2878852 Canada Inc. v. Jones Heward Investment Counsel Inc., 2007 ONCA 14
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COURT OF APPEAL FOR ONTARIO

GOUDGE, SIMMONS and LANG JJ.A.

B E T W E E N :	)	
	)	
2878852 CANADA INC.	)	**Robb C. Heintzman, Mark G. Evans and Matthew Fleming, for the appellant**
	)	
(Plaintiff) Respondent	)	
	)	
- and -	)	
	)	
JONES HEWARD INVESTMENT COUNSEL INC. and MARSHALL NICHOLISHEN	)	**Paul LeVay and Luisa Ritacca, for the respondent**
	)	
(Defendants) Appellant	)	
	)	
	)	**Heard: October 16, 2006**

On appeal from the judgments of Justice Ted Matlow of the Superior Court of Justice, dated August 23, 2004, November 9, 2004 and January 10, 2005.

LANG J.A.:

[1] This is an appeal from a decision of Matlow J. that found the appellant, Jones Heward Investment Counsel Inc. (Jones Heward), a portfolio manager, liable for its partial mismanagement of investments on behalf of the respondent, 2878852 Canada Inc. (2878852). Although the trial judge dismissed the claim against the individual portfolio manager, Marshall Nicholishen, and the main part of the respondent's claim, which alleged negligence in regard to the entirety of the account, he found that the appellant had mismanaged the respondent's account in two respects.

[2] The two instances of mismanagement involved Jones Heward's retention of a significant portion of the respondent's account in short-term investments for a period of twenty-two months (resulting in a loss of $919,439) and its investment on behalf of the

respondent in a stock called Kazakhstan Minerals Corporation (Kazakhstan) (resulting in a loss of $100,865.41). From this combined award of $1,020,304.41, the trial judge deducted $102,830.37 representing professional fees for 1998 that the respondent had not paid Jones Heward.

[3] The appeal relates only to the two instances of mismanagement and, specifically, the trial judge's findings with respect to the short-term and Kazakhstan investments (collectively, the disputed investments). The challenge rests on the appellant's allegation of inconsistent factual findings by the trial judge. In addition, the appellant challenges the judgment because it does not address the issues of ratification, mitigation, contributory negligence and the allocation of the respondent's losses against his profits.

[4] As I will discuss, appellate review was not assisted by the trial judge's decision to incorporate large portions of the parties' facta into his reasons. Nonetheless, I see no basis on which to overturn the trial judge's factual and credibility findings, which were available to him on the evidence. I would also dismiss the challenge to the award on the issues of ratification, mitigation, contributory negligence and allocation of loss.

Issues

[5] The appellant argues that the trial judge erred:

1. in providing reasons that were an inadequate basis for the purposes of appellate review;

2. in finding the appellant negligent in its management of the short-term investments;

3. in finding the appellant negligent in the acquisition and maintenance of the Kazakhstan investment;

4. on the issue of ratification;

5. in his assessment of damages by failing to take into account mitigation and contributory negligence; and

6. in not offsetting the respondent's losses against his overall gains on the other investments in his account.

Background

[6] 2878852 is a holding company used as an investment vehicle by its sole shareholder, Jean Dupéré (collectively, the respondent or 2878852). Mr. Dupéré first placed $5.5 million for investment with Jones Heward pursuant to a letter agreement

signed in February 1993. The letter agreement gave Jones Heward authority "to make and implement investment decisions for our account as you, in your discretion, deem proper and advisable from time to time".

[7] The agreement also relieved Jones Heward of liability "for any error of judgment or any other act or omission provided" that Jones Heward acted "in good faith" and exercised "due care". Although the trial decision does not turn on the nature of their relationship, Jones Heward conceded at trial that the circumstances of this discretionary account placed it in a fiduciary relationship with 2878852.

[8] Mr. Dupéré received quarterly and monthly statements regarding the account. Mr. Nicholishen was the appellant's chair, vice president, and senior portfolio manager, and the respondent's portfolio manager. Mr. Nicholishen, or another Jones Heward representative, met annually with Mr. Dupéré and periodically reviewed his investments in telephone calls and other communications.

[9] Since 2878852 was more than satisfied with the performance of its portfolio during Jones Heward's first three years of stewardship, it deposited a further $14.4 million into the portfolio in January 1996. Throughout the balance of 1996, and until Jones Heward terminated the account in December 1998, more than thirty to forty per cent of the respondent's portfolio was retained in short-term investments. This was the basis for one of 2878852's complaints. The second arose from the March 1996 purchase of shares in Kazakhstan, a mining and natural resource company, at a cost of $89,396, which were sold in September 1997 with a capital loss of $83,213.29. Despite the losses on the two disputed investments, 2878852's portfolio earned an overall profit of about $8.2 million, representing an annual rate of return of 10.7%.

[10] When 2878852 opened the account in 1993, the respondent and Jones Heward agreed on a balanced-growth portfolio, with the objectives of safeguarding assets while generating income and growth. To meet these objectives, Jones Heward invested the respondent's funds in accordance with its balanced growth model portfolio (model portfolio). The model portfolio, which it applied to each of its clients' accounts, included a component for speculative investment in smaller companies, provided that such an investment fit within principled parameters and the portfolio objectives. As well, Jones Heward's investment strategy called for retaining no more than five to eight per cent of the account in cash or short-term investments.

[11] Over the lifetime of the account, Jones Heward invested in 159 stocks on behalf of 2878852. Towards the latter part of the relationship, Mr. Dupéré came to regard many of the Jones Heward investments as speculative and as contrary to what he recalled as an agreed-upon investment strategy of investing in blue chip stocks.

[12] When the respondent and the appellant were unable to resolve their differences, Jones Heward terminated 2878852's account in December 1998. 2878852 launched this action claiming damages of $7 million. Since Mr. Dupéré died unexpectedly after discovery, portions of his discovery were read in on consent at trial.

