

CANADA / JUDGMENT

Jastram Properties Ltd. v. HSBC Bank Canada

2021 BCSC 2204

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2021 BCSC 2204 Jastram Properties Ltd. v. HSBC Bank Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jastram Properties Ltd. v. HSBC Bank Canada,

2021 BCSC 2204

Date: 20211112

Docket: S179117

Registry: Vancouver

Between:

Jastram Properties Ltd.

Plaintiff

And

HSBC Bank Canada

Defendant

In Chambers

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

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

October 6-8, 2021

Place and Date of Judgment:

Vancouver, B.C.

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Overview

- [1] The plaintiff ("Jastram") maintains that it is the victim of a fraudulent investment scheme orchestrated by Virginia Tan in which many investors were collectively bilked of more than \$30 million. Ms. Tan encouraged Jastram and other investors to lend her money on very attractive terms for use in her factoring or bridge loan business. In fact, she was running a Ponzi scheme. Ms. Tan was using fresh funds received from investors to pay out older loans. Ponzi schemes require a perpetual supply of fresh investment funds to continue and are bound to collapse eventually. Ms. Tan's investment scheme was exposed as a fraud in early 2016.
- [2] Jastram pleads that Ms. Tan operated the scheme through accounts at HSBC Bank Canada (the "Bank") from 2011 until early 2013. It pleads that the Bank learned of the fraud in early 2013. At that point, Ms. Tan shifted her banking to other institutions and continued the fraud for another three years.
- [3] Jastram claims against the Bank for negligence. It pleads that, in view of what the Bank knew when it learned of the fraud in 2013, it owed Jastram and other investors whose funds were passing through Ms. Tan's accounts at HSBC a duty to take steps to prevent continuation of the fraud by Ms. Tan. Jastram says it was not sufficient for the Bank to terminate its relationship with Ms. Tan. In the circumstances, the Bank's duty was to investigate, advise "appropriate authorities" of the fraud, and warn other financial institutions whose customer's funds were the subject of the fraudulent activity in the Bank's accounts. In short, Jastram says that the Bank was subject to a duty to investigate and warn.

- [4] Jastram pleads that the Bank breached its duty to investigate and warn and, had it properly discharged its duty, Jastram and other investors who invested in the scheme after March 2013 would not have suffered any loss in respect of investments made in the scheme after March 2013.
- [5] Jastram applies to certify its action against the Bank as a class proceeding. The Bank opposes certification.
- [6] It is not controversial that Ms. Tan was operating a Ponzi scheme. She admitted the essential elements of the scheme in a settlement agreement with the Executive Director of the British Columbia Securities Commission; 2017 BCSECCOM 124. She has consented to judgment for damages to be assessed in a class proceeding brought by Jastram; Jastram Properties Ltd. v. Tan, 2020 BCSC 1610.
- [7] Nor is it controversial that Ms. Tan operated the scheme through accounts at the Bank between 2011 and March 20, 2013.
- [8] The principal points raised by the Bank in opposition to certification are:
- a) The Bank says that it is plain and obvious that the amended notice of civil claim filed by Jastram (the "ANoCC") does not disclose a cause of action against the Bank. It describes the claim pleaded by Jastram as "novel and dangerous";
 - b) The Bank denies that the record on this application discloses the existence of common issues sufficient to justify certification; and
 - c) The Bank submits that certification of a class proceeding is not a preferable procedure; to the extent that a legally arguable claim may be advanced by Jastram and other investors, it should be advanced in an action in which all the claimant investors are named as individual plaintiffs.
- [9] If the conditions for certification are otherwise satisfied, the parties agree that issues concerning the adequacy of the litigation plan proposed by Jastram and the details of the notice to be given to the class should be addressed in a further hearing.
- [10] For the reasons that follow, and subject to receiving further submissions concerning the litigation plan and notice to the class, I am satisfied that the requirements for certification of this action as a class proceeding are satisfied.
- [11] Jastram's negligence claim against the Bank, based on its pleading that the Bank actually knew that Ms. Tan was defrauding investors, is legally arguable. The legal proposition that a bank owes a duty of care to persons suffering losses from a fraud perpetrated by a customer through use of the bank's accounts where it has actual knowledge of the fraud is strongly supported by the authorities. It is arguable that the duty went so far as to require the Bank to warn other financial institutions handling the funds and the authorities, as alleged by Jastram. The ANoCC pleads the necessary facts and is not invalidated by the generality of the allegations advanced. The question of the content of the duty and whether the Bank satisfied

its legal obligations, if Jastram is able to prove the necessary facts, is a matter to be determined at trial, on a full evidentiary record.

- [12] Jastram has identified common issues, supported by the evidence, that warrant certification. I am persuaded that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The remaining requirements for certification - the existence of an identifiable class and that Jastram is a suitable representative plaintiff - are not disputed.

Requirements of the Class Proceedings Act

- [13] My decision that this action should be certified as a class proceeding does not mean that Jastram's claim is likely to succeed. It is simply a decision as to the most appropriate procedure to be adopted for the resolution of the claim; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para.102 [Pro-Sys].
- [14] Section 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] sets out the requirements for certification. Certification is mandatory if the requirements are satisfied. The requirements are:
- (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of two or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a representative plaintiff who:
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Analysis

- (a) Existence of a cause of action

Legal principles

[15] The question of the existence of a cause of action concerns the legal adequacy of the claim stated by Jastram in its ANoCC. A plaintiff only fails this hurdle if, assuming that the facts pleaded are true, it is plain and obvious that the claim cannot succeed; *Pro-Sys* at para. 63. This is the same test as is applied on an application to strike a pleading for failing to disclose a reasonable cause of action or defence. The approach is to avoid stultifying the law by shutting down arguable claims and defences that have not yet been legally recognized. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21 [*Imperial Tobacco*], McLachlin C.J. gave judgment for the Court and stated:

The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [Emphasis added.]

