

CITATION:1442422 Ontario Ltd. et al v. The Toronto-Dominion Bank, 2026 ONSC 3856
COURT FILE NO.: CV-24-00714201-00CL
DATE: 20260703

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

RE: 1442422 Ontario Limited and Jokada Inc., Plaintiffs

v.

The Toronto-Dominion Bank, Defendant

BEFORE: Justice J. Dietrich

COUNSEL: *Robert W. Staley, Nathan J. Shaheen, and Sophia DiNicolo*, for the Plaintiffs

Geoff R. Hall, Sean Petrou, and Sabih Ottawa, for the Defendant

HEARD: May 11-15,19-21 and 26, 2026

REASONS FOR DECISION

Introduction

- [1] The Plaintiffs, 1442422 Ontario Limited (“**144**”) and Jokada Inc. (“**Jokada**”) collectively invested \$17.8 million (the “**Funds**”) with Nestig Inc. (“**Nestig**”). The Funds were invested based on representations by Nestig’s principal, Stephen Heimbecker, that the Funds were to be used in mortgage investments. Unbeknownst to 144 and Jokada, Mr. Heimbecker instead used the Funds to satisfy an unauthorized overdraft in his account with the Defendant, The Toronto-Dominion Bank (“**TD Bank**”). The overdraft had been caused by a cheque kiting scheme perpetrated by Mr. Heimbecker.
- [2] Shortly before receipt of the Funds, TD Bank had commenced an action against various parties, including Nestig and Mr. Heimbecker, claiming TD Bank was the victim of a complex fraudulent cheque kiting scheme. TD Bank had obtained a *Mareva* injunction against Mr. Heimbecker, Nestig and others freezing their accounts. After receipt of the Funds, consent orders were obtained by TD Bank varying the *Mareva* injunction to permit repayment and discontinuing the action that had been commenced by TD Bank.
- [3] 144 and Jokada now claim against TD Bank for the amount of the Funds based in negligence, knowing receipt, conversion, unjust enrichment and money had and received. At trial, 144 and Jokada withdrew claims against TD Bank based on fraudulent conveyance and fraudulent preference.

- [4] TD Bank disputes any liability to 144 and Jokada and also claims, if liable, that damages should be reduced based on contributory negligence and contributory fault.
- [5] For the reasons set out below, the claims by 144 and Jokada (i) in negligence against TD Bank are dismissed; and (ii) in knowing receipt, conversion and unjust enrichment are granted. The claim for punitive damages by 144 and Jokada is also dismissed. Further, the damages payable by TD Bank are not reduced for any claims of contributory negligence or contributory fault.

Background

- [6] The basic facts are not in dispute. The parties put forward an agreed statement of facts that was quite comprehensive.
- [7] In terms of fact witnesses, Romolo Magarelli (the principal of 144) and John Fielding (the principal of Jokada) provided testimony. 144 and Jokada also called the following employees (or former employees) of TD Bank: Michael Dye (Market Manager at Mr. Heimbecker's local TD retail branch at the relevant time), Anna Dayan (Regional Head of Metro West and the Head of Ultra High Net Worth Family Office), Ryan McNally (Senior Vice President, Head of TD Wealth Advice Distribution) and Ajai Bambawale (TD Bank's Group Head and Chief Risk Officer).
- [8] TD Bank called Raymond Wrubel, who formerly acted as counsel for Mr. Heimbecker. Mr. Wrubel invoked all rights available to him under s. 9(1) and (2) of the *Evidence Act*, R.S.O. 1990, c. E.23 prior to giving his compelled testimony, upon having asserted his objection on the ground that his answers may tend to establish his liability to a civil proceeding. It is Mr. Wrubel's intention to rely upon this to oppose any further attempt to use or enter into evidence any answer he gave to questions asked of him during his trial testimony in this proceeding.
- [9] As described below, both parties put forward an expert witness as well.

The Parties

- [10] 144 is a company ultimately owned and controlled by Mr. Magarelli. 144 is the personal investment company of Mr. Magarelli. Since 1997, Mr. Magarelli has been the CEO and President of Evertz Technologies Limited, a publicly-traded company that develops hardware and software technologies for the media broadcast and production industries worldwide. Mr. Magarelli is a longtime private banking customer of TD Bank.
- [11] Jokada is a company ultimately owned and controlled by Mr. Fielding. Jokada is the personal investment company of Mr. Fielding. Mr. Fielding is a serial entrepreneur and has been involved in a number of businesses. He also has a significant interest in horse racing. He was a board member of Woodbine Entertainment Group. Mr. Fielding is also a longtime breeder and owner of racehorses. He often owns an interest (i.e. portion) of a horse, with others owning the remaining interest.

- [12] In 2018, Mr. Fielding was introduced to Mr. Heimbecker at a horse racing event in Kentucky. At that time, Mr. Fielding understood that Mr. Heimbecker had a very good reputation, was well liked, personable, was known to give money to charities, and supported industry initiatives. Mr. Fielding also introduced Mr. Heimbecker to the CEO of BET99 (a company in which Mr. Fielding holds an interest) and, as a result, Mr. Heimbecker became an investor alongside Mr. Fielding in that company.
- [13] In early 2020, during the COVID 19 pandemic, Mr. Magarelli and Mr. Fielding met in the Bahamas where they were both located at the time. They quickly became very close as did their families. They developed total trust in one another.
- [14] Since meeting, Mr. Magarelli and Mr. Fielding have learned of each other's professional and investment experience, and participated in various investment opportunities together, both before the October 2022 period relevant to this case and after.
- [15] TD Bank is a schedule 1 Bank. Mr. Heimbecker was a private banking client at TD Bank for over 20 years. Mr. Heimbecker had two personal accounts at TD Bank including his own personal chequing account and a joint spousal chequing account, collectively, the “**Heimbecker Accounts**”). He also had a commercial deposit account for his company, Nestig (the “**Nestig Account**”).

Mr. Heimbecker and Nestig

- [16] Prior to the events at issue, Mr. Heimbecker had been a long-standing customer of TD Bank who maintained his accounts in good standing, enjoyed a strong reputation within his community, and routinely conducted multiple high-value transactions through his accounts in connection with private mortgage deals. At that time, all parties involved believed Mr. Heimbecker to be an upstanding and successful businessperson.
- [17] Nestig was known to be Mr. Heimbecker’s business, through which he acted as a mortgage broker. Prior to the events at issue, all parties accepted Mr. Heimbecker’s word that he and Nestig were licensed as a mortgage administrator and mortgage broker.

The Cheque Kiting and Unauthorized Overdraft

- [18] On September 19, 2022, TD Bank discovered significant overdraft across the Heimbecker Accounts due to two cheques returned for insufficient funds totaling \$21,649,244.77 (the “**Unauthorized Overdraft**”).
- [19] On September 21, 2022, TD Bank restrained the Heimbecker Accounts and the Nestig Account pursuant to the applicable account agreements. The effect of the account restrictions was that funds could not be withdrawn from the accounts, but deposits were permitted. Upon learning later that his account had been restrained, Mr. Heimbecker advised TD Bank of his intention to repay the Unauthorized Overdraft, following which TD Bank promptly requested particulars regarding the source of funds and the method of delivery.

