,489.65 |
| Essential Energy Serv. | med/high | Mar 2014 | $16,260.00 | Sept 2015 | $4,492.50 | $1030.00 | ($10,737.50) |
| ***After Aug 2014:*** | | | | | | | |
| Australian REIT Inc. Fund | med/high to high | Sept/Nov 2014 | $14,340.00 | May 2015 | $13,582.14 | $557.50 | $134.64 |
| Veresen Inc. | med/high | Sept 2014 | $42,640.00 | Apr 2015 | $46,290.00 | $1300.00 | $4,950.00 |

[127] In the Supplemental Reasons, the judge observed that the appellants did "…not dispute the list in the defendants' table as representing the investments for the material period. They say nothing about the table and the holdings listed there": at para. 27. The judge found the holdings listed in the table realized a profit of $4516.29. He confirmed, as he had earlier in the Reasons, that "…a breach of the duty of care owed by a party does not, in and of itself, give rise to liability in negligence". He held that the appellants had not "…proven they suffered a loss as a result of the defendants' breach of the duty of care", and accordingly dismissed the appellant's claim in negligence: at para. 33.

### *(a) Offsetting losses against gains*

[128] The appellants argue, relying on *Sharpe v. McCarthy* (1994), 94 B.C.L.R.(2d) 384, 1994 CanLII 767 (C.A.), that it was inappropriate for the judge to set off the

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losses from one security against the gains made by other securities within the groupings the judge considered.

[129] The respondents assert that *Sharpe* is inapplicable because it deals with a breach of fiduciary obligation rather than a negligence claim. That submission appears to be inconsistent with this Court's comments about *Sharpe* in *Moldovan* BCCA at paras. 31–32.

[130] In my view, the appellants' position is untenable for a different reason. In the Reasons, the judge asked for further submissions because he sought to ascertain whether the unauthorized change to the risk tolerances—described in relevant KYC documents—actually resulted in securities being purchased that had "significantly higher risk", and that then caused a loss in the appellants' portfolios. There was no finding by the judge about whether the securities purchased after February 2013 had risk profiles that were inconsistent with what the parties had intended under the Proposal in March 2010. Instead, he moved straight to the question of loss.

[131] The chart created by the respondents, which relied on the risk assessments provided by Mr. Holley, indicated that there was no increase in the risk profile of the securities the judge considered. None of the investments purchased during the relevant period were "high risk". The only security that lost money, "Essential Energy Serv." was rated "med/high". Based on the judge's earlier conclusions, that rating was a variation on "medium" and fell within the broad "moderate" risk profile described in the Proposal and intended by the parties from the outset.

[132] Any potential concern about offsetting gains against losses simply does not arise in such circumstances. If all of the securities purchased after February 2013 had been rated either "low" or "medium", and one such security had lost money, it would surely not be open to the appellants to complain that loss should not be offset against other gains when assessing whether their portfolios made money.

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#### *(b) Failure to address loss of opportunity*

[133] The appellants also contend the judge erred in failing to consider their lost opportunity to better invest their funds during the same March 2013 to September 2015 period. In circumstances where a plaintiff has suffered no loss and their claim is dismissed it follows that they cannot advance a claim for loss of opportunity.

### 5. Disposition

[134] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Marchand"

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