[16] The Bank submits that there is an important limitation on the principle that the facts pleaded in the ANoCC must be assumed to be true for the purpose of this analysis. It says that the principle does not apply in relation to bare assertions that are nothing more than speculative allegations. In support of this submission, the Bank cites *Boal v. International Capital Management Inc.*, 2021 ONSC 651 at para. 79, where Perell J. said:

[79] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.

[17] Justice Perell's statement reflects a line of authority that dates back to *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 455. What is important is that the court need not assume as true an assertion in a pleading that is manifestly incapable of proof; *Young v. Borzoni et al*, 2007 BCCA 16 at para. 30. Pleadings set out the material facts the pleading party proposes to plead at trial, and there is no point to assuming that unproveable assertions could supply a factual foundation for a trial decision.

[18] It is not the case that a pleading lacks validity simply because it contains bare allegations. It is in the nature of a pleading that it contains allegations. The allegations may be speculative, in the sense that the pleading party is not yet in a position to prove them; *Imperial Tobacco* at para. 22. Sometimes even bare allegations are appropriate. A common allegation is that, as a result of the defendant's wrongful conduct, the plaintiff has suffered loss and damage. This is a bare allegation of an essential element of many tort claims. It may need to be particularized, but the absence of particulars is not a fatal defect in the pleading of the claim.

- [19] Jastram filed the ANoCC almost two years ago, on November 26, 2019. There is nothing in the record to indicate that the Bank has sought particulars of any of its allegations pursuant to Supreme Court Civil Rules 3-7(18)-(24). If it felt that particulars were required, it has had ample time in which to seek them.

The ANoCC

- [20] The statement of facts in Part 1 of the ANoCC is only 20 paragraphs long. It describes the "Tan Investment Scheme" and characterizes it as a fraudulent scheme. It pleads that Ms. Tan operated the scheme through two accounts with the Bank from 2011 to early 2013.
- [21] Paragraphs 12 and 13 plead that the Bank acquired actual knowledge of the fraud. They state:
12. By 2011, Tan was making cumulative deposits to the HSBC Tan Accounts of approximately \$1 million per month, and was making cumulative withdrawals from the HSBC Tan Accounts of approximately \$1 million per month. Most of the deposits in the HSBC Tan Accounts were large amount[s] in round numbers, and most of the withdrawals were cheques written to individuals for smaller round number amounts. These kinds of transactions are hallmarks of a Ponzi scheme.
13. By early 2013, HSBC became concerned about the nature of the activity in the HSBC Tan Accounts. As a result of HSBC's review of the HSBC Tan Accounts and/or inquiries made by HSBC of Tan, the particulars of which review and inquiry are best known to HSBC, HSBC knew, or concluded that it was reasonably likely, that Tan was using the HSBC Tan Accounts for fraudulent purposes.

[Emphasis added.]

- [22] Paragraph 14 pleads that, in consequence of the Bank's acquisition of knowledge of the fraud, Ms. Tan's accounts with the Bank were closed.
- [23] Paragraph 15 identifies steps not taken by the Bank in consequence of its knowledge of the fraud. It pleads:
15. At no time did HSBC take any steps to notify the proper authorities, or to warn other financial institutions, whose customers' funds had been deposited into the HSBC Tan Accounts and whose customers were receiving payments from the HSBC Tan Accounts, about the circumstances relating to the cessation of activity in the HSBC Tan Accounts and the concerns HSBC had about the Tan's use of the HSBC Tan Accounts.
- [24] The ANoCC goes on to allege that Ms. Tan continued the Tan Investment Scheme through accounts at three different financial institutions from April 2013 until it was exposed as a fraud in early 2016.

- [25] The ANoCC pleads that Jastram was introduced to the Tan Investment Scheme in May 2012 on the basis that it was a bridge financing business involving safe investments. Between May 2012 and March 2013, Jastram invested approximately \$2.9 million in the scheme. Some of these funds were deposited in Ms. Tan's accounts with the Bank and Jastram received interest payments from these accounts. Between April 2013 and March 2015, after the Bank's involvement with the scheme ended, Jastram invested a further \$3.45 million in the scheme. Jastram received only approximately \$1.8 million in interest payments back from the scheme.
- [26] In Part 2, the prayer for relief, the ANoCC seeks "damages for negligence in failing to investigate and warn about the use by Tan of the HSBC Tan Accounts for fraudulent purposes".
- [27] In Part 3, the ANoCC states the legal basis for the claim as follows:
1. HSBC's knowledge that the HSBC Tan Accounts were being use[d] by Tan for fraudulent purposes, or HSBC's knowledge that it was reasonably likely that the accounts were being used for such purposes, imposed a duty on HSBC, to persons whose funds had been the subject of the transactions in the HSBC Tan Accounts, to take further steps to investigate the fraud, to advise the appropriate authorities of the fraudulent activity in the HSBC Tan Accounts, and to warn the financial institutions whose customers' funds were the subject of the fraudulent activity in the HSBC Tan Accounts.
 2. HSBC breached its duty to investigate and warn, as set out in paragraph 1 above.
 3. Had HSBC properly discharged its duty to investigate and warn, [Jastram], and all other class members who invested in the Tan Investment Scheme after March 2013, would not have suffered any loss in respect of investments made in the Tan Investment Scheme after March 2013.

