IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jer v. Samji,*
2013 BCSC 1671

Date: 20130910
Docket: S121627
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Lawrence Brian Jer, Jun Jer and Janette Scott

Plaintiffs

And

Rashida Samji, Rashida Samji Notary Corporation, Samji & Assoc. Holdings Inc., Arvindbhai Bakorbhai Patel aka Arvin Patel, Coast Capital Savings Credit Union, Coast Capital Insurance Services Ltd., The Toronto-Dominion Bank, Royal Bank of Canada, Vancouver City Savings Credit Union, Worldsource Financial Management Inc. and Society of Notaries Public of British Columbia

Defendants

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

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Place and Date of Certification Hearing:	Vancouver, B.C. April 15-19, 2013
Place and Date of Judgment:	Vancouver, B.C. September 10, 2013

I. INTRODUCTION

[1] The plaintiffs seek an order certifying this action against the defendants as a class proceeding pursuant to s. 4 of the *Class Proceedings Act*, R.S.B.C.1996, c. 50 [*CPA*].

[2] The plaintiffs invested funds into a private investment opportunity promoted by Rashida Samji, a notary public. The investment opportunity did not exist. Rather, Ms. Samji was operating a fraudulent scheme where returns are paid to the investors from their own money or the money paid by subsequent investors, and not from profit earned by an individual or organization running an operation. This type of operation is known as a Ponzi scheme. Instead of depositing the plaintiffs' money into her trust account as agreed upon, Ms. Samji dispersed the funds without the plaintiffs' knowledge or consent. As a result, the plaintiffs lost some or all of the funds they had invested.

[3] The plaintiffs seek to represent a class consisting of all persons in British Columbia, except the defendants, who invested in the scheme and lost money.

[4] The claims advanced by the plaintiffs, on their own behalf and on behalf of the class, are for breaches of trust, knowing assistance in breach of trust, fraud, negligence, and conversion in the context of the operation of the Ponzi scheme by Ms. Samji.

[5] The defendants can be divided into the following groups:

1) Rashida Samji, Rashida Samji Notary Corporation, and Samji & Assoc. Holdings Inc. ("Samji Holdings") (collectively, the "Samji defendants");

2) Arvin Patel ("Mr. Patel"), Coast Capital Savings Credit Union, Coast Capital Insurance Services Ltd. (together, "Coast Capital"), and Worldsource Financial Management Inc. ("Worldsource") (collectively, the "Coast defendants"); and

3) Royal Bank of Canada ("RBC"), Toronto-Dominion Bank ("TD") and Vancouver City Savings ("Vancity") (collectively, the "Financial Institutions").

[6] The defendants oppose the certification on a number of bases. The defendants all assert that the common issues defined by the plaintiffs are not common issues or are too broad. They say the claims in this case arise out of a series of separate dealings, transactions, oral exchanges and other individual transactions, and that the individual nature of the dealings will cause the action to break down into individual proceedings.

[7] The Coast defendants assert that the main issue is preferability, i.e., whether jointly managed individual test cases, as are already occurring, as opposed to a class action proceeding is the preferred procedure to follow in resolving the issues. The Coast defendants point to the fact there are numerous individual actions that have been commenced after the class action was commenced, and that these individual actions are being jointly managed.

[8] The Financial Institutions take the position that the pleadings do not disclose a cause of action against them. As well, the Financial Institutions argue the plaintiffs are not appropriate representatives, and they have failed to produce a workable plan to advance the proceeding. The Financial Institutions also say that a class action is not the preferable procedure.

II. STATUTORY REQUIREMENTS FOR CERTIFICATION

[9] Applications for certification are governed by ss. 4-9 of the *CPA*. Section 4 provides:

> (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
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> (e) there is a representative plaintiff 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 the class members of the proceeding, and
>
> iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[10] If the criteria in s. 4(1) are satisfied, there is no discretionary power to grant or refuse certification: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 28.

[11] The authorities establish the *CPA* is to be construed generously in order to achieve the objectives of judicial economy, access to justice and behaviour modification: *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260; *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 5.

[12] Accordingly, courts are not to take an overly restrictive approach. The certification stage is not meant to be a test of the claim's merits but rather the focus is on the form of the class action, i.e., whether the claim is appropriately prosecuted

as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 16.

[13] However, the plaintiff must show some basis in fact for each certification requirement, apart from the pleadings: *Hollick* at paras. 16, 25. In conformity with the liberal and purposive approach to certification, the evidentiary burden is not onerous: *Pro-Sys Consultants Ltd.* at para. 64.

III. FACTS

[14] The certification application was argued on the basis of the notice of civil claim and affidavit material filed by the parties. The allegations and affidavit material have not been tested. The facts are set out for the limited purpose of addressing the issues on this certification application.

[15] The plaintiffs allege Ms. Samji operated a fraudulent investment scheme known as the "Mark Anthony Investment." Ms. Samji described the scheme to potential investors as a private investment opportunity to earn a guaranteed return. The money would be paid into her notary public trust account, where it would remain and would be used to assist the Mark Anthony Group (a reputable firm in the beverage distribution industry) in its business as an importer-exporter in the beverage industry. It was described as involving subsidiaries of the Mark Anthony Group in Chile and South Africa. At the end of a six-month period, the funds could be returned or the investment could be rolled over. The minimum investment ranged from $50,000 to $100,000.

[16] The plaintiffs and the proposed class members placed their money in trust with Ms. Samji by signing a "Letter of Direction" to "Samji & Associates," the name under which Ms. Samji carried on her notary practice. The Letters of Direction which have been appended to the plaintiffs' affidavits directed that the funds would be placed and would remain "in trust," and would not be moved without specific direction from the investor.

[17] In reality, there was no legitimate investment opportunity. The "Mark Anthony Investment" scheme promoted by Ms. Samji had no affiliation with the Mark Anthony

Group. Nor did Ms. Samji deposit the funds into any trust account for the benefit of any business operation. Instead, the invested funds were deposited by Ms. Samji in her general or personal account, or in the Samji Holdings' account. The funds were then used for the general benefit of the Samji defendants and to make payments to investors in the scheme without the knowledge or authorization of the investors.

[18] As a result of investing in the scheme, the plaintiffs and proposed class have suffered loss and damage.

[19] Mr. Patel was a financial advisor employed by Coast Capital. He was also a mutual fund dealing representative for Worldsource. In the course of providing professional investment services to clients of Coast Capital and Worldsource, including the plaintiffs Lawrence and Jun Jer, Mr. Patel recommended the scheme as an investment opportunity to them. Mr. Patel also recommended the scheme to other employees of Coast Capital.

[20] As a registered mutual funds dealing representative of Worldsource, under the *Securities Act*, R.S.B.C. 1996, c. 418, and related enactments, and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, B.C. Reg. 226A/2009, Mr. Patel was restricted to trading in only a limited class of investment funds. The scheme was not an authorized security for the purpose of the *Securities Act,* and Mr. Patel was not authorized to promote it to clients.

[21] Throughout the course of the scheme, the Samji defendants maintained accounts with each of the Financial Institutions. Ms. Samji used those accounts to receive funds from the plaintiffs and proposed class members, to hold those funds, and to pay them out. As stated earlier, the accounts used by the Samji defendants were not trust accounts.

[22] Each of the Financial Institutions knew that Ms. Samji was a notary public. RBC opened three accounts in the name of Rashida Samji, Notary Corporation. TD's representative deposes that the TD Branch staff knew Ms. Samji as a well-

known and respected notary public. Vancity opened an account in the name of Rashida Samji, Notary Corporation with Ms. Samji as the sole signing officer.

[23] From about 2004 until April 2010, Ms. Samji used her notary corporation account at RBC to facilitate the scheme. During that time, tens of millions of dollars flowed through the notary corporation account. Many of these transactions involved the processing of instruments payable "in trust," even though the notary corporation account was a general account and not a trust account.

[24] In April 2010, Ms. Samji stopped using her RBC account to facilitate the scheme. At that time, she incorporated Samji Holdings and opened accounts in the name of Samji Holdings at TD and Vancity.

[25] Between April 2010 and January 2012, when the scheme was exposed, approximately $34 million flowed through Samji Holdings' account with TD. Approximately 38% of the cheques were payable in trust, including a bank draft purchased by the plaintiff, Ms. Scott, for $200,000 and payable to "Samji and Associates in Trust." The balance of these transactions involved cheques and other instruments payable to "Samji & Associates" that were deposited without endorsement in the account of Samji Holdings.

[26] After the scheme was identified as a possible Ponzi scheme in January 2012, an internal investigation by TD quickly determined that its account had been used for fraudulent activity.

[27] The plaintiffs rely on an affidavit from Cheryl Shearer, a chartered accountant with expertise in forensic accounting and investigations. Ms. Shearer provides an opinion that the pattern and nature of the activity in the Samji Holdings' account at TD should have been a cause for concern that there was unusual activity in the account.

[28] The scheme has given rise to numerous claims, including approximately 50 other lawsuits by investors. Approximately 41 of those lawsuits have been commenced by one law firm, Hamilton Duncan Armstrong and Stewart Law

Corporation (“HDAS”), largely on behalf of investors who were clients of Coast Capital and Worldsource and were introduced to the scheme by Mr. Patel.

[29] The plaintiffs assert that the Trustee in Bankruptcy for the estate of the Samji defendants has identified that there were approximately 203 investments in the scheme, many of which were made jointly. The Trustee in Bankruptcy has identified 65 investors who received more back from the scheme than the amount of the principal they invested. The Trustee in Bankruptcy has sent demand letters to those investors that they return the excess amounts. The plaintiffs say that it is estimated that the 96 investors who have not commenced lawsuits lost approximately $22.7 million. It is further estimated that approximately 10% of these losses are for less than $50,000.

IV. SECTION 4(1)(a) – DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

[30] The test to be applied under s. 4(1)(a) of the *CPA* is: is it plain and obvious that the notice of civil claim discloses no reasonable cause of action? The Court is to presume the facts alleged in the pleadings are true in determining whether the pleadings disclose a cause of action. The burden is on the plaintiffs. The threshold is very low. This is not a preliminary merits test: *Elms v. Oliver Drabik Carruthers & Chalcraft*, 2001 BCCA 429 at paras. 20-21.

[31] The causes of action pleaded, namely, breach of trust, knowing assistance of breach of trust, fraud, and conversion are all well established.

[32] I am satisfied the pleadings disclose a cause of action against the Samji defendants, Mr. Patel, and the Coast defendants. Indeed, those defendants do not argue that the pleadings disclose no cause of action against them.

