



Civil Resolution Tribunal

Date Issued: June 28, 2019

File: SC-2018-009403

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lin v. Chiung*, 2019 BCCRT 786

BETWEEN:

JERRY LIN

APPLICANT

AND:

PETER I-TING CHIUNG

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This dispute is about the payment of “deferred sales charges”. The applicant, Jerry Lin, invested money through the respondent financial advisor, Peter I-Ting Chiung, in 2012. The applicant says that the respondent never informed him about a “deferred sales charge” that would be charged when the applicant redeemed his

investment funds. When the applicant redeemed his funds in 2017, he incurred \$5,062.72 in deferred sales charges. The applicant also states the respondent failed to complete a funds transfer when requested.

2. The applicant seeks payment of \$5,000 as compensation for the deferred sales charges and the loss from the respondent failing to complete the funds transfer on time. The respondent denies he owes the applicant any money.
3. The parties are both self-represented.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (“tribunal”). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act*. The tribunal’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “he said, he said” scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the tribunal’s process and found that oral hearings are not necessarily required where credibility is an issue.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
 - a. Order a party to do or stop doing something;
 - b. Order a party to pay money;
 - c. Order any other terms or conditions the tribunal considers appropriate.

ISSUES

8. The issues in this dispute are:
 - a. Is the applicant is entitled to reimbursement for deferred sales charges, and
 - b. Whether the respondent failed to properly make requested changes to the applicant's investment portfolio, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
10. The applicant invested \$25,000 through the respondent in August 2012, and \$100,000 in November 2012, each with a different investment fund company. Each investment transaction was done through a "trade ticket".

11. On March 29, 2017 and April 7, 2017, respectively, the applicant cashed out his investments. At that time, his August 2012 investment was worth \$29,955.67 and he was charged \$1,079.82 in deferred sales charges. His November 2012 investment had been broken down into 2 investments by that time, the first was worth \$66,307.05 minus \$1,976.94 in deferred sales charges, and the second was worth \$46,656.13 minus \$2,000.00 in deferred sales charges. The sales charges total \$5,056.76, and the applicant has abandoned the excess over the tribunal's small claims \$5,000 monetary limit.

Is the applicant entitled to reimbursement for deferred sales charges?

12. The applicant submits he was never informed about the charges, and seeks to be reimbursed by the respondent. The respondent says that the individual investment companies set the charges, not him, but that in any event, the applicant was informed about the charges and agreed to them.

13. In support of his position, the applicant provided a copy of a notice of claim and a settlement agreement he made with another third-party financial advisor, Mr. L, regarding deferred sales charges. However, that case involved a different financial advisor, a different financial advisor management company, and a different investment company. Therefore, I find that other case to be of no assistance to the dispute before me.

14. The respondent submits that when the applicant attended his office in 2012 he advised the applicant he had 2 choices for fees on his investments: (1) a 5% up-front or front-load charge, which meant 5% would be paid immediately as a fee and the remaining 95% would be invested with no further fees, or (2) a deferred sales charge, which meant 100% of the money would be invested then, and a fee would be charged when the money was withdrawn, with the fee percentage decreasing each year the money remained invested. The respondent submits, and the applicant does not dispute, that he provided the applicant with a prospectus for each of his investments which detailed the decreasing schedule of deferred sales charges for each investment. The prospectuses have not been produced in

evidence. The respondent submits the applicant chose to proceed with the deferred sales charge option for both the August and November 2012 investments. The applicant does not deny selecting the deferred sales charge option, but submits he was not provided any information about the sales charges.

15. The investment company's application form for the August 2012 investment contained a section titled "Indicate the applicable sales charge option for each fund," and gave the options of "DSC," "NSC" or "Front-End". The "DSC" box was marked. This application form was signed by the applicant and respondent on August 10, 2012. I infer "DSC" meant deferred sales charge.