Existence of a duty of care

- [28] The Bank's primary submission is that it is plain and obvious that the Bank cannot have been subject to a duty to investigate and warn as alleged in the ANoCC.
- [29] The ANoCC identifies Ms. Tan as a fraudster and the Bank as a financial institution utilized by Ms. Tan to perpetrate the fraud between 2011 and early 2013. The Bank acquired knowledge of the fraud in early 2013. Jastram was an investor in the Tan Investment Scheme and a victim of the fraud.
- [30] In oral argument, the Bank conceded that it is at least arguable that, if a bank has actual knowledge of a fraud being perpetrated on third parties in the use of its accounts, it owes the third parties a duty to take reasonable steps to stop the fraud. The Bank is right to make this concession. It is the subject of a strong consensus of opinion in the authorities; *Ramias v. Johnson*, 2009 ABQB 386 at paras. 26-41; *Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank*, 2010 ONSC 436 at paras. 14-15, 84-85, *aff'd* 2010 ONCA 514 at paras. 2, 9;

Kherani v. Bank of Montreal, 2012 ONSC 2230 at paras. 145-147; Jer v. Samji, 2013 BCSC 1671 at paras. 90-102 [Jer], varied on other grounds 2014 BCCA 116 at para. 35; Grossman v. Toronto-Dominion Bank, 2014 ONSC 3578 at paras. 21, 41-57; 1169822 Ontario Limited v. Toronto-Dominion Bank, 2018 ONSC 1631 at para. 2 [1169822 Ontario].

- [31] In Jer, as in this case, the question arose in the context of a certification application. Justice Gerow certified as a class proceeding a negligence claim against banks, grounded in allegations that the banks had actual knowledge of a Ponzi scheme undertaken by a notary, on behalf of a class of investors who were victims of the fraud.
- [32] A bank that made its services available to a customer on an ongoing basis for the perpetration of a fraud with knowledge of the fraud would come perilously close to incurring liability as a participant in the fraud. Upon becoming aware of the fraud, it is at least plausible that it would owe the victims a duty to take reasonable care for their protection. The injury to the victims is reasonably foreseeable. The passage through the bank's accounts of funds invested by or owing to the victims puts the bank into a relationship of proximity with the victims. Viewed broadly, public policy considerations strongly favour the prevention of fraud carried out by means of the services provided by financial institutions.
- [33] The Bank argues this issue by focusing on the content of any duty it owed, in consequence of its knowledge of the fraud. It makes the following submissions. In principle, its duty could not go further than to require it to close the Tan accounts and comply with reporting obligations imposed under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17. The duty of care propounded by Jastram - a duty to investigate and to warn other financial institutions of the fraud - is a novel affirmative duty to take action. Such a duty could only be imposed on a financial institution in rare circumstances, citing Childs v. Desormeaux, 2006 SCC 18 [Childs] at paras. 35-37. A duty to warn would be at odds with the Bank's obligations of confidentiality at common law and by statute, and would expose it to indeterminate liability to an indefinite class of persons. It could not be imposed consistently with the analysis required by Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63 [Livent]. In short, there is no proximity, and policy considerations negate the possibility of such a duty of care.
- [34] The Bank submits that McDonald & Dickson v. TD Bank, 2021 ONSC 3872, illustrates the proper analysis. The case involved a Ponzi scheme carried out by insiders of an offshore bank, SIB, through the sale of certificates of deposit, with funds flowing through accounts at the TD Bank. After the scheme collapsed, the liquidators of SIB sued TD Bank for negligence, proposing that TD Bank owed SIB a duty to protect its customers from insider abuse. The claim failed.
- [35] In my view, what McDonald & Dickson illustrates is the significance of actual knowledge. The plaintiffs conceded that TD Bank lacked actual knowledge of the fraud. This was critical in the analysis undertaken by the trial judge, Conway J. She stated:

- [159] What the Joint Liquidators are proposing is a novel duty of care and one that requires a full proximity analysis under the Livent framework. In terms of TD Bank's undertaking, it was to provide correspondent banking services to SIB. TD Bank undertook to act as SIB's agent for the purpose of receiving and disbursing funds to purchasers of the CDs. It undertook to process those payments (primarily by wire transfer), to account to SIB for the funds that flowed through the account, and to comply with any directions provided by SIB. TD Bank undertook to comply with the banking procedures that applied to the operation of a correspondent account.
- [160] There is nothing about the bank's undertaking that would support the novel duty proposed by the Joint Liquidators, whether at the account opening or operating stage. The nature of TD Bank's undertaking to operate a correspondent account did not extend to monitoring the internal operations of SIB. It did not extend to protecting SIB from insider abuse, unless there were clear indicia to put the bank on notice that the account was being used for nefarious purposes or that fraudulent conduct might be in issue.
- [161] To hold otherwise would expand the role of the bank well beyond what it undertook to do in acting as a correspondent bank. The bank undertook to provide banking services. It did not assume the role of a regulator, auditor or insurer. Given the nature of the bank's undertaking, there was also no basis for SIB to reasonably rely on TD Bank to protect it from insider abuse.
- [162] The Joint Liquidators have therefore not established the required proximity to give rise to the novel duty of care proposed in this case.

[Emphasis added.]

- [36] The analytical premise of the Bank's argument is that the degree of proximity sufficient to ground a duty to warn is greater than the degree of proximity sufficient to oblige the Bank to cease doing business with Ms. Tan. A duty to warn is qualitatively different than a duty to cease doing business. It requires greater justification. This argument finds some support in *Childs* and in *Imperial Tobacco* at para. 108. These cases hold that duties to take positive steps are only imposed in certain categories of cases. In *Imperial Tobacco*, Chief Justice McLachlin stated:

- [108] I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: [citations omitted]

[Emphasis added.]

