

CANADA / JUDGMENT

Wu v. Ma

2022 BCSC 1737

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1737 Wu v. Ma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wu v. Ma,

2022 BCSC 1737

Date: 20221005

Docket: S182040

Registry: Vancouver

Between:

Hong Fang Wu

Plaintiff

And

Zhi Yong Ma and Superoptionforex Consulting Inc.

Defendants

Corrected Judgment: The front page of the judgment was corrected on April 2, 2024.

Before: The Honourable Justice Winteringham

Reasons for Judgment

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Counsel for the Defendants:

H. Yu

Place and Date of Trial:

Vancouver, B.C.

April 11-14, 19-22, May 16-20, and June 1-2, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2022

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I. OVERVIEW

[1] This case is about the loss of almost \$1 million when Zhi Yong Ma and his company, Superoptionforex Consulting Inc. ("SOF") (collectively, the "defendants"), agreed to act as an investment advisor[1] to Hong Fang Wu. Relying on the competence, skill, and judgment of Mr. Ma and SOF, Ms. Wu entered into investment agreements with the defendants and transferred money accordingly. In the second year of their investment advisement relationship, the defendants invested almost the entirety of Ms. Wu's money into a single corporate stock, DryShips Inc., a company trading on the NASDAQ ("DryShips").

[2] DryShips went bankrupt.

[3] Ms. Wu lost all of her money.

[4] She now sues the investment advisor and his company. She filed a Notice of Civil Claim three months after the contractual relationship ended. Two years later, she sought to amend her claim to add allegations of negligence and breach of fiduciary duty.

[5] The defendants say they did not breach any contract. And if the court finds a breach of contract, only the corporate defendant should be found liable. Mr. Ma contends there is no basis to find personal liability for breach of contract and the contractual claim against him should be dismissed.

[6] The defendants say the other claims were filed out of time. The defendants rely on the Limitation Act, S.B.C. 2012, c. 13, to defend the claims of negligence and breach of fiduciary duty.

[7] Ms. Wu and Mr. Ma testified. As did David Borenstein, an expert qualified to provide opinion evidence about investment advisors, financial risk, and the standard of care.

- [8] The parties' testimony was aligned in terms of the chronology of certain events; that is, agreements were signed, money was transferred, and Ms. Wu's money was lost. However, the parties' testimony did not align on some of the important events relating to communications they had when the agreements were signed. Most importantly, Mr. Ma denies he held himself out to be an expert investment advisor. Rather, he testified that he fully informed Ms. Wu about his limited expertise, that he was not a licensed investment advisor, and that she was keen to experiment with the trading formula he had created--thought by him to be an innovative investment strategy.
- [9] The claim is framed as breach of contract, negligence, and breach of fiduciary duty. In addition to the contractual claim, the issues to be determined are:
- a) What is the nature of the relationship between Ms. Wu and Mr. Ma and SOF? Was it a fiduciary relationship?
 - b) If the relationship was a fiduciary one, did the defendants breach their fiduciary duty to Ms. Wu?
 - c) Did the defendants owe Ms. Wu a duty of care? If so, did the defendants breach the duty of care owed to her? Did any breach result in damages to her? Was Ms. Wu contributorily at fault?
 - d) Does the Limitation Act operate so as to preclude Ms. Wu's negligence or breach of fiduciary duty claim?
 - e) If it is established that Mr. Ma and/or SOF are liable to Ms. Wu and that the claim was brought in time, what damages should be awarded?
- [10] I start with my credibility assessment of the parties. I then turn to the evidence and finally an analysis of the legal principles governing my decision.

II. CREDIBILITY

- [11] Before I examine the specific legal issues raised in this litigation, I address my findings regarding credibility and reliability. While the parties shared some common ground in their evidence, there were several disputes.

A. Legal Principles

- [12] When assessing the truthfulness of the testimony of any interested witness, I am guided by the words in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject [their] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the

preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[13] Justice Dillon provides a helpful summary of the factors to be considered when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' [sic] testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [the witness's] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' [sic] evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' [sic] testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[14] The burden of proof in a civil dispute such as this is a balance of probabilities. Where there is conflicting testimony, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred": *F.H. v. McDougall*, 2008 SCC 53, at para. 49.

B. Credibility findings

[15] In this case, the parties, for the most part, agreed on the chronology of events relevant to their relationship. They disagreed, however, on what transpired during some of those events. I have concluded that the following areas of disagreement are material to the credibility issues the court must resolve:

- a) From their first meeting in July 2015, and thereafter, what were Mr. Ma's representations to Ms. Wu about his qualifications to engage in securities trading?
- b) What was Ms. Wu's level of sophistication regarding securities trading?

[16] This is a case where the only witnesses to the impugned conduct are the parties. Both are of course interested in the sense that they will want the Court to accept their account. I have, therefore, examined what each of them have said regarding the material points to be determined. I have also had the benefit of some objective evidence to assist with the assessment of their testimony. Indeed, much of what transpired between the parties is documented by objective evidence, including the timing of certain communications, the

payment of money, the trading activity, and who was doing the trading.

- [17] As I examined the overall evidence presented at the trial, including the objective evidence, I have concluded that Mr. Ma's testimony was not credible or reliable. I have made that finding for a number of reasons and I set those out below.
- [18] First, I start with the issue about whether Mr. Ma disclosed to Ms. Wu that he was an untrained and unlicensed investment advisor.
- [19] I have specifically rejected Mr. Ma's testimony that he told Ms. Wu about his lack of licensing credentials. In short, I do not accept Mr. Ma's testimony that he disclosed to Ms. Wu at their first meeting, or ever, that he was simply developing a trading technique and was looking for "cooperators." I will say more about his evidence on this point below.
- [20] On the contrary, I found Mr. Ma's testimony about this purported disclosure to be in stark contrast to the balance of the evidence, including the documents presented at the trial.
- [21] Ms. Wu was adamant that she did not find out about Mr. Ma's lack of qualifications until he responded to her lawsuit. I accept Ms. Wu's testimony that she was inexperienced with the stock market, the securities industry, and investing and that she relied on Mr. Ma's purported expertise. I find that she would not have invested with the defendants had she known the true state of affairs about Mr. Ma and his company and, in particular, that he was not qualified to offer investment or securities advice to the public. She showed caution when she departed with her money, asking Mr. Ma for his licensing credentials. She also made clear that her risk tolerance was low because she insisted on a 100% guarantee (at first). She moved to a 90% guarantee at Mr. Ma's insistence.
- [22] I do not accept the defendants' submission that Ms. Wu's status as a party establishes her motive to lie. As I have said, I accept that Ms. Wu is an interested party and I must assess her evidence accordingly particularly where, as here, there is a conflict in the evidence between Mr. Ma and Ms. Wu.
- [23] At this point, it is useful to examine Mr. Ma's testimony about his trading system and the service he endeavoured to offer.
- [24] Mr. Ma testified that he had three clients at the material time (including Ms. Wu) and that his method of operation "applied to all three." He testified that his clients did not need to do anything--"they only needed to provide their trading accounts to me and then I would use their trading accounts to do trading for them based on my trading system." He described this trading system as a temporary business model and he was targeting short-term trading; specifically, focusing on those stocks that had fluctuation opportunities. He testified that through an algorithm or calculation he would find opportunities that included "stocks, currency exchanges, futures, warranties and options."

[25] During his testimony, Mr. Ma did not explain the algorithm he was using nor was he able to validate the viability of this technique. Based on his description of it, the technique is fairly characterized as unsophisticated.

[26] Mr. Ma described his relationship with his clients as a cooperative one. He labelled these three clients as "cooperators." He testified that "the cooperation he had with these three clients was temporary all three clients were aware that I did not have a license and that the trading I did for them was temporary cooperation." He testified that in the summer of 2017, he began cooperating with a fourth client. For this client, he included a representation in their contract that Mr. Ma did not have a license. That agreement, dated July 11, 2017, was tendered at the trial, and states:

The current trader at the Company does not have a finance or securities related professional license, and is not under the supervision and management of the securities industry and any other finance professional association. The client authorizes the Company to carry out trading transactions completely out of his/her will and due to his/her trust in the Company.

[27] There is no dispute that the First and Second Investment Agreements with Ms. Wu (as defined below) do not contain this representation or anything similar to it.

[28] Mr. Ma testified that he believed he could trade in securities and operate the Interactive Brokers Canada trading account (the "IBC Account") without a securities license.

[29] Mr. Ma testified that his clients all knew he did not have a license and they accepted it. Though one must wonder why he would tell his clients he was unlicensed if he thought it did not matter.

[30] Ms. Wu was adamant that Mr. Ma never told her he was not licensed as a stock trader or otherwise. She testified that she walked into his corporate premises and believed the premises reflected an established company. She saw computer terminals and was shown the results of another client's investments. She testified Mr. Ma lulled her into believing he had the necessary expertise to accept money from a member of the public in a professional capacity, invest that other person's money, and then share in any profit.

[31] For the reasons set out above, I reject Mr. Ma's testimony that he was forthright with Ms. Wu about his credentials. I find that he misled her because he did not disclose to her that he was unlicensed and without any formal training in the securities industry. As a result of this nondisclosure, Ms. Wu was induced and transferred her money over to him so he could get to work on what was promised in his advertisement.

[32] This nondisclosure was dishonest.

[33] The second area of Mr. Ma's testimony that impacted his credibility related to his apparent inability to appreciate the conflict that existed between he and Ms. Wu. The way Mr. Ma structured their financial arrangement resulted in an inherent and obvious conflict. I am not sure whether he appreciated the significance of this conflict--that is, was he simply naïve

or was he, as he repeated in his communications to Ms. Wu, just being "greedy." Mr. Ma was taking enormous risks with Ms. Wu's money. He conducted his trading recklessly, without any oversight, and without any downside to himself and with a client who did not understand investing, let alone the high-risk trading with which Mr. Ma was engaged. His tone in their communications was often high-handed. When he needed Ms. Wu to deposit additional funds, she complied.

- [34] In short, Mr. Ma set up a financial arrangement that benefited him, but provided little benefit to Ms. Wu. As I review the chronology of her investments over time, the manner in which he instructed her to deposit additional funds, his failure to report to her and his failure to explain what he was doing, have caused me to characterize this relationship as an exploitative one.
- [35] A third area of concern about Mr. Ma's credibility and somewhat connected, related to his evidence about SOF. Mr. Ma went to great lengths to protect himself from personal liability. This was particularly evident in his communications with Ms. Wu after she discovered the enormous loss and her efforts to engage Mr. Ma to recover the losses. Here, Mr. Ma was disingenuous. He was seemingly apologetic but at the same time, was coaxing Ms. Wu to continue on his reckless path.
- [36] In sum, I did not find Mr. Ma to be credible when he testified about his version of the relationship with Ms. Wu and his responsibility for the losses she suffered.
- [37] Where there are areas of conflict in the evidence, I have preferred Ms. Wu's version of events.

III. EVIDENCE

A. Facts not in Dispute

- [38] To assist with the background, I set out first the facts that are not in dispute.
- [39] Ms. Wu is a citizen and resident of China and was 44 years old when she testified at the trial. She does not speak English and testified with the assistance of a translator. Most of the documents were prepared in Chinese and were translated for the trial. The parties disagreed about the accuracy of some translations. I will address some of these disputes when relevant to a determination of the issues.
- [40] Ms. Wu graduated from junior high school and attended a vocational high school. She now works in an administrative position at an electronic products company, Hangzhou Fuhua Guangdian Technological Company. Her ex-husband's family owns this small business.

- [41] In or around 2012, Ms. Wu contemplated immigrating to Canada with her family. At the same time, she was trying to organize her family's finances and had put together some money for investment purposes. She met Mr. Ma during a trip to Canada in July 2015 as she explored the possibility of moving to Canada. In late 2015, Ms. Wu learned she would not be able to immigrate to Canada. She has remained a citizen and resident of China.
- [42] Relevant to her knowledge about investing, Ms. Wu has never traded stocks herself. She had one prior experience with an investment advisor before she invested with Mr. Ma.
- [43] I turn to her first meeting with Mr. Ma.
- [44] Ms. Wu visited Richmond, BC in July 2015 as she explored immigrating to Canada. She came across an advertisement of SOF placed in a local Vancouver Chinese language newspaper.
- [45] Mr. Ma is the sole shareholder and sole director of SOF, incorporated on October 2, 1997. Mr. Ma came to Canada in 1990 to attend UBC and obtained a Masters of Applied Science. He stayed in BC after his graduation from UBC and worked for several years for AVE Medical Technology, an American medical technology company. He left AVE in 1996 and started SOF the following year. SOF had an office in Aberdeen Centre, Richmond.
- [46] The parties agree that Mr. Ma is not licensed in Canada to trade securities, now or ever.
- [47] Ms. Wu met Mr. Ma for the first time on July 28, 2015 at SOF's office. Ms. Wu contacted Mr. Ma after seeing SOF's advertisement.
- [48] The events of the July 28, 2015 meeting are in dispute. I will say more about the first meeting shortly.
- [49] After the first meeting, Ms. Wu entered into an agreement entitled "Stock Trading and Transaction Agreement" dated August 31, 2015 (the "First Investment Agreement").
- [50] The First Investment Agreement opened with the following statement:

The client will set up an online Investment trading account, and fully authorize [SOF] to operate stock trading transactions, the client agrees to share the profit from investment transactions with [SOF] and pay [SOF] a commission on profit.