- [20] The issue was escalated within TD Bank, and a team was assembled to deal with it including Lori Hergott (Mr. Heimbecker's private banker), Mr. Dye, Ms. Dayan, and Mr. McNally.
- [21] Ms. Hergott and Mr. Dye were responsible for direct communications with Mr. Heimbecker. Ms. Hergott reported to Mr. Dye, who reported to Ms. Dayan, who reported to Mr. McNally. Ms. Dayan and Mr. McNally had no direct communications with Mr. Heimbecker and relied on reports from Mr. Dye.
- [22] TD Bank's Global Security & Investigations group ("**GSI**") also investigated Mr. Heimbecker, Nestig, and the Unauthorized Overdraft. GSI undertook several investigative steps including obtaining Nestig's corporate profile and conducting PPSA searches in respect of Mr. Heimbecker's property holdings. GSI determined that Nestig's mortgage broker licence had been suspended by Financial Services Regulatory Authority of Ontario ("**FSRA**").
- [23] Between September 21 and October 4, 2022, Mr. Heimbecker remained in regular contact with TD Bank through phone calls and emails. Mr. Heimbecker advised he had made arrangements to repay the Unauthorized Overdraft. Mr. Heimbecker identified the anticipated sources of repayment as an investment in an online gaming company, proceeds from mortgage sales, refinancing of his farm property, and a cheque from a lawn care company of over \$8 million. Mr. Dye concluded, as a result his engagement with Mr. Heimbecker at this time, that Mr. Heimbecker repeatedly made misrepresentations to TD Bank regarding his ability to come up with the funds required, when the funds would arrive, and the source of the funds.

TD Bank's Action against Mr. Heimbecker, Nestig and Others

- [24] Although initially unsure of the cause of the Unauthorized Overdraft, by October 3, 2022, TD Bank commenced an action against Mr. Heimbecker and Nestig in this Court (the "**TD Action**") in which it alleged that the overdraft was the result of a cheque kiting scheme perpetrated by Mr. Heimbecker and Nestig, resulting in a loss of more than \$21 million.
- [25] After October 4, 2022, correspondence with between TD Bank and Mr. Heimbecker primarily took place through its legal counsel, McCarthy Tetrault LLP ("**McCarthy**"), and Mr. Heimbecker's lawyer Mr. Wrubel. On October 4, 2022, Mr. Wrubel sent a demand letter to TD Bank stating several cheques from a third party had been returned NSF, Mr. Heimbecker was in the process of recovering funds he had loaned to a third party, and threatening legal proceedings for "significant damage" if the issues could not be settled by the end of the week.
- [26] A day later, on October 5, 2022, McCarthy participated in a conference call with Mr. Heimbecker and Mr. Wrubel. On that call, McCarthy requested an explanation for the transactions that resulted in the Unauthorized Overdraft and Mr. Heimbecker provided the same explanation that was set out in Mr. Wrubel's previous letter. Mr. Heimbecker advised McCarthy that he would review the transactions and respond further.

- [27] On the morning of October 6, 2022, McCarthy emailed Mr. Wrubel and provided a copy of the statement of claim in the TD Action. McCarthy reiterated the requests for information made during the conference call. Mr. Wrubel's evidence at trial was that service of the statement of claim was "out of the blue". After being served, responses to McCarthy's requests were put "to the side" as events moved very quickly.
- [28] On October 6, 2022, Mr. Wrubel wrote to TD Bank stating that Mr. Heimbecker had advised Mr. Wrubel that funds of \$16 million had been secured and it was intended that certified funds would be deposited into Mr. Wrubel's account and then direct deposited to McCarthy's account. Mr. Wrubel also stated that Mr. Heimbecker would be able to pay the balance the following Friday.
- [29] On October 12, 2022, TD Bank brought a motion for an interim *Mareva* injunction that was scheduled to be heard on October 14, 2022. In support of that motion, TD Bank put forward the affidavit of Mr. Dye sworn on October 12, 2022 (the "**Dye Affidavit**").
- [30] Mr. Dye confirmed at trial that, by the time of the Dye Affidavit, TD Bank knew that Mr. Heimbecker and Nestig had perpetrated a complex and sophisticated cheque kiting fraud through their accounts at TD Bank and its loss resulting from the cheque kiting fraud was "extraordinary". In the Dye Affidavit, Mr. Dye also noted that after having begun investigating the cheque kiting fraud, TD Bank discovered that certain transactions in Mr. Heimbecker's and Nestig's accounts at TD Bank from prior to the cheque kiting scheme also had "no rational commercial purpose." At trial, Mr. Dye explained that this meant that those earlier transactions were "improper" and "fraudulent".
- [31] By this point in time, Mr. Heimbecker had repaid approximately \$3 million of the Unauthorized Overdraft reducing the amount from \$21,649,244.77 to \$18,535,525.40. Mr. Heimbecker informed TD Bank that those funds were generated by the refinancing of a farm property and the sale of some mortgages.
- [32] On October 14, 2022, the interim *Mareva* injunction was granted.

Mr. Heimbecker repays TD

- [33] On October 17, 2022, the Nestig Account received a wire transfer from 144 in the amount of \$16,800,000 and McCarthy received \$1,475,000, in trust, for TD Bank, from Ray Wrubel Law, in trust. These sums were delivered as part of ongoing communications between McCarthy and Mr. Wrubel, on behalf of Mr. Heimbecker, to pay back the Unauthorized Overdraft.
- [34] On October 18, 2022, Vermette J. granted a consent order (the "**Consent Order**") directing repayment of the Unauthorized Overdrafts notwithstanding the *Mareva* injunction. On its face, the Consent Order contained a representation that Mr. Heimbecker, Nestig and TD Bank had consented and that no other party was being affected by the Order.
- [35] On October 21, 2022, TD Bank obtained a further consent order terminating the TD Action on the basis it was moot.

- [36] Following repayment of the Unauthorized Overdraft, TD Bank terminated its banking relationship with Mr. Heimbecker and Nestig.

144 and Jokada's Investment with Nestig

- [37] As noted above, Mr. Fielding met Mr. Heimbecker in 2018 at a horse auction. After Mr. Fielding was introduced to Mr. Heimbecker, they had dinner and got to know one another and over time, began to buy racehorses together. They were eventually partners in many racehorses and developed a friendship. Throughout their dealings in the horse racing industry, Mr. Fielding found Mr. Heimbecker to be trustworthy and reliable. Mr. Heimbecker never had problems with trainers, reliably paid his portion of any expenses incurred in connection with the horses and quickly shared any winnings that he received.
- [38] During his horse industry dealings with Mr. Heimbecker, Mr. Fielding came to understand that Mr. Heimbecker had a successful mortgage business. Over time, Mr. Heimbecker occasionally asked Mr. Fielding whether he wanted to participate in a mortgage project. On one occasion, Mr. Fielding sat down with Mr. Heimbecker to discuss how such a project would work. Mr. Heimbecker explained his approach to mortgage investments to Mr. Fielding. Although Mr. Fielding listened and learned for an hour or more, he declined to get involved with the project, as he did all other times prior to October 2022.
- [39] In early October 2022, Mr. Heimbecker again approached Mr. Fielding about a mortgage project. Although Mr. Fielding thought the project sounded attractive, he was only prepared to invest \$1 million, well short of the approximately \$20 million that Mr. Heimbecker indicated was required for the project, even with Mr. Heimbecker committing to personally invest \$3 million.
- [40] Mr. Fielding then introduced Mr. Magarelli to Mr. Heimbecker. Mr. Fielding told Mr. Magarelli that he knew Mr. Heimbecker to be a good and trustworthy person, and explained their history of successful partnerships in the horse racing industry. Mr. Fielding also explained to Mr. Magarelli that he understood Mr. Heimbecker to be an expert and very successful in the mortgage industry and shared certain features of the mortgage project that Mr. Heimbecker was proposing. Mr. Magarelli trusted Mr. Fielding's judgment. Based on Mr. Fielding's description of Mr. Heimbecker and the investment opportunity, Mr. Magarelli was interested in meeting Mr. Heimbecker and learning more, so Mr. Fielding introduced him to Mr. Heimbecker.
- [41] Mr. Magarelli had limited experience investing in private mortgages, always acting as a lender. He had never before invested in a mortgage fund like that proposed by Mr. Heimbecker. The proposed investment involved advancing funds in exchange for a fee payable within seven to ten business days, calculated at approximately eight percent of the total amount advanced. The interest rate was 12.9%, which was favourable in 2022, and it accrued from the date on which 144 and Jokada advanced the funds.
- [42] 144 and Jokada proceeded from initial discussions to funding within six days. Between October 8 and October 14, 2022, Nestig, Jokada, and 144, through Mr. Heimbecker,

Mr. Fielding and Mr. Magarelli, exchanged a series of emails and participated in telephone and video conferences regarding the terms of the proposed investment and the governing agreement.

