COURT OF APPEAL FOR ONTARIO

CITATION: Das v. George Weston Limited, 2018 ONCA 1053
DATE: 20181220
DOCKET: C64146 & C64679 (M48391)

Doherty and Feldman JJ.A. and Gray J. (*ad hoc*)

BETWEEN

Arati Rani Das, Rehana Khatun, Mohamed Alauddin and Kashem Ali

Plaintiffs (Appellants)

and

George Weston Limited, Loblaws Companies Limited, Loblaws Inc., Joe Fresh Apparel Canada Inc., Bureau Veritas – Registre International de Classification de Navires et D'Aeronefs SA, Bureau Veritas Consumer Products Services, Inc., and Bureau Veritas Consumer Products Services (BD) Ltd

Defendants (Respondents)

Joel P. Rochon, Peter R. Jervis and Golnaz Nayerahmadi, for the appellants

Christopher D. Bredt, Markus F. Kremer and Alannah Fotheringham, for the respondents George Weston Limited, Loblaws Companies Limited, Loblaws Inc. and Joe Fresh Apparel Canada Inc.

Michael A. Eizenga, Ranjan K. Agarwal and Gannon G. Beaulne, for the respondents Bureau Veritas – Registre International de Classification de Navires et D'Aeronefs SA, Bureau Veritas Consumer Products Services, Inc. and Bureau Veritas Consumer Products Services (BD) Ltd

Paul J. Pape and Shantona Chaudhury, for the Law Foundation of Ontario

Heard: April 24 and 25, 2018

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated July 5, 2017, with reasons reported at 2017 ONSC 4129, and from the costs order, dated September 20, 2017, with reasons reported at 2017 ONSC 5583.

Feldman J.A.:

A. OVERVIEW

[1] When the Rana Plaza building in Savar, Bangladesh collapsed on April 24, 2013 due to significant structural flaws, killing and injuring thousands, the world was shocked and horrified. Most of the dead and injured were factory workers making garments for international export. Many of those workers were making garments for Joe Fresh Apparel Canada Inc., a well-known brand owned and controlled by Loblaws Companies Limited, a large Canadian company.

[2] The appellants commenced a class action in Ontario against Loblaws[1] and Bureau Veritas,[2] a company Loblaws had contracted to conduct a limited audit of the premises where the garments were manufactured. The appellants sought to hold the two companies responsible for the damages suffered by everyone who was killed or injured in the collapse by applying the class actions law of Ontario.

[3] After the appellants moved for certification, Loblaws and Bureau Veritas brought motions under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the action on the basis that it is plain and obvious that it cannot succeed. They submitted that the action is governed by the law of Bangladesh

[1] In these reasons, George Weston Limited, Loblaws Companies Limited, Loblaws Inc., and Joe Fresh Apparel Canada Inc. are referred to collectively as “Loblaws”.

[2] In these reasons, Bureau Veritas – Registre International de Classification de Navires et D’Aeronefs SA, Bureau Veritas Consumer Products Services, Inc., and Bureau Veritas Consumer Products Services (BD) Ltd are referred to collectively as “Bureau Veritas” and, together with Loblaws, are referred to as the respondents.

and that it must therefore fail for two key reasons: 1) it is statute-barred because it was commenced after the expiry of the applicable one-year limitation period under Bangladeshi law; and 2) it is plain and obvious under Bangladeshi law that neither Loblaws nor Bureau Veritas owed a duty of care or were otherwise legally responsible to the victims for the collapse.

[4] The motion judge dismissed the action on both these bases and made a significant costs award against the appellants. These reasons address the issue of whether Bangladeshi law applies and, if so, whether the action is statute-barred and whether it is plain and obvious that the action must otherwise fail. For the reasons that follow, I conclude that Bangladeshi law applies and that the motion judge correctly dismissed the action.

[5] My colleague, Doherty J.A., writes separately to address the issue of costs. I concur entirely with his reasons and disposition.

B. BACKGROUND

[6] The background is based on the pleadings, including the Fourth Amended Statement of Claim and the documents incorporated by reference into the claim, as well as affidavit and cross-examination evidence that formed part of the record before the motion judge.

(1) The Parties

[7] Loblaws is Canada's largest food, clothing, and pharmacy retailer. Its lines of business include the clothing brand Joe Fresh. For many years, Loblaws purchased clothes from Pearl Global Limited ("Pearl Global"), which in turn outsourced some of the work to New Wave Style Limited and New Wave Bottoms Limited (collectively, "New Wave"). New Wave Bottoms operated on the third floor of Rana Plaza, while New Wave Style operated on the sixth and seventh floors of Rana Plaza. At the time of the collapse, Loblaws purchased about 50% of the garments New Wave produced.

[8] Bureau Veritas is a consulting services enterprise that Loblaws retained to perform auditing and inspection services of its offshore supplier factories, referred to by the motion judge as "social audits" as explained and described in the affidavit of Mr. Jason Hill, Manager of Social Accountability of Bureau Veritas Consumer Products Services Inc. Bureau Veritas conducted two social audits of New Wave Style, one on February 28, 2011 and the second on April 12, 2012. It did not conduct any audits of New Wave Bottoms.

[9] The proposed representative plaintiffs all suffered injury and/or lost family members in the Rana Plaza collapse. Arati Rani Das was 17 or 18 years old at the time of the collapse and worked for New Wave Style.[3] She was seriously

[3] There is some debate about Ms. Das' age at the time of the collapse.

injured in the collapse and her mother, also a garment worker at New Wave Style, died. Both Rehana Khatun and Mohamed Alauddin worked for New Wave Style. They were also seriously injured in the collapse. Finally, Kashem Ali's two sons and one daughter-in-law worked at New Wave and died in the collapse.

(2) Corporate Social Responsibility Standards and Social Audits

[10] Loblaws sources merchandise from around the world, including Bangladesh. It has voluntarily adopted and implemented Corporate Social Responsibility Standards ("CSR Standards"), publicized in various documents including codes of conduct and reports. The CSR Standards are designed to ensure that Loblaws' suppliers manufacture products in a socially responsible manner and to protect the safety of workers around the world that produce goods for the company.

[11] In this case, Loblaws' CSR Standards were reflected in its Supplier Code of Conduct, which was incorporated into Loblaws' Vendor Buying Agreement with Pearl Global. While the Vendor Buying Agreement designated New Wave Style as a supplier for Loblaws, only Loblaws and Pearl Global were parties to the contract. The Supplier Code of Conduct mandated that suppliers comply with national and local laws and adhere to best practices for their industry. Although the Code of Conduct spoke to workplace health and safety, it did not address the structural integrity of buildings in which the suppliers operated.

[12] The Vendor Buying Agreement allowed, but did not require, Loblaws to perform site inspections of its suppliers' factories. Loblaws was also entitled, but not required, to cancel any outstanding orders and end its business relationship with Pearl Global if Pearl Global failed to comply with the Supplier Code of Conduct. Loblaws, however, had no contractual right to control the supplier's operations or order a supplier or sub-supplier to shut down; it also had no right to hire, supervise or fire employees of the supplier or sub-supplier.

[13] To ensure compliance with its CSR Standards, Loblaws retained Bureau Veritas to conduct what the motion judge and the parties termed "social audits". According to Bureau Veritas' evidence, the term "social audit" refers to the practice of independently auditing an organization's compliance-related processes and controls, measured against self-imposed or external standards. The motion judge noted that the scope of the social audit that Bureau Veritas was retained to perform for Loblaws was identical to the scope of Loblaws' CSR Standards. Although Bureau Veritas offered other services beyond the scope of a basic social audit, such as assessments of building construction and structural integrity, Loblaws did not retain it to provide those services.

[14] Bureau Veritas conducted social audits of New Wave Style on February 28, 2011 and April 12, 2012. At the time of the first audit in 2011, New Wave Style operated on the sixth floor of Rana Plaza, and Bureau Veritas found 21 instances of non-compliance, 11 related to health and safety. At the second audit

in 2012, New Wave Style operated on both the sixth and seventh floors, and Bureau Veritas found nine instances of non-compliance, four in the health and safety category. Those four were related to safety equipment, emergency exit signage and marking, and eye wash facilities. Neither audit mentioned the structural integrity of Rana Plaza. Neither Loblaws nor Bureau Veritas followed up on the remediation of the noted deficiencies. Some New Wave employees were interviewed as part of the audits and others observed the Bureau Veritas personnel at the factory. Based on those interviews and observations it is pleaded that the appellants relied on Loblaws and Bureau Veritas to ensure their safety in the workplace.

[15] In January 2013, Loblaws terminated its contract with Bureau Veritas. It retained another inspection and auditing firm, which was scheduled to conduct its first audit on April 24, 2013, the day of the Rana Plaza collapse.

(3) The Rana Plaza Collapse

[16] Rana Plaza was a nine-floor mixed commercial and industrial building. It was originally constructed as a six-floor commercial complex in 2006 without proper approvals. It was subsequently expanded by two additional floors and, just before the collapse, construction of a ninth floor was nearing completion.

[17] On April 23, 2013, cracks were discovered in three pillars of the structure of Rana Plaza. Local police evacuated the site and workers were sent home.

Later that day, however, managers at New Wave ordered New Wave employees to return to work the following day. The next morning, April 24, 2013, New Wave advised workers that the building was safe and threatened to terminate their employment if they did not return to work.

[18] That same morning, as a result of a power outage, the large back-up generators on the upper floors of Rana Plaza began to operate, causing substantial vibration. Around 9 a.m., Rana Plaza collapsed, killing 1,130 people and injuring 2,520 others. Those injured or killed included employees of New Wave, employees of other garment businesses operating out of Rana Plaza and other people who happened to be in or around the building at the time of the collapse.

(4) The Action

[19] On April 22, 2015, just before the second anniversary of the collapse, the appellants commenced an action in Ontario against Loblaws for 1) negligence, 2) vicarious liability for the negligence of Pearl Global and New Wave, and 3) breach of fiduciary duty. The appellants also alleged that Bureau Veritas was liable for negligence. The appellants sought $2 billion in damages as well as other relief, including punitive damages. They brought the action not only on behalf of employees of New Wave and their survivors, but on behalf of all persons who were in Rana Plaza at the time of the collapse and survived, the

estates of all persons who died as a result of the collapse, and the family members and dependents of those who died or were injured.

[20] The appellants alleged that Loblaws was negligent in that it decided to have its garments manufactured in a country notorious for unsafe factory conditions with a known legal and regulatory vacuum. Knowing of these shortcomings and of the vulnerability of the class members, Loblaws implemented CSR Standards and undertook the responsibility to protect workers manufacturing Joe Fresh garments from the risk of injury and death. Loblaws breached its duty to protect workers by failing to ensure that Bureau Veritas conducted adequate audits, including structural integrity audits, and by failing to require that New Wave and other suppliers ensured that safe working conditions existed.

[21] In addition, the appellants alleged that Loblaws was vicariously liable for any negligence by Pearl Global and New Wave because of the inherent risks of the Bangladeshi garment industry and because it assumed direct and indirect control over New Wave's operations by virtue of its purchasing power, its communications with New Wave regarding products, and its right in the Vendor Buying Agreement to terminate its commercial relationship with Pearl Global for non-compliance with that Agreement (including the Supplier Code of Conduct). The appellants also alleged that Loblaws had a non-delegable duty to take reasonable care to ensure the safety of the garment workers.

[22] Finally, the appellants alleged that Loblaws owed a fiduciary duty to ensure that the audits and inspections performed at New Wave were sufficiently comprehensive to identify, address and remedy structural defects, so as to protect worker safety.[4]

[23] In respect of Bureau Veritas, the appellants alleged that it was negligent by failing to conduct reasonable audits and inspections, including audits and inspections that dealt with structural integrity, and by failing to ensure that issues of non-compliance were quickly remedied. In the alternative, it negligently failed to advise Loblaws to include structural integrity as part of the audit process.

(5) The Motions

[24] The appellants brought a motion to have their action certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The respondents contested the certification motion and brought their own motions for an order under r. 21.01(1)(a) of the *Rules of Civil Procedure*, declaring that: 1) the action was statute-barred under Bangladeshi law, which law applied to the claims; and 2) it was plain and obvious that the causes of action could not succeed under Bangladeshi law. In the alternative, the respondents sought a declaration that, if the substantive law of Ontario applied, it was plain and obvious that the causes

[4] On appeal, the appellants challenge the dismissal of their negligence and vicarious liability claims against Loblaws. There was no argument that the motion judge erred in dismissing the fiduciary duty claim and none of the grounds of appeal in the appellants' notice of appeal make reference to that claim.

of action could not succeed under the law of this province. The respondents also sought to challenge the court's jurisdiction over the proposed class members located in Bangladesh who had not formally attorned to the court's jurisdiction. The motion judge ultimately rejected Loblaws' argument that it would have been necessary to determine whether the proposed class members had attorned to the court's jurisdiction before he could certify the action. The jurisdictional component of the motion judge's decision is not under appeal.

[25] As the motion judge noted, despite bringing their motions contesting the legal viability of the appellants' claim under r. 21.01(1)(a), the respondents effectively moved under r. 21.01(1)(b) in seeking a determination that the claim discloses no reasonable cause of action. It appears that r. 21.01(1)(a) was used so that both parties could provide some evidence, including the expert evidence on foreign law, which can be done under r. 21.01(1)(a) but not under (b). This procedure was accepted by the motion judge by the time of the hearing of the motions.

(6) The Evidence on the Motions

[26] The evidentiary record before the motion judge was extensive, including numerous affidavits, transcripts, and documents. Several experts on Bangladeshi and English tort law provided evidence on the issues raised on this appeal. These experts were Mr. Ajmalul Hossain, Chief Justice (ret.) Md. Tafazzul Islam

and Dr. Jonathan Morgan for the appellants, and Ms. Nihad Kabir, Mr. Salahuddin Ahmad, Mr. Rokanuddin Mahmud, Chief Justice (ret.) Latifur Rahman and Dr. James Goudkamp for the respondents.

[27] As the motion judge pointed out, the admission of evidence on the motions was "obviously necessary" to determine the content of foreign law. He also accepted the parties' position that some factual evidence was needed to "understand and to assess certain lynchpin allegations" that formed the basis of the appellants' novel tort claims, including the allegation that Loblaws had assumed responsibility for the safety of the appellants and that Loblaws had the ways and means to protect the appellants' safety.

(7) The Motion Judge's Rule 21 and Certification Decision

[28] The motion judge wrote very thorough reasons, which addressed the substantive issues on the motions, as well as how to approach the expert evidence on foreign law. The motion judge addressed the following issues that are germane to this appeal:

1) What is the proper approach to motions under r. 21.01(1), including in particular, the treatment of different types of allegations that are pleaded in the Fourth Amended Statement of Claim?
2) Does the law of Ontario or the law of Bangladesh apply to the claims?

3) If Bangladeshi law applies, is the applicable limitation period one year or six years?
4) If Bangladeshi law applies, is it plain and obvious that the claims in negligence and vicarious liability against Loblaws cannot succeed?
5) If Bangladeshi law applies, is it plain and obvious that the claim in negligence against Bureau Veritas cannot succeed?
6) What is the appropriate quantum for costs of the motions?

[29] The motion judge gave separate reasons for his award of costs. As noted above, this issue is addressed by Doherty J.A. in separate reasons.

(a) Rule 21 Principles and the Pleaded Facts

[30] While the motion judge accepted the pleaded facts as true, he declined to accept a pleading of law or a conclusory characterization or statement as a fact. For example, he refused to accept as true a pleading that Loblaws had control over New Wave. Instead, he examined the material facts pleaded in order to determine the existence and extent of any control.

[31] As documents were incorporated by reference into the pleading, including Loblaws' Supplier Code of Conduct and its contracts with Pearl Global and Bureau Veritas, the motion judge used those documents to help to determine the factual basis for the claims.

