SUPREME COURT OF NOVA SCOTIA
Citation: *MacRury v. Keybase Financial Group Inc.*, 2016 NSSC 159

Date: 20160623
Docket: Hfx No. 343692
Registry: Halifax

Between:

Kenneth MacRury and Sheila Knowlton-MacRury

Plaintiffs

v.

Keybase Financial Group Inc., Global Maxfin Investments Inc., and Joseph Daniel Laurie

Defendants

DECISION

Judge: The Honourable Justice Denise M. Boudreau

Heard: May 3, 2016, in Halifax, Nova Scotia

Counsel: Gavin Giles, Q.C., and Jane O'Neill, for the Plaintiffs
Kim Duong and Maria Brunello, for the Defendants Keybase Financial Group Inc. and Joseph Daniel Laurie
Michael Ryan, QC, for the Defendant Global Maxfin Investments Inc.

By the Court:

Introduction

[1] The plaintiffs have made application for summary judgment on evidence, as against the three defendants in this matter. This action was commenced against the defendants Keybase Financial Group Inc. ("Keybase") and Mr. Laurie, by Notice of Action dated February 10, 2011. The claim was amended in March 2011 to add defendant Global Maxfin Investments Inc. ("Global").

[2] The plaintiffs submit that summary judgment should be granted on the issue of liability, as, in their submission, there are no genuine issues of material fact for trial.

[3] The evidence before me on this motion is: from the plaintiffs: affidavit of Gavin Giles with attachments (sworn April 14, 2016); affidavit of Jane O'Neill with attachments (sworn April 26, 2016). From Global: affidavit of Maria Andreescu with attachments (sworn April 22, 2016). From Keybase and Mr. Laurie: affidavit of Joseph Laurie with attachments (sworn April 22, 2016); affidavit of Tijana Polic with attachments (sworn April 22, 2016).

Facts

[4] The plaintiffs' claim is founded in breach of contract, negligence, and breach of fiduciary duties. The defendant Mr. Laurie was an investment mutual funds advisor/salesperson, working with Global, and then later, with Keybase. The plaintiffs were his clients. The original Statement of Claim provides as follows:

> 8. Notwithstanding the MacRurys' age, financial circumstances, investment objectives and investment knowledge, Laurie and Keybase advised and recommended to them that they engage in a leveraged investment strategy (" the Leveraged strategy") of a type known generally as a "Smith Maneuver". The particulars of the advice and recommendations provided to the MacRurys by Laurie and Keybase including, without limitation, the following:
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> a) that the MacRurys convert their mortgage on the Chester Property to a home line of credit and borrow an additional $300,000 on the credit line for investment purposes;
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> b) that the MacRurys borrow $200,000 for further investment purposes by taking on a mortgage on the Iqualuit Property;
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> c) that the MacRurys borrow an additional $1.25 Million for further investment purposes by taking out additional investment loans to be secured by certain investments to be purchased for them by Laurie and Keybase;
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> d) that the combined $1.75 million referred to above the used by Laurie and Keybase to purchase certain investments for the MacRurys;
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> e) that the MacRurys make interest only payments on the $1.75 million borrowed for the certain investments referred to above.
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> 9. Laurie and Keybase represented to the MacRurys that the $1.75 million referred to above would be invested in funds that would provide them with monthly distributions from those funds. Laurie and Keybase also represented to the MacRurys that the monthly distributions would be sufficient to service the $1.75 million debt and would also provide them with additional monthly income for expenses or for reinvestment.
>
> 10. As a result of the representations made by Laurie and Keybase, the MacRurys understood that the Leveraged Strategy carried little or no risk to them and that at the end of a fifteen year period, they would be in a position to pay out the

principle on all of the loans referred to above and would have a large and secure investment portfolio left over.

11. Laurie and Keybase failed or neglected to advise the MacRurys that their monthly distributions referred to above would be paid out of both the $1.75 million which they would be borrowing and from the interest which would be earned thereon. Laurie and Keybase failed or neglected to advise the MacRurys that the Leveraged Strategy could result in negative returns.

[5] The claim goes on to allege:

20. As a direct result of the advice and recommendations made by Laurie and Keybase, the MacRurys' investments are currently valued at approximately $1.1 million while their debt obligations stand at approximately $1.75 million. Thus, and as a direct result of Laurie's and Keybase's recommendations regarding the Leveraged Strategy, the MacRurys' net worth has declined by approximately $650,000.

21. The MacRurys say that the Leveraged Strategy recommended to and implemented for them by Laurie and Keybase was wholly unsuitable for them.

22. The MacRurys say further that Laurie and Keybase owed them a duty of care and that Laurie and Keybase breached that duty of care by failing to:

a) correctly assess the MacRurys' financial circumstances, investment experience, objectives and risk tolerance profile, and to keep such assessment current and correct;

b) educate the MacRurys as to the clear and well known risks of employing the Leveraged Strategy in the circumstances of the MacRurys, including, without limitation, the significant risk of losses to which the MacRurys would be unable to respond;

c) provide advice and make recommendations necessary to ensure that the MacRurys' investments were consistent with their objectives and risk tolerance;

d) ensure that the investment and portfolio advice they provided was suitable for the MacRurys;

e) to comply with requirements of the MFDA and the *Securities Act* (Nova Scotia).

23. The MacRurys say that they entered into a contract with Laurie and Keybase under which Laurie and Keybase agreed to provide them with suitable investment advice. The MacRurys say that by failing to provide them with suitable investment advice, Laurie and Keybase are in breach of the contract, causing losses to the MacRurys.

> 24. The MacRurys say that Laurie and Keybase owed them a fiduciary duty when providing them with investment advice. The MacRurys say that by recommending that they enter into the Leveraged Strategy, Laurie and Keybase earned significant commissions and fees which were never disclosed to the MacRurys. The MacRurys say that by virtue of these fees and commissions, Laurie and Keybase, and each of them, put their own financial interests ahead of the interests of the MacRurys, thereby breaching the fiduciary duty.
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> 25. In addition, the MacRurys say that Keybase was negligent for failing to properly supervise Laurie in his recommendation and approval of investments for the MacRurys.
>
> 26. The MacRurys say that in addition to being directly liable to the MacRurys for breach of contract, breach of fiduciary duty and negligence, Keybase is vicariously liable for the actions of Laurie. At all material times, Laurie was acting in the course of his employment, in the ordinary course of Keybase's business and with Keybase's apparent, actual or implied authority.

