SUPREME COURT OF NOVA SCOTIA
Citation: *Crooks v. CIBC World Markets Inc.*, 2016 NSSC 145

Date: 2016-05-27
Docket: Hfx. No. 322441
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and Karen McGrath

Plaintiffs

and

CIBC World Markets Inc./ Marches Mondiaux CIBC Inc.
Carrying on business as CIBC Wood Gundy

Defendant

Decision on Motion to Decertify the Class Proceeding

Revised Judgment: The text of the original judgment has been corrected according to the attached erratum and addendum dated March 20, 2017

Judge: The Honourable Justice Patrick J. Duncan

Heard: January 23, 2014 and September 14, 2015 in Halifax, Nova Scotia

Counsel:

George W. MacDonald Q.C. Jane O'Neill	for the plaintiffs
John Keith Q.C. Jack Townsend	for the defendant

By the Court:

Introduction

[1] The defendant, CIBC World Markets, carries on business under the name of CIBC Wood Gundy. It is an investment firm. This class action has been brought on behalf of a group of its clients who seek compensation for investment losses alleged to have resulted from a margin calculation error made in their accounts.

[2] The defendant now moves for decertification of this action as a class proceeding, or in the alternative, decertification of common issues (g), (h), (j), (k), (n) and (p) recorded in the Certification Order issued July 13, 2011.

The Certification Decision

[3] Justice Gerald R. P. Moir's Certification Decision is reported at *Crooks v. CIBC World Markets Inc.* 2011 NSSC 181. At paragraphs 1 to 29, he provides a detailed outline of the background to the current action. I have reviewed that for the purposes of this motion. I will summarize his comments.

[4] The three representative plaintiffs are among a hundred or so clients of CIBCWM who were involved in trading options under the advice of Fredrick Saturley. The clients suffered losses because of a calculation error in their accounts. Once discovered CIBCWM paid compensation to the clients for their losses, however its method of calculating compensation is alleged to have been inadequate.

[5] The plaintiffs traded in uncovered options. This strategy requires that the investor maintain sufficient margin to honour their potential option obligations. i.e., to buy or sell the underlying security.

[6] The plaintiffs employed a "strangle strategy" in which they sold uncovered option contracts to generate premium income. An increase in margin can be created as a result of taking a strangle strategy position. Thus, the client may see an improvement in the valuation of their investments for margin purposes as a result of implementing the strategy.

[7] In order to calculate the value of the uncovered options, CIBC Wood Gundy's contractor looked to an index of stocks called the Emerging Markets Index Shares or EEM.
[8] On July 24, 2008 the EEM stock split three for one. The contractor missed this. From July 24 until October 8 (the error period), margin was overstated for the clients of Mr. Saturley who employed the strategy. The plaintiffs allege that they relied on the erroneously calculated value of margin when making investment decisions during the error period.

[9] After the error was discovered, officials of the defendant cancelled any transactions in the affected clients' investment accounts that related to EEM options transactions and that were open as of, or after, July 24th, 2008. All affected trades were cancelled regardless of whether or not they generated a loss. Evidence before Justice Moir indicated that CIBCWM compensated for the "net loss" and that all clients were treated in the same way. The overall result of the cancellations was to eliminate a significant net loss suffered by clients. The defendant is understood to have paid in excess of $38 million to clients affected by the error.

[10] The defendant did not consider compensation for losses outside the EEM strangle strategy positions, such as losses on uncovered options outside EEM, losses that resulted from frozen margin accounts, lost dividends on securities liquidated for margin, tax on liquidated securities, or losses due to currency exchange.

[11] Some investors became dissatisfied with the defendant's approach to compensation. They believe that the approach adopted by CIBCWM provided compensation that is much less than they are legally entitled to. A Notice of Action in this matter was filed January 8, 2010.

[12] The types of losses being alleged include:

1. loss of gains realized before July 24, 2008;

2. the value of other adjustments of the EEM options in client accounts to July 24, 2008;

3. commissions earned and trades made based on the misstatement of margin;

4. losses in uncovered options that were not based on EEM underlying stock, but were based on the correct calculation of margin on the EEM index;
5. other losses that resulted from investment decisions that were made in light of incorrectly calculated margin;

6. interest and fees incurred when clients were unable to access funds;

7. income tax that resulted from having to sell securities;

8. currency exchange losses that resulted from the same;

9. lost dividends that resulted from the same.

[13] Justice Moir identified the following as causes of action (Decision at para. 32):

1. Negligence,

2. Breach of contract,

3. Negligent misstatement, and

4. Breach of fiduciary obligation.

[14] After reviewing the law, the pleadings and the evidence before him, Justice Moir identified 19 common issues and certified the action. At the time of the decision, the defendant had not filed a defence, nor admitted liability.

[15] The defendants filed a Statement of Defence on September 8, 2011. Since that time further production has been made and discoveries conducted.

Post certification proceedings

[16] Donald and Carolyn Matheson are two of the affected clients. They opted out of the class action and initiated an application in court alleging the same four causes of action as in this matter. They were represented by the same legal counsel as in this class action, and the statement of claim in this matter is substantially the same in material aspects as the allegations in the *Matheson* application. The

application was heard in September of 2013. A central issue in dispute was the determination of who carried the burden of proof as to causation.

[17] The trial decision, reported as *Matheson v. CIBC Wood Gundy* 2014 NSSC 18, rejected the Mathesons' claim that the defendant owed them a fiduciary duty, and that if one was established that there was no evidence that the defendant had engaged in conduct that could constitute a breach of fiduciary duty. The trial judge also denied the claims in breach of contract and negligence.

[18] The court held that the applicants met the burden of proving that there was a negligent misrepresentation in relation to their EEM holdings but not with respect to the balance of their holdings.

[19] As to causation, the trial judge concluded that the applicants bore the burden of proving what they would have done with their investments "but for" the error. He found no/insufficient evidence to meet this burden.

[20] The Matheson trial decision went on appeal and cross-appeal. In its decision, reported at *CIBC Wood Gundy v. Matheson* 2015 NSCA 22, the Court of Appeal concluded:

> 67 The application judge rejected the Mathesons' argument that a modified "but for" test relieved them, once they had established reliance on the margin misstatement, from the traditional onus of advancing evidence to establish causation. The application judge determined the burden remained on the Mathesons to establish their losses were caused by their reliance on the margin misstatement. I am satisfied that the application judge articulated the correct approach to causation, namely the traditional "but for" test.
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> …
>
> 73 The application judge was clearly not impressed with the lack of evidence advanced by the Mathesons relating to the cause of their non-EEM losses. However, there was no other evidence, other than that described above. That evidence was found by the application judge to be utterly deficient, to establish causation with respect to the EEM portions of their portfolio. The paucity of evidence applied across the totality of the Mathesons' portfolio. There was no evidence of what actions the Mathesons either took or would have otherwise taken, if not for the margin misstatement.
>
> 74 The application judge's EEM "clawback" analysis failed to recognize that it was the Mathesons' obligation to establish causation, and ignored his own earlier findings with respect to the lack of evidence. Rather, after concluding that the Mathesons had relied on the margin misstatement in relation to their EEM

