SUPREME COURT OF NOVA SCOTIA
Citation: Crooks v. CIBC World Markets Inc., 2011 NSSC 181

Date: 20110511
Docket: Hfx No. 322441
Registry: Halifax

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

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DECISION on CERTIFICATION

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	March 21, 2011
Counsel:	George MacDonald, Q.C., Jane O'Neill, and Peter Driscoll, for plaintiffs
	Michael S. Ryan, Q.C., and John Keith, for defendant

Moir, J.:

Introduction

[1] Ms. Crooks, Mr. Gillis, and Ms. McGrath started this action under the *Class Proceedings Act,* S.N.S. 2007, c. 28. I have to decide whether to certify the proceeding under s. 7. If it is certified, I have to make determinations under s. 11, including to state the common issues.

[2] The three plaintiffs are among a hundred or so clients of CIBC Wood Gundy who were involved in trading options under the advice of Mr. Fredrick Saturley. The clients suffered losses because of a calculation error for which CIBC Wood Gundy was responsible.

[3] CIBC Wood Gundy set about to compensate the clients for their losses. The approach it took to that task is alleged to have been, not only inadequate, but so wrongful as to found a claim for punitive damages.

[4] The defendant's position on this motion is that many of the suggested common issues require fact finding about individual losses and what is left is too thin to make a class action preferable to the alternative.

The Error

[5] The plaintiffs, and other members of the proposed class, traded in uncovered options. Options are referred to as "uncovered" when the option holder does not own the underlying security that may be subject to a put or a call. Clients who trade in these must maintain sufficient margin to honour their potential option obligations, to buy or sell the underlying security.

[6] The plaintiffs attest that they authorized Mr. Saturley to employ a "strangle strategy" for their uncovered options trading. That meant that they would buy puts and calls for the same security with the same expiry, but with a lower strike price for a put option and a higher strike price for the call option on the same security.

[7] The client's margin has to be great enough to cover the option obligations, but an increase in margin can also 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.

[8] In order to calculate the value of the uncovered options, CIBC Wood Gundy's contractor looked to an index of stocks in emerging companies that closely track the Standard & Poor's index, S&P 500. This index is the Emerging Markets Index Shares or EEM. It appears that most of, though not all of, the underlying securities were issued by EEM companies.

[9] On July 24, 2008 the EEM stock split three for one. The contractor missed this. From July 24 until October 8, margin was much overstated for the clients of Mr. Saturley who employed the strategy. It appears to be common ground that the plaintiffs relied on the calculated value of margin when making investment decisions.

Steps Taken as a Result of the Error

[10] Mr. Peter Lee, Regional Director of CIBC Wood Gundy, wrote to Ms. Crooks on January 15, 2009. He summarized the steps taken by CIBC Wood Gundy as follows:

> The EEM trading in your account was part of an overall short combination strategy involving an uncovered put at one strike price along with an uncovered call at a higher strike price. In assessing the impact of the margin error, we do not agree that you should only look at the part of the strategy that generated losses. Instead, it is appropriate to look at the entire strategy including all EEM call and EEM put positions that were potentially impacted by the margin miscalculation regardless of whether those positions led to a loss.
>
> Accordingly, we cancelled all activity in EEM that was open on or after July 24th, the first day in which any investment decisions to open, close or hold positions could have been influenced by the margin miscalculation. While all affected trades were cancelled regardless of whether or not they generated a loss, the overall result of the cancellations was to eliminate a significant net loss suffered by clients. As noted above, in your case, the cancellations eliminated a net loss to you of approximately US $1.4 million.

The Director of Regulatory Complaints provided this summary to Ms. McGrath and her husband in a letter dated February 25, 2009:

> In order to protect clients from losses that may have resulted from the margin error, CIBC cancelled all activity in EEM that was open as of (or opened after), July 24, 2008, which was the first day in which any investment decisions to open, close or hold positions could have been affected by the margin calculation. While all affected trades were cancelled regardless of whether or not they generated a

> loss, the overall result of the cancellations was to eliminate a significant net loss suffered by you and other clients. We note that in your case, the cancellations eliminated a net loss to you of approximately $52,094.60US.

The exact same statement was made to Mr. Gillis and his wife in a letter dated March 10, 2009 except that the eliminated net loss was said to be $162,759 US.

[11] Ms. Wilma Ditchfield is the Executive Director of Business Management for CIBC World Markets Inc. and her discovery evidence is part of the record for this motion.

[12] Ms. Ditchfield said that Mr. Saturley reported the calculation error to his superiors on October 9, 2008. CIBC Wood Gundy immediately confirmed that the error had been made.