The trial decision

[13] In his reasons, the trial judge noted Jones Heward's denial of overall negligence, with the "relatively minor exception" that Jones Heward "conceded … and supported by their expert witness, John Priestman, that shares of Kazakhstan Minerals Corporation … should not have been purchased." The reasons for judgment contain no further analysis of the Kazakhstan claim. The trial judge also noted Jones Heward's position that its retention of large sums of short-term investments was done on Mr. Dupéré's express oral instructions, instructions that Mr. Dupéré denied. On the counterclaim, Mr. Dupéré took the position that Jones Heward waived its 1998 fees as a "conciliatory gesture".

[14] Credibility was a significant issue at this seventeen-day trial. Mr. Dupéré's premature death and the enforced reliance on his discovery raised acknowledged difficulties, which the trial judge was satisfied were substantially overcome by the numerous volumes of filed documents. Importantly, the trial judge dismissed the main claim largely on the basis of Mr. Dupéré's own evidence and allowed the partial claim largely on the basis of the Jones Heward evidence, much of which lacked consistency.

[15] On the basis of the evidence he accepted, and contrary to Mr. Dupéré's evidence about a blue chip investment strategy, the trial judge concluded that Jones Heward and 2878852 agreed to the investments in accordance with Jones Heward's model portfolio. With the exception of Kazakhstan, the trial judge concluded that Jones Heward did not breach that agreement and acted honestly, "in good faith and without negligence." In any event, the trial judge would have relieved Jones Heward from liability on the main claim on the basis of the release clause in the letter agreement.

[16] In arriving at his conclusion, the trial judge rejected the opinion of the respondent's expert, that nineteen of the stocks in the respondent's portfolio were unsuitable, because he found the expert's evidence to be vague, "based on questionable sources and unreliable information" and an incorrect factual foundation.

[17] The trial judge preferred the evidence of the Jones Heward expert, John Priestman, whom, he found, had a much better understanding of the facts and the concept of the model portfolio. He accepted Mr. Priestman's evidence that, with the exception of Kazakhstan, the appellant performed in accordance with the letter agreement and model portfolio and did a good job for the respondent.

[18] As a finding of fact, the trial judge determined that Mr. Dupéré was a sophisticated and experienced businessperson and investor who understood how his account was being managed and brought his claim as an attempt to retain profits and be relieved of losses. Although Mr. Dupéré occasionally complained about particular investments, he accepted the appellant's assurances and did not reduce his complaints to writing until February 1998.

[19] On the issue of the claim for inappropriate maintenance of short-term investments, the trial judge gave these reasons:

> [20] I turn now to that part of the plaintiff's claim that arises out of the defendant's retaining excessive amount of cash in the plaintiff's account. I am persuaded on a balance of probability that between March 1, 1996, and December 31, 1997, the defendant allowed accumulations of cash to remain in the plaintiff's account in amounts far exceeding 8% of the total market value of the account, the maximum that should reasonably be maintained in the absence of special circumstances which are not present in this case. The defendant's explanation for allowing this to occur, according to Nicholishen, was that Dupéré had instructed him to do so because Dupéré anticipated the need for a large amount of cash being available to complete a transaction which he expected to take place a short time later. On all of the evidence, I consider it unlikely that Dupéré ever gave such instructions. I find that Nicholishen's evidence, and the evidence of the other employees of the defendant who corroborated it, was likely untrue. If Dupéré had given such instructions, the defendant should have, and likely would have, required Dupéré to give them in writing and he did not. Nor did the defendant record the receipt of such instructions from Dupéré in its own records. Even if Dupéré had given such instructions, the defendant ought to have checked with him from time to ascertain whether the anticipated transaction was still likely to occur imminently or, if not, whether more cash ought to be invested and it did not. There was no advantage to the plaintiff to keep excessively large sums of cash on hand in its account on which fees were payable to the defendant. It could easily have invested those sums on its own without any disadvantage. I find, therefore, that the defendant's default was likely the result of an oversight which, in the circumstances, amounted to negligence and a

> breach of the agreement which required the defendant "to exercise due care" as a condition of avoiding liability.
>
> [21] The evidence is in conflict as to whether or not Dupéré complained to the defendant about the excessively large sums of cash maintained in the plaintiff's account. Dupéré stated that he raised this issue whereas Nicholishen and other defence witnesses denied it. I accept Dupéré's evidence on this issue. The defendant's default was glaring and resulted in large financial consequences for the plaintiff. It is inconceivable that Dupéré would not have noticed what was going on from his examination of the reporting statements he received and it is inconceivable that he would not have complained. Dupéré's conduct should not excuse the defendant's default or bar the plaintiff's entitlement to relief.

[20] As I have said, in addition to his written reasons, the trial judge adopted by reference numerous paragraphs of the parties' written submissions, including the respondent's submissions regarding the inconsistencies in the evidence given by the Jones Heward witnesses. He accepted that Mr. Dupéré complained about the high levels of cash in his account "throughout 1996 and 1997", including at an April 1997 meeting. The trial judge adopted the appellant's submissions about Mr. Dupéré's sophistication as an investor and his knowledge of the types of investment permitted within the model portfolio, including some investment in "speculative stocks", that Jones Heward followed an investment discipline for every security purchased, that Jones Heward reported frequently and regularly to 2878852 and that Mr. Dupéré discussed specific securities with Jones Heward from time to time. Finally, he accepted the submissions that Mr. Dupéré owed Jones Heward $102,830.37 for 1998 fees and that the parties had never reached an agreement under which Jones Heward would forgive any of those fees.

[21] On the basis of this background and the reasons given by the trial judge, I address the issues raised by the parties.

Analysis

1. The sufficiency of the trial judge's reasons

[22] Unquestionably, the trial judge's decision to incorporate parts of the parties' written argument into his reasons was ill-advised and unfortunate. In my view, a trial judge's reasons should be comprehensive on their own and, absent exceptional circumstances, should not simply incorporate, by reference to particular paragraph numbers, portions of the parties' facta or written submissions. In part, this adoption by reference of the parties' positions led to this appeal because the findings in the main body

of the trial judge's reasons were inconsistent with the paragraphs of the written argument that he adopted.