> accounts, the application judge appears to have switched the burden to CIBC to establish why the payments made in November 2008 were appropriate, including to explain the rationale behind the applied "clawback".
>
> 75 With respect, based on his own findings, there was nothing before the application judge which established the Mathesons had suffered any detriment due to their reliance on the margin misstatements. The application judge's reasons do not explain how, in light of his earlier evidentiary conclusions, that the very same evidence then was sufficient to establish causation, either directly or by way of inference.
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> …
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> 78 If the Mathesons wished to establish that the funds received from CIBC in November of 2008 were inadequate, it was up to them to marshal evidence of reliance, causation and the quantification of their damages. If they did so, and their proven losses were greater than the reimbursement received, they would have been entitled to compensation. In my view, the application judge's analysis of the EEM "clawback" losses skipped from reliance directly to damages, without finding the necessary link of causation.
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> (emphasis added)

Position of the Defendant

[21] The defendant's position in support of this motion may be summed up in this way. Since the certification order was granted, it has filed its defence, made certain admissions, and obtained further evidence through production and discovery. There has also been a change in the law relating to the elements necessary to prove the existence of an *ad hoc* fiduciary duty.

[22] This new information when taken together with the legal implications of the *Matheson* decision leads to the conclusion that many of the existing common issues are either no longer in issue or are no longer capable of being resolved as a common issue. Assuming the correctness of this position, the defendant submits that the remaining issues no longer make a class action "preferable" within the meaning of section 7 of the **Class Proceedings Act** S.N.S. 2007, c. 28 (CPA).

[23] In particular, the defendant admits liability in relation to three of the causes of action – breach of contract, negligence and negligent misstatement. It admits that there was a breach of a duty to provide accurate margin information during the error period of July 24, 2008 to October 9, 2008. It does not concede breach of fiduciary duty. It does not concede causation or damages.

[24] The defendant says that issues of breach of fiduciary duty and causation are "highly contextual and individualized" and therefore not suitable for resolution as common issues. It is submitted that the facts and analysis of the courts in *Matheson* support this position.

Position of the Plaintiffs

[25] The plaintiffs submit that admissions made by the defendant in relation to certain of the common issues are just that - admissions that answer those questions to the benefit of all members of the class. It is not a basis for decertification.

[26] The plaintiffs acknowledge that individual damage assessments are likely but that this was always understood to be necessary. Those assessments though are only to be undertaken once the common issues are decided. The results of the common issues trial will inform the subsequent process.

[27] The plaintiffs submit that the breach of fiduciary duty relates only to the defendant's own conduct after the error was discovered, and not the conduct or investment knowledge of the investors. The plaintiffs argue that CIBCWM put its own interests ahead of those of the affected clients, by choosing a single "compensation formula" that avoided committing own funds to covering the margin shortfalls and, among other things, closing out all non EEM uncovered options, the timing of the reversal of the EEM trades, and the decision to "claw back" gains from the EEM trades. These issues remain common to all class members.

[28] The plaintiffs also offer that provisions for amendment of the common issues may be appropriate to address the defendant's arguments.

Issue

[29] What, if any, impact does the new information advanced by the defendant have on the certification of this proceeding as a class action and/or the current statement of common issues ?

Class Proceedings Act

[30] When Justice Moir decided to certify this proceeding he considered and applied the provisions of section 7 of the **Class Proceedings Act** which reads:

7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

(a) the pleadings disclose or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by a representative party;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and

(e) there is a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences 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; and

(f) any other matter the court considers relevant.

(emphasis added)

[31] Justice Moir was, as the plaintiffs submit, alert to the defendant's concerns that there was a likelihood that individual assessments would be required subsequent to the determination of common issues. However he was also

cognizant that such an event was not a bar to certification. Section 10 of the **Class Proceedings Act** directs the court in this regard:

> Certain matters not bar to certification
>
> 10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. 2007, c. 28, s. 10.

[32] The authority to amend a certification order arises in two sections of the **Act**. Section 11(4) states:

> 11 (4) The court may, at any time, amend a certification order on an application of a party or class member or on its own motion.

[33] The power to amend is also found in section 13, which is also the provision relied upon by the defendant as authority for the current motion to decertify:

> Where conditions for certification not satisfied after certification
>
> 13 (1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings. 2007, c. 28, s. 13.

[34] Having regard to the admissions of the defendant the provisions of section 14, in particular section 14(2), become relevant to the current motion:

> 14 (1) Unless the court otherwise orders under Section 15, in a class proceeding,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and
>
> (c) individual issues that require the participation of class members shall be determined in accordance with Sections 30 and 31.
>
> (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Principles of Decertification

[35] The principles relevant to a motion to decertify have been the subject of academic and judicial comment.

[36] Cullity J, writing in *Pearson v. Inco Ltd.* 2009 O.J. 780 analyzed the Ontario equivalent of Nova Scotia section 13(1) of the **Class Proceedings Act**:

> 23 I believe it is implicit in the section that, even after an order certifying a proceeding has been entered, the court has authority to reopen the question whether the requirements for certification … are satisfied. ….
>
> 24 Obviously the intention cannot be that a decision to entertain a motion to decertify before that time is entirely dependent on the whim of a defendant or class member. Section 10(1) does not contemplate that the motion judge is to hear what would be, in effect, an appeal from an earlier decision to certify a proceeding. The moving party has, in my opinion, the burden of showing that the earlier decision would not have been made in the light of new evidence - including evidence of facts that have subsequently occurred. Subsequent facts - consisting, for example, of developments that occur as the proceeding moves towards trial - may demonstrate that, contrary to the original finding, it is not manageable as a class action. …
>
> …
>
> 26 … the section recognizes that the case-managed procedure under the CPA is necessarily somewhat fluid and that certification motions are decided at an early stage of the proceeding and before discoveries. In consequence, certification orders are not intended to be cast in stone and, whether or not they have been entered, they can be, in effect, revoked, or amended from time to time. It is not in the public interest - or in that of the litigants or the class - that a case should be permitted to proceed to trial if further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis. The statutory objectives of the CPA - access to justice, judicial economy and behavioural modification - would

> not be advanced by allowing the action to continue under the CPA in such cases. …
>
> (emphasis added)

[37] Henderson J. writing in *Smith v. Inco Ltd*. 2009 OJ 5439 observed that:

> 24 In my view the *Hollick* and *Pearson* decisions stand for the proposition that there is a low threshold to be met by the class representative on a certification motion because the action is usually in an early stage at the time of the certification motion, prior to examinations and prior to full documentary disclosure. However, as the action matures and evidence is revealed a party may ask the court to reopen the certification issue and more closely scrutinize the case as it relates to the criteria in s. 5 of the **Class Proceedings Act**.

[38] A post-certification change in the law can also provide a basis upon which the court may interfere with a previous certification decision. *See, Elder Advocates of Alberta Society v. Alberta* 2011 ABQB 80l, at para 18; affirmed at 2012 ABCA 355.

[39] The burden then is on the party seeking to establish, on the basis of newly-discovered evidence, post certification developments in the course of the litigation, or post certification changes to the law, that the requirements of section 7 of the **Class Proceedings Act** are no longer satisfied insofar as they relate to the impugned common issues or the entirety of the proceeding. s*ee also, Defending Class Actions in Canada* 3rd ed. (Toronto: CCH Canadian Ltd, 2011) at page 224.