[Underlining added.]

- [51] The First Investment Agreement included the following terms:

1) The client's trading account

The clients choose the trading platform companies and set up trading accounts themselves, and the trading accounts should be able to carry out trading of foreign exchange, North America's stock market, commodity futures and options, with permissions to engage in hedging transactions. The starting cash amount (the initial principal USD) in the client's trading account is US \$380,000.00 only for the account at Interactive Brokers Canada Inc.

- 5) The calculation of commission on profit
 - 1) the commission on profit is calculated based on 50 percent (50%) of the Cash Net Earning, and it is to be paid on time. The commission on profit does not include Canada's Goods and Services Tax.
 - 2) The company guarantees 90% of the initial principal, while the client bears additional fees from third parties, such as those from the trading platforms and banks. At the time of termination of the agreement (except for clause 6.2) if the fund in the account is less than 90% of the initial principal, the company will pay the difference less the additional fees from third parties.

[Bold in original; underlining added.]

- [52] Clause 5(2) of the First Investment Agreement provides a guarantee to Ms. Wu. That is, the company promised to guarantee 90% of the initial principal (the "Guarantee"). As will be seen, Ms. Wu took great comfort in the Guarantee. She did not know that SOF was likely never able to satisfy this financial commitment.
- [53] Ms. Wu opened the IBC Account on August 18, 2015. On August 24, 2015, Ms. Wu transferred US \$380,000 into the IBC Account. On August 29, 2015, Ms. Wu delivered to Mr. Ma (personally) a bank draft for US \$4,500 as part of the deposit for the First Investment Agreement.
- [54] On September 11, 2015, Ms. Wu wired 60,000 Chinese Yuan to an account in China. Ms. Wu wired an additional US \$50,000 into the IBC account on January 25, 2016 and another US \$50,000 on January 26, 2016.
- [55] The First Investment Agreement expired on August 31, 2016. At the expiration of the First Investment Agreement, Ms. Wu and SOF agreed that they would enter into another one-year investment agreement (the "Second Investment Agreement"). At the time of the expiration of the First Investment Agreement, the value of the IBC account was approximately US \$540,000.
- [56] As an aside, based on the wording of the Guarantee, 90% of the "initial principal" would be US \$342,000 and would not take into account the additional funds Ms. Wu deposited in January 2016.
- [57] Ms. Wu entered into the Second Investment Agreement with SOF on September 1, 2016. The principal amount of the Second Investment Agreement was approximately US \$540,000.
- [58] The Second Investment Agreement contains the following opening statement:

The Customer sets up his/her own online investment transaction account, and gives full authority to [SOF] to conduct trading. The Customer agrees to share the profit from such investment trading with [SOF] by paying the latter a commission from the profit.

- [59] The Second Investment Agreement contained the same terms as set out in para. 51 above. However, it also included the following under term (5) calculation of profit commission:
- 6) At contract termination (with the exception of Article 6.2), profit commission is calculated in accordance with the above terms, and the Customer is to complete full payment of profit commission within a month, or the Company is to refund the excess deposit and pay the balance from the loss of original principal it guarantees.
- [60] After entering into the Second Investment Agreement, Ms. Wu made additional US\$50,000 deposits into the IBC Account on: September 22, 2016, September 23, 2016, September 26, 2016, October 13, 2016, and October 14, 2016.
- [61] On December 28, 2016, Ms. Wu opened a second trading account and wired US \$10,000 into the second account. In total, Ms. Wu transferred an additional US \$260,000 into the IBC Account after Ms. Wu and SOF entered into the Second Investment Agreement.
- [62] On November 17, 2016, SOF started investing Ms. Wu's funds in shares in DryShips. On November 18, 2016, the account value of the IBC Account was US \$881,834. Mr. Ma sent a screenshot to Ms. Wu of the IBC Account showing this balance.
- [63] The parties agree that substantially all of the funds in the IBC Account were invested in DryShips between November 17, 2016 and December 28, 2016. By January 2017, the value of DryShips' shares fell by approximately 90%.

B. Disputed Facts

- [64] As stated earlier, Ms. Wu first became aware of SOF through its advertisement in a local Chinese language newspaper. Mr. Ma promoted his expertise through this advertisement and that was the only reason Ms. Wu ever learned about Mr. Ma's offerings.
- [65] SOF's advertisement promises much. The advertisement includes the following representations:
- a) congratulations on all our clients' continuous increase in wealth;
 - b) [SOF's] performance steadily moves forward;
 - c) as of July 8, 2015, the cash earnings have surpassed 30%;
 - d) in 2014, the annual rate of return is between 51% and 98%;
 - e) [SOF] is a Canadian registered limited company specialized in short and medium length investment analysis and online trading services for foreign currency exchanges, North American stocks, and other securities;
 - f) SOF trades on their clients' behalfs using the online trading platform of the clients' choice and the investment accounts are set up by the clients;
 - g) clients will retain one hundred percent control over cash, transfers of the accounts;

- h) [SOF's] service standard is: use love and honesty to treat others; use best efforts for the professional services;
 - i) [SOF's] service principle is: make the good even better--grow clients' investment funds continuously;
 - j) one fund provides for life; and
 - k) if you are middle class (for example, have 1 million CAD for investment) using [SOF's] services will let you live your whole life without any worries for living and can pass on the principal to your heirs.
- [66] The advertisement goes on to make even greater promises to those with \$5 million or more for investment.
- [67] The advertisement was in English and Chinese. At the trial, Ms. Wu tendered a version of the advertisement that Mr. Ma suggested was altered because it was missing some Chinese characters. Mr. Ma presented a different version of the advertisement that included these missing Chinese characters. Mr. Ma testified that the missing four characters should be interpreted as a reminder and warning to those reading the advertisement that they must have knowledge of investment transactions; have sufficient assets; and accept SOF's business model and be willing to cooperate for long term.
- [68] As will be seen, Mr. Ma testified that he represented to Ms. Wu that he was looking for "cooperators" and was not holding himself out to be an investment advisor. Rather, he was looking for "potential cooperators to work with them to trade and promote his trading system."
- [69] Mr. Ma suggested that Ms. Wu had altered the advertisement and removed the "warning" in an effort to misrepresent SOF.
- [70] I do not accept this allegation. I find that Ms. Wu did not alter the document as alleged. Mr. Ma testified that she would have received a copy of the advertisement (because there were copies on the table) and his business card at their first meeting in July 2015. When cross-examined about Mr. Ma's version of the advertisement, Ms. Wu testified that it was "impossible" for her to have erased the characters. During her cross-examination, she returned to this topic after Mr. Ma's version of the advertisement had been presented to her and the suggestion made that she had altered it.
- [71] In response, she testified that she initially could not find the advertisement so she logged into the website and finally found the advertisement. She testified that it was a PDF version and so therefore she could not change anything and she just printed it out. She repeated that the advertisement convinced her that Mr. Ma had the qualifications for trading stocks.

- [72] I have reviewed the two versions of the advertisement. Mr. Ma's version does not provide the warning he suggests. There is nothing in the missing characters that alters the message Mr. Ma was trying to convey to the public. That is, SOF was a Canadian registered company specializing in short and medium length investment analysis and online trading services for foreign currency exchanges, North American stocks and other securities. There is nothing in this so-called "warning" that detracts from this representation.
- [73] The advertisement was misleading, even if I were to accept, which I do not, that Ms. Wu's version was incomplete. The missing words do not detract from the promises set out.
- [74] There is no dispute that Mr. Ma was not licensed in any way to sell or trade securities in BC, or elsewhere. In his closing submission, Mr. Ma described himself, and his relationship to SOF:
- a) In late 2013, SOF changed its name from Angiocure Technologies Inc. to SOF, signalling a change in the company's business from marketing medical devices to developing a technique for trading certain securities on short and medium-term bases. The technique in development was focused on capitalizing on price fluctuation of securities such as futures, warrants, stocks and currencies.
 - b) Neither Mr. Ma nor SOF hold a securities license. Mr. Ma had not received any formal training or education in trading securities. Mr. Ma did not believe it was a requirement for the type of business that SOF was carrying out.
- [75] Without any training or formal education, Mr. Ma testified about the investment technique he was developing--and marketing to the public. In his closing submission he described this technique as follows:
- a) Mr. Ma explained that in accordance with the technique in development, the following steps, amongst others, were usually taken by SOF in connection with trading securities:
 - i. Review the stock activities and charts in Interactive Brokers, Yahoo and Nasdaq websites;
 - ii. Review the historical data of a particular company;
 - iii. Follow world developments in the news;
 - iv. Assess an individual product's performance relative to the market as a whole;
 - v. Only hold a particular product for a short period of time; and
 - vi. When a product is purchased and held, closely follow the market so that the product can be liquidated quickly if anything goes wrong.
 - b) In order to facilitate the development of the technique, SOF sought to work with wealthy individuals who are willing to transfer their funds into an online brokerage account and allow SOF to trade those funds on their behalf in furtherance of the development. SOF and these individuals generally agreed that if there was a profit that resulted from the trading,

SOF would be entitled to a share of the profit as a form of commission. On the other hand, if there was a loss that resulted from SOF's trading of the funds, it was generally agreed that SOF would guarantee 90% of the principal and pay back the individuals any [difference].

[76] By Mr. Ma's own description of his service, I am satisfied that Mr. Ma was required to be registered, in the manner described more fully below, and he was not.

[77] Stock market regulation is intended to protect the public from the unqualified.

[78] Putting aside Ms. Wu's allegations for a moment, one cannot help but question how it was that Mr. Ma or SOF was able to operate without oversight. Particularly in light of Mr. Borenstein's evidence about market regulation and the care taken to monitor those who operate within such markets.

[79] Mr. Borenstein was qualified to provide opinion evidence about the securities industry. He had extensive experience as a manager of Investigations at Ombudsman for Banking Services and Investments in Toronto. I will deal with defence counsel's complaints about Mr. Borenstein's opinion. However, on this point, no issue was taken. That is, as set out in the Executive Summary of Mr. Borenstein's report, the Canadian investment industry is highly regulated. He wrote:

In addition to the provincial regulators, there is the Canadian Securities Administrator (CSA) that publishes National Instruments which all of the provincial regulators have adopted. There is also the Investment Industry Regulatory Organization of Canada ("IIROC"), which is one of the main self-regulatory organizations in Canada. Having reviewed Mr. Ma's activities in relation to various relevant regulations, I find that he meets all objective measures to be considered to be acting as an investment advisor including:

- a) Advertising and offering services to buy and sell securities on behalf of clients.
- b) Advertising [SOF's] specialization in short and medium length investment analysis and on-line trading services.
- c) Conducting the trades in Ms. Wu's account.
- d) Expecting to be paid for his services.

[80] The point is that Mr. Ma needed to be licensed to do what even he admits to doing. That is, he would have to be registered, have the required education, training and experience, and, importantly, meet the proficiency requirements defined by Investment Industry Regulatory Organization of Canada (IIROC).

[81] Mr. Ma candidly admitted that he did not satisfy such criteria.

[82] After reviewing the SOF advertisement, Ms. Wu made an appointment to meet with Mr. Ma. The two met at the SOF office at the Aberdeen Centre on July 28, 2015.

[83] Mr. Ma and Ms. Wu communicated primarily through the WeChat platform. The day before their first meeting, there was some communication on WeChat. Ms. Wu was making some inquiries about SOF. Mr. Ma, on behalf of SOF responded as follows:

I will provide trading services through your investment account. You have to provide me with a risk of 10% of the principal amount, and I will take on the risk for 90% of the principal amount, and help you get an over 10% annual rate of cash return. (if it is less than 10%, I will not charge any service fees).

The results are, last year was my company's first year, and I exceeded the revenue target (over 51%). This year has also exceeded the target (reached 35%).

If you are not comfortable putting your cash into someone else's account but you also want to make money with the money in your own account, I guarantee you will not find anything that is low risk with high and steady rate of cash return like what my clients are getting in North America.

If you want me to trade for you (there is a principal requirement), please call [contact information omitted].

[Underlining added.]