[23] For example, in the main part of his reasons, the trial judge concluded that Jones Heward's acquisition of Kazakhstan did not conform to its model portfolio. However, the trial judge also adopted Jones Heward's written argument that maintained that all stocks, including Kazakhstan, were acquired in accordance with the model portfolio. This and other similar inconsistencies were understandably troubling to the appellant.

[24] Nonetheless, on a fair and common sense reading of the reasons as a whole, it is clear that the trial judge meant that he was dismissing the main part of the respondent's action because Jones Heward invested the respondent's funds within the parameters of the model portfolio, with the important exceptions of Kazakhstan and the short-term investments.

[25] In essence, the appellant's argument on appeal attempts to impugn the trial judge's assessment of the credibility of the witnesses. The evidence from Mr. Nicholishen, and others at Jones Heward, was to the effect that the respondent agreed to give the appellant the discretion to manage its funds in accordance with the model portfolio and Jones Heward complied with those instructions. It was Jones Heward's position that Kazakhstan fit within the parameters of the model portfolio and that a large percentage of cash retained in the portfolio was an exception to its usual investment strategy but made at the express oral instructions of the respondent. Further, the appellant argued that its internal safeguards acted to mandate a regular review of the account, that it was cognizant at all times of the large cash holdings, that those holdings were discussed periodically among Jones Heward staff, including its compliance officer, and that the appellant continued its instruction to maintain this liquidity. The appellant argued that, since the trial judge clearly accepted the Jones Heward evidence on the main complaint and rejected the respondent's evidence about a blue chip investment strategy, it was unreasonable for the trial judge to reject the Jones Heward evidence about the disputed investments and to prefer the respondent's evidence on those two investments.

[26] However, in my view, the trial judge adequately explained his credibility findings by his reliance on the documents and his explanation that "Dupéré's own evidence contributed much to my ultimate conclusion to dismiss a large part of the [appellant's] claim and the evidence of some of the [respondent's] witnesses contributed much to my ultimate conclusion to allow another part."

[27] A fair reading of the reasons in their entirety supports the conclusion that, as he was entitled to do, the trial judge simply believed some of Mr. Dupéré's evidence and some of Jones Heward's evidence. Even though Mr. Dupéré testified that he instructed Jones Heward to invest in blue chip investments only, this evidence was contradicted both by the Jones Heward testimony and by the documents, including the letter

agreement. In other words, Mr. Dupéré's evidence was not credible regarding his main claim. On the other hand, the significant inconsistencies in the Jones Heward evidence regarding the disputed investments affected its credibility. In these circumstances, the trial judge was entitled to reject the Jones Heward evidence as he did and to prefer that of Mr. Dupéré, confirmed as it was by the documentary evidence and the evidence of the appellant's own expert with respect to Kazakhstan.

[28] I will deal with the specific concerns raised about the trial judge's findings in more detail as I discuss the grounds of appeal particular to the disputed investments. However, as a general statement, a trial judge's reasons are sufficient and meet the test set out in *R. v. Sheppard*, [2002] S.C.R. 869, as discussed in the civil context in *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.*, [2002] O.J. No. 2125 (C.A.) at para. 64 when, reading the reasons as a whole, the trial judge is shown to have considered the evidence in its totality in relation to the ultimate issue and the reasons allow for adequate appellate review because they provide an understanding for the basis of the trial judge's decision. In my view, although the reasons in this case lack detail, they are sufficient to ascertain how the trial judge arrived at his decision.

2. Short-term investments

[29] Jones Heward conceded that it retained a minimum of thirty per cent of the respondent's portfolio in short-term investments for about twenty-two months from January 1996 to December 1997. This portion of the portfolio, which had a rate of return of five to six per cent over that period, was comprised of twenty-one short-term investments including guaranteed investment certificates, treasury bills, high grade commercial paper, banker's acceptances and small amounts of cash. The parties were in agreement that no more than eight per cent of a portfolio is usually maintained in such investments, absent special circumstances or instructions, and that the large percentages retained in this case were not in compliance with Jones Heward's own approach to investment.

[30] Mr. Nicholishen testified that this non-compliance conformed to express oral instructions given by Mr. Dupéré to maintain liquidity in anticipation of his need for funds. He also testified that the quantum of short-term investments was obvious to Mr. Dupéré from all their communications. Jones Heward, said Mr. Nicholishen, was mindful of the unusual liquidity of the account because the issue was "constantly raised" among members of the portfolio team and because these investments were actively managed. Furthermore, the Jones Heward witnesses testified that Mr. Dupéré did not complain about the short-term investments during frequent conversations and meetings.

[31] The Jones Heward witnesses included five of Mr. Nicholishen's co-workers, none of whom were privy to receiving the alleged initial instructions for increased liquidity and only one of whom testified that he discussed that liquidity with Mr. Dupéré. The

Jones Heward witnesses gave evidence that was inconsistent with each other and inconsistent with the answers they individually gave years earlier in discovery and in answers to undertakings. Furthermore, their evidence was undermined by the lack of documentary support, including a failure to produce spreadsheets Jones Heward had allegedly used at quarterly meetings to identify investments not in conformity with its investment strategies.

[32] In contrast, Mr. Dupéré denied giving instructions to maintain unusual proportions of short-term investments and testified that he repeatedly complained about those proportions. His evidence was supported by Jones Heward's failure to record any liquidity instructions in its files, the absence of any exception reports, and a failure by Jones Heward to confirm in writing Mr. Dupéré's supposed instructions. The trial judge preferred Mr. Dupéré's evidence on these points, because, as is implicit in his reasons, the Jones Heward witnesses were not credible.

[33] I repeat that it would have been preferable had the trial judge recorded his specific findings on the inconsistencies of the witnesses. However, it is clear that the trial judge was entitled to accept some but not all of the evidence of any witness and he had ample reason to reject much of the Jones Heward evidence. In this sense, the trial judge made no error in finding the Jones Heward evidence "likely untrue".

[34] The appellant takes issue with the trial judge's reasons in two other respects: first, the trial judge did not address evidence that Mr. Dupéré maintained significant cash investments in a different account managed by the firm of Jarislowsky Fraser and, second, the trial judge characterized Jones Heward's negligence as an "oversight".