Defendant's admissions of liability: Common Issues (a), (b), (c) (d), (e), (f)

[40] Since certification the defendant has conceded liability in breach of contract, negligence and negligent misrepresentation. In particular it concedes the breach of a duty to provide accurate margin information during the error period.

[41] The defendant does not admit causation nor damages, that is, it is not admitting that "any negligence, breach of contract or negligent misrepresentations on its part caused the class member to suffer any damages, nor that the class members relied upon any misstated margin information to their detriment."

[42] The defendant notes that issues of reliance and causation have not been certified as common issues and require determination on an individualized basis, after the common issues trial. (Defendant's June 5, 2015 Brief at paras. 72-73)

[43] At paragraph 71 of the defendant's brief of June 5, 2015, it responds to the following common issue questions with: "*Admitted; answered in the affirmative*":

> a) Did CIBC owe the class members a duty of care to provide them with a correct margin calculation in their margin accounts?
>
> b) Did CIBC breach the standard of care by failing to provide class members with a correct margin calculation in their margin accounts?
>
> …
>
> d) Was it an implied term of the class members' investment contracts with CIBC that they would be provided with correctly calculated margin account information?
>
> e) Did CIBC breach the class members' investment contracts by failing to maintain proper margin account information?
>
> f) Did CIBC negligently misrepresent that the class members' margin account calculation was correct?

[44] As to common issue (c):

> (c) Did CIBC Wood Gundy breach the Securities Act and/or IIROC rules by not maintaining correct margin calculations?

- the defendant does not admit this, but submits that it is "…irrelevant in light of the admissions in respect of common issues (a) and (b)".

[45] The defendant says that the question posed in common issue (c) speaks only to issues of liability in negligence or negligent misstatement, both of which are now admitted. I agree that an affirmative answer to this question does not further the plaintiffs' claim now that liability in these causes of action has been admitted.

[46] I conclude that the Certification Order will be amended to delete issue (c) as a common issue.

[47] I agree with the submission of the plaintiffs that the admissions in common issues (a), (b), (d), (e) and (f), should be committed to a form of Order that enures to the benefit of all members of the class.

[48] The effect of these admissions is to leave breach of fiduciary duty as the lone outstanding cause of action for which all elements of proof continue to be denied.

Breach of fiduciary duty: Common Issues (g) and (h)

[49] Common Issues (g) and (h) speak to the question of whether or not the defendant is liable to the plaintiffs for a breach of fiduciary duty. Those issues are:

> (g) When CIBC discovered the margin error, did a fiduciary duty arise to class members in determining how to deal with the error?
>
> (h) If so, did CIBC breach the fiduciary duty owed to the class members in the manner in which it chose to deal with the error by putting its own interests ahead of those of the class members?

[50] Paragraph 18 of the statement of claim is material to this cause of action:

> 18. The Plaintiffs say that Wood Gundy owed them a fiduciary duty as their investment advisor. When Wood Gundy discovered the margin error, Wood Gundy put its own interests ahead of the Plaintiffs when it attempted to correct the error by cancelling Emerging Market Options in the Plaintiffs' accounts that were open as of, or were opened after July 24, 2008 regardless of whether they had generated a profit or loss. The method chosen by Wood Gundy to supposedly correct the error did not fully compensate the Plaintiffs for their losses and resulted in gains to CIBC Wood Gundy.

[51] The plaintiffs state in their supplementary brief that "The claim for breach of fiduciary duty relates only to the actions of CIBC after it discovered the error". (At para. 14). They point to the certification decision to show the way in which Justice Moir understood this claim:

> 25 The plaintiffs also plead that, by choosing to compensate in the way it did, including to make trades in and otherwise alter the investors' accounts, CIBC Wood Gundy undertook fiduciary obligations. In a number of ways, the plaintiffs allege that CIBC Wood Gundy is liable for breach of fiduciary duty. Here, the remedy would not necessarily overlap damages calculated for negligence or breach of contract.

[52] The class members allege that the defendant owed them a fiduciary duty by virtue of the advisor-investor relationship. Such a duty in the advisor – investor

relationship is not presumptive. *see, Chesebrough v. Willson* 2002 166 OAC 119 at para.2:

> 2. …the relationship of broker and client is not, in and of itself, a fiduciary relationship but one that is dependant on the particular facts. The relevant factors that must be considered in determining this question are set out by the Supreme Court of Canada in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

See also, Hunt v. TD Securities 2003 175 OAC 19 at para. 36*; Newman v. TD Securities Inc*. 2007 OJ 139, at para. 7.

[53] The defendant submits that the plaintiffs have the burden of establishing the existence of an *ad hoc* fiduciary relationship, and that the law regarding proof of an *ad hoc* fiduciary duty changed subsequent to the certification decision in this case. The two cases in point are *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 (*Elder Advocates*) and *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* 2012 SCC 71.

[54] McLachlin C.J., writing in *Elder Advocates*, set out the general requirements for imposition of a fiduciary duty:

> 27 The plaintiff class argues that, in addition to traditionally recognized categories like trustee or solicitor-client relationships, a fiduciary duty more broadly may arise whenever one person exercises power over another "vulnerable" person. They rely on *Frame v. Smith*, [1987] 2 S.C.R. 99, where Wilson J., in dissenting reasons later adopted and applied in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, outlined the hallmarks of a fiduciary duty:
>
> > Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > (1) The fiduciary has scope for the exercise of some discretion or power.
> >
> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]
>
> 28 It is now clear that vulnerability alone is insufficient to support a fiduciary claim. …
>
> 29 As useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and

Galambos that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.

30 First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

31 The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.

32 The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in *Galambos*, at para. 77:

> The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

33 Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, di-rector-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.

34 Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.

35 In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

> 36 In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> (emphasis added)

[55] In *Professional Institute*, the court distinguished the characteristics of an *ad hoc* and *per se* relationship as:

> 113 Fiduciary relationships may be either *per se* or *ad hoc*. The former refers to those relationships that the law presumes to be -- and characterizes as -- fiduciary (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37). The recognized categories give rise to fiduciary duties "because of their inherent purpose or their presumed factual or legal incidents" (para. 36). The existence of an *ad hoc* fiduciary relationship, on the other hand, is determined on a case-by-case basis. Whereas the *per se* categories describe relationships in which the fiduciary character is "innate", *ad hoc* fiduciary relationships arise from the specific circumstances of a particular relationship (*Galambos*, at para. 48
>
> (emphasis added)

[56] The court then set out a framework in which to determine the existence of an *ad hoc* fiduciary relationship:

> 121 Beginning with Wilson J.'s dissenting opinion in *Frame*, and subsequently adopted by the majority of this Court (see e.g. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377), the following characteristics were said to identify those relationships where fiduciary obligations had been imposed.
>
> 1. The fiduciary has scope for the exercise of some discretion or power.
>
> 2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> 3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]
>
> 122 Most recently, in *Elder Advocates*, McLachlin C.J. stated that the aforementioned characteristics were useful but did not provide a complete code. This Court adopted the *Hodgkinson* factors, but added the requirement of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

> …
>
> 124 It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.
>
> (emphasis added)

[57] With the addition of this requirement the investors in the class must prove that the defendant undertook "either expressly or impliedly, to act in accordance with a duty of loyalty" to those investors.