[84] The parties very much disagree about what was said at this meeting. I have resolved the point of controversy where necessary to the determination of the legal issues.

[85] One of the most blatant areas of inconsistency of the meeting is whether Mr. Ma told Ms. Wu that he was not qualified to provide securities advice and did not have a securities license.

[86] Ms. Wu testified that Mr. Ma did not tell her that he was not authorized to trade.

[87] Ms. Wu's testimony on this point is compelling. She testified that she was excited to learn about SOF and Mr. Ma's business performance.

[88] She testified that when she arrived at his office, he brought her inside. She observed many counters and cubicles in the office and each cubicle had a computer. She testified that Mr. Ma told her that his employees had the day off that day but that he was waiting for her in the office. She said they chatted a lot.

[89] She testified he explained how he was able to achieve such high returns because he had, by himself, designed a trading system. He then showed her on the computer, information about a specific client indicating that this client had achieved an annual return of 38%. He said because of confidentiality, he could not show her any of the other client's information. She testified that Mr. Ma told her that many people had put their investments elsewhere, that they were unhappy with those investments and so they had turned to him. She said Mr. Ma used a lot of professional terminology in his explanation of things to her and that he impressed her as someone who was very smart with a lot of financial knowledge. She said that she trusted him and that she would very much like to work with him and allow him to

manage the funds.

- [90] Ms. Wu testified that she did not know that Mr. Ma was not licensed to trade and that she only found out after she commenced her lawsuit. Ms. Wu was cross-examined about her failure to specifically ask Mr. Ma for his license to provide to financial advice. Her response was that the advertisement said in big print that he was trading on behalf of clients. She added that the way he was promoting his business suggested "that it had to be legal--it had to be proper and legitimate." She also noted that during the July 2015 meeting, Mr. Ma told her he was able to trade on behalf of clients. She explained that she specifically asked him to produce documents relating to SOF but she did not know how to specify the documents for trading because she did not know how to name them. She added, "he should have, on his own initiative, provided this information to me."
- [91] I agree.
- [92] During the trial, Ms. Wu was shown what purported to be a contract between SOF and another unrelated client. This contract included a term confirming that Mr. Ma did not have a security license. Ms. Wu simply stated, correctly, that a similar disclosure was not included in the First or Second Investment Agreement.
- [93] Mr. Ma suggested that Ms. Wu was a sophisticated trader and knew that there was risk associated with the nature of investments with which he was engaged.
- [94] I have reviewed Ms. Wu's testimony on this point as well as their WeChat communications about trading. Ms. Wu admitted during cross-examination that she knew there was risk associated with investments and that trading in securities could "bring gains or losses without any guarantees." She also agreed that she was reading the documents presented to her (then in Chinese) and would check on the IBC Account but initially only after Mr. Ma had reported on a gain.
- [95] I do not accept that Ms. Wu was a sophisticated investor as suggested. I find quite the contrary. This is evident from her testimony but is also amply reflected in the communication from the moment she engaged SOF to the end of their relationship.
- [96] Ms. Wu testified that the guarantee in the First and Second Investment Agreement was critically important to her. That is consistent with the communications between them.
- [97] At this point, it is useful to consider what is typically required when a investment advisor deals with the public. In the usual client/investment advisor relationship, the expert is required to adhere to a mechanism known as "Know Your Client." (KYC) This regulation requires investment advisors to learn about their clients' risk tolerance and adhere to it. The requirement to KYC is an ongoing one.

- [98] Mr. Ma did not adhere to any of the KYC regulations governing licensed brokers' initial and ongoing responsibilities about informing themselves about their clients' risk tolerance. I will turn to the cases shortly, but I note these sorts of issues are frequently the subject of litigation--whether the advisor adhered to their clients' tolerance of risk and whether the advisor acted consistent with the risk tolerance.
- [99] A licensed investment advisor is also required to deliver reports to their clients about the status of their investments. Mr. Ma's reporting was by the occasional email and by WeChat. It was not formal and was often initiated by Ms. Wu seeking updates about her IBC accounts.
- [100] Mr. Ma did not assess Ms. Wu's risk tolerance nor did he provide her with the regular reporting mandated by the securities regulations.
- [101] I return to their initial dealings in July and August 2015.
- [102] Ms. Wu testified that he instructed her to open the IBC Account and told her how to transfer funds into it. She complied with his instructions.
- [103] After the first meeting, Ms. Wu sought some additional information from Mr. Ma. She testified that she did not know if further documents would be required in Canada, but that he did provide some documents to her when she requested them. To that end, on August 18, 2015, she sent an email to Mr. Ma requesting:
- [C]opies of your company's registration information, such as documents that are similar to the industrial and commercial business license, tax registration certificate, and organization code certificate from China that is relevant to verify your company.
- [104] In response, Mr. Ma sent Ms. Wu the Notice of Articles of SOF, providing the incorporation number and date of incorporation as of October 2, 1997; SOF's business license; invoice for a commercial insurance policy for the Aberdeen office; and, resolution for SOF confirming that Mr. Ma is president and secretary of SOF.
- [105] Mr. Ma testified otherwise. He stated that he told Ms. Wu that he did not have a securities license at their very first meeting. He testified that Ms. Wu asked why he did not work at a bank. That is when he told her that he was not qualified to do so because he did not have a securities license and that his trading technique is incompatible with the way the traditional banks invest in securities as he focuses on short-term trading.
- [106] His testimony that he only focused on short-term trading is somewhat inconsistent with the business card he said he gave to Ms. Wu at this meeting. The business card states explicitly that Mr. Ma "specialized in investment analysis of financial products and mid and short-term transactions."

[107] I do not accept Mr. Ma's testimony that he disclosed to Ms. Wu anything about his failure to comply with regulatory licensing requirements. I find that Ms. Wu would not have dealt with him had he been honest about his lack of financial education, trading experience, or that he was required to have a trading license and did not have one. I base this finding in part on her insistence about the guarantee of the principal amount. She wanted Mr. Ma to guarantee 100% of her principal and he refused, citing fairness to his other clients.

[108] She was cross-examined about her risk tolerance and her willingness to accept higher risk trades so she could achieve higher returns. Ms. Wu was adamant that she was not tolerant to risk in the manner suggested. She testified that it was incorrect to suggest that she would tolerate higher risk for higher returns. In response to this line of cross-examination, Ms. Wu testified that she told Mr. Ma that her idea of investment is to secure the principal and she was fine when the returns are reasonable. She testified that she told him she did not want high risk investments. She went on to say that if there were high returns, then those were shared between them.

[109] Ms. Wu was candid in her response on this point. She said she knew there was some risk associated with securities investments and she ultimately agreed to that risk--to a tolerance of 10%. Despite extensive cross-examination on this point, Ms. Wu never changed or altered her position. She knew there was some risk, she was prepared to accept a loss of 10% and she took comfort in the Guarantee.

[110] In sum, I find that Mr. Ma did not disclose to Ms. Wu that he was unlicensed. In addition, I find that Ms. Wu was not a sophisticated investor. That finding is based on her own testimony, but also as reflected in the WeChat communications.[2]

[111] Some examples of the WeChat communications are as follows:

On August 27, 2015, Mr. Ma wrote:

I logged in to your account and made some changes to the row of trading permissions in the managing accounts. When they are approved by the trading platform company, I can then trade products such as US stocks and commodity futures.

[Underlining added.]

[112] I note that Mr. Ma asserted control of the IBC Account before the First Investment Agreement was even signed.

[113] On August 31, 2015, Mr. Ma wrote:

Last day of August, it is the first time using your account to trade. Profit is 2000 USD. Detailed trading results have been sent to your email. Your account is still not able to trade futures, so I did the ETF of US crude oil. If we had done futures, the profit should be close to 10k USD today.

[114] Two days later Ms. Wu asked: have you been trading recently? Mr. Ma responded:

Nope. Not so quick. Please be patient for my learned observations and opportunities.

[115] Ms. Wu responded:

Hum, no rush. You should do it according to your analysis and plan.

[116] In October, there are further entries demonstrating Ms. Wu's inexperience. On October 3, 2015, Mr. Ma wrote:

Long position natural gas trades have not been cleared. Will be continuing to follow the market on Sunday.

[117] Ms. Wu responded:

Ok. I really don't understand when you talk about all these.

[118] Similarly, on October 10, 2015, Mr. Ma wrote:

The natural gas products selected for this trade has gained 3% already. There remains some hedged position in your account. Hope we can get another 2% next week.

[119] Ms. Wu replied:

okay. I trust your expertise.

[120] Mr. Ma was able to adjust the settings in the IBC Account. On April 1, 2016, he informed Ms. Wu that he adjusted the account setting from "cash" to "margin."

[121] Mr. Borenstein commented on this adjustment to Ms. Wu's account:

Complex structured products and leveraged and inverse-leveraged ETFs, are more complex and involve features and risks that are often not well understood by either clients or registered investment advisors. As such they require additional investment product due diligence and risk disclosure leveraged and inverse-leveraged ETFs are generally not considered suitable for retail investors such as Ms. Wu.

[122] At the end of the First Investment Agreement, Mr. Ma testified that he decided to forego the commission to which he says he was entitled. He did so, he stated, for reasons of good will. Ms. Wu testified that she was grateful for this gesture and as a result entered into the Second Investment Agreement in August 2016. She believed that according to the First Investment Agreement, Mr. Ma was entitled to claim a share of the 12% profit. However, "if we were to work together, he was prepared to give up his share of the return--and that is a way of showing my support for his effort."

[123] From this gesture, Ms. Wu believed Mr. Ma to be a reliable, credible and generous person.

[124] Thereafter, Ms. Wu entered into the Second Investment Agreement.

[125] And within a few short months, her entire investment was gone.

[126] Not only did Ms. Wu lose the original principal, but also an additional US\$260,000 that she had deposited to the IBC Account during the early months of the Second Investment Agreement.

[127] I will not summarize in detail the events of Mr. Ma's purchase of DryShips in late November 2016 and what occurred thereafter. Mr. Ma does not dispute the accuracy of the events as reflected in the WeChat communications. Needless to say, Mr. Ma invested almost the entirety of Ms. Wu's IBC Account into DryShips and within weeks, the investment was almost worthless.

[128] Mr. Borenstein was cross-examined about DryShips and its stock performance. It was suggested that Mr. Ma could not have foreseen the disaster that was to be, in part because of some allegations of impropriety on the part of the company's chief executive officer. Mr. Borenstein, without reservation, rejected this suggestion, describing in some detail the history of DryShips stock trading. He concluded this part of his cross-examination stating:

And so at the time, when [Mr. Ma] started investing in this stock, it was extremely volatile; it had just been frozen as it had gone up way beyond what it previously trading at. It then dropped back down but there was no indication it would go back up.

[129] Mr. Borenstein's opinion was that Mr. Ma's trading activity was highly speculative and unsuitable for Ms. Wu stating this about DryShips:

[Mr. Ma] started investing in [DryShips] the day after trading was halted on the stock. He seems to have bought it purely based on the fact that it had declined from a much higher price. He does not appear to have been aware that [DryShips] shares had temporarily gone up due to a short squeeze and that there was nothing fundamentally underlying this extremely high valuation. Had he done any basic research, he would have know[n] that [DryShips] was a highly speculative stock and the decreased price did not represent a buying opportunity.

[130] In sum, Mr. Borenstein testified that the value of DryShips was low and despite the short-lived increase, it was a struggling company.

[131] In his communications with Ms. Wu, Mr. Ma acknowledged that SOF was at fault for the loss. He stated as much in the WeChat. The following excerpts are but examples of his acknowledgement of fault. On January 12, 2017, Ms. Wu wrote:

this hard earned money is my husband's and my life long savings. It was not easy to finally get it out of China to make some stable and small profits. Now it is losing so much, how is the risk so high? Wasn't there a stop loss point in the contract? I cannot accept this fact, it has gone too far.

[132] Mr. Ma responded:

It's my trading mistake, mainly because I was too greedy. And that there are no time limits in stocks means a failed judgment can be held on for a bit longer. I understand your feelings, clients' worry makes my heart sink deeper. There should be hope to recoup the principal and even make a profit with this stock. Everyone, please give me some time. If we liquidate to stop loss now, the loss would be too big. And this loss will be set in stone. Please let me calm down and think.

Since I bought the stock at the end of last November, I had many opportunities to make money by liquidating in the beginning of December. I was too greedy.

I was indeed greedy. At one point, I saw your account balance was near 1.1 million. I was delirious and wanted to get 50% or more profit. However, the volatility occurred in the middle period was too great and risk is too high. I no longer hoping for anything.