- [37] I am not persuaded by the Bank's argument that it is plain and obvious that the duty to investigate and warn pleaded by Jastram is bound to fail, for the following reasons.
- [38] First, if positive duties in tort are the exception rather than the rule, this may be one of those exceptional cases. Childs identifies situations where a court may conclude that there is proximity sufficient to ground a positive duty to act. One of these "concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large"; Childs at para. 37. Chartered banks are the backbone of the Canadian economy. They are commercial enterprises that arguably have implied responsibilities to the public at large.
- [39] Second, it is at least possible that the reasoning in Childs and Imperial Tobacco only applies in the case of a "free-standing" positive duty, and the duty alleged in this case is not such a duty because it would accompany and supplement a duty to cease providing services to the fraudster.
- [40] This possibility arises because there is respectable authority cited by Jastram for the proposition that the existence of a duty of care should not be confused with its content. Relying on decisions of the Supreme Court of Canada, the Ontario Court of Appeal explained the importance of differentiating the existence of a duty from its content in *Rausch v. Pickering (City)*, 2013 ONCA 740. According to this analysis, the existence of a duty of care is a question of law, and what the duty requires of the defendant in the exercise of reasonable care, is a question of fact to be determined at trial. Speaking for the Court, Epstein J.A. stated:
- [37] The foundation of a claim in negligence is the recognition of a duty of care owed by the defendant to the plaintiff. A duty of care is not a duty to do anything specific: the duty is to take reasonable care to avoid causing foreseeable harm to those with whom one is in a relationship of proximity.

[38] An error frequently made is conflating the duty of care with the standard of care. They are discrete concepts. As the Supreme Court of Canada wrote in *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 32, "the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct." The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care. This important point is expressed in *Carolyn Sappideen & Prue Vines, Fleming's The Law of Torts*, 10th ed. (Sydney: Thomson Reuters, 2011), at pp. 123-24:

The general standard of conduct required by law is a necessary complement of the legal concept of "duty". There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of the defendant to discharge it?" Indeed, it is not uncommon to

encounter formulations of the standard of care or of some particular precaution that an actor in the defendant's position should take in terms of "duty", as when it is asserted that a motorist is under a duty to keep a proper lookout or that a person has (or has not) a duty to warn another of a certain risk. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. "Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. Secondly, it is apt to obscure the division of functions between judge and jury or the distinction between questions of law and fact. It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury or judge sitting alone to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained or the duty breached.

[39] The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at paras. 25-27.

[40] If a duty of care is recognized, then the standard of care necessary to discharge the duty and whether it has been breached will be determined at trial.

[Emphasis added.]

[41] According to this reasoning, the Bank's argument confuses the existence of a duty of care with its content. The analysis in *Livent* addresses whether a duty of care should be imposed, not its content.

[42] It is not clear how this clash of legal arguments grounded in considerations of high principle is to be resolved. While it may be that the analysis in *Rausch* is incompatible with the proposition (from *Childs* and *Imperial Tobacco*) that affirmative duties such as a duty to investigate and warn require greater justification, it may also eventually become clear, with the development of the jurisprudence, that the two lines of authority can be reconciled, perhaps on the basis that greater justification is only required in the case of "free-standing" positive duties. The possible routes towards a reconciliation were not canvassed in the submissions made to me.

- [43] I agree with the parties that the legal issue raised by Jastram's pleading is novel. I must bear in mind the injunction (noted at para. [15] above) that the approach taken to novel legal arguments should be generous, to avoid stultifying the development of the law by shutting down arguable claims and defences that have not yet been legally recognized. There is a real risk that accepting the Bank's argument at this stage in the litigation would do just that.
- [44] Third, the Bank submits that, in principle, its duty could not extend to warning other financial institutions because, on termination of its provision of banking services to Ms. Tan, it was no longer assisting in the perpetration of a fraud and its obligation was spent. It says that the claim is bound to fail because the Bank closed the account and did not assist Ms. Tan once it had knowledge of the fraud.
- [45] This argument confuses the question of the reasonable steps required of the Bank at the time it acquired knowledge of the fraud with a different question of what might have been required of the Bank subsequently. While the termination of the Bank's relationship with Ms. Tan may have brought to an end its duties owed to her victims, it does not follow that what the Bank should have done, when it learned of the fraud, was limited to terminating the relationship.
- [46] Fourth, the Bank submits that it would be wrong to impose on the Bank a duty to warn that could expose it to potential liability to its customer (Ms. Tan) in circumstances where, as a practical matter, it is not realistic for the Bank to assess, without the benefit of hindsight, the precise state of its knowledge and to formulate a proper warning. Of course, the pleading is one of actual knowledge. Perhaps unintentionally, this argument underscores the importance of a full appreciation of the context and circumstances to a determination of what was required of the Bank in the exercise of reasonable care. This is the kind of argument that requires evidence for its proper evaluation.
- [47] Fifth and finally, the Bank submits that its obligation to maintain the confidentiality of its customers' affairs furnishes a powerful objection to the imposition of a duty to warn other financial institutions. However, the duty of confidentiality is not absolute. The common law duty of confidence arising from the banker-customer relationship permits disclosure of confidential information to a third party for the prevention of fraud; *Canadian Imperial Bank of Commerce v. Sayani* (1993), 83 B.C.L.R. (2d) 167 (C.A.) at paras. 20-27. The statutory obligation imposed under the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, is subject to exceptions permitting disclosure of private information for the purpose of suppressing or preventing fraudulent or illegal activity; s. 7(3)(d.1) and (d.2). The constraints owed by the Bank to Ms. Tan to maintain the confidentiality of her affairs will depend on details and circumstances that cannot be analyzed on the pleadings alone. Once again, this argument is a matter for trial.

[48] Summarizing, I am of the view that the duty of care alleged by Jastram is legally arguable. If the facts pleaded are true, the Bank owed Jastram a duty to take reasonable steps to stop the fraud. Precisely what was required of the Bank in taking reasonable care, and whether it was obliged to investigate and warn, are not plain and obvious. Whether Jastram's argument will succeed at the end of the day should be decided on an evidentiary record at trial, and not simply on the basis of the pleading.