[58] The statement of claim does not plead facts material to this element of proof of the existence of an *ad hoc* fiduciary duty. Even if it did, there is a further problem. *Elders Advocates* and subsequent cases affirm that *ad hoc* fiduciary relationships must be established on a case-by-case basis.

[59] In *Canada (Attorney General) v. MacQueen* 2013 NSCA 143 the Nova Scotia Court of Appeal ruled that the plaintiffs' fiduciary claim did not satisfy the test set out in the *Professional Institute* case and could not succeed. The court then continued that:

> 160 … this issue could not be resolved at a common issues trial due to the individual nature of the inquiries involved. Again, in *Elder Advocates* the Supreme Court said:
>
> > [50] No fiduciary duty is owed to the public as a whole, and generally an individual determination is required to establish that the fiduciary duty is owed to a particular person or group. A fiduciary duty can exist toward a class -- for example, adults in need of a guardian or trustee, or children in need of a guardian -- but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation. Group duties have not often been found; thus far, only the Crown's duty toward Aboriginal peoples in respect of lands held in trust for them has been recognized on a collective basis.

[60] The court concluded that each class member had to prove that the defendants "undertook to act in their best interests." To do so could "…only be determined with individual evidence of each person's knowledge and circumstances." They concluded that it could not be a common issue.

[61] When one reads paragraph 18 of the claim the "undertaking" that the plaintiff seems to allege is that the defendant would "fully compensate the Plaintiffs for their losses" and that the breach was in choosing a method which did not do so, and which benefited the defendant at the expense of the investors.

[62] The defendant says that in order to satisfy the requirements in *Professional Institute* it is necessary for each individual class member to lead evidence to establish the particulars of any undertaking they say the defendant gave to them. They point to the evidence of the representative plaintiffs to demonstrate the lack of commonality in their description of what was said to them about compensation.

[63] Ms. McGrath says that "Mr. Humle told (her) that CIBC would compensate (them) for all losses in their accounts". Ms. Crooks alleges that Mr. Humle "admitted that there had been a Margin Error that had negatively affected clients and that CIBC would compensate clients for 100% of their losses." Compare this evidence with that of Mr. Gillis who alleges that Mr. Humle told him "that CIBC would compensate the affected clients by reversing all EEM option trades made after July 24, 2008 when the error was made." There is a material difference in the description of the "undertaking" alleged to have been provided by Mr. Gillis from that of Ms. Crooks and Ms. McGrath.

[64] It is interesting to note that in the *Matheson* application the trial judge concluded that the investors had failed to prove the existence of a fiduciary relationship with the defendant. This issue was not subjected to appeal. That is not the result that the class would hope for in this case. The fact that the class continues to pursue this cause of action highlights that there is a belief that other members of the class may have better evidence to support their claims than that advanced by the Mathesons. As such it reinforces the "case by case" nature of proving the existence of an *ad hoc* fiduciary duty.

[65] I have considered the pleadings and the reasons given for certifying the breach of fiduciary duty as a common issue. In my view, the decisions of the Supreme Court of Canada in *Elder Advocates* and *Professional Institute* create an element of proof that did not exist at the time of certification. The plaintiff investor is required to prove the existence of an undertaking by the alleged fiduciary to act in the best interest of the investor. In the circumstances of this claim I am satisfied that establishing the existence of a fiduciary duty is an individual determination that does not lend itself to resolution as a class issue.

[66] I conclude that the Certification Order will be amended to delete issues (g) and (h) as common issues.

Misleading statements: Common issue (j)

[67] Justice Moir identified the following as one of the "common issues of fact that may inform determinations of liability, remedy, or both":

> (j) Did CIBC wilfully mislead class members by withholding material information about the margin calculation error?

[68] The evidence before Justice Moir was that Mr. Saturley reported the margin calculation error to his superiors at CIBCWM on October 9, 2008. The decision describes what then occurred:

> 13 … However, a decision was made not to tell clients about the reason for the adjustments until officials at CIBC Wood Gundy fully understood the problem. There is some evidence that some clients were to be told that the reasons concerned mismanagement by Mr. Saturley and the condition of the markets. There is some evidence that Mr. Saturley was instructed not to talk to the clients.

[69] A group of senior officials of the defendant was formed to direct a response to the problem. That group decided that "…clients should be told that the market was falling, option positions were losing money, they needed to be closed, and accounts were under margin." "Clients were told of the calculation error later in October when the decision was made to cancel all EEM strangle strategy contracts, at CIBC Wood Gundy's cost." (*see*, Certification decision at paras. 16-17).

[70] Liability arising from any of three of the causes of action is no longer in issue. Liability for breach of fiduciary duty will need to be established on a case by case basis. While the answer to this question might inform the breach of fiduciary duty analysis it would, at best, form a small part of the overall analysis of that question.

[71] The defendant submits that evidence taken on discovery and documentary evidence produced since the certification decision demonstrates that the representative plaintiffs have "individualized complaints regarding how they were allegedly misled by CIBCWG" and therefore the basis for including this as a common issue is no longer present.

[72] I have been referred to passages in the discovery evidence of representative plaintiffs Gail Crooks and Karen McGrath. Both were questioned as to how they believed they were misled by the defendant.

[73] Ms. Crooks felt misled because at one point Mr. Humle told her that the defendant would "pay back 100% of the loss". She characterized this as "somewhat misleading" and that she doesn't "know what their intent was", but that the method used by the defendant to compensate her did not represent 100% of the loss as she calculated it. (Discovery evidence taken July 13, 2013, at pages156-160)

[74] The common issue question centres on whether the defendant intentionally withheld "material information". Ms. Crooks' evidence does not speak to this question. In fact the manner in which she feels she was misled is unrelated to the way in which the question is framed.

[75] Ms. McGrath's discovery evidence taken June 20, 2013 was that on October 10, 2008, Mr. Saturley told her that the margin calculation error was a "computer error" but that he was instructed not to tell the clients that it was a "computer error".

[76] She testified that in a conversation of November 1, 2008, she asked Mr. Humle directly whether there had been a computer error and that he denied it. This is what she believes was the misleading material information.

[77] As she had already been informed that the problem was a miscalculation of the margin her complaint focuses on whether the defendant was truthful in describing the manner in which the error arose. At best, one might say that there was an attempt to mislead her.

[78] The rest of the examination on this question, however, shows the likely individuality of the investors' responses to this question.

[79] Ms. McGrath acknowledged that it was "possible" that Mr. Humle told her there was a margin "calculation error".

[80] When shown a letter to her dated November 18, 2008 citing an improper margin calculation she maintained that the letter should have identified the

"computer error" and that it did not. She continued that it was only in January 2009 that Mr. Humle told her husband that there was a computer error.

