COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Marlin Investments Inc. v. Moldovan,*
2014 BCCA 364

Date: 20140925
Docket: CA041092

Between:

Marlin Investments Inc.

Appellant
(Plaintiff)

And

Traian Moldovan, Robert Holmes and
Canaccord Genuity Corporation

Respondents
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

On appeal from: An order of the Supreme Court of British Columbia, dated July 10, 2013, (*Brandt v. Moldovan*, 2013 BCSC 1218, Vancouver Docket S121186)

Counsel for the Appellant: J.S. Stanley
J. Nieuwenburg

Counsel for the Respondents: D. Mitchell

Place and Date of Hearing: Vancouver, British Columbia
February 14, 2014

Place and Date of Judgment: Vancouver, British Columbia
September 25, 2014

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Frankel

Summary:

The appellant invested in a high-risk options trading program designed and operated by the respondents. While the investment was initially profitable, the appellant ultimately suffered significant losses and brought an action in negligence. The trial judge found the appellant was unsuitable for the investment and held the respondents liable in negligence for failing to meet the obligation owed by investment advisors to "Know your client". When assessing damages, the trial judge deducted the appellant's initial gains from its eventual losses.

The appellant submits that the trial judge erred in awarding damages for only its net losses, and that its initial gains should not have been deducted. The respondents cross-appeal and submit the trial judge erred in finding them liable in negligence. The respondents also submit, in the alternative, that the trial judge erred in not finding the appellant contributorily negligent.

Held:

Appeal dismissed and cross-appeal allowed in part. The trial judge did not err in finding the respondents liable in negligence, nor did she err in deducting the appellant's initial gains from its eventual losses when assessing damages. However, the trial judge did err in not finding the appellant contributorily negligent. Fault is apportioned at 80% for the respondents and 20% for the appellant.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I.

[1] Marlin Investments Inc. ("MII") is the only remaining plaintiff in proceedings brought by a number of investors against their investment advisors and their employer, Canaccord Genuity Corporation ("Canaccord"): *Brandt v. Moldovan*, 2013 BCSC 1218.

[2] MII is wholly owned by Kenneth Marlin, who, at trial in early 2013, was in his late '80s and in failing physical and mental health. MII was incorporated in 2004 during Mr. Marlin's retirement. The company is clearly Mr. Marlin's alter-ego. It invested through Messrs. Moldovan and Holmes in what can only be described as a high-risk options program that I will discuss in more detail below ("Options Program").

[3] The Options Program led to very significant losses in 2008 to many investors, including Mr. Marlin and his investment advisors.

[4] MII sued in negligence, essentially alleging that Messrs. Moldovan and Holmes did not properly screen MII to determine whether its participation in the program was suitable, that is, they failed to satisfy the obligation owed by investment advisors to “Know your client”. MII also maintained that the Options Program was negligently designed and operated by the individual defendants.

[5] The trial judge found Messrs. Moldovan and Holmes liable in negligence and the corporate defendant vicariously liable. The trial judge found that the Options Program was not negligently designed.

[6] In measuring damages, the judge off-set from MII's total loss of $311,291.29, the sum of $98,339.07 representing gains made by MII while participating in the scheme. That off-set grounds MII's appeal to this Court. The defendants cross-appeal on the finding of liability and submit in the alternative that the trial judge erred in not finding MII contributorily negligent.

[7] For reasons that follow, I would dismiss the appeal and allow the cross-appeal to hold MII 20 percent at fault in the circumstances.

II.

[8] I will first deal with the cross-appeal on the issue of liability.

[9] The trial judge described the Options Program developed and administered by Messrs. Moldovan and Holmes “as a team” while working together at TD Waterhouse in Kelowna, B.C. (at paras. 21-22):

> [21] Mr. Moldovan explained that he devised his OEX 100 option trading strategy (which evolved into the Options Program) in the fall of 1998. Initially, only a single client was involved. However, according to Mr. Moldovan, the number of clients grew gradually and steadily. As Mr. Moldovan recalled, at its peak, the Options Program had about 120 accounts and was generating substantial monthly commissions (about $90,000 per month), which were shared between Mr. Moldovan and Mr. Holmes, and their employer.