A. The Financial Institutions

[33] The Financial Institutions take the position that the plaintiffs have not pleaded the material facts necessary to disclose a cause of action against them. RBC and TD say the facts pleaded do not support the plaintiffs’ claims of negligence and

knowing assistance in breach of trust against them. All of the Financial Institutions say the facts pleaded do not support the plaintiffs' claim of conversion against them.

[34] The plaintiffs take the position that the pleadings disclose causes of action against RBC and TD for the negligent processing of trust instruments, knowing assistance of breach of trust, and negligent failure to supervise, and against the Financial Institutions in conversion.

1. Negligent processing of trust instruments and knowing assistance of breach of trust

[35] The plaintiffs have pleaded causes of action in negligence and knowing assistance of breach of trust against RBC and TD.

[36] The notice of civil claim alleges that RBC and TD owed a duty of care to the plaintiff, Ms. Scott, and other class members to deposit cheques or other instruments drawn in trust, and transfers made in trust into a trust account, and RBC and TD breached this duty of care when they deposited cheques or other instruments drawn in trust and transfers made in trust into a non-trust account of Ms. Samji or Samji Holdings. In addition, the plaintiffs assert that in and around April 2010, RBC had concerns about the transactions in Ms. Samji and Samji Holdings' accounts, and that this knowledge imposed upon RBC the duty to take reasonable steps to investigate those transactions.

[37] The plaintiffs submit that these allegations are sufficient to support the claims made against RBC and TD in negligence and knowing assistance. They say similar claims against financial institutions whose accounts were used to facilitate Ponzi schemes have been certified in *Eaton v. HMS Financial Inc.*, 2008 ABQB 631, and *Pardhan v. Bank of Montreal*, 2012 ONSC 229, leave to appeal ref'd 2013 ONSC 355 (Div. Ct.). In those cases, the courts held the allegation of actual knowledge by the bank of the breaches of trust asserted, which in *Pardhan* also involved the deposit of cheques written in trust in non-trust accounts, was sufficient to support the same kinds of claims of negligence and knowing assistance as are advanced in this action.

[38] The plaintiffs assert that RBC and TD were statutorily required by s. 23 of the *Notaries Act*, R.S.B.C. 1996, c. 334, to deposit funds payable to Ms. Samji "in trust" in a trust account at the respective financial institutions. Subsections 23(2) and (3) provide:

> (2) Money received for or on behalf of a client
>
> (a) is trust money,
>
> (b) must be deposited in a savings institution in a trust account, and
>
> (c) must be identified as a trust account in the records of the member and of the savings institution.
>
> (3) Money must not be drawn from a trust account unless it is
>
> (a) money paid to or on behalf of a client from funds that have been deposited in a trust account to the client's credit,
>
> (b) money required for payment to the notary public for or on account of services rendered to or disbursements made on behalf of a client from money belonging to a client, or
>
> (c) money paid into the trust account by mistake.

[39] The plaintiffs argue that RBC and TD's failure to comply with their statutory obligations under these provisions, and their knowledge that Ms. Samji was failing to comply with the obligations imposed upon her by this section, further supports their claims of negligence and knowing assistance.

[40] RBC and TD both assert there can be no cause of action against them for negligent processing of trust instruments because of s. 437 of the *Bank Act*, S.C. 1991, c. 46, which provides:

> (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.

[41] The plaintiffs concede it is clear that s. 437(3) relieves a bank of any obligation to monitor the operation of trust accounts. The plaintiffs argue, however, that s. 437(4) refers to transactions in the account, i.e., to payments or transfers out of the account. The plaintiffs argue that properly interpreted and applied, ss. 437(3)

and (4) merely relieve a bank of any duty to monitor or police transactions concerning funds that are impressed with a trust. In the absence of any other circumstances, the bank is entitled to rely on the authority of the holder of the account to deal properly with trust funds. This section does not entitle a bank to disregard the possible misapplication of trust funds arising out of the deposit of an instrument specifically payable "in trust" in a non-trust account.

[42] Accordingly, while the section relieves the bank of any duty to monitor transactions concerning funds impressed with a trust, the bank may nevertheless be liable if it is aware of circumstances that might suggest a misapplication of trust funds: *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at para. 52. The plaintiffs assert that the section does not confer on a bank blanket immunity from liability in respect of all trust transactions.

[43] The plaintiffs assert this is particularly so in the circumstances of this case where instruments payable "in trust" to a notary were deposited in either the notary's general account (in the case of the deposits made to RBC), or in the general account of an entity unrelated to the notary practice (in the case of deposits made to TD). They submit that the plain wording of s. 23(2) of the *Notaries Act*, which provides that trust money "must be deposited in a savings institution in a trust account" and "must be identified as a trust account in the records of the member and of the savings institution," imposes an obligation on banks in regards to trust funds deposited by a notary. As such, the plaintiffs submit the deposits of trust cheques in non-trust accounts were contrary to s. 23(2) of the *Notaries Act* which clearly speaks to the savings institutions' obligations with respect to trust funds it receives from notaries, as only the savings institution can ensure compliance with the statutory requirement that the account be identified as a trust account in its records.

[44] The plaintiffs submit the plain purpose of s. 23 of the *Notaries Act* is to ensure that trust money is property dealt with and segregated into trust accounts. In that regard, they say that if RBC and TD had complied with the requirements of s. 23(2) of that *Act*, then the funds payable to Ms. Samji's notary corporation in trust would

have been deposited in a trust account. While the banks may have been entitled to rely on the authority with respect to payments out of the trust account, those transactions would have been subject to the scrutiny of reporting required of notaries' trust accounts. Therefore, by failing to require the instruments made "in trust" be deposited in a trust account, RBC and TD deprived the drawers of those instruments of these safeguards and facilitated the implementation of the fraud by Ms. Samji. The plaintiffs have not had the opportunity to conduct discovery of the Financial Institutions with respect to their policies and practices concerning trust transactions in general, or the records that RBC and TD may have concerning the repeated deposit by Ms. Samji of instruments payable "in trust" to non-trust accounts.

[45] In response, both RBC and TD assert that s. 23(2) of the *Notaries Act* does not impose any obligation on banks with respect to trust funds deposited by a notary. TD argues that s. 23 of the *Notaries Act* must be given a purposive analysis.

[46] However, I agree with the plaintiffs that the issues of duty, and the proper construction of s. 437 of the *Bank Act* and s. 23 of the *Notaries Act*, which arise from the facts set out in the notice of civil claim, are not to be determined at this stage.

[47] The defendants have not provided any authority that establishes it is plain and obvious the facts pleaded cannot support the duty alleged against RBC and TD to ensure that instruments payable "in trust" were deposited to a trust account.

[48] RBC relies on the decision in *601039 Ontario Ltd. v. First Ontario Credit Union Ltd.*, [2009] O.J. No. 132 (S.C.J.), aff'd 2009 ONCA 527, in support of its proposition that the plaintiffs would have to establish that the Financial Institutions had some knowledge of the wrongdoing. As the notice of civil claim does not allege RBC was aware of any wrong-doing of Ms. Samji, RBC says it is plain and obvious that the plaintiffs' claim will fail.

[49] However, I agree with the plaintiffs that *601039 Ontario Ltd.* simply stands for the proposition that the type of claim in negligence alleged here cannot be

determined without a factual inquiry. In *601039 Ontario Ltd.*, the plaintiff had commenced an application for a form of summary judgment under the Ontario Rules, alleging that the defendant bank was negligent in depositing a cheque payable “in trust” to the payee’s personal account. The court dismissed the application on the basis that the bank’s knowledge of the transaction was in dispute and held that the plaintiff’s claim must be pursued by way of the ordinary action the plaintiff had also commenced.

[50] As well, the plaintiffs allege that RBC and TD knowingly assisted Ms. Samji in breaching her trust obligations to the plaintiffs and the class by permitting Ms. Samji to deposit cheques and other instruments written “in trust” in the Samji defendants’ non-trust accounts.

[51] Knowing assistance is a cause of action that can result in a stranger to a trust being found liable for knowingly participating in a fraudulent breach of trust. In order to succeed, a plaintiff must plead and prove that:

i. there was a trust;

ii. the trustee perpetrated a dishonest and fraudulent breach of trust; and

iii. a third party 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.

[52] Actual knowledge, which includes recklessness or wilful blindness, is required to render a bank liable under this cause of action: *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787 at 811-813. Constructive knowledge is insufficient to establish liability in knowing assistance cases: *Citadel General Assurance Co.* at para. 48.

[53] RBC and TD take the position that the material facts pleaded fall short of an allegation of actual knowledge of fraud, including wilful blindness or recklessness.

[54] TD argues the pleadings contain no material facts alleging TD knew that Ms. Samji was using the account to further a fraudulent or dishonest breach of trust;

no material facts alleging they suspected Ms. Samji was involved in a fraud and failed to make the necessary inquiries to confirm that decision; and no material facts alleging TD knew of any danger or risk that Ms. Samji was involved in a fraud.

[55] RBC and TD say the cases relied upon by the plaintiffs, namely *Pardhan* and *Eaton*, are distinguishable because there was an allegation in those cases that the banks actually knew of or suspected the customer's fraud and particulars were pleaded regarding the bank's knowledge.

[56] In *Pardham*, the lower court found there was evidence that the bank knew of the trust's existence because numerous cheques marked "in trust" were deposited to a non-trust account. The court went on to find there was some evidence the bank was wilfully blind or reckless, in that there was a bank policy to deposit trust cheques into a trust account and yet the bank accepted trust cheques for deposit in a non-trust account.

[57] On appeal, quoting from *Water's Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 499, the court in *Pardham* noted a cause of action in "knowing assistance" may exist against a bank "where circumstances reasonably raise such suspicions of a breach that an inquiry would be the reaction of the honest, reasonable banker. And failure to inquire (even if not amounting to negligence) can be sufficient in some circumstances to hold a bank privy to such a breach": para. 16. The court went on to find that s. 437 of the *Bank Act* did not provide immunity to the bank in those circumstances.

[58] The plaintiffs argue that RBC and TD's position confuses the nature of the fraudulent breach of trust alleged to have occurred with the nature of the knowledge required for liability for knowing assistance in that breach of trust. The plaintiffs say they do not need to prove, and therefore do not need to allege, that the bank had actual knowledge of Ms. Samji's Ponzi scheme in order to establish liability for knowing assistance in breach of trust.

