CITATION: Pardhan v. Bank of Montreal, 2012 ONSC 2229
COURT FILE NO.: 08-CV-350772CP
DATE: 20120412

2012 ONSC 2229 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
ALNASIR PARDHAN	)	*Maurice J. Neirinck* and *Michael G. McQuade*, for the plaintiff
Plaintiff	)	
– **and** –	)	
BANK OF MONTREAL	)	*Irving Marks* and *Barbara Green*, for the defendant
Defendant	)	
	)	**HEARD:** January 18, 19, and 20, 2012

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*"). The motion was heard together with a motion to certify the companion action of Inayet Kherani v Bank of Montreal ("Kherani action"). Both actions arise out of the same fraud.

[2] Salim Damji ("Damji") committed the fraud ("the Damji fraud"). He represented to prospective investors that he had developed a new teeth whitening product called STS Instant White ("STS"). Thousands of investors gave money to Damji in trust in exchange for shares in STS Inc., pending the sale of STS Inc. to Colgate-Palmolive ("Colgate"). A significant return on the investment was promised. In fact, there was no teeth whitening product, there were no shares in STS Inc., there was no STS Inc. and there was no pending sale to Colgate.

[3] Thousands of investors lost money. In total, Damji defrauded investors of approximately $77 million. On April 26, 2002, Damji was arrested and charged. He pleaded guilty and was

sentenced to 7½ years in jail. Despite the efforts of A. Farber and Partners Inc., a court appointed receiver ("Receiver"), the bulk of the money has not been recovered.

[4] Damji deposited the investors' money into various accounts at the Bank of Montreal ("BMO"). It is alleged that BMO knowingly assisted Damji in his breach of trust, knowingly received the fraudulent funds and/or was negligent in its receipt of these funds.

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[5] The plaintiff seeks to certify this action on behalf of the following proposed class:

> All persons (i) who reside in Canada, (ii) who gave monies to or for Salim Damji ("Damji") on account of a fraudulent Damji tooth whitening process promotion variously known as STS Instant White and other STS related names, (iii) whose monies were directly or indirectly deposited into bank accounts of Cash Plus at the Bank of Montreal's Brown's Line and Evans bank branch in the City of Toronto between January 1, 2000, and March 31, 2002, and (iv) who have not recovered all of their said monies.

[6] There are four other proposed class actions arising out of the Damji fraud. Motions to certify these actions are being held in abeyance pending the outcome of the certification motions in the Pardhan and Kherani actions.

[7] These reasons cover two motions: the plaintiff's motion seeking leave to bring this certification motion and the motion to certify this proceeding as a class action.

[8] BMO has two motions that are being held in abeyance: a summary judgment motion and a motion to dismiss the Pardhan action as an abuse of process. BMO served these motions with its responding material for the certification motion. In the case conferences leading up to the scheduling of the certification motions, BMO's intention to bring these motions was not mentioned. It is the practice in class action case conferences that counsel will identify the proposed motions that the parties wish to bring. It is the role of the case management judge under s. 12 of the *Class Proceedings Act* to make orders and directions "respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Given that the scheduled court time was set aside to hear the certification and leave motions in the Pardhan and Kherani actions, it was unrealistic to expect that BMO's motions could be heard on short notice. To the extent the issues in the summary judgment and abuse of process motions are relevant to the s. 5 test, I directed that the matters could be raised, otherwise the motions would proceed on a later date to be fixed by the court.

THE PLAINTIFF'S MOTION FOR LEAVE

[9] It is BMO's position that the plaintiff must seek leave to bring this certification motion because he failed to bring the motion within the time required under s. 2(3)(a) of the *Class Proceedings Act*. Section 2(3) of the Act states:

> A motion under subsection (2) shall be made,

(a) within ninety days the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered; and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

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[10] BMO argues that leave should not be granted for two reasons. First, the plaintiff caused a delay from August 2010 to December 2010 that he has not explained and second, BMO states that the Pardhan action is an abuse of process. For the reasons that follow I grant leave.

The Delay

[11] Courts have noted that the 90 day limit is more frequently honoured in the breach than in the observance. It is an unfortunate reality that certification motions generally do not proceed until long after the statement of claim is issued: see *Lambert v Guidant Corp*., [2009] O.J. No. 1910 (S.C.J.) ("Lambert"); *Turner v York University*, 2011 ONSC 6151; *Turon v Abbott Laboratories Ltd.*, 2011 ONSC 4343. Rarely does a defendant take the position, as in this case, that the plaintiff must obtain leave to bring the certification motion. It is usually agreed that the motion can proceed.

[12] The statement of claim was issued in March 2008 and BMO's statement of defence was delivered on July 4, 2008. Plaintiffs' counsel promptly wrote to the court to request the appointment of a class proceedings judge to manage the actions arising from the fraud. The action was then held in abeyance for about two years while BMO served numerous third parties. BMO completed service of third parties and advised the plaintiffs' lawyers in August 2010 that it was ready to proceed.

[13] However, during the fall of 2010, plaintiff's' counsel was involved in a lengthy trial that ended in late November 2010. As soon as the trial was over, plaintiffs' counsel wrote to request a case conference in this action. From that point forward, the action moved ahead promptly to a certification hearing.

[14] Given that BMO's third party claims caused a two year delay, it is absurd for BMO to suggest that leave should not be granted because of the short delay in the fall of 2010. Further, plaintiffs' counsel has provided a valid explanation for this very short delay (he was involved in a long trial). This is not a case like *Defazio v. Ontario (Ministry of Labour)*, [2005] O.J. No. 5829 (S.C.J.) where the court did not grant leave because the plaintiff's delay was egregious. The delay in this case is insignificant and justified and is not a reason for denying leave.

Abuse of Process

[15] BMO advances a second reason why leave should not be granted. It argues that the Pardhan action is an abuse of process because an earlier action (the "Mussa action") that sought relief on behalf of plaintiffs who were Damji investors, was dismissed for delay. The abuse of process argument is not made in the Kherani action because that action deals with investor deposits in Damji's personal BMO accounts. The Pardhan and Mussa actions deal with investor monies that were deposited into the BMO Cash Plus account. A review of the history of the Mussa action is set out below.

[16] On August 25, 2005, Ikbal Mussa and Tazim Mussa (the "Mussas") issued a statement of claim against BMO. It was not a proposed class action. The Mussas gave cheques to Damji in trust that were deposited into the BMO Cash Plus account. They alleged negligence, breach of trust and knowing assistance against BMO.

[17] The Mussas were represented by Faskens who at the time also represented the Receiver and a group called the Investor Recovery Group ("IRG"). The Mussas, like Mr. Pardhan, alleged that BMO was responsible for their lost investment.

[18] According to the Receiver's fourth report, if the Mussa action was successful, the IRG "intended to commence negotiations with BMO with respect to claims against BMO by numerous other investors." There is no evidence that BMO agreed that Mussa would serve as a test case. Further, there is no evidence that the thousands of investors that the Pardhan action seeks to protect agreed to abeyance commencement of their own claims and use the Mussa action as a test case.

[19] BMO informed Faskens that it would bring a Rule 21 motion to strike the Mussa action. BMO's lawyers repeatedly attempted to co-ordinate an agreeable motion date, but Faskens did not respond. The motion was not scheduled and BMO did not defend the action pending the Rule 21 motion. After a Status Notice in the Mussa action was issued on December 6, 2007, the Mussas served BMO with a Notice of Change of Solicitors appointing Maurice J. Neirinck & Associates as the Mussas' lawyers in place of Faskens. A Status Hearing was set for January 4, 2008.

[20] On January 2, 2008, Mr. Neirinck delivered a "Fresh Statement of Claim," seeking to amend the Mussa action and convert it from a personal action to a proposed class action on behalf of the following:

> [T]hose persons (i) who reside in Canada, (ii) who issued and gave cheques payable to Damji 'in trust' for the purchase of shares in an alleged corporate entity represented as STS Inc. with an alleged revolutionary teeth whitening product ('the STS Product'), (iii) whose cheques were subsequently endorsed by Damji in favour of and for deposit into the bank account or bank accounts of Cash Plus with [BMO]'s branch at Brown's Line and Evans in the City of Toronto and (v) who suffered losses equal to the amounts of and proceeds from those cheques after the cheques were so negotiated.

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[21] On February 19, 2008, Master Hawkins dismissed the Mussa action and ordered the Mussas to pay the costs of the action fixed in the sum of $7,000 to BMO within 30 days of the order. In his endorsement Master Hawkins stated:

> Amendments which involve the substitution of a party may not be made without leave on the basis of rule 26.02(a). I have therefore disposed of this status hearing on the basis that the amendment of the Statement of Claim on January 2, 2008 over the counter and without leave or notice was ineffective and made without authority. I regard this action as one which is not a class proceeding and which continues to be a Practice Direction Rule 78 action.

[22] The Mussas appealed this order. On March 18, 2008, while the appeal was pending, the Mussas' lawyers served BMO with the Pardhan Statement of Claim. The description of the proposed class in the Pardhan Statement of Claim is identical to the description of the proposed class in the Mussas' proposed Fresh Statement of Claim.

[23] The Mussas did not perfect the appeal and on May 16, 2008, the appeal was dismissed. The Mussas were ordered to pay the costs of the appeal to BMO, fixed in the sum of $750.

[24] The two costs awards were paid to BMO by one cheque, dated July 4, 2008, in the sum of $7,750, drawn on the account of "Mr. Nyaz Jethwani in Trust for IRG/DVG."

[25] BMO argues that the Pardhan action is an abuse of process because it is a second action seeking "identical relief on behalf of the same plaintiffs" as the Mussa action. As a result, leave to bring this certification motion should not be granted.

[26] BMO's position is not accurate. The relief claimed in the Mussa action is not "identical" to the relief claimed in the Pardhan action and the plaintiffs are obviously not the same. In Pardhan, the plaintiff has three causes of action: knowing assistance, knowing receipt and negligence. In the Pardhan action, $50,000,000 in damages is sought for these causes of action and $5,000,000 is sought by way of punitive damages. In Mussa, the same causes of action were alleged but the relief sought was specific to the Mussas' alleged losses. The Mussas claimed damages in the amount of $335,000 as well as punitive damages in an unspecified amount. The sum of $335,000 was the total amount of all payments made by the Mussas to Damji by cheque between February 2000 and December 2001.

[27] The Mussa action was never a class proceeding. Therefore, it did not advance claims on behalf of Mr. Pardhan or the putative class members in the Pardhan action. Mr. Pardhan denies having had any knowledge of the Mussa action when it was proceeding. Since the Mussa action was commenced as a regular action, it does not follow that the Mussas or the IRG were seeking to protect Damji's other victims.

[28] It would be unfair to say that Mr. Pardhan and the putative class cannot pursue this class action when they were not included in or protected by the Mussa action and had no knowledge of the Mussa action while it was proceeding.

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[29] The cases that BMO relies on are distinguishable because they involved the same plaintiff attempting to start a second action seeking the same relief. That is not the situation here.

[30] In summary, I do not accept that the Pardhan action is an abuse of process. Further, there was no unreasonable delay in moving this action forward that would warrant leave being denied. Leave to bring this motion is granted.

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THE CERTIFICATION MOTION

THE EVIDENCE

[31] Before reviewing the evidence, it is important to note the purpose of evidence on a certification motion. Evidence explains the background to the action. A certification motion is not the time to resolve conflicts in the evidence: see *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 at para. 50 (C.A.) ("*Cloud*").

[32] A plaintiff's evidentiary burden on a certification motion is low and the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action: see *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 16-26 ("*Hollick*"); *Lambert* at paras. 56-74 (S.C.J.); *Cloud* at paras. 49 -52; *Grant v. Canada (Attorney General),* [2009] O.J. No. 5232 at para. 21 (S.C.J.); *Lefrancois v. Guidant Corp*., [2009] O.J. No. 2481 at paras. 13-14 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 4129 (Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (Nfld. C.A.).

[33] With the exception of the affidavits of Mr. Pardhan and Mr. Kherani, all other evidence was filed for use in the Pardhan and Kherani actions. The following is a review of some of the evidence. As required, further evidence will be reviewed when the certification criteria are considered.

Overview of the Damji Fraud

[34] The Damji fraud started in 1999 and continued until April 26, 2002 when Damji was arrested. During this period Damji collected almost $78 million from thousands of investors (reference to the investors in this judgment means the putative class members). Damji used most of this money for offshore internet gambling.

[35] On May 7, 2002, an action was commenced under the *Class Proceedings Act* by Nyaz Jethwani (the "Jethwani action"). The Jethwani action was commenced against Damji, his various companies and family members to try and recover the monies that Damji took from the victims. The court appointed A. Farber and Partners Inc. as the Interim Receiver ("Receiver") over the assets and property of Damji, STS and others.

[36] The Jethwani action was certified for the purpose of approving a settlement in July 2005. At this time Olympic Sports Data Services Limited and its owner were added as defendants. The Receiver determined that Damji had transferred approximately $11,400,000 of the investors' monies to Olympic Sports, an internet gambling business in Jamaica. Without any admission of

liability, Olympic Sports agreed to pay $1,200,000. The court approved this settlement. No other monies were paid as part of the final settlement of the Jethwani action. Damji's existing assets had already been recovered by the Receiver. It appears that the value of this recovery was applied primarily to the Receiver's costs.

[37] The evidence from the Receiver is relevant to this action. The Receiver retained Intelysis to assist in the investigation of the fraud and specifically focus on the money flowing in and out of the BMO accounts described below. The Receiver and Intelysis gathered significant information about the Damji fraud and the activity in the BMO bank accounts. As the Receiver noted, Damji moved the investors' money around and through the various bank accounts.

[38] The Receiver provided five reports to the court. Intelysis prepared a report dated November 28, 2002 ("Intelysis report"). Either the full report or excerpts from the reports were filed as evidence on the certification motions in the Pardhan and Kherani actions. These reports document the extensive work that has been done to record the investments and track what happened to the money after it was deposited into a BMO account. The evidence from the Receiver and Intelysis is important because it is evidence that thousands of claims can be managed in common.

[39] The Receiver's reports explain that the fraud started in October 1999. Damji opened a bank account at TD Canada Trust and used this account to deposit money that he was collecting from the investors. This continued until August 2000 when Damji ended his banking relationship with TD. Money deposited at this bank is not part of this action.

[40] The Receiver identified 23 bank accounts across Canada into which the investors' money flowed. Most of the stolen money was deposited into the BMO accounts that are the subject of the Pardhan and Kherani actions.

[41] Damji either personally collected money from investors or relied on brokers (also called collectors) to gather the investors' money for him. Investors used cheques, bank drafts and cash to make their investments. The evidence is that cheques were used most frequently. Reference in the class definition to "monies" is intended to capture each mode of payment. Reference in this judgment to cheques includes bank drafts. Either way the monies in issue were deposited into one of the BMO accounts.

[42] The Receiver explained the investors' methods of payment at para. 62 of its second report as follows:

> Investors typically paid by cheques payable to "Dr. Salim Damji", "Salim Damji" or "Salim Damji, in trust". However, some paid by cheques payable to brokers directly. Some brokers who received certified cheques payable to them then presented the certified cheques at a bank and in return secured bank drafts payable to Damji. At least two brokers initially deposited cheques payable to them or corporations they controlled in separate bank accounts and then wrote Damji cheques or purchased bank drafts from funds in their account.

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[43] Some investors paid cash. The Receiver notes that for these investors difficulties may arise in tracking their investments. However, the Receiver reported that many brokers involved "appear to have relatively good contemporaneous records of investments, including cash investments."

[44] The Pardhan and Kherani actions involve different BMO accounts. In the Kherani action the investors' money was deposited into one of Damji's personal accounts at BMO. In August 2000, Damji opened a personal account with BMO at the Ellesmere Road branch (the "Ellesmere account"). He deposited a $297,766 bank draft from the TD account. In late October, Damji opened a second account at BMO at the Lakeshore/Parklawn branch (the "Lakeshore account"). The Lakeshore account became Damji's main bank account. It was close to his home. The Kherani action seeks to protect a putative class of investors whose money was deposited into the Damji BMO accounts. In the Pardhan action, the investors' money was deposited into the BMO account of 1096166 Ontario Ltd., a numbered company that operated as Cash Plus (the Cash Plus account). This BMO account was at the Brown's Line Etobicoke branch. Cash Plus was a company operated by Edward Reeves. The Pardhan action seeks to protect a putative class of investors whose money was deposited into the Cash Plus account.

[45] As will be apparent in this review, the evidence of activity in the BMO accounts is relevant to both actions. Damji used all of the BMO accounts to facilitate his fraud and he transferred money between the Cash Plus account and his personal BMO accounts.

[46] The Receiver and/or Intelysis requested and gained access to voluminous records. This included bank account statements, thousands of cancelled cheques and bank drafts, wire transfers and spreadsheets relating to the investors' money. The Receiver's second report also refers to information received from approximately 400 investors relating to their invested money. Damji's brokers/collectors are described as having kept "relatively good contemporaneous records of investments (including cash investments)". Intelysis also reviewed the books and records of Cash Plus, spreadsheets that the Cash Plus owner prepared detailing Damji's use of the Cash Plus account and transcripts of the Cash Plus owner's examination under oath.

[47] The Receiver's investigation records the source and amount of the deposits into the various BMO accounts and explains where it went. A review of this evidence follows.

