
CANADA / JUDGMENT

Longstaff v. Robinson

2008 BCSC 1488

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1488 Longstaff v. Robinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Longstaff v. Robinson,

2008 BCSC 1488

Date: 20081103

Docket: S036667

Registry: Vancouver

Between:

Bruce C. Longstaff

Plaintiff

And

Douglas W. Robinson

IPC Investment Corporation

Defendants

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for Plaintiff

A.A. MacDonald

Counsel for Defendants

P.M. Willcock

P. Spinks

Date and Place of Trial/Hearing:

June 2-6, 9-13 & July 2-4, 2008

Vancouver, B.C.

INTRODUCTION

- [1] On the death of his mother, the plaintiff, Bruce Longstaff inherited \$176,362.15 (the "Estate Funds"). He had little experience in financial matters and sought the assistance of the defendant, Douglas Robinson, a professional investment advisor. Based on Mr. Robinson's recommendation, Mr. Longstaff in July 1998 invested the Estate Funds in certain mutual funds (the "Original Portfolio").
- [2] In the spring of 1999, Mr. Robinson recommended that Mr. Longstaff borrow \$200,000 in order to leverage his investments (the "Leverage Plan"). Mr Longstaff again followed Mr. Robinson's advice. To secure the loan Mr. Longstaff pledged some of the funds in the Original Portfolio as collateral.
- [3] Because of a dramatic downturn in the stock market, Mr. Longstaff suffered financial losses and now seeks to recoup his losses from Mr. Robinson. Mr. Longstaff says that given his limited ability to understand investment or financial concepts, the Original Portfolio and the Leverage Plan were not suitable investments. In addition, he says Mr. Robinson breached his fiduciary duty to Mr. Longstaff by failing to advise him to use the Estate Funds to purchase a house.
- [4] The defendants say that Mr. Robinson met the standard of care of an investment advisor and that he took all reasonable steps to ensure that Mr. Longstaff's investments were in keeping with Mr. Longstaff's investment objectives and risk tolerance. They say that Mr. Longstaff's losses resulted from an unforeseen downturn in the stock market and were not caused by the negligence of Mr. Robinson. Mr. Robinson denies that Mr. Longstaff sought from him any housing advice.

BACKGROUND

- [5] Mr. Longstaff was born on June 13, 1950. His father died when he was three months old and he was brought up by his mother and her close friend, whom he considered his aunt. In early grade school he was diagnosed with a learning disability. As a consequence of this disability, as well as a serious speech impediment and a hearing disability, he did not attend standard primary or secondary education classes. Instead, he attended various "occupational" classes until he was about 18 years of age, at which time he left school to enter the labour force.

- [6] On April 17, 1971, Mr. Longstaff commenced work as a garbage man with the City of Vancouver. From that date until his retirement in January 2007, he remained employed by the City. Over the years, he moved jobs internally, from garbage man to truck driver to equipment operator.
- [7] Mr. Longstaff lived with his mother in the family home until he was 30 years old and then for several years resided in a number of apartments. In July 1997, six months prior to his mother's death, he moved back into the family home to assist her with her living needs.
- [8] Until her death, Mr. Longstaff relied upon his mother to organise his financial affairs. Even when he lived on his own, his mail continued to be delivered to his mother's home so that she could keep track of his affairs. She advised him in financial matters and in 1993 she established on his behalf a deferred annuity contract with Northwest Life Assurance Company. He purchased some Canada Savings Bonds through a payroll deduction plan at work. In 1981, he and two friends each invested \$20,600 to purchase five acres of land on Gabriola Island (the "Gabriola Property"). Mr. Longstaff borrowed the money for this investment from his mother.
- [9] In November 1997, his mother's neighbour suggested that he use some of the funds he had invested in Canada Savings Bonds to purchase mutual funds. As a result, on November 15, 1997, he attended at Richmond Savings Credit Union and using funds from matured Canadian Savings Bonds invested \$2,157.01 in the Trimark Select Canadian Growth Fund, described as a conservative Canadian equity fund.
- [10] As part of the transaction, the credit union required Mr. Longstaff to complete a new account application form. Such forms are mandated by security regulators and are referred to as Know Your Client ("KYC") forms. On the KYC form Mr. Longstaff described himself as a novice investor, comfortable with a moderate level of volatility, and a medium risk tolerance. He described his investment objective as "growth".
- [11] In late January 1998, Mr. Longstaff's mother died. Shortly thereafter her house was put up for sale. At her funeral reception, Mr. Longstaff spoke to Mr. Steven Lane, who had been his friend in high school. Mr. Lane was a realtor who lived in Ladner, British Columbia. Mr. Longstaff advised Mr. Lane that he might be interested in purchasing a house in Ladner.
- [12] On three occasions in February and March 1998, Mr. Longstaff met with Mr. Lane and looked for suitable houses in Ladner to purchase. Mr. Lane testified that in 1998 the real estate market in Ladner was relatively slow with few houses on the market. Mr. Longstaff described to Mr. Lane the type of house which might be of interest to him, but they did not find any houses for sale that met his criteria. One house that did meet his criteria had sold in November 1997 for \$218,000. Evidence at trial valued that house as of January 10, 2006 at \$360,000 and April 1, 2008 at \$445,000.