[6] The amended pleadings allege that Mr. Laurie was employed by Global from April 2005 to February 2007, and by Keybase from March 2007 to present. In their amendment, the plaintiffs make the same allegations against Global as against Keybase, and further note that in Mr. Laurie's move from one to the other, there was no change in the Leveraged Strategy.

[7] A Notice of Defence was filed jointly by Mr. Laurie and Keybase. Those defendants pled that the leveraged strategy was completely explained to the MacRurys and that they understood, or should have understood, the risks and benefits of the strategy. Their defence states:

> 16. At all material times, the plaintiffs were cognizant of the relationship between the costs, benefits, and risks inherent in investing. In particular, the plaintiffs were asked to execute a leverage risk disclosure form, which specifically states that the "purchase of securities using borrowed money magnifies the gain or loss on the

cash invested". The form goes on to state that "it is important that an investor proposing to borrow for the purchase of securities be aware that a purchase with borrowed monies involves greater risk than a purchase using cash resources only".

17. Regardless the aforementioned risks, the plaintiffs actually earned over $300,000 in excess distributions over the cost of their investment loans. However, and despite the recommendations made by Laurie, the plaintiffs failed to pay down their debts and they instead used excess distributions on funding their lifestyle choices (such as the purchase of a new roof, a new furnace, and a new car). From the outset, the plaintiffs have had the ultimate choice with respect to their investments, and have made their own informed decisions as to how they wished to deploy their capital, how much debt to carry, and how to spend their excess distributions.

18. During the period between the Autumn of 2008 and December 2010, Laurie spoke with the plaintiffs several times regarding their investment strategy. Laurie also called the plaintiffs with regard to reinvesting their money. Once the plaintiffs began expressing concern about their investments, Laurie discussed possible courses of action and reiterated the long-term nature of the investment strategy. Importantly, in January 2010, Laurie again advised the plaintiffs that they could not continue to spend their excess distributions, as they should be invested, and the plaintiffs should not take distributions, but should instead bring their portfolio back up. To their own detriment, the plaintiffs have regularly failed to follow Laurie's advice and recommendations throughout the relevant times.

19. At all material times, the plaintiffs acknowledged and understood the downside and risks associated with investments and agree that in the long term, the markets would return, and the plaintiffs agreed to stay in the strategy for the long-term. These defendants deny that there has been any breach of duty, breach of contract, want of care, or negligence on their part, particularly with regard to advising or serving the plaintiffs in connection with their investment decisions.

20. At all material times, Laurie was properly supervised by Keybase. These defendants further plead that, at all material times, they acted in a professional and prudent manner.

21. These defendants deny that they owed the plaintiffs a fiduciary duty as alleged in the amended statement of claim or at all. In the alternative, if a fiduciary duty was owed (which is denied), these defendants deny that such duty was breached in any manner whatsoever.

22. At all material times, the plaintiffs were aware of the risks and rewards of investing in their chosen funds, including the increased risk of entering into a leveraged account. In pursuit of the potential rewards, the plaintiffs knowingly and willingly accepted the attendant risk. These defendants rely on the doctrine of *volenti non fit injuria* (i.e., no injury is done to one who consents).

[8] Mr. Laurie and Keybase further pled: normal economic or financial market factors; contributory negligence; and failure to mitigate.

[9] Global has also filed a defence (very recently amended). Global's defence is very similar to that filed by the other defendants: they say that while Mr. Laurie was a salesperson for Global, he performed his job appropriately and with all due diligence. Global notes that its relationship with Mr. Laurie ended on February 28, 2007. Global also pleads contributory negligence on behalf of the plaintiffs, as well as the *Tortfeasors Act* (NS).

Settlement Agreement, decision, and order of the MFDA

[10] It would appear that the plaintiffs were not Mr. Laurie's only unhappy clients. In fact, a number of people voiced complaints about Mr. Laurie to his governing body, the Mutual Fund Dealers Association of Canada ("MFDA"). The MFDA commenced formal disciplinary proceedings against Mr. Laurie in 2014. These proceedings involved 25 clients who had come forward, two of which were these plaintiffs.

[11] Following investigations, on August 11, 2015, Mr. Laurie and the MFDA reached a settlement agreement with respect to the disciplinary proceedings ("the Agreement"). Under the heading entitled "**Overview**" the Agreement provides:

14. This settlement concerns the Respondent (Mr. Laurie) recommending and implementing a leveraged investment strategy in the accounts of 25 clients that was unsuitable for the clients having regard to their personal and financial circumstances, including their age, low investment risk tolerance, limited investment knowledge, and inability to make the payments on their investment loans in the event the leveraged investment strategy did not perform as the Respondent represented it would.

15. The leveraged investment strategy recommended by the Respondent was based on the premise that the investments purchased by the clients with their investment loans would generate sufficient returns to pay the clients' borrowing costs, as well as provide them with the ability to pay down their mortgages more quickly and/or generate excess discretionary income, such that the clients would not have to incur any out-of-pocket expenses to sustain the strategy. The respondent did not adequately explain to the clients the risks inherent in using borrowed monies to invest generally, or the risks specific to the leveraged investment strategy he recommended.

16. Relying on the Respondent's recommendation, the clients borrowed far in excess of the amount they could reasonably afford to finance and invested the borrowed monies in return of capital mutual funds ("ROC mutual funds").

17. The Respondent misrepresented aspects of the clients' know-your-client information on their account opening documents and loan applications in order to increase the likelihood that the lenders would approve their investment loans and the members would approve the implementation of the leveraged investment strategy in the clients' accounts.

18. By late 2008 or early 2009, the unit values of the ROC mutual funds purchase by the clients had declined and the distributions paid by the ROC mutual funds to investors were reduced. As a result, in some cases, the clients were unable to continue to make the payments on their investment loans using only the distributions they received from the ROC mutual funds. In all cases, the investment losses the clients incurred and the reduced distributions they received from the ROC mutual funds jeopardized the financial security of the clients and caused them significant financial hardship.