[81] She was then asked to distinguish between a "computer error" as a source of the margin miscalculation and a miscalculation by the computer based upon human error in failing to input the correct information. She allowed that that could be an explanation for the source of the error, in which case she would characterize the problem as "Computer/human error. It could be 50/50." (Discovery testimony at p. 126)

[82] Ms. McGrath's testimony shows the degree to which the answer to this question will depend upon the individual investor's communications with the defendant's representatives in the days following the discovery of the error and how or why they perceived they were misled.

[83] The individuality of the response is further shown by contrasting the position taken by Ms. Crooks with that of Ms. McGrath as to what constituted the answer to this question.

[84] By reason of the disposition of the causes of action that could be resolved on a class basis, the utility that may be attained by the response to this question has narrowed significantly since certification. The evidence taken subsequent to certification shows that the answer will be individualized and so the question is better answered on a case by case basis.

[85] I conclude that the Certification Order will be amended to delete issue (j) as common issue.

Unauthorized trading: Common issues (k) and (n)

[86] Common Issue (k) is:

> Did CIBC breach the **Securities Act** and/or IIROC Rules by providing investment advice and/or by conducting unauthorized and/or discretionary trading in options without having the necessary regulatory authority to do so?

[87] Common Issue (n) is:

> Did CIBC Wood Gundy provide investment advice, or conduct unauthorized trading in options, without having the necessary regulatory authority to do so?

[88] These are also issues that Justice Moir identified as being among the "common issues of fact that may inform determinations of liability, remedy, or both".

[89] The defendant seeks that these issues be decertified. It submits that evidence gathered since the certification hearing has demonstrated that these are not "common issues". It argues that:

(i) The breadth or scope of the allegations differ on a client by client basis; and

(ii) The factual basis for taking of discretion in any particular account is unique to that particular client and that particular account.

[90] The defendant also submits that the answers to these questions are not material to the now admitted grounds of their liability and that the breach of fiduciary duty allegation has not been pleaded as one arising from the provision of unauthorized advice or engaging in unauthorized trading.

[91] I agree that the answers to these questions may not inform the determination of liability for breach of fiduciary duty. However, in my view, if it is shown that any particular trade or series of trades were made without the authority of the account holder, and/or in contravention of a required regulatory qualification or condition then there is a potential that the defendant will be called upon to compensate the investor for any loss that is proven to have resulted from that fact.

[92] Notwithstanding the fact that damages are to be assessed individually it is still necessary to decide whether these questions remain "common". In making this assessment it is important to remember that the definition of "common issues" as set out in section 2(e) of the **Class Proceedings Act** does not require that there be "identical issues of fact" to satisfy the requirement that they be "common".

[93] The starting point for this analysis is to consider the evidence that was before Justice Moir from the representative plaintiffs.

[94] Ms. Crooks swore in her affidavit filed July 30, 2010 that:

> 16 …CIBC unilaterally closed all of my open uncovered options, resulting in a negative impact on my accounts and a margin call. I did not authorize these transactions to be carried out in my accounts.

[95] She gave evidence as to inquiries she made to determine whether Mr. Humle was properly licenced to provide advice in relation to options trading. These inquiries led her to the conclusion that he was not. (affidavit at paras. 29-31)

[96] Archie Gillis' affidavit filed July 30, 2010 avers that Mr. Humle told Mr. Gillis that he was not licenced to provide advice in options. (at para. 17). Mr. Gillis also says that CIBC "unilaterally closed all of my open uncovered options" without the authority of he or his wife. (at para. 18)

[97] Karen McGrath, the third of the representative plaintiffs also alleges in her affidavit filed July 30, 2010 that CIBC "unilaterally closed all of my open uncovered options…". (at para. 16) She also references unauthorized trades of Semi-Conductor and Brazil options purchased in October 2008. (at para. 22)

[98] In Ms. McGrath's affidavit she outlines complaints that she made about the alleged unauthorized trading. The defendant's Compliance Department first dismissed her complaint as unfounded, after which the CIBC Ombudsman also dismissed her complaint. (at paras. 23-30)

[99] It is easy to see that the complaints in the affidavits of these three investors bear a commonality that supported the conclusion of Justice Moir.

[100] The defendant points to discovery evidence to make its point that what at first may have seemed like homogenous complaints are, with the benefit of closer examination, now shown to be quite divergent.

[101] I have been provided with excerpts of the discovery testimony of Ms. Crooks in which she alleges that Herb Levine of the defendant company had, in May 2009 recorded an unsolicited sale of some of her securities for which she had not given consent.

[102] During her discovery, Ms. McGrath was shown statements showing that on October 8, 2008 Mr. Saturley recorded the sale of shares she held in Bank of Montreal, Bell Aliant and Bank of Nova Scotia. These did not involve EEM or other uncovered options. She testified that she did not authorize Mr. Saturley or anyone else to place those trades.

[103] Other class members, not representative plaintiffs, but intended witnesses for the plaintiffs, have identified various transactions that they say were done without their consent. This information came to the plaintiffs through documents provided

in production. The witness class members include Patrick, Joyce and John Graydon, and Donald Levy. The latter filed a complaint in October 2010 alleging a broader issue in that Mr. Saturley had:

> …exceeded our annual trade volumes, mainly on trades carried out without our specific approval. We found that this occurred because Saturley was trading on options in our account.

[104] There is evidence that John Sawler (a class member) and Donald Matheson (whose claim has been dismissed) provided the defendant with authority to close out the open EEM option positions in their investment accounts. This deviates from the experiences described in the representative plaintiffs affidavits referred to earlier.

[105] This evidence demonstrates that there are differences as among what the investors say were authorized or unauthorized trades - some in options, others in equities - effected by different CIBCWM representatives at differing times. This evidence is that which will determine the quantum of their respective claims, if they are held to be compensable by the defendant to the investor.

[106] Answering these two issues as "common issues" will not replace the necessity of the claimants testifying to the individual trades as part of proving their damages. This makes resolution of these issues more efficient if included as part of the individualized assessment of damages which all agree must take place.

[107] I conclude therefore that the Certification Order will be amended to delete Common Issues (k) and (n).

Compensation formula: Common issue (p)

[108] Justice Moir concluded, at the time of certification, that a single formula for assessment of damages was achievable. It resulted in this common issue:

> (p) What is the proper compensation formula to be applied in assessing the damages suffered by the class members as a result of the conduct of CIBC Wood Gundy?

[109] The defendant says that evidence obtained since the certification, and the determination in the *Matheson* case, make it apparent that this is no longer a sustainable presumption. I agree.

[110] The Court of Appeal decision in *Matheson* approved of the "but for" test used by the trial judge. It put a burden on the applicants to "establish that the funds received from CIBC in November of 2008 were inadequate" and that "it was up to them to marshal evidence of reliance, causation and the quantification of their damages. If they did so, and their proven losses were greater than the reimbursement received, they would have been entitled to compensation". (at para. 78)

[111] At paragraph 49 of the *Matheson* decision, the Court of Appeal identified examples of the evidence that an investor could use to meet this burden. By necessary inference the Mathesons needed to first identify for the court what their investment strategy was, and then show how the margin error caused them to alter that strategy. The court discussed how evidence of individual transactions, or an overall course of action that either occurred, or was not followed, could be pointed to and shown to be a result of the defendant's misstatement. Of course, the Mathesons did not meet that evidentiary burden and their claim failed.