[35] However, the evidence regarding the Jarislowsky Fraser account established only that Mr. Dupéré was surprised to learn that this account contained cash levels in excess of five per cent. There was no evidence whatsoever that the Jarislowsky Fraser liquidity was maintained at Mr. Dupéré's instructions; the only evidence was that it was not.

[36] The trial judge's use of the word "oversight" appears to be nothing more than an attempt to convey his conclusion that Jones Heward did not deliberately set out to mismanage the respondent's investments. This is consistent with his finding that Jones Heward was not negligent on the main part of the respondent's claim. The word "oversight" is also consistent with the trial judge's finding that Jones Heward, in the normal course, would have obtained written instructions about the unusual liquidity, monitored the portfolio's non-compliance in this regard, periodically reviewed the short-term investment percentage with the respondent and noted any instructions to maintain such liquidity. It followed none of these procedures. Thus, he concluded that Jones Heward's negligence was in the nature of an "oversight" in the sense that it was not a deliberate decision to invest in a manner inconsistent with the client's instructions.

3. Kazakhstan

[37] The trial judge found that the appellant "conceded" its negligence regarding the losses resulting from the Kazakhstan acquisition. The appellant denies any such concession. I agree that "concession" was not an appropriate choice of word because the appellant continued to deny any negligence for that purchase.

[38] Nonetheless, while the appellant did not make the concession, it was effectively made by its own expert, Mr. Priestman, whose evidence was accepted by the trial judge. He gave his opinion that all the investments complied with the model portfolio approach, except the Kazakhstan investment. This is the "concession" relied upon by the trial judge. The question then is whether Mr. Priestman's opinion was properly founded on the evidence.

[39] In arriving at his opinion, Mr. Priestman considered the respondent's expert evidence that nineteen of the 159 stocks included in the respondent's portfolio were inappropriate and did his own research, testifying that he was given everything that he requested to analyze Mr. Dupéré's account quarter by quarter, stock by stock, industry by industry.

[40] On the basis of that review, Mr. Priestman found Jones Heward complied with the model portfolio, except for Kazakhstan, which he testified in examination in chief was not "appropriate" for a manager of the "Jones Heward money management style" and was a "truly terrible stock". On cross-examination, he testified that Kazakhstan "stuck out as being one, out of 159 names that were held over the course of this mandate, that didn't appear to fit." In addition, although not determinative, Kazakhstan was not included as an investment in the portfolio of any other Jones Heward client.

[41] Given this evidence, the trial judge's finding is unassailable that Jones Heward's acquisition of Kazakhstan fell outside the model portfolio. I see no reason to interfere with that conclusion.

4. Ratification

[42] The appellant argues that the trial judge did not consider the defence of ratification and that, if he had, he would have concluded that Mr. Dupéré, by his conduct, ratified the disputed investments.

[43] I disagree. One of the central issues at the trial was whether Mr. Dupéré ratified the acquisitions in his portfolio by his continued dealing with Jones Heward in the absence of complaint. Continued dealing, however, is not determinative of the issue. As Gillese, J.A. said in *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.) at para. 75:

> While continued dealings may be evidence of ratification, it is not determinative. In my view, ratification cannot be implied in the face of continuing repudiation even when the investor continues to use the broker for other transactions.

[44] It is true that on the main claim, the trial judge concluded that "for obvious reasons" the respondent could not succeed. He did so because Jones Heward frequently communicated with the respondent about the content of its portfolio, the respondent agreed to the Jones Heward model portfolio management, and it knew the available options if it was "seriously displeased" with Jones Heward's performance. In addition, the trial judge found that Mr. Dupéré made no written complaint about the portfolio until February 1998, and then that his complaint was made on the basis of hindsight motivated by a desire to keep gains and be relieved from losses. For these reasons, the trial judge held that the respondent's main claim could not succeed.

[45] However, the trial judge specifically came to the contrary conclusion regarding the disputed investments. On the basis of the evidence before him, he held that Mr. Dupéré complained about the short-term investments on a continuing basis. The evidence also established that, when Mr. Dupéré inquired about Kazakhstan, and expressed his concern about the difficult circumstances of its geographical location at that time, he was assured that the company was a good investment given its "great reserves" and that it fit within the Jones Heward model portfolio. Despite Mr. Dupéré's concern, Jones Heward did not give him the information that Kazakhstan was highly speculative and a "terrible stock". One cannot ratify what one does not know. Mr. Dupéré did not tacitly, or otherwise by his conduct, approve of or acquiesce to the disputed investments in what, importantly, was a managed account.

[46] In summary, the trial judge was entitled to find that the respondent ratified the investments at issue in the main claim because those investments complied with the agreed-upon model portfolio. However, the evidence supported his finding that the respondent did not ratify the disputed investments.

5. Assessment of damages

(a) Mitigation

[47] The appellant challenges the trial judge's decision on the issue of mitigation in circumstances when the disputed investments were held for lengthy periods of time. The issue of mitigation was raised in the appellant's written submissions at trial; however, this issue was not specifically addressed in the trial judge's reasons.

[48] Nonetheless, an overall reading of the reasons demonstrates that the trial judge was alive to the basis of a claim for mitigation because the respondent's conduct in

acquiescing to and failing to take steps to change investments was a major issue central to the trial. In my view, the trial judge's determination of mitigation was implicit in his conclusion that Mr. Dupéré's conduct "should not excuse the defendant's default or bar the plaintiff's entitlement to relief." This conclusion provides a complete answer to mitigation, based as it is on the trial judge's finding that the respondent acted reasonably by registering ongoing complaints about the short-term investments and relying upon the appellant's unfounded reassurances with respect to the quality of the Kazakhstan investment.

[49] I find support for this conclusion in the fact that that the appellant apparently did not challenge the final figure given in the expert report on damages. That figure gave the maximum of nine months as a reasonable time for the appellant to invest the cash on a gradual basis to the maximum acceptable cash retention of eight per cent of the portfolio. With those generous allowances, the expert found the respondent's loss to be $919,439, a calculation that the trial judge said "was not challenged" on any basis, including the basis that it should be further reduced for mitigation.