(b) Choice of Law

[32] The motion judge rejected the appellants' primary position that the law of Ontario applied and held instead that Bangladeshi law governed the claims. This was a critical issue for the appellants because the action was commenced within the two-year limitation period under Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, but out of time for most class members if a one-year limitation under Bangladesh's limitations statute applied. It would also have been much more convenient for an Ontario court to refer to Ontario tort law to determine the viability of the claims.

[33] Relying on the *lex loci delicti* rule for choice of law in tort cases, as set out by the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the motion judge concluded that the law of Bangladesh applied to the class members' claims. In *Tolofson*, La Forest J. stated, at p. 1050, that "as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*." This rule is applied strictly and typically involves choosing the law of the place where the tragic event occurred.

[34] The motion judge observed that the appellants framed their pleadings to situate the wrongful activity in Ontario. For example, they pleaded that Loblaws made its decisions in Ontario not to conduct structural audits, not to require New Wave to ensure that the building was structurally safe to work in, and not to order

New Wave to stop production on the date of the collapse. With respect to Bureau Veritas, the appellants pleaded that it reported its findings to Loblaws in Ontario and its failure to report on the structural dangers of Rana Plaza occurred in Ontario. The motion judge rejected this characterization of the location of the tort or wrongdoing as a "pleading artifice".

[35] He found that the injury occurred in Bangladesh, the "jurisdiction substantially affected by the [respondents'] activities". He noted, for example, that: Loblaws' alleged wrongdoing consisted of failing to protect the class members, who were located in Bangladesh; the consequences of the wrongdoing were felt in Bangladesh; and Bureau Veritas' social audits took place in Bangladesh.

[36] The motion judge also rejected the argument that this was an exceptional case, as envisioned in *Tolofson*, where Canadian law should apply because applying the law of Bangladesh would give rise to injustice.

[37] First, the motion judge rejected the argument that it would be unjust to apply Bangladeshi law due to a lack of a developed body of tort law in Bangladesh. He observed that Bangladesh has a fully developed tort law jurisprudence, which is capable of responding to any new types of claims. Second, he dismissed the appellants' submission that Bangladeshi law should be ousted on grounds of public policy because it includes Sharia law that distributes

damages unequally between male and female heirs in some circumstances. He reasoned that the law could be severed if the claims got that far and that, in any case, the point was moot because the claims were either statute-barred or not legally viable. Third, the motion judge rejected the argument that Bangladeshi law should be ousted because it does not provide for punitive damages. He was not satisfied that punitive damages are unavailable in Bangladesh. In any event, if the appellants were awarded the $2 billion compensatory award they claimed, it was doubtful that a court would also award punitive damages.

[38] The motion judge thus concluded that the substantive law of Bangladesh governed the claims.

(c) Overview of the Bangladeshi Legal System

[39] Using the expert evidence, the motion judge explained that the Bangladeshi legal system is considerably influenced by the British common law system. The territory that now comprises Bangladesh was at one time part of British India. In 1947, with the partition of India, Bangladesh became part of the Dominion of Pakistan. In 1971, Bangladesh became an independent state.

[40] As a result of this history, Bangladesh's *corpus juris* includes the pre-1947 decisions of the Indian courts and the Privy Council of England, as well as the Supreme Court of Pakistan's decisions from 1947 to 1971. In respect of post-1947 jurisprudence, the motion judge stated, based on the expert evidence, that:

"Today, when confronted with novel tort claims, the courts of Bangladesh will consider authorities from England and Wales to be persuasive although not binding." He also noted that decisions of English and Indian courts are regularly cited in Bangladeshi courts. A substantial body of Bangladeshi law is also codified in statutes.

[41] Again drawing on the expert evidence, the motion judge discussed the Bangladeshi court system. He noted that the Supreme Court of Bangladesh is comprised of two divisions: the High Court Division and the Appellate Division. The Appellate Division hears appeals from the High Court Division, with leave. On a petition for leave, the Appellate Division may: 1) deny leave; 2) dispose of the application with observations; or 3) grant leave and hear the appeal. On a leave petition, the observations of the Appellate Division are binding on lower courts, including the High Court Division.

(d) Limitation Period

[42] The motion judge concluded that, under the law of Bangladesh, any tort claims were statute-barred under Bangladesh's *Limitation Act, 1908* (Act No. IX of 1908), save for the claims of class members who were born on or after April 22, 1996. He also found that the one-year limitation period was not tolled by ss. 7 and 13 of the *Limitation Act, 1908*.

[43] The motion judge explained that Articles 21 and 22 of the *Limitation Act, 1908* provide a one-year limitation period for a cause of action for wrongful death (a cause of action created by the *Fatal Accidents Act, 1855* (Act No. XIII of 1855)) and for any other injury to the person. Article 120, in contrast, provides a six-year limitation period for a suit for which no period of limitation is provided elsewhere.

[44] These provisions were considered by three levels of court, including Bangladesh's highest court in the recent case of *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* (2016), 69 Dhaka L.R. 196 (S.C. Bangladesh App. Div.), which disposed of the leave petition with observation and modification from (2010), 62 Dhaka L.R. 483 (S.C. Bangladesh H.C. Div.). As the motion judge explained, it is the single appellate case to date to consider the application of the *Limitation Act, 1908* to a claim involving wrongful death, tort and vicarious liability.

[45] The motion judge ultimately agreed with the respondents' experts that the Appellate Division decided that the one-year limitation period in Articles 21 and 22 of the *Limitation Act, 1908*, and not the six-year limitation period in Article 120, applied to the claim. The Appellate Division "concluded its decision by saying precisely what it did": it stated that the limitation period expired one year after the accident.

[46] The motion judge also agreed with the respondents' experts that on a plain reading, Articles 21 and 22 apply to all claims arising from wrongful death and any other personal injuries, regardless of the nature of the alleged breach that caused the harm. Article 120, in contrast, is a residual provision that applies only if no other Article setting out a limitation period applies. Since all of the appellants' claims arose out of wrongful death and personal injuries, they were subject to the one-year limitation period in Articles 21 and 22.

[47] The motion judge also rejected the appellants' argument that s. 7 of the *Limitation Act, 1908*, which applies in cases of joint liability, suspended the running of the limitation period. However, he raised the potential applicability of s. 6, which suspends the running of a limitation period for a person under a disability, including minors. The motion judge noted that it was unknown how many proposed class members were minors, particularly since 14-year-old persons may join the regular workforce in Bangladesh. Applying s. 6, the motion judge concluded that the claims of class members born on or after April 22, 1996 were not statute-barred.[5]

[48] The motion judge also rejected the argument that s. 13 of the *Limitation Act, 1908*, which suspends the limitation period while a defendant is absent from Bangladesh, applied in this case.

---

[5] The action was instituted on April 22, 2015. Since s. 6 only tolls the limitation period while a class member is a minor, the class member would have to be 19 years old or younger as of this date for his or her claim not to be statute-barred.

[49] The motion judge therefore concluded that the appellants' claims were statute-barred, except for the claims by class members born on or after April 22, 1996, who were minors at the time of the collapse.

(e) No Reasonable Cause of Action

[50] The respondents also argued, in the alternative, that if the claims were not statute-barred, then they disclosed no reasonable cause of action under the law of Bangladesh. The motion judge addressed this issue on the basis that the claims of class members born on or after April 22, 1996 were timely and could proceed. He concluded that under the law of Bangladesh, it was plain and obvious that these class members had no legally viable tort claims against either Loblaws or Bureau Veritas.

(i) The Duty of Care (Negligence) Claims

[51] The motion judge noted that Mr. Hossain and Ms. Kabir agreed that the appellants' tort claims were novel and unprecedented under the law of Bangladesh. They also agreed that the courts of Bangladesh would be heavily influenced by English law in adjudicating them. As a result, the motion judge stated that the more "decisive factual battleground" was the expert evidence on English law.

[52] He then summarized the competing expert opinions about the appropriate test to determine whether a duty of care exists in English law. He preferred the

evidence of Dr. Goudkamp, proffered by the respondents, to the evidence of Dr. Morgan, proffered by the appellants, for several reasons.

[53] First, Dr. Morgan failed to differentiate between factual allegations and pleaded arguments and underappreciated the distinction between misfeasance and nonfeasance. He failed to recognize that tort law will only impose a duty of care to intervene to protect a person from the risk of harm by a third party in limited circumstances.

[54] Second, he misunderstood and misapplied the assumption of responsibility test. Here, Loblaws had not assumed responsibility for the class members' safety because New Wave was not Loblaws' subsidiary, Loblaws only had limited control over New Wave through its CSR Standards, and with the possible exception of some New Wave employees, no one in Rana Plaza had expectations about Loblaws' or Bureau Veritas' role in protecting workers from the tragedy occurring. In the motion judge's opinion, the class members would not be aware of, depend upon, or be influenced by CSR Standards, social audits, or the contracts between Loblaws, Bureau Veritas, Pearl Global, and New Wave.

[55] Third, Dr. Morgan provided a theory on the scope of liability that was neither reliable nor logically defensible, particularly in his assertion that the respondents' duty of care included persons who did not work at New Wave, but

were in the environs of Rana Plaza when it collapsed. Moreover, in respect of Bureau Veritas, any duty could not extend beyond the scope of its retainer.

[56] Finally, the motion judge found that Dr. Morgan had understated and misstated policy factors for recognizing a duty of care, particularly by placing undue emphasis on the appellants' vulnerability. Although there were policy considerations in favour of recognizing a novel duty, the motion judge agreed with Dr. Goudkamp that negative policy factors displaced any potential duty of care. These negative policy factors included that liability under these circumstances would be indeterminate and disproportionate, result in a deluge of cases based on an assumption of responsibility, and encourage other potential defendants to adopt socially detrimental defensive practices that would adversely affect similar plaintiffs and their economies. The motion judge also agreed with Dr. Goudkamp that imposing liability would be unfair, given that the respondents were not responsible for the appellants' vulnerability, did not create the dangerous workplace, and had no control over the dangerous circumstances, employers and employees.

[57] The motion judge accordingly concluded that it was plain and obvious that under the law of Bangladesh, the appellants' claim did not disclose a reasonable cause of action in negligence against either respondent.

(ii) The Vicarious Liability Claim

[58] The motion judge also found that it was plain and obvious that the appellants' vicarious liability claim against Loblaws could not succeed under Bangladeshi law.

[59] He set out several reasons for rejecting the vicarious liability claim, including: 1) Pearl Global, and even more so New Wave, were not agents or employees of Loblaws; 2) Pearl Global and New Wave were not even independent contractors of the sort that could trigger vicarious liability; 3) Loblaws did not create the dangerous activity, and garment manufacturing is not inherently dangerous; and 4) there was no authority in Bangladesh or England that supported the vicarious liability theory, the recent *Bangladesh Beverage* decision simply being a classic example of an employer who was held vicariously liable for the wrongs of its employee.

[60] Finally, this class claim was not an exceptional case in which to impose vicarious liability for the negligence of an independent contractor. Pearl Global and New Wave operated independent and different businesses from Loblaws. Additionally, Loblaws had not delegated the manufacture of garments in order to escape responsibility and had no non-delegable duty to the class members.

[61] Accordingly, the motion judge concluded that it was plain and obvious that the appellants had no claim against Loblaws for vicarious liability under the law of Bangladesh.

(f) The Motion Judge's Conclusion

[62] The motion judge concluded that the substantive law of Bangladesh applied to the class members' claims, the claims were statute-barred under Bangladesh's *Limitation Act, 1908* (save for the claims of class members born on or after April 22, 1996) and it was plain and obvious that the claims could not succeed. Since there were no legally viable claims, he refused to certify the class action and granted the respondents' motions to dismiss the action.

C. ISSUES ON APPEAL

[63] The appellants challenge the motion judge's determinations that: 1) the law of Bangladesh applies to the claims, not the law of Ontario; 2) under Bangladeshi law, the claims of the class members born before April 22, 1996 are statute-barred; and 3) under Bangladeshi law, it is plain and obvious that the claims in negligence and vicarious liability cannot succeed. The appellants also challenge the motion judge's application of r. 21 principles.[6]

[64] I will address the issues raised by the appellants in the following order:

---

[6] The appellants further assert that, if the law of Ontario applies, the motion judge erred in concluding that it was plain and obvious that the claims would fail. Given my conclusion below that the motion judge correctly determined that Bangladeshi law applies, it is not necessary to address this issue.

1. What is the appropriate standard of review on an appeal from a r. 21 motion?

2. Did the motion judge err in principle by failing to properly apply r. 21 evidentiary principles and the plain and obvious test?

3. Did the motion judge err in law by finding that the law of Bangladesh, and not the law of Ontario, applies to the claims?

    a. Is the law of Bangladesh the *lex loci delicti* of the claims?

    b. Did the motion judge err by failing to exercise his discretion to decline to apply Bangladeshi law under the injustice exception?

4. If Bangladeshi law applies, did the motion judge err by finding that the negligence and vicarious liability claims are statute-barred by Bangladesh's *Limitation Act, 1908*?

    a. Is the limitation period one year under Articles 21 and 22 or six years under Article 120 of the *Limitation Act, 1908*?

    b. Was the one-year limitation period tolled against Loblaws by s. 13 of the *Limitation Act, 1908*?

5. If Bangladeshi law applies, did the motion judge err by finding that it is plain and obvious that the claims in negligence and vicarious liability will fail under Bangladeshi law?

    a. Are the claims in negligence against Loblaws and Bureau Veritas bound to fail under Bangladeshi law?

    b. Is the claim in vicarious liability against Loblaws bound to fail under Bangladeshi law?

D. ANALYSIS

(1) What is the appropriate standard of review on an appeal from a r. 21 motion?

[65] The respondents asked the court to determine a number of questions of law under r. 21.01(1)(a), including: 1) the proper law to be applied to the pleaded

claims; 2) the content of that law on the issue of limitation; and 3) the viability of the claims under that law applying the plain and obvious test. Normally, r. 21.01(1)(b) is invoked to determine the third issue. However, both rules ask the court to determine questions of law and are therefore reviewable on the correctness standard: see *Canadian Union of Postal Workers v. Quebecor Media Inc.*, 2016 ONCA 206, 129 O.R. (3d) 711, at para. 2; *Attis v. Canada (Health)*, 2008 ONCA 660, 93 O.R. (3d) 35, at para. 23, leave to appeal refused, [2008] S.C.C.A. No. 491.

[66] There is a wrinkle, however, when the issues involve findings with respect to the content and application of foreign law. First, in order to determine whether the law of Ontario or that of another jurisdiction is the proper law to apply to the claims, there is a discretionary component, which I will discuss further when I address the substantive issue. The parties agree that the standard of review for that portion of the decision is reasonableness and that the court may intervene only if the motion judge failed to apply the proper principles or the result is clearly unjust: see *Wong v. Lee* (2002), 58 O.R. (3d) 398 (C.A.), at paras. 27-30.

[67] Second, a court requires expert evidence to decide issues involving the content of foreign law. The judge is entitled to accept or reject the expert evidence and make findings on foreign law based on that evidence. The judge is also entitled to review the sources relied on by the experts and come to his or her own conclusions based on that examination: *Lister v. McAnulty*, [1944] S.C.R.

317, at pp. 323-24. The judge's findings are therefore findings of fact, which would normally be accorded deference on appeal. However, in *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904, 88 O.R. (3d) 666, at para. 35, this court held that questions of foreign law should be reviewed on a correctness standard.

[68] The respondents submit that the court should apply the deferential standard to its review of the motion judge's findings of foreign law in the face of competing expert opinions and that *General Motors* should be distinguished on its facts. In that case, the trial judge ignored the expert evidence and interpreted Quebec civil law himself. Rather than find that this resulted in a palpable and overriding error, the court held that it was as well-positioned as the trial judge to determine questions of foreign law and therefore approached the issue *de novo*, applying the correctness standard of review.

[69] As I am satisfied that the motion judge was correct in his findings on Bangladeshi law, for the purposes of this appeal, I am prepared to apply the approach most favourable to the appellants, the correctness standard.

(2) Did the motion judge err in principle by failing to properly apply r. 21 evidentiary principles and the plain and obvious test?