Activity in the BMO Cash Plus Account

[48] The following evidence is available from reports of the Receiver and Intelysis.

[49] From January 2000 to March 2002, $54,507,000 was deposited into the Cash Plus account. The evidence refers to one Cash Plus account. On occasion the plaintiff refers to Cash Plus accounts (for example in proposed common issue 5). This appears to be an error. During the above time frame, the Damji deposits constituted the majority of the Cash Plus business. Cash Plus earned $593,869 in fees and interest as a result of Damji's business.

[50] The Receiver tracked the source of the $54,507,000 that was deposited into the BMO Cash Plus account. This money came from the following sources:

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- $46,636,000 from Investors
- $677,000 from collectors that Damji used to collect money from Investors
- $3,773,000 that Damji transferred from his BMO account
- $ 3,122,000 that Damji transferred from a TD account
- $300,000 that Damji transferred from a CIBC account

[51] As noted above, the total value of all investor bank drafts and cheques that Cash Plus accepted for deposit into its BMO account was $46,636,000. This consisted primarily of cheques. More than 90% of these cheques were made payable to Damji “In Trust”. Damji endorsed the investor cheques and drafts to Cash Plus. The BMO Cash Plus account was not a trust account.

[52] Investor cheques that were made out to Damji personally and not marked “in trust” were usually deposited into Damji’s personal BMO account (primarily the Lakeshore account). These cheques are the subject of the Kherani action.

[53] The Receiver prepared a chart that tracks what happened to the $54,507,000 that Damji deposited into the BMO Cash Plus account. The following is an overview of what happened to most of the money. Damji used $1,631,000 to buy cars and homes, pay for family expenses and pay fees to Cash Plus. He used $2,803,000 to return money to investors who asked for a refund. A total of $18,005,000 was transferred out of the BMO Cash Plus account via Western Union to place bets primarily with Olympic Sports. Damji engaged in a high volume of betting with Olympic Sports. The volume of bets grew with the rapid increase of investor funds in 2000. During a two year period, Damji placed over a thousand bets totaling $78,000,000. The Receiver documented one other significant type of transfer out of the Cash Plus account. Damji transferred a total of $29,658,000 from the Cash Plus account to his personal account at BMO.

<u>Evidence about Damji’s Personal Accounts at BMO</u>

[54] While Damji had a personal account at the BMO Ellesmere branch, the bulk of the relevant banking activity occurred in his personal accounts at the Lakeshore branch. At Lakeshore he opened a Canadian dollar account and a US dollar account. As well, he had Mutual Fund accounts in both currencies.

[55] The Receiver documented a “huge volume of deposits” in the Ellesmere and Lakeshore accounts. As stated in the Receiver’s second report, BMO records indicate that “Damji cashed and deposited to his account many hundreds (if not thousands) of investor cheques.”

[56] A chart that the Receiver prepared confirms that from August 24, 2000 to March 13, 2002, Damji deposited $58,475,000 into his BMO personal accounts. Where did this money come from?

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[57] The receiver identified $12,708,000 of "unknown deposits" and $3,526,000 that came from investors. The report notes that "despite repeated requests, [BMO] has failed to provide supporting documents in order to allow the Interim Receiver to identify the source of a substantial number of deposits" and that the unknown amount likely includes amounts that would be attributable to "Investor Monies".

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[58] In addition, the chart shows that $29,658,000 was transferred to Damji's personal BMO accounts from the Cash Plus account, $1,000,000 came from one of Damji's collectors, $3,550,000 came from Olympic Sports and lesser deposits came from other sources.

[59] Where did this money go? The Receiver's chart provides a detailed analysis and I highlight the following. Damji transferred $45,908,000 of the $58,475,000 to Costa Rica into the account of Montanas Magicas (an internet gambling company), he transferred $3,773,000 to Cash Plus and $1,412,000 was returned to investors who asked for a refund.

BMO's Evidence

[60] Evidence about the Damji and Cash Plus BMO accounts and what BMO did or did not do, comes primarily from the following sources:

- the Receiver/ Intelysis reports (reviewed above)
- The Receiver's examination of Rose Macchione, the Financial Services Manager at the BMO Lakeshore branch
- The affidavit and cross-examination of Murray Dowey, a senior manager at BMO

1. ***Evidence of Ms. Macchione***

[61] The Receiver examined Rose Macchione under oath. The transcript of this examination was filed as evidence on the certification motions in the Pardhan and Kherani actions.

[62] Ms. Macchione has worked in the banking industry for over 25 years. She is the employee at the Lakeshore branch that had the most contact with Damji. Shortly after Ms. Macchione was assigned to the Lakeshore branch she recalls that Damji came in to pay some bills. This was in mid 2000. At the time his account was located at the Ellesmere branch but he lived near the Lakeshore branch.

[63] Ms. Macchione noticed that Damji had approximately $3,000,000 in his Ellesmere account. She asked him if he realized that it was a non-interest bearing account and inquired about whether he wanted to invest the money. As a result of this discussion, Damji opened a Canadian dollar account at the Lakeshore branch and transferred $2,800,000 into it from the Ellesmere account. He opened up a money market account and invested some of this money. At some later point Damji opened a US dollar account because he had US dollar drafts and cheques that he wanted to deposit.

[64] Ms. Macchione recalls that Damji told her he was a dentist or a reconstructive surgeon. She also recalls that Damji told her, Winnie (the Investment Specialist at the branch) and a BMO employee at Private Client Services that he had some teeth whitening products that would be purchased by Colgate.

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[65] A week after Damji opened his BMO Lakeshore account, Ms. Macchione reported "large money dealings" (i.e. deposits) in the Damji account to Corporate Security at BMO. She explained that it is standard practice at the bank to make this report because "we have to make sure it's not money laundering, fraud."

[66] During the life of the Damji accounts, it was bank practice to verify bank drafts received for deposit. Ms. Macchione noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS. Damji told Ms. Macchione that these drafts had to do with his teeth whitening product. He also said that he was going to sell the product to Colgate and earn a phenomenal amount of money. Ms. Macchione did not believe Damji because the amount of money was simply too big. As she stated it was "off the wall…too many zeros".

[67] Ms. Macchione faxed copies of all cheques that Damji was depositing to Corporate Security. At some point, Ms. Macchione asked Corporate Security if she had to continue sending the cheques to them. The answer was yes and so she continued to do so.

[68] Ms. Macchione knew that Damji was wiring money out of his BMO Lakeshore accounts to Costa Rica. This started around January 2001 and continued until February 2002. The beneficiary of the wire transfers was Nigel Roberts. For every wire transfer that Damji sent to Nigel Roberts, he gave Ms. Macchione instructions by telephone or fax and asked her to fax confirmation to Nigel Roberts. If she did not send the fax, Nigel would call her to ask why the wire had not been sent. Nigel told Ms. Macchione that he ran an investment firm, that he lived in Los Angeles and travelled to and from Costa Rica. At some point in this time frame, Damji instructed Ms. Macchione to wire the money to Montanas Magicas. She did not know what the wired money was being used for. During the same period of time Ms. Macchione also knew that Damji was wiring funds to Olympic Sports in Jamaica. Damji told her that he was using the money for offshore sports betting.

[69] Ms. Macchione was questioned about her correspondence and discussions with Paul Hitchcock, the head of Corporate Security at BMO. On June 6, 2001, Ms. Macchione wrote to Mr. Hitchcock to bring to his attention an increase in the amount of Damji's wire transfers. She explained that Damji started out with a $100,000 wire transfer and all of a sudden the amount of the wires increased. Mr. Hitchcock had told her to report anything unusual or changes in the account and so she did. Ms. Macchione was also told that if at any time the money was wired to a different location she had to report this to Corporate Security. She did not ask Damji why the wire amounts had increased.

[70] Later in June 2001, Ms. Macchione noticed that Damji was starting to cash in his money market funds and was transferring the money to Costa Rica. Ms. Macchione explained that this

was "something different" and so she reported it to Mr. Hitchcock and told him that everything else in the Damji account remained the same.

[71] On November 5, 2001, Ms. Macchione reported to Mr. Hitchcock that $1,300,000 was being wired to a new location, the National Westminster Bank in London. The money had come into Damji's BMO account and there had been a problem with the rate of exchange. The money was recalled and sent back. Damji told Ms. Macchione that the money was being returned because they could not agree on a rate of exchange.

[72] At some point in the fall of 2001, Ms. Macchione called Mr. Hitchcock because she had not heard from Corporate Security. During this telephone call, Mr. Hitchcock told her that she no longer had to send Corporate Security copies of the deposits in the Damji account. However, she was told if "anything unusual comes up" she still had to report it. At Ms. Macchione's request, Mr. Hitchcock confirmed this instruction in writing.

[73] Ms. Macchione recalled one occasion when Damji presented a cheque for deposit that was marked payable to him in trust dated April 23, 2001. Ms. Macchione explained that BMO stopped payment on this cheque. It was payable to Damji in trust and Damji's account was not a trust account. Ms. Macchione stated that if a cheque is marked "in trust" then it must go into a trust account. The funds cannot be deposited into a non-trust account. Ms. Macchione was not aware of any other "in trust" cheques that Damji tried to deposit in his personal accounts. When she asked Damji about this cheque, he told her that the reference to "in trust" on the cheque was an error.

[74] At some point in 2002, Rick in Corporate Security asked Ms. Macchione if she knew the name Edward Reeves. She did not but pulled the name up on her computer and saw that he was the signing officer or owner of Cash Plus. Ms. Macchione knew that Cash Plus dealt with another BMO branch and she was aware that Damji had a relationship with Cash Plus. She knew this because Cash Plus had a BMO account at the Browns Line branch. Further, while Damji's accounts were open, Ms. Macchione had put his accounts on referral. This meant that she received a copy of any cheque that Damji wrote on his accounts. As a result, she saw the cheques that he wrote to Cash Plus. She never asked Damji why he was writing cheques to Cash Plus or inquired about his relationship with that company and/or Mr. Reeves. During Ms. Macchione's examination, she was referred to several cheques that Damji made payable to Cash Plus. Not all cheques were identified on the record. Those that were ranged in value from $50,000 to $100,005.

[75] In January 2002, there was a conference call between Ms. Macchione, her supervisor Steve Bang and Murray Dowey (the Senior Manager in the area). Mr. Dowey told them that he did not feel comfortable with the Damji account and how Damji was dealing with the bank. Dowey said it was a good opportunity for BMO to tell Damji that the account would be closed. Shortly after this call, Damji was notified that his accounts would be closed in 30 days. BMO notified Cash Plus that it was closing the Cash Plus account around the same time.

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[76] Around this time Damji called Ms. Macchione on a Friday and told her that he needed $20,000,000 right away. Ms Macchione was busy so the call was given to her colleague Winnie to handle. Ms. Macchione is not sure what happened except that on Monday Damji did not need the money anymore.

2. ***Evidence of Mr. Dowey***

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[77] Mr. Dowey's affidavit provides no evidence about what BMO did or did not do while the fraud was ongoing and the Damji and Cash Plus BMO accounts were open. Instead, this affidavit provides evidence about the various actions that have been commenced as a result of the Damji fraud and the variety of representations that investors heard about the investment opportunity. BMO relies on this evidence to support its position that the Pardhan action is an abuse of process, that the Pardhan and Kherani actions are statute barred and the alleged individuality of the claims (BMO's position is considered in these reasons).

[78] When Mr. Dowey was cross-examined the following minimal evidence was gathered about what BMO did or did not do while the fraud was ongoing and the Damji and Cash Plus BMO accounts were open.

[79] During the relevant time, Mr. Dowey was a senior manager for customer service. He was responsible for a group of BMO branches that included the Lakeshore branch where Damji had his personal accounts and the Browns Line branch where the Cash Plus account was located.

[80] Mr. Dowey recalls that in November 2000, Damji came to his attention as a result of a concern with his accounts at the Lakeshore branch. There was a concern about where the money in the accounts was going. Mr. Dowey did not characterize it as an ongoing problem.

[81] Prior to April 26, 2002 (the date of Damji's arrest), Mr. Dowey did not have any contact with any of the investors who wrote the cheques that were ultimately deposited into the BMO accounts. He is unaware of any such contact occurring between the investors and anyone else at BMO. Further, Mr. Dowey confirmed that before Damji's arrest, BMO did not notify any of the investors whose money was deposited into the Damji or Cash Plus accounts that some wrongdoing had occurred or may have occurred.

[82] Prior to Damji's arrest, there was no contact between BMO and Colgate or the Ontario Securities Commission. There was some contact between BMO and the police but Mr. Dowey was not involved. As Mr. Dowey explained, "We reported something to corporate security. Corporate Security then takes it from there."

[83] Mr. Dowey "thinks" that he was part of the decision to close the Damji accounts. He states that "there was some sort of a pow-wow and we made a decision." Around the same time BMO made a decision to close the Cash Plus account. Mr. Dowey was involved in this decision as well.

[84] Mr. Dowey confirmed that BMO has not done an analysis of the moneys flowing in and out of Damji's personal accounts or the Cash Plus account. As well, there has been no analysis of

how many cheques payable to and endorsed by Damji or Damji in trust were deposited into the Cash Plus account.

[85] Mr. Dowey's affidavit attaches sample investor cheques payable to Damji in trust that were accepted for deposit in the BMO Cash Plus account. On the back of these cheques is a stamp that reads "Credit only to the account of 1096166 Ontario Limited, Bank of Montreal, Browns Line." The actual BMO account number is included in the stamp. The stamp does not reference Cash Plus.

<u>Mr. Pardhan's Evidence</u>

[86] On August 14, 2001, Mr. Pardhan invested $200,000 to buy what he believed were shares in Damji's company, STS. He heard about the investment opportunity through his uncle who told him that Damji had developed a tooth whitening product that he was going to market with Colgate. As soon as there was a deal between Damji and Colgate, Mr. Pardhan understood that he could expect a return of $20 for each dollar invested. The money would be held in trust by Damji until the deal closed and if the deal did not close Mr. Pardhan's money would be returned to him. Mr. Pardhan decided he would invest on this basis.

[87] Mr. Pardhan met Damji once. On this occasion, Damji told Mr. Pardhan that the bank draft would be his receipt for the investment until Mr. Pardhan received his shares in STS. Mr. Pardhan followed his uncle's instructions and delivered the bank draft made payable to "Salim Damji in Trust" to Damji's condominium. When he arrived Damji was not home. He met Mr. Ladak (one of many collectors that Damji used to gather investors' money). Mr. Ladak did not make any representations to Mr. Pardhan. He simply collected the bank draft. Mr. Pardhan left the bank draft with Mr. Ladak and was not given a receipt.

[88] Between August 2001 and December 2001, Mr. Pardhan checked with his uncle several times to find out what was happening with the STS deal. Each time his uncle told him the deal was pending. He did not discuss his investment with anyone other than his uncle. While Mr. Pardhan remained concerned that nothing was happening with his investment, he did not discuss the matter further with his uncle before Damji's arrest.

[89] After Damji's arrest, Mr. Pardhan heard that a group (the "Investor Recovery Group" or "IRG") was organizing to try and manage the recovery of the stolen money. Mr. Pardhan obtained a copy of his canceled bank draft and gave it to the people that were dealing with "the mess". He heard that there were meetings taking place to discuss what had happened, but he did not attend any of the meetings and did not know who attended.

[90] Prior to starting this action, Mr. Pardhan did not take any steps to recover his lost money because he believed that the IRG was attempting to recover the money back on behalf of all investors.

[91] In mid-to-late 2007, Mr. Pardhan was contacted out of the blue by Mr. Jethwani, a person he did not know. Mr. Jethwani asked him if he would be interested in looking at potential

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problems with a lawsuit. At the request of Mr. Jethwani, Mr. Pardhan contacted Mr. Neirinck, class counsel. This led to Mr. Pardhan agreeing to act as the representative plaintiff in this action.

The Ontario Securities Commission

[92] Documents from the Ontario Securities Commission (OSC) file were obtained through a Freedom of Information request and produced as evidence on the certification motion. The redacted file reveals the following evidence.

[93] In May 2001, two people contacted Colgate and expressed concerns about an investment opportunity that STS had presented to them. The people were told that the investment involved a teeth whitening product that Damji had developed. These people were being induced to invest on the basis that Colgate was in the process of acquiring the teeth whitening product. Of course this was false.

[94] Colgate was concerned about the false representation that was being made about Colgate's connection to this product and the possible ongoing harm to the public. As a result, Colgate wrote to the OSC on May 23, 2001 to bring the "potential regulatory concern" to its attention.

[95] The OSC file contains copies of two letters from Colgate addressed "To All Concerned". The first letter is dated June 5, 2001 and the second June 19, 2001. The letters are the same except that the second letter directs the reader to the OSC investigator to have any questions answered. The letter states:

> The Instant White investment issue was recently brought to our attention since Colgate's name was being used without our knowledge or approval. We have never had any relationship with this company or this product and have subsequently requested the Ontario Securities Commission to look into this matter.

[96] There is no evidence in the OSC file or elsewhere on this motion explaining who this letter was sent to or how it was distributed. Mr. Pardhan never saw the letter and never heard anyone talking about it. Further, none of the investors that Mr. Pardhan knows of received a copy of this letter or ever contacted Colgate.