[50] However, since the trial judge did not specifically address mitigation, I consider the issue anew.

[51] Mitigation cannot be an issue regarding the Kazakhstan investment because mitigation is based on the reasonableness of the investor's conduct. It would not be reasonable to expect the respondent to mitigate his Kazakhstan losses when Jones Heward consistently reassured him that the investment fit within his investment objectives, that it was a good investment, and that he should be patient. This information was inconsistent with the opinion of their own expert that Kazakhstan was a "terrible stock". Had the respondent known that Kazakhstan was a poor investment that fell outside the model portfolio, indeed he would have been obliged to mitigate. In the absence of that information, he had no such obligation.

[52] The same cannot be said about the short-term investments. From the outset of the second deposit to the account in January 1996, the respondent was aware of the unusually high proportion of short-term investments in his portfolio. He complained about this from time to time. As Gillese J.A. said in *Hunt*, *supra*, at para. 77, a finding that the respondent did not ratify the investments does not mean that the respondent was entitled to do nothing and, in effect, speculate at the expense of the investment manager. Accordingly, the question on mitigation of the short-term investments is to determine when the respondent reasonably should have realized that Jones Heward was not going to address his complaints and should have taken steps to improve his return.

[53] The expert evidence established that Jones Heward would reasonably be expected to have invested the excessive quantities of short term investments in the account to the eight per cent level by November 1996. As a sophisticated and experienced investor, the

respondent would have been aware that such a delay was to be expected. When the nine months passed without appropriate reduction of the cash component, the respondent was obliged to complain within a reasonable time. The duration of that reasonable time depends upon a number of factors.

[54] The Supreme Court in *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, [2000] 1 S.C.R. 638 provides guidance on the factors relevant to mitigation in disputes between an investor and his or her investment adviser. In particular, the court explained at para. 53 that "a flexible approach must be taken in determining what constitutes a reasonable period of time for the client to act and mitigate the damages" considering "the client's level of experience and knowledge of investments, [and] the complexity of the situation." As well, the court recognized at para. 55 that "the sense of trust that is characteristic of a contract of mandate" must be considered because a client might be unable or reluctant to believe an investment professional invested with significant trust has acted with incompetence. As a consequence, the investor might be slow to realize the extent of the damages and to take charge of the situation.

[55] *Hunt v. TD Securities Inc.*, *supra*, confirmed that mitigation depends upon what is reasonable in the circumstances. Gillese J.A. explained that a claimant's obligation to mitigate arises "on the date of breach (or knowledge thereof in the plaintiff) or more frequently within a period thereafter which is reasonable in all the circumstances." The court concluded at para. 97 that the following factors warrant consideration in determining the reasonableness of the mitigation period:

1. the ease of purchase of replacement shares (considering the number of shares to be purchased, whether they are readily available in the market, and the time and risk involved in their purchase);

2. the degree of sophistication and experience of the investor;

3. the degree of trust reposed in the broker;

4. whether the broker was obliged to follow the investor's instructions in making transactions, and

5. whether the relationship between the investor and broker has broken down to the point that the client has lost confidence in the broker.

[56] Applying those factors to the respondent's circumstances in support of the respondent's obligation to mitigate, it is clear that the short-term investments could easily have been invested in securities within the model portfolio. As well, indisputably, the respondent was a sophisticated investor who, on his own admission, recognized that the proportion of his short-term investments fell well outside the norm.

[57] However, on the other side of the equation, the respondent's account was a discretionary one where the very busy respondent retained Jones Heward to make decisions on his behalf because it was a portfolio manager with a particular expertise in his investment objectives. Subject to the agreed-upon objectives, the respondent placed a great deal of trust in Jones Heward to manage the funds as it saw fit. The respondent had good reason to have faith in Jones Heward because it had managed the respondent's earlier investments for the preceding three years extremely successfully.

[58] The respondent's trust and faith in Jones Heward was evidenced by its decision to invest a further $14.4 million dollars in 1996. This faith or dependence serves to lengthen the mitigation period.

[59] Moreover, on different occasions throughout the thirteen months at issue, the respondent raised the subject of the short-term investments with Jones Heward and understood that the monies would be invested.

[60] The respondent's trust in the appellant is reflected in the action he took when he realized that the appellant was not going to address his concerns. Instead of finding another portfolio manager, the respondent made a written complaint and attempted throughout 1998 to work with Jones Heward to resolve their differences and to continue their relationship. So did Jones Heward.

[61] Jones Heward only terminated the relationship after the parties had tried to resolve their differences for a further twelve months. If Jones Heward thought that twelve months was a reasonable amount of time to spend in negotiations with the respondent, it is difficult for it to complain about the thirteen months that the respondent took to make his complaint sufficiently forceful to obtain Jones Heward's focussed attention to the issue.

[62] Since the appellant totally controlled the investments, the respondent completely trusted the appellant, the appellant gave the respondent ongoing reassurances, the parties enjoyed an ongoing relationship that had not deteriorated, and the respondent expressed continuing concerns about the short-term investments, I am unable to conclude that the respondent was in a position to act decisively or that the thirteen-month period of mitigation was other than reasonable. Accordingly, I would not give effect to the appellant's appeal on the issue of mitigation.

(b) Contributory negligence

[63] Since there was evidence to support the finding that the respondent acted reasonably and a specific finding that his conduct should not deprive him of damages, there is no basis for a finding of contributory negligence. See *LaFlamme*, *supra*, at para. 56.

6. The offset of losses from gains

[64] In my view, the appellant is not entitled to hide the losses from the disputed investments behind the profits made in investments that conformed to the model portfolio and the letter agreement. The appellant is obliged to pay for its negligence and breach of the letter agreement. See *Zraik v. Levesque Securities Inc.* (2001), 153 O.A.C. 186 at paras. 32-33.

Costs

[65] As I would dismiss the appeal, the respondent is entitled to costs, which I would fix in the amount of $25,000 inclusive of Goods and Services Tax and disbursements.

"S. Lang J.A."

"I agree Janet Simmons J.A."