[70] The appellants' position is that the motion judge made a fundamental error in his approach to their pleading in the Fourth Amended Statement of Claim. They say that he did not read the pleading generously, he did not accept the

pleaded facts as true and he should not have used the content of the pleaded documents to refute pleaded allegations. They submit that he instead treated the motion as a r. 20 summary judgment motion and effectively found that the appellants had not proved their case.

[71] For example, the appellants pleaded that Loblaws controlled New Wave. This was a very critical pleading because control is an important factor in establishing a duty of care. The motion judge refused to treat this allegation as a statement of material fact rather than law. He rather looked to the pleaded facts as well as the documents incorporated by reference into the pleading to see if Loblaws had a contractual or *de facto* relationship that gave it control over New Wave.

[72] Another example is the appellants' pleading that characterized Loblaws' and most of Bureau Veritas' wrongful conduct as taking place in Ontario because they made corporate decisions and delivered reports here. The appellants argue that the motion judge ignored these pleadings when he decided where the tort occurred and therefore what law should apply to determine the claims.

[73] I do not accept these submissions. The proper approach to a r. 21 motion to strike a claim as disclosing no reasonable cause of action is easy to state: the motion judge is to accept the facts pleaded in the statement of claim as true to determine whether it is plain and obvious based on the current state of the law,

including how it may be open to development, that the claim discloses no reasonable cause of action.

[74] That said, while the material facts that are pleaded in the statement of claim are assumed to be true for purposes of a motion to strike, bald conclusory statements of fact and allegations of legal conclusions unsupported by material facts are not: see *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, 136 O.R. (3d) 654, at para. 15; *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305, 334 O.A.C. 99, at para. 21, leave to appeal refused, [2015] S.C.C.A. No. 291; *Gratton-Masuy Environmental Technologies v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321, at paras. 101-3. Furthermore, the motion judge is entitled to examine documents that form part of the pleading as part of the material facts that are pleaded and accepted for the purpose of the motion: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), at p. 803.

[75] In *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 19, McLachlin C.J. explained that the power to strike out a claim is “a valuable housekeeping measure” that allows the court to weed out claims at an early stage while ensuring that claims “that have some chance of success go on to trial.” While the appellants submitted that any claim should be allowed to proceed unless it has been specifically addressed and rejected as legally untenable by the courts, relying on *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (Gen. Div.), at p. 466, the Supreme Court’s articulation in *Imperial*

Tobacco is the binding test. In that case, the court confirmed that a claim will not be struck simply because it is novel: at para. 21. If, however, it is plain and obvious that the pleading discloses no reasonable cause of action, it cannot proceed: *Imperial Tobacco*, at para. 17; see also *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. It must have a "reasonable prospect of success": *Imperial Tobacco*, at para. 17.

[76] While the principles are easily stated, the record before the motion judge was voluminous. The Fourth Amended Statement of Claim contained 261 paragraphs. The parties also filed 73 volumes of evidence and compendiums, including extensive evidence on foreign law. The motion judge thoroughly reviewed all of the material. His findings regarding what pleadings were facts, and what were legal conclusions or attempts to characterize facts to fit a legal theory, were fair and proper and fell within his purview. I will deal with specific factual issues raised on appeal as they relate to the negligence and vicarious liability claims when I address those claims below.

[77] Further, he properly applied the plain and obvious test, based on the pleaded facts that he accepted as true. This case is distinguishable from *Miguna v. Toronto Police Services Board*, 2008 ONCA 799, 243 O.A.C. 62, where the motion judge's error was assessing whether the pleaded allegations were provable, rather than accepting them as true.

[78] As the motion judge made no error in his approach, I would dismiss the appellants' argument that he misapplied r. 21 principles and the plain and obvious test.

(3) Did the motion judge err in finding that the law of Bangladesh, and not the law of Ontario, applies to the claims?

[79] The appellants submit that the motion judge erred in his choice of law analysis and that the law of Ontario should govern the claims. On appeal, they raise essentially two arguments.

[80] First, the motion judge misapplied the *lex loci delicti* test from *Tolofson*, which mandates that "the law to be applied in torts is the law of the place where the activity occurred": at p. 1050. The appellants argue that the essence of their claim against Loblaws is that the retailer's wrongful activities, actions and decisions giving rise to liability for what they describe as "novel torts", took place in Ontario. It was in Ontario that Loblaws is alleged to have assumed responsibility for worker safety, determined the scope of the audits, and decided not to require New Wave to take remedial action. Similarly, they say that the gravamen of their claim against Bureau Veritas relates to its negligent provision of professional advice, audit reports and other services to Loblaws, which were received in Ontario. It follows, they say, that the *lex loci delicti* of the claims is the law of Ontario, not Bangladesh. According to the appellants, the motion judge

erred by failing to accept the pleading that all of Loblaws' impugned activities and the most significant of Bureau Veritas' activities took place in Ontario.

[81] Second, in the alternative, even if the law of Ontario is not the *lex loci delicti*, the court should have exercised its discretion to depart from the general rule because applying Bangladeshi law would result in an injustice. As they did before the motion judge, the appellants argue on appeal that the application of Sharia law principles and the unavailability of punitive damages offend principles of equality and essential justice. In addition, they submit for the first time on appeal that the injustice exception should apply because the effect of the Appellate Division's decision in *Bangladesh Beverage* was to change the applicable limitation period from six years to one year to the detriment of the appellants.

[82] I would reject this ground of appeal.

(a) Is the law of Bangladesh the *lex loci delicti* of the claims?

[83] The parties agree that the Supreme Court's decision in *Tolofson* provides the framework for the choice of law analysis in tort. In *Tolofson*, the Supreme Court held that, generally, tort claims should be governed by the substantive law of the place where the activity or wrong occurred, that is to say, the *lex loci delicti*: at pp. 1049-50. The court also recognized a narrow exception, namely,

where its application would give rise to an injustice: *Tolofson*, at pp. 1052, 1054. La Forest J. wrote, at pp. 1049-50:

> [I]t seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.

[84] La Forest J. acknowledged, at p. 1054, that a strict application of the *lex loci delicti* rule may give rise to an injustice at the international level, but envisaged few cases that would warrant departing from the general rule:

> I have already indicated, of course, that I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

[85] In my view, the motion judge in this case made no error in concluding that the place where the wrongful activity occurred was Bangladesh. In essence, the claim against Loblaws is that it owed a duty of care to the employees of New Wave and to anyone else at the Rana Plaza premises to protect their safety because: it knew that garment manufacturing often took place in unsafe conditions in Bangladesh; it adopted a mandatory Supplier Code of Conduct at least in part to protect employee health and safety; it undertook limited audits to

implement its Supplier Code of Conduct; and it had control over its suppliers because it could refuse to accept goods if the Supplier Code of Conduct or local laws were disobeyed. By failing to protect New Wave workers and others at Rana Plaza, Loblaws breached its duty. It was also vicariously liable for the failure of Pearl Global and New Wave to protect New Wave's workers and others at Rana Plaza.

[86] Similarly, the claim against Bureau Veritas is that it too owed a duty of care to the New Wave employees and others at Rana Plaza because it knew or ought to have known that they would be in danger if it failed to conduct the audit process in a reasonable and thorough fashion, including reporting on structural defects in the factory premises and ensuring that any issues of non-compliance were reported back to Loblaws and addressed.

[87] In his analysis, the motion judge relied on the principle of tort law that there is no actionable wrong without injury. He reasoned that the alleged duty was owed to the people in Bangladesh who were killed or injured there. The impugned decisions, it was alleged, resulted in those deaths and injuries. The wrong therefore occurred in Bangladesh.

[88] The appellants focus on La Forest J.'s language in *Tolofson*, quoted in part above, where he notes that while the consequences of the wrong are often felt elsewhere, that does not determine the *lex loci delicti*. However, La Forest J. was

referring to consequences that may be felt by plaintiffs who have suffered injury in one place, but recover in another. The law of the place of recovery is not the *lex loci delicti*, even though the plaintiff may continue to suffer from the injury there. This explanation regarding the consequences of the wrong does not undermine the general rule that the place of the wrong is where the wrongful activity occurred. Here that alleged activity was implementing decisions in Bangladesh that are said to have caused death and injury from the collapse of Rana Plaza.

[89] A similar argument to the one raised by the appellants in this case was made in a different factual context in *Leonard v. Houle* (1997), 36 O.R. (3d) 357 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 19. In *Leonard*, this court held that the law of Quebec governed a tort claim arising out of a motor vehicle accident that occurred in Quebec, even though the alleged tortious conduct of some of defendants commenced in Ontario. Charron J.A. observed, at pp. 364-65:

> While there may be situations where the issue of where the tort takes place will raise "thorny issues", and perhaps also raise issues of public policy, this is not such a case. It seems clear to me that the wrong occurred in the Province of Quebec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in the Province of Ontario, nor are they suing because the Ottawa police failed to adequately warn the Quebec police authorities of the ongoing chase. They are suing because Leonard

> was injured in the resulting car accident in the Province of Quebec. The activity which took place in the Province of Ontario, even if found to constitute a breach of duty on the part of the Ottawa police, does not amount to an actionable wrong. There is no actionable wrong without the injury. The place where "the activity took place" which gives rise to the action is in the Province of Quebec. [Emphasis added.]

[90] Similarly in this case, it was the injury in Bangladesh that crystallized the alleged wrong. As the Supreme Court reasoned in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at p. 404, a plaintiff does not sue because of the defendant's carelessness, but because he or she has been hurt.

[91] In my view, the motion judge did not mischaracterize the appellants' claims. He was not obliged to accept the appellants' characterization of where the negligence occurred. That is a legal conclusion based on the pleaded facts. The motion judge is only obliged to accept factual pleadings, not legal conclusions. This is a case brought by Bangladeshi residents for damages resulting from a tragic building collapse in Bangladesh. The appellants allege that the respondents failed to conduct proper audits and take remedial action to protect them in Bangladesh. The *lex loci delicti* is therefore the law of Bangladesh.

(b) Did the motion judge err by failing to exercise his discretion to decline to apply Bangladeshi law under the injustice exception?

[92] In the alternative, if Bangladeshi law is the *lex loci delicti*, the appellants also submit that the motion judge erred by failing to exercise the exceptional discretion referred to in *Tolofson*.

[93] I would not give effect to this submission. The motion judge fully considered and rejected the two prongs of this submission: that Sharia law mandates an unequal distribution of damages to men and women and would therefore discriminate against women claimants; and that the unavailability of punitive damages offends principles of essential justice.

[94] On the Sharia law issue, the motion judge described how it could not affect the liability claim and could only have an impact on a very small subset of female claimants, namely female family class members who are daughters of a deceased in cases where they have a male sibling or siblings. He concluded that because Sharia law would not affect the rights of most of the claimants, there was no public policy reason not to apply Bangladeshi law to the claims of those claimants. He accepted the respondents' argument that any offensive provisions of Sharia law could be severed and not applied in calculating damages for those claimants who would be affected, if the case got that far. The motion judge also

expressed that the issue was essentially moot because the claims were either statute-barred or not legally viable.[7]

[95] The motion judge also rejected the appellants' argument that the unavailability of punitive damages under Bangladeshi law would result in an injustice. First, he was not convinced that punitive damages were unavailable in Bangladesh. Second, because of the nature of the claims, he concluded that if the appellants were awarded a $2 billion compensatory award based on breach of a novel duty of care, it was unlikely that punitive damages would also be awarded. Finally, he observed that the absence of the availability of punitive damages is not the type of issue that offends Canadian fundamental values. La Forest J.'s statement in *Tolofson*, at p. 1058, supports this conclusion:

> True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle.

[96] I see no basis on which to interfere with the motion judge's discretionary decision not to invoke the injustice exception in these circumstances. The motion judge fully addressed and considered this issue and decided that this was not

---

[7] The parties did not refer the court to the principle described in *Somers. v. Fournier* (2002), 60 O.R. (3d) (C.A.), at para. 51, that the quantification of damages is procedural as opposed to substantive law, and therefore in the choice of law context, the *lex fori* applies to it. It may be arguable that the Sharia law rule regarding the amount of damages to be awarded to the subset of female family class members referred to is a quantification issue. If so, then it is procedural law, and the *lex fori*, i.e. the law of Ontario, would apply in any event.

one of the rare cases where the court should make an exception to the proper application of the *lex loci delicti* rule on the basis that applying Bangladeshi law would cause an injustice that would offend Canadian values. In my view, he made no error and came to a proper conclusion on this issue.

[97] Finally, the appellants now raise a third point that they did not raise before the motion judge: if the decision of the Appellate Division of the Supreme Court of Bangladesh in *Bangladesh Beverage* changed the applicable limitation period from six years to one year to the prejudice of the appellants, that created an injustice and is offensive to Canadian perceptions of essential justice. They argue that because their claims were brought in time if the limitation period is six years, it would be unfair for a change in the law after they commenced the action to deprive them of their claims.

[98] I would reject this ground for invoking the injustice exception because I am satisfied that the decision of the Appellate Division confirmed the High Court Division's decision that the one-year limitation period applies to these types of claims. I will address the substance of this argument in the context of my discussion regarding the limitation period. It is therefore unnecessary to address the appellants' failure to raise this issue before the motion judge, which would have militated against entertaining it on appeal: see *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

[99] In summary, under choice of law principles, I agree with the motion judge that Bangladeshi law applies to the tort claims in this case.

(4) Did the motion judge err by finding that the negligence and vicarious liability claims are statute-barred by Bangladesh's *Limitation Act, 1908*?

[100] The appellants argue that the motion judge erred in two principal ways in his analysis of the applicable limitation period for the claims under Bangladeshi law. First, he erred in concluding that the claims were subject to a one-year limitation period under Articles 21 and 22 of the *Limitation Act, 1908*, not a six-year limitation period under Article 120. Second, he erred in not finding that s. 13 of the *Limitation Act, 1908* tolled the claims against Loblaws because of its absence from Bangladesh.

[101] I would reject both of these arguments.

(a) Is the limitation period one year under Articles 21 and 22 or six years under Article 120 of the *Limitation Act, 1908*?

[102] The claims by the appellants are of two kinds: one is by claimants who represent both the estates and the family members and other dependents of persons who suffered wrongful death and injury in the Rana Plaza collapse, and the second is by claimants who themselves were injured but not killed, for damages to compensate for death or injuries suffered in the Rana Plaza collapse.

[103] The preamble to the *Fatal Accidents Act, 1855* states that before its enactment there was no cause of action in Bangladesh at common law for wrongful death. Subject to discussion regarding the meaning of one sentence in the High Court Division's decision in *Bangladesh Beverage*, it was common ground among the experts on Bangladeshi law that there is no cause of action available at common law for wrongful death, and the only way to make such a claim is under the *Fatal Accidents Act, 1855*.

[104] The parties agree that the *Limitation Act, 1908* is the applicable limitations statute in Bangladesh. Briefly summarized, s. 3 of the *Limitation Act, 1908* provides that a lawsuit "shall be dismissed" if it is "instituted … after the period of limitation prescribed thereof by the first schedule" of legislation. Articles 21, 22 and 120 of the first schedule are the provisions that the parties submit on appeal are applicable to the claims. They provide as follows:

Description of suit.	Period of limitation.	Time from which period begins to run.
….		
21. By executors, administrators or representatives under the *Fatal Accidents Act*, 1855.	One year.	The date of the death of the person killed.
22. For compensation for any other injury to	One	When the injury is

the person.	year.	committed.
….		
120. Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.

[105] On their face and by their plain wording, Articles 21 and 22 apply respectively to wrongful death and personal injury claims, each providing a one-year limitation period. However, the appellants submit, based on the evidence of their experts on Bangladeshi law, that the High Court Division held in *Bangladesh Beverage* that the six-year limitation period applied to the claims in that case and a six-year limitation period would therefore apply in this case as well.