[13] Margins were adjusted accordingly. 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.

[14] Ms. Ditchfield said that a group of four senior officials from CIBC Wood Gundy was formed to deal with the problem. Others joined later, including a senior vice president of CIBC World Markets.

[15] This group decided that Mr. Saturley be instructed not to deal with the clients, to leave that to management. Mr. Per Humle, the Halifax branch manager, and two others were assigned that task. It appears that they were not members of the group formed to handle the problem. Rather, they took instructions from the group.

[16] The group also 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.

[17] 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. In this way, "we were going to give clients their money back". (It appears

that, at first, the group decided to try to settle for 75% of the net loss on EEM options, but later decided to go to 100%.)

[18] In her discovery, Ms. Ditchfield said that the clients were informed of the decision before it was implemented. In the end, however, she went further and maintained that no positions were closed without approval of the client. Mr. Humle merely made recommendations to them. The evidence of the plaintiffs is to the contrary. So, authorization is one of several important issues of fact.

[19] According to Ms. Ditchfield, "We compensated for the losses that had occurred on EEM, and how we did that was by cancelling all trades." That meant that gains made on EEM options trading were treated the same as losses taken on them. All positions outstanding on July 24, 2008 or acquired afterward were cancelled.

[20] Ms. Ditchfield agreed that CIBC Wood Gundy compensated for the "net loss". She said that the group decided to treat all clients in the same way.

[21] Ms. Ditchfield also agreed that the group 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.

Disssatisfaction

[22] Some investors were dissatisfied with CIBC Wood Gundy's approach to compensation. In May of 2009 about thirty of the dissatisfied investors met, and they chose the three plaintiffs to be the "CIBC Option Investors Litigation Group", with authority to instruct counsel.

[23] The dissatisfied investors believe that the approach adopted by CIBC Wood Gundy provided compensation that is much less than they are legally entitled to. The loss compensated in tort or contract would not be gaged as if they had ceased all EEM options trading on the day the error was made. The loss would be gaged, subject to limits against remoteness, according to the measures in tort or contract,

to restore investors to the position they would have been in had the tort not been committed or had the contract been performed according to its terms.

[24] The main causes are negligence and breach of contract. The plaintiffs also plead negligent misrepresentation, but that is based on the margin levels misstated by CIBC Wood Gundy between July and October, 2008. That cause appears to overlap the others as far as the damage issues are concerned.

[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.

[26] Ms. Crooks swears to the following losses as being in addition to the compensation created by cancelling the EEM options or as being caused by that approach to compensation:

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.

[27] CIBC Wood Gundy has chosen not to file a defence until after certification is determined. In addition to Ms. Ditchfield's discovery testimony, I have a short affidavit by Mr. Humle and Mr. Ryan's brief to guide me on CIBC Wood Gundy's position in response to the claim.

[28] Mr. Humle gives evidence to the effect that the investors did not deal with Mr. Saturley as a group. They dealt with him individually "in determining their respective investment strategies". He also says:

> The investment decisions which investors made after July 24, 2008 varied with each individual investor. The reasons for each investment decision were peculiar to the individual investor. The alleged losses pleaded in the Statement of Claim varied with each investor.

And, Mr. Humle goes on to claim that all trades after discovery of the error were authorized by each client. Note, that this statement does not unequivocally say that the cancellation of option positions was individually authorized.

[29] It is CIBC Wood Gundy's position that all claims for losses have to be assessed individually except, perhaps, for the claim for "gains" made on strangle strategy options positions before cancellation. For example, dividend paying securities were not sold for all investors, some had no currency exchange costs, and some had no tax liabilities in connection with the securities. As for cancelling so-called gains, it is CIBC Wood Gundy's position that these "premiums" were nothing more than improvements in margin and they are not distinct from the losses.

Certification

[30] Subsection 7(1) of the *Class Proceedings Act* requires me to certify this proceeding if I am satisfied on each of these propositions:

> (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 [meets the criteria of s. 7(1)(e)].

[31] *Causes*. CIBC Wood Gundy's position takes issue with the claims for losses rather than the alleged causes. That is not to say that CIBC Wood Gundy has admitted liability. There is no defence yet and, in any case, Ms. Ditchfield's evidences tells us that CIBC Wood Gundy will defend this action at least on the basis that the plaintiffs and, if certified, all members of the class authorized the cancellation scheme.

[32] I am satisfied that the statement of claim discloses causes of action in negligence, breach of contract, negligent misstatement, and breach of fiduciary obligation. I make no comment on the merits of these, except to say that none is open to being set aside by summary judgement on the pleadings.