[112] It is self-evident that each investor would develop their own investment strategy designed to meet their specific investment objectives. Each transaction or pattern of transactions would offer an insight to the manner in which the strategy was pursued and the manner in which it was (or was not) altered by the error.

[113] Investment decisions are products of, among other things, the advice the investor receives and the degree of sophistication of the investor. There may be instances where the investor acts on their own initiative and without advice. Each scenario can impact on the success or failure of the strategy. It is not reasonable to conclude that a hundred or so investors making up the class would adopt significantly common investment strategies, holding significantly common objectives and then implement the strategies in markedly similar patterns of transactions. Even the timing of the transactions can reasonably impact on the outcome.

[114] These obstacles to identifying a common formula have manifested themselves in the evidence arising since certification and have been pointed to by the defendant. One area of claim is the impact of the margin error in establishing compensable loss. Another is the perceived impact of the defendant's conduct on investment opportunities said to have been lost.

[115] Ms. Crooks was asked to describe the factors she considered in making investments. She testified that margin was one factor, but so too was risk, the length of time that it would take her to pay back money borrowed from the account, or to get the money back on the investment, liquidity in case she wanted to buy another product, and an assessment of growth in the investment account. She invested using an undisclosed (to her advisor) maximum amount that put between 5% and 10% of the available margin at risk. Another way she described it was as maintaining a "big buffer" of 90-95% of available margin.

[116] Ms. McGrath did not have a margin buffer in mind. Her discovery testimony was that she relied heavily if not entirely on the advice of Mr. Saturley when making investment decisions. She did not have any specific factors in mind as to when to close a contract. It was her evidence that Mr. Saturley kept an eye on the amount of margin that was available. She could not recall giving him a list of factors to consider in making investment decisions.

[117] So in one case the investor was operating with a fixed maximum margin buffer, whereas the other was only concerned that the available margin was sufficient to support a particular trade. The extent then to which the margin error impacted on an investor's account was influenced by these differing considerations. This would in turn result in different consequences which may or may not have led to losses beyond those compensated for. It will be for each investor to make their case on this issue.

[118] The plaintiffs have claimed for lost opportunities. Again the evidence and documents produced show the diversity of the investors' views as to what "opportunities" were lost as a result of the margin error, and the defendant's response to discovering the error.

[119] I have been referred to discovery evidence of Archie Gillis and Gail Crooks. I have also been referred to excerpts from documents produced by or in relation to the claims of Ann Swan, Phillip and Barbara Cameron (non-representative class members intended to be called as witnesses).

[120] Mr. Gillis gave two examples of lost opportunities: (1) because of a lack of an investment advisor he was unable to realize on what he saw as a great opportunity to purchase Bank of Montreal stock; and (2) that after October 10, 2008 the defendant would no longer permit "covered calls or any strangles or puts and calls" on his account.

[121] Ms. Crooks offered that the market was volatile during the error period and that anything she could say about error period investment strategies that she would have employed would be conjecture. When pressed on the issue she thought that she would have employed a strategy involving the sale of uncovered options and the liquidation of assets.

[122] Another class member, Ann Swan, states in her letter of complaint dated sent April 1, 2009 that she was "bullied into accepting, at great financial loss, [Mr. Humle's] advice, and selling several positions that were not in jeopardy." This suggests that she would seek compensation, in part at least, for not being able to continue to hold uncovered call options.

[123] Counsel for the defendant fairly characterized the evidence in this way:

> …it would be illogical to impose a common formula for such losses upon a class member who would have bought bank stocks, a class member who would have sold more options, and a class member who would have liquidated their account…. this could result in windfalls to some class members and could result in others not being fully compensated for provable lost opportunities.
>
> (Defendant's brief January 8, 2014 at para. 102)

[124] In my view the evidence obtained subsequent to certification has made it apparent that it is not realistic to believe that a common compensation formula could be constructed. That the investor claims are not factually identical is not a bar to certification as a common issue, however it is my opinion that there are too many variables at work in trying to arrive at a "one size fits all" formula for the members of the class. It is very possible that such a formula would work unevenly and therefore unfairly to some members of the class. I conclude that the method of calculating a compensation formula should be arrived at on a case by case basis.

[125] For the reasons set out above I conclude that the Certification Order will be amended to delete issue (n) as common issue.

Decertification of the proceeding

[126] There are 7 of the 19 certified common issues which remain outstanding.

[127] The defendant submits that the class wide benefits of this proceeding have been "exhausted" - that all causes of action that could be resolved on a class wide basis have been resolved. The remaining cause of action, breach of fiduciary duty, must be litigated on an individual basis as must the issues of causation and damages. This has resulted in the elimination of a majority of the common issues.

[128] The defendant argues that most, if not all, of the remaining issues must be adjudicated on a case by case basis and that even if there is utility in dealing with some of them as common issues, a class proceeding is no longer the preferable process by which to deal with the investors' claims against the defendant.

[129] The plaintiffs, in their first brief which was submitted prior to the *Matheson* decision and the defendant's clear admissions of liability, characterized the defendant's arguments as an attempt to:

> …re-litigate or "appeal" Justice Moir's decision certifying the common issues. There is no new facts or circumstances before the court to satisfy it that Justice Moir would have rendered a different decision had those facts or circumstances been known to him.
>
> (Plaintiff's Brief January 15, 2014 at para. 44)

[130] In its supplementary brief of August 14, 2015, the plaintiffs submitted, at paragraph 6, that "…CIBC has not provided proper evidence to…" "…demonstrate that the criteria in section 7 or 9(1) (*sic*) of the **Act** are no longer satisfied".

[131] They argue at paragraph 13 that:

> … individual damage assessments will have to be done following a common issues trial and the Court of Appeal's decision has done nothing to change that. If, after a common issues trial an individual class member is required to demonstrate what he or she would have done if CIBC had not provided them with misinformation that can be done at that time. The Court of Appeal, at most, provides some direction for that process.

[132] With respect, I disagree with the plaintiffs.

[133] There are "new facts and circumstances" before the court now as compared to those considered by Justice Moir. I disagree with the plaintiffs' characterization of the *Matheson* decision's effect on the position of the investors in proving their claims against the defendant.

[134] The impact of the post certification developments on what Justice Moir saw as the advantages and disadvantages of a class proceeding must be weighed to determine whether it remains preferable to continue with a class proceeding.

[135] He allowed that this type of motion might one day follow. He states:

> 58 …. In deciding a motion for certification, the court may keep in mind the possibilities for subclassification, redefinition of an issue, and decertification when the issues become more refined after pleadings, disclosure, and discovery: *Chace v. Crane Canada Inc.* (1996), 14 C.P.C. (4th) 197 (B.C.C.A.).

[136] In relation to the matter before him, Justice Moir candidly acknowledged that:

> 67 Although the practical advantages of this proceeding may be less than with other kinds of class proceedings, it remains more practical and more efficient than the alternative, individual suits.

[137] By saying this Justice Moir acknowledged that there was a limit to what could be achieved in pursuing this as a class proceeding. For example, he noted at paragraph 57 of the decision that damages would need to be assessed on an individual basis.

