Investor's claim for lackluster performance of his pref share strategy fails

July 13, 2017

In Shinoff vs BMONB, Justice France Dulude dismissed an investor's claim for $5.3M in alleged losses due to the defendants' alleged failure to properly manage and monitor the investments, and particularly a significant preferred share portfolio of investments. After a lengthy review of the evidence, the Court concluded that the investment advisor fulfilled her obligation to know her client, and to provide adequate information and advice:

[253] In fact, it does not appear that, in the summer of 2006, [the investment advisor] provided him all the information needed on the advantages and disadvantages of holding Preferreds in comparison to other types of instruments, or that she explained in detail the strategy she intended to develop. As well, she did not quantify the risks associated with the recommended trades.

[254] However, the evidence shows that, prior to purchasing any Preferreds, [the investment advisor] described the product and explained to him the concept of Preferreds, including their particularities and advantages. She informed him that they could fluctuate with interest rates and explained the other risks associated with them, including market risk, credit risk, and reinvestment risk.

[259] Thus, the Court is satisfied that the Defendants provided sufficient information and advice to him, given his circumstances, and that they adequately explained the risks involved with the recommended trades, thereby fulfilling their duty to Mr. Shinoff in that regard.

The Court also accepted expert opinion to the effect that a high quality pref share strategy can be suitable for a low risk investment objective:

[396] Mr. Perreault also explained that when securities are of a high quality, such as those in Mr. Shinoff's portfolio, Preferreds and common shares are not automatically by nature unsuitable to a low risk client.

Finally, although the risk objectives may have been slightly off, the Court found that the Defendants did not breach suitability requirements (based mostly on the investor's degree of knowledge and investment sophistication):

[410] It is true that the evidence shows that the portfolio may have been a bit riskier than need be at times. For example, the fact that Preferreds represented some 33% of the total value of the portfolio on occasion does not seem to totally correspond to Mr. Shinoff's objectives. Nevertheless, there is no evidence that the Defendants breached their duty to provide suitable recommendations.

[434] In 2006, [the investment advisor] might not, strictly speaking, have quantified the risks related to Preferreds but, as opposed to the facts in the case law submitted by the Plaintiffs, in 2007 and 2008, when he decided to keep his Preferreds, Mr. Shinoff was clearly aware of the risks. Hence, any Ioss he might have suffered was not caused by anything [the investment advisor] might have done or not done but, rather, by his choice to assume the risk related to holding such securities.

As regards the quantification of any damages resulting from losses in the account, the court referred to the traditional loss of opportunity exercise of comparing performance with a benchmark portfolio consistent with stated suitability, but given the lack of any credible evidence in this regard, applied a profit and loss analysis.

[436] Financial losses are often assessed by comparing the portfolio held by a plaintiff with the market value of a benchmark portfolio that is consistent with his investor profile and objectives. The plaintiff has the burden of identifying such a reference portfolio and showing that it would have generated a better outcome than the one he held. His damages would be the difference between the two results.

[439] Neither his report nor the one submitted by Mr. Hymas is reliable and the Court has rejected them. Consequently, the Plaintiffs failed to prove that it was possible to comply with Mr. Shinoff's profile and objectives and not incur the Ioss he alleges to have suffered, or even the one calculated by Defendants' expert, which we will discuss below.

[440] For his part, Mr. Horgan conducted a profit and loss analysis of Mr. Shinoff's complete portfolio at BMONB for two different periods, namely as at August 1, 2007, and as at the end dates of his different accounts with BMONB. For the first period, he concluded that the accounts had suffered no loss but, rather, a gain of $167,607. For the second period, he opined that at the end date of the accounts, the Plaintiffs had suffered a loss attributable to factors other than commissions and fees, of $1,358,303.

[441] Since Mr. Horgan's expert report is credible, had the Plaintiffs proven a causal fault on the part of the Defendants [which they did not], the Court would have adopted his conclusions.

This case is important as it serves as an excellent review of an investment advisor's duty to inform and to respect suitability requirements, and that these are highly dependent on the investor's level of knowledge and sophistication and own duty to inquire and inform him or herself.

By

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