[106] In *Bangladesh Beverage*, a Bangladesh Beverage truck struck and killed a pedestrian on December 3, 1989. The deceased's family commenced an action on January 1, 1991, immediately following a court holiday from December 1 to 31, 1990. When a limitation period expires during a court holiday, s. 4 of the *Limitation Act, 1908* deems a suit to be filed on time if it is filed the day after the holiday. A limitation issue arose because the plaintiffs initially misidentified the corporate defendant, Bangladesh Beverage, and only sought to properly add the company as a defendant some 13 years after the accident occurred. To decide the issue, the court first had to determine whether the original action was

commenced in time, and then whether a defendant could be added to a properly commenced action after the limitation period had expired.

[107] The High Court Division first found, at para. 63, that because the original action was commenced on the day the courts reopened after the expiry of the one-year period from the accident, it was commenced in time:

> It appears that the period for limitation expired (one year prescribed under Article 22) on 3-12-1990, the last date filing suit having fallen during the vacation of the Court, as such, filing of the suit on 1st January, 1991 i.e. on re-opening day, was perfectly within time.

[108] The court then went on, at para. 63, to explain that a party can be added at any time during the continuation of the suit, including an appeal, if the suit was commenced within the limitation period, and that the addition will relate back to the date the suit was instituted. The High Court Division therefore concluded that the defendant, Bangladesh Beverage, was properly added.

[109] Having decided that the action was filed and Bangladesh Beverage was added within the one-year limitation period, the court continued on, at para. 64, to discuss an argument raised by counsel regarding the limitation period that applies to tort claims generally. The High Court Division referred to an earlier decision of the Appellate Division, *Jamila Khatun v. Rustom Ali* (1996), 48 Dhaka L.R. 110 (S.C. Bangladesh App. Div.), where the six-year limitation period under

Article 120 was found to apply. I will reproduce para. 64 in full as it is the basis for the appellants' position:

> We have gone through the law of tort and we do not find law of tort itself prescribe for any limitation. It is the acts under which occurrence took place, the legal proceeding is guided by that law. The parties agreed that the instant occurrence is [tortious] liability and according to me, [tortious] liability is a continuous compensatory liability can be brought within a reasonable as there is no limitation prescribed under law of Tort, as such, Article 120 of the Limitation Act i.e. where there is no prescribed limitation, action can be brought within six years from the date of occurrence is applicable. Similar question was called to answer by the Appellate Division in the case of *Jamila Khatun vs Rustom Ali,* 48 DLR (AD) 110 wherein the Appellate Division held as 'No such corresponding provisions exists in respect of suits filed by a Muslim for corresponding relief'. In our opinion, residuary Article 120 of the First Schedule, providing for a period of limitation of 6 years from the time when the right to suit accrues in respect of a suit for which no period of limitation is provided elsewhere in the first schedule will be applicable to a suit for maintenance under Ordinance of 1985'.[8] As such, we are of the view that the submission of Mr Sheikh Fazle Noor Tapash, learned Advocate is of no substance. This is not a case either under *Motor Vehicle Act* or under *Fatal Accident Act*, as such, Article 22 of the *Limitation Act* has no manner of application on the facts of the given case. The appellant was impleaded in the suit as per law. [Emphasis added.]

[110] The appellants' experts suggested that the High Court Division was referring to the *Bangladesh Beverage* case when it stated, at para. 64: "This is not a case either under *Motor Vehicle Act* or under *Fatal Accident Act*, as such

[8] The quotation from *Jamila Khatun*, from para. 26 of that decision, ends here.

Article 22 of the *Limitation Act* has no manner of application on the facts of the given case." In my view, the court was not referring to the Bangladesh Beverage case, which was a claim for personal injury and wrongful death caused by a motor vehicle accident. It was clearly referring to the *Jamila Khatun* case that it had just quoted, which was a suit for maintenance (similar to spousal support) under the *Family Courts Ordinance* (Act. No. XVIII of 1985), and did not arise from a motor vehicle accident or involve a claim for injury or wrongful death.

[111] This apparent misunderstanding of para. 64 of the High Court Division's reasons is what has led the appellants and their experts to assert that the High Court Division found that the claims in *Bangladesh Beverage* were general tort claims and that the six-year limitation period under Article 120 applied, rather than the one-year period under Articles 21 and 22.

[112] To complete the jurisprudential picture, Bangladesh Beverage sought leave to appeal the High Court Division's decision to the Appellate Division of the Supreme Court of Bangladesh on a number of grounds, including that because Bangladesh Beverage was added as a defendant 12 years after the institution of the action (13 years after the accident), the claim was statute-barred against it. The Appellate Division disposed of the leave petition with observation and modification, reduced the amount of the judgment awarded, and concluded its reasons, at para. 33, with the following:

> In the result, the leave petition is disposed of with the observation and modification made in the body of this judgment and accordingly, the plaintiffs-respondents are entitled to get a decree of Taka 1,71,47,008.

[113] In the body of the judgment, the Appellate Division discussed the limitation issue, finding that the limitation period was one year. The court concluded that the suit was brought in time by relying on s. 4 of the *Limitation Act, 1908* to extend the limitation period during the court's holiday closure. The court explained, at para. 19, why the suit was brought within the applicable one-year limitation period:

> In the instant case the limitation period expired on 3-12-1990, the last date of filing the suit having fallen during the vacation of the court and, as such, filing of the suit on 1st January of 1991 i.e. on the re-opening day was perfectly within the period of limitation. Therefore, there is no merit in the submission of the learned Advocate for the petitioner that the suit is barred by limitation.

[114] The court then went on to discuss the rules regarding adding a party after the suit was instituted and affirmed the High Court Division's decision that a party can be added at any time, as long as the original action was instituted within the limitation period, and that the addition will relate back to the date the suit was instituted: at para. 25. The Appellate Division referred to its earlier decision in *Nurun Nahar v. Fazlur Rahman* (1979), 3 Bangladesh S.C.R. 135 (App. Div.), where the court explained that if the claim to be added was barred on the date the original action was instituted, the amendment could not be allowed. However,

if the proposed added claim is only barred on the date the amendment is sought, then the amendment may be allowed.

[115] As the Appellate Division found that the original claim in *Bangladesh Beverage* was brought within the applicable one-year limitation period, the later amendment to add Bangladesh Beverage was allowed and related back to the date the action was instituted.

[116] Having specifically determined that the limitation period in the case was one year, the Appellate Division made no reference to the applicability of the six-year limitation period under Article 120 of the *Limitation Act, 1908*.

[117] In my view, the motion judge made no error of law in following the decision of the Appellate Division and the clear language of Bangladesh's *Limitation Act, 1908*. The appellants' position that the High Court Division had found that the six-year limitation period applied is based on a misreading of one paragraph of that court's reasons. Elsewhere, those reasons make it clear that the one-year period applied.

[118] I return now to the appellants' third basis for saying that the court should apply the injustice exception to the *lex loci delicti* rule. The appellants argue that when this action was commenced, the limitation period was six years according to the High Court Division in *Bangladesh Beverage*, and that the Appellate

Division subsequently changed the applicable period to one year. For the reasons I have just explained, I would give no effect to this submission.

(b) Was the one-year limitation period tolled against Loblaws by s. 13 of the *Limitation Act, 1908*?

[119] The appellants also argue that if the applicable limitation period is one year, the motion judge erred by rejecting the submission that the limitation period was tolled against Loblaws by s. 13 of the *Limitation Act, 1908*. Section 13 provides that claims are tolled while a defendant is "absent from Bangladesh":

> 13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from Bangladesh and from the territories beyond Bangladesh under the administration of the Government shall be excluded.

[120] The expert witnesses proffered no case law from a Bangladeshi court interpreting or applying s. 13.

[121] The appellants rely on a decision from the Calcutta High Court from 1887, *Atul Kristo Bose v. Lyon & Co.* (1887), 14 Ind. L.R. (Cal.) 457 (H.C.), which applied an analogous provision of the Indian *Limitation Act, 1877* (Act XV of 1877). In that case, the court held that the provision applied to toll the limitation period against the defendants who carried on their unincorporated business in England and never resided in India. The court acknowledged that its interpretation could result in no limitation period applying to a defendant who

lived out of the country, but reasoned that the words of the provision were express and applied to the defendants.

[122] However, in *Turner Morrison & Co. v. H. I. Trust Ltd.*, [1972] 3 S.C.R. (Ind.) 711, the Supreme Court of India directly addressed the application of its provision analogous to s. 13 to a corporation and stated at para. 36:

> Section 15 (5) of the *Limitation Act*, 1963 [equivalent to s. 13 of Bangladesh's *Limitation Act, 1908*] can be viewed in one of two ways i.e. that that provision does not apply to incorporated companies at all or alternatively that the incorporated companies must be held to carry on their [activities] and thus being present in all those places.

[123] In that case, the defendant was an English investment corporation which had invested large sums in the plaintiff, an Indian corporation. The defendant corporation's board of directors had held meetings in India "now and then", and its representatives attended the general meeting of shareholders of the plaintiff company in India. The court concluded that under those circumstances, the defendant corporation "must be held to have been residing in this country and consequently was not absent from this country": at para. 36. This decision from the Supreme Court of India would be considered persuasive authority by Bangladeshi courts.

[124] Here, the appellants pleaded that Loblaws has engaged in garment manufacturing activities in Bangladesh since at least 2006 and that its

representatives visited New Wave on a number of occasions to conduct inspections and deal with ongoing issues regarding the quality and delivery of the clothing. Therefore, accepting *Turner Morrison & Co.* as persuasive authority and applying it to the facts of this case, Loblaws would be held to reside not only in Ontario but also in Bangladesh for the purpose of determining whether it was absent from Bangladesh within the meaning of s. 13 of the *Limitation Act, 1908*.

[125] The appellants submitted in oral argument that because Loblaws' representatives were in Bangladesh at one time but then left, Loblaws became absent when they left. There are two reasons why that argument cannot be accepted. First, the logic is contrary to the analysis in *Turner Morrison & Co.*, which uses the presence of representatives from time to time to establish residence. Second, if the argument is that Loblaws left Bangladesh after the collapse of Rana Plaza, there is no evidence or pleading that speaks to that time period.

[126] For these reasons, I am satisfied on the record before the court that it is plain and obvious that under Bangladeshi law, the one-year limitation period is not tolled by s. 13 of Bangladesh's *Limitation Act, 1908*.

(5) Did the motion judge err by finding that it is plain and obvious that the claims in negligence and vicarious liability will fail under Bangladeshi law?

[127] Because I have found that the claims brought by the appellants against both respondents are statute-barred under Bangladeshi law, save for the claims of class members born on or after April 22, 1996, the legal viability of the claims themselves is now only relevant for that limited group of class members.[9]

[128] To address the issue of the legal viability of the claims, it is helpful to restate the court's task. Having found that the court is to apply Bangladeshi law, the issue is to determine whether it is plain and obvious that the tort claims asserted against Loblaws and Bureau Veritas could not succeed under Bangladeshi law.

(a) Is the claim in negligence against Loblaws bound to fail under Bangladeshi law?

(i) Loblaws

Overview of the Claim

[129] The appellants submit that Loblaws owed and breached a duty of care to the class members to ensure their safety. They allege that by adopting CSR Standards, visiting the New Wave factories, and controlling the scope of audits, Loblaws voluntarily undertook to ensure that the buildings in which Joe Fresh

---

[9] The respondents do not challenge the motion judge's determination that s. 6 applied to toll the claims of class members born on or after April 22, 1996.

garments were made were structurally sound and met Loblaws' minimum standards for worker and building safety.

The Legal Principles

[130] To determine whether it is plain and obvious that the appellants' negligence claim would fail under the law of Bangladesh, it is necessary to first determine the substantive content of the tort under Bangladeshi law. The expert witnesses agreed that there is no case decided by a Bangladeshi court that has imposed a duty of care in circumstances similar to the ones presented by the pleading in this case. Nor is there authority from India or Pakistan in which a court has done so. However, there are statements by the Supreme Court of India, on which the appellants rely, that speak to that court's expansive approach to tort law and the duty of care.

[131] England has a robust and developing jurisprudence on the parameters for imposing a duty of care, including decisions that address whether and in what circumstances a duty may be owed by one party to protect another party from the harmful actions of a third party. However, no English court has imposed a duty of care in circumstances like those in the present case. The experts acknowledged that the duty of care Loblaws allegedly owed to the class members would be novel.

[132] Against this backdrop, the issue on this r. 21 motion is therefore whether it is plain and obvious that a Bangladeshi court, applying Bangladeshi law and looking to persuasive English and Indian jurisprudence, would not expand the law beyond its current application to impose a duty of care on the respondents to protect the appellants from the damage caused by structural defects at Rana Plaza.

[133] Before embarking on this analysis, I emphasize that the evaluation of the legal viability of the claims does not dwell on the tragic event that occurred with the collapse at Rana Plaza and the terrible losses that flowed from it. That should not be taken as minimizing their gravity. The question for the court arises despite the extent and seriousness of the loss, because if the appellants' claims against the respondents do not have a reasonable prospect of succeeding in law, then the claims cannot proceed.

[134] In addressing and deciding the issue, the motion judge turned to the expert evidence on Bangladeshi law, which included the case law from Bangladesh and relevant jurisprudence from India, and very extensive opinion evidence tendered by all three parties on the duty of care under English common law.

[135] The motion judge rejected as unsupported Mr. Hossain's opinion, proffered by the appellants, that a Bangladeshi court, relying on *Bangladesh Beverage*, would be open to recognizing a new tort consistent with the principles of justice,

equity and good conscience, and that the contract between Loblaws and Bureau Veritas would support the finding of a duty of care owed to the class members. He also rejected Mr. Hossain's reliance on certain Indian cases as supporting a duty of care on the basis that the cases bore no reasonable resemblance to the facts of this case.

[136] The motion judge explained that while the parties' experts on Bangladeshi law came to opposite conclusions about the viability of the claims, their methodologies were similar: they agreed that the claims were novel and that the courts of Bangladesh would be heavily influenced by the development of the law in England. As a result, the motion judge considered the experts' opinions based on the English case law, and found that he preferred and accepted the opinion of the respondents' expert, Dr. Goudkamp, and did not accept the opinion of the appellants' expert, Dr. Morgan.

[137] Dr. Goudkamp's opinion was that the pleaded facts could not support finding a duty of care owed by either of the respondents to the appellants based on the tests in the English case law. Dr. Morgan's opinion was the opposite. Although they were not in complete agreement about the applicable tests, their disagreement was primarily based on whether a court would conclude: first, that the facts were sufficient to establish foreseeability of harm and proximity and that policy factors favoured finding a duty of care; second, that the respondents had assumed responsibility for the appellants' well-being; and third, that recognizing a

duty of care owed by a purchaser of manufactured goods to keep employees of its sub-supplier and other people in the area of the sub-supplier's factory safe, would amount to an incremental development of the law.

[138] The basis of the English courts' current approach to the question whether a duty of care is owed in any particular situation was described by the House of Lords in *Caparo Industries Plc v. Dickman*, [1990] 2 A.C. 605 (H.L. (Eng.)) as requiring consideration of three factors: foreseeability of harm, a relationship of proximity, and whether it is "fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other": at pp. 617-18. The court emphasized the importance of clearly defining the scope of the duty, stating at p. 627:

> It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.

[139] Special rules apply when the damage is caused by a third party and the issue is whether there was a duty of care owed by the defendant to prevent the third party from harming the plaintiff. In the Supreme Court decision in *Michael v. Chief Constable of South Wales Police*, [2015] UKSC 2, [2015] A.C. 1732, a woman was murdered by her ex-boyfriend after the police failed to respond promptly to her emergency call for help. The issue was whether the police had

owed the woman a duty to take reasonable care to protect her safety once they knew she was in danger.

[140] In finding that no duty of care arose in the circumstances of that case, the Supreme Court explained that the general rule is that there is no duty to take action to protect another person from harm by a third party: *Michael*, at para. 97; see also *Mitchell v. Glasgow City Council*, [2009] UKHL 11, [2009] A.C. 874, at para. 15. Subject to two exceptions, the law does not impose liability for omissions: *Michael*, at para. 97.