- [43] Although Mr. Fielding was included in phone calls and copied on correspondence, neither Mr. Fielding, nor Jokada, were involved in any due diligence for the investment. Jokada placed complete reliance on 144 and its principal, Mr. Magarelli, for all due diligence, and undertook none independently.
- [44] In terms of due diligence regarding Nestig and Mr. Heimbecker, Mr. Magarelli relied on internet searches and Mr. Magarelli's communications with Mr. Fielding including Mr. Fielding's experience and prior dealings with Mr. Heimbecker.
- [45] Mr. Magarelli did not verify whether Mr. Heimbecker was, as he represented, a licensed mortgage administrator. Had he done so, he would have discovered Nestig's mortgage brokerage licence had been suspended. Mr. Magarelli also did not conduct any litigation searches, against Mr. Heimbecker or Nestig. Had he done so, he would have identified the action commenced by TD Bank on October 3, 2022. Both Mr. Magarelli and Mr. Fielding admit that, had they been aware of either of these facts, they would have paused to make further inquiries, reconsidered the investment, and ultimately 144 and Jokada would not have proceeded in investing with Nestig.
- [46] In several emails, Mr. Heimbecker expressly referred to relying on a precedent participation agreement from a prior mortgage investment involving himself and Mr. Fielding (although Mr. Fielding had not in fact previously participated in such a transaction). Mr. Magarelli admitted that he glossed over such statements. Mr. Fielding stated that he must have missed the statements. This is despite Mr. Fielding, on at least one occasion, responding to other inquiries raised by Mr. Heimbecker in the same email chain.
- [47] Three days before advancing its funds, Mr. Magarelli received a list setting out some detailed particulars of the purported mortgage investments (borrowers, subject property, principal, closing date, loan to value, interest rate, term, maturity date, etc.). Mr. Magarelli conducted internet searches on some of the addresses, looked at the street view of some of the homes and used GeoWarehouse to audit some of the properties. However, he did not seek or receive any appraisals of the properties at that time. Mr. Magarelli's evidence is that he was not concerned with further diligence on the properties at that time, as he had modified the "Mortgage Participation and Management Agreement" (the "**Participation Agreement**") with Nestig to provide that the funds would be not released for the specific mortgages without his consent. This provided him a further opportunity to due diligence prior to release of the funds.
- [48] On October 14, 2022, Mr. Magarelli and Mr. Fielding caused 144 and Jokada to enter into the Participation Agreement with Nestig. The Participation Agreement provided that the total mortgage project would be for \$20.8 million, with 144 contributing \$16.8 million (80.8%), Mr. Heimbecker contributing \$3 million (14.4%) and Jokada contributing \$1 million (4.8%), with returns to be distributed on the same percentage basis.

- [49] In entering into the Participation Agreement and advancing the Funds pursuant thereto, neither 144 nor Jokada had any knowledge of the cheque kiting fraud or the resulting overdraft amounts owing by Mr. Heimbecker to TD Bank, nor did they have any knowledge of the *Mareva* injunction that TD Bank had obtained.
- [50] Mr. Magarelli and Mr. Fielding caused 144 and Jokada to advance their respective amounts owing under the Agreement to Nestig. On October 14, 2022, 144 wired \$16.8 million from its account at Royal Bank of Canada (“**RBC**”) to Nestig’s account at TD Bank. The remittance information for the wire transfer described the payment as: “/INV/BRIDGE LOAN AS PER PARTICIPATION AGREEMENT”. The day prior, Jokada had wired \$1 million to the trust account of Mr. Wrubel in anticipation of finalizing the Participation Agreement.
- [51] Under the Participation Agreement, 144 and Jokada’s funds were to be held by Nestig until they were advanced to the underlying borrowers, at which time the resulting loans were to be secured by mortgages also to be held in trust for 144 and Jokada. Based on changes that Mr. Magarelli required to be made to the Participation Agreement, the funds could only be advanced to the underlying borrowers with his consent. If the funds were not advanced, they were to instead be returned to 144 and Jokada.
- [52] There is no dispute that despite the terms of the Participation Agreement, the Funds that 144 and Jokada advanced to Nestig were the funds used to repay the Unauthorized Overdraft amounts in Heimbecker’s personal accounts resulting from his prior cheque kiting fraud.
- [53] 144 and Jokada both received a fee pursuant to the Participation Agreement. Specifically, it is agreed 144 received \$1,393,800.00 and Jokada received \$93,549.00.

Events Following October of 2022

- [54] In early November 2022, Mr. Fielding advised Mr. Magarelli in a telephone call that an acquaintance in the horse racing community told him of a rumoured lawsuit against Mr. Heimbecker and Nestig concerning an investment similar to theirs. The individual who had brought an action against Mr. Heimbecker turned out to be Bradley Grant.
- [55] Upon learning of this rumoured lawsuit, Mr. Magarelli engaged his real estate lawyer, Damir Vrancic. Once asked to do so, Mr. Vrancic was able to locate and provide the court file documents regarding the actions against Mr. Heimbecker and Nestig brought by TD Bank and Bradley Grant respectively.
- [56] Mr. Magarelli and Mr. Fielding confronted Mr. Heimbecker with their knowledge of the TD and Grant lawsuits, however, Mr. Heimbecker initially offered various explanations. Mr. Magarelli and Mr. Fielding attempted to recover their funds from Mr. Heimbecker and work with him to obtain additional security for a number of months. Eventually in early 2023, Mr. Heimbecker admitted the fraud to Mr. Magarelli and Mr. Fielding.

- [57] Mr. Magarelli and Mr. Fielding have attempted various other recovery actions, however, given other creditors of Mr. Heimbecker and Nestig, and a Mareva injunction obtained by Bradley Grant, none of those funds recovered have been applied to reduce amounts owing to 144 or Jokada.

Expert Witnesses

- [58] Expert witness testimony was primarily put forward as evidence of the standard of care required to establish a claim in negligence. However, as explained below, in the circumstances, I find that no duty of care was owed by TD Bank to 144 and Jokada such that the standard of care analysis is not relevant.
- [59] However, the expert testimony is, to some extent, relevant to a determination of whether or not TD Bank had constructive knowledge of the fraud perpetrated by Mr. Heimbecker against 144 and Jokada.

Claude Baksh

- [60] 144 and Jokada put forward Claude Baksh as an expert. Mr. Baksh has experience as a senior compliance, risk management and anti-money laundering executive at Canadian federally regulated financial institutions (“**FRFIs**”). Mr. Baksh has experience with and has advised FRFIs, including Canadian banks, in the areas of fraud, money laundering, regulatory compliance, governance and operational risks, including in respect of the development, implementation and operationalizing of policies and procedures relating to such risks. As such, he is qualified to provide opinion evidence on the standard of reasonable conduct of FRFIs in 2022 and on TD Bank's conduct in 2022 relevant to the present case as a FRFI.
- [61] TD Bank submits that Mr. Baksh, however, has never worked at a Schedule 1 Bank and was unable to comment on specific internal bank practices and therefore his opinion should be given limited weight. I accept that Mr. Baksh's experience with banks is not extensive. He has provided limited consulting services to at least one bank, however there is no question, he has never worked at a bank.
- [62] However, a bank is a FRFI, and Mr. Baksh has experience at a FRFIs. The relevant provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c. 17 (the “**PCMLTA**”), the *Criminal Code* R.S.C., 1985, c.C-46 (the “**Criminal Code**”), Office of Superintendent of Financial Institutions (“**OSFI**”) guidelines and Financial Transactions and Reports Analysis Center of Canada (“**FINTRAC**”) guidelines all apply to FRFIs – including banks.
- [63] Mr. Baksh's opinion was that:
- the facts known to TD Bank would have put a reasonable Canadian bank on inquiry;

- the level of inquiry required was enhanced due diligence;
- if such enhanced due diligence did not demonstrate that there was minimal to no risk in accepting funds in repayment of the Unauthorized Overdraft the bank would then be facilitating a fraud or other criminal scheme; and
- a reasonable Canadian bank would not have accepted those funds.