[59] The plaintiffs point to the fact that in *Air Canada* at para. 58, the Court stated it was unnecessary to find the defendant acted in bad faith or dishonestly. The plaintiffs further take the position that depositing of trust cheques in non-trust accounts may constitute actual knowledge of the breach of trust, citing para. 60 and 62 of *Air Canada*. Accordingly, even if a defendant did not have subjective knowledge of the breach of trust, there may be circumstances where the defendant has knowledge of particular facts such that a court will find the defendant was reckless or wilfully blind in failing to realize there was a breach.

[60] The plaintiffs say this is the kind of knowing assistance asserted here. Both RBC and TD knew that cheques written “in trust” constituted trust funds. Both knew that those trust funds were being deposited to the general account of Ms. Samji’s notary corporation (in the case of RBC), or the general account of Samji Holdings (in the case of TD). Both knew these funds would not be subject to the normal protection of a trust account and would be treated as the funds of those corporate entities, subject to any claims against them, including claims the banks themselves may have. The plaintiffs assert that in these circumstances, RBC and TD were knowingly taking a risk that the deposit to the general account may operate to the prejudice of the beneficiary of the trust funds.

[61] TD relies on *Citadel General Assurance Co.* for the proposition that constructive knowledge of a breach of trust arising from the bank’s knowledge that its client was dealing with trust funds is not sufficient to establish liability for knowing assistance of breach of trust.

[62] The plaintiffs agree that constructive knowledge is insufficient to ground liability for this tort. However, the plaintiffs dispute that *Citadel General Assurance Co.* stands for the proposition that a bank’s knowledge that its client is dealing with trust funds cannot form the knowledge necessary for knowing assistance. The Court in *Citadel Assurance Co.* addressed whether a bank’s constructive knowledge was sufficient to establish liability in either knowing assistance or knowing receipt

because the trial judge had made specific findings of fact that the bank was neither actually aware of nor reckless to a breach of trust.

[63] It is clear from the authorities that whether a bank's actual knowledge that a client was dealing in trust funds would constitute sufficient knowledge of a breach of trust will depend on the surrounding circumstances of which the bank was aware and can only be determined after a proper factual inquiry.

[64] The plaintiffs allege that Ms. Samji repeatedly processed instruments payable in trust for substantial amounts through the notary corporation's general account at RBC, and that she continued to process substantial amounts payable in trust through the general account of a corporation unrelated to the notary practice. The plaintiffs allege that starting in 2010, Ms. Samji started processing and depositing cheques payable in trust into Samji Holdings' general account at TD, and that TD permitted the deposit of the trust cheques and other instruments payable in trust into the non-trust account. I agree with the plaintiffs that in order to determine whether the banks' knowledge of Ms. Samji's use of the trust funds constitutes actual knowledge of a breach of trust, the nature and extent of RBC and TD's knowledge of these transactions can only be determined after a proper factual inquiry.

[65] Having reviewed the authorities, it is my view it is not plain and obvious that the plaintiffs' allegations that RBC and TD had actual knowledge of Ms. Samji's breach of trust are bound to fail. Based on my review of the pleadings and authorities, I conclude the plaintiffs have met the low threshold of demonstrating that the pleadings disclose causes of action in negligence and knowing assistance of breach of trust against RBC and TD.

2. Conversion

[66] The notice of civil claim asserts that RBC and TD converted cheques payable to Ms. Samji "in trust" by depositing those instruments in the general accounts of the Samji defendants when they were not entitled to use the proceeds of these "in trust" cheques. The notice of civil claim also alleges that TD and Vancity converted cheques that were payable to Samji & Associates by permitting those cheques to be

deposited in the account of Samji Holdings, who was not the named payee of those cheques and was therefore not entitled to the proceeds.

[67] The plaintiffs argue it is settled law that a bank will be liable for conversion of a cheque by "making the proceeds available to someone other than the person rightfully entitled to possession": *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce,* [1996] 3 S.C.R. 727 at para. 83. The plaintiffs assert that the allegations in the notice of civil claim set out the necessary elements of the tort of conversion.

[68] RBC and TD submit that *Boma* and *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia* (2004), 71 O.R.(3d) 723 (C.A.), have no bearing on this case because the plaintiffs in this case intended to transfer possession of the cheques to "Samji & Associates." Unlike in those cases, the plaintiffs do not complain they wrote cheques to person "A" and the Financial Institutions allowed the cheques to be deposited into the account of person "B." Such conduct, which is not alleged, would constitute conversion or interference with person A's right to possession of the cheques. Rather, the plaintiffs in this case allege trust cheques were deposited into non-trust accounts. RBC and TD take the position that such conduct does not constitute conversion, and is expressly sanctioned by s. 437 of the *Bank Act*.

[69] The plaintiffs say RBC and TD's argument ignores the extremely limited authority given to Ms. Samji by the express terms under which she obtained possession of the instruments. The plaintiffs allege that the instruments were delivered pursuant to the Letters of Direction, which expressly stated that the funds were to be placed by "Samji & Associates in trust" and were not to be paid out without a specific direction from the investor. On these terms, the investors remained at all times the true owners of the funds delivered to Ms. Samji.

[70] The Financial Institutions also take the position the notice of civil claim fails to disclose a cause of action in conversion because on the facts set out, the plaintiffs gave up possession of their instruments to "Samji & Associates," and any subsequent use by "Samji & Associates" cannot constitute a wrongful interference

with any right to possession of those instruments. The Financial Institutions argue that the financial instruments were either deposited in an account of the intended payee (in the case of instruments deposited in the general account of the notary corporation at RBC) or were deposited on the authority of the intended payee acting through Ms. Samji (in the case of cheques deposited in the accounts of Samji Holdings at TD and Vancity).

[71] In support of this argument, TD and Vancity rely on *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81. In that case, 373409 received a cheque payable to it in the ordinary course of its business. The sole officer and director of 373409 then altered the cheque to add another company as payee and deposited the cheque to the account of that other company. 373409 subsequently went into liquidation, and the receiver/manager brought an action in conversion against the bank for having accepted deposit of the cheque into the other company's account.

[72] The Supreme Court of Canada held there could be no conversion in these circumstances because 373409 had authorized the deposit of the funds into the other company's account. The Court stated:

> [9] An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession and does not qualify as a wrongful interference. …
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> …
>
> [15] … As long as the Bank's actions were authorized by 373409, then the criterion of wrongful interference does not arise. An owner's capacity to authorize others to deal with his or her chattel is fundamental to that owner's right of possession. The provisions of the [*Bills of Exchange*] *Act* do not in any way limit the capacity of a cheque owner to delegate such authority.

[73] The Court concluded that based on the facts, 373409 was the true owner of the cheque it received and was able to fully authorize others to deal with the cheque.

[74] In this case, the Financial Institutions argue that based on the pleadings, the payee or intended recipient was "Samji & Associates," the company under which

Ms. Samji carried on business. At the time Ms. Samji deposited the cheques into her or her companies' bank accounts, the plaintiffs had already given up possession of the cheques to "Samji & Associates." Accordingly, the Financial Institutions could not interfere with the plaintiffs' right to possession or immediate possession of such cheques by allowing such cheques to be deposited into Ms. Samji's personal account or the notary corporation's general account. As a result, the Financial Institutions submit it is plain and obvious that the plaintiffs cannot establish the tort of conversion against them.

[75] The plaintiffs take the position that neither Ms. Samji nor "Samji & Associates" was the true owner of the cheques delivered by the class members pursuant to the Letters of Direction. Therefore, neither was free to deal with the cheques or the proceeds in any manner. The authority of "Samji & Associates" was solely and expressly limited to placing and holding the class members' funds in trust.

[76] The plaintiffs say the Financial Institutions dealt with the cheques in a manner not authorized by the rightful owner, and therefore this case can be distinguished from *373409 Alberta Ltd*. The plaintiffs assert that they continued to be the rightful owners as Ms. Samji was limited by the terms of the trust. They say that the Financial Institutions' arguments that the plaintiffs would not have a right to immediate possession are incorrect.

[77] The plaintiffs rely on the House of Lords decision in *Midland Bank, Ltd. v. Reckitt and others*, [1932] All ER 90 (H.L.). In that case, Sir Reckitt had given his solicitor, Lord Torrington, authority to draw cheques upon his account. Lord Torrington then drew some cheques on Sir Reckitt's account for his own purposes. The House of Lords held that these acts were unauthorized and constituted a conversion, stating at 94:

> … Lord Torrington had no actual authority to draw these cheques at all or to receive the proceeds. His only actual authority was to draw cheques for his principal's purposes. Accordingly, if it can be supposed that Sir Harold Reckitt found Lord Torrington standing at the counter of the bank waiting to pay in one of the cheques, he could, if he knew the true facts, have demanded the immediate delivery of the cheque to him. It was his property, and Lord

> Torrington had no title to it. In these circumstances I have no doubt that the bank in presenting and receiving payment for the cheques converted them.

[78] The plaintiffs assert that this analysis applies squarely to the facts set out in the notice of civil claim. On those facts, Ms. Samji had no authority to deposit the class members' cheques to the general account of the notary corporation or to the account of Samji Holdings. Had any one of the class members found Ms. Samji standing at the counter of any financial institution waiting to so deposit the class member's cheque, the class member could have demanded the immediate delivery of the cheque back from Ms. Samji. The plaintiffs argue this demonstrates that Ms. Samji's unauthorized deposit of the cheque constitutes a conversion.

[79] Both TD and Vancity rely upon the decision in *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26, to assert that the class members cannot maintain a cause of action for conversion where the cheques and other instruments were obtained from them by fraud.

[80] However, the facts of *i Trade Finance Inc.* are different from those set out in the notice of civil claim. In *i Trade Finance Inc.*, the initial relationship between the parties was that of creditor-debtor, and there was no doubt that i Trade consented to the other party using the funds. As a result, Webworx acquired an interest in the funds which allowed it to use them, until i Trade revoked its consent.

[81] The plaintiffs assert the facts of this case are very different from those in *i Trade Finance Inc.*, rendering the analysis in that case inapplicable here. The plaintiffs say the class members did not consent at any time to Ms. Samji having use of the funds provided to her under the Letters of Direction. Furthermore, the plaintiffs point to the fact that the relationship between them was not one of debtor and creditor but of beneficiary and trustee. The evidence is that the funds were advanced to Ms. Samji for one purpose only; i.e., to hold in trust for the class members. At no time was Ms. Samji entitled to use the funds for any purpose. Also, in respect of those instruments payable "in trust," the Financial Institutions clearly had notice of the class members' interest in those funds.