[97] The OSC file also includes copies of messages posted on the Yahoo message board in 2001. People posting messages talked about the teeth whitening invention and frequently described it as a scam. On September 26, 2001, Damji posted a message to investors and asked that it be passed on to all investors. Mr. Pardhan did not see Damji's posting until it was made available in this action. The message states as follows:

> Due to unforeseen circumstances, I wish to advise at this time that I am unable to provide a definite date for the return of respective investments. As such, please be advised, that I am in a position to return investment funds for those investors who wish to have their initial investment refunded. Should you wish to have your

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> investment refunded, please advise the person you invested through within four days of receipt of this correspondence. After this date there are no guarantees.
>
> I will be more than happy to continue to work with those investors who share my long-term vision of the project and who are able to, financially or otherwise, live without a return on their investment for an indefinite period of time. The concerns expressed to me by some of you over the last few months with regard to the length of the transaction are valid and hence the present to refund funds is being made. For the project to continue successfully however, we cannot have investors who are concerned about timelines. The amount of times my lawyers and I spend in responding to queries and concerns leaves little room for the rest of work at hand. These queries has left me to take a passenger seat until there is a cooperation.
>
> I will not send another e-mail until there is something positive for me to pass on to all investors. Thank you for your consideration in the above matter.

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[98] The OSC commenced an investigation. It had received calls from concerned investors. Several investors were interviewed by telephone. After these interviews, the OSC referred the matter to the RCMP and the Toronto Police and closed their file on September 14, 2001.

THE LEGAL FRAMEWORK

[99] Subsection 5(1) of the *Class Proceedings Act* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[100] These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.) ("*Sauer*"))

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[101] Winkler J. pointed out in *Frohlinger* at para. 25 , that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[102] The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at paras. 26-29 ("*Western Canadian Shopping")*; *Hollick* at para. 15.

[103] In *Hollick* at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

[104] Since it is not the role of the court on a certification motion to "find facts", I conclude that *Hollick* directs the court to confirm that there is <u>some evidence</u> to support the s. 5 (b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test: see, for example, *Fresco* at para. 61.

<u>5(1)(a) - Cause of Action</u>

[105] The first criterion for certification is the disclosure of a cause of action. In *Cloud* the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("*Hunt*") that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action.

[106] Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1)(a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

[107] The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: see *Hunt* at 980; *Anderson et al. v. Wilson et al.* (1999), 44 O.R. (3d) 673 at 679 (C.A.).

[108] The plaintiff pleads three causes of action against BMO: knowing receipt, knowing assistance and negligence. Before reviewing these causes of action, I will address BMO's position that the action is statute barred.

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Is the Action Statute Barred?

[109] BMO served a summary judgment notice of motion seeking to dismiss this action on the basis that the claim is statute barred. This motion is being held in abeyance because I directed that the certification motions proceed first. However, BMO nevertheless raised the limitations issue in its factum to support its position that the s. 5(1)(a) criterion has not been satisfied.

[110] During the hearing of the certification motion, BMO acknowledged that it is not possible to decide the limitations issue under s. 5(1)(a) because the plaintiff relies on the principle of discoverability. This in my view is the correct approach. Where the resolution of the limitations issue depends on a factual inquiry, such as when a plaintiff knew or ought to have known of the facts constituting the action, the issue should not be resolved at certification: see *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at paras. 140-145. In these circumstances, it is not plain and obvious that the action will fail because of an expired limitation period.

[111] Given this concession, I will briefly outline the limitation issue as it is raised in the pleadings. I agree with BMO's concession that it is not plain and obvious that the claim is statute barred.

[112] The statement of claim was issued on March 13, 2008. BMO filed a statement of defence and in paragraphs 22-23 it pleads the limitation defence as follows:

> 22. The Plaintiff's cause of action, if any, first arose on August 14, 2001, the date of his bank draft to Damji referred to at paragraph 29 of the Statement of Claim (the "Bank Draft"). Accordingly, the applicable limitation period expired on August 14, 2007. As the Statement of Claim was issued on March 13, 2008, the Plaintiff's action is barred by section 45 of the Limitations Act, R.S.O. 1990, c. L.15.
>
> 23. The Plaintiff and the other investors knew or ought to have known of Damji's fraud prior to March 13, 2002.

[113] Mr. Pardhan filed a reply. His lengthy reply to the limitation defence can be summarized as follows. Mr. Pardhan and the putative class did not know about the fraud until after Damji's arrest on April 26, 2002. There is no basis for alleging that they ought to have discovered the fraud before the arrest. Mr. Pardhan and the putative class trusted and believed in the legitimacy of the Damji investment. This is the basis on which they gave money to Damji. Prior to the arrest they had no reason to investigate Damji let alone discover the fraud. Money continued to be

invested up until the arrest and Mr. Pardhan and the putative class never asked for their money back before the arrest. Damji, Mr. Pardhan and the putative class all belong to the Ismaili community. Their trust and belief in Damji was reinforced by the common community bond.

[114] Mr. Pardhan argues that since the police with all their powers did not charge Damji until April 26, 2002, there is no basis for the defence to say that Mr. Pardhan and the putative class ought to have investigated Damji and discovered his fraud before April 26, 2002. It follows that Mr. Pardhan and the putative class had no basis to believe that they had a claim against BMO. Mr. Pardhan did not discover the basis for the claim against BMO until in or around the fall of 2007. The same applies to the putative class. I note that neither the statement of claim nor the reply provide particulars of why the basis for the claim against BMO was discovered in the fall of 2007.

[115] I will now turn to consider the three causes of action and whether the plaintiff has satisfied s. 5(1)(a). Subject to some minor deficiencies in the statement of claim that I will address, I conclude that criterion 5(1)(a) is satisfied.

Knowing Assistance in Breach of Trust

[116] During the certification motion, the plaintiff's knowing assistance claim was narrowed to knowing assistance in breach of trust. This will require an amendment to the pleading.

[117] Knowing assistance is a cause of action that can result in a stranger to a trust being found liable for a breach of that trust. In order to succeed, the plaintiff must prove that there was a trust, that the trustee (in this case Damji) perpetrated a dishonest and fraudulent breach of trust and that the third party (BMO) participated in and had actual knowledge of the dishonest and fraudulent breach of trust: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 at para. 34 (S.C.C.) ("*Gold*").

[118] The knowledge requirement for "knowing assistance" is actual knowledge, which includes recklessness or willful blindness: *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787 at paras. 39-41("*Air Canada*"). Constructive knowledge is not sufficient to establish liability on the basis of knowing assistance.

[119] BMO states it is plain and obvious that the knowing assistance claim will fail for three reasons. First, BMO says that the statement of claim does not allege that a "genuine trust" was established. Second, the knowledge that the statement of claim alleges is either constructive knowledge or the pleading blurs the line between constructive and actual knowledge. Third, BMO states that s. 437 of the *Bank Act*, S.C. 1991, c.46 precludes a claim of knowing assistance of breach of a trust by a non-customer against a bank. For the reasons that follow, I reject BMO's arguments.

1. The Genuine Trust Issue

[120] BMO states that a knowing assistance claim requires that a genuine trust between the settlor of the trust and the trustee exist. If a genuine trust is set up and the trustee then goes on to

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breach the trust in a fraudulent and dishonest way, a knowing assistance claim may be made where the stranger to the trust is alleged to have actual knowledge.

[121] In this case, Mr. Pardhan is the settlor of the trust and he genuinely intended that the investment money would be held in trust. He pleads that he and the class members gave their money to Damji in trust. The money was to be held in trust pending their receipt of shares in STS Inc. However, since the statement of claim pleads that Damji's investment scheme was fraudulent from the start, BMO argues that there never was a genuine trust.

[122] I reject BMO's argument that what they call a genuine trust is necessary to ground a knowing assistance claim. This would unfairly shield a third party who participates in and has actual knowledge of the dishonest and fraudulent breach of trust. Further, case law does not support this restriction on a knowing assistance claim.

[123] In *Eaton v. HMS Financial Inc.,* 2008 ABQB 631 ("*Eaton* "certification motion) and *Eaton v HMS Financial Inc.,* 2010 ABQB 635 ("*Eaton*" summary judgment motion), a knowing assistance claim against a bank was considered in similar circumstances. Investors gave money to a company in trust. From the start the investment was a fraud but of course the investors did not know this. The company was running a ponzi scheme. The plaintiffs alleged that the bank knowingly assisted in the fraudulent breach of trust. The court certified the proceeding as a class action. The bank then moved to dismiss the claim on a summary judgment motion. The motion to dismiss the knowing assistance claim was denied because the Bank failed to establish "beyond doubt that it did not have knowledge of the Ponzi scheme." The fact that a ponzi scheme existed from the start did not preclude the knowing assistance claim. This is apparent from the certification and summary judgment decisions.

[124] It is correct to say that a knowing assistance claim requires that a trust exist. However, the focus is not on whether Damji ever intended there to be a genuine trust. It is the intention of the settlor of a trust that determines its creation.

[125] D. Waters, in *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) discusses the "intention" requirement for the creation of a trust in the following way at p.132-133:

> There is no need for any technical words or expressions for the creation of a trust. Equity is concerned with discovering the intention to create a trust; <u>provided it can be established that the transferor had such an intention, a trust is set up</u>.
>
> [Emphasis added]

[126] Waters cites *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.) in support of this statement. In *Ablan Leon*, Heald J. writing for the majority, cites *Kingsdale Securities Co. Ltd. v. M.N.R,* (1975) C.T.C. 10 (Fed. C.A.), where Ryan J. explains that only the settlor can demonstrate the necessary intention to create a trust:

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38 In this connection it is instructive to consider the comments of my brother Ryan J. at page 22 of the Kingsdale case (supra) relative to a settled trust. Mr. Justice Ryan said:

> The role of the settlor is, of course, vital in the creation of a settled trust. It is the settlor who transfers to the trustee the property which constitutes the trust fund or res; it is the settlor who vests powers in the trustee. Only the settlor can do these things. Once the trust is established, the participation of the settlor may come to an end, as was contemplated in this case, but only he can bring the trust into existence.

[Emphasis added.]

[127] More recently in *Canada (Attorney General) v. Ristimaki,* [2000] O.J. No. 47 at para. 13 (S.C.J.), the court confirmed that it is the intention of the settlor that is relevant when deciding whether there is certainty of intention:

> An express trust is created only at the will of the settlor and only if he outwardly manifests the intention to create a trust by words written or spoken or by his conduct, (see *Bosse's Estate v. Leck* (1979), 26 N.B.R. (2d) 1 (Q.B.) at p. 13).

[128] In summary, the statement of claim alleges that Mr. Pardhan and the putative class gave the money to Damji in trust. The statement of claim goes on to allege that Damji fraudulently breached the trust by misappropriating and misusing the trust monies for his own purpose. This is sufficient to satisfy the first and second elements of the knowing assistance claim.

2. ***Constructive v Actual Knowledge***

[129] The statement of claim includes a detailed pleading of BMO's participation in and alleged actual knowledge of the fraud. In some instances, the statement of claim pleads actual knowledge, willful blindness and recklessness. This satisfies the third element of this cause of action.

[130] The statement of claim also includes an allegation of constructive knowledge when for example the pleading states that BMO "should have been aware" of the fraud. For the purpose of the knowing assistance claim, reference to what BMO should have been aware of is irrelevant since this reflects constructive knowledge. This, however, is a drafting deficiency that should be corrected and does not alter the conclusion that the claim is otherwise properly plead.

3. ***Section 437 of the Bank Act***

[131] BMO argues that s. 437 of the *Bank Act* precludes a claim of knowing assistance of breach of trust by a non-customer against a bank. The same argument is made for the knowing receipt and negligence causes of action. The following analysis applies to all of the causes of action.

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[132] Subsections 437(3) and (4) state as follows:

> (3) A bank is not bound to see to the execution of any trust to which any deposit made under the authority of this Act is subject.
>
> (4) Subsection (3) applies regardless of whether the trust is express or arises by the operation of law, and it applies even when the bank has notice of the trust if it acts on the order of or under the authority of the holder or holders of the account into which the deposit is made.

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[133] The above sections of the *Bank Act* confirm that a bank has no general obligation to monitor its customers' accounts. However this general limitation on a bank's duty does not extend to preclude actions against a bank for knowing assistance, knowing receipt or negligence. BMO relies on several cases that consider the current s. 437 or the predecessor versions of this section. These cases do not support BMO's position as the following review confirms.

[134] BMO relies on the following passage in *Arthur Andersen Inc. v. Toronto Dominion Bank* [1994] O.J. No. 427 at para. 40 where the court discussed ss. 206 (1) and (2), the predecessor to s. 437:

> No one would suggest that a bank has a duty to monitor, on a daily basis, the operation of its clients (even construction clients) merely because it knows that those clients have funds on deposit which may be impressed with a trust – statutory or otherwise. Indeed, ss. 206(1) and (2) of the Bank Act, R.S.C. 1991, c.B-1, specifically state that a bank is not bound to see to the execution of any trust, whether express, implied or constructive, to which any deposit is subject, and that, where a bank has notice of a trust, a receipt or cheque signed by the person in whose name the account stands is a sufficient discharge to all concerned.

[135] However, BMO fails to note that at para. 41, the court went on to state that the section does not offer protection in all circumstances:

> It is not contended in this action that s. 206 represents protection to banks in all circumstances. The real question is: at what stage in its dealings with a customer with trust funds on deposit does a bank's knowledge of its customer's affairs impose a duty on the bank to inquire as to the possible misapplication of trust funds?

[136] I add that in *Citadel General Insurance Co. v. Lloyds Bank Canada,* [1997] 3 S.C.R. 85 at para. 52 ("*Citadel*") this point was repeated. Speaking of s. 206, the court stated as follows:

> …Nonetheless, this provision does not render a bank immune from liability as a constructive trustee or prevent the recognition of a duty of inquiry on the part of a bank. Indeed, in certain circumstances, a bank's knowledge of its customer's

> affairs will require the bank to make inquiries as to possible misapplication of trust funds.

[137] In *Fonthill Lumber Ltd. v. Anger (c.o.b. Anger Construction Co.) (Trustee of),* [1959] O.J. No.17 (C.A.), s. 96(1) (another predecessor section) was considered. The court specifically recognized that this section did not immunize a bank from liability in the case of knowing assistance. The court explained this point in the following passage:

> The wording of s. 96 (1) of the *Bank Act* is the same as that of s. 56 (1) relating to any trust to which any share of the bank's stock is subject. That provision, of course, is applicable to trusts of which the bank has notice, for there is no responsibility in law for not seeing to the execution of a trust unless the existence of the trust has in some way been brought to the bank's knowledge. In my view, however, the section does not release a bank from liability if it knows not merely of the existence of the trust, but also of the commission of a breach thereof, or of circumstances which should put it on inquiry.

[138] BMO relies on three additional cases to support its position that claims alleging negligence by assisting in a breach of trust are precluded by s. 437 of the *Bank Act*. However these cases do not support BMO's position. In *Keeton v. Bank of Nova Scotia*, 2009 ONCA 662, s. 437 of the *Bank Act* is not even referenced. In *Toronto Dominion Bank v. Mapleleaf Furniture Manufacturing Ltd.,* [2003] O.J. No. 4719 (S.C.J.) claims for knowing assistance and knowing receipt were dismissed because there was no evidence of a trust between the parties. Once again there was no consideration of s. 437 of the *Bank Act*. Lastly, in *Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce,* [1975] B.C.J. No. 1173 (B.C.C.A.) at para. 142, the Court held that there is no duty on a bank to monitor whether a cheque is signed by the proper signing authority for a company. The Court held that it would be onerous and unreasonable to expect a bank to inquire into whether the signature of the payee matches the signature of a corporation's signing officer. Once again, the court did not consider the relevant section of the *Bank Act*.

[139] It is notable that in the various key decisions that discuss the knowing assistance, knowing receipt and negligence causes of action against a bank, s. 437 of the *Bank Act* (or the predecessor) is not described as shielding a bank from these causes of action. If s. 437 of the *Bank Act* shielded a bank from liability as BMO argues, one would expect this to be acknowledged by the numerous courts that have considered these causes of action (i.e. *Air Canada*; *Gold*; *Citadel*; *Dynasty Furniture Manufacturing Ltd. v. Toronto Dominion Bank* 2010 ONSC 436, aff'd 2010 ONCA 514 ("*Dynasty*")).

[140] Lastly, I turn to *Waters' Law of Trusts in Canada* to support my conclusion that s. 437 of the *Bank Act* does not shield BMO from the causes of action in this case. At p. 499 of this text, the learned author discusses the knowing receipt and knowing assistance causes of action. Waters explains that despite the provisions of the *Bank Act*, namely s. 437, a bank still has an "independent obligation, like any other person, not to join in any dishonest and fraudulent design of an express trustee or of a fiduciary." The author explains that pursuant to s. 437 of the *Bank*

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Act, a bank is not liable in contract, or in negligence, to a non-customer upon whom a cheque is drawn in favour of a customer, nor is a bank liable for permitting the withdrawal of money held in a trust account even though the bank knows that the money is held in trust. That said, Waters states clearly that "despite these provisions, a bank is still subject to the general law of knowing receipt and knowing assistance."

[141] In summary, the knowing assistance cause of action is properly pleaded and it is not plain and obvious that this cause of action will fail.