[64] At trial, Mr. Baksh explained that in his view the TD Bank's then current anti-money laundering entitled The Toronto-Dominion Bank Enterprise AML/ATF Policy effective May 24, 2022 (the "**2022 AML Policy**")¹ and the *PCMLTA* were engaged such that TD Bank was required, including by its own policies to conduct enhanced diligence.

Murray D'Angelo

[65] TD Bank put forward Murray D'Angelo as an expert witness. Mr. D'Angelo has experience in retail banking, commercial banking, and special loans operations at banks in Canada, including experience in the application of a bank's know your customer standards and practices, due diligence standards and practices, and anti-money laundering and terrorist financing standards and practices. As such, he is qualified to provide opinion evidence on the standard of care of a reasonable Canadian bank in 2022, and on TD Bank's conduct in 2022 in the present case as a Schedule I Canadian bank.

[66] Mr. D'Angelo annually reviewed and implemented bank policies during his long career with National Bank of Canada where he was acted in positions such as vice president of personal and commercial banking and vice president of special loans. However, Mr. D'Angelo admitted he was not an expert in anti-money laundering and terrorist financing standards and practices.

[67] Mr. D'Angelo opined that the bank's conduct in accepting repayment of Funds was reasonable given what he described as a holistic approach in evaluating what TD Bank knew at the time. These holistic factors included the amount of money represented by the repayment from Nestig of \$16.8 million was not extraordinary by historical standards of the account; the fact the deposit noted on its face was a "bridge loan" and consistent with representations made by Mr. Heimbecker that he was obtaining a loan; that Mr. Heimbecker was a long-term client in good standing with no historical problems; that Mr. Heimbecker was a well established and a high-profile member of the local community; that Mr. Heimbecker had repaid \$3 million of the overdraft prior to the repayment in issue; that the Nestig bank account was not a trust account; and that the payments were made pursuant to court orders.

¹ It was only during trial that certain bank policies, including 2022 AML Policy were produced by TD Bank. Although relevant policies were to be produced in accordance with an agreed discovery plan, near the beginning of the trial it was raised by 144 and Jokada that various policies, including the 2022 AML Policy, referred to in TD Bank's publicly available Code of Conduct were not in fact produced. The policies were ordered to be, and were, produced by TD Bank shortly following 144 and Jokada's request for same.

- [68] Mr. D'Angelo also focussed on the fact that the Funds could not be recalled or subject to chargebacks (as a dishonoured cheque maybe). Although this may be relevant to TD Bank in ensuring that the Unauthorized Overdraft was repaid, it does not assist in an analysis of whether TD Bank acted reasonably in accepting the funds without having an understanding of where the funds came from.
- [69] According to Mr. D'Angelo, there was no reason to consider the possibility of money laundering in this particular case as in his view: (1) Mr. Heimbecker had no history of money laundering concerns; (2) there was no appearance of potential money laundering as Mr. Heimbecker had a reasonable explanation as to the source of funds; (3) cheque kiting is not considered to be a red flag for money laundering; and (4) the amount of funds involved was not inconsistent with historical volumes processed through the Nestig account. Mr. D'Angelo recognized the mortgage broker suspension may be of concern, but that there may have been many reasons for the suspension.

Issues

- [70] The primary issues to be decided are whether TD Bank is liable to 144 and Jokada for claims of: (i) negligence; (ii) knowing receipt; (iii) conversion; (iv) unjust enrichment; and (v) money had and received.
- [71] In respect of damages the following additional issues are to be decided:
- a. if TD is liable in negligence, the Court must also decide if 144 and Jokada are contributorily negligent such that damages payable by TD are reduced;
 - b. if TD is liable in knowing receipt, unjust enrichment or money had and received, the Court must also decide TD's claim that 144 and Jokada are contributorily at fault reduces the damages payable by TD; and
 - c. is TD liable to 144 and Jokada in punitive damages in the amount of \$1 million?
- [72] As mentioned above, 144 and Jokada advised during closing arguments at trial that they were not pursuing claims of fraudulent conveyance or fraudulent preference. Accordingly, those issues are not addressed by the Court.

Analysis

Negligence

- [73] In order to establish liability on the basis of negligence, 144 and Jokada must establish both that TD Bank: (i) owed them a duty of care; and (ii) breached the applicable standard of care: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] S.C.R. 114, at para. 3.

Duty of Care

- [74] The requirements for a duty of care in pure economic loss differ depending on what activities the defendant has undertaken. In the specific context of this case – a claim against a bank for harm caused to a plaintiff by a customer of the bank – the parties agree that TD Bank will be found to have owed 144 and Jokada a duty of care for purposes of a claim in negligence if TD Bank had actual knowledge of the fraud: see *1169822 Ontario Limited v. The Toronto-Dominion Bank*, 2018 ONSC 1631 [*Sequest*], at para. 215. Such a duty of care, however, is not made out if TD Bank only had constructive knowledge of the fraud: see *Sequest*, at para. 217.
- [75] There is no allegation that TD Bank had subjective actual knowledge of the fraud. Rather, 144 and Jokada argue that TD Bank was willfully blind or reckless and therefore should be found to have actual knowledge.
- [76] The different levels of knowledge were summarized by Dunphy J. in *Sequest* as follows:

[132] It has long been held that actual knowledge of fraud also extends to parties who are wilfully blind of the fraud or who are reckless as to its existence. They are each equivalent to each other in terms of the consequences that flow from having such knowledge and failing to act upon it.

[133] Both wilful blindness and recklessness are comparatively high standards of knowledge because they involve a level of knowledge that is considered to be morally equivalent to actual knowledge. They require a consideration of both the degree of actual knowledge and of the culpable attitude or mental state of the person whose knowledge is in question.

[134] They are concepts that are defined in part by contrast to what they are not. While a failure to inquire after being put on notice can be a component of wilful blindness or of recklessness, it can also be a component of constructive knowledge, the latter concept entailing a significantly lower level of knowledge and culpability.

[135] Wilful blindness or recklessness requires proof of culpable conduct that goes beyond “mere” negligence or laziness underlying a failure to inquire. It requires a combination of knowledge and conduct of a level that that can fairly be equated to actual knowledge. The additional element I have described as “culpability” was described by Iacobucci J. in *Air Canada* as being “want of probity”. He described this as the element that differentiates wilful blindness or recklessness (either of which will bind the stranger’s conscience) from constructive knowledge (which normally will not): *Air Canada* at para. 41.

[136] Wilful blindness arises where a party is aware of the need for inquiry but declines to undertake it “because he does not wish to know the truth”; where “it can almost be said that the defendant actually knew”; where it can be said that the person suspected the fact and realized its probability but refrained from obtaining confirmation deliberately: *R. v. Sansregret*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570 at para. 22. It is to be distinguished from mere negligence in failing to obtain

information. The required level of knowledge extends beyond knowledge of some risk of fraud to knowledge of the “clear probability” of it: *Big X Holdings Inc. v. Royal Bank of Canada*, 2015 NSCS 184 at para. 89. In *Bullock v. Key Property Management Inc.*, 1997 CanLII 3440 (ON CA) the Court of Appeal found that wilful blindness is premised on the existence of an *actual suspicion* that certain facts exist and not on the failure to take steps to inform oneself of those facts.