[82] The plaintiffs argue *i Trade Finance Inc.* only stands for the proposition that property passed unconditionally through fraud may pass an interest that may subsequently be acquired by a third party purchaser for value. The plaintiffs argue this principle does not apply to this case because the Financial Institutions are not third party purchasers for value. Quite apart from the notice that RBC and TD had of the trust arrangements with respect to cheques and other instruments payable "in trust," the Financial Institutions were not advancing anything for value in collecting the cheques.

[83] The plaintiffs assert it is settled law that "the collecting bank acts as agent for the person in whose account the cheque has been deposited": *Canada Trustco Mortgage Co. v. Canada*, 2011 SCC 36 at para. 32. Accordingly, TD and Vancity were acting as agent for Samji Holdings in collecting the cheques deposited to its accounts and therefore, can have no greater rights to those funds as agent than the principal on whose behalf the funds are collected.

[84] The plaintiffs point to the fact that under s. 165(3) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, the collecting bank can acquire the status of a holder in due course, "where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque". As the Court in *Boma* explained at para. 76: "the 'person' in s. 165(3) must mean a person who is entitled to the cheque. This means that only the payee or the legitimate endorsee of the payee would qualify as a 'person' for the purposes of section 165(3)." As long as the payee or endorsee is entitled to the proceeds of the cheque, the cheque can be deposited without an endorsement. That is because when a bank is presented with a cheque for deposit to a payee, the bank is entitled to assume that it was the intention on the part of the drawer of the cheque that the payee receives the proceeds: *Boma* at paras. 70, 76, 78.

[85] The plaintiffs concede s. 165(3) provides a defence to any claim in conversion for a cheque payable simply to "Samji & Associates" that was deposited to a general account of the notary corporation. In those circumstances, the Financial Institutions

are entitled to assume that the drawer of the cheque intended “Samji & Associates” to receive the proceeds of that cheque as its own funds. The plaintiffs do not assert a claim in conversion is made out in respect of such cheques.

[86] However, the plaintiffs take the position that the section does not provide a defence to cheques that are payable to “Samji & Associates in trust.” The plaintiffs say it is clear from the face of the cheque that “Samji & Associates” was not entitled to the proceeds of the cheque as its own funds and therefore was not entitled to have the cheque deposited to its general account. The plaintiffs assert the section cannot provide a defence to cheques payable to “Samji & Associates,” whether in trust or not, that were deposited unendorsed to the account of Samji Holdings because Samji Holdings is not the named payee on the cheque. As a result, the plaintiffs take the position a cause of action for conversion may be asserted with respect to these cheques.

[87] In my view, the arguments being advanced by the plaintiffs and the Financial Institutions cannot be determined at this stage of the process. That would in effect be determining the merits of the case. This is not a merits test. As stated earlier, the Court is to presume the facts alleged in the pleadings are true, and determine whether it is plain and obvious that no claim exists.

[88] Having considered the pleadings, and the arguments advanced, I have concluded that it cannot be said that the authorities relied upon by the Financial Institutions establish that it is plain and obvious the plaintiffs’ cause of action in conversion is bound to fail.

[89] Accordingly, I have concluded that the allegations in the pleadings are sufficient to support the claims made against the Financial Institutions for the tort of conversion.

3. Negligent failure to investigate

[90] The plaintiffs allege RBC and TD breached their duty of care to the plaintiffs and class members by failing to investigate the transactions involving the deposit of

trust instruments into non-trust accounts. The plaintiffs further allege that RBC became concerned about the activities in the accounts of Ms. Samji and Samji Holdings in or around April 2010.

[91] Both RBC and TD assert that their actual knowledge of the repeated deposit by Ms. Samji of instruments for substantial amounts payable “in trust” into non-trust accounts is insufficient to give rise to a duty to investigate to ensure the bank’s facilities are not being used for fraud.

[92] The plaintiffs say RBC and TD’s arguments are premised in part on the assertion that, pursuant to s. 437 of the *Bank Act*, a bank does not have a duty to see to the terms of a trust. The plaintiffs submit the case law establishes that s. 437 of the *Bank Act* does not permit banks to turn a blind eye to the possible misapplication of trust funds. The plaintiffs argue this is reflected in *Citadel General Assurance Co.* at para. 56, where the Court found that “a reasonable person would have been put on inquiry about the possible misapplication of the trust funds” and that the bank “should have taken steps, in the form of reasonable inquiries, to determine whether the funds were being misapplied.”

[93] The plaintiffs rely on *Pardhan.* As discussed earlier, that case involved a claim against the defendant bank for negligent failure to inquire in the context of a Ponzi scheme where, as here, there were repeated deposits of instruments payable in trust into non-trust accounts. The circumstances that grounded the alleged duty included the fact that cheques payable in trust were deposited into non-trust accounts. The court found that doing so was contrary to banking industry practices and the bank’s policies and procedures. The court noted, at para. 210, that an investor who writes a trust cheque expects it will be deposited into a trust account. At para. 211, the court further noted the bank was aware that the person who wrote the cheque intended the money to be held in trust. The court found that in these circumstances, an investor had an expectation that the bank would act on the alleged suspicions, and that it was fair and just to impose a duty of care.

[94] The plaintiffs argue that the circumstances set out in *Pardhan* are analogous to those set out in the notice of civil claim in this case. Many investors provided their cheques to Ms. Samji payable "in trust." These cheques were then repeatedly processed by RBC and then by TD into non-trust accounts. Furthermore, these cheques were payable to a notary corporation, which was statutorily obligated to deposit these cheques into a trust account.

[95] The plaintiffs submit that it cannot be said that a duty to inquire grounded in these circumstances is bound to fail.

[96] In addition, the plaintiffs have alleged that RBC had concerns with these transactions which, in April 2010, caused Ms. Samji to cease using the notary corporation account at RBC to carry out the Ponzi scheme and to form Samji Holdings as a vehicle to do so through the accounts opened at Vancity and TD. The plaintiffs have no further details of those concerns or the events of April 2010 and have alleged that the particulars of such are well known to RBC.

[97] The plaintiffs assert these allegations of concern are equivalent to the allegations of suspicion in *Pardhan,* although they concede there was actual evidence in *Pardhan* that suspicions concerning the "in trust" transactions had been raised internally within the bank. The plaintiffs say this is a reflection of the more extensive pre-certification procedures in Ontario, such as cross-examinations on affidavits. This permits the parties to develop a much more extensive record for the purposes of certification, and the consequent pleading of facts so revealed by that evidential record.

[98] As noted earlier, the plaintiffs have not had the opportunity to conduct discovery of the Financial Institutions concerning their policies relating to the processing of trust cheques and their knowledge with respect to these particular transactions, or RBC regarding the events in April 2010. As well, the plaintiffs have not had the opportunity to conduct discovery of TD to determine what concerns, if any, it had about the transactions in the Samji defendants' accounts.

[99] In arguing that the plaintiffs' claim cannot succeed, RBC and TD rely on *Dynasty Furniture Manufacturing v. Toronto Dominion Bank*, 2010 ONSC 436, aff'd 2010 ONCA 514.

[100] In my view, the facts in *Dynasty* are distinguishable. In *Dynasty*, the plaintiff alleged a general duty on the bank in opening accounts to ensure that the accounts would not be used for an unlawful purpose.

[101] The duty alleged here is based on the actual knowledge of RBC and TD concerning the repeated deposit by Ms. Samji of substantial funds payable "in trust" to non-trust accounts, and in the case of RBC, the concerns that it had with respect to those transactions that led Ms. Samji to move her accounts.

[102] I agree with the plaintiffs that at this early stage of the proceeding, it cannot be said it is plain and obvious that the cause of action in negligent failure to investigate is bound to fail.

V. SECTION 4(1)(b) – IS THERE AN IDENTIFIABLE CLASS?

[103] The plaintiffs propose the following class definition:

> All persons, other than the Defendants, who have provided funds to invest in the "Mark Anthony Investment" scheme promoted by Samji and who have received payments from the scheme which are lesser in total amount than the total principal amount they invested.

[104] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38, McLachlin C.J.C. stated that:

> …Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded) and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria. ...

[105] The plaintiffs take the position that these conditions are plainly satisfied by the proposed class definition. It states objective criteria by which membership in the class can be determined. In order to be a class member, a person must have provided funds to invest in the “Mark Anthony Investment” scheme promoted by Ms. Samji and must not have received payments from the scheme greater in amount than the funds invested. Whether that has occurred can be determined objectively, by reference to the records of the Samji defendants and those of each putative class member.

[106] Only the Coast defendants object to the class definition. While they do not dispute that the proposed class defines a group of individuals determinable on an objective basis, they say the proposed class is over-inclusive and inappropriate vis-à-vis the Coast defendants. The plaintiffs acknowledge many in the proposed class have no claims against Coast Capital, Mr. Patel or Worldsource.

[107] The requirement to show that the class is defined in sufficiently narrow terms is not an onerous one. Although the class should not be unnecessarily broad, not everyone in the class has to share the same interest in the resolution of the common issue: *Hollick* at paras. 20-21.

[108] In this case, I find there are objective criteria to satisfy the requirement of defining a sufficiently narrow class, in that a person is a member if he or she invested in the scheme and lost money. If subsequent to certification, differences among class members become material, they can be dealt with either through sub-classes or as individual issues.

VI. SECTION 4(1)(c) – DO THE CLAIMS RAISE COMMON ISSUES?

[109] The inquiry under s. 4(1)(c) is limited to whether common issues of fact or law exist. It is not an exercise, at this stage, of weighing the common issues against individual issues: *Rumley v. British Columbia*, 2001 SCC 69 at para. 33; *Harrington v. Dow Corning Corp.,* 2000 BCCA 605 at para. 23.

[110] The touchstone to this inquiry is whether proceeding as a class action will avoid duplication of either fact-finding or legal analysis. To determine whether issues are common, two questions should be asked:

1) Is the resolution of the issue necessary to the resolution of each class member's claim?

2) Is the issue a substantial ingredient of each of the class member's claims?

[111] The case law further establishes that while courts must avoid certifying overly broad common issues, the common issues do not have to be dominant or determinative of liability in order for the action to be certified. They need only be issues that will move the litigation forward when resolved: *Stanway* at para. 8; *Jones* at para. 4.

[112] The proposed common issues are set out in the attached Schedule A: Common Issues. They break down into four groups:

1) Proposed common issues 1 to 8 and 18 deal with the claims against the Samji defendants for fraud, breach of trust, knowing assistance and conversion.

