BC Supreme Court rejects investor's claim against self-directed brokerage

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Retail investors who use self-directed online discount brokerages have limited ability to blame the brokerage for their own investment decisions. Where an investor suffers a loss from a poor investment decision, the Court has signalled a willingness to strictly enforce the terms and conditions of the applicable account agreement to preclude any claims that the investor may pursue against the brokerage.

Overview

In a recent decision of the Supreme Court of British Columbia, *Baan v. Scotia Capital Inc.*, 2023 BCSC 565, the Court held that the brokerage was not liable for an investor's decision to sell shares that he did not own in a junior mining company that had just completed a 10:1 share consolidation. The Court also held that the brokerage had the right, under the applicable account agreement, to liquidate the other securities held in his investment account to partially cover the resulting shortfall. The Court granted judgment in favour of the brokerage for the remaining indebtedness in the investor's account, plus interest and costs.

The Court found that the brokerage's account agreement "expressly and unambiguously" precluded the investor's claim that the brokerage was negligent by allowing him to sell shares that he did not own. Crucially, the Court found that by entering into the account agreement, the investor assumed the risks inherent in trading securities over the internet, including that information and data available on the online trading platform would not always be up-to-date or reliable, and that the brokerage would not be responsible for any technical problems that may arise on the trading platform.

Key takeaways

- The Court has signalled a willingness to strictly enforce the terms and conditions in account agreements for self-directed retail investment accounts.
- The applicability and enforceability of account agreements for investment and bank accounts continues to be governed by the analysis in *Tercon Contractors*

Ltd. v. British Columbia, 2010 SCC 4 – there is no separate or special analysis for banking agreements.
- Investors will be responsible for their own investment decisions made in self-directed investment accounts, even where a trade is made based on inaccurate or incomplete information available on the trading platform.
- Investors who use online self-directed trading platforms assume the risk that information or data available on the trading platform may not always be up-to-date or reliable.
- Investors who elect to be "non-objecting beneficial owners" of the securities held in their account will be deemed to have received and have constructive knowledge of material corporate resolutions for those securities, including share consolidations and splits.

Background

In 2017, the Plaintiff held 752,270 shares of a junior mining company traded on the TSX-V, New Carolin Gold Corporation (New Carolin), through the Defendant's self-directed online trading platform. The Plaintiff elected to be a "non objecting beneficial owner" of the shares, which meant that correspondence from New Carolin to its shareholders was sent directly to the Plaintiff.

In December 2017, the shareholders of New Carolin passed a resolution to consolidate its share capital on a 10-for-1 basis, to be effective at a later date. Thereafter, New Carolin issued a press release to that effect. Immediately following the resolution, the Plaintiff placed an order to sell all of his shares of New Carolin on the TSX-V through the trading symbol, LAD.

On January 15, 2018, New Carolin issued a press release, which announced that the consolidation of New Carolin's share capital would become effective on market opening on January 16, 2018. Prior to market opening on January 16, the TSX-V cancelled the Plaintiff's sell order and the Defendant restricted the trading of LAD on its platform.

On January 16, the Plaintiff's account continued to show that he held 752,270 shares of New Carolin. That day, the Plaintiff repeatedly attempted to sell 752,270 shares of New Carolin as LAD on the Defendant's trading platform. Each of those attempts were met with error messages stating that he did not hold sufficient shares of the security to make the trade.

The Defendant then changed the currency denomination of the sell order from Canadian to US currency, which changed the order from LAD on the TSX-V to LADFF on the over-the-counter (OTC) exchange. There was no restriction on LADFF on the OTC exchange. The Plaintiff successfully placed an order to sell 752,270 shares of New Carolin on the OTC exchange, and as a result, sold an extra 677,073 shares of New Carolin that he did not own.

Following the Plaintiff's sale of 677,073 shares of New Carolin that he did not own, the Defendant purchased shares of New Carolin at prevailing market rates to fulfil the order, which put the Plaintiff's trading account into a negative balance. The Defendant then liquidated the other securities held in the Plaintiff's account to cover part of the shortfall. After the sale of those securities, the Plaintiff's trading account had a negative balance of $151,601.56.

The Plaintiff sued the Defendant in conversion for the liquidation of the other securities in his trading account and in negligence for allowing him to trade shares that he did not own. The Defendant filed a counterclaim for the indebtedness in his trading account plus interest and costs.

The Court's decision

In his Notice of Civil Claim, the Plaintiff pleaded that he was unaware of the share consolidation when he placed the order to sell LADFF on the OTC exchange. However, the Plaintiff did not state in any of his three affidavits filed in the litigation whether he was aware of the share consolidation. The Court found that, based on the available circumstantial evidence including the timing of the Plaintiff's sell orders and the issuance of the information circular and press release by New Carolin, the Plaintiff knew or ought to have known about the share consolidation at the time of his sell order placed on the OTC exchange.

The Court held that the terms of the account agreement authorized the Defendant to liquidate the remaining securities held in the Plaintiff's trading account to cover part of the shortfall, which precluded the Plaintiff's conversion claim.

The account agreement contained an assumption of risk and exclusion of liability provision for any loss or damage caused by technical errors affecting the trading platform, including any inaccurate data and information displayed on the platform. The Court applied the law from *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4 and held that the exculpatory provision "expressly and unambiguously" precluded the Plaintiff's claim in negligence and that the Plaintiff assumed the risk of technical errors with the trading platform.

The Court dismissed the Plaintiff's claim and pronounced judgment with respect to the Defendant's counterclaim. As a result, the Plaintiff was ordered to pay to the Defendant the shortfall in the trading account, interest at the rate of prime plus 1.55%, and solicitor-and-client costs under the terms of the account agreement.

Conclusion

This case serves as a cautionary tale to self-directed investors. Where the investor makes an error and suffers loss and damage, it is unlikely that they will be able to hold the brokerage responsible for their loss.

This case will be welcome news for investment dealers that offer self-directed trading platforms to members of the public. The Court has affirmed a number of common provisions in investment account agreements as being enforceable and serving to preclude negligence and conversion claims brought by aggrieved users of their trading platforms.

This case also demonstrates the importance of contractual terms applicable to the use of self-directed trading platforms that not only protect the brokerage from liability, but also provide the brokerage with the ability to enforce its rights where the actions of the user causes a loss to the brokerage.

At BLG, we have a significant breadth of experience providing counsel and representation to Canadian investment dealers and advisors, including defending regulatory and civil claims brought by investors. If you have any questions about the issues raised by this case, or any other investment dealer or securities-related litigation issues, please reach out to any of the key contacts below.

By

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