



Civil Resolution Tribunal

Date Issued: August 17, 2020

File: SC-2019-010751

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lang v. Snow*, 2020 BCCRT 911

BETWEEN:

HENRY LANG

APPLICANT

AND:

CLAYTON SNOW

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about financial advising services.
2. The applicant, Henry Lang, says that the respondent, Clayton Snow, was his financial advisor and that he misrepresented the nature and expected return of 3 life insurance policies that Mr. Lang purchased. Mr. Lang purchased one policy for

himself and one policy for each of his two children. Mr. Lang ultimately cancelled all 3 policies and seeks \$2,156.79 for the unrefunded portion of the contributions he made to the policies.

3. Mr. Snow denies that he misrepresented the policies and says he is being blamed for market performance, over which he has no control. Mr. Snow says this claim should be dismissed.
4. The parties are each self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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.
6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties to this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision in *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.
7. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
9. As noted, Mr. Lang cancelled all 3 life insurance policies in August 2019. In this dispute, he claimed \$172.32 for the unrefunded portion of the contributions he made to the policy in his own name. Mr. Lang says that after starting this dispute, he received a \$172.32 refund and is satisfied that his claim relating to his own policy has been resolved. Therefore, I find Mr. Lang's only outstanding claims relate to the policies in his children's names, totaling \$1,984.47.
10. I also acknowledge that Mr. Lang provided evidence and submissions about alleged threats Mr. Snow made toward him after Mr. Lang brought complaint to Mr. Snow's a professional or regulatory body about these transactions. However, I find that Mr. Lang has not sought any remedy from the CRT about these allegations and, therefore, I decline to address them in these reasons.

ISSUE

11. The issue in this dispute is whether Mr. Snow is legally responsible for the losses Mr. Lang incurred when he cancelled the life insurance policies, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant Mr. Lang 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.

13. I note at the outset that Mr. Snow did not provide any evidence in this dispute, despite having the opportunity to do so. He submits that he requested evidence from his regulatory body but did not receive it due to staffing issues related to the Covid-19 pandemic. Mr. Snow did not request an extension of time to provide this evidence. In any event, I find that I am not bound by a regulatory body's processes. Therefore, I find it is reasonable to proceed based on the evidence Mr. Lang provided and the parties' respective submissions.
14. Mr. Snow is a financial advisor. He says that Mr. Lang was his long-time client and that they had a business relationship over several years. It is undisputed that on July 20, 2018, Mr. Lang asked Mr. Snow to help him invest in a Registered Education Savings Plan (RESP).
15. Mr. Lang submitted a screen shot of a July 20, 2018 Facebook (FB) message between him and Mr. Snow which shows that Mr. Snow said: "I'll make you 16%" and suggested Mr. Lang come to his office the following Monday.
16. Neither party explained what they discussed at the meeting, but the evidence shows that on July 23, 2018, Mr. Lang applied for life insurance policies (policies) for his two children. The policies were issued by Equitable Life of Canada (Equitable Life). I infer from the evidence that Mr. Snow advised Mr. Lang that the policies were a superior investment vehicle and would offer more flexibility and a higher rate of return than RESPs, so long as Mr. Lang made payments over and above the required policy premiums.
17. A series of FB messages Mr. Lang sent to Mr. Snow between August 14 and September 14, 2018 show that Mr. Lang expressed concern and sought repeated clarification about the policies and Mr. Snow's plan. I find that Mr. Lang told Mr. Snow that saving for his children's education was his primary goal and that he did not have a clear understanding of Mr. Snow's advice about how the policies would work to achieve this goal. In reply, I find that Mr. Snow was often dismissive of Mr. Lang's concerns and otherwise assured Mr. Lang that he had made the right choice to purchase life insurance policies over RESPs.