[141] The first exception arises when the defendant was in a position of control over the third party and should have foreseen the likelihood of the third party causing damage to someone in close proximity if the defendant failed to take reasonable care in the exercise of the control, as occurred in *Dorset Yacht Co Ltd. v. Home Office*, [1970] A.C. 1004 (H.L. (Eng.)): *Michael*, at para. 99.

[142] In that case, the Home Office was held liable for the damage caused to the plaintiff's boat when young boys in detention on an island escaped in the boat and damaged it. The House of Lords found that the boys were under the control of the Home Office's officers, that it was foreseeable that the boys would cause damage to the plaintiff's property if they escaped, and that there was no policy reason the Home Office should have immunity from its responsibility.

[143] The second exception identified in *Michael*, at para. 100, stems from the House of Lords' decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners*, [1964] A.C. 465 (H.L. (Eng.)). It occurs when the defendant assumes a positive responsibility to safeguard the plaintiff and arises in relationships where there is a positive duty to act, such as fiduciary or doctor/patient relationships: *Michael*, at para. 100. While this exception is known as the assumption of responsibility doctrine, the court observed in *Michael*, at para 100, that:

> There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by [the defendant].

The court also emphasized that this exception should not be expanded artificially: *Michael*, at para. 100.

[144] Superimposed on the duty of care analysis is the principle that the law of negligence should develop incrementally and by analogy to existing categories of duty, rather than by "giant steps"; the court should examine where the law has gone or refrained from going and why, and whether policy considerations and overall coherence support an extension of liability: *Michael*, at para.102.

[145] The appellants submit that the motion judge also erred by failing to apply the assumption of responsibility analysis to the pleaded facts, and that he should have found that a novel duty of care could be owed by the respondents on that basis. They rely on the English Court of Appeal's seminal decision in *Chandler v.*

Cape Plc, [2012] EWCA Civ. 525, [2012] 1 W.L.R. 3111, for support. *Chandler* is one of the first in a series of cases in which the English courts have considered whether a parent company assumed responsibility for the actions of its subsidiary in relation to people who foreseeably suffered harm as a result of those actions: see *Chandler*, at para. 2. *Chandler* was discussed extensively by the parties' English law experts.

[146] The plaintiff in *Chandler* was a former employee of Cape Building Products Ltd. ("Cape Products"), a defunct company that had manufactured bricks and asbestos products and had been a subsidiary of the defendant, Cape Plc ("Cape"). While working as a brick loader at Cape Products, the plaintiff was exposed to asbestos dust that migrated to his work area from an open-sided factory on site; he later contracted asbestosis. The trial judge found that the parent company should have foreseen the risk of injury from asbestos exposure.

[147] The issue for the court on appeal was whether the parent company had, by its actions, taken on a direct duty to the employees of its subsidiary to advise on or ensure a safe system of work for them. The parent company employed both a scientific and a medical officer who were responsible for health and safety issues for the employees of all the subsidiary companies. On the basis of the evidence as a whole, the trial judge found that the parent dictated the subsidiary's health and safety policy and retained overall responsibility for ensuring that the

employees of its subsidiaries were not exposed to the risk of harm from asbestos exposure.

[148] The Court of Appeal described the four factors that led it to impose responsibility on the parent company for the health and safety of its subsidiary's employees. They included:

1) The businesses of the parent and subsidiary were in a relevant respect the same;
2) The parent had or ought to have had superior knowledge on some relevant aspect of health and safety in the particular industry;
3) The parent company knew or ought to have known that the subsidiary's system of work was unsafe; and
4) The parent knew or ought to have foreseen that the subsidiary or its employees would rely on the parent using its superior knowledge for the employees' protection: at para. 80.

For the purposes of the last factor, the court explained that it is not necessary to show a practice by the parent of intervening specifically in the health and safety policies of the subsidiary. The court will examine the relationship between the parties more widely, and may find reliance where the parent intervened in other aspects of the subsidiary's business such as trading operations, including production or funding: at para. 80.

[149] The Court of Appeal found that the circumstances of the relationship between Cape and Cape Products met the test to establish a duty owed by the parent company to its subsidiary's employee. Arden L.J. explained, at paras. 78-79:

> Given Cape's state of knowledge about the Cowley works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to Mr. Chandler was the result. As the judge held, working on past performance and viewing the matter realistically, Cape could, and did on other matters, give Cape Products instructions as to how it was to operate, with which, as far as we know, it complied.
>
> In these circumstances, there was, in my judgment, a direct duty of care owed by Cape to the employees of Cape Products. There was an omission to advise on precautionary measures even though it was doing research and that research had not established (nor could it establish) that the asbestosis and related diseases were not caused by asbestos dust.

[150] Commenting on the decision, the editors of *Clerk and Lindsell on Torts*, 22d ed. (London: Sweet & Maxwell, 2018) drew the conclusion that the factors "did not exhaust the possibilities, and the case merely illustrated the way in which the requirements of *Caparo Industries Plc v Dickman* may be satisfied between a parent company, and the employee of a subsidiary": at para. 13-08.

[151] There have been some developments in the English case law since *Chandler* on the duty to protect from harm caused by a third party, including four recent parent/subsidiary cases. Importantly, three of these cases involve actions against English parent companies for harm caused by their subsidiaries operating in foreign jurisdictions.

[152] The first of the four cases is *Thompson v. Renwick Group Plc*, [2014] EWCA Civ. 635, a case like *Chandler* where an employee who had handled asbestos during the 1970s and suffered damage to his health, later sought to recover from the parent holding company of his employer. The Court of Appeal distinguished *Chandler*, holding that no duty of care arose in the case.

[153] The court found first that the parent's appointment of a director of the subsidiary with responsibility for health and safety matters did not amount to the assumption of a duty of care by the parent: at paras. 24-25. Second, it affirmed the three-part *Caparo* test for imposing a duty of care and discussed its application in *Chandler*. Third, it concluded that the case before it was entirely distinguishable from *Chandler*: at paras. 28-29. Tomlinson L.J. explained that unlike in *Chandler*, the parent company was not in the same business as the subsidiary nor did it have superior knowledge about the risks of handling asbestos. There was therefore no basis for the subsidiary to rely on the parent to protect the employees from risk of injury: *Thompson*, at paras. 37-38.

[154] The most recent opinions on the issue of the duty to protect come from three decisions of the English Court of Appeal involving English parent companies whose subsidiaries' operations either caused or failed to prevent harm in foreign jurisdictions: see *Lungowe v. Vedanta Resources Plc*, [2017] EWCA Civ. 1528, [2018] 1 W.L.R. 3575,[10] *Okpabi v. Royal Dutch Shell Plc*, [2018] EWCA Civ. 191, [2018] Bus. L.R. 1022,[11] and *AAA v. Unilever Plc*, [2018] EWCA Civ. 1532.[12] In two of these actions (*Lungowe* and *Okpabi*), the operations of a subsidiary of an English parent company in a foreign jurisdiction caused significant environmental and health-related damage to local employees of the subsidiary and other local residents. In the third (*AAA*), the issue was whether the parent and subsidiary companies owed a duty of care to the workers and their families to protect them from foreseeable tribal violence following a local election.

[155] *Lungowe* is the only reported case to date involving a subsidiary operating in a foreign jurisdiction in which the court found there was a good arguable case for imposing a duty of care on the parent company: see *Lungowe*, at para. 88. The factual background was that Vedanta Resources Plc ("Vedanta") was an English holding company for a group of metal and mining companies, including a

[10] Permission to appeal to the Supreme Court of the United Kingdom was granted on March 23, 2018 (UKSC 2017/0185).
[11] Permission to appeal to the Supreme Court of the United Kingdom has been sought (UKSC 2018/0068).
[12] Permission to appeal to the Supreme Court of the United Kingdom has been sought (UKSC 2018/0181).

Zambian company, Konkola Copper Mines Plc ("KCM"), which owned and operated copper mines in Zambia. The claim arose out of the pollution of waterways in Zambia caused by KCM's copper mining operations. The claimants were Zambian citizens who relied on the clean water in the waterways for drinking, washing, cooking, recreational purposes, irrigation, livestock and fresh fish, and therefore, for their physical, economic and social well-being. They brought proceedings against Vedanta and KCM.

[156] The claimants' action was brought in the English courts against both the Zambian subsidiary company and its English parent company. For the claimants to establish jurisdiction in the English courts over their claims against the Zambian subsidiary, they needed an English "anchor defendant", hence the claim against the parent. That claim could not stand unless there was a "real issue" between the claimants and the parent. This requirement has been variously described as requiring consideration of whether there is a "good arguable" or "properly arguable" case or whether the claim is "bound to fail" or has "no real prospect of success": see *Lungowe*, at para. 63; *Okpabi*, at paras. 33, 132, 141, 199, 207; *AAA*, at para. 1.

[157] The claim against Vedanta as the parent company alleged that it owed the plaintiffs a duty of care because it had assumed responsibility to ensure that KCM's mining operations did not cause harm to the surrounding environment and to the inhabitants.

[158] The Court of Appeal referred to the three-part test in *Caparo* for recognizing a duty of care: proximity, foreseeability and reasonableness. After reviewing *Chandler* and other relevant case law, Simon L.J. outlined, at para. 83, several principles which may be material to the issue of whether a parent company owes a duty of care to third parties affected by the operations of its subsidiary, including the following:

> (1) The starting point is the three-part test of foreseeability, proximity and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary's employee. (5) The first of the four indicia in *Chandler v. Cape Plc* [80], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary…

[159] In *Lungowe*, the claimants relied on six factual factors, discussed at para. 84, to ground their claim, namely that: 1) Vedanta had published a report stating that oversight for its subsidiaries rested with the Vedanta board and indicating that it had "a governance framework to ensure that surface and ground water do not get contaminated by our operations" for a mine in Zambia; 2) there was a management and shareholders agreement which contractually bound Vedanta to provide a myriad of operational services and funding to KCM; 3) Vedanta provided environmental and technical information to all of its group of subsidiaries; 4) Vedanta provided financial support to KCM, investing approximately US$3 billion since it acquired the company; 5) Vedanta had made various public statements regarding its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure, including designing a comprehensive and well-funded program to address legacy environmental issues; and 6) there was evidence from a former KCM employee that Vedanta exercised significant direct control over KCM operations, by putting its own people in management, cost-cutting and discarding most of KCM's operational policies.

[160] In these circumstances, the Court of Appeal concluded that while the claimants may or may not ultimately succeed against Vedanta at trial, their claim could nevertheless not be dismissed "as not properly arguable": at para. 90.

[161] More recently, the Court of Appeal revisited the principles from *Lungowe* in *Okpabi*, where, unlike in *Lungowe*, the court held that the claimants failed to establish a good arguable case that the parent company owed them a duty of care. There, representatives of the Ogale community in Nigeria brought actions against the parent company, Royal Dutch Shell Plc ("RDS"), and its subsidiary that operated an oil pipeline in a joint venture with Nigerian entities. They sought compensation for serious environmental damage, including unremediated pollution of natural water sources caused by leaks from the pipeline.

[162] Both sides accepted that the test to be applied for determining whether a duty of care was owed by a parent to those who had been harmed by the operations of its subsidiary was correctly stated in *Lungowe*, at para. 83: *Okpabi*, at para. 23. The claim against RDS was based on an alleged duty of care to prevent spills and foreseeable damage.

[163] It was pleaded that, as a result of RDS's knowledge and control over its subsidiary's operations and their foreseeable effect on the environment, there was a relationship of proximity. It was also pleaded that it would be "fair, just and reasonable" to impose a duty of care in light of the fact that both companies were involved in exploration, extraction and transporting of crude oil, RDS had superior expertise and resources for protection of health and safety and the environment, and RDS knew that the subsidiary would rely on its superior knowledge and expertise: at para. 36.

[164] The majority of the court in *Okpabi* found that these pleaded facts did not establish an arguable case for finding a duty of care owed by RDS. While both judges in the majority wrote separate reasons, each focused on proximity as the controlling issue to be analyzed.

[165] Sir Geoffrey Vos C. essentially agreed with Simon L.J., who concluded that the claimants had not demonstrated a sufficient degree of control over the subsidiary's operations by RDS to establish the necessary degree of proximity, but elaborated on his position in more detail. First, he found that the fact that RDS had laid down detailed policies and practices for all of its subsidiaries to follow could not create a duty of care owed to those affected by the operations of all of its subsidiaries. In his view, the corporate structure itself tended to militate against the parent's assumption of responsibility for the acts of the subsidiary. He offered an example of a circumstance that could establish the necessary proximity: "where a parent required its subsidiaries or franchisees to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful to health": at para. 196.

[166] Second, he distinguished the circumstances from those in *Lungowe*. As discussed above, in *Lungowe*, the board of the parent company oversaw all of its subsidiaries through a governance framework to ensure that surface and ground water would not become contaminated. The company agreed in a management and shareholders agreement to provide its subsidiary with a plethora of specific

services to carry out its operations, including employee training, metallurgical management systems, and administrative and financial support services, to name a few. The parent invested $3 billion in the subsidiary, and made a public commitment to address environmental risks and technical shortcomings in the subsidiary's mining infrastructure, including designing a comprehensive and well-funded program specifically to address legacy environmental issues: *Okpabi*, at para. 197. However, in *Okpabi*, none of these factors was present to the same degree or in some cases at all. Moreover, Sir Geoffrey Vos C. also found as an important factor that Vedanta, unlike RDS, had discarded the subsidiary's operational policies and inserted its own policies and management: at para. 197.

[167] Third, Sir Geoffrey Vos C. reasoned that while RDS provided high-level guidance to the subsidiary, based on its expertise and experience, that level of guidance spoke against the exercise of control or the assumption of responsibility: at para. 198. The necessary degree of control would have required RDS to have enforced its policies and standards, rather than leave compliance up to the subsidiary. Similarly, the fact that spending decisions by the subsidiary required the approval of RDS did not amount to the type of financial control that would indicate assumption of responsibility: at para. 205.

[168] While Sales L.J. dissented in *Okpabi*, I believe it is fair to say that his opinion was based on his view of the available evidence and the weight to be given to it for the purpose of determining whether the claimants had a good

arguable case, rather than on the test for establishing a duty of care itself. He viewed the evidence of a number of witnesses as available to indicate evidence of control that the other two judges rejected.

[169] The third and final case in the recent jurisprudence from the English Court of Appeal on the duty of care of English parent companies for harm caused by their subsidiaries operating in foreign jurisdictions is *AAA*. In that case, the claimants were employees, former employees and other residents of a tea plantation in Kenya operated by Unilever Tea Kenya Limited ("UTKL"), a Kenyan subsidiary of Unilever Plc ("Unilever"), an English company. The claimants alleged that they suffered tribally-motivated violence by marauding mobs following the 2007 presidential election in Kenya. They claimed that UTKL and Unilever owed them a duty of care to take effective steps to protect them from that political violence, which was foreseeable. As in the other foreign subsidiary cases, the issue was whether, for jurisdictional reasons, there was a good arguable case against the parent for breach of a duty of care.

[170] Addressing the test to be applied, the court stressed that there is no special doctrine that applies in a parent/subsidiary situation and that the *Chandler* case did not establish a separate test beyond the general principles regarding the imposition of a duty of care: *AAA*, at para. 36. The court then explained, at para. 36, that there are two different types of cases in which a duty could be found in the parent/subsidiary context:

> Although the legal principles are the same, it may be that on the facts of a particular case a parent company, having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of the parent. The cases where this might be capable of being alleged will usually fall into two basic types: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with: see *Vedanta Resources*, at [83]) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. As to claims of the first type, see *Chandler v Cape Plc*; *Vedanta Resources* at [83]; and *Okpabi* at [86]-[89] and [127] (Simon LJ) and [141] (Sales LJ).