2) Proposed common issues 9 to11 deal with the claims of negligence against Mr. Patel.

3) Proposed common issues 12 to14 and 17 deal with the claims of vicarious liability and negligent supervision against Coast Capital. Proposed commons issues 12, and 15 to17 deal with the claims of vicarious liability and negligent supervision against Worldsource.

4) Proposed common issues 19 to 26 deal with the claims of conversion, knowing assistance and negligence against the Financial Institutions.

1. The proposed common issues involving the Samji defendants

[113] Proposed common issues 1 to 8 and 18 arise out of the claims against the Samji defendants. They are issues of fact and law that arise from the common factual context shared by all class members concerning the perpetration of the scheme by the Samji defendants. The resolution of these common issues does not necessitate an individual inquiry in order to determine each class member's claim. They can be determined based on the systemic practices of the Samji defendants in their perpetration of the scheme.

[114] The plaintiffs say it is plain that the issues raised by the class members' claims against the Samji defendants can be determined for the benefit of the class as a whole.

[115] Proposed common issue 1 is whether Ms. Samji made false statements to the class members regarding the scheme, knowing those statements were false, and provided class members with Letters of Direction for execution, knowing that the terms of the letters would not be followed, with the intention to deceive the class members.

[116] I agree with the plaintiffs that this issue does not require an examination of the individual circumstances of each class member's investment in the scheme. Rather, the issue can be determined with reference to the systemic and consistent false statements and false pretenses that permeated the entire scheme.

[117] In my view, this common course of conduct, if established, will resolve an ingredient in all of the individual investment transactions, regardless of the nature of the individual representations that may have been made to each investor.

[118] Proposed common issues 2 and 3 focus on the nature and purpose of the false statements and false pretenses made by Ms. Samji in implementing the scheme, and the knowledge of the Samji defendants in receiving funds for investment in the scheme.

[119] I agree with the plaintiffs that these are clearly common issues. They will be determined through an assessment of the systemic conduct of the Samji defendants in implementing the scheme and their knowledge in receiving funds from investors.

[120] Proposed common issues 4 to 8 arise out of the trust claims advanced against the Samji defendants.

[121] The Society for Notaries Public of British Columbia ("Society") takes issue with the suitability of the proposed certification of common issue 4.

[122] The Society says that the notice of civil claim fails to plead a cause of action or relief against it, and there is no claim to the Special Fund in the relief sought by the plaintiffs.

[123] The Society asserts that the plaintiffs instead seek to lay the groundwork to claim against it and access the Special Fund indirectly through proposed common issue 4, which seeks determination of:

> Were the funds that the Class members paid to Ms. Samji for investment in the scheme entrusted to and received by Ms. Samji in her capacity as a member of the Society?

[124] The Society argues that the determination of proposed common issue 4 can be relevant only for the purposes of making a claim against it to access the Special Fund. The Society submits that since the notice of civil claim does not disclose a claim against the Society or the Special Fund, proposed common issue 4 cannot form a substantial ingredient of each class member's claim, its resolution cannot be necessary to the resolution of each class member's claim, and it cannot advance the litigation in any way.

[125] The Society further submits it would be inappropriate for the plaintiffs to seek a determination of proposed common issue 4 in this proceeding in order to make potential claims in this or another proceeding against the Society or the Special Fund. Such a claim must be put squarely before the court with proper pleadings, rather than being embedded with other claims, as in the present case.

[126] The Society takes the position that claims to the Special Fund were not meant to be dealt with this way but rather through the Society's own investigation, as set out in s. 20 of the *Notaries Act.*

[127] On this point, the plaintiffs concede that the determination of proposed common issue 4 will not usurp the Society's role in administering the Special Fund. Any claims against the Special Fund would still have to proceed in accordance with s. 20 of the *Notaries Act*, although a claim could be made on behalf of the certified class.

[128] As well, the Society takes the position that the capacity in which Ms. Samji received the funds from individuals is a live issue which must be determined on an individual basis.

[129] The plaintiffs assert that the fact Ms. Samji received funds in her capacity as a notary public is foundational to their claims that Ms. Samji is a trustee of the funds placed with her; the knowing assistance of breach of trust claim advanced against Samji Holdings; and the claims for conversion, knowing assistance, and negligence advanced against the Financial Institutions.

[130] I agree with the plaintiffs that proposed common issue 4 forms a substantial ingredient of each class member's claim. The issue of whether class member's funds were entrusted to and received by Ms. Samji in her capacity as a member of the Society arises from the common course of conduct of Ms. Samji in carrying out the scheme and can be determined for all class members.

[131] I further agree the determination of proposed common issue 4 will simplify the process of resolving the issue of whether the investors' funds were entrusted to and received by Ms. Samji in her capacity as a notary public.

[132] I also am of the view that the issues identified in proposed common issues 5 to 8 may be determined for the class as a whole because their determination turns on the standard conduct of the Samji defendants in implementing the scheme, the

standard terms on which the investors' funds were provided to Ms. Samji under the Letters of Direction, and the use of the funds by the Samji defendants.

[133] Proposed common issue 18 addresses whether the Samji defendants wrongfully converted the cheques, instruments and funds provided by the class members to Ms. Samji for investment.

[134] I agree this question can be determined with reference to the standard terms upon which class members' funds were provided to Ms. Samji for investment, and the Samji defendants' use of the funds.

[135] Worldsource asserts that the common issues relating to the Samji defendants are not seriously in dispute and will not advance the litigation in any substantial way.

[136] However, the Samji defendants dispute the allegations set out in the common issues, and they are not admitted by the other defendants. The answers to the common issues relating to the Samji defendants impact the claims against the other defendants.

[137] As well, the authorities support the proposition that even if fault was admitted by the Samji defendants, it is appropriate to certify the question of the Samji defendants' fault as a common issue so that all class members can take advantage of the admission: *Dalhuisen v. Maxim's Bakery*, 2002 BCSC 528 at para. 8; *Kotai v. Queen of the North (Ship)*, 2007 BCSC 1056 at para. 37.

[138] As a result, I agree with the plaintiffs that certification of these issues is necessary in order that they can be determined for the class as a whole. The resolution of the issues will move the litigation forward.

2. The proposed common issues involving Mr. Patel, Coast Capital and Worldsource

[139] The plaintiffs, Mr. Patel, Coast Capital and Worldsource agree that the common issues relating to them, while to some degree separate, are interrelated.

[140] Proposed common issues 9 to 11address Mr. Patel. Proposed common issues 12 to14 and 17 deal with the claims of vicarious liability and negligent supervision against Coast Capital. Proposed common issues 12, and 15 to17 deal with the claims of vicarious liability and negligent supervision against Worldsource.

[141] Proposed common issue 9 addresses whether Mr. Patel owed a duty of care to class members who he introduced to the scheme to exercise due diligence and reasonable care in providing investment services to them, by reviewing and evaluating the investment to determine its suitability and screening out unsuitable investments. If the answer is yes, proposed common issue 10 is whether Mr. Patel breached that duty by introducing or recommending the scheme to class members. If the answer to proposed common issue 10 is yes, proposed common issue 11 is whether that breach caused or contributed to the losses suffered by those class members who were introduced to the scheme by Mr. Patel.

[142] The Coast defendants take the position that proposed common issue 9 is not a single question, but a myriad of questions that are susceptible to different answers at different times for different class members. Specifically, they say the duty of care owed by Mr. Patel will vary based on the context within which the class members learned of the scheme from him. The Coast defendants assert the evidence in the record suggests Mr. Patel may have connected some of the class members with the scheme through his personal relationship with them, as opposed to a professional relationship with them. Consequently, they assert there must be an individual inquiry into the nature of the relationship between Mr. Patel and any particular class member in order to determine whether Mr. Patel was acting as an investment advisor and as such had a duty to that class member.

[143] The Coast defendants point to the period of time over which the investments took place and the fact that Mr. Patel observed that the investment paid on schedule. Mr. Patel says the scope of his duty to investigate the investment will vary over time because he received repeated confirmation the investment was operating as promised. Accordingly, many of the class members' claims will give rise to

individualized defences which cannot be addressed if all of the investors are lumped together.

[144] However, I agree with the plaintiffs that the common issues involving Mr. Patel can be determined for the class as a whole because they are determined with reference to Mr. Patel's conduct before he started interacting with the investors. In other words, whether Mr. Patel had a duty to review investments before presenting them to investors is determined by reference to the nature of the responsibilities he assumed as a professional financial advisor. If Mr. Patel assumed such a duty, then whether he breached that duty is determined by reference to his conduct in evaluating the scheme before it was presented to his clients as an investment opportunity. There is, therefore, no need to examine the circumstances of those individual interactions.

[145] In *Collette v. Great Pacific Management Co. Ltd.,* 2004 BCCA 110, the plaintiff alleged that the defendant financial advisors and investment brokers were negligent in marketing certain mortgage units to their clients. The plaintiff claimed the defendant had breached its due diligence obligations to review the mortgage investments before offering them for sale to its clients. The Court of Appeal held that the action was properly certified as a class proceeding because the plaintiff's claim raised common issues of duty, breach and causation, stating at para. 35:

> …The appellant's case is that no investment advisor could have offered the units to any client unless they passed the due diligence test of the specialty investment department. Any breach of duty at that stage, in allowing the units to be offered for sale by any advisor to any client, is common to all clients of the firm.

[146] The Coast defendants attempt to distinguish *Collette* on the bases that it involved an investment firm, and there was a two stage process in the sale of the mortgage units. However, it was the first stage, i.e. the due diligence stage of the investment, which was certified, and which the plaintiffs in this case complain of. The issue that arises from the allegation in the notice of civil claim that Mr. Patel presented existing clients with the opportunity to invest in the scheme is whether Mr. Patel owed a duty to his existing clients to screen out unacceptable investments.

[147] This is a substantial ingredient of the claim of each class member who was an existing client of Mr. Patel at the time he presented the investment, and the resolution of the issue will be capable of extrapolation.

[148] Accordingly, I agree with the plaintiffs that they will not have to rely on individual circumstances to establish whether Mr. Patel had a duty to review the suitability of the investment prior to recommending it to clients. While the plaintiffs may not be successful, in my view, the questions regarding Mr. Patel should be certified.

3. The common issues involving Coast Capital and Worldsource

[149] The proposed common issues involving Coast Capital are 12 to14 and 17. The proposed common issues involving Worldsource are 12, and 15 to17. All of these proposed common issues address the plaintiffs' claims of vicarious liability and negligent supervision of Mr. Patel.