[12] The next section of the Agreement is entitled "**The Leveraged Investment Strategy**":

19. In or about late 2005 to early 2006, while registered with Global Maxfin, the Respondent learned of a leveraged investment strategy that used ROC mutual funds.

20. The leveraged investment strategy that the Respondent subsequently recommended to his clients both at Global Maxfin and later at Keybase, involved the following steps:

(a) the Respondent would:

i. refer a client (or prospective client) to a mortgage broker or lender for the purposes of determining how much the lender was willing to lend the client and establishing a mortgage or a line of credit ("LOC") for the client in that amount; or

ii. have a client (or prospective client) referred to him from a mortgage broker, who had already established a mortgage or a LOC for the client (or prospective client);

(b) under either scenario, the mortgage broker/lender would determine the client's "available equity" based on an amount equal to at least 75% of the value of the clients home, less any debt owed on the home. The client would then take out a mortgage or LOC secured against the client's home in an amount generally equivalent to the client's "available equity";

(c) relying upon the Respondent's recommendation, the client used the proceeds from the mortgage or LOC to purchase investments for the client's account and, in many instances, to fund the client's portion of a 2:1 or 3:1 investment loan obtained from an investment loan company. Where the client utilized a 2:1 or 3:1 investment loan, the net effect was to significantly increase the total amount of money borrowed by the client above what the client otherwise qualified for based upon their "global limit" or "available equity";

(d) the Respondent recommended that the client's investment loan(s) be structured as an interest-only loan(s) (as opposed to principal and interest loans) in order to reduce the clients monthly payment obligations. The Respondent also recommended that the clients apply for "no margin" loans, with margin loans only being taken out by a client if the lender required it for a particular client;

(e) the Respondent recommended that the clients invest all of the borrowed monies in ROC mutual funds, based on his opinion that they paid investors a regular income stream;

(f) the Respondent arranged for the distributions paid by the ROC mutual funds to be deposited in the client's bank account. The Respondent directed the client to use the distributions to make the monthly payments on their mortgage or LOC, as well as their investment loan(s), and, in some cases, to also make an accelerated (i.e. additional) payment on their mortgage. The Respondent advised the client that the client could treat any remaining cash as a supplementary source of income to be used for discretionary purposes; and

> (g) the Respondent also recommended that the client purchase a life insurance policy from him using either their regular income or by using the distributions paid by the ROC mutual funds. The Respondent's rationale for this was that once the clients mortgage or LOC was paid off, the client would have the option of not paying down the principal on their investment loan (i.e. the client could continue to pay only interest on the investment loan), allowing the client to carry the investment loan indefinitely while using the distributions received from the ROC mutual funds primarily for other purposes. When the client passed away, the proceeds from the life insurance policy would be applied to repay the investment loan.

[13] The next section was entitled "**Misrepresentation of Client Information**":

> 21. Between 2005 and 2011, the Respondent misrepresented the know-your-client information recorded on client's account opening and loan application documents by, among other things:
>
> (a) misrepresenting the client's risk tolerance, investment knowledge, and time horizon;
>
> (b) overstating the clients income; and
>
> (c) overstating the client's assets and understating the client's liabilities.
>
> **(a) Misrepresenting risk tolerance, investment knowledge, and time horizons**
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> 22. From 2005 to 2011, the Respondent "matched" 25 clients to the leveraged investment strategy he placed them in by populating virtually identical risk tolerances, investment knowledge levels, and time horizons on their account opening documents as follows:

[14] What follows in the Agreement is a table, with some information about the 25 clients: numbers 7 and 8 are indicated as "K & S M". There appears to be no serious objection to the suggestion that "K & S M" are, in fact, these plaintiffs.

Their risk tolerance is noted to be "medium-high"; their investment knowledge "good"; their time horizon "11-20 years". The Agreement goes on:

> 23. The respondent recorded the information on the clients' account opening documents at the time that he recommended the leveraged investment strategy to them when he knew or ought reasonably to have known that:
>
> > (a) all 25 clients had a far more modest tolerance than "medium-high", ranging from very low to medium and, based on the Respondent's misrepresentations, believed the leveraged investment strategy was low risk and secure;
> >
> > (b) most of the clients had limited or no investment knowledge; and
> >
> > (c) most of the clients had time horizons of less than 10 years, based on their age, health issues, and need for liquidity.
>
> **b) Overstating income**
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> 24. The Respondent overstated the income on the account opening and loan application documents of six clients who implemented the leveraged investment strategy in their accounts.
>
> …
>
> **c) Overstating assets and understating liabilities**
>
> 26. The respondent overstated the assets and understated the liabilities (including in some instances not recording liabilities altogether) on the account opening and loan application documents of 19 clients who implemented the leveraged investment strategy in their accounts.
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> …
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> **Failure to explain leveraged investment strategy**
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> 32. From 2005 to 2011, the respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks, benefits, material assumptions, features and costs of the leveraged investment strategy and its underlying investments that he recommended and implemented in the accounts of 25 clients. In particular, the Respondent, at various times, misrepresented, failed to fully and adequately explain, or omitted to explain:
>
> > (a) the nature of the distributions that the ROC mutual funds paid to investors, that is, that the distributions represented *profits* generated by the

ROC mutual funds, when in fact a substantial portion of the distributions paid to investors consisted of a return of the investors' own capital;

(b) the risk that the ROC mutual funds might decline in value over time, particularly if the clients used the distributions paid to them by the ROC mutual funds to pay their investment loans, mortgages or LOC or for discretionary expenses instead of reinvesting the distributions;

(c) the risk that if the ROC mutual funds declined in value, the clients might not be able to sell the ROC mutual funds to pay back the entirety of their investment loans or cover investment losses; and

(d) the risk that the ROC mutual funds might reduce, suspend or cancel altogether the distributions paid to investors due to declining market conditions, poor investment performance or other factors, such that the clients would be forced to incur out-of-pocket expenses to make the payments on their investment loans and sustained leveraged investment strategy.

…

36. During his discussions with clients, the Respondent focused on the positive aspects of the leveraged investment strategy and did not disclose or discuss all of the attendant risks and potentially negative outcomes. The Respondent either did not disclose and discuss the likelihood of any risks materializing, or if he did discuss such risks and the likelihood of the risks materializing, he did so in a manner that downplayed the likelihood of the risks arising and the potential consequences for the clients if the risks did materialize.