Knowing Receipt

[142] The next cause of action is knowing receipt. Knowing receipt arises in circumstances where the third party has received trust monies for his or her personal benefit. A series of Supreme Court of Canada cases have confirmed the essential elements of a knowing receipt cause of action. To succeed, the plaintiff must prove the following:

(1) That the property received was subject to a trust in favour of the plaintiff (*Gold* at para. 53).

(2) That the property was taken from the plaintiff in breach of the trust. It does not matter if the breach of the trust was fraudulent (*Citadel* at para. 24; *Gold* at para. 48).

(3) That the defendant had knowledge of facts sufficient to put a reasonable person on notice or inquiry of the breach of trust (constructive knowledge) (*Citadel* at paras. 48-49).

(4) That the defendant received the trust property and applied the property for its own use and benefit (*Air Canada at para. 37*).

[143] Mr. Pardhan alleges that he and the putative class members gave money in trust to Damji and Damji breached that trust through his fraudulent scheme. Damji appropriated the trust money to pay for his gambling and personal expenses. To access the trust money, Damji endorsed the investors' cheques to Cash Plus and deposited millions of dollars of trust monies into the Cash Plus BMO non-trust account. From the BMO Cash Plus account, large sums of trust monies were transferred to Damji's personal BMO account and to gambling organizations. Mr. Pardhan alleges that BMO had constructive knowledge of the breach of trust.

[144] It is alleged that BMO used the trust money to enrich itself. In paragraph 41(b) of the statement of claim, the plaintiff alleges that BMO was profiting from the deposits in the accounts as follows:

> BMO did not question the aforementioned endorsing, depositing and disbursing of the Subject Cheques and proceeds therefrom because it was not in BMO's best interests to do so. Cash Plus was suddenly one of, if not the, most important depositor with the BMO Lakeshore Road Branch. BMO was profiting from the

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> deposits of the Subject Cheques into the said Cash Plus BMO account or accounts and the resulting transactions therefrom.

[145] Particulars of the alleged profit are provided at paragraph 44(d) of the statement of claim as follows:

> BMO wrongfully sanctioned, permitted, abetted and even enabled Damji's fraud and breach of trust, thereby took possession of all of the proceeds from the Subject Cheques and disbursed the said proceeds although BMO had no right, title or interest permitting it to do so because the proceeds were beneficially held by the Plaintiff Class, chose to deal with the Subject Cheques and the proceeds therefrom when it had no right to do so, profited from the proceeds from the Subject Cheques and from the uses and transactions which subsequently took place relating thereto including, inter alia, from fees, interest and charges to Damji and Cash Plus and, in return for and in the course of profiting therefrom, wrongfully allowed the proceeds from the Subject Cheques to be totally misappropriated and used to the detriment of the Plaintiff and of the Plaintiff Class

[146] Based on counsel's submissions, I understand the reference to fees and charges to cover typical bank services charges that an account holder is obliged to pay. In other words, Damji and Cash Plus were charged service fees for their accounts and BMO used the trust money in the account to pay for the fees. There is also the broad allegation in paragraph 41(b) that BMO was profiting from the deposit of the trust cheques. The pleading does not explain the circumstances of the interest charge. Nevertheless it is alleged that BMO profited by charging interest.

[147] There are two reasons why BMO states this cause of action should be struck. First, it says that there never was a genuine trust because Damji intended to defraud the investors from the start. As a result, BMO argues that the first element of the cause of action is missing. I have already considered and rejected the "genuine trust" argument.

[148] The second reason focuses on BMO's alleged use of the trust money (the fourth element of this cause of action). BMO states that the pleading does not allege that BMO received any of the funds in its personal capacity and the plaintiff cannot ground a cause of action for knowing receipt by relying on bank service fees.

[149] The statement of claim alleges that Damji and Cash Plus were charged these service fees. Damji of course would not be charged service fees on the Cash Plus account but he would be charged service fees on his personal BMO accounts at the BMO Lakeshore branch. The pleading alleges a connection between the Cash Plus and Damji accounts. It is alleged that "$26,000,000 or so" of the trust money deposited into the Cash Plus account was transferred to Damji's Lakeshore account. This forms the basis for alleging that BMO used the trust money from the Cash Plus account for its own use and benefit when it charged services fees on Damji's personal account.

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[150] The parties disagree on whether bank service fees can ground a knowing receipt claim. BMO argues that they cannot and therefore say it is plain and obvious that this claim will fail and should be struck.

[151] A knowing receipt claim requires the plaintiff to prove that the bank took the trust property and applied the property for its own use and benefit. As the court stated in *Gold* at para. 41, "[t]he essence of a knowing receipt claim is that, by receiving the trust property, the defendant has been enriched" and because the property is "subject to a trust in favour of the plaintiff the defendant's enrichment [i]s at the plaintiff's expense."

[152] It is clear that simply receiving the trust money into the BMO Cash Plus or Damji accounts does not satisfy this fourth element of the cause of action. In *Citadel* at para. 25, the court stated that the bank must apply the money for its own use and benefit, such as using the money to reduce or discharge the customers overdraft:

> In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:
>
> > The essential characteristic of a recipient . . . is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, <u>if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit</u> .... [Footnotes omitted.]

[153] If the bank charges the account holder a service fee and takes this fee out of the account, is the bank using the trust property for its own use and benefit? While the enrichment to the bank in this situation seems obvious, the court in *Eaton* came to a different conclusion on the summary judgment motion. At paras. 33-34, the court found that banking service charges are insufficient to ground a knowing assistance claim. The court explained as follows:

> 33 Both at the hearing and in HSBC's subsequent written submissions, the Court was advised that there are no known Canadian authorities that address whether bank service charges are sufficient benefit to ground a claim for knowing receipt. Nevertheless, consideration of this issue must be informed by the character of knowing receipt as a kind of unjust enrichment and by the nature of unjust enrichment as a creature of equity. Iacobucci J.'s comments at para. 49 of Gold are instructive in this regard:
>
> > ... the cause of action in knowing receipt arises simply because the defendant has improperly received property which belongs to the plaintiff. The plaintiff's claim amounts to nothing more than, "You unjustly have my property. Give it back." Unlike knowing assistance, there is no finding of fault, no legal wrong done by the

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defendant and no claim for damages. It is, at base, simply a question of who has a better claim to the disputed property.

[Emphasis added.]

34 Approaching the question from this perspective, it would be inequitable to allow a bank to reduce a defendant's debts to it using misappropriated funds belonging to another party. Thus, for the purposes of knowing receipt claims, such applications of funds have been found to constitute receipt by the bank for its own benefit. By contrast, the amounts charged by CIBC in this case were fees charged for the provision of banking services. There is, in my view, nothing "unjust" about these charges and I find that they are insufficient to ground the claim for knowing receipt.

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[154] As the court noted in *Eaton* there are no other decisions that have considered whether bank service fees can ground a knowing receipt claim. With respect to the court in *Eaton*, I do not agree with the result that was reached. The issue is not whether the charge *per se* was “unjust” as stated in *Eaton*. Whether one looks at a debt owing on an overdraft or a service fee that an account holder owes the bank, both are legitimate fees that a bank is entitled to charge the account holder. In each case, the account holder is contractually obliged to pay the debt in the case of an overdraft and pay service fees for the account. The wrong occurs when the bank has constructive knowledge of the breach of trust and uses the trust money to enrich itself.

[155] I see no rational distinction between using the trust money to reduce an overdraft and using the trust money to pay service fees. If the bank is enriched by reducing an overdraft, then clearly it is enriched when it uses trust money in the account to pay the service fee. In fact, the enrichment from a service fee is more apparent than the enrichment that results from the reduction of an overdraft. For example, banks earn interest from customers who have overdrafts. If trust money in the account is used to discharge an overdraft, this may be a disadvantage since the bank will lose the benefit of interest and charges that would have been payable on the overdrawn account. Viewed through this lens, a more compelling case is made for using the service fees to ground the knowing receipt claim. The enrichment that the bank enjoys when it uses the trust money to pay service fees is not subject to this diminishing enrichment problem.

[156] While this point has never been considered in the Canadian cases that discuss knowing receipt, it was discussed by Michael Bryan in his article titled “The Receipt-based Constructive Trust: A Case Study” (1999) 37 Alta. L. Rev. 73-94 as follows:

14 The case law on beneficial receipt assumes the application of trust money to reduce an overdraft is financially advantageous to a bank. This will certainly be the case if the customer is doubtfully solvent. But, if the customer is clearly solvent and the overdraft has been arranged for sound commercial reasons, the discharge or reduction of the overdraft may well be disadvantageous to the bank, and it thereby loses the benefit of interest and charges payable on the overdrawn account. This point has been noted by the Australian High Court:

> [T]he proposition that a financial institution which makes profits by lending money at interest is better off whenever a corporate customer, which is not known to be insolvent, reduces its use of an overdraft facility which has been made available on commercial terms sounds somewhat strangely in modern ears.

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[157] In summary, there is no principled basis for concluding that service fees cannot be used to ground a knowing receipt claim. It is, however, an unsettled area of the law. Matters of law not fully settled in the jurisprudence must be permitted to proceed.

[158] I conclude that this cause of action is properly pleaded. Further, it is not plain and obvious that the knowing receipt claim will fail.

Negligence – Actual and Constructive Knowledge

[159] The third cause of action is negligence. The statement of claim alleges that BMO owed a duty of care to Mr. Pardhan and the class members not to allow the bank's operations to be used for fraudulent purposes. It is alleged that BMO breached the duty when it accepted for deposit the cheques into the Cash Plus non-trust account, failed to make inquires about these monies that were moved to other BMO accounts, transferred elsewhere and/or withdrawn for Damji's use (the allegations are set out in detail in the pleading). As a result, Mr. Pardhan and the class members lost their money.

[160] The statement of claim alleges that BMO had actual knowledge of the fraud, was willfully blind or reckless. As well, it is alleged that BMO had constructive knowledge of the fraud. Constructive knowledge refers to knowledge of facts that would put an honest person on inquiry.

[161] BMO agrees that to the extent the negligence cause of action depends on actual knowledge (that includes willful blindness or recklessness) it is a valid cause of action. This was determined in *Dynasty*. As a result, it is not plain and obvious that this cause of action will fail if the cause of action depends on actual knowledge.

[162] The issue on this motion is whether it is plain and obvious that a negligence cause of action that depends on constructive knowledge will fail. BMO argues that this issue was decided in *Dynasty* and therefore this part of the negligence cause of action will fail and it should be struck.

[163] In *Dynasty*, the plaintiffs invested in high yield certificates of deposit offered by Stanford International Bank ("SIB"), a private bank domiciled in Antigua. It turned out that this was part of a Ponzi scheme and the investors lost their money. TD acted as the correspondent bank for SIB globally with 14 accounts. TD accepted deposits into these accounts from investors dealing with SIB.

[164] The plaintiff in *Dynasty* alleged two categories of negligent activity on the part of the bank: "(1) a failure of TD to verify the legitimacy of SIB's business activities at the time of

opening new accounts for SIB and thereafter to ensure that SIB was not using the bank's facilities to further fraudulent activities; and (2) a failure to conduct a reasonable inquiry after being put on notice of facts suggesting the possibility of a fraudulent scheme." (See para. 65)

[165] A careful consideration of *Dynasty* does not support BMO's position. While the court in *Dynasty* struck the negligence cause of action that was tied to constructive knowledge, it did so on the facts of that case. *Dynasty* does not stand for the proposition that such a cause of action can never proceed.

[166] *Dynasty* was appealed and the decision was upheld. The Court of Appeal expressly stated at para. 9 that it did not "find it necessary to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual knowledge (willful blindness or recklessness) of the fraudulent activities being conducted through an account of its customer." The court left the question of whether such a duty exists to another day. As a result, *Dynasty* does not provide a final answer to the question of whether a bank can be found liable in negligence to a non-customer in the absence of actual knowledge. This is consistent with the court's interpretation of *Dynasty* in *Javitz v. BMO Nesbitt Burns Inc*., 2011 ONSC 1332, 105 O.R. (3d) 279.

[167] If the law does not recognize a duty of care as pleaded in the statement of claim, then it is necessary to determine if a new duty of care should be recognized. This requires the application of the test in *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 ("*Cooper*") (the "*Anns* analysis") to the facts alleged in the statement of claim.

[168] The plaintiff states that the *Anns* analysis is not required because there are three decisions where the court has recognized a duty in negligence that relies on constructive knowledge: *Semac Industries Ltd. v. 1131426 Ontario Ltd*., [2001] O.J. No. 3443 (S.C.J.) ("*Semec"*), *Vitalaire General Partnership v. Bank of Nova Scotia*, [2002] O.J. No. 4902 ("*Vitalaire*"), and *Dupont Heating & Air Conditioning Ltd. v. Bank of Montreal*, [2009] O.J. No. 386 ("*Dupont*"). Since the facts pleaded in these three cases were less compelling than those in the Pardhan statement of claim, the plaintiff says that it is not plain and obvious that a duty of care does not exist in this case

[169] In my view, it is clear from *Semac*, *Vitalaire*, *Dupont* and *Dynasty* that as between a non-customer and a bank, the law does not categorically recognize that a duty of care is owed when negligence is grounded in constructive knowledge. However, it does not follow that *Semac*, *Vitalaire*, *Dupont* and *Dynasty* can be ignored. The nature of the duty alleged in those cases and the allegations of breach are relevant examples of when a duty may or may not be recognized.

[170] As a result, it is necessary to apply the *Anns* analysis to determine if a duty should be recognized in the circumstances of the case in question. This is the approach the court took in *Semac*, *Vitalaire*, and *Dynasty*. The same approach must be followed in this case to decide if it is plain and obvious that a negligence claim grounded in constructive knowledge will fail. To put it another way, is it plain and obvious that there is no duty owed in this situation?

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[171] The starting point of my analysis is the Pardhan statement of claim and identifying what duty BMO allegedly owed Mr. Pardhan and the putative class. The duty is described three times in the pleading.

[172] In paragraph 41(c) of statement of claim it is alleged that "In the circumstances, BMO had a duty and obligation not to allow Damji to use Cash Plus and its BMO bank account as a vehicle within which to dump the Subject Cheques, launder and cleanse the proceeds from the said Cheques and get his hands on the proceeds from the Subject Cheques."

[173] In paragraph 47(c) it is alleged that "by reason of the allegations already set out above as well as the additional ones set out below (i) BMO owed the Plaintiff and the Plaintiff Class a duty not to harm them or allow them to suffer harm in relation to the Subject Cheques and proceeds therefrom."

[174] In paragraph 47(a) of the statement of claim, it is alleged that "banks such as BMO owe duties to the plaintiff and the Plaintiff Class as drawers of the Subject Cheques to inter alia not allow themselves and their operations to be used for fraudulent illegal or other wrongful purposes."

[175] The alleged duty is grounded in the allegations or "circumstances" set out in the previous paragraphs of the pleading which are set out as follows:

- By October 2000, Damji had deposited $4,000,000 from the investors into his personal account at the BMO Ellesmere branch.

- BMO had concerns about Damji's account at the Ellesmere branch: the reason for the cheques that he deposited, the source, volume and amount of the cheques, the reference marked on the cheques and Damji's use of the monies he deposited.

- The Customer Service Manager at the Ellesmere branch confronted Damji about concerns regarding his banking activity and reported the concerns to Corporate Security. BMO was put on notice by October 25, 2000 that something was wrong with Damji's deposits and related banking activity.

- In late October 2000, Damji opened a personal account at BMO's Lakeshore branch and deposited about $55,000,000 into this account. He began to use it as his primary account.

- Damji was forced to start using the Cash Plus account to deposit cheques and bank drafts marked "in trust" because BMO had refused to accept them for deposit in Damji's personal accounts.

- BMO knew that before Damji started to use the Cash Plus account to deposit the investors' monies, activity in the Cash Plus account generally consisted of modest amounts. BMO was aware that the business of Cash Plus consisted primarily of

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cheque cashing for and payday loans to customers who had little or no financial worth and who lived from pay cheque to pay cheque.

- BMO knew that the deposits from the investors were "completely and totally inconsistent" with prior historical activity in the Cash Plus account.

- BMO was presented with cheques payable to Damji in trust that were endorsed to Cash Plus.

- BMO did not deposit the trust cheques into a Damji trust account but deposited them into the Cash Plus non-trust account. Doing so was contrary to banking industry standards and BMO policies and procedures

- Millions of dollars of trust cheques that were deposited into the Cash Plus account were withdrawn and transferred to gambling organizations. BMO permitted millions of dollars of trust cheques to be transferred from the Cash Plus account to Damji's personal BMO account. BMO facilitated what they had refused to allow Damji to do: deposit trust monies into his personal account.

- BMO allowed this practice to continue despite "concerns and suspicions" regarding Damji's BMO personal bank accounts.

- Ms. Macchione confronted Damji regarding her concerns and suspicions about his banking activity and reported this to BMO Corporate Security.

- Ms. Macchione and other BMO Managers at the Ellesmere and Lakeshore branches repeatedly discussed and reported their suspicions and concerns about Damji to more senior BMO employees in BMO Corporate Security. Their suspicions and concerns arose from Damji's use of the BMO accounts, the source of significant deposits without any apparent source of income or assets, the contradictory explanations that Damji gave BMO and that BMO employees did not believe him. This began as early as October 2000. They never received any assistance or direction from Corporate Security.