Technical sufficiency of the ANoCC

[49] The Bank submits that the ANoCC does not properly plead that Jastram suffered a loss in consequence of the Bank's negligent conduct, for two reasons. First, the only pleading that connects the alleged negligence to a loss is paragraph 3 of part 3, which is a pleading of the legal basis of the claim, not a pleading of fact. Second, the pleading in question is nothing more than a bare allegation, without substance. For ease of reference, I again quote paragraph 3 of part 3:

3. Had HSBC properly discharged its duty to investigate and warn, [Jastram], and all other class members who invested in the Tan Investment Scheme after March 2013, would not have suffered any loss in respect of investments made in the Tan Investment Scheme after March 2013.

[50] For reasons I have already addressed, the Bank's second objection is not well-founded. Viewed as a pleading of fact, paragraph 3 does not advance a bare allegation of an objectionable nature.

[51] The Bank's first objection is well-founded. The pleading that the Bank's negligence caused Jastram loss is a pleading of a material fact that is a necessary element of the cause of action. Material facts must be pleaded in part 1 of a notice of civil claim; it is not sufficient if they are pleaded only in part 3; *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621 at para. 34.

[52] The misplacement of paragraph 3 in part 3 rather than part 1 of the ANoCC is not a matter of substance because it can be fixed by a simple amendment. As in *Bains v. Green*, 2012 BCSC 1733 at para. 62, I direct that Jastram restructure the ANoCC and grant it leave to amend as necessary to rectify the misplacement. I approach this application on the basis of the pleading as it will be amended.

Conclusion concerning the existence of a cause of action

[53] For these reasons, I conclude that the ANoCC discloses a cause of action against the Bank for negligence. The first of the certification requirements is satisfied.

(b) There is an identifiable class of 2 or more persons

- [54] The evidence discloses that Jastram was one of many investors who were bilked of funds through Ms. Tan's Ponzi scheme.
- [55] In the course of oral argument, Jastram limited the proposed class from that indicated in the notice of application by restricting it to investors in the Tan Investment Scheme during the period of the Bank's involvement with the scheme. The parties agree that March 21, 2013 is the date the Tan accounts at the Bank were closed. Accordingly, Jastram proposes the following class:

All persons, other than the Defendant, who provided funds to invest in the Tan Investment Scheme promoted by Virginia Tan before March 21, 2013 and who received payments from the Scheme which are lesser in total amount than the total principal amount they invested.

- [56] The Bank did not dispute this class definition in oral argument. It would appear to contain less than 200 members.
- [57] I am satisfied that this class definition satisfies the requirements of s. 4(1)(b) of the CPA as set out in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82. It is defined by objective criteria that do not depend on the merits of the claim. It bears a rational relationship to the common issues to be addressed below: it is neither unnecessarily broad, nor does it arbitrarily exclude potential class members. It contains more than two members.
- (c) The claims of the class members raise common issues

Overview of the proposed common issues

- [58] Jastram proposes nine common issues, one of which was modified in the course of oral argument. With the modification, they are set out in an appendix to these reasons. The proposed common issues fall into three categories. The first (issues 1 to 5) concerns the Tan Investment Scheme and its fraudulent character. The second (issues 6 to 8) concerns the Bank's knowledge and conduct. The third (issue 9) addresses whether the Bank's (hypothesized) breach of duty caused or contributed to losses suffered by members of the class.
- [59] The Bank objects that issues 1, 3, 7, 8 and 9 fail to qualify as common issues because they engage the differing experiences of individual investors.

Legal framework for the assessment of proposed common issues

- [60] A common issue is a substantial and necessary ingredient of the claim of each member of the class, whose resolution will move the matter forward; *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312 at para. 92. A finding that there exist common issues must be supported by evidence; it must have "some basis in fact"; *Pro-Sys* at paras. 98-108.

- [61] Common issues must be substantial, but they need not be determinative, nor need they predominate over individual issues; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 104.

Issues concerning the Tan Investment Scheme and its fraudulent character (issues 1 to 5)

- [62] The record contains evidence that tends to establish that Ms. Tan operated a fraudulent investment scheme as alleged in the ANoCC. Proposed common issues 1 to 5 address the creation of the scheme, its operation, and its fraudulent character.
- [63] The Bank's objection in respect of these common issues is that issues 1 and 3 centre the fraud in false representations by Ms. Tan that she was in fact operating a legitimate short-term loan business rather than a Ponzi scheme by which returns to investors were funded from fresh investments. The evidence shows that different investors came to the scheme in various ways, sometimes being persuaded to invest in Ms. Tan's apparent business by word of mouth without actually speaking with her. The Bank submits that issues 1 and 3 therefore lack true commonality. It points to *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at paras. 161-170, *aff'd* 2015 BCCA 252 at paras. 20-22 as a case demonstrating the difficulty of finding commonality in the absence of uniformity in the representations made to class members.
- [64] It appears to me that the claim in this case bears a greater similarity to that advanced in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.), *aff'd* (1999) 46 O.R. (3d) 315 (Div. Ct.), *varied* (2000), 51 O.R. (3d) 236 (C.A.). Bre-X was a company developing gold-mining properties in Indonesia. It issued reports indicating favourable drilling results and the price of its shares rose vertiginously. The drilling results had been manipulated, the properties were essentially worthless, and the stock price and the company collapsed when the truth was revealed. In subsequent class proceedings brought on behalf of persons who purchased shares and suffered a net loss in consequence, the court certified common issues for misrepresentation notwithstanding the absence of a single common representation made to members of the class. Winkler J. (as he then was) explained:

I am of the view that the claim in fraudulent misrepresentation raises common issues. The plaintiffs' allegation is that the Bre-X operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.

