IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basyal v. Mac's Convenience Stores Inc.,* 2021 BCSC 1002

Date: 20210525
Docket: S1510284
Registry: Vancouver

Between:

Prakash Basyal, Arthur Gortificaion Cajes, Edlyn Tesorero and Bishnu Khadka

Plaintiffs

And

Mac's Convenience Stores Inc., Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Plaintiffs:	R.C. Gordon, Q.C. S.A. Quail (via video)
Counsel for Mac's Convenience Stores Inc.:	D.G. Cowper, Q.C. K.F. Milinazzo A. Chowdhury (via video)
Counsel for Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.:	R.W. Cooper, Q.C (via video)
Place and Date of Hearing:	Vancouver, B.C. January 21 and 22, 2021
Place and Date of Judgment:	Vancouver, B.C. May 25, 2021

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Introduction

[1] The parties to this class action dispute what claims the Court of Appeal permitted to proceed and what it remitted to this Court after it set aside the order of the certification judge, substituted its order on some issues and remitted "any remaining issues regarding certification of the pleaded causes of action" to this Court. This application is to address the "remaining issues regarding certification" and the plaintiffs' proposed amendments to the statement of claim.

[2] The plaintiffs came to Canada under the Temporary Foreign Worker Program. They allege that Mac's Convenience Store Inc. ("Mac's") and Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. (collectively, "Overseas") and Trident Immigration Services Ltd. ("Trident") arranged for class members to come to Canada as temporary foreign workers employed by Mac's. They allege that Mac's breached their contracts of employment and those of some of the class members by not providing employment when they arrived. They allege that Overseas charged all class members unlawful recruitment fees in breach of their fiduciary duty to class members. The plaintiffs allege that Overseas and Trident were unjustly enriched by receipt of the unlawful recruitment fees.

[3] The plaintiffs submit that the Court of Appeal has certified certain claims and has therefore held that there are common issues arising from those claims. The plaintiffs ask this Court to approve their proposed common issues. The plaintiffs seek to amend the notice of civil claim to, among other things, plead that Mac's is Overseas' principal and liable for their unjust enrichment. The plaintiffs submit that the Court of Appeal remitted the certification of the claim of agency as the basis for liability in unjust enrichment to this Court.

[4] The defendants submit that the plaintiffs do not properly interpret the Court of Appeal's order. They submit that while the Court of Appeal has determined that certain claims disclose a cause of action or are properly pleaded, the agency unjust enrichment claim has not been remitted to this Court because the Court of Appeal held it was bound to fail. The defendants disagree that the Court of Appeal ruled that

all of the certified claims give rise to common issues; rather, this Court must determine whether those claims give rise to common issues. With the exception of breach of contract, the defendants submit that the plaintiffs have not demonstrated that common issues can be stated.

[5] In addition, the parties seek orders on some issues pertaining to certification that are not directly related to the appeal of the certification judge's order, the order of the Court of Appeal or the Court of Appeal's reasons for judgment. These issues pertain to some of the plaintiffs' proposed amendments, the litigation plan and notice of certification. The defendants submit that the plaintiffs' litigation plan is inadequate. Mac's seeks an order that prior to notice of certification, there should be a summary trial of the issue of whether the breach of contract subclass (explained below) has a duty to mitigate.

[6] The issues include a statement of all of the matters necessary for a certification order, although some not disputed. The complete list is:

1. class and subclass definition;
2. common issues pertaining to breach of contract;
3. what the Court of Appeal ordered, and/or what this Court should order on:
    i. breach of duty of honest performance, in particular, whether a common issue can be stated;
    ii. Mac's liability for the alleged unjust enrichment of its alleged agents, Overseas;
    iii. Mac's liability for the breach of fiduciary duty of its alleged agents, Overseas;
    iv. Overseas' alleged breach of fiduciary duty;
    v. Overseas' and Trident's alleged unjust enrichment;
4. whether the litigation plan is adequate;

5. whether the plan for, means of, and content of the notice of certification is appropriate; and

6. whether notice of certification should be deferred until after a summary trial on mitigation with regard to the breach of contract and breach of duty of honest performance of contractual obligations claims against Mac's.

The Order of the Certification Judge

[7] The certification judge certified this claim on September 18, 2017. In his reasons for judgment indexed at 2017 BCSC 1649, the certification judge held that the claims pleaded disclosed causes of action, raised common issues and a class proceeding would be the preferable procedure to resolve the common issues as required by ss. 4(1)(a)(c) and (d) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 5. The certification order:

a) stated a class definition that included a subclass of persons resident in British Columbia and another of persons not resident in British Columbia (s. 4(1)(b))[1];

b) appointed the named plaintiffs as representative plaintiffs (s.4(1)(e)); and

c) stated common issues pertaining to breach of contract, agency, conspiracy, breach of fiduciary duty, unjust enrichment, waiver of tort, remedy and damages (s. 4(1)(c)).