- BMO knew there was a connection between Cash Plus and Damji and that significant amounts of monies were withdrawn or transferred out of the Cash Plus account for Damji's use, including into his personal BMO account, where it was then withdrawn or transferred elsewhere to pay for Damji's personal and gambling expenses.

- The reference line on many of the cheques that Damji deposited in the BMO accounts described the purpose of the cheque as relating to the purchase of shares in STS.

- BMO never contacted any of the people who issued the cheques to Damji.

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- BMO gave Damji and Cash Plus notice that their accounts would be closed. This allowed Damji to clean out and misappropriate the balance of the monies in these accounts.

[176] The duty that is alleged in the Pardhan statement of claim is specifically grounded in the unique circumstances summarized above. This is not a case like *Dynasty* where the plaintiff asserted a general duty of care described in *Dynasty* at para.35:

> 35 Second, the plaintiffs allege in paragraph 26 that, after the opening of any such accounts, T-D had a duty to ensure that the accounts were not being used for unlawful purposes. <u>This duty is not pleaded as being conditional upon the bank first becoming aware of suspicious circumstances or unusual transactions</u>. Instead, this pleading implies a continuing general duty in favour of third parties dealing with customers of the bank to make inquiries of their customers to ensure the legitimacy of their operations and, in particular, to ensure that the bank's facilities are not used to further fraudulent business activities.
>
> [Emphasis added]

[177] In *Dynasty*, the plaintiff alleged that suspicious circumstances gave rise to a duty of care. It is important to note that the suspicious circumstances in *Dynasty* are far less compelling than those in the Pardhan pleading. Further the pleading in *Dynasty* left unanswered how TD obtained knowledge of the alleged suspicious circumstances. At para. 28 in *Dynasty,* the court described the suspicious circumstances in question:

1. that the TD received deposits on behalf of SIB investors across the world;
2. that SIB accounts were used to move investor funds out of Canada and across the world;
3. that hundreds of millions of dollars were received from investors and transferred to accounts outside of Canada;
4. the large number of such transfers;
5. that funds collected from investors were to be invested in certificates of deposit bearing interest rates in excess of the rates offered by traditional banks, including the TD; and
6. that complaints had been filed by 2003 with the National Association of Securities Dealers in the United States alleging the operation of a Ponzi scheme (although there is no pleading that TD was aware of these complaints).

[178] Mr. Pardhan and the putative class are similar to the investors in *Dynasty*. They did not have an account at BMO just as the *Dynasty* investors did not have accounts at TD. However,

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there is a significant difference between the pleadings in the two cases and the suspicious circumstances that ground the constructive knowledge claim. Unlike the general nature of the alleged duty in *Dynasty*, the duty alleged in the Pardhan statement of claim depends on the unique allegations in that pleading. In particular, Mr. Pardhan and the putative class gave Damji cheques in trust, Damji endorsed the trust cheques to Cash Plus and BMO accepted these cheques for deposit into the Cash Plus account that was not a trust account.

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[179] The duty alleged in *Semac* as in Pardhan, was anchored in specific alleged circumstances. These circumstances warranted the cause of action being sent to trial in *Semac*. In contrast, the lack of such circumstances in *Dynasty* led the court to strike the cause of action. This was noted by the Court of Appeal in *Dynasty* at paras. 7 and 8 as follows:

> 7 The appellants rely on *Semac Industries Ltd. v. 1131426 Ontario Ltd*. (2001), 16 B.L.R. (3d) 88 (Ont. S.C.) to support the position that the struck portions of this claim should proceed to trial so that the question as to whether the court should recognize a duty be decided with the benefit of a full evidentiary record. In Semac the motion judge identified particular circumstances of the claim that, in his view, ought to be dealt with at a trial. These included allegations that the bank had already raised concerns internally about suspicious conduct on the part of its customer, and that the non-customer had subsequently alerted the bank to its allegation of fraud.
>
> 8 No such allegations were pleaded in the appellants' statement of claim and in our view, there are no circumstances disclosed in the claim that warrant the issue going to trial. We would, therefore, not give effect to this submission.
>
> [Emphasis added.]

[180] There are similarities between the allegations in *Semec* and the Pardhan statement of claim. Both allege that bank employees had concerns about the account. The Pardhan statement of claim alleges that from the time Damji opened his accounts, BMO employees repeatedly identified and reported suspicions and concerns to various superiors at BMO. Specific concerns are pleaded about the operation of Damji's personal bank accounts, the sources of the deposits into those accounts, what Damji used the money for, Damji's contradictory explanations, the fact the bank did not believe Damji's explanations, the connection between Damji's use of the Cash Plus account and his personal accounts, the transfer of monies between these accounts, and the transfer of significant amounts of money to gambling organizations.

[181] In *Semac*, the defendant company, Bancroft, had been using a stop payment scheme to defraud the plaintiff suppliers. The plaintiffs sued the bank where Bancroft had its business account for negligent management of Bancroft's account. The plaintiffs pleaded that the bank knew or ought to have known that the plaintiffs would rely on the cheques to their detriment. The bank moved for summary judgment to have the claim against them dismissed.

[182] In *Semec*, there was evidence on the summary judgment motion concerning the fraud (the stop payment scheme). A customer service representative at the bank alerted the branch manager

to the excessive number of stop payment orders that Bancroft had issued on its cheques. There were about 40 such orders. An investigator hired by the plaintiff met with the bank manager to ask about the stop payment orders and advise her that the plaintiff was alleging fraud against Bancroft. Shortly after this meeting, the bank gave Bancroft 30 days notice that its account would be closed.

[183] In *Dynasty*, the court distinguished *Semac* at para.51, stating that the case was decided on a very specific issue and was actually based on actual knowledge of fraud, not constructive knowledge. I do not agree with this interpretation of *Semec*. The motion to dismiss the negligence claim was denied and the plaintiffs' claims in negligence were directed to proceed to trial. The reasons do not limit this direction to negligence grounded in actual knowledge. While it is true that descriptions of constructive and actual knowledge seem to be spoken of interchangeably in *Semac*, liability for "failing to inquire" when there are "reasonable grounds for doing so" is included in Cameron J.'s definition of the duty. It is clear from the following passage that Cameron J. was dealing with actual and constructive knowledge:

> [66] I am satisfied that the test in Barclays Bank and Silverman Jewellers Consultants Canada Inc. is an appropriate standard to raise the liability. If a bank knows of the customer's fraud in the use of its facilities or has reasonable grounds for believing or is put on its inquiry and fails to make reasonable inquiry, the bank will be liable to those suffering a loss from the fraud. The bank should not be liable unless it is aware of the clear probability of fraud that is the civil standard for finding fraud. A lesser standard would be unfair to the bank and possibly unfair to the customer.
>
> ....
>
> [71] In this case the liability would be limited to the amount of the cheques issued and countermanded between: a) learning of the fraud or, being put on inquiry, failing to make the inquiry ("Constructive Knowledge"); and b) closing the account and terminating the relationship. The Bank would not be liable for N.S.F. cheques if funds are not in the account and is not liable once the account is closed.
>
> [72] The class to whom the duty is owed is not so wide as those contemplated in Hercules and Forsythe. It is limited to suppliers of the customer who present cheques for payment which have been countermanded after the bank acquired Constructive Knowledge of the fraud and prior to the closing of the account and termination of the relationship.
>
> [Emphasis added.]

[184] In *Vitalaire*, the defendant Bank of Montreal ("BMO") brought a motion for an order striking the statement of claim. The plaintiff ("Vitalaire") maintained a bank account ("the BNS account") with the defendant BNS at a branch in Edmonton. The defendant Universal Bancorp Ltd. maintained a bank account ("the BMO account") with BMO at a branch in Toronto.

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[185] On March 22, 2000, persons unknown to the plaintiff faxed a document to the defendant BNS at its branch in Edmonton, requesting ostensibly on behalf of the plaintiff that the BNS debit the BNS account and transfer via wire the sum of $452,000 to the BMO account. BNS reacted to the request by debiting the BNS account in the amount of $452,000 and by transferring these funds to the BMO account.

[186] In total there were three faxed requests to wire money. All were fraudulent and were not sent by or on behalf of the plaintiff. The plaintiff had never dealt with Universal and at no time did the plaintiff owe any debts to Universal. As a result of the fraudulent requests and the resulting wire transfers, the plaintiff suffered a loss.

[187] It was alleged that BMO owed a duty to the plaintiff to exercise due care and attention when opening business accounts so as to minimize the likelihood that such accounts could be used for fraudulent purposes, and that in opening the account of the defendant Universal, BMO breached its duty, causing the plaintiff's loss.

[188] The plaintiff alleged that suspicious circumstances existed during the opening of the BMO account and during the wire transactions. It was alleged that BMO as a reasonable banker was, or ought to have been put on its enquiry. It ought to have made additional inquiries not only into the nature of the BMO account, but also into the March 22, 2000 wire transfer. If BMO had made these inquiries, the plaintiff alleged that BMO would have discovered and prevented the fraud.

[189] The reasons in *Vitalaire* do not provide assistance. It is not clear from the decision what was suspicious about the opening of the BMO account. The plaintiff alleged that the size of the wire transfer was unusual when compared to the normal transactions in the account and this ought to have put BMO on its enquiry. The court noted at paras. 21 and 22 that there was "real difficulty with the pleadings" and "no hard facts to ground the claim." Nevertheless, the court found that a bank may owe a duty of care to non-customers in two situations: generally in opening accounts for their own customers and specifically when confronted with circumstances "so unusual or strange as to put a reasonable banker on his or her guard". Since it was not plain and obvious that Vitalaire's case disclosed no reasonable cause of action, the motion to strike the pleading was dismissed.

[190] First, if *Vitalaire* stands for the proposition that a general duty of care is owed to non-customers on the opening of a customer account and that a claim can be advanced absent actual knowledge, this is no longer good law given *Dynasty*. Second, to say that a duty arises from circumstances "so unusual or strange as to put a reasonable banker on his or her guard" is of no assistance because the decision does not reveal what was unusual and strange.

[191] The last decision that the plaintiff relies on is *Dupont*. This was not a Rule 21 motion but rather a summary judgment motion by defendant Bank of Nova Scotia ("BNS") to dismiss the plaintiff's claim against it. The plaintiff employer sued BNS, the bank of its former bookkeeper, who had defrauded the plaintiff of $385,000 by forging cheques to himself to support his gambling habit over a three and one-half year period. The plaintiff forged the signature of the

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employer's president, Muraca, and the cancelled cheques were returned to the employee who shredded them on receipt.

[192] The plaintiff employer alleged that BNS breached its own "Know Your Customer" policy and its obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000 c. 17. It submitted that the frequency of deposits made during the period of the fraud, the apparently random use of multiple ABM machines to make the deposits and the inevitable cash withdrawal following each deposit ought to have alerted BNS that the employee's activity did not meet the profile that it had or ought to have had for its customer, or otherwise should have signaled suspicious activity in the account. The bank argued there was no genuine issue for trial.

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[193] The court cited *Semec* and *Vitalaire* as support for the proposition that a bank may in certain circumstances owe a duty of care to detect "indications of fraud in its own customers account." However, the court concluded that whether a duty of care existed on the facts of that case should be determined on a full evidentiary record. As a result the motion was dismissed.

[194] In summary, while these cases do not eliminate the need to conduct the *Anns* analysis in this case, they do offer some guidance. It is apparent that when general and sweeping allegations of a duty are made, a duty will not likely be recognized. Focused allegations of duty that are anchored in specific conduct are less likely to be struck from a pleading.

<u>The Anns Analysis</u>

[195] It is important to remember that the *Anns* analysis on this motion is being considered under s. 5(1)(a) of the *Class Proceedings Act*. The objective is not to determine if the plaintiff and putative class have a cause of action against the bank for negligence alleging constructive knowledge. The question is whether it is plain and obvious that such a claim will fail. Like a Rule 21 motion, the s. 5(1)(a) assessment is done on the pleadings and no evidence is allowed. The material facts as pleaded are assumed to be true and the pleading is to be read generously.

[196] The first branch of the *Anns* test, requires a consideration of the following questions:

(1) Was it reasonably foreseeable that BMO's alleged negligence might result in financial loss to the plaintiff/investors?

(2) Was BMO in a close and direct relationship with the plaintiff and putative class making it just to impose a duty of care on BMO to them? (see *Cooper* at para. 42) This is known as the proximity requirement.

[197] The answer to each question is yes. I start with the observation that the alleged circumstances in the statement of claim are unique. The statement of claim alleges a web of suspicious activity that involved Damji at three different BMO branches over almost 2 years. From the outset, BMO employees had concerns about Damji's banking activity that were reported to Corporate Security. These concerns continued. BMO did not allow Damji to deposit the trust cheques in his personal non trust accounts. This effectively forced Damji to use the

Cash Plus account to deposit the trust cheques. BMO allowed millions of dollars of trust cheques to be deposited in the Cash Plus account that was not a trust account. Millions of dollars of this trust money was then disbursed as noted above. BMO facilitated what they had refused to allow Damji to do: deposit trust monies into his personal account. In these circumstances, where BMO allegedly failed to investigate and identify the fraud, it was a reasonably foreseeable consequence that investors whose monies were deposited into the Cash Plus account would suffer a loss.

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[198] It is reasonably foreseeable that when you allow numerous trust cheques payable to Damji in trust to be deposited into a non-trust account that does not belong to Damji, and then allow these monies to be transferred into Damji's personal non-trust account and/or dispersed directly to gambling organizations that the investors would, in these circumstances, never see their money again and therefore suffer a loss. This is particularly so, when due to concerns about Damji and the cheques, BMO allegedly refused to allow Damji to deposit the trust cheques into his personal BMO accounts which forced Damji to start using the BMO Cash Plus account for deposits.

[199] In *Dynasty*, the court accepted that in the circumstances of that case "the plaintiffs may be able to establish that financial loss was a reasonably foreseeable consequence of a failure of the part of T-D to identify the fraudulent scheme". I find that foreseeability is satisfied since the circumstances in the Pardhan action are more compelling than those in *Dynasty*.

[200] Proximity is the term used to describe the type of relationship that is necessary to ground a duty of care. As stated in *Cooper* at para. 35, "the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case." At para. 32 of *Cooper* the court stated:

> "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in Donoghue v. Stevenson, supra, at pp. 580-81:
>
>> Who then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[201] The proximity analysis involves a consideration of factors such as expectations, representations, reliance, and property or other interests involved: see *Cooper* at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2003] 3 S.C.R. 129 at para. 23; *Odhavji Estate v. Woodhouse,* 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 50.

[202] As the Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24, per La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering

> between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]

[203] In *Cooper* at para. 34, provided the following direction when assessing proximity:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[204] In *Dynasty*, the court found that the proximity requirement was not met. At para. 68, the court explained this conclusion:

> Similarly, there is no relationship of proximity to support the alleged duty of T-D to monitor SIB's use of the bank's facilities and/or SIB's business activities in order to ensure the legitimacy of its customer's activities. The only relationship between the plaintiffs and T-D that could be asserted is the very indirect one of a drawer of a cheque that is deposited by the payee SIB in its account at T-D. However, as a correspondent bank, T-D could not know the identities of the parties with whom SIB was doing business nor could it know the purpose of any cheque deposited into SIB's account unless, in either case, it actually conducted an investigation. The proximity requirement of the Anns test requires a much more direct relationship to justify the imposition of a duty of care involving an obligation to investigate the business of a customer of a bank.

[205] As in *Dynasty*, there is no direct relationship between BMO and Mr. Pardhan and the putative class (the investors). The investors in SIB were the drawers of the cheques just as they are in this case. The court in *Dynasty* described this as an indirect relationship in the sense that the cheques were deposited into SIB's account at the bank.

[206] In *Dynasty*, the court stated that the bank could not be expected to have the plaintiffs in contemplation on the opening of the account, except as members of an "indeterminate class" of persons who "might have business dealings" with the bank's customer. The court concluded that this was "far too distant and indeterminate a relationship to establish proximity in respect of a claim for financial loss resulting from a failure to make inquiries as to the legitimacy of a new customer's business." The court also concluded that a duty to investigate a new customer would expose a bank to guarantor liability for all parties having future dealings with the new customer. The same concerns were identified regarding the alleged duty to monitor the legitimacy of a customer's activities once the account is open.

[207] The allegations in the Pardhan pleading go well beyond what was alleged in *Dynasty*. This is not a case of an indeterminate class of people that might have business dealings with BMO's customer (Damji). The class of people is restricted to those who were investing with Damji in what they thought was a legitimate business.

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[208] The unique web of banking activity among the BMO accounts distinguishes this case from *Dynasty*. In particular, the statement of claim pleads that BMO became concerned as early as October 25, 2000 about the references on the cheques (many described the purpose or reason for the cheque as relating to the purchase of shares in STS). Further, BMO refused to allow Damji to deposit trust cheques in his personal account at the Ellesmere branch. Damji then opened another personal account at the Lakeshore branch and also started to use the BMO Cash Plus account to deposit the investor trust cheques. It is alleged that Damji was forced to use the Cash Plus BMO account to deposit the investor cheques because BMO had refused to accept the "in trust" cheques for deposit into Damji's personal non trust accounts at the Ellesmere and Lakeshore branches. Damji proceeded to deposit about $46,000,000 of trust cheques in the Cash Plus account.