- [65] As in *Carom*, the gist of *Jastram's* case is that the Tan Investment Scheme had a fraudulent character that permeated all of the representations made to various victims of the scheme in various ways.

[66] In this light, I find that issues 1 to 5 state common issues. The members of the class share a common interest in having these issues determined in the same way, and a favourable determination will advance their claims against the Bank.

Issues concerning the Bank's knowledge and conduct (issues 6 to 8)

[67] Issue 6 asks whether the Bank acquired knowledge of the fraud as alleged in the ANoCC. It is obviously a common issue and the Bank does not contend otherwise.

[68] Issue 7 addresses the question of whether the Bank owed class members a duty of care and, if so, what that duty required of the Bank. The Bank submits that these questions cannot be answered for the class as a whole because it will be necessary to inquire into the details of what investors were told, their relationships with Ms. Tan and the people who worked with her, their sophistication, what inquiries they made, whether they had cause for suspicion, and so on. The Bank submits:

A question of equity will loom large: who, as among innocents, ought to bear the burden for Tan's fraudulent scheme. Some class members may be differently situated than others, as the Plaintiff, for example, knew of HSBC's inquiries of Tan about the HSBC Tan Accounts prior to its investment.

[69] It would have helped me to understand the Bank's submission if it had crystallized its defences by filing a pleading. Unfortunately, notwithstanding the requirement in Rule 3-3(3), the Bank failed to file a response to civil claim, and Jastram did not insist, as it might have done, by threatening to take judgment in default of a defence. I am left with the Bank's advice, in argument, that it intends to defend on at least three bases: contributory negligence; an absence of clean hands on the part of class members; and a more general defence that equitable considerations preclude liability in this case. Though not expressly put in these terms, in the Bank's argument there is a hint of a fourth defence of a voluntary assumption of risk on the part of at least some investors.

[70] I do not understand how any of these proposed defences, or any other defence the Bank could raise, would answer the issue raised by question 7 as to the existence of a duty of care. This is not a case in which class members and the Bank were dealing directly with one another. Considerations of the circumstances and conduct of individual class members would not prevent a duty of care from arising. Nor could they influence an assessment of the steps that should have been taken by the Bank, in the exercise of reasonable care.

[71] Issue 8 asks whether, if the Bank owed class members a duty of care to investigate and warn, it breached its duty. As with issue 7, this is an issue that must turn on an assessment of the Bank's conduct, without reference to the conduct and circumstances of class members.

[72] I find that issues 7 and 8 are common issues. The members of the class share a common interest in having them determined against the Bank. A favorable determination would advance the claims of class members against the Bank.

Causation (issue 9)

[73] Issue 9 asks:

9. If the answer to question 8 is "yes", did the breach of duty by HSBC cause or contribute to the loss suffered by Class members who invested in the Tan Investment Scheme after March 2013?

[74] Jastram observes that causation was certified as a common issue in identical terms in *Jer*, a case which also involved alleged losses suffered by investors in a Ponzi scheme.

[75] The Bank submits that the evidence does not disclose a common methodology for the determination of class-wide causation so that issue 9 is not a common issue. It submits that *Jer* is of no help in this context, because it was decided in early 2013 before the Supreme Court affirmed the importance of finding, on the evidence, that there exists a workable methodology to enable the plaintiff to prove causation on a class-wide basis in *Pro-Sys* at paras. 114-118. The Bank points to *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 and *Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177, aff'g 2013 ABQB 422, as cases where certification failed in the absence of proof of a workable methodology for proof of class-wide causation.

[76] *Pro-Sys* clarified the relevant law, but did not mark a dramatic change from the pre-existing law in British Columbia, under which *Jer* was decided. As to causation, prior to *Pro-Sys*, the plaintiff was required to show "a credible or plausible methodology"; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 68. Now it is required to show that there exists a workable methodology for proof of class-wide causation.

[77] The causation issues in *Charlton* and *Andriuk* were inherently difficult. In *Charlton*, the plaintiff claimed to have suffered damages consequent on an increased risk of heart problems associated with consumption of a medicine manufactured by the defendant. According to the plaintiff's expert, the increase in the risk was in the order of 16%. In *Andriuk*, the claim was that shareholders in a speculative biotech stock suffered losses due to the trading of the defendant in the stock. In both cases, there was no obvious way to value the loss on a class-wide basis. Evidence was required to show that a method of valuing the loss might exist, and there was none.

[78] In this case, Jastram's theory of causation is simple and obvious. Jastram's theory is that, had the Bank taken reasonably necessary steps to investigate and warn appropriate authorities and other financial institutions of its findings on learning of the fraud, the Tan Investment Scheme would have been brought to an end. Members of the class (who were all investors in the scheme at the time) would not have suffered further losses.

[79] The record is sufficient to permit me to conclude that Jastram's theory of causation is plausible. I do not need expert evidence.

- [80] The Bank argues that the consequences of reporting to other financial institutions (if that is what was required of it) may have been different from some class members than for others. In substance, the suggestion is that the exercise of reasonable care might not have brought the Tan Investment Scheme to an end. If the Bank is correct, then some class members may have suffered a loss in consequence of the Bank's negligence, but the class as a whole will not.
- [81] Issue 9 asks whether the Bank's breach of duty was a cause of loss suffered by class members generally. There may have been other legally relevant causes, such as (possibly) contributory negligence. Be that as it may, the members of the class share a common interest in having this issue determined against the Bank. A favourable result will advance their claims against the Bank. Accordingly, I find that issue 9 is a common issue.