37. As a result of the Respondents misrepresentations and omissions, including the Summaries and Spreadsheets he prepared and provided to the clients, the clients believed that:

(a) the leveraged investments they purchased would increase in value significantly while also generating a continuous monthly cash flow;

(b) the leveraged investment strategy was low risk and their investments were secure; and

(c) they would not have to incur any out-of-pocket expenses in order to implement and maintain the leveraged investment strategy in their accounts.

Unsuitable Leveraging Recommendations

38. From 2005 to 2011, the leveraged investment strategy that the respondent recommended and implemented in the accounts of 25 clients was not suitable and appropriate for the clients having regard to the clients' "know-your-client" information and financial circumstances including, in particular:

(a) the ability of the clients to afford the cost associated with the investment loans, regardless of the performance of the investments and without relying on anticipated income or gains from the investments;

(b) the ability of the clients to withstand investment losses without jeopardizing their financial security if the leveraged investment strategy did not perform as represented; and

(c) the clients':

i. age;

ii. risk tolerance;

iii. investment knowledge;

iv. net worth;

v. employment status (most of the clients were retired and/or on fixed or limited incomes);

vi. health issues; and

vii. investment time horizons.

39. The 25 clients borrowed between $50,000 and $1,260, 000 each, resulting in excessive loan-to-net-worth ratios. After receiving the investment loans, 22 of the 25 clients had loan-to-net-worth ratios of at least approximately 50% to 150% as follows:

# 7 & 8	K & S M	Both 61	January 2007	$750,000	--
	K & S M	Both 61	April 2007	$1, 000, 000	150%

40. The Respondent knew, or ought to have known, the investment loans were excessive having regard to the resulting debt servicing obligations that would be imposed on the clients and the potential for the client's obligation to repay the investment loans to erase a substantial portion, and potentially all, of the clients' net worth in the event the strategy did not perform as the Respondent represented it would.

41. All 25 of the clients who implemented the leveraged investment strategy were relying entirely upon the distributions generated by the ROC mutual funds to pay all of the costs of servicing their investment loans. Many of the clients were retired seniors or individuals living on fixed or limited incomes. Some of the clients were in poor health such that they had limited capacity to earn income, or limited to no opportunity to re-enter the work force should it be necessary to earn additional employment income. Many, if not all, of the clients did not have the means to cover the costs of servicing the investment loans in the event the leveraged investment strategy did not perform as the Respondent represented it would.

42. Most of the clients had limited or no investment knowledge, such that they were incapable of understanding and appreciating the potential risks of the leveraged investment strategy before agreeing to implement it in their accounts. The Respondent exacerbated the effect of the clients' limited investment knowledge by leading the clients to believe, through his representations and omissions, that the leveraged investment strategy was a safe and secure manner of investing.

43. Most of the clients had investment risk tolerances ranging from very low to medium, at best, such that the leveraged investment strategy generally exceeded the level of risk that the clients are willing to assume, had they understood and appreciated the true risks of the strategy.

44. Most of the clients had investment time horizons of less than 10 years, based on their age, health issues, and the need for liquidity, such that they leveraged investment strategy exceeded the investment time horizon of those clients.

45. As a result of implementing the leveraged investment strategy, almost all of the clients incurred significant investment losses attributable to both a decline in the value of the ROC mutual funds they purchased and a reduction in the distributions paid by the ROC mutual funds to investors (which required the clients to draw on other sources of assets or income to sustain the leveraged investment strategy).

...

[15] Under the section **"Additional Factors"** the Agreement notes:

50. The respondent states that he has errors and omissions insurance coverage, which is serving to respond to claims that have been commenced by clients with financial losses in this matter.

[16] The next section is entitled **"Contraventions":**

52. The Respondent admits that:

a) between 2005 and 2011, he misrepresented the know-your-client information on the account opening and loan application documents of 25 clients, thereby engaging in conduct unbecoming an Approved Person and failing to observe high standards of ethics and practice in the conduct of business, contrary to MFDA Rules 2.2.1 and 2.1.1;

> b) between 2005 and 2011, he misrepresented, failed to fully and adequately explain, or omitted to explain, the risks, benefits, material assumptions, costs and features of a leveraged investment strategy that he recommended and implemented in the accounts of 25 clients, including the risks that:
>
> > (a) the underlying investments might decline in value such that the clients might incur investment losses and would be unable to rely on the sale proceeds of the investments to pay back their investment loans; and
> >
> > (b) the underlying investments might reduce, suspend or cancel altogether the distributions paid to investors upon which the clients were relying to make the payments on their investment loans,
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> thereby failing to ensure that the leveraged investment strategy was suitable and appropriate for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1; and
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> c) between 2005 and 2011, he recommended and facilitated the implementation of a leveraged investment strategy in the accounts of 25 clients without performing the necessary due diligence to learn the essential facts relative to the clients and without ensuring that the leveraged investment strategy was suitable for the clients and in keeping with their investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

[17] The Agreement provided that it would not be final (or public) unless and until it received approval from the MFDA hearing panel. Paragraph 58 of the Agreement also provided the following statement:

> 58. Staff and the Respondent agree that if this Settlement Agreement is accepted by the hearing panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

[18] The matter was heard by the MFDA hearing panel on August 18, 2015. Written reasons for decision were issued on October 26, 2015, with the panel accepting the Agreement.

Summary Judgment

[19] The "new" CPR Rule 13 provides as follows:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
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> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the preceding, allow a claim, dismiss a claim, or dismiss a defence.
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> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favor of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
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> > (a) determine a question of law, if there is no genuine issue of material fact for trial;

> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[20] The previous “two-part” test, under the old rule, no longer exists (*Quadrangle Holdings v. Coady Estate* 2016 NSSC 106; *Drysdale v. Bev & Lynn Trucking* 2016 NSSC 109). The mandatory wording of Rule 13.04(2) remains, meaning that summary judgment must be granted where the court finds no genuine issue of material fact for trial, and no question of law requiring determination (*Ross Estate v. Police Assn. of Nova Scotia*, 2014 NSSC 42; *Krewenki v. Long Beach Boat Building Ltd.*, 2015 NSSC 80).