[171] In *AAA*, the claimants conceded that their case did not fall within the first category, as UKTL managed its own operations. Instead, they claimed that Unilever gave UKTL advice regarding the management of the risk of political violence, sufficient to ground a duty of care under the second category. The court rejected the claim. It found that the witness and documentary evidence showed that UKTL did not receive any relevant advice from Unilever, and that the subsidiary understood that it was responsible for devising its own risk management policy and for handling the severe crisis, and that it did so: at para. 40. The fact that Unilever had a crisis management policy which required that local policies be in place did not impose a duty of care on Unilever.

[172] I am aware that the three recent foreign subsidiary cases were not discussed by the English law experts in their reports, given that the cases were

released after the reports were authored, although the *Lungowe* and *Okpabi* cases were included in the parties' factums on appeal without objection. I am also cognizant that foreign law must be proved to the satisfaction of the court when the court is to apply that foreign law, usually by experts in the particular foreign law in question: *Allen v. Hay* (1922), 64 S.C.R. 76, at pp. 80-81; *Northern Trusts Co. v. McLean*, [1926] 3 D.L.R. 93 (Ont. C.A.), at p. 93.

[173] In this case, however, the experts agreed that a Bangladeshi court, deciding whether to recognize a novel duty of care in this case, would turn to English law as persuasive authority. These cases demonstrate that the issue before this court is a developing one in the English courts. Because a Bangladeshi court would look at these cases as they develop, this court ought to examine them for the same purpose. Indeed, Canadian courts routinely consider English jurisprudence when applying domestic law in the absence of expert evidence on the English jurisprudence: e.g. *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 29-32; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 69-76. There is no suggestion in the expert evidence in this case that Bangladeshi courts would operate any differently.

[174] In any event, these cases have not changed the principles set out in *Chandler* and *Caparo*: they have followed and applied them. *Chandler* and *Caparo* were discussed by the experts and serve as relevant factual examples of the application of those principles.

Application of the Principles

[175] In the present case, the appellants assert that Loblaws assumed responsibility for the safety of the workers in Rana Plaza and anyone else attending there based on its relationship with New Wave. The argument for Loblaws' assumption of responsibility is grounded in four essential factors: the incorporation of Loblaws' CSR Standards into its contracts with Pearl Global; the engagement of Bureau Veritas to conduct social audits to gauge compliance with those standards and the receipt of Bureau Veritas' reports; reliance by workers who saw Bureau Veritas personnel conducting audits; and Loblaws' ability to exercise a degree of control over New Wave by cancelling any product orders for non-compliance with its CSR Standards. The appellants submit that Loblaws could have required New Wave to fix the structural problems in the factory, sent the workers home or ensured that the manufacture of its products took place elsewhere. They also submit that, given the history of poor factory conditions for workers in Bangladesh, including an apparent lack of enforcement of codes and standards, it was foreseeable that if Loblaws did not enforce its standards, workers would be forced to work in unsafe facilities.

[176] In my view, the motion judge made no error in concluding that it is plain and obvious that under Bangladeshi law, the negligence claim has no reasonable prospect of success. The appellants point to no case in Bangladesh that has imposed a duty of care on a retailer to the employees of a sub-supplier and other

people who happen to be nearby that sub-supplier's factories to ensure their safety. Indeed, they point to no case from Bangladesh that involves remotely similar circumstances to the case at bar.

[177] While the appellants seek to rely on the English case of *Chandler,* the determinative circumstances in that case are absent from the relationship between Loblaws and New Wave. First, they are not in a parent/subsidiary relationship. The nature of their proximity is completely different: New Wave could contract with any number of purchasers, none of which could have the kind of control present in a parent/subsidiary relationship. In any event, there was no contractual relationship between Loblaws and New Wave. Loblaws' contract was with Pearl Global. Second, Loblaws and New Wave are not in the same business. Third, while there is a pleading that Loblaws knew Rana Plaza had numerous structural deficiencies, it is not pleaded that Loblaws had superior knowledge or expertise about issues of structural safety in the working environment.

[178] Fourth, although there is a pleading that Loblaws did not review and monitor the social audit reports to ensure that the audits were conducted in accordance with Loblaws' CSR Standards and other standards specified by Bureau Veritas, and did not follow up on the issues identified in Bureau Veritas' audit reports, those audits did not, nor were they intended to audit any structural issues in the New Wave factories. And while there is also a pleading that the

appellants relied on Loblaws and Bureau Veritas to ensure that audits would be sufficiently rigorous to address all safety concerns that could lead to death or injury, including structural issues, it remains clear that the limited social audits did not and were not intended to cover any structural issues in the New Wave factories. There is therefore no basis for any reliance on Loblaws or Bureau Veritas with respect to the structure of the Rana Plaza premises.

[179] Simply put, the pleaded facts in this case do not amount to the type of relationship or control over New Wave's operations by Loblaws that has been found in English law to be sufficient to establish proximity or assumption of responsibility, and to thereby impose a duty of care to protect against harm by third parties.

[180] Loblaws was not directly involved in the management of New Wave or in the process of manufacturing the products. Loblaws did not have control over where the manufacturing operation took place. Loblaws' only means of controlling New Wave was through cancellation of its product orders from Pearl Global for non-compliance with the CSR Standards. Nor is there any pleaded history of Loblaws using that lever to enforce any change in New Wave's operations.

[181] Even if the relationship factors could be viewed as sufficient to give Loblaws some control over New Wave's operations, and to establish some

degree of proximity, there is no pleaded basis to extend that control to structural issues with Rana Plaza, or to find that Loblaws assumed responsibility for any structural issues. The CSR Standards do not refer to the structural integrity of factory premises. The audits identified workplace safety issues relating to eye wash stands, the use of protective eyewear and rubber mats, the location and functioning of smoke detectors, the sufficiency of first aid facilities, and emergency exit lighting, locations, and signage. The scope of the audits for which Bureau Veritas was engaged did not extend to any structural examination, nor was any such examination conducted.

[182] In *Caparo*, the House of Lords emphasized that it is always necessary to determine the scope of any duty owed, "by reference to the kind of damage from which A must take care to save B harmless": at p. 627. For example, had the appellants suffered damage as a result of one of the deficiencies that had been identified by Bureau Veritas in its reports, that could well have affected the analysis of whether a duty was owed.

[183] The motion judge went on to conduct a policy analysis to determine whether it would be fair, just and reasonable to impose a novel duty of care on Loblaws. He recognized that there could be policy considerations that favoured imposing legal accountability on a Canadian company doing business in Bangladesh, but found that the negative policy factors outweighed the positive ones.

[184] The appellants argue that the motion judge erred in his policy analysis by ignoring the unique social and economic issues that would influence a Bangladeshi court, as they had influenced the Supreme Court of India in *M.C. Mehta v. Union of India*, [1987] All Ind. R. 1086 (S.C.). There, the Supreme Court of India found that the social costs of conducting hazardous activities should be borne by the profit-maker and not by the community. In moving the law in India beyond the rule developed by nineteenth-century English courts in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, the court relied on the social and economic context in India, as distinct from that in England.

[185] While this class action was commenced on the assertion that Loblaws, as a Canadian company ordering products manufactured in Bangladesh, should be held responsible in law for the losses that occurred when the factory premises in Rana Plaza collapsed, the legal basis for that assertion has not been made out on the pleaded facts. In my view, it is therefore not appropriate for the court to address the policy issue, having concluded that the claim must fail based on the lack of proximity and the absence of any assumption of responsibility on Loblaws' part to protect the class members from harm by third parties: see e.g. *AAA*, at para. 5.

[186] Had it been otherwise, and had the pleaded facts shown that Loblaws controlled New Wave and its operations and that it had effectively assumed responsibility for the structural safety of the New Wave factory premises, then the

court would be in a position to conduct a meaningful policy analysis. It would be able to weigh the factors for and against imposing a duty on a Canadian company conducting business in Bangladesh in the context of a legally compelling factual scenario. However, without proximity, or an assumption of responsibility, the negative policy concerns such as the potential for indeterminate liability would likely dominate the analysis, skewing the policy-balancing process against imposing a duty.

[187] In my view, the motion judge was correct to find that it is plain and obvious that if Bangladeshi courts used English case law as the basis for their decision, they would not find that Loblaws owed a duty of care to the appellants.

[188] This conclusion, however, does not end the matter. The appellants assert that the motion judge erred by focusing on English authorities and disregarding Indian authorities, which they contend take a more liberal and expansive approach to tort law. As discussed earlier, Bangladeshi courts also find decisions from the high courts of India and Pakistan to be persuasive authorities. The appellants point to two decisions of the Supreme Court of India as particularly relevant: *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, [1994] 3 S.C.R. (Ind.) 866, and *M.C. Mehta*. Both cases involved the strict liability of companies for damage caused by leaks or overflows from one property onto another. In *Jay Laxmi*, the issue was the limitation period, while in *M.C. Mehta*, it was the limits of the rule in *Rylands v. Fletcher*.

[189] In both cases, the court expressed the view that there should be a liberal approach to the development and expansion of tort law: see *Jay Laxmi*, at pp. 875-76; *M.C. Mehta*, at p. 843. In *M.C. Mehta,* for instance, the Supreme Court of India emphasized that the strictures around the rule in *Rylands v. Fletcher* had developed in England in the nineteenth century under different social and technological conditions and that the law in India should not necessarily be constricted by reference to the law in England, stating in part at p. 843:

> We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England.

[190] The motion judge did not specifically address whether the view expressed by the Supreme Court of India that Indian courts would not be constrained from developing new principles just because English law had not yet done so affected his conclusion that it was plain and obvious that Loblaws did not owe a duty of care to the appellants under Bangladeshi law. That may be because the appellants' expert, Mr. Hossain, did not take the specific position that even if English law did not support finding a duty of care, a court in Bangladesh would find one based on the statements made in *Jay Laxmi* and *M.C. Mehta*. Instead,

he expressed the more general view that while a lack of precedent in Bangladeshi law would be a hurdle to bringing this claim, the courts of Bangladesh would take an expansive view in developing tort law.

[191] The appellants nevertheless argue on appeal that the motion judge erred by failing to consider the effect of the Supreme Court of India's decisions on Bangladeshi law, resulting in an overly restrictive approach to the recognition of novel duties of care. I would not give effect to this argument for two reasons.

[192] The first is that the motion judge's job was to consider the expert evidence on Bangladeshi law and use that evidence as the basis for his findings. The second is that it would be pure speculation to find that, despite the courts' incremental approach to the development of the law on duty of care, a Bangladeshi court would go far beyond the parameters recently developed by the English courts on this current, dynamic jurisprudential issue. Such an approach would not be consistent with the common law's incremental development. The Indian jurisprudence speaks to evolution, not revolution. In *M.C. Mehta*, for instance, the court wrote "the law has to be evolved in order to meet the challenge of … new situations": at p. 843 (emphasis added). The English jurisprudence similarly reflects an incremental approach: *Michael*, at para. 102; *Caparo*, at p. 618.

[193] Also, to make such a finding, the motion judge would have had to develop a cogent theory and analysis that has no current foundation in the case law. The fact that a Bangladeshi court is not precluded from taking such an approach in the future does not detract from the ability of the motion judge or this court to determine that at this point in time, it is plain and obvious that under Bangladeshi law, there is no duty of care owed by Loblaws to the appellants.

[194] As a result, I agree with the motion judge that it is plain and obvious that the negligence claim against Loblaws would fail under Bangladeshi law.

(ii) Bureau Veritas

[195] The appellants' negligence claim against Bureau Veritas is that despite the fact that Bureau Veritas was not contracted to conduct structural audits of the New Wave factories, it had a duty of care to ensure the safety of the appellants. It breached that duty by failing to conduct reasonable audits and inspections and to report any safety issues to Loblaws to ensure they were remedied. The motion judge found that even if Bureau Veritas owed a duty of care to any of the appellants, the duty was limited to their obligations to inspect and report under their contract with Loblaws and could not extend to structural issues outside the scope of its retainer.

[196] In my view, the motion judge correctly held that it was plain and obvious that the appellants' pleaded claim in negligence against Bureau Veritas would fail

under Bangladeshi law. The appellants cite no Bangladeshi precedent that supports imposing on Bureau Veritas the duty of care pleaded in the Fourth Amended Statement of Claim. Indeed, the appellants point to no precedent from any country in which a court has imposed a duty of care on a service provider to a third party to perform an activity outside the scope of its limited retainer.

[197] The motion judge considered the English Court of Appeal's decision in *Clay v. A.J. Crump & Sons Ltd.*, [1964] 1 Q.B. 533 (C.A.), relied on by the appellants, where an architect was found liable to a third party who was injured by his negligence in leaving an unstable wall in place on site. While that case imposed a duty of care on the architect to a third party, the duty was limited to negligence in the performance of his contractual functions. Here, Bureau Veritas' limited retainer did not extend to conducting a structural audit of Rana Plaza.

[198] The motion judge also found, in accord with Dr. Morgan's acknowledgement, that because Bureau Veritas' retainer had been terminated by Loblaws long before the cracks that caused the collapse were discovered on April 23, 2013, it could not have owed any duty in respect of the collapse.

[199] The appellants nonetheless argue that a Bangladeshi court would take an expansive approach to its negligence claim against Bureau Veritas, relying on the Indian authorities discussed above. For the reasons discussed above, I do not accept this submission.

[200] In my view, the motion judge was correct in his conclusion that it is plain and obvious that, under Bangladeshi law, there could be no duty of care owed by Bureau Veritas to the appellants to inspect for and remedy structural defects. In particular, no such duty could be owed in respect of the defects that caused the collapse of Rana Plaza.

(b) Is the claim in vicarious liability against Loblaws bound to fail under Bangladeshi law?

[201] The appellants bring a further claim against Loblaws arguing it is vicariously liable for the negligence of New Wave and Pearl Global. The appellants allege that, by subcontracting its garment work to New Wave and Pearl Global, Loblaws benefited financially and created a risk that resulted in injury and death. They contend that garment manufacturing in Bangladesh is an inherently dangerous activity and that Loblaws was under an obligation to protect the safety of the class members.

[202] The appellants submit that the motion judge erred in law in finding that it was plain and obvious under Bangladeshi law that Loblaws could not be found vicariously liable for New Wave and Pearl Global's failure to provide a structurally safe environment for employees and for others attending Rana Plaza. They acknowledge that there is no case from Bangladesh that has held the purchaser of manufactured goods vicariously liable for the failures of the contracting

manufacturer, but nonetheless argue that it is not plain and obvious the claim would fail.

[203] The leading case in Bangladesh on the issue of vicarious liability is *Bangladesh Beverage*, discussed above. In that case, a truck driver employed by Bangladesh Beverage and driving the truck in the course of his employment negligently killed a pedestrian by driving in the wrong direction and striking the man while he crossed the road. His employer, Bangladesh Beverage, was found vicariously liable for his negligent conduct.

[204] In its reasons, the High Court Division stated, at para. 36:

> In order that the doctrine of vicarious liability may apply, there are two conditions which must co-exist—
>
> (a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;
>
> (b) The servant must in committing the wrong have been acting in the course of his employment.

[205] On appeal, Bangladesh Beverage argued in part that the High Court Division erred by failing to determine whether the driver was acting within the course of his employment before holding the company vicariously liable. The Appellate Division rejected the argument, holding that “the High Court Division rightly found that [Bangladesh Beverage] was vicariously liable for the fault of the driver”: *Bangladesh Beverage* (S.C. Bangladesh App. Div.), at para. 17.

[206] Although there is no pleading that Loblaws was in an employment relationship with New Wave and Pearl Global, the appellants nonetheless argue that the motion judge erred in concluding that it was plain and obvious that the vicarious liability claim would fail under Bangladeshi law. The appellants make essentially two arguments. First, the motion judge erred by rejecting Mr. Hossain's opinion that a Bangladeshi court would approach a novel claim from first principles and engage in a contextual analysis of the law. In so doing, a Bangladeshi court would follow the approach taken by the Supreme Court of India in *M.C. Mehta* to expand the law in Bangladesh beyond existing precedents. Second, even if a Bangladeshi court did not follow *M.C. Mehta* and instead relied more heavily on English jurisprudence, it is not plain and obvious that the claim would fail under English law. I would reject both these arguments.