[133] Ms. Wu's communications with Mr. Ma were desperate. She wanted him to provide a solution to the devastating loss and he had none to give. As she expressed to him the pressure she was under, he wrote to her on January 17, 2017 stating:

I will teach you a method. Set a period of time for yourself, for example, the end of April. Don't look at your account until then, and think of it as a long term investment. The well known US long term value investor Warren Buffet had a famous saying: if you aren't willing to own a stock for ten years, don't even think about owning it for ten minutes. Although this is not my trading style, since we are tied up now, we can only learn from Buffet's patience.

[134] Ms. Wu testified that as she saw the stock drop in value, she implored Mr. Ma to dispose of it--but he refused. She testified that she was unable to sell the stock herself because she did not know how to operate the IBC Account. Significantly, she believed the Second Investment Agreement prohibited her from trading in the account, or else she would be waiving the liability of SOF, including the guarantee.

[135] She also testified about her continued trust in Mr. Ma. The correspondence indicates this trust. Mr. Ma encouraged this trust and Ms. Wu's reliance on him. He told her to be patient and seemed to be suggesting at times that there was still hope for a financial recovery.

[136] Sadly, her trust and any confidence in Mr. Ma was woefully misplaced.

[137] I have also considered correspondence prepared by Mr. Ma in response to the DryShips' loss. Mr. Ma testified that he sent this letter to his clients. In the letter dated January 23, 2017, Mr. Ma wrote:

While trading the US stock DRYS this time, I made serious errors in judgment and operation by being too greedy and relying on the potential value of the company business while significantly underestimating the risk of stock price fluctuation, overly focusing on the financial capabilities of the company owner and ignoring his business ethics; I failed to take the profit after the purchase and continued to hold it for almost a month after the loss started, and caused a serious loss in the book value of your account, which spawned unacceptable worries and anxiety for you, brought on emotional agony to you and even affected your day-to-day family life and the mood to

celebrate the Chinese new year. I'm very sorry and I feel very upset

It has been three years since the business was open, and this is the first time I've ever run into such a serious investment trading crisis that's like a disability-causing car accident leading to such a serious physical and emotional setback. My company and I never owed any money in the past, and this time I will take my responsibility to the very end, and do everything to make money and recover your investment principal as soon as possible. I plead to you to give me some time.

[Underlining added.]

[138] Mr. Ma went on in his letter to set out a three-point plan to recover the losses.

[139] Not surprisingly, Ms. Wu told Mr. Ma that she wanted out.

[140] In the months following the DryShips' loss, Ms. Wu wanted to enter into a different agreement with Mr. Ma and SOF. There was significant evidence tendered about a third agreement entered into between Ms. Wu and SOF. In this agreement, it is clear that Ms. Wu was seeking to ensure that Mr. Ma would be personally liable.

[141] Ultimately, a third agreement was signed between Ms. Wu and SOF (the "Supplementary Agreement"). The Supplementary Agreement is dated February 25, 2017, but the parties disagree about the date. Ms. Wu believed that the Supplementary Agreement ensured that Mr. Ma would be personally liable to guarantee the return of her principal as required by the Second Investment Agreement:

[SOF] guarantees and promises to recover 100% of the original principal in the account.

In the event of [SOF's] bankruptcy, the person in charge of [SOF] promises to continue managing the account of [Ms. Wu] and to recover its original principal.

[142] The parties focused their submissions on the Supplementary Agreement as the document governing the contractual dispute.

C. Expert Evidence

[143] The plaintiff tendered an expert report from Mr. Borenstein to address, among other issues, the standard of care expected of someone in a position such as Mr. Ma. On the point of standard of care, Mr. Borenstein's opinion is unchallenged.

[144] However, the defendants contend that the Court should place little or no weight on Mr. Borenstein's evidence because his opinion was based on assumptions not born out by the evidence and because he was biased.

- [145] During the trial and in response to the defendants' objection to the report, portions of his report were excised. The plaintiff tendered a report that reflected the excisions. I have relied on the excised version of the report and have focused this analysis on Mr. Borenstein's opinion about the standard of care expected in the circumstances presented here. I have not considered his opinion on the ultimate issue I am asked to decide--whether the defendant breached the standard of care.
- [146] In my view, Mr. Borenstein's task was not an easy one. He was being asked to tender an opinion about standard of care in circumstances where Mr. Ma admitted he was not following licensing requirements or adhering to professional criteria. Rather, he was offering a service where others could benefit in the development of his trading technique. Mr. Ma attempted to distinguish his service from those that need to be regulated.
- [147] I have concluded that Mr. Ma's conduct must be measured against a standard applicable to those operating in the securities industry. To conclude otherwise would hold those unlicensed to a lesser standard than those who have done what is required of them to engage with the public when it comes to their financial affairs. That is, the advisors that have completed the requisite training and qualified for licensing, and have agreed to adhere to professional requirements as mandated by their governing professional body.
- [148] Individuals such as Mr. Ma cannot operate in a vacuum independent of any oversight.
- [149] It is undisputed that Mr. Ma is not licensed to provide investment and trading services and has never received any formal training or education related to trading securities or providing investment advice.
- [150] Mr. Borenstein's evidence was that Mr. Ma was required to be licensed to provide the services that he did to Ms. Wu. In his report, he stated the following:
- a) SOF and Mr. Ma advertised investment advisory services, charged a fee for providing these services, and regularly traded on behalf of clients, and therefore fall under the definition of an "adviser" as set out in the Securities Act;
 - b) Mr. Ma conducted all trades in the IBC Account and expected to be paid (and was being paid) for his services;
 - c) As a person providing services of an "adviser" as defined in the Securities Act, Mr. Ma was required to:
 - i. Be a registered representative ("RR") employed by a registered dealer member of the Investment Industry Regulatory Organization of Canada ("IIROC");
 - ii. Have the required education, training and experience;
 - (1) Meet the proficiency requirements defined by IIROC;
 - (2) Be subject to IIROC regulatory obligations and oversight;

- (3) Observe high ethical standards for how he conducted his business;
- (4) Adhere to KYC due diligence requirements to ensure that recommendations made to clients are suitable to their financial situation, investment knowledge, investment objectives, time horizon, risk tolerance, assessment of current investment portfolio and risk level;
- (5) Diligently research each investment recommended to clients and ensure it is suitable based on order type, trading strategy, and methods of financing and continuously monitor to ensure that it remains suitable; and
- (6) Exercise the highest diligence for complex structured products, such as leveraged products and inverse-leveraged exchange traded funds.

[151] Mr. Borenstein testified that in his opinion, Mr. Ma's trading activity and his interaction with Ms. Ma revealed the following:

- a) He failed to register SOF as an IIROC dealer member when it was required to do so, as well as register himself as a RR, therefore there was no adherence to regulatory oversight or independent supervision;
- b) He failed to meet the proficiency requirements established by IIROC by attaining the proper education, training and experience to advise Ms. Wu or conduct discretionary trading on her behalf;
- c) He advertised in a misleading manner that is contrary to ethical business practices, and specifically targeted a vulnerable, Chinese-speaking population;
- d) He failed to have a documented KYC process and did not gather any of the basic KYC information required to make suitable recommendations to Ms. Wu;
- e) He failed to conduct any Know Your Product (KYP) process and to properly research the investments he traded on;
- f) He traded very complex products based primarily on their price movement without clearly understanding how the actual products worked or why the prices were moving in the direction they did, and traded in a highly leveraged manner as well as using a high level of margin;
- g) He failed to establish or adhere to any limits on the risks in trading Ms. Wu's account;
- h) He employed trading strategies that were reckless, extremely high-risk and entirely unsuitable for Ms. Wu, given that she did not wish to risk more than 10% of her investment principal; and
- i) He made trades that were reckless in extremely high-risk and speculative investments that were entirely unsuitable for Ms. Wu's risk tolerance.

[152] Mr. Borenstein's opinion was that there existed even higher KYC standards for discretionary and managed accounts, such as the IBC Account.

[153] In sum, I have accepted Mr. Borenstein's opinion about the standard of care expected of the defendants in the circumstances, including the specific aspects of Mr. Ma's investment strategy as it related to Ms. Wu and her investment.

D. Findings of Fact

[154] Based on the above and the credibility findings I have made, I briefly summarize the following findings of fact relevant to the determination of the legal issues the Court is to resolve:

- a) The defendants were operating without the requisite securities licenses and did not disclose this material fact to Ms. Wu;
- b) Ms. Wu was an unsophisticated investor;
- c) The parties entered into three agreements;
- d) The defendants had control over the IBC Account and operated it accordingly;
- e) Pursuant to the First and Second Agreements, Ms. Wu invested US\$840,000;
- f) The defendants invested all of the funds into DryShips in November and December 2016;
- g) The value of the DryShips investment decreased by 90% within six weeks of the investment; and
- h) The defendants have not returned any funds to Ms. Wu.

IV. LIMITATION ACT

A. Chronology of the Litigation

[155] The action was started on January 25, 2018. This is just over one month after Ms. Wu's last written communication with Mr. Ma on December 3, 2017 where she persisted in her efforts to have Mr. Ma repay her the principal investment. She hoped that he would pay at least some of the money.

[156] In response, Mr. Ma provided an update of SOF's business, but he did not offer any form of repayment. Indeed, his evidence at this time was that he was negotiating for more time to repay the principal amount. This suggestion that he would be able to repay her is inconsistent with his testimony that he lost hope in DryShips in or around May 2017.

[157] At times, he seemed to suggest to Ms. Wu that his other clients continued to invest money in DryShips. He wrote an email to her on October 14, 2017 stating, "in addition, an old customer added US\$200,000 in preparation for the re-trading of the shipping company's shares."

1. Notice of Civil Claim - January 25, 2018

[158] The Notice of Civil Claim filed on January 25, 2018 ("NOCC") sets out the following:

- a) the facts in support of the breach of contract claim;
- b) identified the involved parties and briefly touches on the background, including reference to the advertisement in a local Vancouver Chinese language newspaper;
- c) the particulars of the First and Second Investment Agreement, including the requirement that Ms. Wu open the IBC Account and grant control of the IBC Account to Mr. Ma;
- d) particularized the money that was deposited by Ms. Wu in accordance with the First and Second Investment Agreements;
- e) specified that Ms. Wu delivered funds to Mr. Ma personally in accordance with the First Investment Agreement as follows:
 - i. RMB\$60,000 (approximately US\$13,730) to the account of Hong Cheng Ma, Mr. Ma's relative; and
 - ii. US\$5,000 to Mr. Ma personally.
- f) the facts regarding Mr. Ma's investment into DryShips and the subsequent losses associated with the DryShips investment; and
- g) the details relating to the Supplementary Agreement and chronicled Ms. Wu's efforts to ensure repayment of the guaranteed amount (90%).

[159] The NOCC pleads that the defendants breached the terms of the agreement because Ms. Wu demanded repayment and the defendants have refused to pay her back. Ms. Wu seeks an order that SOF and Mr. Ma are jointly and severally liable to pay Ms. Wu US \$800,000, plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[160] The defendants filed their Response to Civil Claim on March 20, 2018.

2. Amended Notice of Civil Claim

[161] Ms. Wu filed a Notice of Application on October 9, 2019, seeking to amend the NOCC ("Amended NOCC").

[162] There is some dispute about a Notice of Application filed on November 5, 2019, attaching a further revised amended NOCC. I accept counsel's submission that the only revision to the November 5, 2019 version of the NOCC was the removal of a statutory claim under the Securities Act, R.S.B.C. 1996, c. 418.

[163] By order dated November 18, 2019, Ms. Wu was granted leave to file the Amended NOCC. However, the order was made without prejudice to the defendants' right to raise limitation defences.

[164] The Amended NOCC maintained the original contractual pleadings. It further particularized events referenced in the NOCC. The Amended NOCC included the following further details of those earlier referenced facts:

- a) Specific representations taken from the advertisement, including:
 - i. SOF specialised in short-term and mid-term analysis of financial securities such as foreign currency and North American stocks, as well as online trading services;
 - ii. Wealth of all its clients had increased;
 - iii. The performance of SOF had steadily increased;
 - iv. As of July 8, 2015, SOF had secured cash returns for its clients of over 30% and in 2014, SOF had annualized returns of 51-98%; and
 - v. If an individual had \$1 million or more to invest, using SOF's services would ensure that the individual would live comfortably the rest of their days and leave the principal for their children.
- b) Further details about the parties including the fact that Ms. Wu did not speak English and was unfamiliar with Canada, and that Mr. Ma did not hold a securities licence and had not received any formal training regarding trading services.
- c) Particulars of Ms. Wu's reliance on Mr. Ma as an investment advisor and that she trusted he had the necessary qualifications, skill, knowledge and would exercise the degree of care of a professional investment advisor.
- d) Before investing in the shares of DryShips, Mr. Ma did not:
 - i. Inform Ms. Wu of his intention to invest the entirety of the funds available in the IBC Account in DryShips;
 - ii. Warn Ms. Wu of any of the risks associated with investing in DryShips; or
 - iii. Exercise reasonable and appropriate care, skill, diligence and competence in exercising his professional judgment in the investigation and researching DryShips.