> [22] Mr. Moldovan explained that the strategy was based on the S&P 100 index. He explained that he picked that index because he felt that, given its make-up, that index represented the least amount of risk. Mr. Moldovan explained that the strategy held up during the market decline in September 2001. Essentially, the strategy involved the simultaneous selling (or "writing") of a put option and the selling of a call option on the S&P 100 index. By the time Mr. Moldovan and Mr. Holmes joined Canaccord, the strategy included the purchase of a put option (a "protective put") with an exercise price below the exercise price of the put option sold in connection with the call option. The full strategy would consist of two or three contracts on each side (e.g., two puts and two calls). Ideally, the options would expire unexercised (or worthless), and the client would keep the premium and thereby make a profit. However, at times, the client could find itself "in the money" and with a liability, which could be substantial. A client could lose money unless it "rolled out" a new position. Mr. Moldovan explained that a client would have to purchase the option "in the money", and then sell a new option position two months out. In most cases, the sale would cover the cost of the expiring option that was "in the money."

[10] The only expert witness on the issue of liability was called by MII. The trial judge specifically noted (at para. 89) the "investor's suitability" analysis in the expert's evidence (which also further describes the Options Program):

> [89] The final matter on which Mr. Fox was asked to express his opinion concerned the profile of an investor that would reasonably be considered a "suitable" investor for participation in the Options Program, with reference to the criteria normally used by a reasonably prudent investment advisor to make such an assessment. Mr. Fox said:
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> > The OEX Index option strategy on its own is a systematic approach to producing income through the action of selling combinations of options. First, it requires a very large capital base; much more than merely the margin requirements of a single trade. It is a strategy that may succeed over time but only if one has the capital to continue to roll over the losing positions and re-establish new ones that one will hope, eventually, will show a profit. It requires capital, but moreover it also requires the discipline to follow it without deviation – and potentially for a long period of time, as in the near term one may suffer adverse short term volatility.
> >
> > The strategy also requires the ability to withstand consistent short-term losses that may persist in the event that the market continues in one direction unchecked for a period of time. The investor must be able to withstand these losses. In addition, the investor must also be able to withstand the occasional large loss that will result from a "spike" in the markets.
> >
> > Finally, the investor must have a certain level of sophistication and understanding of the mechanics and the risk/reward of the

> strategy so that they also understand the results that they are achieving on a month to month basis.
>
> For those who may not fall into this bracket, it is difficult to see the need for it as a bona-fide holding in their portfolio. To make [a] suitability determination for this strategy it might include an investor who had some risk capital at their disposal; which if lost, would not represent any financial hardship. It would also require a sophisticated investor with a solid understanding of the dynamics of the options markets. It would not be appropriate for an investor looking for stable income or growth in their portfolio. It is a portfolio strategy that is market-neutral and does not require the markets to go up or down over time.

[11] The trial judge undertook her liability analysis against the backdrop of MII's controlling mind - Mr. Marlin - and his personal circumstances from 2005 to 2008, the period of investment and loss, and in the period thereafter leading up to the trial at the beginning of 2013 (at paras. 9-10):

> [9] Mr. Marlin was born in June 1923. As of the fall of 2005, when MII became a client of Canaccord, Mr. Marlin was devoting substantial time to the care of his wife, Helen, who for many years had a number of very serious health problems. (Mrs. Marlin is now deceased.) Around this time, Mr. Marlin also began experiencing some serious health problems of his own. There were problems with his pacemaker. Mr. Marlin lost the sight in his good eye (his right eye) as a result of treatment in connection with prostate cancer. Since then, Mr. Marlin has been getting by with his left eye and using a large magnifying glass. Once he lost sight in his right eye in the fall of 2005, and although his practice had been to check his bank and investment accounts regularly on-line, Mr. Marlin was no longer able to read material on a computer screen. He was also unable to drive.
>
> [10] Finally, and especially in the two or three years prior to trial, Mr. Marlin has noticed significant problems with his memory. These were apparent when he testified at trial. In some areas and on some topics (for example, his time as a businessman in Alberta), his memory seemed reasonably reliable. However, in others, Mr. Marlin clearly struggled, and not merely with details of relevant events. For example, he had difficulty answering questions concerning the notices of assessment for his income tax filings over the last few years, and he struggled to recall more recent events such as his examination for discovery in this action.

