

92-2667

National Association of Securities Dealers
Case Number 92-03667

In the Matter of the Arbitration Between

Aaron S. Bell, Trustee, The Jacob Bell Family Trust,
Claimant

and

Capital Analysts of New England, Inc

Charles Evan,

Respondents

Decision and Award

Case Information:

This matter was submitted to arbitration pursuant to a Uniform Submission Agreement executed by Claimant August 5, 1992; by Respondent Evan January 20, 1993 and by Respondent Capital Analysts on January 11, 1993.

Pre-hearing discovery was conducted by the parties and the matter came on for hearing before the undersigned as sole arbitrator, at the offices of NASD in Boston, Massachusetts at 9:30 A. M. on March 30, 1993.

Representation:

Claimant, who initiated the claim pro se, was represented at the hearing by Nathaniel Pitnof, Esquire of Kessler, Kessler & Pitnof, Worcester, Massachusetts.

Respondents Capital Analysts of New England, Inc. (hereinafter "CANE") and Evan were represented by James F. Kavanaugh, Jr., Esquire and Maureen E. Curran, Esquire of Conn, Kavanaugh, Rosenthal & Peisch, Boston, Massachusetts.

Hearing:

Three witnesses gave testimony and were cross examined. In addition to the pretrial pleadings and the Submission Agreements which were received into evidence as Arbitrator's Exhibit #1, thirteen documentary exhibits were admitted into evidence.

Case Summary:

Claimant met with Respondent Evan and other representatives of Respondent CANE during 1987. It is undisputed that Evan was consulted in his capacity as an experienced financial planner. Claimant alleges that he sought Evan's advice concerning management of the assets of the Jacob Bell Trust, of which Claimant is Trustee. Claimant alleges that he placed great emphasis on the importance to him of preservation of capital and that Evan also recommended the preservation of capital as being of prime importance to individuals of their age. (Both Claimant and his wife were over 60 years of age at the time of the meetings.)

Claimant also alleges that although he agreed to pay a fee of \$3250 for the services to be rendered, Respondent Evan, who was also a registered securities representative, promised that the fee would be reduced by any commission earned by CANE on securities purchased through CANE.

Claimant alleges that in September of 1987, at the urging of Respondent Evan, he invested \$101,000 of the funds of the Jacob Bell Family Trust in MFS Government Securities High Yield Trust later renamed MFS Government Income Plus Trust. (The MFS Trusts are hereinafter referred to as "MFSGSH".) He alleges that this investment was unsuitable for the preservation of principal and that he had suffered a loss of \$18,364 when he discovered this fact in January of 1991. He liquidated the investment in 1992 and 1993. He further seeks the return of \$2000 paid in 1987 for financial planning services on the ground that CANE was paid \$4795 in commissions when the MFS Government Securities High Yield Trust was purchased. Claimant further contends that he sold 1250 shares of Exxon at the behest of Respondents in order to invest in MFSGSH and in closing asked that he be awarded the value of the lost opportunity since Exxon did well in the market during the time that MFSGSH declined. Claimant alleges that he first learned that MFSGSH was unsuitable for capital preservation when he read an article on the subject in the Boston Globe in January 1991.

Respondents contend that they were engaged to do an overall financial plan with emphasis on tax saving, estate planning and retirement income for the Bells which included the Jacob Bell Trust; that the trade offs between high yield and preservation of principal were carefully explained to Claimant; that Claimant was provided a prospectus which fully described the risk of loss of share value; that when income received by Claimant is added back, Claimants received a total of \$138,000 and hence suffered no loss on the \$101,000 investment; and that the agreement on fees was that any commissions earned were in addition to the agreed upon fee of \$3250.