[165] The Amended NOCC recast the breach of contract claim. Under the legal basis, Ms. Wu added negligence and breach of fiduciary duty pleadings as follows:

- a) Particulars of Mr. Ma's negligence are, inter alia, as follows:
 - i. Mr. Ma owed a duty of care to Ms. Wu as her investment adviser and trading representative;
 - ii. Mr. Ma breached the standard of care required of a professional investment adviser and trading representative by failing to:
 - (1) exercise his powers and discharge his duties honestly, in good faith, and in the best interest[s] of Ms. Wu and the IBC Account; and

- (2) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;

iii. In particular, Mr. Ma breached the standard of care by:

- (1) Failing to keep Ms. Wu informed of the investments made through the IBC Account;
- (2) Failing to disclose material facts to Ms. Wu, including the risks associated with investing the entirety of the funds available in the IBC Account on shares in DryShips; and
- (3) Failing to determine whether investing in DryShips was suitable for Ms. Wu, given her particular characteristics and circumstances; and

iv. Mr. Ma's breach of the standard of care caused Ms. Wu's loss in the amount of US\$800,000, which loss was reasonab[ly] foreseeable.

[166] Regarding the breach of fiduciary duty claim, Ms. Wu pleaded that Mr. Ma owed a common law fiduciary duty to her to act honestly and in good faith and with a view to her best interests. She pleaded that he breached that duty by misusing his position by:

- a) Failing to give undivided loyalty to Ms. Wu, putting her interest ahead of his own in giving comprehensive financial advice;
- b) Failing to keep Ms. Wu informed of the investments made through the IBC Account;
- c) Failing to disclose material facts to Ms. Wu, including the risks associated with investing the entirety of the funds into DryShips; and
- d) Failing to determine whether investing in DryShips was suitable for Ms. Wu, given her particular characteristics and circumstances.

[167] As a result of the breach of fiduciary duty, Ms. Wu claimed she suffered damages of US\$800,000.

3. Amended Response to Civil Claim

[168] The defendants maintained their denial of the breach of contract claim. Regarding negligence and breach of fiduciary duty and in addition to a general denial, the defendants rely on the Limitation Act and plead the new claims are statute barred. In addition, the defendants allege the plaintiff failed to file a Reply to their Response to Amended NOCC and as such, Ms. Wu should be prohibited from responding to the limitation defence.

[169] The defendants plead that Ms. Wu is contributorily negligent. They also plead that she has failed to mitigate because she has not pursued her remedies against DryShips in class actions in the United States.

[170] I set out the legal analysis regarding the Limitation Act issue and my decision regarding it.

B. Legal Principles - Limitation Act

[171] The defendants deny they were negligent or in breach of any fiduciary duty. However, the defendants relied principally on their position that these claims are statute-barred.

[172] As set out above, the NOCC pleaded only breach of contract in the legal basis section.

[173] After the first examination for discovery of Mr. Ma on April 11-12, 2019, Ms. Wu indicated her intention to seek to amend the NOCC to add negligence and breach of fiduciary duty (in addition to piercing the corporate veil) in the legal basis of the claim.

[174] The application to amend the NOCC was filed on October 9, 2019

[175] The Supreme Court of Canada set out the purpose of limitation periods in *M.(K.) v. M.(H.)*, [1992] S.C.J. No. 85 at paras. 22-24:

- a) first, "[t]here comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations " (para. 22);
- b) the second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence: "[o]nce the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim " (para. 23); and
- c) finally, " plaintiffs are expected to act diligently and not 'sleep on their rights'; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion " (para. 24).

[176] The defendants submit these factors should weigh in their favour that the amended claims are out of time.

[177] Ms. Wu takes the position that the Amended NOCC does not raise new causes of action in the sense relevant to pleadings amendments. Rather, the Amended NOCC merely reformulates the legal bases for liability in relation to a set of facts already pleaded (*Taylor v. Blenz The Canadian Coffee Co.*, 2019 BCSC 906 at para. 44).

[178] As stated in *Fletcher v. British Columbia (Public Safety and Solicitor General)*, 2013 BCSC 554 at paras. 18-19, where there are sufficient facts pleaded in a notice of civil claim, the limitation period with respect to the claim as advanced will not have run.

[179] In *Beruschi v. British Columbia*, 2020 BCSC 1531 Justice Wilson neatly summarized the recent authorities addressing the question about whether a new pleading constitutes a new cause of action. Starting at para. 59, Wilson J. wrote:

[59] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, the Court of Appeal considered whether proposed amendments that detailed a claim for failure to warn constituted a new cause of action or whether they were subsumed within a plea of negligence in a claim against an insurance broker. Since any limitation would have long

since expired, the first question is whether the proposed amendments plead a new cause of action. The Court of Appeal addressed what constitutes a cause of action and referred to two definitions. The first was from *Danyluk v. Ainsworth*, 2001 SCC 44, in which the Supreme Court of Canada described a cause of action at para. 54 as follows:

- [54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 1915 CanLII 514 (ON CA), 33 O.L.R. 125 (C.A.).
- [60] The Court of Appeal in *Swiss Reinsurance* also referred to Lord Diplock's definition in *Letang v. Cooper*, [1965] 1 Q.B. 232 at 243-243 (Eng. C.A.), in which a cause of action was described as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". The Court of Appeal concluded there was no real difference between the two definitions.
- [61] The Court of Appeal in *Swiss Reinsurance* referred to the Ontario Court of Appeal's decision in 1100997 Ontario Ltd. v. North Elgin Centre Inc., 2016 ONCA 848. In *North Elgin*, the Ontario Court of Appeal explained the distinction between amendments that seek different relief based upon an alternative legal theory that relies on previously pleaded facts on the one hand and a different claim based upon facts that were not pleaded on the other at paragraphs 20 to 23:
- [20] In *Morden & Perell*, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014), at p. 142, the authors state:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

[Footnotes omitted.]

- [21] In *Dee Ferraro Ltd. v. Pellizzari*, this court noted the distinction between pleading a new cause of action and pleading a new or alternative remedy based on the same facts originally pleaded. The appellants had commenced an action against their lawyer claiming damages for breaches of contract, trust and fiduciary duty and for fraud and negligence. The appellants then sought to amend their pleading. This court, in overturning the motion judge's dismissal of the motion to amend, concluded that the proposed amendments, such as claims for a mandatory order and a constructive trust over shares, could be made because they flowed directly from facts previously pleaded.
- [22] By contrast, a proposed amendment will not be permitted where it advances a "fundamentally different claim" after the expiry of a limitation period: *Frohlick v. Pinkerton Canada Ltd.* In that case, the court did not permit the plaintiff in a wrongful dismissal action to amend the statement of claim to assert a claim for damages for constructive dismissal on

the basis that the limitation period had expired. This court dismissed the appeal. The amendment regarding constructive dismissal related to events that occurred prior to the events described in the original statement of claim that were unrelated to that claim. The defendant was unaware of the new allegations prior to the plaintiff seeking the amendments, and the events were not put in issue or encompassed within the original claim.

- [23] Based on the foregoing, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded.
- [62] The question is therefore whether Beruschi's proposed plea of unjust enrichment and for a declaration of trust is an alternative theory based upon previously pleaded facts, in which case there is no new cause of action, or whether it raises new facts that were not previously pleaded.
- [180] On what constitutes a "new cause of action", Wilson J. examined the elements required to prove the newly added pleadings of unjust enrichment, and the existing pleadings of breach of contract. He concluded that the new pleadings did not constitute a new cause of action, stating:
- [66] The provisions of a contract may be sufficient in some circumstances to provide a juristic reason for a benefit and corresponding deprivation. For example, a contract that expressly provides for the parties' remedies in the event of a default may provide the requisite juristic reason. However, it does not necessarily follow that a claim for an unjust enrichment cannot succeed solely because the claim is founded in contract. Similarly, while fiduciary duties do not arise in many contractual arrangements, there are nonetheless many contracts that do give rise to fiduciary duties, the presence of which depends upon the nature of the relationship.
- [67] The facts as pleaded, and which I assume to be true for the purposes of this application, are that Billingsley had agreed to monitor the Tony Claims for Beruschi and ensure they would not lapse, but that he allowed them to lapse and then claimed them for himself. Subsequently, the pleadings allege that Billingsley agreed to convey the Tony Claims to Beruschi but then subsequently refused to do so notwithstanding his agreement. I am unable to say that any new facts would be required in order to make out a claim for unjust enrichment, or for breach of trust. I am satisfied that the proposed claims for unjust enrichment and declaration of trust are alternative legal remedies arising out of the previously pleaded facts.
- [181] The question is whether the Amended NOCC changes the substances of the factual issues or does it simply recast the legal characterization of those issues? I turn to resolve that question now.

C. Analysis

- [182] Ms. Wu filed the NOCC on January 25, 2018 and filed an application for the Amended NOCC on October 9, 2019.
- [183] Mr. Ma submits that the Amended NOCC raises new causes of action which were discoverable no later than October 1, 2017, the day the Supplementary Agreement was set to terminate. As such, the defendants submit that the claims it advances are statute-barred pursuant to s. 6(1) of the Limitation Act.
- [184] In response, Ms. Wu contends that the amendment constitutes a mere particularization of the underlying claim and thus does not give rise to a new cause of action to which the Limitation Act might apply.
- [185] Section 6(1) of the Limitation Act operates to bar claimants from bringing a claim more than two years after its discovery. A "claim" is defined in s. 1 of the Limitation Act as follows:
- "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission
- [186] Justice Watchuk, in *West Bros. Frame and Chairs Ltd. v. Yazbek*, 2019 BCSC 1844, dealt with a similar argument and said this about the similarity between "claim" as defined in the Limitation Act and "cause of action":
- [239] This is similar to the definition of a "cause of action" referred to in *Swiss Reinsurance Co. v. Camarin Ltd.*, 2018 BCCA 122 at para. 28 [Swiss Re] as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".
- [240] An amendment which does not change the substance of the injury, loss or damage in question, or of the acts or omissions alleged to have caused it, will not give rise to a new claim or cause of action: *Swiss Re* at para. 29. Such an amendment is not barred by the operation of the Limitation Act. To give rise to a new claim, an amendment must clearly go beyond the "scope" of the claims in the original proceeding: *Swiss Re* at para. 34.
- [241] Similarly, an amendment which pleads a new or alternative remedy on the basis of the same underlying facts does not give rise to a new claim, nor one which merely particularizes the allegations advanced in the original claim: *Swiss Re* at para. 31.
- [187] The NOCC pleaded breach of contract and summarized that:
- a) Ms. Wu was contemplating moving to Canada;
 - b) During a visit to Canada to assess her move, she discovered an advertisement placed by the defendants in a local Vancouver Chinese language newspaper;
 - c) Ms. Wu connected with Mr. Ma after reviewing the advertisement;

- d) Ms. Wu entered into the First Investment Agreement on or about August 31, 2015 which included terms that required Ms. Wu to deposit \$380,000 and a later deposit of US \$100,000 into the IBC Account and the defendants would control and invest these funds; that the defendants would provide Ms. Wu with investment advice in exchange for fees; a guarantee of 90% of the principal investment;
- e) Ms. Wu entered into the Second Investment Agreement with similar terms to the first reflecting an increased contribution amount of US\$540,000 plus reflecting the additional deposit of US\$260,000;
- f) During the Second Investment Agreement, the defendants used the entirety of the IBC Account to invest in DryShips and by January 2017, the value of DryShips shares had fallen by approximately 90%;
- g) When Ms. Wu learned that the defendants could not make the guarantee payment, she sought to enter into the Supplementary Agreement; and
- h) Ms. Wu pleaded that the defendants breached the terms of the Supplementary Agreement by failing to return the principal amount of US\$800,000.

[188] The Amended NOCC added claims of negligence and breach of fiduciary duty.

[189] With respect to the negligence claim, Ms. Wu particularized Mr. Ma's negligence and pleaded that Mr. Ma owed her a duty of care as her investment advisor and trading representative; that he breached the standard of care required of a professional investment adviser by "failing to (1) exercise his powers and discharge his duties honestly, in good faith and (2) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances." Ms. Wu pleaded that Mr. Ma breached the standard of care by failing to keep her informed of the investments; failing to disclose material facts to her, including the risks associated with investing the entirety of the funds available in the IBC Account on shares in DryShips; and failing to determine whether investing in DryShips was suitable for Ms. Wu. Finally, Ms. Wu pleaded that this breach of the standard of care caused the loss of her entire investment, US\$800,000.