[21] A motion for summary judgment is not the time to assess issues of credibility, or to weigh evidence. Nor, by virtue of Rule 13.04 (2), is a motions judge hearing such a matter to be concerned with the parties “chances of success”.

[22] It is the moving party’s burden to show that there are no genuine issues of material fact for trial. What is a “material fact”? As noted by our court in *Quadrangle Holdings Ltd. v. Coady Estate*, supra, at para. 26:

> A “material fact” is a fact that is essential to the claim or defence; it is a fact that can or will affect the outcome of the matter, or "anchors" the cause of action or defence: *Coady v. Burton Canada* 2013 NSCA 95 at para. 87; *Sinclair v. Fierro*, 2014 NSCA 5 at para. 28.

[23] The plaintiff submits that there are no material facts for trial in this case. In making this submission, the plaintiff relies heavily on the recent Nova Scotia Court of Appeal decision in *National Bank v. Barthe Estate* 2015 NSCA 47 (hereinafter "*National Bank (CA)*").

[24] This was one of many Nova Scotian cases which arose from the collapse of Knowledge House, which happened after an insider's market manipulation scheme was discovered. An employee of National Bank, who was a stockbroker, was involved in the scheme; that bank was sued for negligence, and for failure to supervise him appropriately. At trial, the bank denied any responsibility or liability for the losses.

[25] At the end of the trial, but before the trial judge had rendered his decision, it was discovered that the bank had, sometime previously, entered into a settlement agreement with its provincial regulator. In that settlement agreement the bank had admitted violations of securities law, and admitted their failure in supervising their employee. This settlement agreement had not been disclosed in the litigation.

[26] The trial judge gave a first decision in relation to the admissibility of the settlement agreement, and the weight to be given to it. Having decided that the

agreement was not protected by settlement privilege, he further concluded as follows (*National Bank v. Potter* 2012 NSSC 76):

> 55. Even though settlement privilege does not apply to concluded settlement agreements in this context, such agreements must still meet the traditional evidentiary tests for admission. In this case, the settlement agreement is an admissible hearsay statement on the basis of the exception against declarations against interest made by a party.
>
> 56. The settlement agreement is logically probative of the issues in dispute in this action. The settlement agreement is permissible similar fact evidence. Its probative value outweighs any prejudicial effect that may result from admission. Therefore, the settlement agreement is admissible for the truth of its contents subject to weight based on all the other evidence that is presented at trial.

[27] The trial judge went on to give a second decision in the trial proper (*National Bank v. Potter* 2013 NSSC 248). He considered and interpreted the admissions made in the settlement agreement, as part of his consideration of the whole of the evidence.

[28] When the case reached the Nova Scotia Court of Appeal, that settlement agreement took on crucial importance. The Court of Appeal was of the view that the concealment of that agreement by the bank, through years of protracted litigation and denials, was conduct worthy of stern sanction. The court noted as follows (*National Bank (CA)*):

> [280] … I conclude that the Bank had, through its execution of the settlement agreement, committed itself to an unequivocal act showing that it had decided "which of two conflicting positions… was the true one", by unequivocally coming down on the side of manipulation by Clarke and an acknowledgment that

> it had failed to supervise Clarke's activities. In my opinion the execution of the settlement agreement changed everything. From that point on the Bank had acknowledged in one forum its own negligence and failure to comply with regulatory laws and policies. Yet, in court, in its pleadings, it professed absolute innocence.
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> …
>
> [282] As I explain further below (p. 334-335), years after the settlement agreement was signed, and then years after its existence was discovered, the Bank still try to insist that it, and its employee Clarke, had complied with the law and done nothing wrong, such that they were entirely blameless, were in no way responsible for the losses experienced by others, and were themselves the innocent victims of a fraud perpetuated by an invariably fluctuating list of insiders.
>
> …
>
> [293] In this, the Bank's actions caused considerable harm and massive expense to the other litigants who found themselves caught up in more than a decade of needless litigation which should have otherwise been resolved years ago. Here are two specific examples of the harm experienced by others.
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> …
>
> [312] For all of these reasons I find that the Bank's repeated efforts to keep secret the contents of the settlement agreement it negotiated, as well as the other examples I have provided of very serious misconduct, constitute that rare and exceptional circumstance where the Court's own process has been abused, thereby requiring the Court's swift and unequivocal intervention.
>
> [313] All of this justifies striking the Bank's pleadings in all of its claims, counterclaims and defences in every action in which it was a participant in matters which form the subject of these three appeals.

[29] The Court of Appeal also noted that the settlement agreement, had its existence been known, might also have affected a summary judgment motion that had previously been made:

> [299] The fourth example of Bank misconduct to which I will refer is the bank's decision to challenge the summary judgment motion, in part, on the basis that Dr. Ristow had not put forward any proof that the bank had failed to supervise Clarke when, all along, the Bank was concealing proof of that very fact.

> [300] The Bank successfully defended Dr. Ristow's summary judgment application in 2009 (2009 NSSC 305 (N.S.S.C.)). There is no doubt that the Bank had every right to defend his claims vigorously. However, two elements of its defence show a continuation of the Bank's misconduct and an abuse of the court's process.
>
> …
>
> [303] Before Justice Hood, however, Dr. Ristow failed to prove the facts sufficient to support his claim for summary judgment. One of the critical facts missing is set out by Justice Hood in her decision at p. 78:
>
>> The settlement agreement between NBFL and to the IDA with respect to the Joliette branch is not proof that NBFL failed to supervise Bruce Clarke in the Halifax office. At trial, it may be helpful but it is not sufficient to establish Lutz Ristow's claim at this time.
>
> [304] While Justice Hood's conclusion is unimpeachable, what she did not know was that NBFL had withheld proof of that fact from the individual investors for over four years - a continuation of the abuse of the court's process. While the outcome of Dr. Ristow's summary judgment application may or may not have been different if he had been able to lay the 2005 settlement agreement and NBFL's admissions before Justice Hood, the more concerning fact is that a highly relevant document continued to be withheld.
>
> …

[30] In the case at bar, we are not talking about a "hidden" settlement agreement. The Agreement between Mr. Laurie and the MFDA is public and well-known. This is not a case where the plaintiffs allege any misconduct such as the court saw in *National Bank (CA).*

[31] However, it is the plaintiff's contention that the Agreement resolves all material questions of fact as between the parties to this litigation, when looked at in light of *National Bank (CA)*. The plaintiffs submit that the admissions made by Mr. Laurie in the Agreement would preclude him from arguing anything else at trial;

since to do so would constitute an abuse of process, following the logic in *National Bank (CA)*. He has, says the plaintiff, therefore admitted everything that is needed to prove liability.