[209] BMO had ongoing suspicions about Damji's banking activity. BMO knew that there was a connection between Damji's use of the Cash Plus account and his personal BMO accounts. BMO was suspicious about the source of the deposited cheques, the amounts of the deposited cheques, the references on the cheques, the uses Damji was making of the proceeds from the cheques and the volume of the deposits both in terms of number of deposited cheques as well as the totals of the cheques. Management at the branch confronted Damji and reported the concerns to Corporate Security at BMO. BMO did not believe the reason for the cheques being deposited into his personal accounts and yet allowed Damji to use all of the BMO accounts for almost two years to facilitate his fraud and gain access to the funds.

[210] The investor who writes a cheque to Damji in trust expects that it will be deposited into a trust account. That investor has an expectation that a bank in the circumstances of this case will act on the alleged suspicions. It is fair and just to impose a duty of care in these unique circumstances.

[211] In summary, the duty that is alleged is grounded in ongoing suspicious circumstances and the unusual allegations of this case. The investors made their cheques payable to Damji in trust. Since the cheque was presented to BMO for deposit, BMO knew that the person who wrote the cheque intended the money to be held in trust by Damji. It is fair to say that a person who issues a cheque to someone in trust expects that the money will be protected by the trust. The statement of claim pleads that the investors gave their money to Damji in trust for purchase of the shares in STS.

[212] In the unique circumstances set out in the Pardhan claim, the investors are "persons who are so closely and directly affected by [BMO's decisions] that [BMO] ought reasonably to have them in contemplation" when they accepted the trust cheques for deposit in the Cash Plus account and allowed the money to be dispersed back into Damji's personal account and to gambling organizations. This is particularly so given the allegation that BMO had already refused to allow Damji to deposit the trust cheques into his personal BMO accounts, the concerns and suspicions reported by BMO employees at these branches, the large volume of trust cheques that BMO received, the amount of money involved and the transfer of monies from the Cash Plus account to Damji's personal BMO accounts. In these circumstances proximity is satisfied.

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[213] In summary, I conclude it is not plain and obvious that the requirements of foreseeability and proximity are not met.

[214] If foreseeability and proximity are satisfied then a *prima facie* duty of care arises. This, however, is subject to stage two of the *Anns* analysis that requires the court to determine if this duty is "negated by other broader policy considerations." (*Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 12 ("*Childs*")).

[215] Moving to the second part of the *Anns* analysis poses a problem within the context of a s. 5(1)(a) test, because as noted, no evidence is allowed. Once foreseeability and proximity are found based on the pleadings, the burden shifts to the defendant to prove that countervailing policy considerations dictate against a duty of care being found. (See *Childs* at para. 13.)

[216] BMO offered several policy considerations for the second part of the *Anns* analysis but did so in its written argument as follows:

(a) The proposed duties of care would create the possibility of a bank's indeterminate liability to an undetermined class. In other words, any individual or entity who had transactions with Damji could potentially hold BMO liable for their losses;

(b) The proposed duties of care ignore the specialization of roles in the financial industry. Regulatory authorities are charged with the responsibility for establishing rules to protect against fraudulent participants in the financial system and for supervising the system's use. The investigation and prosecution of such fraudulent activity is conducted by governmental regulatory authorities. The proposed duties of care would impose a significant responsibility on banks that does not currently exist, and is unnecessary in view of the existing regulatory and statutory regime, specifically in light of the *Bills of Exchange Act*, *Proceeds of Crime* legislation and the *Bank Act*;

(c) In *Dynasty* the Court recognized that: "If such duties of care were imposed, banks would be required to establish policies and procedures to identify circumstances suggestive of fraudulent activities and to investigate into such circumstances… To protect themselves, banks would be required to establish policies and procedures to identify circumstances suggestive of fraudulent activities, including possible widespread systematic fraud, and to conduct investigations into such circumstances: an enterprise in which banks have little experience or competence. It is also trite to observe that the cost of compliance would be onerous given the volume and complexity of transactions handled daily by Canadian banks. Ultimately, such cost would be borne by customers and shareholders of the bank";

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(d) The proposed duties of care would effectively transform banks into the "insurer" of parties who invested with bank customers; and

(e) It is unfair and punitive to impose "guarantor liability" on a bank when it was only one of many parties, including governmental bodies, to receive information regarding the alleged fraudulent activities of Damji and Cash Plus, many of whom were charged with the responsibility of protecting the public against fraudulent activities.

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[217] As the court stated in *Williams v Toronto (City),* 2011 ONSC 6987 (Div. Ct.) ("*Williams*")at para. 47, "a court should be reluctant to dismiss a claim for policy reasons without a full record (see, for example, *Haskett v. Equifax Canada Inc*. (2003), 63 O.R. (3d) 577 (C.A.) at para. 52)." In *Williams*, the motions judge conducted the *Anns* analysis on a certification motion. He found that there was no proximity and went on to assess the policy considerations under part two of *Anns* without the benefit of an evidentiary record. He denied certification because the court concluded that no cause of action existed. This was overturned on appeal because the second part of the *Anns* analysis was conducted without the benefit of an evidentiary record. The case raised a novel issue of law and it was not plain and obvious that the claim would fail. As a result, certification was granted on appeal.

[218] I agree with the result in *Williams*. I have concluded based on the pleadings that foreseeabilty and proximity are established. The parties must be afforded an opportunity to provide evidence as to whether policy concerns should dictate against imposing a duty of care against BMO for negligence based on constructive knowledge.

[219] As a result, all that can be said at this point is that it is not plain and obvious that the cause of action as pleaded will fail. I reach this conclusion based on the above analysis.

[220] In summary the plaintiff has satisfied the s. 5(1)(a) criterion.

5(1)(b)- Identifiable Class

[221] The plaintiffs propose the following class definition:

> All persons (i) who reside in Canada, (ii) who gave monies to or for Salim Damji ("Damji") on account of a fraudulent Damji tooth whitening process promotion variously known as STS Instant White and other STS related names, (iii) whose monies were directly or indirectly deposited into bank accounts of Cash Plus at the Bank of Montreal's Brown's Line and Evans bank branch in the City of Toronto between January 1, 2000, and March 31, 2002, and (iv) who have not recovered all of their said monies.

[222] Subsection 5(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: see *Bywater v. Toronto Transit Commission,*

[1998] O.J. No. 4913 at para. 10 (Gen. Div.). To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

[223] Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There simply must be a rational connection between the class member and the common issues: see *Sauer* at para. 32.

[224] In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class." The plaintiff must define the class by reference to objective criteria, so that a given person can be determined to be a member of the class without reference to the merits of the action.

[225] During the hearing BMO withdrew its objection to this proposed class definition. I am satisfied that the class definition meets the requirements and objectives set out in the case law above. The some evidence requirement is met. There is an identifiable class of two or more persons. The Receiver's evidence provides evidence that cheques from investors totaling $46,636,000 for investment in STS Inc. were deposited into the Cash Plus account and 90% of these cheques were made out to Damji in trust.

[226] The class definition includes investors whose "monies were directly or indirectly deposited into bank accounts of Cash Plus." The evidence explains the distinction between direct and indirect. Most investors gave their money directly to Damji and he deposited the money into the Cash Plus account. Other investors gave money to Damji indirectly by giving money to a collector who then issued a cheque to Damji that was deposited into the BMO account.

[227] There is a rational connection between the class and the causes of action since each class member whose money was accepted for deposit into the Cash Plus account seeks to hold BMO liable. It is not unduly narrow or broad. A specific time frame is set out to define the scope of the class. Lastly, the class is defined without reference to the merits of the action.

[228] I conclude that the s. 5(1)(b) criterion is satisfied

5(1)(c) - Common Issues

[229] Subsection 5(1) of the *Class Proceedings Act* requires that "the claims or defences of the class members raise common issues." Section 1 of the *Class Proceedings Act* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts ….

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[230] For an issue to be common it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: see *Hollick* at para. 18.

[231] An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.), aff'd, [2003] O.J. No. 3918 (Div. Ct.).

[232] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: see *Western Canadian Shopping Centres Inc.* at para. 39.

[233] The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: see *Frohlinger* at para. 25; *Fresco* at para. 21.

[234] An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: see *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[235] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: see *Hollick* at para. 25. As Lax J. stated in *Fresco* at para. 61 "[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

[236] Finally, a plaintiff is not required to produce evidence on each element of a cause of action pleaded. As Lax J. stated in *Glover v. Toronto (City),* [2009] O.J. No. 1523 ("*Glover*") at para. 56: "One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged."

Proposed Common Issues

[237] The plaintiff asks the court to certify the following common issues:

(1) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing assistance of Damji with respect to a breach of trust owed to the Class Members?

(2) Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing receipt of monies being defrauded by Damji from the Class Members including trust monies?

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(3) With respect to issues (1) and (2) above, did BMO:

(i) have actual knowledge of Damji's fraudulent conduct?

(ii) did BMO willfully shut its eyes with respect to obvious conduct on the part of Damji?

(iii) did BMO willfully and recklessly fail to make inquiries that an honest and reasonable person would make with respect to Damji and his conduct?

(4) With respect to issues (1) and (2) above, were the monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002, subject to a constructive trust? If yes, should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

(5) Did BMO owe a duty of care to the Class Members with respect to (i) monies deposited into the bank accounts of Cash Plus at BMO's bank branch located at Brown's Line and Evans in the City of Toronto, between January 1, 2000, and March 31, 2002, and (ii) BMO's dealings with those bank accounts and/or Damji?

(6) If the answer to issue (5) above is yes, did BMO breach the said duty of care owed to the Class Members?

(7) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (1), (2), (3), (4), (5) and (6) above? If so, what is the appropriate measure or amount of such loss or damages?

(8) Were the monies deposited into the bank accounts of Cash Plus at BMO's Brown's Line and Evans bank branch between January 1, 2000, and March 31, 2002, monies which were defrauded from the Class Members and, if yes, is BMO obliged to repay those monies to the Class Members?

(9) Should BMO pay punitive damages to the Class Members? If so, what is the amount of such damages?

[238] Common issues 1, 2, 5 and 6 cover the three causes of action. Common issue 1 covers the knowing assistance cause of action, common issue 2 covers the knowing receipt cause of action and common issues 5 and 6 cover the negligence cause of action. These are stand alone questions that encompass the entire cause of action.

[239] Common issue 3 deals with actual knowledge. The plaintiff links common issue 3 back to the knowing assistance and knowing receipt common issues. First, since the knowing receipt claim only requires constructive knowledge, it is incorrect to link common issue 3 to common issue 2. Second, I question the need for common issue 3. To succeed on common issue 1, the

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plaintiff will have to prove each element of this cause of action. It is unclear why a separate common issue is required for the knowledge element of this cause of action and yet the other elements of the cause of action are not assigned separate questions.

[240] Common issues provide the common issues trial judge with a road map. Clarity is important. There is no apparent reason why a common issue should be assigned to deal with the knowledge issue when each element is a necessary component of the cause of action and must be proven to succeed. There are two solutions: common issue 3 is removed or common issues 1 and 2 are broken down into a set of questions that address each element of the cause of action. I have set out the elements of each cause of action in this decision and this decision will be available to the common issues trial judge. As a result, there is no need to assign a separate question for each element of each cause of action. Common issue 3 is not required.

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[241] I will start with common issue 1 and review it on the basis that common issue 3 is unnecessary.

Common Issue 1 –Knowing Assistance

Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing assistance of Damji with respect to a breach of trust owed to the Class Members?

[242] As noted, this cause of action requires that there be a trust and a dishonest and fraudulent breach of that trust. Knowing assistance requires actual knowledge (which includes willful blindness and recklessness) of the breach of trust.

[243] There is some evidence of the first two elements of this cause of action: that a trust between the investor and Damji existed and that Damji breached the trust in a dishonest and fraudulent way. Some evidence of a trust between Damji and the investors is obvious. Numerous investors gave cheques payable to Damji in trust to be held pending their receipt of shares in STS Inc. This is what investors intended. In particular, the Receiver's report states that 90% of the investor cheques given to Damji were made payable to Damji in trust.

[244] BMO argues that, whether a trust existed between Damji and any individual investor and the terms of that trust, is an individual issue that cannot be assessed in common. Specifically, BMO says that not all investors had the same information when they decided to invest in STS Inc. BMO relies on evidence in the OSC file. The OSC investigator spoke to about 10 investors. Her notes of these discussions record that what these investors were told varied on the following points:

- Whether funds would be held in trust
- The timing of the return of the investment
- The quantum of the return on the investment

- Whether or not the investor was told that Colgate was involved
- The extent of any paperwork received or signed by the investor
- Whether Damji communicated directly with the investor or used a collector
- Whether the investor paid the money directly to Damji in trust or wrote the cheque to the collector who in turn wrote a cheque to Damji

[245] This evidence is a sample of an exceedingly small number of investors. It does not lead me to conclude that common issue # 1 will require an individual inquiry. Whether or not a trust was created depends on three certainties: intention, subject matter and object. There is evidence that 90% of the investor cheques were made payable to Damji in trust (intention), that the subject matter of the investments was STS and that the investors' object was to secure shares in STS Inc. and earn money. It does not matter if, for example, various investors had different expectations about the investment, or whether the investor communicated with Damji or a collector.

[246] There is overwhelming evidence that Damji breached the trust. The STS product and the pending deal with Colgate was a scam. There is evidence that Damji defrauded numerous investors. He was charged with fraud, he pleaded guilty and he was sentenced to jail.

[247] BMO argues that there is no evidence of the knowledge component for the knowing assistance claim. Further, BMO argues that the knowledge component of this cause of action cannot be assessed in common because of the variations in the evidence as noted above. This incorrectly assumes that the plaintiff must prove that BMO knew what each investor was told, the specific variations in this evidence and the specific terms of the trust to the extent such terms varied. In my view, such variations are irrelevant to the knowing assistance cause of action. It does not matter, for example, if some investors believed that they would get a return on their investment sooner than others or earn a higher rate of return. It does not matter if some saw promotional material for STS and others did not. Either way, Damji created a fraudulent scheme that he used to collect money from numerous investors.

[248] The issue in the knowing assistance cause of action is not whether BMO knew about these variations, but rather did BMO have "actual knowledge of the trust's existence and actual knowledge that what [was] being done [was] improperly in breach of that trust" (*Air Canada* at para 39).

[249] There is some evidence that BMO knew of the trust's existence because numerous cheques all marked "in trust" payable to Damji were deposited into the BMO Cash Plus account. There is no evidence of the exact number of cheques made payable to Damji that were deposited into the Cash Plus account. However, BMO conceded during the motion that there were numerous cheques. The Receiver reported that the total value of the investor cheques deposited into the Cash Plus account was $46,636,000. Further, 90% of the cheques were made out to Damji in trust. On each occasion a BMO employee accepted a cheque payable to Damji in trust and deposited it into a non-trust account belonging to Cash Plus.

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[250] Further, there is some evidence that is relevant to whether BMO was willfully blind or reckless. For example, there is evidence from Ms. Macchione that it is bank policy to deposit a trust cheque in a trust account and yet BMO accepted for deposit numerous trust cheques into a non-trust account. There is some evidence that BMO knew what the trust monies were being used for. For example, money was transferred out of the Cash Plus account to offshore gambling organizations and a large amount of the trust money was transferred from the Cash Plus account into Damji's personal BMO account.

[251] There is evidence from Ms. Macchione that she noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS. Damji told Ms. Macchione that these drafts had to do with his teeth whitening product. He also said that he was going to sell the product to Colgate and earn a phenomenal amount of money. Ms. Macchione did not believe Damji because the amount of money was simply too big. As she stated it was "off the wall…too many zeros."

[252] A week after Damji opened the Lakeshore account, Ms. Macchione reported him to Corporate Security at the bank because she had to make sure what he was doing was not money laundering or fraud. Ms. Macchione put Damji's accounts on referral. This meant that she received a copy of any cheque that Damji wrote on his accounts. As a result, she saw the cheques that he wrote to Cash Plus and she knew there was a connection between Damji and Cash Plus.

[253] Whatever the bank did at the Corporate Security level to address this concern was not revealed on this certification motion. What is known is that BMO never contacted any of the investors whose cheques were deposited into the BMO accounts in question.

[254] While the above evidence may not satisfy proof of the knowledge element, it is nevertheless some evidence of BMO's knowledge. However, if I am wrong and this is not some evidence of BMO's actual knowledge, willful blindness or recklessness, it is not fatal to this common issue. BMO agrees that the "some evidence" rule does not require the plaintiff to provide some evidence of each element of the cause of action. Nevertheless, BMO argues that because the knowledge requirement goes to the heart of the action, there is an obligation on the plaintiff to provide some evidence of this knowledge.

[255] BMO's position misconstrues the some evidence test. The plaintiff does not have to provide some evidence of <u>every</u> element of the cause of action: see *Glover*. Further, there is absolutely no authority to support the proposition that one must assess each element of a cause of action, decide which element goes to the heart of the action and then mandate that there must be some evidence to support that element. Frankly this makes no sense. A cause of action has certain elements. To succeed at trial a plaintiff must prove each element of a cause of action, otherwise the claim fails. The court does not weigh the importance of one element over the others. One might be easier to prove, but in the end all must be proven or the claim will fail.

[256] There is also some evidence to support the time frame noted in this common issue. The common issue deals with BMO's conduct between January 1, 2001 and March 31, 2002.