[33] *Class.* The proposed class reads:

> any client or former client (including their estates and assigns) of Wood Gundy operating in Halifax, Nova Scotia, who held an investment account as of July 24, 2008 that used uncovered equity options on a security called iShares MSCI Emerging Markets Index (“EEM” an Exchange Traded Fund) to carry out their investment strategy

I am satisfied that there is “an identifiable class”. Indeed, in this case one can ascertain the identity of each individual in the class.

[34] *Common Issue.* There are several common issues. CIBC Wood Gundy concedes that the claim about gains having been wiped out along with losses is a common issue. However, there are other common issues too.

[35] *Adequacy of Representatives.* The criteria under s. 7(1)(e) are

> (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.

[36] The plaintiffs were appointed by a group representing over twenty percent of the class, and the group has since grown to almost half the class. Their affidavits and discovery testimony show good levels of knowledge about investing and the facts supporting the causes. I am satisfied that they will represent the class fairly and adequately.

[37] The affidavit of one of the plaintiffs' counsel, Mr. Peter Driscoll, exhibits a proposed litigation plan containing procedures for notice to class members, deadlines for documentation, disclosure and discovery of witnesses, and continuation of judicial case management. The plan proposes resolution of as many common issues as possible through summary judgment. It also proposes deadlines for expert reports. Finally, the plan provides for disposition of individual claims in the event the representative plaintiffs are successful on some common issues. This includes the possibility of a reference.

[38] I am satisfied that the plan sets out a workable method for advancing the proceeding, and that the plan, taken with a proposed form of notice also exhibited to Mr. Driscoll's affidavit, provides a workable method for notifying class members.

[39] I see no evidence of any conflict between the plaintiffs' interests and the interests of other class members on the common issues.

[40] *Whether Class Action Preferable.* This s. 7(1) criterion is controversial on this motion. It turns on two questions:

- first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim"
- second, whether the class proceedings would be preferable "in the sense of preferable to other procedures".

Rumley v. British Columbia, 2001 SCC 69 at para. 35 with quotes coming from *Hollick v. Toronto*, 2001 SCC 68 at para. 28.

[41] Subsection 7(2) requires the court to consider various factors when determining whether a class action would be preferable to alternatives for the fair and efficient resolution of the dispute. Those factors are:

> (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 mean; and
>
> (f) any other matter the court considers relevant.

[42] Unlike British Columbia and recently Nova Scotia, the Ontario statute does not prescribe factors to be considered when deciding certification. In the absence of factors, "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...". *Hollick* at para. 27 and see *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69.

[43] While the prescribed factors provide guidance here (see *Rumley*, para. 35), I think that the three advantages, which also help describe the purposes of the statute, must be borne in mind. That is certainly so for the catchall in s. 7(2)(f).

[44] Firstly, I must take into account "whether questions of fact or law common to the class members predominate over questions affecting only individual members", s. 7(2)(a).

[45] Mr. Ryan refers to para. 91 of the Statement of Claim, which lists the failures alleged against CIBC Wood Gundy:

> a) Failed to adjust the EEM options in their accounts to July 24, 2008, the date that the error occurred. Instead, Wood Gundy cancelled all options

which were open as of July 24, 2008, or opened after July 24, 2008, as of the opening date.

b) Failed to cancel the commissions earned by Wood Gundy on the trades made in their accounts based on the erroneous margin information;

c) Failed to compensate the Plaintiffs for losses incurred in all of their uncovered option accounts;

d) Failed to compensate the Plaintiffs for losses incurred as a result of investment decisions that they had to make during the period that the information in their margin accounts was erroneous;

e) Failed to compensate the Plaintiffs for interest and fees incurred by them as a result of their inability to access funds in their accounts while Wood Gundy was attempting to account for its error;

f) Failed to compensate the Plaintiffs for the amounts payable by them under the *Income Tax Act* as a result of having to sell certain securities;

g) Failed to compensate the Plaintiffs for currency exchange costs incurred by them as a result of having to sell certain securities;

h) Failed to compensate the Plaintiffs for dividend payments they were forced to forgo as a result of having to sell certain securities.

Mr. Ryan says that only one of these raises a common issue. Each of the other alleged errors requires an inquiry into individual claims. As Mr. Humle's affidavit shows, not all members would have claims as described under para. 19(b), (c), (d), (e), (f), (g), or (h). Therefore, the common issue is not predominant. Indeed, it is not enough to justify certification.