[32] The defendants disagree. The defendants Mr. Laurie and Keybase argue that the admissions found in the Agreement do not resolve liability in this case, as there is contradictory evidence which they have put forward. Secondly, say the defendants, even if the admissions are binding, they do not constitute sufficient evidence to establish all the elements of the causes of action. Furthermore, they say, even if the Agreement resolves some issues of liability, there are remaining issues that are intimately intertwined, such as contributory negligence, and vicarious liability of the corporate defendants; such would result in “partial” summary judgment on liability, which would be improper.

[33] The defendant Global adopts those submissions, and has made some additional arguments. Global points out that neither it, nor Keybase, were parties to the Agreement, so they could not possibly be bound by it. Furthermore, they point out, it is unknown whether the plaintiffs have retained the mutual funds, in whole or in part, that they purchased while Global clients. Global therefore questions whether any duty owed by themselves to the plaintiffs, would have ended after the plaintiffs became Keybase clients.

Analysis

[34] I start by pointing out that, while *National Bank (CA)* is the foundation for the plaintiff's motion, the plaintiffs are in fact seeking that I go one step further than that decision. I say that because the Court of Appeal in *National Bank (CA)* was looking at the agreement retrospectively: what should be done where a trial took place without disclosure of such an agreement. Here, I am being asked to assess the matter prospectively: what should be done where a trial has not yet taken place, and we have the agreement.

[35] In *National Bank (CA)*, the Court of Appeal commented on the trial judge's approach, given the totality of the circumstances. In their view, the trial judge should have specifically focused his attention on whether an abuse of process had taken place:

> 332. From these passages we can see that the trial judge's attention was focused on whether he *needed* the settlement agreement and attachments to prove Clarke's improper activities, and to what extent (if at all) the settlement agreement was relevant to a claim of bad faith.
>
> 333. Respectfully, that was not the question the judge ought to have asked himself. As I have explained, it was essential that he consider and decide whether the Bank's concealment of the settlement agreement as well as its conduct throughout the litigation amounted to an abuse of process, and, if it did, with what result. Failing to appreciate the importance of that question, and then not answering it, was a serious error in law.

[36] And later:

348. The key assertion in the statement of defence that runs contrary to the admissions in the settlement agreement is the bank's denial that it failed to properly supervise Clarke in a number of different ways. This is pleading something that the bank knew to be false. It is also difficult to reconcile the Bank's insistence in its pre-June 2005 pleadings (which it never amended) that Clarke was on a "frolic of its own" and denying vicarious liability for his actions that the Bank's admissions in the settlement agreement that it failed to supervise Clarke. Warner, J. points out what follows, legally, from the Bank's admission on May 17, 2012 in its post-trial brief that it failed to supervise Clarke:

> [35] … The effect of this admission is that, if Clarke is found to have acted unlawfully; that is, fraudulently, negligently, or in breach of his contractual obligations to the Dunlop Clients or to any of them in connection with the 540 account, NBFL is liable to those Dunlop clients for Clarke's action both on the basis of NBFL's own negligence and breach of contract, and on the basis of vicarious liability for the acts of Clarke who, it is not contested, was acting throughout in his capacity as broker employed by NBFL.

349. This is an admission that the bank hid from every other party to this litigation, from the time it executed the settlement agreement in June 2005.

350. The profound effect such a disclosure would have had on the course of this litigation, cannot be denied.

351. As I have already explained, the trial judge made a serious error in failing to pursue that inquiry. With respect, the issue is not whether the Bank's *ex post facto* admissions in the settlement agreement served to confirm the evidence adduced at trial, but how the Bank's deliberate withholding of the settlement agreement affected the litigation. For example, the Dunlop Clients were forced to call Clarke as a witness, and establish that the Bank failed to supervise him. The Dunlop clients were compelled to take steps to prove something that the Bank admitted seven years before and had deliberately withheld. The fact that the Bank admitted that it failed to supervise Clarke in its May 17, 2012 post-trial brief after all evidence had been adduced is one of the most egregious examples of trying to close the stable door after the horse has bolted. By then the writing was on the wall, and the Bank's admission that it had failed to supervise Clarke, had violated securities laws, and had acted contrary to the public interest was no concession or admission at all.

352. From all of this the inescapable conclusion is that following the execution of the settlement agreement by its National President in June 2005, the Bank sought to maintain a position in its claims against others, and in its own defence, which it knew to be false.

[37] As I have pointed out, the plaintiffs' submission here goes one step further. They say that the *National Bank (CA)* decision leads to the implicit conclusion, that when a party makes admissions in a settlement agreement with a regulatory body, they must and will be bound by those admissions, in any subsequent court proceeding relating to those matters.

[38] Having framed the plaintiff's argument and the *National Bank (CA)* case, I wish to now look more closely at the Agreement here. What was admitted by Mr. Laurie in that document, specifically in relation to these plaintiffs?

The Agreement and its application to these plaintiffs

[39] It was acknowledged by the plaintiffs that not all of the Agreement can be said to apply to them.

[40] The Agreement refers to all clients with initials. There does not appear to be any dispute that "K & S M" are, in fact, the plaintiffs.

[41] At some places in the Agreement, the expression "all 25 clients" is used. These sections would, purportedly, apply to the plaintiffs. However, this is not always the case.

[42] The Agreement contains an "overview" which applies to all sections of the agreement, those involving all clients, and those involving some clients. I am not confident that it relates to these specific plaintiffs.