[190] With respect to the breach of fiduciary duty claim, Ms. Wu pleaded that Mr. Ma owed a common law fiduciary duty to her to act honestly and in good faith, with a view to her best interests. She alleged that he breached his fiduciary duty by misusing his position including failing to give undivided loyalty to her, putting her interest ahead of his own; failing to keep her informed; failing to disclose material facts to her, including the risks associated with investing the entirety of the funds into one company; and failing to determine whether investing in DryShips was suitable for her. She pleaded that she suffered the same damages, loss of US\$800,000, as a result of the defendants' breach of fiduciary duty.

[191] The NOCC pleaded breach of contract and alleged that Mr. Ma was to provide investment advice to Ms. Wu in exchange for a fee and that he would have control of the IBC Account in order to invest her funds. The parties conducted themselves in accordance with the terms

of the contract. That is, Ms. Wu deposited her money, the defendants took control of it by operating the IBC Account and made investments on Ms. Wu's behalf. During the Second Investment Agreement, the defendants invested the entire value of the IBC Account into DryShips and lost the entirety of the investment.

[192] The claims of negligence and breach of fiduciary duty arise out of the identical factual matrix as the claim for breach of contract. The breach of contract claim engages a number of overlapping legal doctrines. The elements of the breach of contract claim included the following assertions of fact:

- a) The defendants were to provide investment advice in exchange for certain fees;
- b) Ms. Wu was required to deposit money into the IBC Account from time to time, but ultimately totalling US\$800,000;
- c) The defendants had control of the IBC Account;
- d) The defendants moved the entirety of Ms. Wu's investment into DryShips; and
- e) DryShips went down in value by 90% and ultimately was worthless.

[193] These facts were pleaded in the NOCC. These facts are foundational elements of the negligence and fiduciary duty claims now advanced. Though the Amended NOCC may recast the original allegations, a new cause of action is not advanced. The amendments add particulars to, and alternative remedies on the basis of the same underlying facts. A new cause of action does not result.

[194] In the result, the amendments contained in the Amended NOCC do not constitute a new cause of action. Thus, they are not barred by operation of the Limitation Act.

[195] I am satisfied that the NOCC put the defendants on notice that they were being held to account for obligations relating to the investment services they provided to Ms. Wu and the loss she suffered. I agree with the plaintiff's submission that the increased particularity of the Amended NOCC does not engage a different set of facts or course of dealings.

[196] There is no question that the NOCC was timely. Ms. Wu acted diligently and did not sleep on her rights. She sued both Mr. Ma personally and SOF. I have also considered the misleading impression Mr. Ma created in the months following the loss, including the October 14, 2017 representation about DryShips' performance.

[197] Finally, the defendants claimed that Ms. Wu failed to file a Reply to the Amended Response to Civil Claim and thus is barred from advancing her submission that the negligence and breach of fiduciary claims are not statute barred.

[198] I do not agree.

[199] The Supreme Court Civil Rules Rules 3-6(3) and 3-6(4) provide that if no reply is served, a joinder of issues on the response to civil claim is implied. Further, a reply that is a simple joinder of issue must not be filed.

[200] I conclude the Limitation Act does not serve to bar the claims of negligence or breach of fiduciary duty.

V. LEGAL PRINCIPLES - NEGLIGENCE/BREACH OF FIDUCIARY DUTY

[201] The defendants assert that any relationship between the parties is defined by the First and Second Investment Agreements and their rights and obligations are to be governed by the Supplementary Agreement.

[202] Ms. Wu says otherwise. She claims that Mr. Ma's wrongful conduct is much broader than that set out in their agreements.

[203] I will now turn to the negligence and breach of fiduciary duty jurisprudence and my analysis regarding those claims.

[204] For the reasons set out below, I have concluded that the relationship between Ms. Wu and the defendants is not just a contractual one.

A. Breach of Fiduciary Duty

[205] A determination of a fiduciary relationship involves an examination of the relationship between the parties. The Supreme Court of Canada made this clear in *Hodgkinson v. Simms*, [1994] S.C.J. No. 84 at paras. 25-28. Justice La Forest described this part of the analysis at the outset of his reasons:

[25] Before turning to the particular facts of this case, it is useful to review the principles underlying the notion of fiduciary duties, for, in my view, liability in this case inexorably flows from these principles. In the famous case of *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, Sir Eric Sachs of the English Court of Appeal stated the fiduciary principle as follows, at p. 341:

Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.

From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicium of its existence. Vulnerability is common to many relationships in which the law will intervene to

protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

- [26] At the same time, however, it is only by having regard to the often subtle differences between these causes of action that civil liability will be commensurate with civil responsibility. For instance, the fiduciary duty is different in important respects from the ordinary duty of care. In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 571-73, I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also *Nocton v. Lord Ashburton*, [1914] A.C. 932, at pp. 968-71, per Lord Shaw of Dunfermline. However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.
- [28] Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.); *McLeod v. Sweezey*, [1944] S.C.R. 111; P. D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (Ont. C.A.), leave to appeal refused, [1986] 1 S.C.R. vi. However, as Professor Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see *supra*, at p. 88.
- [206] An investment advisor is not necessarily a fiduciary, rather the relationship to the client should be considered on a spectrum. At one end, the advisor effectively makes all the investment decisions because of the client's trust and reliance. This advisor is a fiduciary, especially so if they have authority to make trades without the client's consent. On the other end of the spectrum, an advisor that is merely an order-taker for the client is likely not a fiduciary (*Osborne v. Harper*, 2005 BCSC 1202 at paras. 87-92; *Hunt v. TD Securities Inc.*, [2003] O.J. No. 3245 at para 42).
- [207] In *Hunt*, the court, stated the following regarding when an advisor is a fiduciary:

[42] In applying these factors, the words of Forsyth J. in a recent Alberta Queen's Bench decision provide a helpful framework:

[O]ne should consider the broker-client relationship to be a spectrum. At one end is a relationship of full trust and advice. The broker effectively makes all the decisions because of the great reliance and trust reposed in him or her by the client . . . This is exacerbated where the account is discretionary, such that the broker has the authority to make trades without the client's consent or even knowledge . . . Obviously, there is a fiduciary relationship at this end of the spectrum . . .

At the other end is a relationship where the broker is merely an "order-taker" for the client, the client does not rely on any advice from the broker, and the broker had no discretion. This was the case in Varcoe itself. Relationships at this end of the spectrum lack the elements of a fiduciary relationship.

Most cases fall somewhere in the middle. . . .

[Citations omitted.]

[208] In *Osborne v. Harper*, 2005 BCSC 1202 at paras. 87-92, Justice Sigurdson described the nature of the broker/client relationship and whether it constituted a fiduciary one. He stated that the broker/client relationship is not necessarily a fiduciary relationship and there is a spectrum of the relationship and the relevant duties. Where they lie on the spectrum depends on the circumstances of each individual case.

[209] Drawn from *Hodgkinsons*, at para. 92 Sigurdson J. listed the following factors as relevant in determining whether a fiduciary relationship existed between an investment advisor and a client:

1. Vulnerability: the degree of vulnerability of the client that exists due to such things as age or lack of language skills, investment knowledge, education or experience in the stock market;
2. Trust: the degree of trust and confidence that a client reposes in the advisor and the extent to which the advisor accepts that trust;
3. Reliance: whether there is a long history of relying on the advisor's judgment and advice and whether the advisor holds him or herself out as having special skills and knowledge upon which the client can rely;
4. Discretion: the extent to which the advisor has power or discretion over the client's account; and
5. Professional Rules or Codes of Conduct: help to establish the duties of the advisor and the standards to which the advisor will be held.

- [210] Fiduciary relationships are often found in an investment advisor/client relationship where the advisor was extended authority to manage the investment account and exercise actual discretion, and the client placed their trust and relied on the advisor without any independent diligence to the advisor's recommendation.
- [211] In *Agar Corporation Ltd. v. Lee*, 2019 ABQB 886 at para. 93 [Agar], Justice Dilts' comments are instructive with respect to whether the investment advisor in that case breached his fiduciary duty:
- [93] Finally, I find that Mr. Lee failed to ensure that the CMC investment and the Groundstar investment were consistent with ACL's investment needs, objectives and risk tolerance. I refer again to the evidence of Mr. Holley that CMC was an unsuitable investment given ACL's investment objectives. With respect to Groundstar, Mr. Holley's evidence was that ACL's purchase of Groundstar increased the risk of ACL's portfolio. Mr. Holley's evidence was that at the time of the Groundstar investment, ACL's portfolio was beyond the prudent and reasonable risk parameters for a client whose primary objective was to preserve its capital while earning some return. His opinion was that a reasonably prudent advisor would not have recommended an investment in Groundstar in those circumstances and I agree. In doing so, Mr. Lee breached the fiduciary duties he owed to ACL as its investment advisor.
1. Was the relationship between Ms. Wu and the defendants a fiduciary one?
- [212] As I consider the authorities cited above, in particular *Hodgkinsons* and *Hunt*, I am satisfied that Ms. Wu has established on a balance of probabilities that Mr. Ma and SOF were in a fiduciary relationship with Ms. Wu. All five of the *Osborne* factors are engaged. I am satisfied that Ms. Wu has proven on a balance of probabilities that Mr. Ma owed her a fiduciary duty. The evidence presented in this trial meets all five factors outlined in *Hodgkinsons* and as articulated in *Osborne*.
- [213] I have based this finding on the totality of the evidence tendered. I highlight some of that evidence here.
- [214] First, Ms. Wu was an extremely vulnerable individual in her relationship with Mr. Ma. She did not speak English. The communication between the two was in Chinese, as reflected in the WeChat discussions. On a few occasions, Ms. Wu asked Mr. Ma to communicate with her in Chinese because she did not understand English. She was not highly educated. The highest education she attained was at an industrial vocational school after finishing junior high school. I have not accepted Mr. Ma's evidence that Ms. Wu portrayed herself as a sophisticated business person. Her communications to him, particularly in the early days, are the statements of a novice investor.
- [215] Ms. Wu had limited investment knowledge and limited experience. She had but one past experience with an investment advisor before meeting Mr. Ma. She did not have any securities trading experience.

- [216] She did not know the regulatory requirements in Canada's investment industries. She was unfamiliar with what was required for someone in Mr. Ma's position. Her written request for documents proving the legitimacy of his company is but one example of her lack of sophistication.
- [217] Second, Ms. Wu testified repeatedly that she trusted Mr. Ma completely with her investment. She told him as much in her WeChat communications. Mr. Ma accepted and fostered this trust. He presented himself and SOF as highly successful in the securities industry. He held himself out as someone with specialized knowledge in securities trading and expressly indicated that he had superior trading techniques to others in the securities industry. This is also evident in her WeChat communications with him. His offer to waive his fee after the First Trade Agreement came to an end caused Ms. Wu to increase her trust in him. It induced her to continue their relationship and to sign off on the Second Trade Agreement. She was not challenged on her evidence that she trusted Mr. Ma.
- [218] When DryShips was plummeting, Mr. Ma expressly asked her to trust him and his expertise. He told her that they should continue to hold the stock and he explained, in technical and authoritative statements, that the stock would recover. On this point, Mr. Ma admitted that he understood Ms. Ma fully trusted him and relied on him to manage the IBC accounts.
- [219] Thirdly, Ms. Wu has proven the reliance factor. That is, she relied on Mr. Ma for his expertise. The relationship commenced in 2015 and was described by both as a successful one--in the first year. During the first 15 months of their relationship, the evidence demonstrates Ms. Wu's reliance on Mr. Ma and what she perceived to be his special skills, knowledge and expertise. Mr. Ma represented to Ms. Wu that he had the skill and knowledge on which she could rely.
- [220] This reliance was reflected in Ms. Wu's communications. She did not speak English and her investment knowledge and experience was limited. Though he periodically and inconsistently provided her with an update, she did not have any way to verify the information he was providing. She did not know how to operate the IBC Account and handed over authority to Mr. Ma. In fact, Mr. Ma set up his control of the account at the very beginning of their relationship.
- [221] She even needed help from him to open the IBC Account.
- [222] What places this relationship at the high-end of the investment advisor spectrum is the discretion Mr. Ma had to trade in her account without Ms. Wu's input--at all. I accept the plaintiff's submission that from the opening of the IBC Account and throughout their relationship, Ms. Wu's reliance on Mr. Ma was complete--with no reservations.

[223] Her reliance was evident in some of the messages Ms. Wu received regarding the IBC Account. For example, in December 2016, she received an email from Interactive Brokers warning her about the IBC Account and needed Mr. Ma to help her respond to the warning. She relied on him to explain the import of the warning. Mr. Ma told her that this was not an issue. The WeChat correspondence from December 6-7, 2016 aptly demonstrates this reliance:

December 6, 2016

Ms. Wu: What is the meaning of this? There was an email sent to me for me to read.