[46] This argument has merit. I am of the view that many of the proposed common issues interest only some of the proposed class members. However, the argument is subject to these responses:

- Assessment of damages is not the only source of important issues, be they common or individual.

- The major issue on damages applies across the board.

- A good number of proposed common issues that do not interest all class members seem ripe for subclassification.

[47] Assessment of damages is not the only source of important issues. Although CIBC Wood Gundy has already invested millions in compensation, there has not yet been an unequivocal admission of liability. The evidence before me is open to a finding that the compensation was made more for business purposes than to respond to liability. Further, even if CIBC Wood Gundy has admitted liability neither the cause nor the particulars of breach have been admitted.

[48] The plaintiffs propose nineteen common issues. Of these, the first ten concern liability for negligence, breach of contract, or breach of fiduciary duties. The eleventh, twelfth, and fourteenth overlap liability and damages. Those concern breach and are framed in such a way as would also lay a foundation for the approach to be taken on the assessment of damages.

[49] Further, the fifteenth question asks whether CIBC Wood Gundy breached the *Securities Act* or IIROC Rules when it followed the approach it took. There is no claim for breach of statutory duty. This issue of fact is designed to inform the determination of liability and the assessment of damages. It has both general and individual implications.

[50] Furthermore, another liability issue seems to be emerging. It appears likely that CIBC Wood Gundy will defend on the basis of a promissory estoppel, settlement agreement, or accord and satisfaction alleging that each class member authorized the cancellation scheme. This part of the dispute lends itself to findings at both general and individual levels.

[51] 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? 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.

[52] Finally, the claim for punitive damages raises issues of both liability and quantification that are general.

[53] The major issue on damages applies across the board: whether the cancellation approach to compensation adopted by CIBC Wood Gundy equalled, or for that matter bettered, what class members would receive on an assessment of damages. This is raised by several of the proposed common questions.

[54] The thirteenth proposed common issue is,

> 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?

This is broad enough to capture the general question about the cancellation of positions approach.

[55] The eleventh proposed common issue is restricted to the general question. The court would have to determine whether there was a breach because of the failure "to credit the class members for gains that had occurred to them when [positions were] cancelled".

[56] Also, the first in a series of questions proposed in the twelfth question pertains to both the general question of breach and to assessment of damages. That is, whether CIBC Wood Gundy breached the duty of care, the contract with investors, or fiduciary obligations by failing "to adjust the EEM options open as of July 24, 2008, to July 24, 2008, the date that the error occurred".

[57] Determination of the general issue will set the stage for determining many of the individual issues on damages. It comes first logically because its resolution will affect the determination of many of the lesser damage issues, such as, compensation for uncovered options outside EEM, consequential losses for decisions made in the belief that margin was correctly calculated, interest and fees, tax losses, currency exchange losses, lost dividends on liquidated investments, and lost capital gains on liquidated investments.

[58] The third point is that the proposed issues that do not interest all class members may be ripe for subclassification. 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.).

[59] While there are numerous damage issues that interest only some class members, many appear at this early stage to be candidates for subclassification. The question of predominance pits common against individual issues. Those that

could be brought into the class action by subclassification should not count so heavily against certification as those that are purely individual.

[60] In my assessment, the common issues predominate over the purely individual issues when these three considerations are borne in mind.

[61] That disposes of the first s. 7(2) factor. The next two do not arise on the evidence. Paragraph 7(2)(d) requires me to consider "whether other means of resolving the claims are less practical or less efficient". The only other means that appears here is individual suits.

[62] The number of members, and the ease with which they can be identified, distinguish this class action from most others. Leaving the dispute to individual claimants would not be impractical or inefficient.

[63] Already, some sixty of about one hundred and thirty potential claimants have banded together. One expects that most of the sixty would give their authority for a single, non-class action. We have seen such before, and we have

seen such suits proceed with seeming efficiency. The sixty or so could ensure that kind of efficiency by organizing themselves under Rule 68.08.

[64] As for the rest, some may move to be joined as defendants, some may choose to start their own actions, and others may choose to advance no claim.

[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.

[66] There is a practical advantage for the public in avoiding multiple proceedings and the duplication of demand for judicial services before trials and adjudication through trials.

[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.

[68] Under s. 7(2)(e), I am required to consider "whether the administration of the class proceeding would create greater difficulties than those likely to be experienced [with the alternative]". Individual suits by the plaintiffs and their allies, and separate suits by others, would likely be brought under case management. The administration of individual suits would be more complicated because consolidation and severance issues would not automatically be resolved, and the practical advantages discussed in reference to s. 7(2)(d) would be forgone.