18. In a September 13 and 14, 2018 FB message thread, Mr. Lang told Mr. Snow that he was confused and “not feeling great” about Mr. Snow’s plan. Mr. Lang asked Mr. Snow to “get me out”, to which Mr. Snow responded that if Mr. Lang cancelled the policies, he would charge Mr. Lang \$2,000 for his time. In the FB message thread, Mr. Lang continued to request clarification about how much he will have to contribute to the policies and how to withdraw funds, to which Mr. Snow repeatedly responded that he had already explained the process many times.
19. Despite Mr. Lang’s reservations, on October 1, 2018, he told Mr. Snow that he also wanted to open a life insurance policy in his own name. Based on the FB messages in evidence, I find that this was also on Mr. Snow’s advice. As noted above, Mr. Lang no longer has any claims associated with his own policy.
20. In an August 26, 2019 FB message, Mr. Lang accused Mr. Snow of leading him on about how much he had to contribute to the policies and how much he could withdraw each year and said Mr. Snow was now telling him something different than when he purchased the policies. Mr. Lang advised Mr. Snow in the message that he was going to cancel the policies, to which Mr. Snow responded, “sounds good”.
21. Mr. Lang cancelled all 3 policies on August 29, 2019. The evidence shows that Equitable Life partially refunded Mr. Lang the paid premiums on his children’s policies based on the “cash surrender” value of each policy. A January 14, 2020 letter from Equitable Life shows that Mr. Lang paid \$5,221.67 in premiums for his daughter’s policy and Equitable Life refunded him \$3,982.70. For his son’s policy, Mr. Lang paid \$5,154.33 in premiums, and received a \$3,968.39 refund.
22. I note that the amounts reflected in Equitable Life’s letter suggest that the unrefunded premiums total \$1,238.97 for his daughter’s policy and \$1,185.94 for his son’s policy. However, in the Dispute Notice Mr. Lang claims a loss of only \$1,017.30 from his daughter’s policy and \$967.17 from his son’s policy. He provided no explanation for this discrepancy. I accept that Mr. Lang lost the lower amounts he claimed in the Dispute Notice.

23. Mr. Lang's essential claim against Mr. Snow is based on misrepresentation. He says Mr. Snow convinced him to purchase the policies by making several misrepresentations about how the policies would work to achieve his financial goals, including that the policies would earn 16% compounded interest, that they were Registered Education Savings Plans (RESPs), that Mr. Snow would deposit \$4,000 into the policies after the first year, and that the plan included some extended health care benefits. Mr. Lang says he never would have purchased the policies if Mr. Snow had not misled him with these false promises.
24. I turn to the applicable law. There are two kinds of tortious misrepresentation: fraudulent misrepresentation and negligent misrepresentation.
25. A fraudulent misrepresentation occurs when someone knowingly makes a false oral or written representation, or where they are reckless as to whether or not the statement is false: see *Ban v. Keleher*, 2017 BCSC 1132 at paragraphs 16 and 31.
26. A negligent misrepresentation is made by someone who fails to take due care to ensure that the representation is true. In order to prove the tort of negligent misrepresentation, an applicant must establish the following elements as set out in *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87:
- a. There must be a duty of care,
 - b. The representation in question must be untrue, inaccurate, or misleading,
 - c. The respondent must have acted negligently in making the misrepresentation,
 - d. The applicant must have relied, in a reasonable manner, on the negligent misrepresentation, and
 - e. The reliance must have resulted in damages.
27. In determining whether there was a duty of care, the question is whether Mr. Snow ought reasonably to have foreseen that Mr. Lang would rely on his representations and whether Mr. Lang's reliance on his advice was reasonable. Given Mr. Snow's

profession, I find Mr. Lang's reliance on Mr. Snow's professional investment advice was reasonable. Further, I find that Mr. Snow should reasonably have foreseen that Mr. Snow would rely on his representations and that carelessness on his part might cause damage to Mr. Lang. Therefore, I find that Mr. Snow owed Mr. Lang a duty of care.

28. As noted above, Mr. Lang alleges that Mr. Snow made several misrepresentations about the policies. I find there is insufficient evidence to conclude that Mr. Snow told Mr. Lang that the policies were RESPs, that he would deposit \$4,000 into the policies, or that the policies included extended health care benefits, as Mr. Lang says. While I find Mr. Lang cannot prove that Mr. Snow actually made these statements, I find that Mr. Lang was confused about whether Mr. Snow made these statements due to his fundamental misunderstanding about the nature and operation of the policies, which I will discuss further below.
29. However, there is no dispute that Mr. Snow initially represented to Mr. Lang that he would earn Mr. Lang a 16% rate of return. Was this a negligent misrepresentation?
30. Mr. Lang provided several emails from Steve Jennings, a senior compliance consultant, audit and ombudsman at Equitable Life, the life insurance policy issuer. Given Mr. Jennings' undisputed job title and role at Equitable Life, I find Mr. Jennings has relevant knowledge about the sale and operation of Equitable Life policies and I accept Mr. Jennings' emails as expert opinion evidence under the CRT rules.
31. In a March 17, 2020 email, Mr. Jennings said Equitable Life uses a computer program to estimate how a policy will perform in the future, which is programmed not to allow a return in excess of 8% in order to be conservative. While Mr. Jennings acknowledged that policy returns can be greater than 8%, he said Mr. Snow should not make promises of a return greater than 8%.
32. Based on Mr. Jennings' email, I find that Mr. Snow's statement that he would earn Mr. Lang a 16% rate of return was at best misleading. Further, I find that Mr. Snow

breached the standard of care of a reasonably competent financial advisor when he promised Mr. Lang a return 2 times what was recommended. Therefore, I find that Mr. Snow negligently misrepresented the policies to Mr. Lang and that his misrepresentation significantly contributed to Mr. Lang's decision to purchase the policies, resulting in Mr. Lang's financial loss when he learned he had been misled and cancelled the policies.