The Court of Appeal's Order

[8] The Court of Appeal allowed the defendants' appeals and substituted an order certifying some claims, striking some claims and stating that some claims disclose a cause of action. It issued two sets of reasons, the first indexed at 2018 BCCA 235 ("2018 Court of Appeal Reasons") and the second indexed at 2019

[1] At the time of the certification judge's order and the appeal, the *Class Proceedings Act* required non-BC resident class members to be a subclass and to opt in to the class proceeding. The legislation has since been amended to not require such a subclass and to provide an opt-out regime for all class members. The parties agree the amendments apply to this case so the reference to a non-BC resident subclass in the class definition stated by the certification judge and the Court of Appeal should be eliminated.

BCCA 276 ("2019 Court of Appeal Reasons"). The order following the 2019 Court of Appeal reasons is the subject of the disputes on this application. When I refer to the Court of Appeal's order, that is the order to which I am referring.

[9] Given the issues on this application, I set out the Court of Appeal's order in its entirety:

> THIS COURT ORDERS that the appeal is allowed;
>
> THIS COURT FURTHER ORDERS THAT the Order of Mr. Justice Silverman pronounced September 18, 2017 is set aside, and the following orders are substituted:
>
> 1. The claims of breach of contract made in this proceeding directly against the appellant, Mac's Convenience Stores Inc. ("Mac's"), may continue in this proceeding as a certified class action provided a subclass of plaintiffs is created, in respect of:
>
>   (a) the allegation that Mac's failed to provide a job or failed to provide the amount of work it had promised in contracts of employment with members of the plaintiff subclass; and
>
>   (b) allegations that Mac's failed to pay travel costs or other accommodation expenses which it agreed to pay in the employment contracts with members of the subclass.
>
> 2. The plaintiff subclass is defined as follows:
>
>   All persons who, on or after December 11, 2009 to the opt out/opt in date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and/or Trident Immigration Services and who thereafter:
>
>   i. entered into binding contracts (i.e., contracts in respect of which all conditions precedent were satisfied or waived) of employment with Mac's Convenience stores to work in western Canada or the Northwest Territories under Canada's Temporary Foreign Worker Program;
>
>   ii. obtained valid work permits and (where required) travel visas to enter Canada to undertake such employment; and
>
>   iii. validly entered Canada and reported to work as required by their contracts of employment; and
>
>   iv. were not provided by Mac's with work at all, or were not provided with work in the amount specified in the contract of employment; or in respect of whom Mac's failed to pay expenses relating to accommodation or travel costs which Mac's was obligated to pay under such employment contracts.

> 3. For the purposes of section 4(1)(a) of the *Class Proceedings Act*,
>
> (a) the plaintiffs have pleaded [sic] cause of action in breach of the duty of honest performance against Mac's; and
>
> (b) the plaintiffs have pleaded that Mac's is in an agency relationship with Overseas Immigration Services Inc. and Overseas Career and Consulting Services Ltd. ("Overseas") in respect of the claim for breach of fiduciary duty against Overseas.
>
> 4. The claims in conspiracy, breach of fiduciary duty as against Mac's, unjust enrichment as against Mac's, and breach of contract in connection with Article 11 of the Employment Agreement and the *Employment Standards Act* have not been pleaded and are struck.
>
> 5. The certification of the class action as against Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd. for breach of fiduciary duty is confirmed.
>
> THIS COURT FURTHER ORDERS THAT any remaining issues regarding certification of the pleaded causes of action are remitted to the Supreme Court of British Columbia.

[10] The order of a court is the formal document that determines the issues between the parties, not the reasons for judgment: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 citing *Canadian Pacific Railway Co. v. Blain* (1905), 36 S.C.R. 159 at 166-67. However, where a dispute arises about the appropriate interpretation or application of an order, it is appropriate to refer to the reasons for judgment to determine if there is an ambiguity and if so, how it should be resolved: *3464920 Canada Inc. v. Strother*, 2009 BCSC 1286. If there is an ambiguity, the court may interpret the order using objective criteria including the reasons for judgment of the court making the order, pleadings, the circumstances in which the order was made, and the language of the order itself: *Yu v. Jordan*, 2012 BCCA 367 at para. 53.