[69] The factors under s. 7(2) favour a finding that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute". The purposes of class action statutes also favour certification of this action, although the class is small and easily identified. Overall, a class action would be a fair and efficient way of advancing the claim described by the plaintiffs.

[70] *Conclusion on Certification*. Although the disputes between some investors and CIBC Wood Gundy over the handling of the calculation error could be fairly and practically left to individual suits, a class action is more fair and more practical. I will grant an order certifying this action as a class proceeding.

Common Issues

[71] The *Act* defines "common issues" as "common but not necessarily identical issues of fact" and "common but not necessarily identical issues of law that arise from common but not necessarily identical facts". The juxtaposition between "common" and "identical" recognizes that the issue must be significant for each class member although its resolution may have various ramifications.

[72] Counsel for the plaintiffs accurately summarize "principles [that] guide the common issue analysis":

- The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 39.

- For an issue to be common, it is not essential that the class members be identically situated vis-á-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton, supra* at paras. 39-40.

- The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which would be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).

- The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* supra at para. 65; *Rumley v. British Columbia* (sub. nom. *L.R. v. British Columbia*), [2001] 3 S.C.R. 184 at para. 33.

- For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City), supra* at para. 18.

- For an issue to be common, it cannot be dependent on individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada*, [2000] O.J. No. 3821 (Sup. Ct.) at para. 39 (S.C.J.), aff'd [2001] O.J. No. 4952 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.).

- The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25.

[73] The plaintiffs propose a long series of common issues. The first eight of these parallel the pleaded causes and I am satisfied that they are common. The eight are:

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

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

3. Did CIBC breach the *Securities Act* and/or IIROC rules by not maintaining correct margin calculations?

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

5. Did CIBC breach the class members' investment contracts by failing to maintain proper margin account information?

6. Did CIBC negligently misrepresent that the class members' margin account calculation was correct?

7. When CIBC discovered the margin error, did a fiduciary duty arise to class members in determining how to deal with the error?

8. 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?

[74] Several further questions raise common issues of fact that may inform determinations of liability, remedy, or both. I am also prepared to set these out in the certification order as common issues:

9. Did CIBC breach industry and its own codes of conduct in the manner in which it chose to deal with the error?

10. Did CIBC wilfully mislead class members by withholding material information about the margin calculation error?

11. 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?

[75] As discussed, CIBC Wood Gundy's general approach to client consent is in issue. I propose a further common issue:

> 12. 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?

[76] Some further questions are formulated in a way that Mr. Ryan rightly objects to. These appear as (k), (l), and (n) in the draft order. For example, (k) asks

> Was CIBC negligent, did it breach its investment contract with the class members and/or did it breach its fiduciary duty owed to the class members by failing to credit the class members for gains that had accrued to them when it cancelled all EEM options contracts that were opened as of or after July 24, 2008?

But, the issue of liability has already been included. Better to recognize the common issue of fact, and leave the implications for liability and damages to those issues.

[77] Therefore, I propose instead of (k):

> 13. 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?

[78] Similarly, (n) should be:

> 14. Did CIBC Wood Gundy provide investment advice, or conduct unauthorized trading in options, without having the necessary regulatory authority to do so?

[79] There is a further problem with proposed common issue (l), which has nine subparagraphs. Eight of these call for determinations about other uncovered options, losses caused by misinformed investment decisions, interest and fees, taxes on liquidated securities, losses on currency exchanges, lost dividends, and lost capital gains. As discussed in reference to the preferable proceeding question,

some class members have no interest in these. The same goes for question (r) about exchange rates.

[80] The inclusion of these eight would conflict with the principle drawn from *Hollick* that resolution of a common issue be necessary to each class member's claim.

[81] In my assessment only question (l)(i) should be set as a common issue, although the other eight subparagraphs and question (r) may be suitable for subclassification. I would put (l)(i) this way:

> 15. Did CIBC Wood Gundy fail to adjust the EEM options open as of July 24, 2008 to July 24, 2008, the date that the error occurred.

[82] The remaining proposed common issues are about damages, and they pertain to assessments across the board:

16. 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?

17. Does CIBC Wood Gundy's conduct warrant an award of punitive damages?

18. Are the class members entitled to compound pre-judgment interest and, if so, at what rate?

Conclusion

[83] I will grant the proposed certification order with changes that conform with this decision and further discussions I will have with counsel. Our *Class Proceedings Act* applies the *Civil Procedure Rules* on costs. Costs will be in the cause.

J.