[137] Each of these definitions of wilful blindness intentionally sets this standard apart from mere negligence and thus attaches to a much narrower, more exceptional and thus more culpable range of conduct. In *Bullock*, it was not sufficient that the bank should have been on inquiry regarding its customer. The court found that “a stranger to a trust will be wilfully blind and hence liable as a constructive trustee where that stranger suspects that a trust exists and that the trustee is acting dishonestly towards that trust” and, armed with that suspicion “declines to make the inquiries necessary to confirm that suspicion” (*Bullock* at para. 9).

[138] Recklessness also requires more than mere negligence or inadvertence but entails (i) acting in such a way to create obvious or serious risk; and (ii) doing so either without thought to the risk or recognizing the risk but deciding to take it: *Machias v. Mr. Submarine Ltd.* 2002 CanLII 49643 (ON SC) at para. 146. [Emphasis Added]

[77] In this regard, the state of TD Bank’s knowledge when it received repayment of the Unauthorized Overdraft is what is key. As noted in *McDonald and Dickson v. TD Bank*, 2021 ONSC 3872, at para. 98, it is important not to look at the facts through the lens of hindsight.

[78] At the time of repayment, on October 14-18, 2026, the evidence is that:

- a. Despite the longstanding nature of Mr. Heimbecker as a TD Bank customer, Mr. Dye had sworn an affidavit that Mr. Heimbecker, and others, had orchestrated a complex cheque kiting fraud resulting in the Unauthorized Overdraft;
- b. Mr. Heimbecker had repaid \$3 million of the Unauthorized Overdraft to TD Bank, which was unusual from TD Bank’s perspective for customers who had engaged in cheque-kiting;
- c. Mr. Heimbecker had made numerous untrue statements regarding repayment of the remainder of the Unauthorized Overdraft;
- d. TD Bank understood Nestig to be part of Mr. Heimbecker's mortgage broker business, but had learned that Nestig’s licence has been suspended. Accordingly, TD Bank understood that Nestig could not legitimately act as a mortgage broker;
- e. TD Bank was aware that Mr. Heimbecker’s risk status had changed in this time period. This change was required given the number of ‘red flags’ including the significant cheque kiting fraud, the multiple misrepresentations regarding repayment, and the loss of Nestig’s mortgage broker license that TD Bank had

learned of, despite Mr. Heimbecker's historical long-term relationship with TD Bank and his reputation in the community. ,;

- f. TD Bank was aware that based on their internal 2022 AML Policy that the 'red flags' surrounding Mr. Heimbecker required that TD Bank engage in enhanced diligence in respect of Mr. Heimbecker's conduct. This was because, as Mr. Dye testified, among other things, he was aware there was an ongoing risk that Nestig could be used improperly by Mr. Heimbecker including to misapply funds that came into his possession;
- g. TD Bank understood that enhanced due diligence required "asking more questions", "gathering more information", "getting documentary evidence that goes to the point being investigated" going both to the customer and any particular transaction, getting information from third parties including "information relevant to evaluating the propriety of a particular transaction", and "verifying that information is accurate";
- h. TD Bank knew of the need for inquiries regarding the source of funds that Mr. Heimbecker was proposing to use to repay the overdraft amounts in his personal accounts. Multiple inquiries were in fact made;
- i. TD Bank initially sought to undertake some due diligence in response to Mr. Heimbecker's overdraft and requested repayment. When Mr. Dye and Ms. Hergott engaged with Mr. Heimbecker, they insisted on receiving information from Mr. Heimbecker, including about the source of funds that Mr. Heimbecker was proposing to use to repay the overdraft. This included email correspondence from TD Bank on September 26, 2022 and September 29, 2022;
- j. Mr. Dye confirmed that his emails were intended to demand from Mr. Heimbecker how Mr. Heimbecker intended to repay the Unauthorized Overdraft, including "when and how and what the source of funds was going to be", and that TD Bank required "specific detail" about all such information, and similarly specific details about the cheque transactions that TD Bank later concluded constituted the cheque kiting fraud;
- k. By October 3, 2022, having received no response, Mr. Dye followed up with a further email to Mr. Heimbecker, stating: "Please take a look at my previous email, and get in touch with the nature of the transactions that resulted in your accounts becoming overdrawn, and please give us an indication of when and how you plan on covering this overdraft";
- l. In an email sent by McCarthy to Mr. Wrubel on October 6, 2022, McCarthy wrote demanding full transparency; and
- m. Despite knowing of the need for enhanced due diligence, and requesting the relevant information multiple times, TD Bank applied the Funds in repayment of

the Unauthorized Overdraft without having received the due diligence previously requested in respect of the Funds.

- [79] As well, the degree of risk resulting from Mr. Heimbecker's and Nestig's conduct was such that TD Bank concluded that it needed to close Mr. Heimbecker and Nestig's accounts at TD Bank. Mr. McNally, who was personally involved in the decision to close the accounts, testified that Mr. Heimbecker was not someone TD Bank wished to continue to do business with because, among other things, TD Bank was concerned it could not rely on his word going forward. TD Bank knew of all the reasons it concluded required TD Bank to close Mr. Heimbecker's and Nestig's accounts at the time that it accepted the Funds in repayment of the Unauthorized Overdraft amounts..
- [80] Having considered the record before me, I am not satisfied that the culpability element of willful blindness or recklessness is satisfied so as to find that TD Bank had actual knowledge of the fraud perpetrated by Mr. Heimbecker on 144 and Jokada. As noted in *Sequest*, at para. 136, for a finding of actual knowledge, by way of willful blindness or reckless, the evidence must show that TD Bank had knowledge that extended beyond some risk of fraud to a knowledge of the 'clear probability' of it. I am not persuaded that TD Bank did in fact have such knowledge. I accept that TD Bank was aware of a risk of fraud given the 'red flags' exhibited by Mr. Heimbecker's conduct, however, I am not persuaded that TD Bank had knowledge of a clear probability of fraud so as to satisfy the culpability required for a finding of actual knowledge through either willful blindness or recklessness. Mr. Heimbecker had repaid \$3 million of the Unauthorized Overdraft through legitimate means, although there were numerous red flags, this prior repayment is significant in demonstrating that there was not a 'clear probability of fraud' in Mr. Heimbecker's repayments.
- [81] Accordingly, I find that the high standard of actual knowledge by TD Bank of the fraud perpetrated by Mr. Heimbecker on 144 and Jokada was not met. In this circumstance, and as agreed by the parties, absent a finding of actual knowledge, I find no duty of care by TD Bank to 144 and Jokada existed in the circumstances.

Standard of Care

- [82] Given my factual finding that TD Bank did not have actual knowledge of the fraudulent conduct of Mr. Heimbecker and Nestig, and therefore TD Bank did not owe a duty of care to 144 and Jokada there is no need to consider if TD Bank breached the applicable standard of care in the circumstances.
- [83] The claim in negligence by 144 and Jokada as against TD Bank is dismissed.

Knowing Receipt

- [84] A claim for knowing receipt has two elements: (i) that the defendant has received trust property; and (ii) that the defendant has the requisite level of knowledge: see in *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 [*Citadel*], at para. 24.

- [85] The first element requires that a stranger to a trust receives or applies trust property for their own use or benefit: see *Citadel*, at para. 25. TD Bank, in closing submissions, acknowledged the Funds were trust property as the evidence demonstrated that the Funds met the requirements of a *Quistclose* trust as set out in *Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781, 2 C.B.R. (6th) 45, at paras. 14-16.
- [86] The first element also requires that TD Bank has received the trust property. In this case, there is no dispute that the Funds were applied by TD Bank to eliminate the Unauthorized Overdraft and this requirement is satisfied: see *Citadel*, at para. 25. Accordingly, the first element is satisfied.
- [87] The second element requires that TD Bank is found to have constructive knowledge of the fraud (as opposed to actual knowledge): see *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Garcia*, 2020 ONCA 412, 151 O.R. (3d) 529, [*Caja Paraguaya*], at para. 57.
- [88] The Supreme Court of Canada, in *Citadel* described actual as opposed to constructive knowledge this way:

48 Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In “knowing assistance” cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in “knowing assistance” cases; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 811-13. However, in “knowing receipt” cases, which are concerned with the receipt of trust property for one’s own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff’s expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold*, *supra*, where he finds, at para. 46, that a stranger in receipt of trust property “need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice”.