FINDINGS:

After considering the pleadings, the testimony, the exhibits and the arguments of counsel presented at the hearing, I have decided in full and final resolution of the issues submitted for determination as follows:

1. I find that the Claimant knew, or should have known, that he was assuming market risk in buying MFSGSH. Each of the prospectuses from 1987 to 1992 state in bold face type: "Therefore, the net asset value of the shares of an open-end investment company such as the Trust, which invests in interest bearing securities, changes as the general levels of interest rates fluctuate. When interest rates decline, the value of a portfolio invested at higher yields can be expected to rise. Conversely, when interest rates decline, the value of a portfolio invested at lower yields can be expected to decline. In addition, the Trust's use of option contracts to enhance current yield may result in the loss of principal under certain market conditions."

Each annual prospectus beginning with March 29, 1988, contains the statement that "Preservation of capital is not an objective of the Trust."

While Claimant denied ever having been sent or given a prospectus, he admitted on cross examination that he might have been sent copies by MFS and discarded them without reading them. The conclusion that he at least had the opportunity to read the prospectus is bolstered by testimony that the application to buy the MFSGSH funds was torn from the prospectus itself and by Claimant's signature attesting, under penalties of perjury that he had inter alia, received a copy of the current prospectus. Although I view it only as cumulative and give it little weight, an affidavit of MFS' transfer agent states that in the normal course of business MFS issues a prospectus to all new shareholders to confirm the opening of their account and mail copies of all updated prospectuses to each shareholder of record at least annually. Claimant was a shareholder of record.

Claimant is a college graduate with a major in accounting. He has run his own business for more than thirty years. He had maintained accounts with at least two brokers prior to meeting Respondents. He was and is quite capable of understanding the prospectus and I find that he was given or sent copies. The investment was a small portion of Claimant's overall net worth, as disclosed to Respondents, at the time it was made. Contemporaneous notes of the interview with Respondent Evan indicate that Claimant's principal goal was not

preservation of capital but a desire to produce retirement income. The investment was not discretionary with Respondent. Claimant mailed the check with a cover letter and signed the application form. While, with the benefit of hindsight, other investments might have been more appropriate for Claimant, I do not find MFSMGH unsuitable under the circumstances.

In view of the above finding, I find it unnecessary to deal with Respondents' argument that Claimant earned a profit on the investment. I also find it unnecessary to deal with the lost opportunity in Exxon stock but note that clear documentary evidence showed that the Exxon stock was sold by Claimant on May 21, 1987 which is prior to his first meeting with Respondents and long prior to his September 20, 1987 decision to invest in MFSMGH.

2. I find that Claimant is entitled to a refund of the \$2000 paid by him to CANE for investment advice. The Investment Adviser Services Agreement was prepared by Respondents and any ambiguities must be construed against them. The contract calls for payment of \$3250 "payable as follows". The lines after that print are blank. No payment schedule of any kind is described. Four lines below that language is typed in "if, as a result of our analysis, new financial products are recommended and you decide to act on those recommendations or an offshoot of those recommendations, we expect you to act through Capital Analysts, Inc. so that we can be compensated by commissions generated." This language is fully consistent with Claimant's understanding that commissions generated would be credited against the adviser fee.

While Respondents argue that a payment of \$1000 by Claimant in December of 1987, after he made the MFSMGH investment is inconsistent with his position, I note that respondents never billed or invoiced any portion of the \$3250 which is inconsistent with Respondents' position.

I therefore award Claimant \$2000 plus interest of \$1200 for a total of \$3200, said award to be paid by either Respondent CANE or Evan but not by both.

Forum Fee:

3. In accordance with rule 43c of the Code of Arbitration Procedure, the following forum fees are assessed to be paid by Respondent CANE:

\$100	- Non-refundable filing fee
\$600	- Two hearing sessions at \$300 per session

Claimant deposited \$400 and Respondent CANE shall reimburse Claimant that amount and remit the balance of \$300 to the NASD.

Respectfully submitted,



Charles H. Resnick
Sole Arbitrator

Executed on:
April 8, 1993

Date of Decision: April 12, 1993