- [13] Mr. Lane testified that throughout the spring of 1998 he continued to follow up with Mr. Longstaff. He says, however, that Mr. Longstaff appeared to lose interest in purchasing a house and in late May 1998, Mr. Lane stopped pursuing him as a prospect.
- [14] On June 1, 1998, after the sale of his mother's house, Mr. Longstaff moved to a one bedroom apartment on Selkirk Street where he still resides. He found the apartment convenient as it was close to his work.
- [15] As a result of his mother's passing, Mr. Longstaff in March 1998 received an annuity payment of \$19,596.89. On June 30, 1998, he received the Estate Funds.
- [16] At about the time that Mr. Longstaff received the Estate Funds, he discussed his inheritance with a friend at work. The friend asked him whether he had given any thought to investing the inheritance and suggested he should see Mr. Robinson. Mr. Longstaff made arrangements to see Mr. Robinson on July 2, 1998.
- [17] Mr. Robinson was initially trained as a chartered accountant. Most of his working life had been spent in real estate development. As of July 1998, he had been an investment advisor for two years.
- [18] At their initial meeting on July 2, 1998, Mr. Robinson asked Mr. Longstaff questions concerning his resources, financial experience, financial objectives and risk tolerance. He canvassed with Mr. Longstaff his investment time frame and discussed in general terms how he could fund his retirement.
- [19] At the meeting, Mr. Robinson learned that Mr. Longstaff was 48 years old and hoped to retire at age 55. He earned approximately \$44,000 per year. He was single and had no dependents. He had worked for the City of Vancouver for 27 years and would have to work for eight more years to reach 35 years of service, after which time he would be eligible for a pension equal to 70% of his salary over the last five years. His pension income was estimated to be \$2,200 per month. Mr. Robinson learned of Mr. Longstaff's existing investments and Mr. Longstaff was asked to provide documentation concerning those investments.
- [20] At the meeting of July 2, 1998, Mr. Robinson did not learn that Mr. Longstaff had a learning disability, below average reading skills, had not completed high school or that he had largely relied on his mother to organise his finances. To Mr. Robinson, Mr. Longstaff did not appear any more naïve about financial matters than the average person approaching him for advice. It was not apparent to Mr. Robinson that Mr. Longstaff did not have sufficient understanding of his advice to ask meaningful questions.
- [21] Mr. Longstaff testified that he remembered very little of his first meeting with Mr. Robinson. He does say that at the first meeting he advised Mr. Robinson that he was considering using the Estate Funds to purchase a house. He says that Mr. Robinson told him that it was not a good time to enter into the housing market because housing prices were flat. Mr. Longstaff testified that he relied upon that advice and decided not to purchase a house.

- [22] Mr. Robinson has no recollection of any discussion about Mr. Longstaff purchasing a house. He does not recall telling Mr. Longstaff that the housing market was flat. He says he would not have advised Mr. Longstaff that it was not a good time to buy a house because he does not believe that he has ever given anyone that advice. Other evidence at the trial indicates that the real estate market was, in fact, flat in 1998 and it remained so for at least two years thereafter.
- [23] Following the initial meeting, Mr. Robinson prepared a personal investment profile for Mr. Longstaff. The profile contains a questionnaire that Mr. Robinson completed based on information provided by Mr. Longstaff at their initial meeting. The answers to the questions resulted in a computer generated profile that indicated that Mr. Longstaff's investment goals and risk tolerance were compatible with an aggressive growth portfolio.
- [24] On July 6, 1998, Mr. Robinson again met with Mr. Longstaff and at that time he reviewed with Mr. Longstaff the answers to the questionnaire. Mr. Longstaff, on cross-examination, agreed he would have answered all the questions posed on the profile questionnaire in a manner consistent with the way the questionnaire was completed by Mr. Robinson.
- [25] Mr. Robinson said that the questionnaire tended to overstate the degree to which investors were aggressive because it was heavily weighted by the investor's age and investment horizon. Mr. Robinson told Mr. Longstaff he did not think he should engage in investing in anything as aggressive as that described by the profile and recommended that his funds be invested in conservative, but growth-oriented mutual funds. The funds that Mr. Robinson recommended to Mr. Longstaff were significantly more stable and conservative than those described in the asset allocation mix generated by the computer software.
- [26] On July 7, 1998, Mr. Robinson prepared and provided to Mr. Longstaff an investment plan. The objective of the investment plan was to provide Mr. Longstaff with income in his retirement years which would be consistent with his then current income of \$4,000 per month.
- [27] Mr. Robinson reviewed the investment plan with Mr. Longstaff and illustrated the manner in which changes in rates of return could affect the growth of the investment. He showed Mr. Longstaff the rates of return that had been earned by the funds in which he was about to invest and described the variability of returns on those funds.
- [28] On July 7, 1998, Mr. Robinson prepared a KYC form which contained the description of the client's characteristics. On that form, Mr. Longstaff is described as an investor with low investment knowledge, medium risk tolerance with investment objectives of growth and tax benefits. Mr. Longstaff signed the form. The description of Mr. Longstaff is similar to the KYC form he had completed a year earlier at Richmond Savings. Mr. Longstaff does not dispute this description of his risk tolerance and investment objectives.