[43] Paragraphs 22 and 23 are entitled "misrepresenting risk tolerance, investment knowledge, and time horizons", referring to all 25 clients. However, paragraph 23 provides variations within that group of 25, without detailing those in or out:

> 23. The Respondent recorded the information on the clients' account opening documents at the time that he recommended the leveraged investment strategy to them when he knew or ought reasonably to have known that:
>
> (a) all 25 clients had a far more modest tolerance than "medium-high", ranging from very low to medium and, based on the respondent's misrepresentations, believed the leveraged investment strategy was low risk and secure;
>
> (b) most of the clients had limited or no investment knowledge; and
>
> (c) most of the clients had time horizons of less than 10 years, based on their age, health issues, and need for liquidity. (underlining is mine)

[44] The admissions at paragraphs 24 and 25 relate to "six clients".

[45] Paragraphs 26 to 31("**Overstating assets and understating liabilities**") note that the failings contained therein occurred in the cases of 19 of the 25 clients.

[46] Paragraphs 34 to 37 refer to documents created by Mr. Laurie for certain clients:

> 34. During the course of recommending the leveraged investment strategy to the clients, the Respondent created and provided spreadsheets (" Spreadsheets") to some or all the clients that showed only positive financial outcomes…

[47] Again, it cannot be definitively said that the plaintiffs are caught by those paragraphs.

[48] Paragraphs 41 to 45 of the Agreement do not apply to all 25 clients.

[49] For ease of reference, and for the purposes of this summary judgment motion and decision, in my view the only parts of the Settlement Agreement which could be said to apply to the Plaintiffs, are as follows:

1. That Mr. Laurie admits that "he advised that they could treat cash generated by their investments not required for the repayment of the investment related loans as a supplementary source of income" (Agreement para. 20(f));
2. That Mr. Laurie recommended a strategy that "was not suitable and appropriate for them, having regard to their KYC forms, and financial circumstances" (Agreement paras. 38-39);
3. That Mr. Laurie "misrepresented, failed to fully and adequately explain, or omitted to explain that their investments were a type and kind which

predominantly only returned capital and which did not generally produce profits." (Agreement para. 32(a));

4. That between 2005 and 2011, Mr. Laurie misrepresented the know-your-client information on the account opening and loan application documents of those clients (Agreement para. 52(a));

5. That Mr. Laurie misrepresented, failed to fully and adequately explain, or omitted to explain, the risks, benefits, material assumptions, costs and features or a leveraged investment strategy that he recommended and implemented in their account, including the risks that:

   a) The underlying investments might decline in value such that the clients might incur investment losses and would be unable to rely on the sale proceeds of the investments to pay back their investment loans; and

   (b) The underlying investments might reduce, suspend or cancel altogether the distributions paid to investors upon which the clients were relying to make the payments on their investment loans

thereby failing to ensure that the leveraged investment strategy was suitable and appropriate for the clients and in keeping with their investment objectives (Agreement para. 52(b));

6. That between 2005 and 2011, Mr. Laurie recommended and facilitated the implementation of a leveraged investment strategy in their accounts without performing the necessary due diligence to learn the essential facts relative to the clients and without ensuring that the leveraged investment strategy was suitable for the clients and in keeping with their investment objectives (Agreement para. 52(c)).

[50] Having said that, I then ask myself: are the defendants (in particular, Mr. Laurie) bound by those admissions at this trial? If he is, are there still genuine material questions of fact left for trial here?

Effect of admissions

[51] The defendants have argued that, notwithstanding the admissions in the Agreement, there is contrary evidence that exists, and that should be presented at a trial for a judge's consideration. That contrary evidence includes, for example:

1. Evidence in relation to the Know Your Client forms, which are of crucial importance in such cases. The evidence shows that, at times, these forms were completed by Mr. Laurie with the plaintiffs present; or sometimes they were mailed to the plaintiffs for their signature, having been pre-filled out. The forms were regularly updated in either fashion. It is the plaintiffs' signatures on all of the forms. They were free to make changes, and made such a change to a KYC form in 2011;
2. Due to the level of investment experience and education of the plaintiffs, the defendants submit that they would be found to have at least "good" investment knowledge;
3. These plaintiffs were looking at a 15 year timeline, not 10 years;
4. While the plaintiffs had expressed concern about their investments in early 2008, they expressly made no changes to their investment portfolio and expressed to Mr. Laurie that they were "in it for the long haul".

[52] In such a case, the defendants argue, they need the opportunity to put all of the admissible evidence before a trial judge, including the admissions. That judge

would weigh all of the evidence and make findings of fact. The defendants point out that the trial judge in *National Bank* had done exactly that.

[53]   The plaintiff argues that the Court of Appeal decision in *National Bank (CA)* fundamentally changes the approach a trial court should take, when faced with a case where formal admissions have been made in another forum, by one of the parties.

[54]   Frankly, I remain unconvinced. It must be remembered that the *National Bank (CA)* case had <u>very</u> particular facts which were being addressed by the Court of Appeal. That court was dealing with, in its view, a situation of very clear misconduct which needed to be addressed: that is, the concealment of the agreement by National Bank. Its comments must be interpreted in that light. I do not interpret the case as conclusively standing for the proposition that admissions made to administrative bodies, would always constitute “trump cards” in any litigation.

[55]   Historically, for example, it would appear that only formal admissions made within a specific case would be considered binding on a party. Admissions made in other contexts were admissible, relevant, and impacted on credibility, but were not binding. (I note, for example, *R. v. Baksh* 2008 ONCA 116.)

[56] Having said that, in my view even if these admissions were binding, the plaintiff's motion would still fail, since I find that these admissions do not resolve all questions of material fact.

[57] The plaintiffs have brought a number of causes of action. The first is in negligence. Any successful negligence claim requires, firstly, the existence of a duty of care, and a breach in that standard of care.