49 This lower threshold of knowledge is sufficient to establish the “unjust” or “unjustified” nature of the recipient’s enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in *Lac Minerals*, *supra*, at p. 670, “[t]he determination that the enrichment is ‘unjust’ does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief”. In “knowing receipt” cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication

of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.
[Emphasis added.]

- [89] As noted in *A & A Jewellers Limited v. Royal Bank of Canada*, 2001 53 O.R. (3d) 97 (Ont. C.A.) [**A&A Jewellers**]:

[43] In cases such as this, where the Bank is under a duty to make inquiries of its customer regarding a possible breach of trust, the Bank will be found to be in constructive knowledge of the breach of trust if it "fails to make the appropriate inquiries". (See *Citadel General Assurance Co.*, supra at p. 839.) Whether the inquiries are appropriate or not will depend on the particular facts and circumstances of the case. No bright line test can be fashioned. What can be said is that the Bank is not required to engage in an impractically extensive inquiry, nor is it to be held to a standard of perfection. All that is required of the Bank is that it act reasonably in the circumstances. (See *Gold v. Rosenberg*, 1997 CanLII 333 (SCC), [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 385 per Sopinka J. for the majority at p. 802.)

[44] Although it is impossible to specify the types of inquiry that might be encompassed by the words "reasonable", at a minimum, they surely must include steps and measures that are part of the Bank's obligation under the terms of the agreement governing the account, not to mention the Bank's policy. In other words, in assessing whether the inquiries made by a Bank in a particular case are reasonable, it is proper to measure them against the terms and conditions of the agreement with the customer, as well as the Bank's policy. If the steps or measures taken do not accord with either, then absent a valid explanation, I fail to see how the inquiries can pass the "reasonableness" test.
[Emphasis added.]

- [90] As noted above, the evidence was that TD Bank knew, based on multiple 'red flags' raised by Mr. Heimbecker's conduct, that enhanced diligence was required based on TD Bank's own 2022 AML Policy in effect at the time.
- [91] The 2022 AML Policy provided that TD Bank business lines have in place customer due diligence controls and procedures. Among other things, those procedures were to be reasonable and encompass appropriate risk-based measures to perform customer due diligence proportional to the level of money laundering risk posed by the customers. Customer due diligence could be standard or enhanced with enhanced due diligence required for customers identified as representing a higher risk of money laundering. Enhanced due diligence in accordance with the 2022 AML Policy included establishing processes for conducting commensurate risk-based diligence such as risk-based enquiries, information gathering, record keeping and analysis and for performing enhanced ongoing monitoring of the relationship. The 2022 AML Policy also provided closing accounts of a customer based on risk as well as the filing of suspicious activity or transaction reports.
- [92] The provisions of the 2022 AML Policy are consistent with the multiple inquiries made by TD Bank and McCarthy of Mr. Heimbecker and his counsel regarding the source of repayment of the Unauthorized Overdraft. TD Bank and McCarthy received no answer to

these inquiries and did not verify the subject of these inquiries with respect to the Funds. Mr. Dye also testified that an unusual transaction report was filed in accordance with the applicable anti-money laundering policy when cheque kiting was suspected. He further testified that his understanding was that once cheque kiting was confirmed it would rise to the level of suspicious transaction as contemplated by the applicable policy.

- [93] TD Bank relies on the evidence of Mr. Wrubel at trial that Mr. Wrubel did not suspect Mr. Heimbecker of fraud to argue that if Mr. Heimbecker's own counsel did not suspect him of fraud – how was TD Bank to? I am not persuaded by this argument given evidence referred to in paragraph 78 above, including, the contents of the Dye Affidavit, which clearly stated that TD Bank believed at that time that Mr. Heimbecker had in fact committed a complex cheque kiting fraud that resulted in Unauthorized Overdraft. Further, Mr. Wrubel also testified that on October 14, 2022, he insisted Mr. Heimbecker sign an "Acknowledgment" that stated: "I confirm to Mr. Wrubel that I have not undertaken any fraudulent or otherwise illegal actions in order to obtain any third-party financing that will allow me to pay the settlement funds to TD Bank." Mr. Wrubel testified that he had not previously required a client to execute such an Acknowledgement, but did so because of the allegations made in the TD Action and because Mr. Heimbecker had not answered the outstanding inquiries regarding the source of funds and particulars of transactions that gave rise to the Unauthorized Overdraft.
- [94] With respect to the expert witness testimony, I accept the evidence of Mr. Baksh that enhanced diligence was required, including as a result of the 2022 AML Policy. This is also consistent with the TD Bank witnesses understanding and the inquiries made by TD Bank at the time.
- [95] I do not accept Mr. D'Angelo's view that the 2022 AML Policy or the PCMLTFA was not relevant. Based on his own admission, this is not a subject that Mr. D'Angelo is an expert in and it was clear during testimony that he was not familiar with relevant *Criminal Code* and *PCMLTFA* definitions that underpin money laundering offences. It was accepted by counsel to TD Bank during argument that Mr. Heimbecker's cheque kiting scheme itself was in fact a money laundering offence for the purposes of the PCMLTFA.
- [96] Once enhanced diligence was required, including under the 2022 AML Policy, it was not appropriate to treat repayment of the Unauthorized Overdraft as a separate and distinct transaction as urged by TD Bank. Rather, once Mr. Heimbecker was subject to enhanced diligence because of the 'red flags', enhanced diligence was required in respect of the customer – not just one transaction.
- [97] Accordingly, I find that TD Bank had constructive knowledge of the breach of trust perpetrated by Mr. Heimbecker on 144 and Jokada as it failed to make and receive answers for the reasonable inquiries based on the circumstances known to TD Bank.
- [98] Accordingly, the elements of knowing receipt have been established, and I find TD Bank liable to 144 and Jokada under this claim.

Conversion

- [99] The parties agree that the starting point of the tort of conversion is set out by the Supreme Court of Canada in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, [**Boma**] at para. 31, “[t]he tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence.” The ‘goods’ at issue in *Boma* were cheques.
- [100] Whether the tort is limited to chattel or is also available in respect of deposits in a bank account - which are intangibles - is the only issue in dispute between the parties with respect to whether the test for conversion has been met. If the tort of conversion is found to apply to funds in a bank account, TD Bank does not dispute that the other elements of the tort of conversion have been established.
- [101] 144 and *Jokada* refer to a number of recent cases in Ontario that have dealt with whether the tort of conversion applied in circumstances where the property in dispute was funds in a bank account. For example, in *Corridor Transport Inc. v. Vittorio Junior Lentini*, 2024 ONCA 773, [**Corridor**] at para. 37, the Ontario Court of Appeal analyzed a claim for conversion in respect of funds in a bank account. The Court of Appeal in *Corridor*, dismissed that the appellant’s claim in conversion noting that the appellants had not established a possessory interest in the funds. Although, the Court of Appeal did no analysis as to whether funds in a bank account could be subject to the tort of conversion, the analysis appeared to presume the tort applied to the funds.
- [102] More directly on point, at para. 24 of *BMO v. 2761387 Ontario Inc. et al.*, 2024 ONSC 6281, the Court wrote:
- The references in the classic definitions to “goods” or “chattels” include funds or money: *Wymor Construction Inc. v Gray*, 2012 ONSC 5022 (CanLII) at para. 10; *Pang v Zhang*, 2021 BCSC 591 (CanLII) at para. 42; *Reliable Mortgage Investment Corp. v Chan*, 2016 BCSC 405 at paras. 106-112; *Columere Park Development Ltd. v Enviro Custom Homes Inc.*, 2010 BCSC 1248 (CanLII) at para. 30.” [Emphasis added].
- [103] Also see *Two-Tyme Recycling Inc. v. Woods*, 2010 ONSC 5672, at para. 12 and footnote 4, where Hoy J. (as she then was) found the tort of conversion applied in respect of transfers of funds in a bank account.
- [104] In *Reliable Mortgages Investment Corp. v. Chan*, 2016 BCSC 405, [**Reliable**], the British Columbia Supreme Court addressed, and rejected, the argument that the reference to ‘goods’ in *Boma* by the Supreme Court of Canada was inconsistent with applying the tort of conversion to funds in a bank account. The argument before the Court in *Reliable*, as expressed at para. 111, was that funds in a bank account are not chattels, they are not pieces of paper in respect of which the payment is made, and therefore a claim for conversion must fail. The Court in *Reliable* referred to a number of earlier cases from British