- [29] Mr. Longstaff's initial investment was \$213,000. This included the Estate Funds, his existing RRSPs and the annuity fund which he had received on his mother's passing. The Original Portfolio was comprised of 94.4 % equity investments. It made up approximately 68% of Mr. Longstaff's total assets. Mr. Robinson thought that was suitable for a person like Mr. Longstaff, whom he had rated as a person with medium risk tolerance and who planned to retire in eight years, to have 70% of his total net worth exposed to the equity market.
- [30] Over the next several months the value of the Original Portfolio declined. By March 1999 it was worth just under \$200,000. In the spring of 1999, Mr. Robinson became concerned that the Original Portfolio had failed to perform as anticipated and over the declining rates of return in the market generally. This caused him to re-evaluate Mr. Longstaff's prospects for retirement and on May 18, 1999, Mr. Robinson prepared for Mr. Longstaff's consideration the Leverage Plan.
- [31] The Leverage Plan was premised on Mr. Longstaff borrowing \$200,000 from the Laurentian Bank (the "Bank") and pledging \$100,000 of his existing investments as collateral for the loan. The \$200,000 would be invested in mutual funds in the expectation that Mr. Longstaff's total investments would grow at a rate which would be sufficient to pay the interest on the loan and allow Mr. Longstaff to retire with sufficient funds to maintain his current income of \$4,000 per month.
- [32] During a series of meetings in May and June 1999, Mr. Robinson prepared illustrations for Mr. Longstaff of projections of Mr. Longstaff's financial future. One set of illustrations was based on Mr. Longstaff earning \$40,000 a year, while the other contemplated annual earnings of \$48,000, a sum similar to his present earnings. Mr. Robinson pointed out to Mr. Longstaff that if he maintained his current level of consumption there was a risk that his investments in the Original Portfolio would run out at approximately age 80. Mr. Longstaff was concerned about that possibility and agrees that it was a major factor which motivated him to invest in the Leverage Plan.
- [33] While a leveraged programme had the potential of greater rewards, those rewards came with increased risk. The major risk was that if the value of the portfolio declined, the Bank would call upon Mr. Longstaff to pledge further assets to meet potential margin calls.
- [34] Mr. Robinson advised Mr. Longstaff that he was borrowing money to increase the size of his portfolio in the hope that his returns would be significantly larger. He was advised that there were some tax advantages to borrowing to invest as he would be able to write off his interest charges. Mr. Longstaff knew that the Leverage Plan required that some of his investments be given as collateral and that collateral was necessary to ensure that the loan was repaid. He understood that there was a "little more risk" in borrowing to invest than in simply investing. He agreed that Mr. Robinson properly described the funds into which the money would be invested and that the value of the funds were subject to fluctuation.

- [35] Mr. Robinson testified that he believed that the Leverage Plan would produce the intended result of ensuring Mr. Longstaff retirement income. The plan which he created for Mr. Longstaff had a significant margin for error in that (a) only half of Mr. Longstaff's invested assets were pledged as security for the loan, (b) Mr. Longstaff had other assets outside the plan, notably real property at a value estimated at \$50,000, and (c) the funds would have to perform particularly badly in order for a margin call to occur.
- [36] Mr. Longstaff accepted Mr. Robinson's recommendations and by June 10, 1999, all steps necessary to implement the Leverage Plan had been completed.
- [37] In April 2000, Mr. Longstaff, at Mr. Robinson's suggestion, attended the Financial Strategies for Successful Retirement ("FSSR") investment course. The FSSR course ran for 2 hours per session on three consecutive evenings. It considered the sources of retirement income, types of investment and risk management strategies.
- [38] The Leverage Plan initially performed as expected. As at February 21, 2000, the total value of the Leverage Plan and the Original Portfolio was \$445,563.
- [39] Commencing in the spring of 2000 through to the fall of 2002, there was a dramatic fall in the world's stock markets and Mr. Longstaff's investments declined significantly. In 2002, Mr. Longstaff began receiving warnings from the Bank concerning possible margin calls. On September 23, 2002, the Bank advised that the mutual funds held as collateral for the investment loan would be redeemed in their entirety unless steps were taken to increase the collateral. As a result of that letter, Mr. Robinson advised Mr. Longstaff to pledge one of his unencumbered mutual funds to bring the loan into good standing.
- [40] By the end of September 2002, as a result of receiving the margin call letters and the serious losses he had suffered in his investments, Mr. Longstaff had lost confidence in Mr. Robinson as an investment advisor. On September 30, 2002, Mr. Longstaff contacted Mr. Robinson and instructed him to move all his remaining investments into a money market fund. Mr. Robinson did not execute this instruction as it required written instructions before acting.
- [41] On October 17, 2002, Mr. Longstaff retained Darren Mather as his new investment advisor. Mr. Mather testified that when he first met Mr. Longstaff, Mr. Longstaff was visibly upset and distraught over his investment losses. Although Mr. Mather believed that Mr. Longstaff's existing portfolio was outside his risk tolerance, he advised Mr. Longstaff that the current market conditions dictated that he should remain invested in his present equities until such time as market conditions warranted a switch to funds that were more in line with his risk tolerance. Mr. Longstaff followed that advice.