SOF: I looked into your managing account and did not see such a message. It is probably because your account is a margin account that can engage in leveraged trading and that your account now has used 96% of the principal (margin) to trade Drys stocks with less than 5% principal left. Therefore, IB trading system sent you an automatic message to remind you. You can ignore it because I did not and will not buy this stock using leverage.

I have been holding this stock for more than a week. The price has returned to our buy in price. There were 2 occasions where the profit surpassed 10% but I didn't liquidate. If there is an opportunity to profit again, I will not give it up.

[224] During this time, Mr. Ma instructed Ms. Wu to deposit more money into a second IBC Account. On December 11, 2016 he told her to deposit at least US\$10,000 stating:

SOF: DRYs went from profit to negative profit. One of the reasons is that since your account is a margin account that can use leverage, IB trading platform takes the stocks in your account and lend[s] them to others to sell. To prevent this, IB says you need to open a cash account again, and transfer those stocks from the margin account to your cash account. Please go on IB and apply for a cash account that can trade US stocks. Please put at least 10k USD cash into the new cash account.

[225] Ms. Wu complied with the request to deposit more money.

[226] A few days later, Mr. Ma asked Ms. Wu to send him her account name and login password and to give him her cash account credentials. He then learned Ms. Wu had not set up the cash account the way he wanted it. He wrote:

SOF: I logged in your old account and found out that you added a new account under your old account. This is not what I wanted. Maybe I did not explain clearly. I need you to open a new account with a new account name and login password. Aside from setting the new account up as a cash account, other information should be [the] similar to the old account. According to IB's regulations, the stocks in client's cash accounts cannot be lent out to sell to the market. Your old account is a margin account. The stocks I bought for you can be lent out to sell in the market, which means they are working against us. Therefore, we need a new cash account, and transfer the stocks to that account to avoid this.

- [227] That Ms. Wu followed Mr. Ma's instructions cannot be seriously in dispute. She trusted his explanation about what was occurring. She relied on Mr. Ma to trade in her best interests, to the point where he had permission to change and manage the settings of the IBC Account.
- [228] I accept the plaintiff's submission that on Mr. Ma's request, Ms. Wu immediately opened a second IBC account to assist Mr. Ma's trading, even though it is clear from the WeChat correspondence and her testimony that she did not understand why this needed to be done, other than trusting Mr. Ma's word that this was necessary and needed to be done urgently.
- [229] Ms. Wu's reliance was also evident in what occurred during the early months in 2017. That is, Mr. Ma repeatedly told her to be patient, to give DryShips an opportunity to recover, and she was trying to follow that advice. Importantly, Ms. Wu relied on Mr. Ma's advice and assurance that Mr. Ma would be able to pay the guarantee if he were given more time.
- [230] On January 22, 2017, Mr. Ma told Ms. Wu that he had not thought that this one trade would possibly ruin all of his plans. He said, "I will promise again that I will try my best to recover your principal as soon as possible, and hope we can still be friends." In February 2017, Mr. Ma wrote to Ms. Wu at least twice, instructing her to be patient. For example, on February 10, 2017, he wrote, "I will try my best to make the money and repay it voluntarily. That's why I am holding on but I will need time. Holding this stock still gives us such opportunities to recover the principal." And on February 16, 2017 he stated, "right now, I only ask everyone to wait patiently and there will be a good result."
- [231] Mr. Ma repeated his assurances in May when he stated, "I will be responsible to the end . I am actively looking for new clients and new business, in hope I can earn money and compensate for your loss soon. Please quiet down and wait patiently."
- [232] I turn to discretion, the fourth factor in determining whether a relationship is a fiduciary one. Here, I have examined the extent to which the defendants had power or discretion over the client's account.
- [233] Ms. Wu testified that Mr. Ma controlled the IBC Account. In my view, the evidence overwhelmingly proves this control and I find that Mr. Ma had complete and unfettered discretion to manage the IBC Account. This is reflected in the communications identified above at paras. 111-119 and 225-228. This finding is also based on the evidence I have found:
- a) Mr. Ma unilaterally traded stocks without obtaining Ms. Wu's prior consent or authorization. The IBC Account records show the trading activity. Comparing the WeChat communications with the trading activity, it is clear that Mr. Ma often did not even inform Ms. Wu of the trades;

- b) I do not accept Mr. Ma's testimony that he reported to Ms. Wu after each trade. The correspondence indicates the contrary. On this point, I accept the plaintiff's submission that there were only eleven so-called reports to Ms. Wu. These reports consisted of an email with a screenshot of the IBC Account. This was but a fraction of the trades that occurred in the IBC Account.
- c) At times, Mr. Ma agreed that Ms. Wu was not allowed to interfere with his trading. This is specifically set out in provision 6.2 of the Second Investment Agreement, which stipulates that if Mr. Ma does not have complete control and authority to trade or if Ms. Wu interrupted or interfered with Mr. Ma trading the IBC Account, she would be in breach of the agreement. Ms. Wu testified that she believed that if Mr. Ma found she breached the Second Investment Agreement then SOF would be entitled to keep the deposit and profit from the trades, and would no longer have any liability under the Second Investment Agreement.
- [234] Ms. Wu made clear in her testimony that she believed she would lose the Guarantee if she interfered with the IBC Accounts. Based on Mr. Ma's messages to her, including his tone, the basis for her belief was reasonable.
- [235] The final factor to consider relates to the rules and regulations of the governing body. These rules and regulations will help establish the duties of the advisor and the standards to which the advisor will be held. Of course, Mr. Ma was operating outside any regulatory regime. In my view, he is nonetheless held to the same standard as a regulated investment adviser.
- [236] On this point, Mr. Ma admitted that he had to put Ms. Wu's interest ahead of his own. However, the First and Second Investment Agreements place Mr. Ma in a direct conflict with Ms. Wu. Their interests did not align. If he lost money, the defendants' interests conflicted with Ms. Wu's. The Guarantee would have impacted his decision-making about when or if to sell DryShips.
- [237] It is troubling that Mr. Ma seemed to be experimenting with other people's money. He was testing a technique, without the necessary qualifications or expertise. His experiment had no real cost to him and everything to Ms. Wu.
- [238] In sum, I am satisfied that Ms. Wu trusted Mr. Ma and relied on him fully for his purported trading expertise. Mr. Ma had full control over her accounts, including asking for her passwords. She was an unsophisticated and vulnerable novice investor. Mr. Ma held himself out to be someone with a special type of knowledge about investing. He had none.
- [239] The evidence shows that Mr. Ma was on the fiduciary end of the advisor-client relationship spectrum. He effectively had full control of Ms. Wu's investments and frequently made trades without her knowledge; he was far more than a mere order-taker.

- [240] Similar to this case, Sigurdson J. in *Osborne* found a strong fiduciary relationship between an investment broker and his vulnerable, unknowledge client (at para. 112). The broker in *Osborne* had far less discretion to make trades than Mr. Ma. Thus, there is even stronger evidence in this case that Mr. Ma was a fiduciary.
- [241] I am satisfied that Ms. Wu has established on a balance of probabilities that Mr. Ma and SOF stood in a fiduciary relationship with her.
2. Did Mr. Ma breach the fiduciary duty he owed to Ms. Wu?
- [242] In my view the evidence is overwhelming that Mr. Ma breached his fiduciary obligations to Ms. Wu.
- [243] I agree with Ms. Wu's submission that Mr. Ma repeatedly breached professional rules and codes of conduct that govern investment advisors, perhaps the most egregious of which is failing to be licensed at all. His explanation that he thought he did not need to be licensed because it was a "temporary" arrangement and that he was in a partnership "cooperating" with his clients to trade on their behalf does not relieve him of the fiduciary obligations I have found he owed to Ms. Wu.
- [244] Mr. Ma invested substantially all of the Principal Amount into one high risk and volatile stock. He admitted that he knew the stock was risky and volatile at the time of investment, all the while knowing that SOF could not pay the Guarantee if the investment failed. Of course, this meant that he kept all of the upside and none of the downside of the pure gambles that he was taking with his clients' money. Mr. Ma admitted in his cross-examination that he transferred funds to himself from SOF in 2014 and 2015 every time a client paid SOF, often within a few days. At no time could SOF ever pay the Guarantee.
- [245] Mr. Ma failed to act in the plaintiff's best interest. As reflected in the correspondence above, Mr. Ma pleaded with Ms. Wu to continue holding DryShips. He said to Ms. Wu "according to the contract, you are doing me a favour by reducing my loss as much as possible, and helping me go through this obstacle. If that's the case, I will be extremely grateful".
- [246] It is inexplicable how he could continue to hold the plummeting stock. I accept Mr. Borenstein's evidence on this point about the conflict of interest. A qualified investment advisor would have mitigated this loss. Indeed, Mr. Ma continued to hold the stock even as it plummeted in value, encouraging Ms. Wu to be patient. I do not know whether he really believed the stock could or would recover. This failure caused Ms. Wu's loss.
- [247] By failing to sell Dryships when Ms. Wu requested that he sell, Mr. Ma's conflict was apparent. He failed to act in Ms. Wu's best interest in failing to sell the investment to minimize overall losses. In sum, Mr. Ma failed to act in Ms. Wu's best interests by following a highly risky investment strategy without confirming Ms. Wu's risk tolerance.

[248] A breach of a fiduciary obligation by an individual employed by a corporation remains a breach by the individual. The fiduciary obligation is a direct personal obligation imposed on the person who acts as a fiduciary. Breaches of such a fiduciary obligation results in the fiduciary being personally liable (see *Hignell v. Leeb*, 2018 SKQB 330 at para. 218).

[249] I conclude that Mr. Ma is liable to Ms. Wu for breaching his fiduciary obligations. SOF is vicariously liable for the conduct of their employee who held that fiduciary duty.

B. Negligence

[250] Though I have found the defendants liable for breaching the fiduciary duty owed to Ms. Wu, and not necessary to my determination of liability, I have decided to address the negligence claim as well.

[251] In a successful negligence action, a plaintiff must demonstrate that: (1) the defendant owed them a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3). Legal causation (or remoteness), examines whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha* at para. 12, citing *A.M. Linden and B. Feldthusen*, *Canadian Tort Law* (8th ed. 2006), at 360).

1. Did Mr. Ma owe Ms. Wu a duty of care?

[252] As a matter of negligence, it is well-established that an investment advisor owes a duty of care to a client. But since investing involves risk, an advisor is not responsible for any specific outcome of the advice (*Hodgkinson* at paras. 44 and 131; citing *Varcoe v. Sterling*, [1992] O.J. No. 60 at 234-236).

[253] Ms. Wu submits that the defendants owed her a duty of care. The scope of the duty varies with the nature of the relationship and it can be shaped by the regulatory framework governing the relationship (*Brandt v. Moldovan*, 2013 BCSC 1218 at paras. 90-92, cross-appeal allowed 2014 BCCA 364 (sub nom. *Marlin Investments Inc. v. Moldovan*), citing *Quantum Financial Services (Canada) Ltd. v. Yip*, [1998] B.C.J. No. 2922 at paras. 82-83).

[254] The defendants did not strenuously dispute that they owed a duty of care to Ms. Wu. Whether that duty was breached by the defendants is very much an issue, including whether Mr. Ma is somehow personally at fault for negligence. The defendants allege contributory negligence on the part of the plaintiff. As well, if the duty was breached, the parties differ about the extent of the damages.

[255] Based on the evidence that I have accepted, Mr. Ma owed Ms. Wu a duty of care.