Conclusion as to the existence of common issues

- [82] For these reasons, I find that all of the proposed common issues satisfy the requirement in s. 4(1)(c) of the CPA.
- (d) Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

Legal principles

- [83] Section 4(2) of the CPA lists five considerations to be addressed in considering whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. I address each of these considerations below. Following this, I address two overarching questions identified in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 25:
- a) Whether a class proceeding would be a fair, efficient and manageable method of advancing the class members' claims; and
 - b) Whether a class proceeding would be preferable compared with other realistically available means for their resolution?
- [84] The first question must be considered in the context of the action as a whole, comparing the relative importance of the common and individual issues. The second question involves consideration of the impact of a class proceeding on class members, the defendant, and the court, applying a practical, cost-benefit approach. Attention must be paid to the three principal procedural advantages of class proceedings: judicial economy, access to justice, and behavioural modification; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 16.

Considerations listed in s. 4(2) of the CPA

- [85] The first consideration is whether common questions of fact or law predominate over any questions involving only individual class members.

- [86] I agree with the Bank that significant individual issues arise from the dealings between individual class members and Ms. Tan and her colleagues. Even if Jastram succeeds on all the common issues, the Bank's proposed defences of contributory negligence, an absence of clean hands, its broad invocation of equitable principles, and (possibly) a defence centred on a voluntary assumption of risk will have to be addressed. The defence of contributory negligence could affect the quantum of individual claims. The other proposed defences might affect entitlement.
- [87] I cannot say that the common issues predominate over the individual issues. The common issues are clearly important. For some class members, the individual issues may be relatively trivial, while in other cases they may require extensive factual investigation. This is a case in which the damages are potentially large enough in at least some cases - Jastram's is one of them - to justify some kind of trial process to resolve individual issues where warranted on the facts.
- [88] The second consideration is whether a significant number of class members have a valid interest in individually controlling the prosecution of separate actions. There is no evidence of any such interest.
- [89] The third consideration is whether the class proceeding would involve claims that are or have been the subject of any other proceedings. I am advised that there are no other actions against the Bank arising from the Tan Investment Scheme.
- [90] The fourth and fifth considerations are whether other means of resolving the claims are less practical or less efficient, and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. I address these considerations below.

Would a class proceeding be a fair, efficient and manageable method of advancing the class members' claims?

- [91] This case closely resembles others in which the court concluded that a class proceeding would be a fair, efficient and manageable method of advancing claims of victims of a Ponzi scheme; *Jer* at para. 215; *Jastram Properties Ltd. v. Tan*, 2019 BCSC 475 at para. 71 [*Jastram* 2019]. Taking into account the presence of significant individual issues that may have to be tried in some cases, judicial economy still favours the determination of the common issues in a single proceeding in which all class members and the Bank will be bound by the result.

Would a class proceeding be preferable compared with other realistically available means for resolution of the class members' claims?

- [92] The Bank maintains that there is a realistic preferable alternative to a class proceeding. The alternative would be to see the claims advanced in an ordinary action in which all class members were joined as plaintiffs. I will refer to this as the joinder option. The Bank offers 1169822 Ontario, involving 20 individually named plaintiffs, as an example of such a case. It submits that the joinder option identifies from the outset all the individuals who wish to

make claims, and it avoids bifurcation of issues and litigation in slices. It suggests that early discovery might prune the class, describing this as a potential benefit. Considering the importance of the individual issues, the Bank submits that a single trial as opposed to many individual trials will be fairer: it will provide a fuller evidentiary record in a case with monumental implications for the banking industry.

- [93] Actions in this Court in which plaintiffs pursued the joinder option - that is, in which claims were advanced by a large number of claimants against deep-pocketed defendants in the manner proposed by the Bank - include *Burns v. Kelly Peters & Associates Ltd.* (1987), 16 B.C.L.R. (2d) 1 (C.A.); *Arkelian v. Daley*, 1992 CanLII 1302 (B.C.S.C.); *British Columbia Children's Hospital et al v. Air Products Canada Ltd. et al*, 2003 BCCA 177; *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346, 2010 BCSC 1384; and *The Owners, Strata Plan LMS 3851 v. Homer Street Development Limited Partnership*, (20 published decisions culminating in 2017 BCCA 150) [Homer Street]. These are all cases in which I had some involvement as counsel.
- [94] One of the purposes of class proceedings is to facilitate access to justice. An unfortunate reality of the joinder option is that it burdens the plaintiffs with extensive and expensive discovery prior to trial. The defendant has the right to obtain full discovery of documents and examine each plaintiff for discovery. If there are dozens of plaintiffs, the defendant may conduct dozens of examinations for discovery. A deep-pocketed defendant in a case with "monumental implications" may be expected to exercise these rights to the fullest.
- [95] Of course, such extensive discovery may ultimately be necessary. Or it may not. The case may fail on a ground having nothing to do with the individual plaintiffs. *Jastram's* case will fail if it is unable to establish that the Bank had knowledge of the fraud. If the plaintiffs are in a position to prove their case on the common issues prior to individual discovery, the case may be amenable to settlement in circumstances where a deep-pocketed defendant might otherwise hope to exhaust the plaintiffs.
- [96] Class proceedings have a sometimes deserved reputation as languid, complicated, exhausting lawsuits. This often has more to do with the matters at stake, and the tactics adopted by counsel on both sides, than any intrinsic quality of the procedure. It is instructive to compare *Homer Street* with *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, because the two actions involved very similar claims, one (*Sharbern*) advanced as a class proceeding, and the other (*Homer Street*) pursuant to the joinder option. In both actions, the plaintiffs purchased strata units in a hotel marketed as investments pursuant to disclosure statements issued under the Real Estate Act, R.S.B.C. 1996, c. 397 [rep. 2004, c. 42, s. 146]. In both cases, the plaintiffs complained of misrepresentations in the disclosure statement, succeeded at trial, and failed on appeal.
- [97] The two actions were started just eight months apart. *Homer Street* was commenced on November 7, 2002. *Sharbern* was commenced on June 16, 2003 and came to its conclusion in 2011, six years before *Homer Street* finally concluded in 2017.