GOUDGE J.A. (Dissenting):

[66] I have had the benefit of reading the thorough reasons for judgment of my colleague Lang J.A. However, for the reasons that follow, I am unable to agree with her conclusion. I would allow the appeal and order a new trial on the two issues on which judgment was granted to the respondent.

[67] Before turning to these issues, like my colleague, I think the way the trial judge put his reasons together must be addressed. The evidence in this trial took some seventeen days, concluding on March 19, 2004. Reasons for judgment were released a little over five months later, on August 23, 2004. The reasons that provide the trial judge's thinking on the issues in his own words are twenty-three paragraphs long. In the seven paragraphs that follow, the trial judge offers his explanation for then incorporating into the reasons sixty paragraphs of the respondent's written submissions and an additional forty-five paragraphs from the written submissions of the appellant. Those seven paragraphs read as follows:

> [24] I now conclude with some further comments about the evidence and the relative brevity of these reasons.
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> [25] It is now nearly six months since the conclusion of the trial of this action. The pressure of presiding over other cases and preparing judgments in more urgent, but not necessarily more important, cases has made it impossible for me to give my judgment earlier. As well, in addition to the oral evidence of witnesses, the record in this case includes a vast number of documents and it has required a great deal of time to review all of the evidence and arrive at a just disposition. It is now desirable that judgment be rendered prior to the expiry, in just a few days, of what is now considered to be the acceptable time limit for judgments to be reserved in the absence of unusual circumstances.
>
> [26] As I began to write these reasons, I was fortunate to have the closing submissions of both sides before me. Both contained extensive references to the evidence and the inferences that should be drawn. Accordingly, I found myself using those submissions extensively and borrowing freely from them.
>
> [27] In these circumstances, I have therefore decided to shorten these reasons by adopting portions of both submissions as submitted by counsel rather than by setting

> out in my own words essentially what counsel have already done. There is nothing to be gained in delaying the release of this judgment merely to enable me to rewrite the submissions. Both of them were carefully prepared and, so far as I could ascertain, fairly and accurately reflected the evidence that was tendered.
>
> [28] I adopt and incorporate into these reasons the following paragraphs of the submissions made on behalf of the plaintiff; 134, 135, 136, 137, 138, 139, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180 (the reference in [para.] (c) at page 75 should be to Nicholishen and not Monahan), 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 197A.
>
> [29] I adopt and incorporate into these reasons the following paragraphs of the submissions made on behalf of the defendants; 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85.
>
> [30] I acknowledge and thank all counsel for their help throughout this trial. Their performance, without exception, met the highest standard of skill and professionalism.

[68] There is no doubt that limited, careful, and explained adoption of counsel's argument can sometimes assist reasons for judgment. That is not this case. In my view the wholesale incorporation here, and the seven paragraphs I have quoted, raise three serious concerns about the reasons as a whole.

[69] First, they raise the concern that large parts of the judgment were pasted together from the thinking of others, to meet the six month guideline for the release of judgments, at some cost to full and independent consideration of the case by the judge himself.

[70] There can be no doubt that both the principle of timely release of judgments and the principle of full and independent judicial consideration are vital if the parties and the public are to have confidence in the judicial system. One cannot be traded off against the other. Where a judgment raises that possibility, the system is not well served. Moreover, in this case, there was no need for it, given the timing I have described. The trial judge had three more weeks to put his own stamp on the reasons and yet stay within the guidelines.

[71] Second, the manner of incorporation here runs the risk of creating an incoherent judgment. The trial judge provides no guidance about the issues to which he thinks the incorporated paragraphs relate. Nor does he tell us whether those incorporated paragraphs that are phrased in the typical language of submissions are to be read as judicial findings. In my view, reasons for judgment should leave the reader guessing as little as possible.

[72] Third, as my colleague points out, this case clearly demonstrates the risk inherent in this technique of a conflict between the trial judge's own words and those he adopts by incorporation.

[73] This problem arises most acutely in the context of the Kazakhstan shares issue. To sustain the trial result on that issue, the respondent argues that the trial judge concluded that these shares were not purchased in accordance with the appellant's model equity portfolio. The respondent must then explain the direct conflict between that finding and the trial judge's incorporated finding that at all times the appellant operated the respondent's account in accorandance with the same management strategy it applied to all clients and in accorandance with its model equity portfolio. As I will discuss, I do not think that circle can be squared in this case.

[74] Whether or not the wholesale incorporation of parts of the parties' submissions creates a fatal flaw in the trial judgment in any particular case, I agree with my colleague that it is an ill-advised and unfortunate practice. It can only diminish public confidence in the justice system and weaken the primary mechanism through which a judge is accountable, namely his or her reasons for judgment.

[75] Beyond these concerns about the reasons for judgment, the appellant challenges both the findings against it concerning the maintenance in the respondent's portfolio of excess short-term investments and the findings against it concerning the purchase of the Kazakhstan shares.

[76] The respondent does not cross-appeal from the dismissal of its main claim that the appellant purchased a number of corporate stocks for its portfolio that it should not have. As my colleague says, in the course of dismissing this claim the trial judge found that the respondent had ratified these purchases (through its principal Dupéré). The trial judge concluded his findings on the respondent's main claim this way:

> [16] … Dupéré knew that the defendant's purchase of stocks for the plaintiff's account would include some speculative stocks and he was content with that as well. The defendant kept Dupéré aware of the transactions it had entered into for his account by sending him regular periodic statements of his

> account in accordance with the method he chose and by various telephone and personal communications with him.
>
> [17] Although Dupéré was content with almost all of the transactions entered into, he questioned the defendant about some from time to time and then received explanations which reassured him. There was nothing in those explanations which have been shown to be untrue or misleading. Until late in 1997, Dupéré was a sophisticated and experience[d] businessman and investor and understood what was taking place with respect to the plaintiff's account. Dupéré was content to receive the benefits of the defendant's services despite his occasional complaints. If he was seriously displeased with the defendant's performance, he could have made a formal complaint or given further specific instructions to the defendant with respect to how he wished the plaintiff's account to be managed. As well, he could have moved the plaintiff's account elsewhere at any time but he chose to continue to maintain the plaintiff's account with the defendant. It was not until February, 1998, that he made any complaint in writing to the defendant.
>
> [18] On all of the evidence, I conclude that this action is based, in part, on the plaintiff's wish, based on hindsight, to take advantage of the benefit of the stock purchases that appreciated in value and to be relieved from the losses emanating from those purchases that depreciated in value. For obvious reasons, the plaintiff is not entitled to succeed in that endeavour.