[11] If the order is not clear or is ambiguous, the reasons for judgment are the "strongest indicator" of the objective meaning of the order: *R v. Rajaratnam*, 2019 BCCA 209 at paras. 155-156. However, as Mr. Justice Girouard stated in *Canadian Pacific Railway*: "[t]he reasons of judgment are mere opinions which may be considered as part of the judgment in so far as they disclose the grounds upon which it is rendered, but they cannot vary the text or *dispositif* of the formal judgment."

[12] The Court of Appeal's order sets aside the order of the certification judge and substitutes orders such that case overall remains certified, but on different terms and with some of the aspects of certification remitted to this Court. To address the parties' disagreement as to the manner in which the Court of Appeal has permitted the claims to proceed, I have applied the principles to determine if there is ambiguity and to resolve any ambiguity for each issue in dispute.

Class Definition

[13] The parties agree on class and subclass definitions. So that these reasons are comprehensible, I set them out.

[14] The class is defined as:

> All persons who, on or after December 11, 2009 to the opt-out[2] date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. (collectively, "Overseas") and/or Trident Immigration Services Ltd. ("Trident Immigration") in exchange for employment at Mac's and who were thereafter provided with employment contracts offering employment at Mac's Convenience Stores operated by Mac's Convenience Stores Inc. in British Columbia, Alberta, the Northwest Territories and Saskatchewan ("Western Canada") under Canada's Temporary Foreign Worker Program, which offer they accepted (the "Class").

[15] The subclass is defined as:

> All persons who, on or after December 11, 2009, to the opt-out date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and/or Trident Immigration Services and who thereafter:
>
> i. entered into binding contracts (i.e. contracts in respect of which all conditions precedent were satisfied or waived) of employment with Mac's Convenience stores to work in Western Canada under Canada's Temporary Foreign Worker Program;
>
> ii. obtained a valid work permit and (where required) travel visas to enter Canada to undertake such employment;
>
> iii. validly entered Canada and reported to work as required by their contracts of employment, and
>
> iv. were not provided by Mac's with work at all, or were not provided with work in the amount specified in the contract of employment or in respect of whom Mac's failed to pay expenses related to

[2] The Court of Appeal's order included a reference to the opt-in date but for the reasons explained in footnote 1, I have removed those references from the class and subclass definitions.

> accommodation or travel costs which Mac's was obligated to pay under such employment contracts

(the "Subclass).

Representative Plaintiffs

[16] Each of the plaintiffs meets the definition of both the Class and the Subclass. There is no proposal before me about representative plaintiffs for the Subclass. It may be appropriate to have different representative plaintiffs as between the Class and the Subclass given that the Subclass members have claims (breach of contract) that the Class members do not.

[17] I direct the parties to confer on this issue. In the event that they are in agreement, the plaintiffs shall deliver to me, through the Registry, a short submission setting out the agreed upon proposal which I shall consider and address through a written decision. If the parties are not in agreement, within 30 days of these reasons the parties shall deliver to me, through the Registry, written submissions of no more than five pages setting out their positions, which I shall consider and address through a written decision.

Claims Against Mac's

Breach of Contract

[18] On this application, the parties addressed breach of contract and breach of the duty of honest performance separately. As I will discuss further, the Supreme Court of Canada has explained that the duty of honest performance of contractual obligations is a doctrine of contract law, the breach of which is a breach of contract. Because of the approach the parties took, I will address them in the manner the submissions were made, but the separate treatment is not a comment on the nature of the claim.

[19] Paragraph 1 of the Court of Appeal's order, in relation to breach of contract against Mac's, provides that "the claims may continue in this proceeding as a certified class action" subject to the creation of a subclass. Paragraph 2 of the Court of Appeal's order defined the subclass.

[20] There is no dispute about the interpretation of paragraphs 1 and 2 of the Court of Appeal's order. The use of the words "certified cause of action" in paragraph 1 mean that the breach of contract claims have met the requirements for certification under s. 4(1) of the *Class Proceedings Act*. This includes that the breach of contract pleadings disclose a cause of action (s. 4(1)(a)) and that the claims raise common issues (s. 4(1)(c)).

[21] While the Court of Appeal's order provides that the breach of contract claims raise common issues, the parties agree that the Court did not address the form of the common issues. The Court of Appeal left open the formation of all common issues when it stated, in paragraph 81 of the 2018 Court of Appeal Reasons: "I would also remind counsel that the proposed common issues will likely require substantial amendment, although counsel did not focus on this point in any detail in their submissions".