- [98] Sharbern was certified in February 2004. An appeal from the certification order was dismissed in March 2006. A trial of the common issues lasted 33 days, with judgment rendered in August 2007. The Court of Appeal allowed the defendants' appeal and set aside the trial judgment in May 2009, and the Supreme Court of Canada dismissed the plaintiff's appeal in May 2011.
- [99] Homer Street had an unhappy procedural history, featuring separate trials of liability and damages, and multiple appeals. The trial on liability lasted 46 days and the plaintiffs obtained judgment in August 2008. This was already later than the Sharbern trial decision, and the trial was longer. The defendants appealed and lost in September 2009. The parties then proceeded to a further trial on damages that lasted 26 days. They recovered \$8 million in damages but, on appeal, the Court of Appeal held that they had suffered no damages and dismissed the action in September 2016. The plaintiffs' application for leave to appeal to the Supreme Court of Canada was dismissed in June 2017.
- [100] I do not suggest that the 15-year progress of Homer Street through the courts exemplifies the joinder option in action. It is an exceptional case. But it does demonstrate that the joinder action is not necessarily a better option from the point of view of access to justice and judicial economy. Nor is it necessarily likely to provide a greater incentive to behavioural modification on the part of erring defendants. Regards must be had to the circumstances of the case at hand.
- [101] In this case, I find that a class proceeding is preferable to the joinder option. The bifurcation of issues and litigation in slices that is inherent in a class proceeding is justified. The common issues are truly distinct from the individual issues. The Bank will not be prejudiced by having them determined without reference to the dealings of individual class members with Ms. Tan. The fuller evidentiary record desired by the Bank offers no real benefit. Early discovery of class members under the joinder option would be more likely to oppress the class members than facilitate early resolution.
- [102] Accordingly, I am satisfied that the other means of resolving the class members claims are less efficient. I think it unlikely that the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Conclusion as to preferability

- [103] For these reasons, I find that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The requirement under s. 4(1)(d) of the CPA is satisfied.
- (e) Is there a representative plaintiff?
- [104] It will be recalled that s. 4(1)(e) of the CPA requires a representative plaintiff who:
- (i) would fairly and adequately represent the interests of the class,

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

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

[105] Subject to further consideration of the litigation plan, I am satisfied that Jastram is a suitable representative plaintiff. The Bank does not dispute Jastram's suitability and Justice DeWitt-Van Oosten found it to be a suitable representative plaintiff in earlier litigation, on an equivalent record to that which is before me; Jastram 2019 at paras. 72-74.

Disposition

[106] For these reasons, subject to further consideration of the litigation plan, I find that Jastram has satisfied the requirements of s. 4(1) of the CPA and is entitled to an order certifying it as the representative plaintiff on behalf of the class stated in paragraph [55] of these reasons for the determination of the common issues stated in the appendix.

[107] As noted, I direct that Jastram restructure the ANoCC and grant it leave as necessary to complete the pleading of causation in part 1 by including factual allegations presently contained in part 3.

[108] The parties may arrange through the registry a hearing before me to address the litigation plan and notice requirements.

"Gomery, J."

Appendix: Common Issues

1. From at least 2011 until the end of 2015, did Virginia Tan operate an investment scheme (the "Tan Investment Scheme") in which she represented to investors that the money invested with her would be used by her in a factoring or short-term loan business which she represented she had successfully operated for several years, when in fact those representations were false in that:
 - a. Virginia Tan did not operate a factoring or short-term loan business during this period; and
 - b. Virginia Tan did not intend to use money in any such business but rather for her own use and benefit and to fund payments to investments in the Tan Investment Scheme.
2. Did Virginia Tan issue promissory notes to investors in the Tan Investment Scheme, together with post-dated cheques for the amount of interest payable under the promissory notes, knowing that the money to pay the post-dated cheques, and any return of principal payable under the promissory note, would be paid from funds provided to Virginia Tan for investment in the Tan Investment Scheme?

3. If the answer to question 1 and 2 is "yes", were the false statements made by Virginia Tan concerning the Tan Investment Scheme material misstatements, and was the provision of the promissory notes and post-dated cheques to investors concerning their interest in the Tan Investment Scheme a material false pretence, designed and intended by Virginia Tan to induce investors to provide Virginia Tan with funds to invest in the Tan Investment Scheme?
4. If the answer to the above question is "yes", did Virginia Tan knowingly receive funds for investment in the Tan Investment Scheme from Class members under false pretense?
5. Did Virginia Tan convert funds provided to her by Class members for investment in the Tan Investment Scheme to her own use and benefit, including to make interest payments to Class members and any repayment to Class members of the principal amount they provided to Virginia Tan for investment in the Tan Investment Scheme?
6. In early 2013, did HSBC become suspicious about the nature of the transactions in the Tan accounts at HSBC (the "HSBC Tan accounts") and, as a result, did HSBC know or conclude that it was reasonably likely that Virginia Tan was using the HSBC Tan accounts for fraudulent purposes?
7. If the answer to question 6 is "yes", did HSBC have a duty to Class members whose funds had been subject of the transactions in the HSBC Tan accounts, to take further steps to investigate the suspicious transactions in the HSBC Tan accounts, to advise the appropriate authorities of any fraudulent activity in the HSBC Tan accounts, and to warn the financial institutions whose customer's funds are the subject of the fraudulent activity in the HSBC Tan accounts?
8. If the answer to question 7 is "yes", did HSBC breach its duty to investigate and warn?
9. If the answer to question 8 is "yes", did the breach of duty by HSBC cause or contribute to the loss suffered by Class members who invested in the Tan Investment Scheme after March 2013?

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