- [42] When Mr. Mather was initially retained he told Mr. Longstaff that he may need additional funds to pay down his loan to keep the Bank from selling his investments. At that time the Gabriola Property had been listed for sale for some months. In order to raise additional money Mr. Longstaff approached the two co-owners of the Gabriola Property who agreed to purchase his interest for \$40,000. Some months after they purchased Mr. Longstaff's interest, the co-owners sold the Gabriola Property for \$170,000.
- [43] The Bank ultimately did not call their loan and the proceeds from the sale of the Gabriola Property were not used to pay down the loan.
- [44] Mr. Longstaff invested \$376,000 in the Original Portfolio and the Leverage Plan. When he transferred his account to Mr. Mather, its value was \$247,000, of which Mr. Longstaff owed \$200,000 to the Bank. In addition, Mr Longstaff had invested over \$45,700 in RRSPs, which as of the date he transferred his investments to Mr. Mather were valued at \$34,700.
- [45] Mr. Mather completed a KYC form concerning Mr. Longstaff on October 17, 2002. On that form, he indicated that Mr. Longstaff was still a novice with respect to his investment knowledge, that his risk tolerance was 2 of a possible 9, that his investment objective was safety and that he sought liquidity in 3-5 years.
- [46] Mr. Mather acknowledged that when he first met Mr. Longstaff that Mr. Longstaff was clearly troubled by his losses and those losses had affected his risk tolerance and investment objective. Notwithstanding the change in Mr. Longstaff's objective, Mr. Mather recommended that Mr. Longstaff continue in the Leverage Plan.
- [47] Mr. Mather continues to be Mr. Longstaff's financial advisor. While he has made some changes in the investment portfolio, he did not substantially alter the underlying plan, other than to move some investments into income generating investments to pay the interest on the loan. As Mr. Mather came to know Mr. Longstaff and as the pressure of the margin call was resolved, Mr. Mather completed further KYC forms. The KYC forms completed on August 12, 2003 indicated that Mr. Longstaff then had long term growth as his investment objective for his open plan and medium risk tolerance for both his open plan and RRSP investments.
- [48] Despite the fact that the rate of growth of the investment programme was slowed because of the movement of a portion of the assets into income generating funds, Mr. Longstaff's portfolio recovered with the stock market. As of December 31, 2005, the value of his investments was \$379,000. By December 31, 2006, the value of the investments had increased to \$397,000. There has been some subsequent decline in the investments and as of the date of trial the value of the investments was approximately \$370,000.
- [49] By December 31, 2006, the investment loan could have been repaid on terms that would have left Mr. Longstaff with a fund close to that which he had initially invested. Mr. Mather thought it was appropriate for Mr. Longstaff to remain in a leveraged investment plan with a view towards his recovering all his initial investment.

- [50] Mr. Mather testified that given Mr. Longstaff's investment knowledge, his risk tolerance, his investment objectives, his ability to instruct his advisor and his ability to understand the risk in which he was engaging in, that it was appropriate for Mr. Longstaff to continue to borrow money for the purpose of maintaining his investments with a view towards growth. He thought Mr. Longstaff could read and understand the documents. He at no time sought the assistance of others for the purpose of obtaining instructions from Mr. Longstaff. He believed that Mr. Longstaff was able to understand the advice that he was receiving and to give instructions. Mr. Mather thought Mr. Longstaff had the intellectual capacity to understand the risk of continuing in leveraged investments.

OPINION EVIDENCE: STANDARD OF CARE

- [51] Before reviewing the evidence of the witnesses called to give evidence about the standard of care, I will first consider the defendants' submission that I should draw an adverse inference against the plaintiff because of his failure to lead opinion evidence on the standard of care from Ms. Karen Henderson, a witness the plaintiff called in regards to damages. Ms. Henderson is an investment advisor like Mr. Robinson and familiar with standards of care in the industry. In cross examination Ms. Henderson disclosed that she had given counsel for the plaintiff a verbal opinion on the quality of work that Mr. Robinson had done for Mr. Longstaff. The plaintiff did not ask Ms. Henderson for a written opinion and did not adduce any opinion evidence from Ms. Henderson concerning Mr. Robinson's work. In these circumstances the defendants ask the court to draw an adverse inference from the plaintiff's failure to elicit opinion evidence from Ms. Henderson.
- [52] I am not prepared to draw any such inference. In the course of an action it is not unusual that a party may consult several potential experts whose evidence they ultimately choose not to lead. Such consultations form part of the solicitor's brief and are generally regarded as privileged unless the expert is subsequently called as a witness: *R. v Stone*, [1999] 2 S.C.R. 290. Absent the plaintiff calling Ms. Henderson as a witness, the defendants would not be entitled to lead evidence that she had given an opinion to the plaintiff: *Benek v. Pugash*, 2004 BCSC 1222. No party should be deterred from engaging an expert by the prospect that the subsequent failure to call the expert would lead the court drawing an adverse inference as to the evidence that the expert may have given.
- [53] The plaintiff having chosen to call Ms. Henderson as a witness, albeit on damages, the defendants were entitled to cross examine her at large in regard to any matter in issue. The plaintiff could no longer claim her opinion as to whether Mr. Robinson met the standard of care was privileged. Given her qualifications the defendants were within their rights on cross examination to elicit from her the fact that she had given an opinion to the plaintiff concerning the quality of Mr. Robinson's work and if the defendants had so chosen they could have gone further and elicited the opinion itself. Having however chosen not to elicit the actual opinion from the witness, when the witness was in the box, the defendants cannot now ask the court to infer that Ms. Henderson's opinion would be adverse to the plaintiff.

Such a conclusion would be pure speculation. If the defendants wanted the court to consider Ms. Henderson's opinion, they should have asked her what that opinion was.