Columbia including *Ast v. Mikolas*, 2010 BCSC 127, 54 E.T.R. (3d) 12, and *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248, 94 C.L.R. (3d) 85, [**Columere Park**] that both had held that funds or money can be the subject of a conversion claim. *Columere Park* refers itself to a line of cases, going back to *Royal Canadian Legion, Branch No. 15 v. Burkitt*, 2005 BCSC 1752 [**Royal Canadian Legion**] that apply the tort of conversion to funds. *Royal Canadian Legion*, at paras. 97-104 again references additional cases from British Columbia including *Pezzotti v. Zuliani*, [1999] B.C.J. No. 605 (S.C) and *Kuhn v. Union Securities Ltd.*, 2002 BCSC 979, aff'd 2003 BCCA 683, which found that transfers of funds could properly be subject to the tort of conversion. In para. 112, the Court in *Reliable* concluded: "In my opinion, it would be unreasonable to treat the cheque as a chattel that can be the subject of a claim for conversion, but if the cheque is cashed and converted into money (which is what happened here), the money is not a chattel and there can be no claim for conversion in respect of it."

- [105] TD Bank, however, relies on a recent decision in *RIP Beverages Co. Ltd. v Dave Dunn Enterprises Ltd.*, 2026 SKCA 9 [**RIP Beverages**], which notes that whether the tort of conversion is available when funds in a bank account are misappropriated has not been decided by that Court. The issue was not raised by the parties, but rather the Saskatchewan Court of Appeal wrote:

[51] In stating this conclusion, I put to the side a question not addressed by either party in their submissions; that being whether intangible money in an account (i.e., money in a non-cash form) can be converted. The issue arises because, in its traditional formulation, the "tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession" (*Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 at para 31, [1996] 3 SCR 727 (SCC) [*Boma Manufacturing*], emphasis added).

[52] There is no doubt that the wrongful taking of cash, monies represented by a cheque, and other intangibles such as shares represented by a certificate, can found a claim for conversion (*Boma Manufacturing* at paras 30-31). The authors of *Fridman's The Law of Torts in Canada*, 4th ed (Carswell, 2020) at pp 156-157, write that "[w]hether intangibles that have not been given physical form — in the way that the intangible of a debt (chose in action) is given physical form in a paper cheque — is a live issue in Canada". A line of cases represented by *Reliable Mortgages Investment Corp. v Chan*, 2016 BCSC 405 at para 112, hold that "funds are chattels that can be the subject of a claim for conversion". Yet, I am unaware of this issue coming before an appellate court in this country, and the majority in *OBG Ltd. v Allen* (2007), [2008] 1 AC 1 at 42-45, 92 and 97 (UKHL), expressed the view that conversion is preserved for the wrongful taking or other interference with tangibles.

- [106] TD Bank further argues that none of the case law in Ontario, or the more established case law in British Columbia that applies to the tort of conversion to funds on deposit has addressed the reasoning by the UK House of Lords in *OBG Ltd. v Allan* (2007), [2008] 1

AC 1 [**OBG**] and therefore is questionable. This argument has also been made by Professor Bradley Crawford in his text *Law of Banking and Payment in Canada* s. 10:124 (Toronto: Thomson Reuters Canada, 2020) Online: Westlaw Canada. [**Law of Banking and Payment**].

- [107] I do not agree. The issue before the UK House of Lords in *OBG* was whether a chose in action could be subject to conversion. As the House of Lords reasoned at para. 321 of *OBG*, there is an important distinction between the wrongful taking of a document with a determinable value (such as a cheque) and the wrongful assertion of a right to a chose in action that may not have a readily determinable value (as was the case in *OBG*). Such a concern does not exist when addressing funds in a bank account – there is no issue as to the value of the funds. Further, in *OBG* the UK House of Lords was addressing expanding the tort of conversion to intangibles generally and indicated that to do so would have far reaching consequences that could not be assessed by a court. The issue before this Court is much narrower and addresses only the applicability of the tort of conversion to funds on deposit. This is not a drastic reshaping of the law – there are already multiple cases in Ontario and numerous cases in other provinces including British Columbia, which date back over 20 years, which have done so. TD Bank did not put forward any evidence or argument that such existing case law has led to disruptions to the stability of the payment system as posited by Professor Crawford: see Crawford, Bradley et al., *Law of Banking and Payment* at s. 10:124.
- [108] I agree with the reasoning of the British Columbia Supreme Court in *Reliable* that it is appropriate to extend the tort of conversion to funds on deposit in a bank account.
- [109] Accordingly, as there is no dispute regarding the remaining elements of the tort of conversion, I find TD Bank liable to 144 and Jokada in conversion.

Unjust Enrichment

- [110] Historically, restitutionary recovery was available based on traditionally recognized categories, including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request: see *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303 [**Moore v. Sweet**], at para. 36. The principled approach noted below now co-exists with the traditionally recognized categories of restitutionary recovery: see *Moore v. Sweet*, at para. 37. Those traditional categories include the claims of knowing receipt and money had and received that are also advanced by 144 and Jokada.
- [111] The elements of the principled approach to unjust enrichment are well-established: (i) an enrichment by the defendant, (ii) a corresponding deprivation of the plaintiffs and (iii) an absence of juristic reason for the enrichment: see *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30.
- [112] The first two elements are closely related. As stated in *Moore v. Sweet*, at para. 41 “[t]o establish that the defendant was enriched and the plaintiff correspondingly deprived, it

must be shown that something of value – a ‘tangible benefit’ – passed from the latter to the former.”

- [113] Here, 144 and Jokada were deprived of the Funds as they were held in trust for them. TD Bank was enriched by receipt of the Funds. There is no dispute that TD Bank used the Funds to repay the Unauthorized Overdraft.
- [114] TD Bank argues that it has not become richer because before the payment, TD Bank had an asset (in the form of a debt owing by Mr. Heimbecker) and following the payment that asset (the debt) was simply replaced with another asset (the cash). I do not accept that the two assets were the same. The debt may have been in an amount equal to the Funds, but that does not mean that they had the same actual value. If TD Bank truly believed the two assets had the same value, they would not have been pursuing repayment of the Unauthorized Overdraft.
- [115] Accordingly, I find that there was a deprivation of 144 and Jokada and a corresponding enrichment of TD Bank in the amount of the Funds.
- [116] As for the third element, TD Bank argues that there was a juristic reason for the enrichment – the repayment of a valid debt owing by Mr. Heimbecker to TD Bank. The concern I have with TD Bank’s argument in this regard is that the juristic reason for the enrichment needs to consider the relationship between 144 and Jokada and TD Bank – not between TD Bank and Mr. Heimbecker.
- [117] As stated in *Moore v. Sweet*, at para. 55:

The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant’s retention of the benefit conferred on him or her at the plaintiff’s expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant’s enrichment and the plaintiff’s corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff’s expense, and the plaintiff’s claim will fail accordingly.” [Emphasis added].