[150] The plaintiffs say that proposed common issue 12 involves the consideration and assessment of the relationship between Mr. Patel's negligence and the responsibilities imposed upon him by Coast Capital and Worldsource as Mr. Patel's employer and principal, respectively. The plaintiffs assert that Coast Capital and Worldsource are vicariously liable for Mr. Patel's negligence because the duty imposed upon him to exercise reasonable care and due diligence in presenting investment opportunities to his clients arises out of what Mr. Patel was authorized and expected by Coast Capital and Worldsource to do – to provide financial advice and present investment opportunities to their clients.

[151] The plaintiffs say that even if the scheme was not authorized by them, Coast Capital and Worldsource could still be held vicariously liable for Mr. Patel's negligence in presenting the unauthorized investment to their clients. The question is whether Mr. Patel's negligence in presenting the investment was sufficiently related to conduct authorized by Coast Capital and Worldsource to justify the imposition of vicarious liability based on *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 41.

[152] The plaintiffs argue this analysis is common. The determination requires a consideration of such factors as whether there was a significant connection between what Mr. Patel was asked by Coast Capital and Worldsource to do and his negligence; whether Coast Capital and Worldsource increased the risk of harm to their clients by putting Mr. Patel in his position and requiring him to perform his assigned tasks; and whether Mr. Patel's negligence may have furthered the aims of Coast Capital and Worldsource.

[153] The plaintiffs say these are all factors which require the Court to consider Mr. Patel's negligence in the general context of his responsibility as a financial advisor and dealing representative. The plaintiffs further say that Coast Capital and Worldsource expected Mr. Patel to create a relationship of trust with their clients so those clients would rely upon Mr. Patel's investment advice. The fact that Mr. Patel might provide imprudent investment recommendations in the context of this relationship of trust is plainly a foreseeable risk of the relationship fostered by Coast Capital and Worldsource between Mr. Patel and their clients. The plaintiffs, citing *Straus Estate v. Decaire*, 2011 ONSC 1157, aff'd 2012 ONCA 918, say such factors will be sufficient to justify imposing vicarious liability upon Coast Capital and Worldsource for Mr. Patel's negligence in presenting an unauthorized investment to their clients.

[154] Coast Capital takes the position that the common issues the plaintiffs have proposed are actually individual issues or mere elements of common causes of action which must ultimately be determined on individual facts. Alternatively, Coast Capital says that these proposed common issues rely upon inappropriate assumptions of fact. Coast Capital argues that those issues which can be shown to be truly common will not materially advance the litigation, are overwhelmed by the individual issues in the action, and are better resolved through alternative means.

[155] The pleadings assert the basis for this claim is that Coast Capital allegedly "failed to review from time to time the investment products recommended by Mr. Patel to members and clients" of Coast Capital. Coast Capital points to the fact

there is evidence before the Court in the client notes for Ms. Amrit Dhaliwal indicating numerous discussions with persons other than Mr. Patel about her investments with Coast Capital. Coast Capital says, as a result, the issues of whether such inquiries were made, and whether any duty was breached, will need to be addressed on an individual basis considering the discussions and dealings between Coast Capital and the investors over time. Furthermore, whether Coast Capital's duty to supervise Mr. Patel, if any, extended to the dealings between Mr. Patel and any particular member of the proposed class, in respect of the scheme, will depend upon a consideration of the individual facts and dealings of each investor, and whether those dealings were within or outside Mr. Patel's employment, as will the issues of breach of any such duty and causation.

[156] For its part, Worldsource says the roles of Coast Capital and Worldsource with respect to Mr. Patel are very different, and will give rise to different vicarious liability analyses. Coast Capital was Mr. Patel's employer during the entire period of Mr. Patel's alleged involvement with the scheme, whereas Worldsource had a very limited agency relationship with Mr. Patel that commenced in May 2008. Worldsource argues it is therefore inappropriate and unhelpful to frame a question of vicarious liability in respect of Coast Capital and Worldsource as if it was a single common issue.

[157] In addition, Worldsource argues that its vicarious liability for the alleged negligence of Mr. Patel cannot be determined on a class-wide basis. Mr. Patel was not an employee of Worldsource, and therefore Worldsource's liability for Mr. Patel's actions cannot be determined with reference to the tests for vicarious liability that apply to employers as the plaintiffs suggest. Rather, whether Worldsource is vicariously liable in this case will depend not only on findings of fact relating to the specific relationship between Mr. Patel and Worldsource, but will also depend on the circumstances surrounding each class member's investment in the scheme, including their history of interactions with Mr. Patel and Worldsource.

[158] In this regard, Worldsource refers to a number of decisions dealing with the liability of mutual fund dealers and analogous institutions for the actions of sales representatives. Those cases indicate that in the absence of an employment relationship vicarious liability will be imposed only in circumstances such as those alleged in this case where ostensible authority can be made out. Ostensible authority is determined with reference to what the reasonable person in the shoes of the plaintiff would have understood. Worldsource submits this is an inherently individual inquiry that requires the Court to conclude whether each individual plaintiff, in his or her dealings with Mr. Patel and Worldsource, reasonably believed Mr. Patel was acting within the authority granted by Worldsource.

[159] Moreover, Worldsource says the plaintiffs' allegations that Worldsource and Coast Capital promoted a relationship of trust between Mr. Patel and their clients creating a foreseeable risk that Mr. Patel would provide those clients imprudent investment advice, is an individual issue. Its determination depends on the context of an individual investor's investment.

[160] Worldsource says it intends to plead the plaintiffs either had actual knowledge, or were put on notice, and their dealings with Mr. Patel in respect of the scheme had nothing to do with Worldsource. Relying on *Frost v. Bassett*, 2006 BCSC 243 at para. 20, Worldsource argues if this argument is successful, there can be no vicarious liability. Worldsource asserts that the issue of the individual plaintiff's actual knowledge is an individual inquiry which precedes any determination of vicarious liability.

[161] I do not accede to the positions of Coast Capital and Worldsource. I agree with the plaintiffs that the issues of duty and breach require an examination of the conduct of Coast Capital and Worldsource to determine what they did, and what they ought to have done, in supervising Mr. Patel. The answer to these questions may be that Coast Capital and Worldsource failed to do what they should have done at any time, or that they properly supervised Mr. Patel at all times, or that they properly supervised Mr. Patel only at some times or with respect to some of his

dealings with certain of his clients. Whichever is the case, the issue can be determined at the common issues trial with reference to the conduct of Coast Capital and Worldsource. In my view, the answers will substantively advance the litigation.

[162] If it is determined there was a breach of supervision of Mr. Patel at any particular point in time, then there must be an assessment of how this breach of supervision would have impacted his presentation of the scheme to investors. I agree with the plaintiffs that this determination can also be made at the common issues trial and that this will determine the extent to which the class members' losses were caused by the breach of duty found to have occurred, in the sense that those losses could have been prevented had the duty to supervise been properly discharged.

[163] The authorities hold that the possibility that the evidence may ultimately establish that there was only a breach of duty by Worldsource or Coast Capital at a particular point or points in time does not detract from the commonality of this inquiry: *Gerber v. Johnston*, 2001 BCSC 687; *Cooper v. Hobart* (1999), 68 B.C.L.R. (3d) 293 at para. 20 (S.C.); *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.)

[164] As well, Worldsource argues that whether it owed a duty to class members who are its clients cannot be determined on a common issue basis because the proposed class includes investors who have never been Worldsource's clients. However, s. 6(1) of the *CPA* expressly recognizes there may be claims raised in a class proceeding which raise common issues that are shared by a part of the class. The presence of sub-class common issues does not preclude a class action: *Metera v. Financial Planning Group (#2)*, 2003 ABQB 326 at para. 54; *Western Canadian Shopping Centres Inc.* at para. 54.

[165] Further, Coast Capital and Worldsource's arguments that the commonality of vicarious liability cannot be determined on the theory presented by the plaintiffs go to the merits of the determination of the plaintiffs' claim. For example, Worldsource asserts that it cannot be vicariously liable because the investment was not an authorized Worldsource product, and was not indicated or recorded on any

statements issued by Worldsource to their clients. I agree with the plaintiffs this is clearly an issue that can be properly determined at the common issues trial and its resolution will advance the litigation.

[166] Further, Coast Capital's argument that the issues of its vicarious liability for Mr. Patel or its negligence in supervising him are issues that are better resolved through a series of test cases demonstrates the commonality of these issues. The resolution of these issues in selected test cases can assist in the resolution of the remaining cases only if the issues raised by the test cases and the remaining cases are common. Coast Capital's argument that there is efficiency to be gained through the *ad hoc* application of *res judicata* and issue estoppel based on the trial of test cases is inconsistent with its argument that there is no commonality between class members with respect to the common issues asserted against Coast Capital. Put simply, there can be no test cases without common issues.

[167] In my view, all of the following are common issues that will resolve either each class member's claims or a substantial ingredient of each class member's claims: what duty both Coast Capital and Worldsource had to supervise Mr. Patel, either as an employee or an authorized agent; whether either party breached the duty; and whether any breaches on their part caused or contributed to the losses suffered by their clients as a result of their investments in the scheme. In my opinion, the resolution of the common issues identified by the plaintiffs regarding the vicarious liability of Coast Capital and Worldsource will advance the litigation.

[168] Accordingly, I am of the view it is appropriate to certify common issues 12 to 17.

4. The proposed common issues involving the Financial Institutions

[169] Proposed common issues 19 to 26 involve the Financial Institutions. They arise out of the plaintiffs' claims for conversion, negligent processing of trust instruments, knowing assistance of breach of trust, and negligent failure to supervise.

[170] The Financial Institutions take the position that the common issues would break down into individual proceedings because individual considerations predominate with respect to both liability and damages. As such, the resolution of the common issues does not advance the claims against them in any practical way.

[171] Proposed common issue 19 addresses the plaintiffs' claim that RBC and TD wrongfully converted cheques or other instruments payable in trust by depositing them into non-trust accounts. Proposed common issue 20 addresses the plaintiffs' claim that TD and Vancity wrongfully converted cheques that were payable to "Samji & Associates."

[172] TD argues that to establish conversion against each of the Financial Institutions, the plaintiffs must prove that: (i) payment upon the cheque was made to someone other than the rightful holder; and (ii) crediting the proceeds to accounts was not authorized by the rightful holder. The Financial Institutions take the position that both inquiries are individual issues and are not questions of law but questions of fact. To determine the rightful holder, evidence would be required from each drawer of each cheque to determine who was the intended payee and whether it was the drawer's true intention to pay "Samji & Associates."