- [54] Both parties called expert evidence. The plaintiff called Mr. Douglas McDonald, while the defendants called Mr. Douglas Fox and Mr. Bradley Doney. All three witnesses were qualified to give evidence on the standard of care that applies to an investment advisor and whether the Original Portfolio and the Leverage Plan were appropriate investments for an investor like Mr. Longstaff.
- [55] Mr. McDonald testified that it would have been a suitable investment for someone in Mr. Longstaff's circumstances to use the Estate Funds to assist him in purchasing a home as a principal residence. He opined that the purchase of a principal residence would have been more suitable financial planning advice than the purchase of mutual funds in the Original Portfolio.
- [56] Mr. McDonald agreed that the advice to purchase mutual funds in and of itself was suitable financial advice and the individual funds purchased were suitable. He was of the opinion, however, that the asset mix in the portfolio was not appropriate for Mr. Longstaff. He noted that all of Mr. Longstaff's prior investment experience had been in interest-bearing assets of a basic nature. He believed that a 90% based equity portfolio was inappropriate for Mr. Longstaff based on Mr. Longstaff's knowledge, experience and risk tolerance. In his opinion, the overall asset mix should have been no greater than 45% equity with the balance of 55% in fixed income securities.
- [57] Mr. McDonald opined that the Leverage Plan was inappropriate because any significant downturn in the market would likely have resulted in Mr. Longstaff having to liquidate his investments to service the loan and possibly cover cash calls. He believed that to invest almost all of the Leverage Plan in equity stocks added to the potential risk. He believed that the leverage advice was given with total disregard for Mr. Longstaff's circumstances and interests.
- [58] Mr. McDonald further opined that Mr. Robinson did not conduct himself with the requisite standard of care. He testified that if Mr. Robinson had understood his client's financial position, his lack of ability to service the loan and to maintain an equity position over the long term, he never would have suggested the investments that he did.
- [59] Mr. McDonald acknowledged that, generally speaking, in the long term equity investments have a better return than fixed income investments. He acknowledged that all sectors of the market suffered during the 2000-2002 crash. He was unaware of what specific enquiries Mr. Longstaff had made concerning purchasing a home. He testified that in his opinion any portfolio which is weighted 90% in equity investments is very aggressive regardless of the specific makeup of the funds in the portfolio. He agreed that his approach to investment is more conservative than that of many investment advisors. He also agreed that the selection of an asset mix has many schools of thought and that the investment horizon is an important factor in considering the asset mix.

- [60] Mr. Fox testified that it was reasonable in July 1998 for Mr. Robinson to recommend to Mr. Longstaff that he invest 100% of his portfolio in mutual funds. By using mutual funds, Mr. Longstaff was able to diversify his holdings among several securities in a cost effective way.
- [61] Mr. Fox assessed the various funds that Mr. Robinson had purchased on behalf of Mr. Longstaff. He concluded that the overall mix of the mutual funds in the plan had a "medium" or a "moderate" rating. He assessed the plan as having a medium risk profile. He noted that the profile was similar to funds that Mr. Mather subsequently purchased for Mr. Longstaff.
- [62] Mr. Fox was of the opinion that the funds purchased for Mr. Longstaff were appropriate having regard to Mr. Longstaff's state of experience, risk tolerance and investment objectives. He opined that the investments chosen were appropriate for an investor with little investment knowledge, a medium risk tolerance who had a primary investment objective of growth.
- [63] Mr. Fox believed that it was appropriate for Mr. Robinson to recommend to Mr. Longstaff in mid-1999 that he borrow funds in order to leverage his investment. He noted the question of whether the leverage investment was suitable must be answered in reference to a specific investor after assessing their individual investments needs and risk tolerance. In this regard, he noted that Mr. Longstaff's investment objectives were growth or capital appreciation and that these investment objectives were reasonable as Mr. Longstaff had little need for immediate income, had no dependents, was comfortable with some volatility in the stock market and had a long-term investment horizon. He noted that an investment horizon of at least five or more years is necessary in order to outlast any negative cycles in the marketplace. Over time, growth investments have proven to be more successful than any other asset class, but time is needed in the event that a short term downward cycle in the market is encountered.
- [64] Mr. Fox was of the opinion that it was reasonable for Mr. Robinson to assume in mid-1999 that the growth on investment would be sufficient for Mr. Longstaff to obtain a reasonable rate of return after expenses on the loan had been paid. The investment plan was predicated upon nine percent return and market research indicates that since 1925 equity markets have returned an average in excess of 10% per annum. There have been no 10-year periods after 1945 where equity markets have shown a negative return.
- [65] Mr. Fox did not agree with Mr. McDonald that it was inappropriate to invest 90% of a portfolio in equity stocks. He was of the view that a 45% equity, 55% fixed asset mix was too conservative for someone with a long-term investment horizon. Mr. Fox acknowledged that the Leverage Plan did increase the risk, but believed it was consistent with the stated objectives and expressed risk tolerance. He agreed that one should not invest in a leverage programme if they do not have the resources to meet potential margin calls.
- [66] Mr. Doney testified that it was appropriate for Mr. Robinson to recommend to Mr. Longstaff in mid-1999 that he borrow funds in order to leverage his investments. He noted that leverage through the borrowing of funds is an accepted and common investment strategy.

He believed that the Leverage Plan was reasonably designed to achieve capital appreciation over the intermediate to long term. He noted that the decline in Mr. Longstaff's portfolio during the period December 31, 2000 to the end of October 2002 was comparable to the decline during the same period of the S&P/TSX composite index and considerably less than the decline in the NASDAQ composite index.

- [67] Mr. Doney believed that the investments made in Mr. Longstaff's account were appropriate given his stated experience, risk tolerance and objectives. While the leverage investment strategy was aggressive with a high loan to equity ratio that increased the possibility of a call on the loan, the strategy was consistent with the stated objectives and expressed risk tolerance.
- [68] Mr. Doney did not consider the asset mix to be an aggressive portfolio given the objective of growth, Mr. Longstaff's age and the investment horizon. If the object of a portfolio is growth, it is necessary to invest in equities. A 45/55 asset mix, as suggested by Mr. McDonald, would be inconsistent with the investment objective.
- [69] Mr. Doney in cross-examination agreed that the Leverage Plan was not suitable for an investor with low risk tolerance. The asset mix must reflect the investment objective.