[138] Justice Moir well understood that his determination was being made at a very early stage in the proceeding (at para. 59) and that the benefits to the class members were perhaps not as significant as those in other class proceedings. He said:

> [65] In my assessment, the circumstances of this case are such that class members would gain only one serious, practical advantage from a class action. They would receive a determination of general issues at common expense before they have to consider funding the determination of any subclass or individual issues that remain live after determination of the general issues. The defendant also obtains the advantage, subject to opting out by some class members, of having all potential claims dealt with. That can be a significant advantage when one considers that other class members may be able to take a wait and see approach to individual actions or a representative action.

[139] When Justice Moir made his appraisal of whether a class action was preferable he was acting with the understanding that the defendant would contest

liability, and that this issue alone would involve extensive litigation if adjudicated on a case by case basis for the many investors involved. In paragraph 82 he identified three questions as common issues that spoke to damages, but damages, as he acknowledged, would be left to either subclass actions or individual assessment.

[140] He also made his appraisal with the belief that all four causes of action were capable of being litigated on a class basis, which he saw as preferable. Clearly, the determination of all questions of liability on a class basis would provide a "fair" and much more "efficient resolution of the dispute".

[141] Liability has now been admitted to three of the four causes of action. In these matters the members of the class can go directly to the proof of causation and assessment of their individual damages if warranted. The *Matheson* decision has made it clear that these two latter issues must be adjudicated on a case by case basis.

[142] What Justice Moir saw as the advantage to the defendant of having all potential causes of action dealt with as a class proceeding has been minimized. The defendant has already had to defend one application of an investor who opted out of the class proceeding, and will necessarily have to defend the breach of fiduciary duty allegation, causation and damages on a case by case basis. It is difficult to see much advantage to the defendant at this point were the remaining common issues to be subjected to a trial.

[143] Justice Moir saw it as a possible "significant advantage" that other class members "may be able to take a wait and see approach to individual actions or a representative action." He was correct in that the plaintiffs and the defendant have, through the *Matheson* decision, the benefit of a clear ruling on the legal path forward for these claims. The fact that when applied to this proceeding it results in a much stronger argument for case by case resolution underscores the need to reconsider the appropriateness of continuing this as a class proceeding. There continues to be opportunities for the class members to take individual actions that can guide the parties in other claims.

[144] So too, Justice Moir could not have known that the legal test for proof of the existence of a fiduciary duty would be changed shortly after his decision. He could not have foreseen that the proof of an *ad hoc* fiduciary duty could not be resolved on a class basis and that instead it would require a case by case assessment.

[145] In summary, the foundation upon which Justice Moir's decision was built included an expectation that liability in relation to four pleaded causes of action could be resolved or substantially resolved on a class wide basis. That is no longer the situation.

[146] At paragraph 47 Justice Moir notes that "… even if CIBC Wood Gundy has admitted liability neither the cause nor the particulars of breach have been admitted." The decision does not discuss causation as a stand-alone issue. It is now apparent that proof of causation will also require an individualized assessment.

[147] In summary, there have been changes in the circumstances from those which Justice Moir relied upon to reach his conclusions. Those changes have resolved or eliminated as common issues much of what was intended to be accomplished in the common issues trial.

[148] The issue then is, having regard to the present circumstances, whether the remaining common issues can be decided on a class basis, and, if so, whether a common issue trial of these issues is preferable within the meaning of section 7 of the **Class Proceedings Act**.

[149] Common Issue (i) was described by Justice Moir in paragraph 74 as one of the "…common issues of fact that may inform determinations of liability, remedy, or both." It asks:

> (i) Did CIBC breach industry and its own codes of conduct in the manner in which it chose to deal with the error?

[150] This question speaks to the conduct of the defendant in the period after the discovery of the error. Specifically, the claim of the plaintiffs is that the defendant's communications with the investors and its choice of method to compensate the investors breached a fiduciary duty the plaintiffs say that the defendant owed them. That cause of action is to be addressed on a case by case basis and so this question can be addressed in that inquiry. Similarly the role, if any, of the answer to this question may be to impact the damages assessment, but that too is individualized. In my view, common issue (i) is a question better addressed on a case by case basis.

[151] Common Issue (l) is:

> (l) Did CIBC Wood Gundy attempt to rectify the calculation error by seeking authorizations from members for cancellation of all positions open on July 24, 2008 or opened after, or did it impose cancellation unilaterally?

[152] Justice Moir's assessment of the significance of this question was that:

> 51 … Answering that question will not be determinative of any member's claim, because a finding of fact on the general approach does not answer whether that approach was followed with an individual investor or how the investor responded to it. On the other hand, it is logical and practical to settle what was the general approach before determining how it played with this or that investor.

[153] Justice Moir concluded that, notwithstanding the answer's limited value to the resolution of the investor's individual claims, it merited inclusion as a common issue. This was understandable when the issue would be addressed as part of a much larger common issues trial. In my view the answer to this question is now better obtained as part of the individual investor's claim hearings at which time the investor can answer Justice Moir's question as to "…whether that approach was followed with an individual investor or how the investor responded to it."

[154] Common Issues (m) and (o) are:

> (m) Did CIBC Wood Gundy fail to credit the class members for gains that had accrued to them when it cancelled all EEM option contracts that were opened as of or after July 24, 2008?
>
> (o) Did CIBC Wood Gundy fail to adjust the EEM options open as of July 24, 2008 to July 24, 2008, the date the error occurred?

[155] The factual background to these questions is not in serious dispute. The defendant cancelled all trades on EEM options open as of or after July 24, 2008. The effect of this was to eliminate both premium income taken in when the options were sold, and the cost incurred by the class members when the options were closed or bought back. The issue then is not whether this occurred but rather what was the impact on the individual investors.

[156] The *Matheson* decision says that it is the investors who must individually establish that but for the defendant's actions they would have been in a more advantageous position than they were in as of the November 2008 cancellations undertaken by the defendant. The answers to these two common issues do not advance the resolution of the investors' claims.

[157] Justice Moir described Common Issues (q), (r) and (s) in paragraph 82 as being "about damages". Those issues ask:

> (q) Does CIBC Wood Gundy's conduct warrant an award of punitive damages?
>
> (r) Are the class members entitled to compound pre-judgment interest and, if so, at what rate?
>
> (s) Are the class members entitled to have their damages calculated in US dollars, converted and paid in Canadian dollars using the applicable exchange rate and if so, what is the applicable exchange rate?

[158] These questions only become relevant after the investor has satisfied the "but for" test of causation, a test that will not be adjudicated on a class wide basis.

[159] The court's jurisdiction to award prejudgment interest is found in section 41 of the **Judicature Act** R.S. c. 240. Section 41(i) ties the determination of the rate to the time frame between the date when the cause of action arose and the final disposition of the case. Section 41(k) gives the court a discretion to decline or reduce the interest rate, or the period during which interest is paid, if any of three listed and different factors are found to apply. These factors are fact driven and specific to the conduct of the individual litigant.