[12] Although Mr. Marlin held very senior positions in the 1970s and 1980s in investment firms in Alberta selling mutual funds and investment contracts, he was a victim of the Principal Group's financial collapse in the late 1980s. He was “virtually wiped out” (para. 16) and made an assignment in bankruptcy in 1988. He was

discharged in 1995 after his move to British Columbia. He was 72 years old in 1995. At the time that MII's account at Canaccord was opened in 2005, the uncontradicted evidence indicated that “there were very few assets in MII...”; “he [Mr. Marlin] still had a car but otherwise had very few fixed assets” and he was living on government subsidies, CPP and OAS (at para. 35).

[13] In contrast to this reality, the client opening forms tendered to Canaccord in 2005 painted a much rosier picture of MII's and Mr. Marlin's circumstances. According to the trial judge, in those forms:

- MII's estimated net worth was $700,000;
- its annual income from all sources was $50,000;
- under “Investment Experience” it was suggested that it was “Extensive” in options, commodities/futures, venture situations and margin trading; on Mr. Marlin's evidence this was untrue;
- two copies of the same form had different entries for “Investment Objectives”; on that in Canaccord's file “100%” is typed in under “Speculative High risk”.

[14] The “Supplemental Account Profile” form was intended to record information about the person with beneficial ownership of the corporate client; this information was also important because Mr. Marlin was required to give his personal guarantee for MII. The trial judge observed (at paras. 43-44):

> [43] The form does a poor job of capturing information about Mr. Marlin. There is nothing on the form in the section for Mr. Marlin’s spouse, although at the time Mrs. Marlin was still alive. “# of Dependents” is left blank. MII is typed in under “Employer’s Name,” although the form also shows “Self Employed” typed in as Mr. Marlin’s occupation. Beside “Years with Employer,” the figure “45” is typed in. What all of this is actually supposed to mean in relation to the “Know your client” rule is a mystery, since MII was in fact incorporated in 2004 and Mr. Marlin had been retired since about 1995. Mr. Marlin never made any secret of this. Mr. Marlin’s correct birth date has been typed in. A reader would be informed he was in his 80s. I conclude that both Mr. Moldovan and Mr. Holmes knew how old Mr. Marlin was, and that in fact he was retired.

> [44] In the section “Co-account Holder Assets”, some figures are written in by hand. At trial, Mr. Marlin was asked about the handwritten figures, and when asked if it was his handwriting, indicated that he would say yes. However, he also said that he did not know what the numbers meant. For example, the figure “565,000” appears under estimated net liquid assets, “850,000” under estimated fixed assets and “1,415,000” under estimated total net worth. The circumstances in which the figures were placed on the form were never explained. In the absence of some credible explanation, I am not prepared to infer that Mr. Marlin, on his own, deliberately wrote down on this form figures purporting to represent his personal assets when he knew those figures did not accurately represent the facts.

[15] In her analysis, the trial judge averted to the scope of the duty of care owed to an investment advisor's client and cited *Quantum Financial Services (Canada) Ltd. v. Yip* (1998), 60 B.C.L.R. (3d) 365 (S.C.). She noted that the duty of care is also shaped by the regulatory framework that governs the relationship and that Messrs. Moldovan and Holmes “accepted that they had obligations to comply with the ‘Know your client’ and suitability rule as part of standard practice” (at para. 92).

[16] At para. 95 of her reasons, the trial judge referred to the “Know your client” rule as “the cardinal rule of the brokerage business”. The rule is “designed to ensure that a portfolio is suitable for the client...”. While the forms completed when an account is opened are one method of collecting the necessary information, they are not the only method (para. 96). The trial judge continued (at paras. 97-99):

> [97] For example, the information-gathering process that Mr. Dickson described (and that Mr. Holmes agreed with) as part of complying with the “Know your client” rule went well beyond merely accepting at face value information on account opening forms. Mr. Fox expressed the views that the investment advisor must use due diligence to learn the essential facts of a client’s financial circumstances, and that an investment strategy must be suitable to the client, not merely conform to the information recorded on an account opening form. I agree.
>
> [98] Here, much of the information on the forms was filled in at Canaccord, on Mr. Moldovan’s instructions, before the forms were sent to Mr. Marlin. In other words, Mr. Moldovan, in his capacity as investment advisor, took on the initial responsibility to complete the forms. Mr. Moldovan could provide little assistance concerning how he gathered the information about MII and Mr. Marlin that ended up on the forms. His evidence is too thin to support a conclusion that, in carrying out this task, he exercised reasonable care. Mr. Marlin, for example, did not recall anyone from Canaccord contacting him, and his evidence is uncontradicted. As I noted above, some of the information typed on the Supplemental Account Profile form did not make