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January 1, 2000 is when Damji started to use the Cash Plus account to deposit the investors' money. March 2002 is when the BMO Cash Plus account was closed.

[257] There is evidence that this common issue can be assessed in common. Damji carried out the fraud in a "common" way as described in the above evidence. For 90% of the investors, the same procedure was followed: the investor issued a cheque payable to Damji in trust, Damji endorsed the cheque to Cash Plus and BMO accepted the cheque for deposit into the Cash Plus BMO account. For those who gave their investment to a collector, that person issued a cheque to Damji and he deposited the cheque into the Cash Plus account. For the few who paid cash, the Receiver notes that there are records documenting cash payments.

[258] Once the trust money was deposited into the BMO account, BMO treated it all the same. It accepted the deposit, never contacted any of the investors whose monies were deposited, asked Cash Plus no questions and allowed the money to be transferred out of the Cash Plus account.

[259] Finally the receiver's reports are further evidence that the common issue can be managed in common. The receiver's detailed analysis tracks the bulk of the money that came into the BMO accounts and records where it went.

[260] In summary, there is some evidence to support common issue # 1 and some evidence that it can be decided in common. I accept common issue #1.

Common Issue 2 –Knowing Receipt

Did BMO engage in conduct between January 1, 2000, and March 31, 2002, which amounted to a knowing receipt of monies being defrauded by Damji from the Class Members including trust monies?

[261] I refer to my analysis of common issue 1. There is some evidence of the trust and Damji's breach of the trust. As well, there is some evidence of BMO's knowledge of the breach of the trust. Knowledge for this common issue is constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry of the breach of trust). The same evidence referred to for common issue 1 applies.

[262] BMO argues that there is no evidence that it applied the trust money for its own use and benefit. However, BMO admits in its statement of defence that it charged "nominal banking fees." While there may not be any other evidence of "fees interests or charges" the admission in the pleading is sufficient to satisfy the some evidence test. In any event, lack of further evidence is not fatal to certification of this common issue because the plaintiff is not required to provide some evidence of every element of the cause of action. The "some basis in fact" test or what is called the some evidence rule is not a requirement to show that the cause of action will probably or possibly succeed: see *Glover* at para 15.

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[263] There is ample evidence that this issue exists as noted above. I have determined that there is some evidence that common issue 1 can be assessed in common. The same evidence applies to support the commonality of common issue 2.

[264] To be clear, I rely on the reasons articulated for common issue 1. I accept common issue 2.

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Common Issue 4 – Constructive Trust

With respect to issues (1) and (2) above, were the monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002, subject to a constructive trust? If yes, should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

[265] There are two parts to this common issue: Were the monies subject to a constructive trust and if yes, should BMO be declared a constructive trustee.

[266] The first part of this common issue should be struck. Knowing assistance and knowing receipt require proof that the monies were held in trust. This element of the cause of action speaks to the relationship between Damji, the investor and the money. The case law does not specify the type of trust.

[267] A constructive trust results when a stranger (i.e. BMO, not Damji) to a trust is found liable based on knowing receipt or knowing assistance. It is correct in law to ask if BMO, a stranger to the trust, should be declared a constructive trustee. The constructive trust becomes the remedy or vehicle by which the plaintiff can seek recovery from BMO.

[268] There is some evidence to support this common issue as revised and to show that it can be decided in common. I refer to my analysis for common issues 1 and 2.

[269] I accept this common issue revised as follows: Should BMO be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with BMO between January 1, 2000, and March 31, 2002?

Common Issues 5 and 6 - Negligence

5 Did BMO owe a duty of care to the Class Members with respect to (i) monies deposited into the bank accounts of Cash Plus at BMO's bank branches located at Brown's Line and Evans in the City of Toronto, between January 1, 2000, and March 31, 2002, and (ii) BMO's dealings with those bank accounts and/or Damji?

6 If the answer to issue 5 above is yes, did BMO breach the said duty of care owed to the Class Members?

[270] These common issues focus on the conduct of BMO. The investors are similarly situated in their relationship with BMO: they are not BMO customers and all came to have contact with BMO because their monies were deposited into the BMO account.

[271] The statement of claim pleads negligence and alleges actual and constructive knowledge. Common issues 5 and 6 do not distinguish between actual and constructive knowledge. The common issues trial judge will have to be alert to this distinction and consider the negligence cause of action in two stages: actual knowledge and constructive knowledge.

[272] The negligence cause of action grounded in actual knowledge is a valid cause of action. However, if it is grounded in constructive knowledge the court must conduct the *Anns* analysis to decide if on the facts of this case a duty of care in law should be recognized. Unlike the *Anns* analysis conducted for the purpose of s. 5(1)(a), the trial judge will have the benefit of an evidentiary record.

[273] There is some evidence that this common issue exists and that it can be decided in common. The Receiver's reports and the report from Intelysis offer evidence that the investors' monies were deposited into the Cash Plus account during the time frame in question.

[274] There is evidence that the investors provided their cheques, bank drafts and/or monies for investment in the same fraudulent scheme. The Intelysis report states that in addition to marking their cheques in trust, investors noted on their cheques that they were purchasing shares of STS.

[275] For all of the investors, Damji used BMO's banking facilities to effect his fraud. He used the Cash Plus BMO account to deposit the money and then arranged to have the money disbursed out of the Cash Plus account for his benefit to the detriment of the investors.

[276] BMO's response when the cheques, bank drafts and/or monies were presented for deposit into the Cash Plus account was the same. The deposits were accepted, put in the BMO Cash Plus non-trust account and then disbursed primarily to Damji's personal BMO accounts or to feed his personal needs such as gambling. BMO never contacted any of the investors whose money was deposited into the BMO accounts.

[277] There is evidence from Ms. Macchione that it is bank policy that a trust cheque must be deposited into a trust account. The Receiver provides evidence that 90% of the cheques were marked "in trust" and each was deposited into this Cash Plus account. Further, Ms. Macchione was aware of the connection between Damji and Cash Plus. She noticed a number of bank drafts being deposited into Damji's account that were related to shares and STS.

[278] Ms. Macchione monitored Mr. Damji's account and frequently reported her concerns to Corporate Security. I refer to the evidence detailed above regarding the concerns of Ms. Macchione and others at BMO about Mr. Damji.

[279] In summary, there is some evidence to support these common issues and show that they can be decided in common. I accept common issues 5 and 6.

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Common issue 7 - Damages

Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (1), (2), (3), (4), (5) and (6) above? If so, what is the appropriate measure or amount of such loss or damages?

[280] This common issue focuses on whether a loss occurred and, if so, how to measure the loss. BMO did not dispute this common issue. Reference to common issue 3 should be deleted.

[281] There is ample evidence to show that this common issue exists and can be decided in common. The Receiver's reports provide evidence that the investors suffered a loss. The class invested millions of dollars. The Receiver's reports trace the flow of the money from the investors into the Cash Plus account. The money is then traced out of the Cash Plus account to a variety of sources that benefited Damji (primarily into his personal BMO account and to gambling organizations). The Receiver documents the inability to recover the bulk of the money.

[282] Mr. Pardhan describes his loss and states that he has been contacted by many other investors who lost their money. As well, investors who were interviewed by the Toronto Police and the OSC state that they did not get their money back after giving it to Damji.

[283] If BMO is found liable, the appropriate measure of damages can be identified on a class basis. In the statement of claim Mr. Pardhan seeks return of the investors' monies that were deposited into the BMO Cash Plus account. The extensive banking records and the Receiver's review and investigation of these records are evidence that this issue can be decided in common.

[284] In summary, there is some evidence to support this common issue and show that it can be decided in common. I accept common issue # 7

Common Issue 8

Were the monies deposited into the bank accounts of Cash Plus at BMO's Brown's Line and Evans bank branch between January 1, 2000, and March 31, 2002, monies which were defrauded from the Class Members and, if yes, is BMO obliged to repay those monies to the Class Members?

[285] This common issue asks two questions. While BMO did not dispute this common issue, it is problematic and unnecessary. The first question seeks to classify or trace the monies deposited into the Cash Plus account as money that was defrauded from the class members. If the answer to the first question is yes, then the second question asks if BMO is liable to repay the monies to the class.

[286] Dealing with the first question, the trial of common issues 1, 2, 5 and 6 will require the plaintiff to prove that monies deposited into the Cash Plus account originated from the class and that Damji defrauded the investors of this money. There is already a significant amount of evidence from the Receiver tracking the money. The plaintiff did not explain why this common issue is required. I appreciate that this is a factual question that must be asked at trial. It would

have to be answered in the affirmative for the plaintiffs to succeed. I would expect that such a finding of fact would be part of the trial judge's analysis of the liability common issues.

[287] Turning to the second question, BMO's liability to the class is the subject of specific common issues dealing with knowing assistance, knowing receipt and negligence. There is no purpose served in asking generally if BMO is liable to repay the monies.

[288] I reject this common issue.

Common issue 9 – Punitive Damages

Should BMO pay punitive damages to the Class Members? If so, what is the amount of such damages?

[289] BMO did not dispute this common issue. This question focuses on whether punitive damages should be awarded and, if so, how much. Evidence of the underlying loss is available. Investors lost millions of dollars. Assuming the plaintiffs succeed and recover damages, this will ground the punitive damage claim. Since the entitlement to punitive damages will focus on BMO's systemic behaviour, this issue is quite capable of being managed on a common basis.

[290] I accept this as a common issue.

5(1)(d) - Preferable Procedure

[291] Subsection 5(1)(d) of the *Class Proceedings Act* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[292] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: see *Cloud* at para. 73; *Hollick* at paras. 27-28; and *Markson* at para. 69.

[293] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

[294] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

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[295] BMO argues that a class proceeding is not the preferable procedure for three reasons: there are too many significant individual issues, access to justice is not met because Mr. Pardhan has a claim that is worth a lot of money and behaviour modification is not met because certification in this case will "turn the banks into police." For the reasons explained below, I reject BMO's position.

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Too Many Individual Issues

[296] BMO states there are three individual issues that support the position that a class action is not the preferable procedure: proof that there was a trust, contributory negligence and the limitation period defence/discoverability.

1. Was there a Trust?

[297] I have already rejected BMO's argument that the determination of a trust in this case is an individual issue. Further, the existence of a trust is not required for the negligence cause of action.

2. Contributory Negligence

[298] BMO argues that particulars of the contributory negligence in this case include:

(i) Was there was a lack of due diligence in making the investment?

(ii) What was the investor's investment experience?

(iii) Did the investor have an investment advisor?

(iv) Was there was a lack of due diligence in monitoring the investment?

(iv) Was the investor's response reasonable having regard to whether the investor had notice of the Colgate Letter?

(v) Was the investor's response reasonable having regard to whether the investor had notice of Damji's Email?

(vi) Was the investor's failure to demand a refund in the circumstances reasonable?

[299] BMO offered no authority to support the argument that a claim of contributory negligence is an individual issue that makes this case unsuitable for certification. In fact, there are authorities that support the principle that contributory negligence is not a defence to intentional torts and arguably negligence as pleaded in this action. These authorities are briefly set out below not for the purpose of deciding the issue on this motion, but to explain why I reject BMO's position.

[300] Waters asserts in his text, *Waters' Law of Trusts in Canada*, that contributory negligence cannot be raised as a defence to a claim based on a breach of trust or fiduciary duty: see *Waters*, at p. 500. Turning to the case law, in *Eaton* at para. 104 of the reasons for certification, the court stated that contributory negligence is not a defence to intentional torts:

> ...for intentional torts, such as fraudulent misrepresentation (or knowing assistance and knowing participation), contributory negligence cannot be asserted as a defence: Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2), [2003] 1 A.C. 9 59, at para. 18; Wilson v. Bobbie, [2006] A.J. No. 19, at paras. 20-1 (Slatter J.); and Keleman v. El-Homeira, [1999] A.J. No. 1279 (C.A.), at para. 26, leave to appeal dismissed, [2000] S.C.C.A. No. 4015;

[301] In a footnote to this decision, the court noted that the above cases cited in support of the conclusion did not explicitly refer to knowing assistance and knowing receipt. The court concluded, however, that even if it is possible that contributory negligence is an issue that requires determination, it did not change the decision to certify the action.

[302] Lastly, I refer to *Toronto Dominion Bank v. Mapleleaf Furniture Manufacturing Ltd.*, [2003] O.J. No. 4719 at para.38, where the Court noted that contributory negligence could not be alleged when the plaintiff bank had acted based on fraudulent misrepresentations made to it:

> The assertion in (a) above that the bank was negligent with respect to the making or monitoring of the loan is, at law, clearly without merit where, as here, fraudulent material misrepresentations were made to the bank. In such circumstances the entitlement of the victim would not be reduced by contributory negligence, even if the latter were proved.

[303] It is apparent from these authorities that BMO cannot assume contributory negligence is relevant. Even if the defence of contributory negligence is available, it does not lead me to conclude that a class proceeding is not the preferable procedure. The liability common issues can be determined without reference to contributory negligence. If the class succeeds on one or more of the liability common issues and if BMO is still pursuing contributory negligence against the class members, the common issues trial judge will have to decide if contributory negligence applies or not. If the class does not succeed on any of the liability common issues, then the contributory negligence issue is moot. Managing the contributory negligence issue in this way will allow significant common issues to go forward and be decided in a fair, efficient and manageable way.

3. Limitation Period/Discoverability

[304] As already noted, BMO pleads that the claims are statute barred. The principle of discoverability is triggered and for this reason, BMO argues that the issue becomes individual and militates against finding that a class proceeding is a preferable procedure. To determine discoverability BMO says that each class member must be asked the following:

(1) Did the investor know of the Colgate Letter? If so, when?

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(2) Does knowledge of the Colgate Letter constitute the investor's discoverability?

(3) Did the investor know of the Email? If so, when?

(4) Does knowledge of the Email constitute the investor's discoverability?

(5) What other information, if any, was provided to the investor?

(6) What was the investor's expected date for receipt of payment?

(7) What inquiries did this investor make once the date passed with no payment received?

(8) What other inquiries did the investor make?

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[305] There is limited information on this certification motion about the Colgate letter and Damji's email. The representative plaintiff did not learn about them until he started this action. None of the putative class members that he has spoken to knew about this letter. Copies of the Colgate letters (June 5 and 19, 2001) simply appear in the OSC file. How the Colgate letter was circulated (assuming it was) and to whom is unknown. Damji's email dated September 26, 2001 appears to have been posted on the Yahoo message board. There is no evidence on this motion about whom this email reached. There is evidence from the Receiver's reports that money continued to flow into the BMO accounts after the dates of the Colgate letters and Damji's emails.

[306] Based on the scant evidence that is available, it is not clear that the discoverability issue will become individual. The possibility that discoverability may require an individual inquiry is not a reason to deny certification. The Ontario Court of Appeal addressed this issue in *Pearson v. Inco*, [2005] O.J. No. 4918 at para.63 as follows:

> [I]t is now clear as a result of this court's decision in Cloud, supra, at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

[307] Recently, the Court of Appeal again addressed this issue in *Smith v. Inco*, 2011 ONCA 628, 107 O.R. (3d) 321 at para.165:

> 165 <u>Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined.</u> Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences: see Pearson v. Inco Limited (2005), 78 O.R. (3d) 641, at para. 63. On the trial judge's findings, the applicability of the Limitations Act as he characterized its applicability was not a common issue.

[Emphasis added.]

[308] A class action is a fair, efficient and manageable way to manage the claims of thousands of investors. The three goals of a class action are met. The goal of judicial economy will be achieved if this action is certified as a class proceeding. This is a case where the resolution of the common issues will materially advance each class members' claim. The issues that are common to all class members should be decided in one action. The class will share the costs of gathering evidence and retaining experts. It would be uneconomical, inefficient and prohibitively expensive for individual investors to pursue BMO on their own. No useful purpose is served by requiring a multiplicity of thousands of individual proceedings. This would result in excessive and unnecessary expense for the class members and the judicial system.

[309] BMO argues that access to justice is not achieved with a class action because the value of Mr. Pardhan's investment was significant ($200,000). As a result, BMO says that it would have been worthwhile for him to have pursued an individual action. I reject this argument. First, there are many class actions where the value of the class members' claims have been similar (the tainted blood class actions and the residential school class action) and yet access to justice is still achieved by the class action. BMO's position completely ignores the real cost of litigating. The cost of litigating an individual action would quickly exceed the value of Mr. Pardhan's loss.

[310] Further, many investors have claims less than $5,000. Of the 3,700 investors identified to date, 2,000 of them gave Damji less than $5,000. It is fair to say that most, if not all of these 2,000 investors, would not bother advancing individual actions. The class action gives thousands of investors the opportunity to share the daunting expense of litigation. In my view, access to justice is achieved.

[311] A class proceeding will also achieve the goal of behavior modification. If BMO is found liable, it will motivate banks to change their behaviour and undertake reasonable inquiries and/or take protective measures in circumstances such as this case.

[312] I conclude that criterion 5(1)(d) is satisfied.

5(1)(e) – A Representative Plaintiff with a Workable Litigation Plan

[313] The final requirement for certification is that there be a representative plaintiff who will fairly and adequately represent the interests of the class, has produced a suitable litigation plan and does not have a conflict of interest on the common issues, with other class members. The capability of the proposed representative to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class ..." (*Western Canadian Shopping Centres* at para. 41).