[173] However, I agree that the answer to the question of whether a cheque payable "in trust" has been wrongfully converted by its deposit into a non-trust account will be the same for each and every cheque or instrument that was payable in trust and deposited in a non-trust account. Similarly, the answer to the question of whether a cheque payable to "Samji & Associates" was wrongfully converted by its deposit to the account of a different entity, Samji Holdings, will be the same for every cheque or instrument so deposited. In my view, the answers to those questions will resolve either each class member's claims or a substantial ingredient of each class member's claims.

[174] The remaining common issues arise out of the plaintiffs' claims against RBC and TD for negligence and knowing assistance. I agree with the plaintiffs that these are proper common issues because their determination involves an assessment of

the knowledge and conduct of these financial institutions. This assessment clearly can and should be done once for the benefit of all class members.

[175] Although the Financial Institutions assert there is no basis in fact for the common issues asserted by the plaintiffs, there is evidence that the class members delivered the cheques to Ms. Samji pursuant to the Letters of Direction, which required the funds to be placed in trust. There is also evidence that cheques designated to be paid in trust were deposited into non-trust accounts.

[176] While RBC and TD have provided affidavit evidence to the effect that they were unaware of any fraudulent activity in Ms. Samji's accounts, the evidence shows that both RBC and TD knew that Ms. Samji was a notary public and that cheques payable to "Samji & Associates in trust" were repeatedly processed by these banks through non-trust accounts. As well, the plaintiffs have adduced expert evidence that the transactions in Ms. Samji's accounts were of such a pattern and nature as to raise a suspicion of fraudulent activity.

[177] In my view, these facts are sufficient to establish a basis for the plaintiffs' claims in conversion, negligent processing of trust cheques, and knowing assistance in breach of trust.

[178] I agree with the plaintiffs that there is some evidence in the record to support the common issues that: RBC and TD had a duty to investigate transactions in Ms. Samji's accounts to prevent their financial facilities from being used for fraudulent purposes; that RBC and TD failed to discharge that duty; and that their failure to do so caused loss to the investors in the scheme. There is no need for individual inquiry in order to resolve these issues and their resolution will apply uniformly to all class members.

[179] As stated earlier, the requirement for the common issues to have "some basis in fact" does not involve an assessment of the merits. The plaintiffs are not required to show that a *prima facie* case has been made out or that there is a genuine issue for trial: *Glover v. Toronto (City)*, [2009] O.J. No. 1523 at para. 15 (S.C.J.), leave to

appeal ref'd 2010 ONSC 2366 at paras. 12-13 (Div. Ct.); *Lambert v. Guidant Corp.*, [2009] O.J. No. 4464 (Div. Ct.).

[180] Vancity asserts that the sole proposed common issue as against Vancity is not a common issue capable of certification as it is not shared by each member of the class members whom the plaintiffs seek to represent. This is similar to the argument advanced by Worldsource. As stated earlier, there is no requirement that every common issue certified must apply to each member of the class: *CPA*, s. 6(1). The proposed class members are united by the common issues involving the Samji defendants. The fact that all of the proposed class members do not share claims against all of the defendants does not preclude the certification of the action.

[181] Accordingly, I have concluded that the proposed common issues involving the Financial Institutions should be certified.

VII. SECTION 4(1)(d) – IS A CLASS PROCEEDING THE PREFERABLE PROCEDURE?

[182] Section 4(1)(d) of the *CPA* requires the court to determine whether a class proceeding is the preferable procedure for the fair and efficient resolution of those issues. Section 4(2) of the *CPA* sets out several factors the court must consider in making this determination:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[183] In *Pro-Sys Consultants Ltd.*, the Court of Appeal adopted the following approach to the question of preferable procedure:

> [71] The Ontario Court of Appeal summarized the proper approach to the question of preferable procedure in *Cloud*:
>
> > [73] As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.
> >
> > [74] *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[184] The plaintiffs submit that a class proceeding would be a fair, efficient and manageable method of advancing the claims of class members because resolution of the common issues will determine whether all or some of the defendants are liable to the class members or some of them. This will leave only the quantum and possibly the extent of that liability to be determined. This process is preferable to the only other reasonably available means of resolving the claims of class members, which would involve a multiplicity of individual actions raising the same issues.

[185] The plaintiffs take the position that it is clear from the fact that more than 40 individual actions have been commenced, that the claims of investors will be litigated whether this action is certified as a class proceeding or not.

[186] The plaintiffs say that if this action is not certified, the court will almost certainly be faced with close to 100 more individual actions in addition to those that have already been commenced.

[187] The choice facing this Court on this application, then, is whether the remaining investors should be required to commence over 90 more individual

actions in order to advance their claims or whether those claims are more efficiently and effectively pursued through the vehicle of a class proceeding.

[188] The plaintiffs submit this is the very kind of situation that the *CPA* was designed to address. Requiring all investors in the Samji scheme to commence their own individual actions if they wish to secure relief has the potential to overwhelm the court's resources. It is neither economical nor efficient for the court or the parties.

[189] Moreover, the plaintiffs submit that the *CPA* permits issues common to all investors' claims to be resolved in one hearing, which will result in binding determinations on class members and the defendants. The *CPA* also confers upon the court the flexibility to design procedures that are tailored to meet the needs of any individual issues that remain after determination of the common issues.

[190] The Coast defendants take the position that certification would not materially advance the interests of judicial economy, access to justice or behaviour modification. They submit that the claims against Coast Capital, Mr. Patel and Worldsource will ultimately break down into a series of individual trials to resolve the predominantly individual issues raised by those claims. Moreover, the vast majority of claimants have commenced individual actions against them. The value of the claims is such that if the class action is not certified, the individual claimants will almost certainly proceed. To the extent the Coast defendants have been responsible for any losses, they will be held accountable in the individual actions. Therefore, behaviour modification will be addressed through those claims.

[191] The Financial Institutions also assert that a class proceeding is not the preferable procedure. Part of the rationale for a class proceeding is that, given the size of the claim, it is unlikely for economic reasons that a particular plaintiff would proceed individually to seek redress. The Financial Institutions say this is not a concern here because the plaintiffs' claims are not so small that the absence of a class proceeding would preclude such claims from being litigated. As pleaded by the plaintiff, the minimum investment ranged from $50,000 to $100,000. There are currently more than 50 actions that have been commenced by individual investors

for losses arising from the scheme, which makes clear that the absence of a class proceeding will not preclude investors from seeking redress. Accordingly, certification will have no impact on behaviour modification. In the circumstances, the plaintiffs have failed to satisfy the onus of showing a class action would be the preferable procedure.

1. Do the common issues predominate?

[192] The defendants all assert that the issues are not common and therefore the class proceeding is not preferable.

[193] However, I have determined there are common issues involving each of the defendants. While the defendants argue the common issues are negligible in relation to the individual issues, I have determined that the common issues identified by the plaintiffs will in fact determine issues that are common to all of the proposed class members' claims, and will move the litigation forward.

[194] In addition, for the reasons set out earlier, it is my view that the questions of fact or law common to the class members predominate over the individual issues. If some or all of the common issues are resolved in favour of the defendants (or any of them), then those claims of the class members are at an end. Conversely, if some or all of the common issues are resolved in favour of the class, this will leave only the quantum, and possibly the extent, of the liability of any of the defendants to each class member to be determined in the individual issues phase of the class proceeding.

[195] For example, if it is determined that contributory negligence is a defence available to some or all of the defendants, individual hearings may be required to determine the extent to which those defendants liable in negligence are responsible for the losses suffered by the class members. Whether contributory negligence is a defence to some or all of the claims is an issue that can be determined at the common issues trial, in the context of the plaintiffs' claims and those advanced in any of the individual actions that are tried together with the common issues.

[196] The fact that individual hearings may be required after the resolution of the common issues does not detract from certification of this action as a class proceeding. The *CPA* clearly contemplates a proceeding whereby individual issues will remain for determination after the common issues have been determined. Indeed, the courts have acknowledged that it would be unusual for a class proceeding to contain only common issues with no individual issues to be determined. Class proceedings are usually two stages, the first being the common issues trial, and the second being a procedure to determine the individual issues: *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228 at para. 59; *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328 at para. 202; *Metera.*

[197] Cases have been certified to determine the common issues of liability, notwithstanding that complex issues of causation and damages have to be determined on an individual basis: *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at para. 60 (S.C.); *Stanway* at para. 87; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 87-88, aff'd 2013 BCCA 21.

[198] As stated earlier, it is my view that the determination of the common issues identified by the plaintiffs will move the litigation forward, and will serve to narrow and focus the nature of any individual inquiry that may be necessary.

2. What is the effect of the individual actions?

[199] The plaintiffs submit the fact that a substantial number of proposed class members have commenced individual actions does not detract from the preferability of a class proceeding for resolving the class members' claims, for two reasons.

[200] First, most of the individual actions have been commenced by or under the control of one law firm, HDAS. The controlled and coordinated prosecution of these individual actions under the guidance of one counsel demonstrates that the individual plaintiffs in these actions are content to have their claims pursued collectively through a coordinated process.

[201] Second, the fact a substantial number of class members chose to pursue their claims through the strategy of collective individual actions does not change the fact that a majority of proposed class members have not chosen to do so.

[202] I agree with the plaintiffs that these class members should not be deprived of the benefits of a class proceeding simply because other class members have chosen to pursue their claim through the strategy of coordinated, individual actions.

3. What is the effect of other proceedings related to the action?

[203] The plaintiffs concede that the certification of this action as a class proceeding will involve claims that are the subject of the individual actions commenced by some of the investors. It is for that reason that the plaintiffs have proposed that the common issues in this class proceeding be tried in conjunction with several select individual actions.

[204] However, it is clear from the proceedings to date that the individual actions do not provide a means for determination of all class members' claims. Accordingly, they cannot be regarded as an alternative to this proposed class proceeding.

[205] Many of the individual actions have been commenced by investors who were clients of Coast Capital and Worldsource, and the actions are focused on claims against those defendants. There is no claim in these collective individual actions against the Financial Institutions.

[206] The evidence is that many of the proposed class members are not clients of Coast Capital or Worldsource and do not have claims against those defendants. In light of the Samji defendants' bankruptcy, these class members' prospects for recovery of their losses rest largely on the claims against the Financial Institutions. I agree with the plaintiffs that these claims will not be addressed in the individual actions and are appropriate claims for resolution in the class proceeding.