16. The investment company's application form for the November 2012 investment, which was signed by the applicant and his wife on November 19, 2012, states:

I understand that if I choose the sales charge purchase option (front-load), I agree to pay a commission which is deducted from my original purchase amount. If I choose the redemption charge purchase option (low-load or deferred sales charge), I request that the sales commission described in the simplified prospectus be paid to the dealer on my behalf. I may be required to pay a redemption charge upon withdrawal, as specified.

17. The applicant and respondent both provided copies of the investment transactions' "trade tickets". The August 10, 2012 trade ticket for the \$25,000 investment notes "DSC" beside the investment amount. The ticket is signed by both the applicant and the respondent. The November 19, 2012 trade ticket for the \$100,000 investment also notes "DSC" beside the investment amount. The ticket is also signed by both the applicant and the respondent.

18. The respondent stated that it was not customary in 2012 for a financial advisor to write down the deferred sale charge schedule on the trade ticket, but just to acknowledge the investor's choice. I accept the respondent's evidence on this point, as it would likely include having to record several different rates and time periods which would have been provided for in the prospectuses.

19. Although the applicant stated he had not received any information about deferred sales charges when he signed the trade tickets, I prefer the evidence of the respondent, which is supported by the documentary evidence. I find that the applicant was informed about his different options for fees, and selected the deferred sales charge option for both investments.
20. This is also supported by correspondence between the parties years later. In October 2015, approximately 3 years after purchasing the investments, the applicant wrote to the respondent asking how much money he would get if he withdrew at that time. The respondent responded advising the applicant's fees would lower as of January 1, 2016, and provided the applicant with the redemption value and cost of fees for the investments. I find the October 2015 correspondence is consistent with the applicant having previously been informed about the deferred sales charges.
21. In summary, based on the evidence before me, I find the applicant was informed of, and chose, the deferred sales charge option for both the August 2012 and November 2012 investments. As such, he was obligated to pay the fees upon withdrawal of his investments. The applicant is not entitled to reimbursement for those fees. Therefore, I dismiss the applicant's claim reimbursement of deferred sales charges.

Did the respondent fail to properly make requested changes to the applicant's investment portfolio, and if so, what is the appropriate remedy.

22. The applicant submits that at some point after making the November 2012 investment of \$100,000, he sought to move 50% of that investment into a different fund, which he says the respondent failed to do. The respondent states the funds transfer was completed.
23. The applicant seeks damages for "the loss of uncompleted switching order", but does not break down his \$5,000 claim between the deferred sales charges claim

and the claim for the uncompleted fund switch. In any event, I find this “switching order” claim cannot succeed.

24. Correspondence produced in evidence indicates that in January 2014, the applicant requested that 50% of his November 2012 investment be transferred into another fund. When the applicant received his statement in April 2014, he noticed 100% of the investment was still in 1 fund, and he followed up with the respondent by email.
25. The respondent advised the applicant that he had sent the paperwork to the investment company for the transfer and that he would follow up with them directly. A few days later the respondent wrote back to the applicant and advised him that the investment company had not processed the paperwork properly, and it would be resubmitted, and confirmed the applicant’s choice of fund. Given the later withdrawal of this investment from 2 funds, I find the transfer was ultimately made successfully. In the circumstances, I am satisfied the transfer was made, although late.
26. As noted above, the burden of proof is on the applicant to show that, on a balance of probabilities, the respondent was responsible for failing to transfer his funds, or for the delay in the transfer. I find the applicant has failed to meet his burden. Based on the evidence before me, I am satisfied the respondent was not responsible for the delay. Even if I had found the respondent was responsible for the delay, I find the applicant has not proven any damages as a result of the delay. As a result, I dismiss the applicant’s claim for compensation for the failure or delay in transferring funds.
27. Under section 49 of the Act, and the tribunal rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. I see no reason to deviate from that general rule. As the applicant was not successful, I find that he is not entitled to reimbursement of his tribunal fees. No dispute-related expenses were claimed.

ORDER

28. I order the applicant's claims, and this dispute, dismissed.

Andrea Ritchie, Vice Chair