POSITION OF THE PARTIES

- [70] Mr. Longstaff submits that Mr. Robinson owed him fiduciary, contractual and tort duties to provide comprehensive and selfless financial advice. He submits that Mr. Robinson breached these duties by failing to give professional financial advice in respect of Mr. Longstaff's desired goal of purchasing a house when Mr. Longstaff expressed his interest in using the Estate Funds to purchase a house. He submits that upon learning that Mr. Longstaff had the goal of owning a house, Mr. Robinson should have thoroughly canvassed whether that was a suitable use of the Estate Funds given Mr. Longstaff's means, his retirement goals and the cost and benefits of owning a house. He says at a minimum Mr. Robinson was under a duty to seriously explore and evaluate the option of purchasing a house as a viable alternative to the purchase of mutual funds. Mr. Longstaff submits that Mr. Robinson diverted him from purchasing a house so that he could be remunerated through commissions by selling Mr. Longstaff mutual funds.
- [71] Mr. Longstaff submits that Mr. Robinson further breached his fiduciary duties to Mr. Longstaff in recommending that Mr. Longstaff enter the Leverage Plan. He submits that Mr. Robinson promoted the Leverage Plan and frightened Mr. Longstaff into borrowing \$200,000 for the purpose of purchasing investments, so that he could earn another substantial commission. Mr. Longstaff submits that the advice was motivated by self-interest and given in breach of Mr. Robinson's fiduciary obligations to provide comprehensive and selfless advice.

- [72] Mr. Longstaff further submits that Mr. Robinson breached his contractual and tort duties of care when he advised Mr. Longstaff to use the Estate Funds to purchase the Original Portfolio. He submits that Mr. Robinson failed to know his client and recommended unsuitable investments. In particular, Mr. Longstaff submits that Mr. Robinson failed to learn basic information about Mr. Longstaff including information concerning his learning disabilities and that he did not even have a rudimentary understanding of the financial products being discussed. He submits that given Mr. Longstaff's inability to comprehend investment and financial concepts, Mr. Robinson's recommendation to purchase the Original Portfolio was wholly unsuitable and that a suitable portfolio would have been a portfolio with an asset mix of 45% equity and 55% fixed income as described by Mr. McDonald.
- [73] Mr. Longstaff submits that Mr. Robinson again breached his contractual and tort duties of care when he advised Mr. Longstaff to implement the Leverage Plan. He submits the Leverage Plan was unsuitable for Mr. Longstaff and did not accurately reflect Mr. Longstaff's risk tolerance and investment goals. He says Mr. Longstaff's reaction in the fall of 2002, when margin call letters arrived from the bank, was clear evidence that the Leverage Plan was far outside his risk tolerance.
- [74] The defendants say that the relationship between Mr. Robinson and Mr. Longstaff was not a fiduciary one and in any event, to the extent that it was fiduciary, Mr. Robinson did not breach any fiduciary obligations he owed Mr. Longstaff.
- [75] The defendants take issue with the proposition that Mr. Longstaff sought advice from Mr. Robinson about buying a house. They submit that by the time Mr. Longstaff met with Mr. Robinson, he was no longer interested in purchasing a house.
- [76] The defendants say that the Original Portfolio and Leverage Plan were appropriate investments for Mr. Longstaff. They submit that both plans were consistent with Mr. Longstaff's own description of himself as an investor with moderate risk tolerance and an objective of growth.

DISCUSSION

A. Breach of Fiduciary Duty

- [77] The authorities have made clear that the relationship between an investment advisor and his client is fact specific. While an investment advisor-client relationship is not inherently fiduciary (*Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.)), it can become so as explained by Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Gen. Div.) ("*Varcoe* ") at 236:

Primarily, a broker's relationship with the client is that of agent and principal. The agent takes instructions from the principal and carries them out with care, skill and diligence. Failure to do so may give rise to an action in breach of contract or in negligence.

The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith. In any case where a broker has an interest in a particular transaction, the broker must make full disclosure and assumes the onus of proving that no advantage was taken of the client, that the transaction was entered into in perfectly good faith and after full disclosure. It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly. If the broker fails to honour that trust or betrays the trust by taking advantage of the client, the broker has breached that fiduciary duty.

- [78] Factors that are considered in determining whether an investment advisor stands in a fiduciary relationship with his client include vulnerability, trust, reliance, discretion and professional rules or codes of conduct: *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.).
- [79] The important factors in this case are that Mr. Longstaff was an unsophisticated investor with a limited education who had minimal experience in making financial investments. He placed his complete trust and confidence in Mr. Robinson and relied on Mr. Robinson to properly advise him. Without exception, he followed all of Mr. Robinson's recommendations. I find that there was a fiduciary relationship between Mr. Robinson and Mr. Longstaff.
- [80] A fiduciary duty requires the investment advisor to act consistently with the trust reposed in him by the client and not to betray the trust out of self-interest. To succeed on the claim for breach of fiduciary duty, the plaintiff must establish that Mr. Robinson placed his personal interests before those of his client and took advantage of the relationship for his direct or indirect personal advantage: *C.A. v. Critchley* (1998), 60 B.C.L.R. (3d) 92 (C.A.); *Shetty v. Gill*, 2004 BCSC 451.
- [81] Mr. Longstaff's claim for breach of fiduciary duty is primarily based on the allegation that Mr. Robinson failed to provide selfless financial advice when Mr. Longstaff expressed interest in using the Estate Funds to purchase a house. Mr. Longstaff submits that Mr. Robinson did not give professionally considered advice to Mr. Longstaff about purchasing a house, because he was intent in selling Mr. Longstaff mutual funds so he could earn remuneration through commissions.
- [82] The plaintiff's submission is based on the premise that Mr. Longstaff in July 1998 was still actively considering a house purchase. It is dependent upon the court accepting Mr. Longstaff's evidence that he sought housing advice from Mr. Robinson. The evidence does not support such a conclusion. Mr. Longstaff had never owned a house in his life. Following his mother's death and the impending sale of her house, where he was then residing, he had

explored with Mr. Lane the purchase of a house in Ladner. Mr. Lane's evidence was that by May 1998, Mr. Longstaff was no longer interested in a house purchase. On June 1, 1998, after his mother's house had been sold and a month prior to first meeting with Mr. Robinson, Mr. Longstaff, instead of pursuing a house purchase with Mr. Lane, had rented an apartment.