> much sense. Information that is incomplete or ambiguous or does not appear to make sense is a poor guide to "knowing your client."
>
> [99] I find that it was Mr. Moldovan who made the decision to check the boxes indicating "extensive" knowledge of the commodities and futures markets and options, because unless those boxes were checked, the accounts would not be opened. He probably did not know the level of MII's (or Mr. Marlin's) experience with option trading, and made an assumption. Mr. Moldovan checked off "moderate" for mutual funds, even though Mr. Marlin in fact had experience selling mutual funds.

[17] The trial judge addressed the defendants' argument that if the account information was wrong, MII and Mr. Marlin were nevertheless bound because those misrepresentations misled Canaccord in undertaking the suitability analysis (presumably undertaken by Messrs. Moldovan and Holmes). At paras. 101-105, the trial judge gave four reasons for rejecting this submission. I take the chief reason to be this (at para. 103):

> [103] Second, I conclude that neither Mr. Moldovan nor Mr. Holmes in fact relied on the information on the forms signed by Mr. Marlin when the MII accounts were opened. Mr. Moldovan in particular knew how the forms were generated. I do not think it reasonable for him to generate a form indicating that Mr. Marlin was still earning an income from employment at age 82, without making some further inquiry about the facts. There is no evidence that he did, and the careless manner in which the forms were generated leads me to conclude that Mr. Moldovan never placed much importance on them, other than as a means to get the accounts opened. Moreover, neither Mr. Moldovan nor Mr. Holmes used the information on the forms to assess and determine the suitability of the Options Program for MII. Mr. Holmes acknowledged that he never did a suitability review at any time. Mr. Moldovan was not aware that he needed to investigate to make a determination about suitability, and if he did something, he could not recall what it was.

[18] The trial judge then made this critical finding (at para. 106):

> [106] In my view, Mr. Moldovan and Mr. Holmes failed to take reasonable care in assessing MII's suitability for participation in the Options Program, and I conclude that if a proper assessment (as described by Mr. Fox, and consistent with the obligation to "Know your client") had been done, MII would not have been accepted as a client. Moreover, because of the undisputed importance of margin and the ability to "stay in the game," and because Mr. Marlin was giving a personal guarantee for MII, Mr. Marlin's personal circumstances needed to be taken into account in assessing whether the Options Program was suitable for MII. In that light, since Mr. Marlin was personally at risk, Mr. Moldovan and Mr. Holmes needed to consider whether participation in the Options Program was suitable for a retired person in his 80s. I find that they simply failed to do this.

[19] On the issue of contributory negligence, the trial judge noted the defendants' submission that MII never informed Canaccord, after October 2005, that the information in the account forms was incorrect so as to have allowed Canaccord to know that MII was not suitable for the Options Program. The trial judge rejected this submission (at para. 117):

> [117] However, I cannot accept this submission. Mr. Moldovan and Mr. Holmes had an obligation to know their client, and to undertake an assessment of MII's suitability for participation in the Options Program. I have concluded that they failed at the outset to take reasonable care in assessing MII's suitability. They did not do what a reasonably prudent investment advisor would and should have done, and they breached their duty to "Know your client." In those circumstances, I am not prepared to find that MII was also at fault for the damage caused.

III.

[20] On cross-appeal, the defendants allege these additional errors in the judgment:

> 22. The trial judge erred in finding that MII suffered losses because it was unsuitable for the options trading programme in the absence of an evidentiary basis that the company lacked the assets and resources that would have made it capable of bearing the risks of the programme.
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> 23. Alternatively, MII made a series of representations to the respondents about its assets and resources that, if true, would have made it capable of bearing the risks of the programme. MII had a continuing contractual obligation to Canaccord to ensure that those representations were correct. Liability should therefore be apportioned 50% to MII.