[58] The defendants point to the case of *Transpacific Sales v. Sprott Securities* 67 O.R. (3d) 368 (Ontario Court of Appeal) in support of their submission that, in the context of a relationship between a financial advisor and the client, the issues of duty of care and standard of care are fact specific. I note the following comments from that decision:

> [33] The appellants properly submit that the extent of a broker's duty to a client, beyond the duty of executing instructions and acting honestly, is a question of fact in each case. As well, the content and scope of a broker's duty to warn is defined with reference both to the knowledge and skill of the client and to the nature of the relationship between the client and broker. As Winkler J. stated, at pp. 233-34 O.R. in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, 35 C.P.C. (4th) 43 (S.C.J.), aff'd (1999), 4 6 O.R. (3d) 315n, 6 B.L.R. (3d) 82 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236, (C.A.), leave to appeal to the Supreme Court of Canada denied [2000] S.C.C.A. No. 660:
>
>> [A] duty to warn does not arise merely because of the broker- client relationship. In Reed v. McDermid St. Lawrence Ltd. (1990), 1990 CanLII 5406 (BC CA), 52 B.C.L.R. (2d) 265 at p. 271, [1991] 2 W.W.R. 617 (C.A.), the court stated:
>>
>>> The extent of the duty of broker to client beyond the bare duty of executing instructions and being honest is thus a question of fact in

> each case of what passes between broker and client. A duty to warn does not arise from the mere relationship of broker to client, but from the facts.
>
> In essence, the existence of a duty to warn is dependent on the standard of care owed to a particular client. Accordingly, the specifics of the relationship between the broker and the client must be analyzed to determine whether a broker has a duty to warn a client . . . For example, it cannot be said that the same standard of care exists between [a discount brokerage firm, which does not provide advice, and its client] . . . as would exist between a broker and a client who relied on the broker to manage a discretionary trading account. Nor can it be said that the standard of care for a client who is interested only in speculating is the same as that for a client who relies upon the broker for advice on a long-term investment.
>
> . . .
>
> The standard of care owed by an investment advisor to a particular client is concordant with the services that the advisor undertook to provide to the client, that is, whether the client was to be provided advice as opposed to [page378] mere information or whether the advisor was given discretion to trade on behalf of the client.
>
> [34] The standard of care which applies to an inexperienced investor is considerably higher than the standard that exists between a broker and a seasoned investor. In *Refco Futures (Canada) Ltd. v. Fresaid Enterprises Ltd.*, [1993] R.J.Q. 2359, J.E. 93-1522 (Que. S.C.), aff'd [1998] A.Q. No. 403 (QL), J.E. 98-552 (Que. C.A.), Hesler J. addressed this proposition, at p. 2370 R.J.Q., para. 146: "Certainly the obligations of the broker have to be inversely proportional to the experience and skills of the client and the degree of independence the latter asserts in decisions regarding investments."

[59] This same conclusion was reached in *Robinson v. Fundex Investments* [2006] OJ No. 2976 (Ont. S.C.J.); and in *Parent v. Leach* [2008] OJ No. 2155 (Ont. S.C.J.).

[60] The Agreement certainly acknowledges Mr. Laurie's failures, as a member of the MFDA, towards certain clients, including the plaintiffs. However, the Agreement is silent, as it would be, as to the applicable standard of care, for the

purposes of negligence law, that would be applicable to Mr. Laurie vis-à-vis these particular plaintiffs, or in fact, any of his other clients. In other words, do those identified and acknowledged failures, equal a finding of negligence in law? In my view, they do not.

[61] For example, let us assume that there existed a "duty to warn" here. Mr. Laurie has admitted that he failed to warn the plaintiffs and other client about certain risks. But I question: What was the scope of Mr. Laurie's duty to warn these plaintiffs? What risks/dangers should have been identified? Are they the same as have been acknowledged by Mr. Laurie in the Agreement? None of those questions are answered.

[62] I find the defendant's submissions persuasive. The scope of Mr. Laurie's duty towards the plaintiffs as a financial advisor is, as described in the caselaw, a question of fact; as are the risks that he should have pointed out. I remain unconvinced that there are no questions remaining to be asked on the issue of liability in negligence. In my view these questions require a trial.

[63] The plaintiffs have advanced a second cause of action, breach of fiduciary duty. The parties agree that the following five factors inform a finding of fiduciary

duty: vulnerability, trust, reliance, discretion, and professional rules or codes of conduct that would apply to the purported fiduciary.

[64] The defendants note that, even if such a duty can be shown, a trial judge would then be required to assess the nature of the fiduciary relationship, the nature of the duty owed, how the duty was breached, how the defendant put its own interests ahead of the plaintiffs interests, and the appropriate remedy (*Cooper v. Atlantic Provinces Special Education Authority* 2008 NSCA 94).

[65] I have no evidence before me to establish that these factors existed here, certainly not to the extent required for summary judgment to be granted. The breach of fiduciary duty claim will have to be proven at trial, if it is to succeed.

[66] The defendants have also raised the issue of contributory negligence in their pleadings, and they raise it in response to this motion. It is their view that contributory negligence is also a material question of fact which requires trial.

[67] The defendants note various aspects of the evidence which support their claim in contributory negligence, including but not limited to: the fact that the plaintiffs signed off on K-Y-C forms, as well as other documents that explained risk; the fact that the plaintiffs made decisions to keep the investments rather than make any recommended changes; and so on.

[68] The Agreement is silent as to any contributory negligence on the part of any of the 25 clients of Mr. Laurie, including the plaintiffs.

[69] On its face, given what is before me, I agree that contributory negligence is a live issue within this action. Having said that, I recognize that it would be possible for me to grant summary judgment on the issue of the liability of the defendant(s); leaving open the question of contributory negligence for another day.

[70] However, in my view, such would not be a desirable outcome here. Frankly, I believe such a result would still require a court to hear much of the evidence in order to make a decision, as it would turn on many factors that are involved in the central liability claim: the standard of care expected of the defendant(s), the expertise/education of the plaintiffs, what information they were given, and so on. I am of the view that the issues of liability of the defendants, and liability of the plaintiffs in contributory negligence, are intimately intertwined.

[71] I further see very little that would be saved, in terms of judicial resources, by resolving only the first part of that equation. I heed the warning of Justice Karakatsanis in *Hyrniak v. Mauldin* [2014] 1 SCR 87, to avoid “partial” summary judgment in situations which run the risk of duplicative proceedings and inconsistent findings of fact.

Conclusion

[72] In conclusion, I am not convinced that there remain no material questions of fact for trial in this matter. I deny the motion for summary judgment.

[73] To be clear, I leave the issue of the admissions in the MFDA Agreement, and their effect on the trial, entirely in the hands of the trial judge.

Boudreau, J.