2. Did Mr. Ma breach the standard of care?

- [256] The standard of care applicable to an investment advisor requires consideration of whether the advisor has acted "in accordance with a practice which is accepted as proper by a person skilled in that profession" (Miller v. RBC Dominion Securities Inc., 2021 BCSC 1811 at para. 54 citing Longstaff v. Robinson, 2008 BCSC 1488 at paras. 87-89).
- [257] The standard of care for an investment advisor is whether they used reasonable care and skill in exercising their professional judgment. To this end, accepted industry practices are relevant. Moreover, the advisor is not a guarantor of investment returns. Thus, the question is not whether the advisor turned out to be wrong or whether the advice achieved its goal (Miller at paras. 54-55).
- [258] The defendants contend the expert evidence is deficient to prove, as is the plaintiff's burden, that Mr. Ma breached the standard of care. However, the defendants have not put forward any evidence to contradict Mr. Borenstein's evidence that Mr. Ma breached the standard of care investment advisors owe to clients.
- [259] I accept the plaintiff's submission that there is some authority for the proposition that an unregistered investment advisor is subject to the same standards of conduct that apply to registered investment advisors under the regulatory regime, including the obligation to act in good faith, to provide appropriate caution, and to ensure that the recommended investments were suitable given a client's investment objectives. A failure to perform to the standard of care set by securities regulators is relevant to whether an advisor failed to discharge a duty of care at common law; see Agar at para. 91. I turn to consider the requisite standard of care and whether Mr. Ma breached it.
- [260] Mr. Ma admitted he did not review the financial statements of Dryships prior to investing Ms. Wu's funds in Dryships.
- [261] I have considered the totality of the evidence about Mr. Ma's investment strategy and his dealings with Ms. Wu and the IBC Account. I find as follows:
- a) Mr. Ma acted as an investment advisor to Ms. Wu in providing her with investment advice;
 - b) Mr. Ma owed Ms. Wu a duty of care in his capacity as an investment advisor who had full discretion to trade her investment account;
 - c) Mr. Ma breached the standard of care required of an investment advisor; and
 - d) Mr. Ma's actions caused losses and damages to Ms. Wu.
- [262] In my view, Mr. Ma's trading decisions breached the standard of care in two primary respects.
- [263] First, his decision to invest in a highly risky stock where he did not have the requisite knowledge, skill or level of expertise required to understand the impact of the stock's volatility or skill to undertake such a risky investment.

- [264] Second, Mr. Ma's decision to invest almost the entirety of the IBC Account into one stock ignored, as Mr. Borenstein put it, "the basic investment adage of not putting all of your eggs into one basket by investing all of Ms. Wu's money in a single highly-volatile stock" cannot be considered reasonable for any investment advisor, registered or not.
- [265] I have also relied on the conduct as set out in the fiduciary duty analysis above at paras. 205-249
- [266] In sum, the defendants owed Ms. Wu a duty of care and they breached the standard of care expected of someone in Mr. Ma's position--that is, someone holding himself out to be an investment adviser.
- [267] I am satisfied that the evidence establishes overwhelmingly that Mr. Ma's negligence caused Ms. Wu's damages.
3. Did Ms. Wu fail to mitigate her damages?
- [268] I am also satisfied that Ms. Wu did what she could to mitigate her damages.
- [269] DryShips decline was quick.
- [270] I accept Ms. Wu implored Mr. Ma to liquidate her investment as soon as she saw what was happening with her investment. Mr. Ma encouraged her to stay the course and be patient. Here, the defendant does not really suggest otherwise. In the circumstances, I do not accept that Ms. Wu was required to seek standing in a class proceeding in the United States to mitigate her damages. This is the defendants' burden to establish and they did not satisfy it. I was not provided with any information about the status of any class proceeding or indeed whether Ms. Wu would qualify as a potential class member in light of where she resided.
- [271] Ms. Wu may have had a duty to liquidate from DryShips. However, there was nothing left to liquidate by the time Ms. Wu appreciated what was occurring.
- [272] The defendants have not established that Ms. Wu failed to mitigate, or take reasonable efforts to mitigate, by selling DryShips or by not participating in a class proceeding.
4. Was Ms. Wu contributorily negligent?
- [273] The defendants submit that Ms. Wu is contributorily negligent for her own loss by accepting the levels of risk of the defendants' technique of trading securities on short- and medium-term bases. The defendants assert that Ms. Wu observed a 25% loss in the IBC Account in June 2016, yet nevertheless decided to enter into the Second Investment Agreement.

- [274] To establish the defence of contributory negligence, the defendant must prove that the plaintiff did not take reasonable care of themselves and thereby contributed to their injury. The apportionment of fault for the injury is thus based on the extent each party departed from their standard of care (*Refco Futures (Canada) Ltd. v. SYB Holdings Corp.*, 2004 BCCA 15 at paras. 101-103).
- [275] In *Miller*, Justice Steeves found the plaintiffs to be contributorily negligent because, for the most part, they were not attentive to the progress of their investments. However, Steeves J. specifically found that the plaintiff was either not monitoring the accounts or was indifferent to the activity that was occurring over the years of the client/broker relationship. Though not required to conduct a forensic audit of his statements, the plaintiff had some responsibility to read the information that the broker was sending.
- [276] In the case before me, Mr. Ma invested everything into DryShips, without informing Ms. Wu or advising her of the risks associated with this investment. She did not have an opportunity to assess Mr. Ma's trading decision because he did not tell her about the investment.
- [277] I have also found that Mr. Ma did not describe his trading technique to Ms. Wu at any time. His failure to disclose his lack of qualifications and his failure to tell her about the investment did not give Ms. Wu with any opportunity to protect her investment. I find that Ms. Wu was not in any way blameworthy for the subsequent damage caused by the fall of DryShips.

5. Conclusion

- [278] Based on the findings of fact that I have made and the jurisprudence that governs this dispute, I am satisfied that Ms. Wu has established on a balance of probabilities that the defendants owed her a duty of care. I find that the defendants breached the standard of care expected of them in the circumstances in the following manner, in both Mr. Ma's trading activity and his interaction with Ms. Wu:
- a) Mr. Ma failed to register SOF as an IIROC dealer member when it was required to do so, as well as register himself as a RR, and therefore he did not adhere to the requisite regulatory oversight or independent supervision;
 - b) Mr. Ma failed to meet the proficiency requirements established by IIROC by attaining the proper education, training and experience to advise Ms. Wu or conduct discretionary trading on her behalf;
 - c) Mr. Ma advertised in a misleading manner, contrary to ethical business practices, and specifically targeted a vulnerable, Chinese-speaking population;

- d) Mr. Ma failed to adhere to the KYC criteria, a statutory requirement for regulated investment advisers, in that he did not have her complete any such document nor did he gather the basic KYC information--as a professional advisor would--so that suitable recommendations could be made to her;
- e) Mr. Ma failed to conduct any KYP process and properly research the investments he traded on, specifically DryShips;
- f) without understanding how the products worked or why the prices were moving in the direction they did, Mr. Ma Traded very complex products based primarily on their price movement, and traded in a highly leveraged manner as well as using a high level of margin;
- g) Mr. Ma failed to establish or adhere to any limits on the risks in trading Ms. Wu's account and, by his own admission, was greedy; and
- h) Mr. Ma employed trading strategies that were reckless, extremely high-risk and entirely unsuitable for Ms. Wu, given that she did not wish to risk more than 10% of her investment principal; and
- i) Mr. Ma made trades that were reckless in extremely high-risk and speculative investments that were entirely unsuitable for Wu's risk tolerance.

[279] On this latter point, I find that Mr. Ma contravened the standard in the industry warning against such a single investment strategy, contrary to what Mr. Borenstein described as an adage warning against putting all of your eggs in one basket.

[280] I also find that a reasonable investment advisor would follow established industry KYC and KYP guidelines. Mr. Ma failed to do so.

[281] Based on my assessment of the activity in the IBC Account and the WeChat communication, I find that Mr. Ma did not take steps to try and mitigate the losses as the DryShips stocks dropped. Rather, he seemed to encourage Ms. Wu to hang on to the stocks, despite her request to sell, because he hoped to recoup the losses. Ms. Wu believed that if she sold the stocks on her own that she risked breaching the contractual guarantee, a valuable protection, at least in her mind.

[282] Despite his testimony to the contrary, I have found that Mr. Ma failed to disclose the risks of his investment strategy. I have not accepted Mr. Ma's evidence when he stated he had a general discussion with Ms. Wu about the risks of investing when he opened the accounts. Certainly, the promotional advertisement, even with his version containing the additional wording, did not disclose the risks in his strategy. There is also no evidence supporting Mr. Ma's contention that he told Ms. Wu about the risks. Certainly, there is nothing in their correspondence warning her about what he was up to and the risks associated to his trading. Since Mr. Ma did not discuss his trades with Ms. Wu prior to conducting them, he could not have disclosed the specific risks of the various investments he traded. Mr. Ma, through his company SOF, guaranteed that Ms. Wu would lose no more than 10% of her

investment capital, thereby suggesting a low to moderate risk overall. SOF does not appear to have had the financial wherewithal to fulfill this guarantee given the very high-risk nature of Mr. Ma's trading.

[283] In the result, I find that Mr. Ma failed to meet the standard of care for investment advisors, caused Ms. Wu's loss, and is liable for negligence. I find that SOF is vicariously liable for the negligence of its employee.

C. Breach of Contract

[284] Because of my findings of liability regarding negligence and breach of fiduciary duty, it is not necessary to address the breach of contract claim. The contractual agreements were prepared without the benefit of legal advice, for either Ms. Wu or the defendants. This much is clear when trying to interpret the meaning of some of the provisions. I have found it to be an unnecessary exercise in light of my findings.

[285] However, I will address the defendants' submission about what they described as an exclusion of liability clause.

[286] The defendants submit that their liability is limited by the terms of the Second Investment Agreement and Supplementary Agreement. To that end, they rely on para. 16 of *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] S.C.J. No. 1, for the proposition that the tort duty must yield to the parties' superior rights in contract.

[287] I have considered *Alton v. Lower Mainland Motocross Club*, 2017 BCSC 2460 at para. 35 citing *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2010 SCC 4 at paras. 121-123 as it provides useful guidance on this point:

- 1) whether as a matter of interpretation the exclusion clause applies to the circumstances;
- 2) whether the exclusion clause was unconscionable at the time the contract was made; and
- 3) whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy.

[288] I accept that para. 6(1) of the Second Investment Agreement does not limit the defendants' liability. First, the clause is found under the heading "Contract Duration" and the preamble to the subparagraphs start with "early termination may happen in the following situations." The Second Investment Agreement did not terminate early. Further, para. 6(1) must be read in conjunction with the entire subparagraph, which not only set out that the agreement is terminated early, but the specific manner of termination. In this case, being terminated early if the loss reached 10%. This did not occur.

[289] I am satisfied that reading the whole of the Second Investment Agreement supports this interpretation, particularly when considering para. 6(2).

[290] I conclude that the contractual documents do not serve to limit the defendants' liability.

VI. Damages

- [291] In this case, the assessment of damages is the same whether calculated as damages in negligence or breach of fiduciary duty. That is, the Court will attempt, as far as monetary damages are possible, to place the plaintiff in the same place as if the negligence or breach of fiduciary duty had not occurred (Hignell at paras. 222-223).
- [292] The plaintiff takes the position that for investment losses, the appropriate calculation is to account for the actual loss of the investment and add the lost opportunity had the principal amount been invested in securities more suitable for the plaintiff's objectives and risk tolerance.
- [293] The plaintiff submits the calculation date for the lost opportunity should be close to trial to accurately reflect the loss of opportunity suffered by the plaintiff. The Court found in Hignell that the damages with respect to the plaintiff's investment loss were to be calculated to the date of trial, followed by pre-judgment interest until the date of judgment.
- [294] I have reviewed the evidence regarding loss of opportunity. I have not found this part of the claim to be well-developed on the evidence. In my view, it is speculative that Ms. Wu would have invested her money and earned 10%. I have based this conclusion not on the defendants' submission regarding the errors in Mr. Borenstein's report. Rather, Mr. Borenstein's calculation is based on an assumption that I have not found to be established on the evidence before me. As such, I decline to make an award for loss of opportunity.
- [295] However, the extent of the damages caused by the defendants' negligence and breach of fiduciary duty is noncontroversial. Ms. Wu transferred US\$840,000 to Mr. Ma over a 16-month period. She is entitled to a damage award in that amount. Counsel have leave to make further submissions about foreign currency exchange rates and the appropriate conversion to Canadian currency.
- [296] For the reasons set out above, I find that the defendants, Mr. Ma and SOF, are jointly and severally liable in relation to the award made to Ms. Wu.
- [297] Ms. Wu is also entitled to interest pursuant to the Court Order Interest Act.

VII. Costs

- [298] As the successful party, Ms. Wu would be entitled to her costs on Scale B.
- [299] However, counsel sought to make submissions about an award for special costs. They have leave to do so. If they intend to pursue an award of special costs, the plaintiff must deliver a request to appear to trial scheduling within 60 days of the date of these reasons.

"Winteringham J."

- [1] Advisor is defined as a person engaging in, or holding himself, herself or itself out as engaging in, the business of advising another with respect to investment in or the purchase of sale of securities or trades of derivatives (Securities Act, R.S.B.C. 1996, c. 418). I have used

investment advisor and securities industry to define the nature of the work performed by the defendants. I note that the various regulators and self-regulator organizations use different terms to describe the categories of individuals approved to provide investment advice. I have used investment advisor and securities industry for consistency.

2. In their document agreement, the parties agreed that WeChat communications are accurate and can be used. Primarily, I have used the WeChat to assess Ms. Wu's testimony where there is a suggestion she has been inconsistent. For Mr. Ma, some of the messages constitute admissions; ie. Where he says he is at fault for the loss because he was greedy, etc.

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