[21] The first error is not developed in any substantial way in the defendants' factum on the cross-appeal. Referring to the information contained in the client opening forms, the defendants say this in their factum (at para. 31):

> 31. There is also no evidence that the information is wrong, other than Mr. Marlin's unreliable memories. There is no evidence that MII was unable to make second margin call and so no evidence that MII's losses were caused by the respondents.

[22] With respect, this submission is self-contradictory. There was evidence that Mr. Marlin and MII had nominal assets. It was Mr. Marlin's evidence, and it was as

the trial judge said "uncontradicted". Mr. Marlin's memory was clearly an issue by the time of trial but the trial judge was alive to this and accepted his evidence nonetheless.

[23] The trial judge made a clear finding (see para. 115) to the effect that Messrs. Moldovan and Holmes' failure to take reasonable care in assessing MII's suitability for the Options Program caused MII to suffer damage. No suggestion that the findings of fact underlying this conclusion were palpable and overriding errors was advanced by the defendants.

[24] I would not disturb the trial judge's findings on liability. But I would turn to her conclusion on the issue of contributory negligence. In my respectful view, the judge did not come to grips with the central question in the consideration of any contributory negligence on the part of MII (through Mr. Marlin).

[25] This Court discussed contributory negligence in the context of client/investment adviser actions in *Refco Futures (Canada) Ltd. v. SYB Holdings Corp.*, 2004 BCCA 15. There, Madam Justice Ryan quoted Viscount Simon (at para. 101):

> [101] The leading case on contributory negligence is *Nance v. B.C. Electric Railway*, [1951] A.C. 601 (J.C.P.C.). Viscount Simon set out the following principle at p. 611:
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> > But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.

[26] The Court noted s. 1(1) of the *Negligence Act*, R.S.B.C. 1996, c. 333 and Mr. Justice Lambert's observations for the majority in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.) and, in particular, this discussion (at paras. 19 and 24 of *Cempel)*:

> I think that such an approach to apportionment is wrong in law. The *Negligence Act* requires that the apportionment must be made on the basis of

> "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
>
> ...
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> In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. In making that apportionment in this case I would apportion 60% of the fault to the defendant, Harrison Hot Springs Hotel, and 40% of the fault to the plaintiff, Cassandra Cempel.

[27] It appears to me that rather than look to whether Mr. Marlin, in Viscount Simon's words, "…did not in his own interest take care of himself and contributed by this want of care, to his own injury…", the learned judge erred (at para. 117) by concentrating solely on the conduct of Messrs. Moldovan and Holmes. In my opinion, it is clear that Mr. Marlin "did not in his own interest take care of himself". Although he may not have been responsible for the erroneous information on the account forms, he chose to participate in the Options Program and to continue participating in it despite his inexperience with options trading, his limited financial resources and his ailing health. Mr. Marlin's failure to take reasonable care of himself contributed to his losses.

[28] That being so, it is open to this Court to undertake the apportionment of fault discussed in *Cempel*. In doing so, I would apportion fault at 80% to the defendants and 20% to MII and Mr. Marlin.

IV.

[29] I turn to MII's principal appeal. On damages, MII, through its expert, Mr. Dean E. Holley, purported to nominate a "Claim Period" from 1 September 2008 to 31 December 2008. This period marked the steady decline in MII's position in the Options Program to the point when its participation in the scheme ceased. Losses

during this period amounted to $311,291.29. Mr. Holley did not deduct therefrom the gains enjoyed by MII from the opening of its position in the Options Program to 31 August 2008. During this period, MII made a net gain of $91,339.07.

[30] The trial summarized MII's position on damages so (at para. 128):

> [128] MII says that Canadian courts have adopted two approaches to the assessment of losses in a case such as this. One approach is to examine the impugned transactions and assess the loss associated with each. The other approach is to allow a plaintiff to nominate a claim period and examine the loss within that period. On that approach, gains outside the claim period are not taken into account. MII says the latter approach is the correct approach here, and that the defendants are not entitled to offset the losses against past profits. In support of its position, MII cites *Sharpe v. McCarthy* (1994), 94 B.C.L.R. (2d) 384 (C.A.) and *Zraik v. Levesque Securities Inc.*, 2001 CanLII 21223 (Ont. C.A.).