[207] In *M.C. Mehta*, referenced above, the respondent corporation was a fertilizer company that produced products hazardous to the surrounding community. As a result of an escape of oleum gas, many people suffered harm. As noted above, one of the issues before the court was whether the English rule from *Rylands v. Fletcher* applied or whether there were other principles on which to determine liability. The court found that it should not be bound by the parameters of a rule that evolved in the nineteenth century in England, and that the law had to evolve to take account of twentieth century conditions in India, which included industries whose operations were inherently dangerous to their

workers and to the surrounding communities. The court found such industries owed a non-delegable duty to those workers and to the community to protect them. The court concluded that it would not be bound by the rule in *Rylands v. Fletcher*, but would adopt a broad principle of absolute liability for operators of dangerous enterprises, at p. 843:

> We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.

[208] The appellants also point to three other cases from Indian courts, referred to by Ms. Kabir, the respondents' expert, which have recognized vicarious liability for the negligence of an independent contractor: see *Vadodara Municipal Corporation v. Purshottam V. Murjani* (2014), 16 S.C. Cases (Ind.) 14; *P. Ravichandran v. Government of Tamil Nadu* (2011), 6 Current Tamil Nadu Cases 636 (H.C. Mad.); *V. Ganesh v. Dr. K.S. Shanmuga Sundaram* (2010), 1 L. Weekly 209 (H.C. Mad.). Two of those cases involved public bodies that had hired an agent to carry out a function on their behalf: see *Vadodara Municipal Corporation*; *P. Ravichandran*. In the third, the court confirmed that hospital authorities are usually held responsible for the negligence not only of their employees, but also their agents: *V. Ganesh*, at paras. 44-45.

[209] In my view, applying the legal principles from the Indian case law does not lead to a route to finding that, on the pleaded facts, Loblaws could be held to be vicariously liable for the actions of New Wave and Pearl Global under Bangladeshi law. Garment manufacturing is not an inherently dangerous or hazardous activity. New Wave and Pearl Global are not on the staff of Loblaws, as either employees or independent contractors. Nor is it pleaded that New Wave was acting as agent for, or on behalf of Loblaws in conducting its operations. Even if a Bangladeshi court looked to the Indian jurisprudence to expand the established test for vicarious liability set out by the High Court Division in *Bangladesh Beverage*, it is plain and obvious the claim against Loblaws would fail.

[210] The appellants also argue, however, that the English jurisprudence supports imposing vicarious liability on Loblaws in this case. The English experts referred to the doctrine of non-delegable duty, as articulated and applied by the Supreme Court of the United Kingdom in *Woodland v. Swimming Teachers Association*, [2013] UKSC 66, [2014] A.C. 537. In that case, a child sustained severe brain injuries during a swimming lesson with her class. The lesson was supervised by a swimming teacher and lifeguard who were employed by independent contractors. The Supreme Court of the United Kingdom found that the claim that the education authority owed the plaintiff a non-delegable duty to

ensure that reasonable care was taken of the claimant during the school day was not bound to fail.

[211] Lord Sumption identified two broad categories of cases in which a non-delegable duty may arise, one when a defendant employs an independent contractor to perform some function which is inherently dangerous, and the other when the defendant and plaintiff are in a relationship with certain characteristics: *Woodland,* at paras. 5-7. He explained, at paras. 5-6, that "non-delegable duty" has become a shorthand to describe those cases that depart from the general principle that a defendant cannot be held liable for the negligent acts and omissions of others:

> The law of negligence is generally fault-based. Generally speaking, a defendant is personally liable only for doing negligently that which he does at all, or for omissions which are in reality a negligent way of doing that which he does at all. The law does not in the ordinary course impose personal (as opposed to vicarious) liability for what others do or fail to do…. The expression "non-delegable duty" has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others.
>
> English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. There are, however, two broad categories of case in which such a duty has been held to arise.

[212] He then described, at paras. 6-7, the two categories of non-delegable duties that have emerged in the English jurisprudence:

> The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work.
>
> […]
>
> The second category … comprises cases where the common law imposes a duty on the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's.

[213] After reviewing relevant case law, Lord Sumption summarized, at para. 23, the factors that have led to the recognition of a non-delegable duty of care:

> If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is

> possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, i e whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[214] The appellants' expert on English law, Dr. Morgan, conceded that imposing a non-delegable duty on Loblaws would require a liberal reading of *Woodland*. He acknowledged that the appellants were never in the actual care, control or custody of Loblaws, but reasoned that a stringent insistence on the requirement may be lessened if Loblaws assumed responsibility for their safety. He further opined that the appellants could argue that a non-delegable duty arose due to the ultra-hazardous nature of garment manufacturing in Bangladesh, but admitted such an argument would be unlikely to succeed.

[215] The motion judge rejected this analysis and held that this was not one of the rare cases, referred to by Lord Sumption, in which it would be appropriate to

impose vicarious liability for the wrongdoing of an independent contractor based on a non-delegable duty. The motion judge found, at para. 469, that it was plain and obvious that the appellants did not have a cause of action based on vicarious liability for the following nine reasons:

> a. Pearl Global, and even more so New Wave, were not agents or employees of Loblaws.
>
> b.… Pearl Global and New Wave were not even independent contractors of the sort that can trigger vicarious liability; i.e., they were not providing a service or task that could have been performed internally by Loblaws' employees; New Wave was selling goods not services or tasks that were part of Loblaws' enterprise.
>
> c. There is no rationale for treating the employers of the 438 employees of Phantom Apparels Ltd.; the 254 employees of Phantom Tac Ltd., the 450 employees of Ether Textile Ltd., and the employers of the 439 persons who unfortunately just happened to be in or around the building at the time of the collapse as employees, agents, or independent contractors of Loblaws.
>
> d. Loblaws had no duty of care much less a non-delegable one for all the reasons expressed [in the reasons] in discussing the law of England and … the law of Ontario.
>
> e. Loblaws did not create the dangerous activity of garment manufacturing in Bangladesh, and garment manufacturing is not a dangerous activity of the type meant to be captured by the rare exception to the rule that vicarious liability is not imposed on defendants for the conduct of their independent contractors, which none of the employers of the putative Class Members were in any event.
>
> f. The Plaintiffs have reasoned backwards from a dangerous industry, injured employees, employers

> breaching a duty of care to keep their employees safe, a contractual relationship between the negligent employers and Loblaws, to a conclusion that Loblaws had a non-delegable duty of care. But Loblaws never had a duty of care to the employees and so this backwards reasoning does not work. Loblaws did not delegate its responsibility for the safety of the employees of New Wave because it had no such responsibility.
>
> g. The exceptional circumstances in which an enterprise can be vicariously liable for the misdeeds of independent contractors are not extant in the case at bar. Loblaws is not an enterprise engaged in a hazardous or inherently dangerous industry; Loblaws is a retailer that sells food, drugs, and consumer goods. It is a retailer not a manufacturer of garments. Loblaws had no control over how Pearl Global and New Wave carried on their manufacturing business or treated their employees.
>
> h. There are no cases that support the Plaintiffs' theory of vicarious liability in England, in Canada, or in Bangladesh where *Bangladesh Beverage Industries Ltd. v. Rowshan Akhter* … is no more than a classic example of an employer being vicariously liable for its employee, who during the normal course of business while driving a delivery van, struck and killed a pedestrian.
>
> i. *Bangladesh Beverage* has nothing to say about exceptional cases or about vicarious liability of independent contractors.

[216] In my view, the motion judge correctly concluded that it is plain and obvious that a claim based on vicarious liability against Loblaws cannot succeed under the law of Bangladesh.

E. CONCLUSION

[217] For these reasons, I would dismiss the substantive appeal.

[218] At the conclusion of the hearing, it was agreed that costs of the appeal would be dealt with following release of the reasons for decision. If the parties are unable to agree on the costs of the appeal, Loblaws and Bureau Veritas shall each submit a costs brief together with brief (maximum three pages) written submissions within 14 days of release of these reasons. The appellants and the Law Foundation of Ontario may make brief (maximum three pages) written response submissions within 14 days thereafter.

"K. Feldman J.A."

Doherty J.A.:

A. OVERVIEW

[219] I concur entirely with my colleague Feldman J.A.'s reasons and disposition on the appeal. As Feldman J.A. indicated, however, there is a further issue on this appeal involving the motion judge's costs order. These reasons address that issue.

[220] The motion judge made a single costs order in respect of the four motions that he heard over nine days. While the appellants won a few battles in the course of the hearing (e.g. the jurisdictional issue), the respondents decisively won the war. The action was dismissed against both respondents in its entirety.

[221] The motion judge concluded that the respondents were entitled to their costs on a partial indemnity basis. He described the issues raised on the motions as "extremely complex" and the evidentiary record as "enormous". The motion judge fixed the Loblaws respondents' costs in the amount of $1,350,000, and the Bureau Veritas respondents' costs in the amount of $985,601.60.

[222] Under the order, the costs are payable by the appellants. However, as the appellants had successfully applied for, and received, funding from the Class Proceedings Fund (the "Fund"), the Fund is liable upon application by Loblaws and Bureau Veritas to pay the costs award made against the appellants: *Law Society Act*, R.S.O. 1990, c. L.8, s. 59.4.

[223] The Law Foundation of Ontario (the “LFO”) administers the Fund and had standing at the costs hearing before the motion judge. The LFO seeks leave to appeal the costs order made by the motion judge.

[224] This court seldom grants leave to appeal from costs orders. However, for the reasons set out below, this is an appropriate case in which to grant leave, allow the appeal, and reduce the costs payable to the respondents by the Fund.

[225] The motion judge failed to appreciate the public interest component in the claim advanced by the appellants. He also took irrelevant factors into account in discounting the impact of the public interest considerations on his costs assessment. While the respondents’ success in the action entitled them to costs, there should have been a significant reduction in those costs to reflect the public interest component of the claim. I would reduce the costs awarded by 30%.

B. THE COSTS HEARING BEFORE THE MOTION JUDGE

[226] The LFO argued that even though the claims had been dismissed, there should be no order as to costs or, alternatively, that any costs awarded to the respondents should be reduced significantly from the amounts claimed. In advancing this position, the LFO relied on: 1) what it characterized as the mixed results of the various motions; 2) the strong public interest in the litigation of the claims advanced; and 3) the legal novelty of those claims. The LFO did not argue that the amounts claimed by the respondents inaccurately reflected the amounts

expended on the defence. The LFO also did not argue that the amounts claimed were beyond what the losing party could reasonably expect to pay: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24.

[227] The motion judge rejected the arguments advanced by the LFO. With respect to the argument that success on the motions was mixed, the motion judge acknowledged that the appellants had been successful on the jurisdictional motion, and had satisfied all of the certification requirements in s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"), save the requirement that the pleadings disclose a cause of action. He observed, however, that all of the motions were "essentially argued as one motion", and that the respondents were successful in achieving the dismissal of the claims. He said, at para. 121:

> The defendants successfully resisted certification and under the loser-pays regime of the *Class Proceedings Act, 1992*, they are entitled to the spoils of victory.

[228] On the second and third arguments advanced by the LFO, the motion judge referred to s. 31(1) of the *CPA*. That provision directs a judge, in exercising their discretion as to costs, to consider whether the proceeding was "a test case", "raised a novel point of law", or "involved a matter of public interest". There was no suggestion that this was a test case. The LFO did, however, rely on the other two factors identified in s. 31(1).

[229] The motion judge recognized that the factors identified in s. 31(1) had to be considered along with the other factors relevant to costs, which are identified in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. He indicated that the s. 31(1) factors were not determinative of the appropriate costs order. In some cases, those factors would have a very significant impact on the order to be made. In other cases, the impact would be minimal.

[230] The motion judge held that even if the claims could be said to involve a matter of public interest or advance a novel point of law, those factors, considered in the context of the other circumstances of the case, would not cause him to depart from the normal rule that successful defendants should have their costs on a partial indemnity basis. The motion judge went on to hold that, in any event, the claims had no public interest or novelty component as those terms are used in s. 31(1).

[231] In rejecting the appellants' submission that the public interest and novelty aspects of their claims should at least mitigate the costs award, the motion judge stressed the monetary motive behind the claims, and the manner in which the appellants had pleaded and prosecuted their claims. He said, at paras. 123-25:

> [A] significant motivator in this proposed class action was money, independent of public policy, and the plaintiffs were intent on intensifying the pressure and risks on the defendants and to motivate them to settle and to pay a substantial award. This proposed class action was not purely altruistic and the plaintiffs' lawyers

> must be taken to have weighed the awards along with the risks when they decided to take on a case that they litigated with little or no mercy, temperance or proportionality.
>
> The plaintiffs pleaded and prosecuted their case in a way that indicated that they expected to be paid costs. They telegraphed that they would rebuff any argument that there should be no order as to costs because the case was novel or in the public interest. The plaintiffs pleaded and prosecuted their case in a way that they should and would have reasonably expected: (a) to pay costs; and (b) that they would not be able to use the argument that the case was novel or in the public interest.
>
> Negligence and vicarious liability are non-intentional torts, but the plaintiffs went out of their way to vilify the defendants, and the subtext of the plaintiffs' pleaded negligence claims and their breach of fiduciary duty claim was that the defendants purposely, knowingly, or recklessly for greed and personal profit, exploited the class members… The plaintiffs presented the case as if the defendants intentionally or recklessly injured the denizens of Rana Plaza; litigating in this fashion, the plaintiffs should and would have reasonably expected to pay the costs and not be able to use the argument that the case was novel or in the public interest.

C. ISSUES ON APPEAL

[232] The LFO raises two issues on appeal:[13]

---

[13] Counsel for the LFO also made the argument that costs, especially costs associated with certification motions, are spiraling out of control, and that the parties' expectations with respect to costs are no longer an appropriate guide in fixing the quantum. Counsel referred to observations of experienced class action judges to that effect: see *Goldsmith v. National Bank of Canada*, 2015 ONSC 4581; *Heller v. Uber Technologies Inc.*, 2018 ONSC 1690. This argument was not advanced before the motion judge. It raises important policy questions, which should only be addressed by this court with the benefit of a full record and the considered reasons of an experienced class proceeding judge.

1. Did the motion judge err in principle in awarding costs to the respondents for the jurisdiction motion on which they were unsuccessful?

2. Did the motion judge err in principle in failing to give effect to s. 31(1) of the *CPA*, despite the public interest in, and/or novelty of, the appellants' claims?

D. ANALYSIS

(1) Did the motion judge err in awarding costs to the respondents on the jurisdiction motion?

[233] The motion judge chose to treat the motions as a single motion for the purpose of his costs assessment. Much of the evidence was common to more than one of the motions, and the motion judge observed that the various issues on the motions were inextricably integrated.

[234] The motion judge was intimately familiar with the proceedings and the record. He was in the best position to assess the nature and degree of the interrelationships among the motions. I see no error in principle in his determination that the motions should be treated as a single entity for the purpose of costs. I would defer to the motion judge on that issue.

(2) Did the motion judge err in principle in failing to give effect to s. 31(1) of the *Class Proceedings Act, 1992*?

[235] Section 31(1) reads:

> In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.

[236] Section 31(1) identifies three factors that a judge may take into account in fixing costs in a class proceeding. Those factors should be given "significance" in the costs assessment process: see *Pearson v. Inco Ltd.* (2006), 267 D.L.R. (4th) 111 (Ont. C.A.), at para. 11; *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274, 95 O.R. (3d) 709, at paras. 27-29, 31, leave to appeal refused, [2009] S.C.C.A. No. 226.

[237] In the context of a claim by a successful defendant for costs, the factors identified in s. 31(1) may mitigate the costs that the losing plaintiff might otherwise be required to pay. In some cases, the s. 31(1) factors may result in a "no costs" order: see e.g. *Joanisse v. Barker* (2003), 46 C.P.C. (5th) 348 (Ont. S.C.).