- [118] As *Moore v. Sweet* notes at paras. 57-59, the juristic analysis proceeds in two stages. First is there an established category of reason (i.e. contract, disposition of law, donative intent, other valid common law, equitable or statutory obligation) to justify the defendant’s retention of the benefit at the plaintiff’s expense. Second, if none of the established categories apply, is there some residual reason to deny recovery considering the parties’ reasonable expectations and public policy.
- [119] Here, TD Bank relies on the first branch of the analysis, an established category of valid common law or contractual obligation, to justify repayment by Mr. Heimbecker of a valid debt to TD Bank. As noted above, however, I disagree with this analysis. The question is not whether TD Bank has a juristic reason *vis a vis* Mr. Heimbecker – but rather whether TD Bank has a juristic reason *vis a vis* 144 and Jokada. There is no contract, common law, equitable or other category of juristic reason as between TD Bank and 144 or Jokada. Nor

do I find it is within the reasonable expectations of the parties that property of 144 and Jokadawas used to repay a debt of Mr. Heimbecker in the circumstances.

- [120] Accordingly, I am satisfied that 144 and Jokada have established the elements of unjust enrichment and find TD Bank liable to them in this respect.

Money had and Received

- [121] Given my findings above that TD Bank is liable to 144 and Jokada in knowing receipt, conversion and unjust enrichment, it is not necessary to also determine if TD Bank is liable for the tort of money had and received.

Contributory Negligence and Fault

- [122] If I were to have found TD Bank liable in negligence, TD Bank alleges that an appropriate allocation of fault to 144 and Jokada would be 50%. TD Bank submits that if TD Bank (and Mr. Wrubel) missed something about Mr. Heimbecker that should have been detected, then so did Mr. Magarelli and Mr. Fielding.
- [123] In TD Bank's Fresh as Amended Statement of Defence at paras. 33 and 34, TD Bank pleads that 144 and Jokada were contributorily negligent in advancing the Funds as on October 14, 2022: (a) the fact that on July 5, 2022 Nestig's licence as a mortgage broker had been suspended by FSRA was publicly available information; (b) the statement of claim that TD Bank had issued against Mr. Heimbecker and 144 on October 3, 2022, which contained detailed particulars of the fraudulent cheque kiting scheme, was publicly available information; and (c) the *Mareva* injunction issued by Justice Vermette on October 14, 2022 was publicly available information.
- [124] From a timing perspective, there was no evidence that the *Mareva* injunction was publicly available at the time the Funds were advanced. Both Mr. Magarelli and Mr. Fielding admit that they could have found the information regarding Nestig's mortgage broker licence and the TD Action if searches had been done. Further they admit that those searches were not in fact done and if the information had been known they would likely not have advanced the Funds.
- [125] Although in its answers to undertakings, TD Bank confirmed to 144 and Jokada that if further grounds for contributory negligence were being relied upon, TD Bank would so advise, no further grounds were raised prior to trial. At the conclusion of the trial TD Bank took the position that the broader conduct of 144 and Jokada is relevant - including the limited diligence, the fact that both Mr. Fielding and Mr. Magarelli missed a 'red flag' in that Mr. Heimbecker referred in emails to previous investments by Mr. Fielding (which did not exist) and the rushed timeline of the investment. Based on my analysis below, I find that even considering the broader conduct of 144 and Jokada, no reduction in damages should occur based on contributory negligence. Accordingly, I do not need to decide if TD Bank is limited to the claims set out in para. 34 of its pleading.

- [126] A finding of contributory negligence requires a finding that the harm was foreseeable by 144 and Jokada. Specifically, in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 76, the Supreme Court of Canada accepted the test for contributory negligence as summarized by the following statement of Denning L.J. in *Jones v. Livox Quarries*, [1952] 2 Q.B. 608 (Eng. C.A.), at p. 615:

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless

- [127] I am not persuaded that Mr. Heimbecker fraudulently using the Funds was reasonably foreseeable by 144 and Jokada. It has long been held that a lack of due diligence is not a defence to an action for fraud: see *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 69.
- [128] Mr. Fielding had known Mr. Heimbecker since 2018 as part of the horse racing community. Mr. Fielding had owned horses with Mr. Heimbecker who had consistently paid his share of expenses and distributed winnings appropriately. All parties accept that Mr. Heimbecker's reputation was highly regarded as a businessman and member of the community.
- [129] TD Bank itself did not suspect Mr. Heimbecker of any questionable dealing until they discovered the cheque kiting scheme. It was only when TD Bank discovered the Unauthorized Overdraft that it conducted the search necessary to reveal the suspension of the mortgage broker license.
- [130] I recognize that the time between when the investment opportunity arose and the advancement of funds was relatively short. However, Mr. Magarelli's evidence, which I accept, is that he ensured the Participation Agreement had been amended so that funds could not be released to specific mortgage investments without his consent. Accordingly, he believed at the time the Funds were advanced that he had the opportunity to perform additional diligence prior to the release of funds by Nestig to borrowers.
- [131] Accordingly, on the facts, I do not find that had TD Bank been liable in negligence that the damages should have been reduced based on a claim of contributory negligence against the 144 and Jokada.

Contributory Fault

- [132] TD Bank also argues that damages should be reduced for the claims of knowing receipt and unjust enrichment to account for the alleged contributory fault of 144 and Jokada.

- [133] As noted above, I have found as a fact that there was no contributory negligence and this finding would apply equally to claims of contributory fault should those claims properly exist.
- [134] Even assuming contributory fault was properly pled in TD Bank's statement of defence, which 144 and Jokada dispute, as a matter of law, I am not persuaded that the concept of contributory fault applies to the torts of knowing receipt and unjust enrichment.
- [135] To support its argument, TD Bank relies the reasoning in *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP*, 2024 ONCA 925, leave to appeal granted 2025 S.C.C.A No. No. 41673, but appeal discontinued on October 28, 2025 [Arcamm]. In that case, the Ontario Court of Appeal held that contributory fault could reduce damages in a breach of contract case.
- [136] I am not persuaded that the reasoning in the *Arcamm* is applicable to the restitutionary torts at issue here – knowing receipt and unjust enrichment. As previously held by this Court, a concept similar to contributory negligence does not apply in respect of those torts: see *Her Majesty the Queen in Right of Ontario v. Madan et al.*, 2022 ONSC 1538, at para. 35, aff'd *Ontario v. Madan*, 2023 ONCA 18, 165 O.R. (3d) 510; *Chase Paymentech Solutions v. 1191540 Alberta Inc.*, 2013 ONSC 4833, at para. 40; and *Pardhan v. Bank of Montreal*, 2012 ONSC 2229, 26 C.P.C. (7th) 99, at para. 300.

Punitive Damages

- [137] 144 and Jokada also assert a claim for punitive damages in the amount of \$1 million. No independent actionable wrong is specifically alleged, nor am I persuaded that one exists such as to satisfy the very high standard required for punitive damages: see *McCabe v. The Roman Catholic Episcopal Corporation for the Diocese of Toronto*, 2019 ONCA 213, 146 O.R. (3d) 607, at para. 64. Accordingly, the claim for punitive damages is dismissed.

Disposition

- [138] For the reasons set out above, TD Bank is liable to 144 and Jokada in knowing receipt, conversion and unjust enrichment. The parties agree that the proper measure of damages is the amount invested by each of the plaintiffs, less the fees received by them in 2022. Accordingly, TD Bank is liable to pay \$15,406,200 to 144 and \$906,451 to Jokada, plus pre-judgment interest on both amounts.
- [139] If the parties are not able to resolve costs of this matter, 144 and Jokada may email a costs submission of no more than four double-spaced pages to the Commercial List office within 15 days of the date of this decision. TD Bank may deliver responding submissions of no

more than four double-spaced pages within 15 days following the delivery of 144 and Jokada's submissions. No reply submissions are to be delivered without leave.

Date: July 3, 2026

The Honourable Justice J. Dietrich