- [83] I find that by July 1998 when Mr. Longstaff first met with Mr. Robinson, he was no longer considering purchasing a house and he did not convey any such interest to Mr. Robinson. While he had considered such a purchase earlier in the year, by July 1998 he was no longer interested in doing so. If he had any interest in purchasing a house, surely he would have gone back to Mr. Lane, his old friend with whom he had been looking at houses. He did not do so. Nor did he provide any other evidence to prove that he was still considering a house purchase.
- [84] Mr. Longstaff testified that he has little recollection of his initial meeting with Mr. Robinson other than Mr. Robinson's comment about the housing market being flat. His recollection does not provide a context for the statement. While I am prepared to accept that Mr. Robinson may have made that statement, I cannot find that it was made in the context of providing investment advice or for the purpose of dissuading Mr. Longstaff from purchasing a house. I find that Mr. Robinson did not breach any fiduciary duty to Mr. Longstaff by failing to provide detailed housing advice.
- [85] Mr. Longstaff submitted that Mr. Robinson's recommendation of the Leverage Plan was a further breach of his fiduciary duty because it was made to allow Mr. Robinson to earn further commissions. The evidence does not support such a finding. Mr. Robinson initially recommended the Original Portfolio and when he concluded a year later that the Original Portfolio would not meet Mr. Longstaff's retirement needs, he then recommended the Leverage Plan. Mr. Robinson had a duty to monitor Mr. Longstaff's investments and make recommendations for change if he believed change was necessary. In recommending the Leverage Plan he was fulfilling that obligation.
- [86] There is no evidence that suggests that the Leverage Plan was recommended to churn Mr. Longstaff's account or earn additional commissions. Investment advisors are paid by commission. To establish a breach of fiduciary duty, more is required than the mere fact that the advisor earned commission income on a transaction. I find that the recommendation to enter the Leverage Plan was not a breach of fiduciary duty.

B. Breach of Duty of Care

- [87] An investment advisor owes his client a duty of care. The nature of the duty of care was discussed in *Rhoads v. Prudential-Bache Securities Canada Ltd.* (1992), 63 B.C.L.R. (2d) 256 (C.A.) at 261:

What, then, is the duty of a stockbroker who chooses to offer financial, investment and taxation advice, in addition to the services of a broker or "order-taker"?

A stockbroker who merely makes sales and purchases on the instructions of clients may well have no responsibility for the wisdom of the transactions involved. The broker may, if asked, agree to give opinions on purchases or sales, and may make it apparent to the client, if not already well understood between them, that these constitute no more than personal opinions, and are not in the nature of considered investment advice. Where, however, as here, the firm and its employees seek to enhance their business by offering guidance to would-be investors--on "growing and managing retirement wealth" and "keeping investments safe," and to serve in "ways that no one else can" through the advice of "two financial advisors with 22 years of combined investment and taxation experience"--they must expect that their advice may be relied on as that of skilled, independent professional advisors. Stockbrokers who carry on business in this way accept responsibilities beyond those involved in bringing together buyers and sellers. They undertake the duty of providing careful, competent, considered professional advice of a sort in which clients, especially those who have no experience of their own to guide them, may well place their complete reliance.

[88] The negligence claim against Mr. Robinson is founded upon an allegation that the Original Portfolio and Leverage Plans were not appropriate investments for Mr. Longstaff. When addressing a negligence claim against a professional advisor, the question for determination is not whether the advice was correct or whether the client achieved the desired outcome, but whether the advisor brought to bear to the case an appropriate degree of care and skill in the exercise of his or her professional judgment. In *Varcoe*, Keenan J. said at 236:

The broker is not a guarantor of financial success for the client. Even when the client relies on the broker for advice, there is no guarantee that following the advice will achieve the desired result. So long as the broker applies the skill and knowledge relied upon and advises fully, honestly and in good faith, the broker has discharged his or her obligations and is not responsible if the transaction proves unfavourable.

[89] In determining whether a professional person has been negligent, it is necessary to consider whether that person has acted in accordance with a practice which is accepted as proper by a person skilled in that profession. In this case, both Mr. Fox and Mr. Downey opined that the Original Portfolio and Leverage Plan were appropriate investments for Mr. Robinson. Mr. McDonald, mainly because of the asset mix, thought otherwise. That there may be different schools of thought on such questions is not surprising. An investment advisor cannot however be found negligent because he or she adheres to one acceptable school of thought as opposed to another. A professional person is not negligent if he is following a generally accepted practice, assuming that the practice itself is sufficient, merely because there is a body of opinion that takes a contrary view: *Belknap v. Meakes* (1989), 64 D.L.R. (4th) 452 (B.C.C.A.).

[90] Mr. Longstaff submits that the Original Portfolio and Leverage Plan were not appropriate investments. He submits that Mr. Robinson failed to know his client and recommended unsuitable investments. Given his learning disabilities and limited investment knowledge, Mr. Longstaff says that the portfolio mix was inappropriate and exposed him to risk well in

excess of his risk tolerance. Mr. Longstaff submits that to the extent that his answers on the KYC forms differ from his evidence at trial, his evidence at trial should be accepted concerning his risk tolerance and investment goals.