[207] The other proceedings, including the bankruptcy proceedings involving the Samji defendants, the B.C. Securities Commission investigation, a criminal

investigation by the RCMP, and disciplinary hearings by the Society do not provide a means of adjudicating the claims being advanced in the class action and have no bearing on the preferability of the proposed class action.

4. Are the alternatives to a class proceeding less practical and less efficient?

[208] If a defendant asserts that a class proceeding is not the preferable procedure, they must provide a proposal for a realistic alternative and support that contention with an evidentiary foundation: *Barbour v. UBC,* 2006 BCSC 1897 at para. 72; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 27 (S.C.J.).

[209] Coast Capital has suggested that investors in the scheme be left to commence individual actions, which actions can then be resolved using a funnelling approach similar to that used in *Giles et al v. Westminster Savings and Credit Union et al*, 2002 BCSC 1583, 2010 BCCA 282.

[210] Under this concept, certain individual actions will be funnelled forward for resolution. Coast Capital asserts that the resolution of these selected actions will provide a yardstick for assessing liability or negotiating settlement of other claims. No specifics are provided as to how this “yardstick” will be applied should the remaining actions require a litigated resolution.

[211] I agree with the plaintiffs that there are problems with this approach. First, it requires investors to commence many more individual actions, perhaps with an array of additional counsel. Second, there is no formal mechanism by which determinations made in one, or a group of individual actions, will be binding on any other individual action. Third, there is obviously great potential for expense and delay in this funnelling approach arising out of the procedural rights which attach to each individual action.

[212] In addition, as noted by the plaintiffs, *Giles* is not an example of efficient multi-party litigation. The two actions in issue in *Giles* were commenced in 2000. The

litigation took 10 years. It was not resolved until the appeal decision in 2010, at which time the Court of Appeal dismissed the plaintiffs' appeals on abuse of process and granted costs against them on a joint and several liability basis.

[213] The *CPA*, on the other hand, provides for the resolution of common issues that is binding on all defendants and class members. It also offers procedural flexibility for the resolution of any individual issues that remain after the resolution of the common issues. I agree with the plaintiffs that this is clearly a preferable procedure for the resolution of class members' claims, rather than attempting to resolve more than 100 individual cases through the *ad hoc* funnelling approach.

5. Will a class proceeding create greater difficulties than other procedures?

[214] The plaintiffs take the position that the class proceeding as proposed has the potential for resolving the proceeding without any individual hearing because conversion is a strict liability tort. If the claims of conversion are made out against the Financial Institutions, they will be liable to the plaintiffs for the amount converted. These amounts should be able to be determined from the Financial Institutions' records and from the joint expert report based upon those records. Accordingly, the plaintiffs assert that if the claim in conversion succeeds, there will likely be no need for any individual hearings.

[215] In my view, judicial economy will be enhanced under a class action. If the defendants are successful at the common issues trial, the court and class members will be saved from having to manage and participate in individual procedures. If the plaintiffs are successful, any procedures necessary to resolve the individual issues will be no more complex than they would have been within the individual litigation. Given the many management tools available under the *CPA*, and given the focus the determination of the common issues will bring, the individual proceedings should be simpler.

[216] Having considered the various factors set out in s. 4(2), I have concluded that the class proceeding will serve the goals of judicial economy and access to justice

better than any other alternative and that it is the preferred procedure for the resolution of the class members' claims against the defendants.

VIII. SECTION 4(1)(e) – PROPOSED REPRESENTATIVE PLAINTIFFS

[217] Section 4(1)(e) provides:

> (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

[218] The inquiry about the representative plaintiff's suitability is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues, then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest.

[219] Coast Capital, TD, RBC, and Vancity argue that this case should not be certified because the proposed representative plaintiffs have a conflict with their fellow class members.

[220] Those defendants argue that it is inherent in the nature of a Ponzi scheme that the investors are in conflict because earlier investors receive both interest and principal from funds of other investors. Accordingly, each class member will have a claim against other class members under the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164.

[221] The natural extension of the defendants' argument in this regard is that none of the investors can be represented by the same counsel. This is contrary to their arguments regarding preferability, where they assert one counsel can act for a number of plaintiffs in a funnelling approach.

[222] There is, in my opinion, no conflict between the representative plaintiffs and the proposed class members on any of the common issues. All of the class members have the same interest in proving the liability of and maximizing recovery from the defendants. While the plaintiffs and the majority of the proposed class members received some payments from the scheme – which could raise a conflict later at the distribution phase – that does not create a conflict between them at this stage of the proceedings: *Eaton* at paras. 62-64, 187; *Pro-Sys Consultants Ltd.* at para. 78.

[223] Moreover, in my view, the proposed litigation plan sufficiently addresses the requisite issues and demonstrates that the plaintiffs and class counsel have thought through the process of the proceeding.

[224] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members: *Fakhri et al v. Alfalfa's Canada cba Capers, Inc.* 2003 BCSC 1717 at para. 77; *Pro-Sys Consultant Ltd.* at para. 79.

[225] The case management plan here recognizes that the class proceeding will be case managed and coordinated with the collective individual actions in order to achieve efficiency for the parties and the courts, and proposes that discovery of documents and examinations for discovery be conducted in a manner that minimizes duplication between the class proceeding and the individual actions.

[226] Those class members who wish to control their own actions or develop special theories inconsistent with the theory being advanced by the plaintiffs in this action remain free to do so after opting out of the class proceedings.

[227] Based on the foregoing, I find that s. 4(1)(e) of the *CPA* is satisfied in this case.

IX. CONCLUSION

[228] I conclude this action should be certified as a class proceeding.

"Gerow J."

X. SCHEDULE A: COMMON ISSUES

1) Did Samji make false statements to the Class members regarding the "Mark Anthony Investment" scheme, knowing those statements were false, and provide the Class members with Letters of Direction for execution regarding the "Mark Anthony Investment", knowing that the terms of the Letters would not be followed, with the intention to deceive the Class members?
2) Were the false statements made by Samji concerning the "Mark Anthony Investment" scheme, and the false pretense of the Letters of Direction, material misstatements designed by Samji to induce the Class members to provide Samji with funds to invest in the "Mark Anthony Investment" scheme?
3) Did Samji and Samji Holdings knowingly receive funds for investment in the "Mark Anthony Investment" scheme from the Class members under false pretense?
4) Were the funds that the Class members paid to Samji for investment in the "Mark Anthony Investment" scheme entrusted to and received by Samji in her capacity as a member as Society of Notaries Public of British Columbia?
5) Was Samji a trustee of the funds obtained from Class members for investment in the "Mark Anthony Investment" scheme?
6) If the answer to Question 5 is yes, did Samji breach her obligation as a trustee with respect to the funds provided to her by the Class members?
7) If the answer to Question 6 is yes, did Samji Holdings knowingly assist Samji in the breach of her obligations as a trustee?
8) If the answer to Question 5 and 6 is yes, are the funds received by Samji and Samji Holdings in breach of trust subject to a constructive trust and an accounting?
9) Did Patel owe a duty of care to those other Class members who were introduced to the "Mark Anthony Investment" scheme by Patel to exercise reasonable care, skill, and due diligence in providing professional investment services to them and, in particular, to review and evaluate an investment to determine if it was suitable and to screen out investment products that had little or no investment merit or were otherwise unsuitable?
10) If the answer to Question 9 is yes, did Patel breach his duty of care when he introduced or recommended the "Mark Anthony Investment" to Class members?
11) If the answer to Question 10 is yes, did the breach of duty by Patel cause or contribute to the losses suffered by those Class members who were introduced to the "Mark Anthony Investment" scheme by Patel?
12) If the answer to Question 11 is yes, are either Coast Capital or Worldsource, or both of them, vicariously liable for Patel's breach of duty?
13) Did Coast .Capital owe a duty to Class members who are members and clients of Coast Capital to supervise Patel in the discharge of his employment responsibilities as a financial advisor providing investment advices and services on behalf of Coast Capital to those class members?

14) If the answer to Question 13 is yes, did Coast Capital breach that duty of care?

15) Did Worldsource owe a duty of care to Class members who are clients of Worldsource to supervise Patel to ensure that he was selling only authorized securities pursuant to the *Securities Act*?

16) If the answer to Question 15 is yes, did Worldsource breach that duty of care?

17) If the answer to either or both of Questions 14 or 16 is yes, did the breach of duty by either Coast Capital or Worldsource or both, as the case may be, cause or contribute to the losses suffered by all or some Class members who were members or clients of Coast Capital or Worldsource, as a result of their investments in the "Mark Anthony Investment" scheme?

18) Did Samji and Samji Holdings wrongfully convert or misappropriate the cheques or other instruments or funds which were provided by the Class members to Samji for investment in the "Mark Anthony Investment" scheme?

19) Did RBC and/or TD wrongfully convert cheques or other instruments written or obtained by Class members that were payable to Samji and Associates "in trust", or any funds transferred to RBC and/or TD to the account of Samji and Associates "in trust"?

20) Did the Toronto-Dominion Bank and Vancouver City Savings Credit Union wrongfully convert cheques and other instruments written or obtained by the Class members that were payable to Samji and Associates?

21) Did RBC and/or TD owe a duty of care to those Class members whose cheques or other instruments were made payable to Samji and Associates "in trust," or who transferred funds to RBC and/or TD to the account of Samji and Associates "in trust," to ensure that those cheques or other instruments or the funds so transferred were deposited only into a trust account and not into a non-trust or general business, personal or other accounts?

22) If the answer to Question 21 is yes, did RBC and/or TD breach that duty of care by permitting Samji to deposit cheques and other instruments written to "Samji and Associates in trust," or receiving funds transferred to the account of Samji and Associates "in trust," into a non-trust account of Samji or Samji Holdings?

23) If the answer to Question 6 is yes, did RBC and/or TD knowingly assist Samji in breaching her trust obligation to those Class members whose cheques or other instruments were payable to Samji and Associates "in trust" or whose funds were transferred to RBC and/or TD to the account of Samji and Associates "in trust"?

24) Did RBC and/or TD have the duty to Class members, whose funds were deposited into the accounts of Samji and Samji Holdings at the Financial Institutions, to take reasonable steps to investigate the transactions in those accounts to prevent the Financial Institutions' facilities from being used for fraudulent purposes?

25) If the answer to Question 24 is yes, did RBC and/or TD breach their duty of care to these Class members by failing to investigate the transactions in the accounts held by Samji or Samji Holdings?

26) If the answer to Question 22 or 25, or both, is yes, did the breach of duty by RBC and/or TD cause or contribute to the loss suffered by some or all of the Class members?