[160] There is some debate about the sufficiency of evidence necessary to support an award of compound interest. In the *Matheson* case, Justice Pickup discussed the legal status of such a remedy at paragraphs 135 to 138 of the trial decision. He declined to award compound interest concluding that the Mathesons had failed to provide sufficient evidence to support such an award. (As the underlying award was overturned on appeal, the Court of Appeal did not speak to this question. s*ee, Matheson* appeal decision at para. 28)

[161] In this case, the determination of whether and on what basis prejudgment interest is paid is dependent upon the relevant time period for which it is claimed, which will only be known at the end of the proceeding. The factors addressed in section 41(k) will be determined as a product of the end result of the individual investors' claims. Thus, whether prejudgment interest is warranted, the time period for which it should be awarded, and the rate calculation that the circumstances support will be individualized.

[162] Issues (q) and (s) are capable of being determined in the individual investor claims and even if they could be resolved on a common basis would not justify a common issues trial on their own.

Conclusion

[163] For the reasons set out herein I conclude that an Order will issue that sets out the defendant's admissions of liability to the members of the class for breach of contract, negligence and negligent misrepresentation. The benefit of this finding enures to the benefit of all class members. The relevant Common Issues to these admissions are (a), (b), (d), (e) and (f).

[164] I conclude that the Certification Order made by Moir J. and dated July 13, 2011, will be amended to delete Common Issues (c), (g), (h), (j), (k), (n) and (p).

[165] I have not been asked to delete the remaining Common issues, but for reasons set out herein, I have concluded that they are capable, and generally better addressed on a case by case basis having regard to my findings that:

(i) the only outstanding contested cause of action, breach of fiduciary duty, must be tried on a case by case basis;

(ii) that causation must be tried on a case by case basis; and

(iii) that the assessment of the investors' damage claims must be tried on a case by case basis.

[166] As Justice Moir stated in paragraph 42 of the Certification decision, whether to certify or not should not only be based on the factors set out in section 7 of the **Class Proceedings Act** but should also recognize that "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification...", citing *Hollick* at para. 27 and *see Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69.

[167] This class proceeding has resulted in admissions of liability by the defendant which will have saved court time. Those admissions have eliminated a significant part of the rationale for a common issues trial.

[168] The court has always understood that further resources would be committed to the ultimate resolution of the investors' claims. I am satisfied that the elimination of most of the liability questions offsets the addition of some issues to the case by case hearings that were always known to be required.

[169] The admissions of liability provide the class members with a favorable outcome while saving the time and cost that the members of the class would have incurred in trying those issues.

[170] I observe that the *Matheson* application, in which all issues were in dispute, took four days to try. This is an indicator that the resolution of the outstanding claims on a case by case basis, while cumulatively will be significant to the defendant, require quite modest time requirements for the individual investor. Overall costs to the plaintiffs of pursuing these claims on a case by case basis is likely to be something less than it would have been had the matter not been conducted as a class proceeding to this point. The ability of each litigant to seek a court ordered remedy to their complaint has been enhanced by the proceeding. However, I do not see further benefit to the litigants of continuing this action as a class proceeding.

[171] The *Matheson* claim adjudicated the same issues as presented by the class proceeding, albeit only on the facts relevant to the Mathesons. Notwithstanding that distinction, the decision of the Nova Scotia Court of Appeal in their case has resolved key issues that relate to the burden of proof of causation and damages, which apply to the members of the class. That decision has set out a legal path that supports case by case assessment of the remaining outstanding issues.

[172] It has always been understood by the court and the litigants that the damages hearing would need to be conducted on a case by case basis. Having regard to the determination that the breach of fiduciary duty allegation and causation must also be tried on a case by case basis, I have concluded that the questions of fact and of law that remain common to the class members no longer predominate over any questions affecting only individual members of the class.

[173] At the time of the certification the defendant, while having paid millions of dollars to the investors, had not admitted liability. Some behaviour modification is evidenced by their admissions. It remains to be seen whether the compensation paid "…was made more for business purposes than to respond to liability." *see*, Certification Decision at para. 47. The remaining litigation steps will identify and

compensate where the court finds it to be appropriate. Awards of damages, if ordered against the defendant in the individual cases, can further the goal of behaviour modification.

[174] The defendant has satisfied its burden, on the basis of newly discovered evidence, post certification developments in the course of the litigation and post certification changes to the law, to establish that the requirements of section 7 of the **Class Proceedings Act** are no longer satisfied. Having examined the common and individual issues and taking into account that which each class member must prove to demonstrate liability and damages, I conclude that a class action is no longer the preferable procedure for proceeding with these claims.

[175] I will sign an order to give effect to the admissions of liability by the defendant, and to decertify the proceeding.

[176] I will hear from counsel at the next case management hearing on the question of costs and future steps to be taken in this matter.

Duncan J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Crooks v CIBC World Markets Inc.*, 2016 NSSC 145

Date: 2016-05-27
Docket: Hfx. No. 322441
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and Karen McGrath

Plaintiffs

and

CIBC World Markets Inc./ Marches Mondiaux CIBC Inc.
Carrying on business as CIBC Wood Gundy

Defendant

Decision on Motion to Decertify the Class Proceeding

Judge:	The Honourable Justice Patrick J. Duncan	
Heard:	January 23, 2014 and September 14, 2015 in Halifax, Nova Scotia	
Addendum & Erratum Date:	March 20, 2017	
Counsel:	George W. MacDonald Q.C. Jane O'Neill	for the plaintiffs
	John Keith Q.C. Jack Townsend	for the defendant

Addendum to *Crooks v. CIBC World Markets Inc.*, 2016 NSSC 145

Paragraph 43 of this decision sets out that the defendant "Admitted; answered in the affirmative" the following common issue questions:

(a) Did CIBC owe the class members a duty of care to provide them with a correct margin calculation in their margin accounts?

(b) Did CIBC breach the standard of care by failing to provide class members with a correct margin calculation in their margin accounts?

…

(d) Was it an implied term of the class members' investment contracts with CIBC that they would be provided with correctly calculated margin account information?

(e) Did CIBC breach the class members' investment contracts by failing to maintain proper margin account information?

(f) Did CIBC negligently misrepresent that the class members' margin account calculation was correct?

At various points in the decision the answers to these questions were referred to as "admissions of liability" or language conveying a similar concept. In making these admissions, the defendant did not admit that, nor was the use of this term intended to suggest that, the plaintiffs are entitled to any form of relief claimed by them.

Such references to "admissions of liability" or language conveying a similar concept, and which should be read as described above, are found in the decision at:

- Paragraphs 23, 40, 45, 70, 90,129, 141, 163, 167, 169, and 175;
- The title between paras. 39 and 40

Erratum to *Crooks v CIBC World Markets Inc.*, 2016 NSSC 145

Current:

[29] What, if any, impact does the new information advanced by the plaintiff have on the certification of this proceeding as a class action and/or the current statement of common issues?

Should read:

[29] What, if any, impact does the new information advanced by the defendant have on the certification of this proceeding as a class action and/or the current statement of common issues?

Current:

[48] The effect of these admissions is to leave breach of fiduciary duty as the lone outstanding cause of action.

Should read:

[48] The effect of these admissions is to leave breach of fiduciary duty as the lone outstanding cause of action for which all elements of proof continue to be denied.