- [91] The difficulty with the plaintiff's approach is that the case must be determined based on the knowledge that Mr. Robinson had at the time that he was advising Mr. Longstaff. In complying with his obligations to know his client, Mr. Robinson was of necessity reliant on the information that Mr. Longstaff provided. Mr. Longstaff never told Mr. Robinson that he had a hearing problem, limited education, or trouble reading. Mr. Longstaff never told Mr. Robinson that he did not understand Mr. Robinson's investment recommendations. At Mr. Robinson's suggestion Mr. Longstaff attended the FSSR course. Mr. Longstaff never told Mr. Robinson that he did not understand the material at the FSSR course.
- [92] Mr. Longstaff professed to lack even the most rudimentary investment knowledge. He says he did not follow his investments or keep track of how his investments were doing.
- [93] Mr. Longstaff's evidence is to be contrasted with that of Ms. Peggy McHattie who worked with Mr. Robinson and his clients from November 1999 to September 2002. She testified that she had several meetings with Mr. Longstaff about his investments. She says that at these meetings she found him well prepared and well versed in his investments. He would ask intelligent questions. At least twice he discussed selling the Gabriola Property and using the proceeds to further leverage his investments. She says that on several occasions he brought in magazine articles concerning investments trends. The articles usually concerned hi-tech or resource stocks and Mr. Longstaff would question whether he should have such stocks in his portfolio. Most of the stocks he discussed were of a high risk nature and more aggressive and risky than either Mr. Robinson or Ms. McHattie thought appropriate. Mr. Longstaff testified that he had no recollection of such meetings or of ever bringing in newspaper articles, or suggesting particular investments. Ms. McHattie has no interest in these proceedings. I find her to be a truthful witness and I accept her evidence.
- [94] At trial, Mr. Longstaff professed to recall little about his meetings with Mr. Robinson. He had no recollection of Mr. Robinson discussing with him the potential risk of the proposed investments or that the investments might go up and down. He did not recall Mr. Robinson reviewing with him the history of the funds he was recommending for purchase. He could not recall various documents and forms that bore his signature. Mr. Longstaff agreed that in both 1998 and again in 1999 Mr. Robinson had provided him with detailed written investment plans. Mr. Longstaff says he never read the material.
- [95] I accept Mr. Robinson's evidence that he reviewed with Mr. Longstaff in detail the investments that he recommended and the risk of those investments. I accept Mr. Robinson's evidence that he believed that Mr. Longstaff understood the investment advice he was providing. In making that finding I rely in part on the evidence of Mr. Mather who testified that he believed Mr. Longstaff understood the advice that he was given and had the intellectual capacity to understand the risk of continuing to engage in the Leverage Plan.

- [96] To support the conclusion that the investments were outside Mr. Longstaff's risk tolerance, reliance is placed on Mr. Longstaff's reaction in the fall of 2002 when his securities fell in value. I accept that he was then clearly distraught. Such a reaction is not uncommon when one's wealth declines, but it is little assistance in determining whether or not Mr. Robinson should have been aware in 1998 that Mr. Longstaff's risk tolerance might be different than that to which he then professed.
- [97] In 1997, Mr. Longstaff told the Richmond Savings Credit Union he had a medium risk tolerance. He made similar comments to Mr. Robinson and later to Mr. Mather. In his evidence he agreed he was prepared to take some risks.
- [98] Mr. Longstaff's stated investment goal until he retained Mr. Mather in October 2002, was growth. He wanted in retirement to maintain his present life style. To maintain that life style his investments had to grow in value. Any growth strategy contains a degree of risk.
- [99] On July 7, 1998, Mr. Robinson recorded on the KYC form that Mr. Longstaff was an investor with low investment knowledge, medium risk tolerance with investment objectives of growth and tax benefit. I find that characterisation accurately portrayed the investor that Mr. Longstaff purported to be in July 1998. If the characterisation is not accurate, Mr. Longstaff has only himself to blame. The characterisation is consistent with the determination made by the Richmond Savings Credit Union in November 1997 and Mr. Mather in August 2003.
- [100] Mr. Robinson established for Mr. Longstaff a long-term investment plan with the stated goal of providing sufficient capital to fund his retirement. To achieve that goal required a growth strategy. Such a strategy contains a moderate degree of risk. A growth strategy required a portfolio mix heavily weighted toward equity investments. The mutual funds selected were of a medium or moderate rating and consistent with Mr. Longstaff's investment objective of long-term growth with medium risk and a long-term investment horizon.
- [101] Both Mr. Doney and Mr. Fox testified that the Original Portfolio and Leverage Plan were appropriate investments for Mr. Longstaff given his investment goals and risk tolerance. I accept their evidence. That the plan failed was not the fault of Mr. Robinson. Between 2000 and 2002, the stock market suffered its worst decline since the 1920's. The mutual funds selected by Mr. Robinson were not high risk or speculative in nature and performed as well as the market itself.
- [102] It is noteworthy that Mr. Mather did not abandon the Leverage Plan when he took over Mr. Longstaff's account. While he made same changes in the asset mix to reflect Mr. Longstaff's now reduced risk tolerance, the fundamentals of the plan, including the leverage component, remained intact. By December 2006, almost all losses had been recovered.

- [103] Given all of the circumstances of this case, I find that Mr. Robinson was not negligent in recommending either the Original Portfolio or the Leverage Plan. The plans were suitable for Mr. Longstaff given his investment knowledge, goals and risk tolerance. The dramatic decline in the stock market that occurred subsequent to the plan's implementation was not predictable.
- [104] The action is dismissed. Unless there are matters of which I am unaware, the defendants are entitled to their costs on Scale B. If either party seeks a different cost determination, they should make submissions in writing within 21 days of release of these reasons. Any responsive material should be filed within 14 days thereafter.
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The Honourable Mr. Justice R.B.T. Goepel

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