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The Representative Plaintiff

[314] BMO argues that Mr. Pardhan is not a suitable representative plaintiff for three reasons: he is merely a nominee of the IRG, there is no evidence that Mr. Pardhan is able to bear the costs of this litigation and his health interferes with his ability to properly instruct counsel.

1. The IRG

[315] The IRG was created shortly after Damji's arrest. It acted as a liaison between the investors and the Receiver. The IRG was run by Nyaz Jethwani.

[316] In 2007, Mr. Jethwani contacted Mr. Pardhan "out of the blue" and asked him to contact Mr. Neirinck about the possibility of obtaining recovery of his stolen monies. Mr. Pardhan had no prior relationship with Mr. Jethwani. BMO argues that Mr. Pardhan has little independent knowledge about the matters set out in his affidavits, other than knowledge of his own personal investment. He was recruited by the IRG and is simply their nominee.

[317] The role of the IRG in directing this action was addressed in an email to BMO from class counsel. Speaking about the six proposed class actions, counsel stated as follows:

> While there are six representative plaintiffs … they are not the only people with whom we are dealing in this matter. The 'class' so to speak is represented by what we call the Investor's Recovery Group ('IRG'), and they are the people with whom I have the most dealings/receive most of my instructions… .

[318] The recruitment of a representative plaintiff is a factor to consider in determining whether the plaintiff has the necessary interest, independence and incentive to fulfill his duties to the class. It is also a factor to be considered in assessing whether there is indeed an underlying class with an actual grievance, as opposed to an issue identified by the industry of counsel.

[319] The fact that the class representative is recruited is not fatal. As Strathy J. stated in *Singer v. Schering-Plough Inc*., 2010 ONSC 42, 87 C.P.C. (6th) 276 at para. 221, "not many people wake up in the morning and decide that they want to start a class action. They may well need the encouragement of experienced counsel to take up the cudgels and put their name to a worthy cause."

[320] I see no problem with the fact that the IRG recruited the representative plaintiff. There is a real underlying class with an actual grievance. The IRG itself is not a person. It cannot act as a representative plaintiff. Clearly, it had to find someone to act in this role. Mr. Pardhan is a genuine plaintiff with a real loss. He accepted the request to act as the representative plaintiff and is motivated to prosecute the claim. It is clear from his affidavit that he appreciates the responsibility. Mr. Pardhan has famiarlized himself with the issues in the claim and the steps that will be taken in this class action. His claim is the same as those in the class: they all lost money in the Damji fraud and their monies were all deposited in the BMO account. He is motivated to pursue the claim on his own behalf and on the behalf of the class.

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2. Bearing the Costs of the Litigation

[321] BMO argues that Mr. Pardhan is not a suitable representative plaintiff because there is no evidence that he can bear the cost of his own lawyers' fees which are estimated to exceed $500,000.

[322] BMO relies on the following passage in *Western Canadian Shopping Centres* at para. 41 where Chief Justice McLachlin suggested that the capacity of the proposed representative to bear costs is a relevant consideration:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
>
> [Emphasis added.]

[323] Cullity J. considered the above paragraph from *Western Canadian Shopping Centres* in *Mortson v. Ontario Municipal Employees Retirement Board* (2004), 4 C.P.C. (6th) 115 (S.C.J.) He decided that at the certification stage, a proposed plaintiff is not required to show that he or she has the ability to satisfy a costs award. Cullity J. stated, at paras. 90 - 94:

> The statements in Dutton and [of Nordheimer J. in Pearson v. Inco] are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.
>
> ...
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[324] In *Pearson v. Inco Ltd.*, at para. 95, the Court of Appeal agreed with Cullity J. and went on to state at para. 96:

> If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the outstanding orders had been paid. I agree with Cullity J. that there is no requirement under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements.

[325] I accept the law as stated in *Mortson v. Ontario Municipal Employees Retirement Board* and *Pearson v. Inco Ltd.* and conclude that Mr. Pardhan's ability to bear the costs of the litigation is not a relevant consideration.

3. __Mr. Pardhan's Health__

[326] Mr. Pardhan suffered a stroke in May 2011, just prior to swearing his first affidavit in support of the certification motion. He had a second stroke in October 2011, which delayed his cross-examination. During the cross-examination, Mr. Pardhan said that his doctor told him that he was well enough to pursue this litigation. When asked if he has experienced any problems with his memory since the strokes, Mr. Pardhan said that it takes time for him to recall "certain kinds of information" and explained that the strokes seem to have affected his short and long term memory. These answers raised concerns about Mr. Pardhan's ability to act as the representative plaintiff.

[327] After the cross-examination, Mr. Pardhan produced a letter from Dr. Homuth, dated November 18, 2011, which states: "In my Medical Opinion [Pardhan] is medically stable to continue with the court case in question. His recent medical history should [sic] no problems to proceeding". The letter from Dr. Homuth was written on the letterhead of Dr. Rita Chuang.

[328] It is the position of BMO that Mr. Pardhan is not an appropriate representative plaintiff because he admits that the strokes have impaired his long-term and short-term memory. As a result, BMO says he is not capable of properly instructing counsel.

[329] Mr. Pardhan's admission that his memory is affected is a serious concern. Unfortunately, the letter from Dr. Homuth does not address the specific nature of this concern. It is not known if Dr. Homuth is Mr. Pardhan's treating physician for the strokes. This is in doubt given that the letterhead belongs to a different doctor, Dr. Rita Chuang. Mr. Pardhan did not produce Dr. Homuth's curriculum vitae so his expertise that would allow him to comment on the problem is unknown.

[330] The role of the representative plaintiff is demanding. For example, the representative plaintiff must be able to comprehend the issues in this case, attend meetings, instruct counsel, swear affidavits and attend an examination for discovery and answer questions based on his information and belief. It is not a task that one takes on lightly.

[331] The representative plaintiff must be capable of asserting the claim on behalf of all class members. Thousands of investors who are part of this class will rely on Mr. Pardhan. They must be able count on him to perform this role without limitations in his short and long term memory.

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[332] Based on the scant available evidence, it is difficult to appreciate to what extent the "memory" problems might interfere with Mr. Pardhan's ability to act as the representative plaintiff. However, since Mr. Pardhan has identified memory problems, I cannot ignore the issue. Dr. Homuth's letter does not explain the extent of the memory loss and whether Mr. Pardhan's strokes and memory loss will affect his ability to instruct counsel and carry the litigation through to its conclusion. In the absence of better evidence, there is reason to doubt Pardhan's ability to fulfill the role of representative plaintiff.

[333] I am not prepared to accept Mr. Pardhan as a suitable representative plaintiff given this health issue. I do not doubt his interest in this litigation and his commitment to the role of representative plaintiff. He attended each day of the certification hearing. However, the court must have the interests of the class in mind when considering the suitability of a representative plaintiff. Since Mr. Pardhan is otherwise an acceptable representative plaintiff, I will give class counsel an opportunity to provide a better medical report addressing the concerns outlined above. The doctor who provides the report must have sufficient expertise and familiarity with Mr. Pardhan's health and must be fully informed about the nature of the role of the representative plaintiff. The doctor must be able to explain the nature and extent of the memory limitations and provide an opinion as to whether or not such limitations will interfere with Mr. Pardhan's ability to fulfill the role of the representative plaintiff. If the court is not satisfied with the opinion and Mr. Pardhan's ability to perform the role of representative plaintiff, an alternative representative plaintiff will have to be proposed.

The Litigation Plan

[334] The production of a workable litigation plan serves two purposes. First, it assists the court in determining whether the class proceeding is the preferable procedure and second it allows the court to determine if the litigation is manageable: see *Carom v. Bre-X Minerals Ltd*., (1999), 44 O.R. (3d) 173 (S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.).

[335] The amount of detail in a litigation plan will vary according to the circumstances and complexity of each case. However, a plan that simply sets out the usual steps that occur in any litigation is not acceptable: see *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242 at para.52 (S.C.J.).

[336] The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: see *Caputo v. Imperial Tobacco Ltd*., (2004), 236 D.L.R. (4th) 348 (S.C.J.) at para. 76 ("*Caputo*").

[337] As stated in *Caputo* at para. 78, the plan should contain, "details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined."

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[338] BMO argues that the Pardhan Litigation Plan is deficient because it fails to address three points: the presence of a jury notice, the individual issues and the related actions and third party claims. I will deal with each separately.

[339] The plaintiff filed a jury notice. The Pardhan Litigation Plan does not consider how the common issues trial can be managed when many of the proposed liability common issues (knowing assistance, knowing receipt and constructive trust) deal with equitable claims that cannot be decided by a jury pursuant to s .108(2) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. Only the common issue dealing with negligence can be tried by a jury.

[340] Class counsel recognized this problem but did not address it in the Pardhan Litigation Plan because he wanted to first see which common issues were certified. Based on the common issues that I have accepted, it is clear that the jury notice presents a problem. Class Counsel should recognize this in the Pardhan Litigation Plan and propose how this issue will be managed. The court will need to be satisfied that the proposal is workable.

[341] BMO argues that significant individual issues exist and the Pardhan Litigation Plan offers no plan for how they will be managed. I have rejected BMO's position that the determination of whether a trust exists is an individual issue. The only other individual issue that BMO raised is the discoverability issue that is relevant to the limitation period defence. The Pardhan Litigation Plan is silent about how the limitation period will be addressed. Based on what I have said above about the limitation period, it is fair to say that it should be dealt with after the trial of the common issues.

[342] Lastly, BMO states that there are multiple actions and third party claims arising out of the Damji fraud and no plan for determining the "overlapping liability issues." BMO does not articulate the nature of the "overlapping liability issues" in any way. It simply states that they exist.

[343] Dealing with the third party claims BMO says that there is no plan to address the allocation of liability between the plaintiffs and BMO and as between BMO and the third parties pursuant to ss. 1 and 3 of the *Negligence Act*, R.S.O. 1990, c. N-1. These sections state:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

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[344] The "multiple" actions that BMO refers to are the 4 other proposed class actions. In total there are six proposed class actions that have been commenced against various defendants. All arise out of the Damji fraud. The defendants and issues in the actions vary. It was the intention of all counsel in these actions to have joint certification hearings proceed at the same time. The complexity of hearing six different certification motions together, each with subtle differences and varying defendants, led me to direct counsel to choose one or two actions to go forward to certification first. As a result, it was agreed that the two actions against BMO (Pardhan and Kherani) would proceed first.

[345] The two actions against BMO are very similar. Most of the evidence that the parties filed was applicable to both the Pardhan and Kherani actions. These two actions should be managed together. Common documentary and oral discovery must be considered. The possibility of joint management of the two actions should be included in the Pardhan Litigation Plan along with a proposal as to how this would be done. The Pardhan Litigation Plan does not address how the two class actions against BMO might be managed together. I appreciate that class counsel was waiting for the outcome of the certification motions before considering these management issues. He is now able to address this in the Litigation Plan.

[346] I am not prepared to say at this point that the Pardhan Litigation Plan is deficient for not addressing the other four actions that have not even been certified. There is no order consolidating all six actions nor any order directing that they be tried together one after the other. The fact of these other proposed pending actions should not interfere with the ability of the Pardhan and Kherani actions to go forward.

[347] Litigation plans are amended as needed. Depending on what transpires with the other four actions, it may become necessary to amend the Pardhan Litigation Plan in this action to deal with the other four actions. At this point, it is premature to suggest that the Litigation Plan in Pardhan or Kherani should be amended to deal with the four other actions

[348] I have the same concern about the third party claims. Once again BMO makes a general statement that the Pardhan Litigation Plan does not address "overlapping liability" issues. All of the third party claims are being held in abeyance. The parties have yet to decide if they will continue to be held in abeyance. The issue of lifting the informal stay or not has not been considered in a case conference nor has there been any discussion of how this might be managed.

[349] Aside from the reference to the *Negligence Act*, BMO does not explain the basis for the concern. I note that in the plaintiff's reply, he pleads that since the plaintiff and class members were victims of fraud, there is no basis in law for alleging contributory negligent against the plaintiff and class members. I have already reviewed the authorities that support this position.

[350] As a class action moves forward, the issues and evidence will develop. Possible issues relating to the other actions, third party claims and the applicability of contributory negligence are matters to be dealt with as this case unfolds. While a litigation plan requires a level of specificity, a plaintiff is not expected to map out a plan to address issues that are uncertain at best.

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[351] I now turn to deal with other problems with the Pardhan Litigation Plan that BMO did not identify.

[352] The Pardhan Litigation Plan does not address how damages will be managed and assessed. Presumably, the plaintiff will rely on the extensive records that have already been reviewed by the Receiver and the BMO records as well. Nothing is said about how a punitive damage award will be shared among the class. Will recovery be shared *pro rata*?

[353] There is no detail to assess how Maurice J Neirinck & Associates as class counsel proposes to manage this litigation. It is not apparent if this firm has the resources to manage the class actions. It is not known if Mr. Neirinick has a team assembled to assist with the Pardhan and Kherani class actions.

[354] The Pardhan Litigation Plan proposes various ways to communicate with the class members and collect their information. What is proposed raises several questions and gives the appearance of being disorganized.

[355] The Pardhan Litigation Plan proposes that a website at dvgnews.com be used to communicate with the class members. The name of the website is Damji Victims Group News. There is no information about who created this website and who is responsible for keeping it current. It is not a website dedicated to this class action. Does class counsel have control and access to use of this website? The content of this site confirms that it was created some time ago, since it refers to the efforts of the Receiver. It is proposed that this website will be updated regularly. While a copy of the statement of claim in this action is posted, the website offers no further information about the status of this action.

[356] On this website, Damji victims are requested to fill out and submit a form identifying themselves and the amount of their loss. The Pardhan Litigation Plan states that the names and addresses of over 3,700 class members have been identified. It is not clear if this was gathered from the above website or some other source such as the Receiver. It is not known who has this list of names and whether class counsel has a copy or access to this list. It is not known to what extent 3,700 represents all of the potential class members in this action.

[357] Identifying class members is covered in paras. 33-35 of the Pardhan Litigation Plan. It is proposed that a "Program be set up and implemented for the purpose of compiling a list of names and addresses" of all class members. The compilation will initially be undertaken using the records of BMO and then completed using the records of the Receiver. There is no mention of using the existing database of 3,700 names and addresses. The Pardhan Litigation Plan proposes that BMO pay the cost of the Program used to compile the names. The nature of the program is not identified.

[358] Paragraph 18 of the Pardhan Litigation Plan proposes that class counsel "will be seeing to the set-up of a database for all persons who contact the website". It is unclear if this is the Program referred to above.

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[359] Someone has already gathered 3,700 names. Is this information already organized? Clearly, the names of the class members need to be recorded and their information organized. To simply state that a program is needed and that BMO must pay is vague. The court first needs to know the status and details of the information that has been collected concerning the 3700 names.

[360] Paragraph 18 of the Pardhan Litigation Plan also states that class members will be notified of all relevant developments by email. Why is email communication required when it is proposed that the class be kept up to date through dvgnews.com? Are both methods of communication being proposed?

[361] The Pardhan Litigation Plan proposes that notice of certification and the right to opt out be given through a direct mailing, publication in the Globe and Mail three times, posting notice on the dvgnews.com website and by direct delivery to anyone that contacts class counsel and asks for a copy of the notice. It is then proposed that the court will appoint a chartered accountant to receive the written elections from anyone who opts out and that the accountant will compile a list and deliver it to the court. It is not clear why a chartered accountant or any third party is required to perform what should be a simple task of recording opt outs.

[362] While a litigation plan is a work in progress, the plan in this action has too many deficiencies and fails to satisfy s. 5(1)(e)(ii) of the *Class Proceedings Act*. I am confident that this plan can be improved to address the problems listed above.

[363] Criterion 5(1)(e) is not satisfied.

CONCLUSION

[364] I grant leave to bring this certification motion.

[365] The plaintiff has satisfied the criteria under s. 5(1) (a) to (d) of the *Class Proceedings Act*. Criterion 5(1)(e) is not satisfied. This will not result in the dismissal of the motion. Since the plaintiff has met the other requirements for certification, the fair approach is to give the plaintiff an opportunity to resolve Mr. Pardhan's health issue or alternatively propose another representative plaintiff and to produce an acceptable litigation plan.

[366] Pursuant to s. 5(4) of the *Class Proceedings Act* I adjourn this certification motion on the following terms. The plaintiff has 30 days from release of these reasons to provide some evidence to satisfy s. 5(1) (e). This must be served on the defendant and a copy provided to the court within the 30 day time period.

[367] BMO may cross-examine on whatever affidavit evidence is filed and/or file responding evidence. The plaintiff may cross-examine on any evidence that BMO serves. Counsel may exchange brief written submissions on the new evidence and s. 5(1) (e) and will deliver submissions to the court. Counsel will have 30 days after the plaintiff serves its evidence to complete these additional steps. If counsel require an opportunity to make brief oral submissions this may be arranged on request.

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C. Horkins J.

Released: April 12, 2012

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CITATION: Pardhan v. Bank of Montreal, 2012 ONSC 2229
COURT FILE NO.: 08-CV-350772CP
DATE: 20120412

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALNASIR PARDHAN

Plaintiff

– **and** –

BANK OF MONTREAL

Defendant

REASONS FOR JUDGMENT

C. Horkins J.

Released: April 12, 2012