[31] The trial judge distinguished *Sharpe v. McCarthy* in the manner that Hood J. did in *Allen v. Girard*, 2002 BCSC 1354 (at para. 132):

> [132] Unlike *Sharpe v. McCarthy*, this is not a case where the complaint is about individual transactions that are separate and distinct from one another. Rather, the transactions and trades are linked. They are part of a systematic approach to producing income through the action of selling combinations of options, that may succeed over time, if one has sufficient discipline and capital. Moreover, I have found the defendants liable on the basis that they failed to exercise reasonable care in assessing whether participation in the Options Program was suitable for MII, and that but for their negligence, MII should and would have been excluded from the Program at the outset. In those circumstances, MII would not have suffered the losses, but also would not have enjoyed the gains. In my view, to put MII back in the position it would have been in had the breach of duty not occurred, both the gains and the losses should be taken into account.

[32] I respectfully agree with this reasoning. *Sharpe v. McCarthy* and *Zraik v. Levesque Securities* are very different cases from that at bar and the difference is largely based, as the trial judge said, on the fact that the transactions and trades in the Options Program are linked; they are part of a "systematic approach to producing an income through the action of selling combinations of options...".

[33] MII suggested in its factum, and stressed again in its oral submissions, that the trial judge erred by returning MII to the time when the defendants first violated the standard of care and not to the time when the defendants were negligent, which

was when the losses occurred. This reflects the defendants' point that the tort of negligence is not complete or perfected until a loss has been experienced. But this overlooks the fact that there were losses in the period before 31 August 2008; they were simply “uncrystalized” because MII was able to stay in the Options Program.

[34] Further, the defendants' approach here mistakenly circumscribes the limit of MII's damages to the period when the defendants say it enjoyed an actionable cause of action in negligence. That confuses the measurement of a plaintiff's loss with the issue of when a defendant's negligence, that is, his breach of a standard of care owed to the plaintiff, became actionable at the suit of the plaintiff. The two are not necessarily coterminous. One must go back to first principles as the Supreme Court of Canada did in *Athey v. Leonati*, [1996] 3 S.C.R. 458. In dealing with the respondent's analogy to cases of independent intervening events after a plaintiff has been injured by a defendant's negligence, Mr. Justice Major considered “first principles” (at para. 32):

> [32] To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[35] So here, the trial judge was required to do what she indeed did: assess what MII's circumstances would have been in its “original position”, that is, before the defendants in breach of their duty of care placed it in the Options Program, and compare that position with MII's “injured position” at the end of the Options Program. MII was placed in its “original position” as though it had never been involved in the Options Program at all.

[36] This is the approach sanctioned by this Court in *Secord v. Global Securities Corp.*, 2003 BCCA 85. That was a case involving the negligent allocation of investments which included, coincidentally, options trading that was initially successful (causing the account value to rise), but that quickly turned disastrous. The Court upheld the trial judge's decision to award the plaintiff investor a fixed sum as compensation for “the lost opportunity to place capital more productively in other investments” (at para. 44). Notably, the trial judge in *Secord*, 2000 BCSC 1544, held that the issue in measuring damages was (at para. 199):

> [199] What is necessary to put the plaintiffs in the same position, or as good a position, as if the defendants had not involved them in options trading? This is the question that arises, whether the breach is considered to be in contract or negligence. The answer is complicated by the fact that the options trading frequently involved the purchase of the underlying equities, and I was not persuaded on the evidence that the defendants were in breach of their duties through the selection of the equities per se.

[37] I note parenthetically that a number of the cases in this area assess damages arising out of a broker's negligence by constructing a hypothetical portfolio of appropriate investments, looking at the experienced returns therefrom, and comparing those returns to the losses experienced by the plaintiff in the inappropriate investments. Cases like *Hawkenson v. Rogers*, 2006 BCCA 177 and *Laflamme v. Prudential-Bache Commodities Canada Ltd.,* 2000 SCC 26 are examples of the application of this methodology. It may well be preferable in most cases. However, neither party submitted this methodology should be used and I am satisfied that, in the particular circumstances of this case, the trial judge’s alternative approach to assessing damages is sound.

V.

[38] In the result, I would dismiss the appeal and allow the cross-appeal to the extent of apportioning fault between the parties as I have indicated.

[39] The defendants should have costs on the appeal and the cross-appeal.

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Frankel"