33. Given my finding on the issue of negligent misrepresentation, I do not have to address whether Mr. Snow's statement constituted fraudulent misrepresentation.
34. However, while not specifically argued, I have also considered whether Mr. Lang's claim involves a breach of fiduciary duty. A fiduciary relationship involves the presence of loyalty, trust, and confidence, and the fiduciary obligation carries a duty of skill and competence as well as a duty of loyalty: *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 SCR 377. A fiduciary relationship is often recognized between a financial advisor and client, and I find that one existed between Mr. Snow and Mr. Lang.
35. The evidence shows that Mr. Lang trusted and put his confidence in Mr. Snow to give him advice about an investment vehicle that was in his best interests and would meet his financial goal of saving for his children's future. I find that Mr. Lang repeatedly told Mr. Snow about his financial and personal circumstances and that when Mr. Lang raised concerns or questions about whether the life insurance policies were right for his particular situation, Mr. Snow brushed him off and simply told him not to worry.
36. I find that Mr. Snow breached his duty of loyalty to Mr. Lang in several ways. First, I find that Mr. Snow failed to adequately explain the nature and operation of the policies and how they would meet Mr. Lang's financial goals. This is illustrated by Mr. Lang's confusion about a \$4,000 deposit into the policies, whether the policies somehow constituted RESPs, and that they could include extended health insurance benefits. Overall, I find the evidence shows that Mr. Lang did not understand Mr. Snow's advice.

37. Next, I find Mr. Snow's statement that he would charge Mr. Lang \$2,000 for his time if he cancelled the policies was designed to intimidate Mr. Lang. In an April 23, 2020 email, Mr. Jennings explained that advisors are paid by commission, so there is no charge to cancel a policy unless there is a special contract in place where the client agrees to pay additional fees to the advisor. There is no evidence of such a contract in this case. I find that Mr. Snow breached his duty of loyalty when he discouraged Mr. Lang from cancelling the policies when Mr. Lang was clearly uncomfortable with them, and by saying he would charge Mr. Lang for his time.
38. Finally, I find that Mr. Snow did not adequately consider Mr. Lang's financial circumstances and risk tolerance when he advised Mr. Lang to purchase the policies. In an April 6, 2020 email, Mr. Jennings explained that before selling a policy, advisors must document a needs analysis to ensure the client can afford the premium and that the product is a good fit. This involves documenting the client's employment, financial position and needs, and when cash will be needed in the future. I find that Mr. Snow did not undertake this needs analysis for Mr. Lang and, given all the evidence, the policies were not a good fit for Mr. Lang.
39. Given all the above, I find that Mr. Snow breached his fiduciary duty to Mr. Lang in advising him to purchase the policies and discouraging him from cancelling them when he could minimize his losses.
40. Damages for breach of fiduciary duty are restitutionary in nature, which means the applicant is entitled to be put in the position he would have been in had the breach not occurred. This is the same measure of damages that applies to negligent misrepresentation. I find that if Mr. Snow had not breached his fiduciary duty or negligently misrepresented the policies' rate of return, Mr. Lang would not have purchased the policies at all. So, I find Mr. Lang is entitled to be fully refunded for all premiums he paid toward the policies, as if he had never purchased them. Therefore, I find Mr. Snow must pay Mr. Lang the unrefunded portion of Mr. Lang's paid premiums, which is \$1,984.47.

41. The *Court Order Interest Act* applies to the CRT. Mr. Lang is entitled to pre-judgment interest on the \$1,984.47 from August 29, 2019, the date Mr. Lang cancelled the policies, to the date of this decision. This equals \$33.72.
42. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. While Mr. Lang was successful, he did not pay CRT fees or claim dispute-related expenses. So, I make no order for them.

ORDERS

43. Within 30 days of the date of this decision, I order Mr. Snow to pay Mr. Lang a total of \$2,018.19, broken down as follows:
 - a. \$1,984.47 in damages, and
 - b. \$33.72 in pre-judgment interest under the *Court Order Interest Act*.
44. Mr. Lang is entitled to post-judgment interest, as applicable.
45. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

46. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Kristin Gardner, Tribunal Member