[238] The factors identified in s. 31(1) do not, however, negate consideration of other factors which promote the interests served by awarding costs to successful defendants. These interests include discouraging inappropriate, meritless and expensive class litigation: see *Re*Collections Inc. v. Toronto Dominion Bank*, 2011 ONSC 3477, 20 C.P.C. (7th) 195, at para. 14 (citing *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 2839, 89 C.P.C. (6th) 263).

[239] In applying the s. 31(1) factors, the court must have regard to the circumstances of the particular case and the purposes animating the *CPA*. Those purposes are: promoting access to justice, effecting behavioural modification, and making effective use of limited judicial resources: see *Ruffolo*, at para. 33. When considered alongside the other factors relevant to costs, most notably the outcome of the litigation, the s. 31(1) factors will often lead to some reduction in the costs awarded to a successful defendant. However, defendants who have successfully resisted a class proceeding claim should not routinely be required to shoulder the entire burden of their no doubt significant legal costs merely because the unsuccessful plaintiff's claim raised a novel legal point or involved a matter of public interest.

(a) Did the claim raise a novel legal point?

[240] The motion judge rejected this submission. In his view, the appellants' claims involved the application of well-established negligence principles to a specific fact situation. The motion judge further held that the claims strained those established principles beyond their well-recognized limits. He said, at para. 133:

> The absence of proximity between the proposed class members and the defendants was manifest under traditional principles, giving the plaintiffs good reason to expect to fail.

[241] It is not surprising that s. 31(1) recognizes the novelty of legal issues as potentially relevant to the fixing of costs. Legal novelty can be considered in fixing costs in all kinds of civil litigation: see *Baldwin v. Daubney* (2006), 21 B.L.R. (4th) 232 (Ont. S.C.), at paras. 13-32. Novelty takes on added importance in light of the *CPA*'s commitment to promote access to justice.

[242] Novelty can have different meanings. It can refer to a legal issue that has not previously been decided in the specific fact situation presented in a particular case. Novelty in that narrow sense cannot be enough to warrant any costs adjustment. Access to justice is not furthered by promoting meritless claims in the context of a class proceeding simply because they present new factual situations.

[243] To impact on the costs assessment, a novel claim must have some potential merit. It must be a viable claim in the sense that it has some reasonable prospect of success. In *Baldwin*, Spence J. offered this rationale for treating the novelty of a claim as a mitigating factor on costs, at para. 22:

> If the unsuccessful party says that he or she should be relieved from the costs rule because a novel issue was raised, it is not clear why that should be a relevant reason unless that element of novelty goes to the reasonable expectations of the party about the litigation. If the issue is truly open in the sense considered above

> [i.e. that the law in the decided cases does not provide adequate guidance to resolve the issue], the litigant could reasonably say that he or she had no proper reason to expect to fail. But if all the litigant can say is that there was no decided case directly on point, that begs the question about reasonable expectations. The litigation in that situation is vulnerable to the response: although there was no decided case directly on point, the law is clearly against your case, so you should reasonably expect to lose. [Emphasis added.]

[244] A legal issue can be viewed as novel for the purposes of s. 31(1) if it is central to the outcome of the litigation, it has not been decided in the factual context in which it is presented, and the decided cases and controlling principles do not provide a clear indication of how it will be determined in the fact situation presented: see *Baldwin*, at para. 19; *Edwards v. Law Society of Upper Canada* (1998), 38 C.P.C. (4th) 136 (Ont. Gen. Div.), at para. 12, aff'd (2000), 48 O.R. (3d) 329 (C.A.), at para. 50; *Williams v. Mutual Life Assurance Co. of Canada* (2001), 6 C.P.C. (5th) 194 (Ont. S.C.), at paras. 22-23; *McCracken v. Canadian National Railway Company*, 2012 ONSC 6838, 31 C.P.C. (7th) 237, at para. 80.

[245] Novelty for the purposes of s. 31(1) is not an all or nothing thing, but rather operates along a continuum: *Smith v. Inco Ltd.*, 2013 ONCA 724, 313 O.A.C. 156, at para. 29. For example, if a legal issue is novel in that, on the current state of the law, either party could have reasonably expected to be successful on the point, the novelty of the claim should play a significant role in fixing costs. However, if the legal point is novel in the sense that it has not been decided in

the specific factual context in which it is raised, but the applicable case law and principles pointed strongly towards the outcome eventually arrived at in the proceeding, a claim of novelty will have little or no impact on the costs awarded against the losing party. In cases where there is an element of novelty to the claim, it is for the motion or trial judge to determine where the case fits along the novelty continuum.

[246] The motion judge rejected the appellants' argument that the novelty of the legal issues should impact on the costs order. He accepted that the central legal issues raised by the appellants' claim had not previously been decided in the factual context in which they were presented. However, he further held that it was clearly predictable, in light of the established case law and the applicable principles underlying that case law, that those issues would be resolved in favour of the respondents. As the motion judge said the appellants had "good reason to expect to fail." That assessment was reasonably open to the motion judge. On that view of the appellants' claim, the motion judge did not err in concluding that the novelty of the issues should not mitigate the otherwise appropriate costs consequences.

(b) Does the claim involve a matter of public interest?

[247] The motion judge held that the claim had no public interest component in the sense that that term is used in s. 31(1) of the *CPA*. He further held that, in

any event, the monetary motive for the action and the manner in which the plaintiffs pleaded and prosecuted the case negated any reliance on any public interest component that might otherwise justify reducing the costs award.

[248] The term “public interest” in s. 31(1) can refer to the public interest in facilitating access to justice through class proceedings by persons or groups who have historically faced significant disadvantages when seeking legal redress for alleged wrongs. Public interest can also refer to the subject matter of the claims. Claims that raise issues that transcend the immediate interests of the litigants and engage broad societal concerns of significant importance are matters of public interest: *Kerr v. Danier Leathers Inc.*, 2007 SCC 44, [2007] 2 S.C.R. 331, at para. 67; *Pearson*, at para. 9; *Edwards*, at para. 13; *Ruffolo*, at paras. 38-41, aff’g (2008), 90 O.R. (3d) 59 (S.C.); *McCracken v. Canadian National Railway Company*, 2012 ONCA 797, 5 C.C.E.L. (4th) 327, at para. 9; *Williams*, at paras. 24-26; *Joanisse*, at para. 14.

[249] The Class Proceedings Committee (the “CPC”) is statutorily mandated to consider various factors when deciding whether to provide financial support to a plaintiff: *Law Society Act*, s. 59.3(4). The Class Proceedings Regulations, O. Reg. 771/92 provide that the committee may consider:

> The extent to which the issues in the proceeding affect the public interest.

[250] I see no reason why the phrase “public interest” in the Regulations should not be given the same meaning as the phrase “public interest” in s. 31(1) of the *CPA*. If the Fund properly follows its mandate and properly concludes that the litigation involves a matter of “public interest”, the Fund can reasonably expect that if the motion judge or trial judge also concludes that the litigation involved a matter of “public interest”, that the “public interest” will mitigate to some extent the costs for which the Fund may be liable. As Winkler C.J.O. observed in *McCracken* (ONCA), at para. 10:

> The Fund was created to facilitate access to justice. If the Fund was required to absorb steep costs awards imposed on litigants even though the proposed action displays the factors in s. 31(1) of the CPA this would have an undesirable chilling effect on class proceedings.

[251] I agree with Winkler C.J.O.’s observation. I would think that the CPC would inevitably take a more restrictive view of the cases it would fund if, in cases that were found to involve matters of public interest, the courts routinely give little or no weight to that factor when assessing costs payable by the Fund to the successful defendant: see *McCracken* (ONSC), at paras. 57-58.

[252] The motion judge did not consider the public interest factor in s. 31(1) from the perspective of promoting access to justice. Clearly, the ready-wear garment workers who form part of the proposed class come from a segment of the community that is historically disadvantaged, primarily for socioeconomic

reasons. A class proceeding provided the only avenue by which this group could advance their claim in a Canadian court. Facilitating access to justice for this group gave the class proceeding a public interest component: see *Vennell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.), at paras. 31-32.

[253] Loblaws submits that, for the purposes of s. 31(1) of the *CPA*, serving the public interest by promoting access to justice applies only to claims brought on behalf of Ontario residents. It submits that any claim advanced by a non-resident cannot engage access to justice considerations, since the LFO's mission is to further access to justice for Ontarians.

[254] I cannot accept this argument. Assuming the residence of the class is relevant on an application to the CPC for funding, there is nothing in the language of s. 31(1) of the *CPA* or the policies that animate the *CPA* that would justify limiting access to justice concerns to claimants who happen to reside in Ontario. If a claim is arguably justiciable in Ontario, there is a public interest in facilitating access to the courts in Ontario. This is particularly true for disadvantaged groups who have historically faced barriers in bringing their grievances before the courts.

[255] The nature of the class advancing the claim in this litigation made access to justice a significant concern. It gave this proceeding a public interest component.

[256] In considering the subject matter of the claim and the public interest, the motion judge referred to the case law that identifies matters of public interest as matters that engage societal concerns of significant importance to the community. The motion judge did not, however, apply that definition to the subject matter of this claim. Instead, he stated that a significant motivator for the appellants in bringing the proceedings was “money, independent of public policy”. He also referred to the manner in which the appellants pleaded and prosecuted the claim, which he described as “a blistering attack on the morality of the defendants’ conduct”. The motion judge held that these factors negated any public interest in the subject matter of the claims. In particular, he held that by pleading and pursuing their claim in the manner they did, the appellants forfeited any argument that the public interest component of the claim should mitigate any costs order made in favour of the respondents.

[257] I will first address the nature of the subject matter of the claim. Then, I will turn to the relevance of the appellants’ monetary motive and the manner in which they pleaded and pursued their claim.

[258] The claims arise out of the collapse of Rana Plaza in Bangladesh. That collapse killed or seriously injured over 3,600 people, many of whom worked in the ready-wear garment industry. That industry, as it operates in developing countries like Bangladesh, provides cheap clothing and footwear to consumers around the world, particularly consumers in affluent countries like Canada.

[259] In a very real sense, the tragedy at Rana Plaza reveals the true cost associated with the production of inexpensive goods for consumers in affluent countries. The ready-wear garment industry in Bangladesh pays very low wages, and tolerates unsafe and unhealthy working conditions. The low wages and abysmal working conditions are the product, in part, of the very low prices paid for the products made by those workers. Purchasers like Loblaws are able to keep the prices paid for the products low under the implied threat of taking their business to a manufacturer in another developing country.

[260] The Rana Plaza tragedy, and the Canadian connection to the ready-wear garment industry that operated in Rana Plaza, sparked discussion in Canada about the social, moral, and legal responsibilities of Canadian retailers and the Canadian government to workers whose efforts ultimately benefit Canadian businesses and consumers. Various organizations urged Canadian businesses that profit from the industry and the Canadian government to become involved, not only in providing relief to the victims of the tragedy (which Loblaws has done in a very significant way), but also in working towards the long-term improvement of the wages and working conditions in the ready-wear garment industry.

[261] The attention focused on the working conditions in the ready-wear industry as a result of the Rana Plaza collapse led to hearings before the Canadian Standing Senate Committee on Human Rights. In July 2015, the Committee produced a Report entitled “Fast Fashion: Working Conditions in the Garment

Industry". The Report described the working conditions in the ready-wear garment industry, the causes of those conditions, and attempts by the Canadian government to improve those conditions over the years. The Report acknowledged that the low wages and poor working conditions in the industry were the product, in part, of the low prices paid by foreign buyers for the products produced in factories like those found in Rana Plaza.

[262] The claim advanced by the appellants lays bare important public policy questions going to the role Canada and, more specifically, its business community, play and should aspire to play in the global marketplace. Do Canada and Canadian business entities have any social, moral, or legal obligations to workers in developing countries whose labour contributes to the economic well-being of Canadian businesses and consumers? If so, what are those obligations? These difficult issues go well beyond the immediate interests of the parties to this lawsuit, and raise important matters of public interest.

[263] In rejecting the submission that the public interest component of the claim should mitigate the damages, the motion judge referred to the appellants' monetary motive. I agree that the appellants were not public interest litigants, their claim was not "altruistic", and monetary compensation was the primary motivation behind their claim. However, a claim for damages, even very large damages, is not inconsistent with a significant public interest component in the issues raised in the claim. Both can exist together in a class action claim.

[264] In *Smith*, this court rejected the argument that a monetary motive somehow eliminated any public interest component of the claim, at para. 39:

> [T]he public interest element of this case is not undermined by the fact that the class plaintiffs sought, *inter alia*, to vindicate their own private property interests. In many cases, there is a mix of private interest and public interest. This court has consistently recognized the importance of the public interest factor and the availability of reduced costs awards to successful defendants because of this factor in cases where plaintiffs sought to vindicate their individual pecuniary interests.

[265] The motion judge was entitled to consider the nature of the monetary claim in assessing the financial risks and benefits of the litigation as they related to the parties' reasonable expectations with respect to costs. That consideration does not, however, mean that the public interest referred to in s. 31(1) must be taken out of the costs assessment when the losing party has a financial motive for advancing the claim.

[266] With respect, the motion judge conflated the public interest as an element in assessing costs under s. 31(1), and the parties' reasonable expectations with respect to costs based on the financial risks and benefits associated with the litigation. Both are relevant to the issue of costs, but they operate in different directions in this case. The presence of a public interest component in the claim works to mitigate the costs that the appellants, as the unsuccessful party in the proceedings, would otherwise be required to pay.

[267] The motion judge also focused on the manner in which the appellants pleaded and pursued their claim in concluding that the public interest component did not warrant any reduction in the costs. There is no doubt that the appellants made serious allegations against the respondents. Those allegations went beyond the facts that the appellants had to prove to establish their claim. I cannot, however, see a connection between that approach and the presence or absence of a public interest in the proceeding. If the subject matter of the claim raised issues of broad societal concern, and therefore matters of public interest, I do not think that the claim loses that characteristic merely because it is framed in intemperate language and contains unsubstantiated allegations that are extraneous to the claims advanced in the pleadings.

[268] It must be borne in mind that this is not a situation in which the appellants can be penalized in costs for the failure to prove allegations of fraud, dishonesty, or other dishonourable conduct made against the respondents: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 26. The motions were not the time or the place for the appellants to attempt to prove those allegations. Therefore, it cannot be said that they failed to prove those allegations.

[269] The nature of the pleadings and the manner in which the appellants pursued their claims were, however, relevant to the costs assessment in one way. Given the nature of the appellants' attack on the respondents, the

appellants could reasonably expect that the respondents would spare no cost and leave no stone unturned in vigorously defending the claims. The appellants could reasonably expect that, should their approach fail, as it did, they would face substantial claims for costs from the respondents.

(3) What costs order should be made?

[270] For the reasons outlined above, the motion judge erred in law in failing to give effect to the public interest component of the claims when fixing costs. He was required to consider that factor along with the other relevant factors he identified in the course of his reasons.

[271] Many of the factors favoured the order made by the motion judge. These included:

- the appellants claimed damages of $2 billion;
- the issues were numerous and complicated;
- the evidentiary record was “enormous” and detailed;
- the appellants’ theory of liability was legally tenuous;
- the nature of the attack on the respondents’ business ethics and motives demanded a “no stone unturned” defence; and
- the respondents were entirely successful.

[272] Having regard to all of the relevant factors, especially the tenuous nature of the claims, the indemnification of the successful respondents was, in my view, the major chord to be struck in fixing costs. The public interest component of the claim, while significant to the assessment, was a more minor chord.

[273] The motion judge should have reduced the quantum of costs to reflect the public interest component in the claims. The award, however, should remain substantial and reflective of the respondents' success in the proceedings. In my view, a reduction of the costs awarded by 30% achieves the appropriate balance. I would vary the motion judge's costs order accordingly.

"Doherty J.A."

Gray J. (***ad hoc***):

[274] I concur entirely with the reasons and dispositions of Doherty and Feldman JJ.A.

Released: “D.D.” December 20, 2018

“D.K. Gray J. (*ad hoc*)”