[77] Turning first to the short-term investments issue, I agree with my colleague that it was open to the trial judge to find as a fact that Mr. Dupéré gave no instructions to maintain these excessive amounts in the respondent's account. Indeed, the appellant does not challenge this finding. Because this failure to follow its usual investment practice was without instructions, the trial judge found the respondent at fault as follows:

> I find, therefore, that the defendant's default was likely the result of an oversight which, in the circumstances, amounted to negligence and a breach of the agreement which required the defendant "to exercise due care" as a condition of avoiding liability.

[78] This conclusion left the questions of ratification and mitigation in connection with the short-term investments very much alive at trial.

[79] Neither the trial judge's own reasons nor those he adopts from counsel make any express reference to ratification in the context of the short-term investments.

[80] The trial judge does find as a fact that Dupéré complained to the appellant about the excessively large sums of cash maintained in the respondent's account. The trial judge then immediately concludes that "Dupéré's conduct should not excuse the defendant's default or bar the plaintiff's entitlement to relief". I am prepared to take it that this is his implicit finding about ratification. As such, however, it presents two problems.

[81] First, it is purely conclusory. It offers no analysis of why the trial judge concludes that the respondent did not ratify the appellant's accumulation of excess short-term investments. While there was evidence from Mr. Dupéré that he complained about the situation probably two or three times in 1997 and once in 1996, it is clear that because of the appellant's regular reporting he knew about it from the time it began in March 1996. Moreover, Mr. Dupéré's evidence was that the appellant's response to him was that it would invest these sums whenever a good opportunity arose. There is no evidence that Mr. Dupéré was dissatisfied with this response or ever gave direction to the appellant to invest these excess sums immediately.

[82] The trial judge evaluates none of this evidence in the context of the ratification issue. One is left to ask whether he considered the evidence of the complaints to constitute a continuing repudiation of the appellant's excess accumulation of short-term investments, despite Mr. Dupéré's apparent acceptance of it and his failure to direct otherwise. Or did he fail to consider some or all of this evidence? Or did he consider it irrelevant to the issue altogether? His conclusory finding offers no guidance.

[83] Second, the evidence relevant to ratification of the excess retention of short-term investments is very similar to the evidence relevant to the ratification of the purchases that were the subject of the main claim. In both cases, the respondent had knowledge, complained from time to time, and received explanations that appeared to reassure him. The trial judge offers no explanation of why one should constitute ratification and the other should not. Absent an irrelevant consideration, I find it hard to think of one.

[84] Given these deficiencies, I would conclude that the trial judge does not explain his pathway through the conflicting evidence to reach his conclusion on the short-term investments issue. In other words, the reasons on the issue of ratification do not permit adequate appellate review. See *R. v. Sheppard*, [2002] 1 S.C.R. 869; *Armstrong v. Centenary Health Centre*, [2005] O.J. No. 2386 (C.A.) (Q.L.).

[85] On the question of mitigation in relation to the excess short-term investments, the reasons are even more deficient. In my view, there is no reference to mitigation at all, either explicit or implicit. The trial judge's view that "Dupéré's conduct should not excuse the defendant's default or bar the plaintiff's entitlement to relief" cannot address this question, since the respondent took no steps whatever to mitigate between March 1, 1996 and December 31, 1997 and advances none on this appeal. Nor do I think that the trial judge's calculation of damages can be said to be a reasoned disposition of the mitigation issue. I am not prepared to assume that this calculation constitutes a decision about the need to mitigate.

[86] The judicial silence on the mitigation issue is concerning. Assuming the respondent's complaints about the excess short-term investments were enough to constitute continuing repudiation of the appellant's retention of them, and that this negates ratification, it is hard to understand why the respondent would not be obliged to mitigate by directing the appellant to invest the excess rather than retain it. Because of his silence, the trial judge's reasons prevent any appellate understanding, let alone review, of his thinking on this issue.

[87] With respect, I disagree with my colleague that this error can be cured by deciding the mitigation issue for the first time in this court. The various factors set out by my colleague as relevant to this issue must be applied in the context of seventeen days of evidence. I do not think this court is properly equipped to do that effectively. Moreover, while mitigation was argued on appeal it was in the context of whether the trial judge erred on the issue. It was not in the context of this court deciding the issue at first instance. Neither party invited us to do so.

[88] In my view the result must be a new trial on the short-term investments issue. While the errors concern the questions of ratification and mitigation, I think it would artificially tie the hands of the new trial judge to confine the new trial to these aspects of the short-term investments issue. I would therefore set aside paragraph one of the judgment appealed from, and order a new trial on the short-term investments issue. This remedy creates no prejudice to the respondent as a result of the unfortunate death of Mr. Dupéré since the first trial had to cope with that circumstance as well.

[89] The second battleground on this appeal is the Kazakhstan shares. The trial judge found the appellant liable for the loss resulting from the appellant's purchase of these shares for the respondent's portfolio.

[90] The entirety of the trial judge's reasons on this issue are as follows:

> [1] … In addition, a further award is made to the plaintiff against the defendant, in an amount to be fixed, to compensate the plaintiff for its further loss as a result of the

> defendant's default in purchasing for inclusion in the plaintiff's investment account shares in Kazakhistan Minerals Corporation.
>
> …
>
> [9] … The defendant and Nicholishen deny the plaintiff's allegations with one relatively minor exception. It is conceded by them, and supported by their expert witness, John Priestman, that shares of Kazakhistan Minerals Corporation which the defendant purchased for inclusion in the plaintiff's account should not have been purchased.
>
> …
>
> [14] … As well, subject to the Kazakhistan exception, the defendant would be entitled to be relieved from any liability relating to the purchase or sale of any other stocks from the plaintiff's account by reason of the release from liability provision contained in their agreement.
>
> …
>
> [15] … I accept his evidence that, subject to the Kazakhistan exception, the stocks identified by McInnes were not unsuitable for the plaintiff's account and that the defendant "did a very good job" for the plaintiff and performed its services as it had promised to do.

[91] Several months later, the trial judge fixed damages for this loss at $100,865.41 in a one line endorsement.

[92] As I read the words of the trial judge, he finds the appellant liable for the purchase of the Kazakhstan shares because of the appellant's concession. This would explain the absence of meaningful reasons on the issue, and the failure of the trial judge to deal at all with the appellant's argument that in any event the respondent had ratified the purchase of these shares. The finding that the appellant conceded liability for the purchase of these shares is not just an inappropriate choice of words. It is wrong. The appellant made no such concession. To find liability on this basis is an error that in my view requires a new trial of the issue.

[93] My colleague reads the trial judge as accepting Mr. Priestman's evidence that the purchase of the Kazakhstan shares did not comply with the model portfolio approach and

on that basis finding the appellant liable because this purchase fell outside that model. In my view this reading presents three equally insurmountable problems.

[94] First, the finding that the purchase of the Kazakhstan shares fell outside the model is contradicted by the repeated findings of the trial judge (through incorporation) that all the purchases complained of by the respondent (including Kazakhstan) complied with the model. Through incorporation, the trial judge makes the following clear findings:

> There is no evidence that JHIC [Jones Heward], or any of those responsible for the management of the plaintiff's account, engaged in any form of self-dealing, dishonest conduct or acted in bad faith. To the contrary, the evidence establishes that the plaintiff's account was operated, throughout the mandate, in accordance with the same coherent management strategy and investment discipline which JHIC and Nicholishen brought to bear in managing each one of their clients' accounts. In doing so, JHIC and Nicholishen invested the funds entrusted to them in good faith, with due care and (as is the case with every professional portfolio manager) in accordance with the model equity portfolio which had been the basis of JHIC's track record of superior performance.
>
> …
>
> Following the opening of the account, JHIC proceeded to invest the plaintiff's funds in exactly the same manner, and subject to exactly the same research, investment and compliance processes as it had and continued to apply to each and every one of its client accounts throughout this period. In the result, and particularly with regard to the equity portion of the account, the plaintiff held the same securities, and in the same proportions, as every other JHIC client.
>
> …
>
> Following Dupéré's additional investment of funds in early 1996, JHIC continued to invest the plaintiff's funds according to the same growth-oriented investment style, and subject to the same research, investment and compliance processes as had been followed since the opening of the plaintiff's account in early 1993. JHIC continued to apply the same decision making process in the purchase and sale of securities held in

> its model portfolio with the result that the plaintiff continued to hold the same securities and in the same proportions as every other one of JHIC's clients.

[95] Unlike my colleague, I cannot read these paragraphs as meaning all stocks but with the exception of Kazakhstan. They do not say so, unlike the earlier passages in his reasons quoted above, where he carefully expresses an exception for the Kazakhstan shares. I cannot see a basis for reading the exception into the trial judge's findings without beginning with the assumption that the trial judge did not make a mistake by making incompatible findings.

[96] In my view, these inconsistent findings on the central fact underpinning his legal conclusion means that the conclusion cannot stand.

[97] Second, Mr. Priestman's evidence on the Kazakhstan shares was contradicted by the evidence of the members of the appellant's portfolio management team. They testified that all of the securities that the respondent complained about (including Kazakhstan) were purchased in accordance with the model portfolio. The trial judge recites their evidence at paragraphs sixteen, seventeen and eighteen of the appellant's submissions, all of which are incorporated as part of his reasons for judgment.

[98] If the trial judge is to be read as choosing Mr. Priestman's evidence over that of the appellant's portfolio management team, he does so entirely without explanation and without any obvious reason for the choice. Compliance (or not) with the model equity portfolio would not seem to require expert evidence. Indeed those who developed and implemented the model might be said to be preferably placed to say if the model is conformed to in a particular case. The trial judge's choice of Mr. Priestman's evidence is central to his finding of liability. Doing so without giving any reasons for the choice is a failure to discharge his obligation to give meaningful reasons.

[99] Third, as my colleague reads him, the trial judge finds liability on the basis of only one stock being purchased outside the model portfolio, out of 159 stocks that the appellant bought for the respondent's account. The trial judge set out the appellant's legal obligation this way:

> The defendant agreed to invest the plaintiff's funds in a relatively conservative manner <u>substantially</u> in accordance with the parameters of its 'model portfolio' which it had developed for use by its clients and that is overwhelmingly what it did. [Emphasis added.]

[100] The obvious question is whether substantial compliance can accommodate one failure out of 159 purchases or whether that standard requires perfection. In my view the

answer is not obvious. The trial judge's failure to address it is another deficiency in his reasons.

[101] Even if the reasons on liability for the purchase of the Kazakhstan shares were problem free, they are silent on the questions of ratification and mitigation. These questions were as alive here as for the main claim of unsuitable share purchases and the claim concerning short-term investments. The evidence was the same in each case: complaint followed by assurance followed by an apparent acceptance by the respondent and no direction to the appellant to do anything different. In my view, meaningful reasons would require at least a limited explanation of why ratification or mitigation does not apply to the Kazakhstan shares issue.

[102] For these reasons I would conclude that a new trial is also necessary for the Kazakhstan shares issue.

[103] Finally, because I think a new trial is necessary on both this and the short term investments issue, I would set aside the costs order against the appellant made at trial.

[104] In summary, it is my view that the reasons for judgment are simply inadequate. There are too many obscurities surrounding how the trial judge reached his conclusions in the face of real factual and legal issues. As a result, the reasons do not permit proper appellate review. To paraphrase *Sheppard, supra*, the appellant does not understand why he was found fully liable for the short-term investments and the Kazakhstan shares purchase and neither do I.

[105] I would allow the appeal.

RELEASED:

"STG" "S.T. Goudge J.A."
"JAN 12 2007"