[22] The plaintiffs propose the following common issues pertaining to breach of contract, to which Mac's does not object:

1. What are the relevant terms (express, implied or otherwise) of the Subclass members' employment contracts with the defendant Mac's respecting:
    i. wage rate;
    ii. hours of work;
    iii. length of the contract;
    iv. recruitment fees; and
    v. payment of two-way air transportation.
2. Did Mac's breach any of the foregoing contractual terms? If so, how?
3. Where Subclass members' employment was terminated prior to the completion of the 24-month fixed term set out in the contract, were they required to mitigate their losses?

[23] Mac's proposes the additional following issues pertaining to breach of contract to which the plaintiffs consent:

1. Are Subclass members able to recover damages in excess of the minimum notice period in the employment contract?
2. Is Mac's entitled to set off salary earned by Subclass members during the notice period or otherwise, even if the Subclass members had no duty to mitigate?

[24] I order the common issues pertaining to breach of contract be those sought by the plaintiffs with the addition of those sought by Mac's.

Breach of Duty of Honest Performance

[25] The plaintiffs seek an order that states that the claims asserted on behalf of the Subclass include breach of the duty of honest performance against Mac's and seeks to have a common issue certified as follows:

> Did Mac's breach its duty to honestly perform the terms of the employment contract by misleading subclass members about the availability of employment?

[26] The plaintiffs assert that the Court of Appeal's order provides that the plaintiffs have properly pleaded breach of the duty of honest performance in satisfaction of s. 4(1)(a) of the *Class Proceedings Act,* but the Court of Appeal did not address whether the claim raised common issues under s. 4(1)(c).

[27] Mac's submits that the claim for the breach of the duty of honest performance cannot be decided commonly. Mac's argues that the evidence does not disclose a basis in fact that there is a common alleged "lie" or act to "knowingly mislead" which is required to decide the alleged breach of the duty of honest performance on a class-wide basis. Mac's also submits that the breaches alleged by the plaintiffs are pre-contractual acts to which the duty of honest performance does not apply.

The Court of Appeal's Order Regarding Breach of the Duty of Honest Performance in Contractual Relations

[28] The certification judge's reasons and order do not explicitly deal with breach of duty of honest performance or the common issue the plaintiffs now seek to have certified.

[29] The Court of Appeal's order addresses the "direct" breach of contract claim and "breach of the duty of honest performance" separately. Breach of the duty of honest performance is addressed at paragraph 3(a), which I set out again for ease of reference:

> For the purposes of section 4(1)(a) of the *Class Proceedings Act*,
>
> (a) the plaintiffs have pleaded [sic] cause of action in breach of the duty of honest performance against Mac's;

[30] In its order, the Court of Appeal referred to breach of the duty of honest performance as a cause of action. However, while indicating that the matter is not necessarily settled, the Supreme Court of Canada has described the breach of duty of honest performance as a doctrine of contract law, the violation of which is a breach of contract, not as a distinct cause of action: *Bhasin v. Hrynew*, 2014 SCC 71, at paras. 72-74, 90, 93 and 103; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 50.

[31] Assuming the Court of Appeal did not expand the doctrine to a freestanding cause of action, then paragraph 3(a) of the Court of Appeal's order should be read such that the breach of duty of honest performance is properly pleaded as a breach of contract. Arguably, that also means that the claim is certified per paragraph 1 of the Court of Appeal's order.

[32] However, the use of "cause of action" in paragraph 3(a) introduces ambiguity. That wording could indicate the Court of Appeal ordered that breach of duty of honest performance is properly pleaded as a distinct cause of action. In that case, there is a question as to whether it was also certified. If it was not certified by the

Court of Appeal, it is the role of this Court to consider whether it gives rise to a common question.

[33] I will consider the reasons, and if necessary, other material, to resolve the ambiguity.

[34] At paragraphs 22-25 of the 2018 Court of Appeal Reasons, the Court describes the plaintiffs' pleadings pertaining to direct breach of contract. There is no discussion of breach of duty of honest performance in that portion of the reasons.

[35] Paragraphs 26-29 of the 2018 Court of Appeal Reasons describes the "other causes of action" pleaded by the plaintiffs. The Court of Appeal does not list breach of duty of honest performance among the causes of action it describes. When referring to paragraph 230 of the notice of civil claim the Court of Appeal stated that subparagraphs 230(b)-(e) relate to the breach of contract claim. Duty of honest performance is not included in those subparagraphs.

[36] At paragraphs 49-58 of the 2018 Court of Appeal Reasons, the Court of Appeal addressed the breach of contract claim and concluded that it disclosed a cause of action, there were issues common to a subclass that the Court of Appeal required be defined, and a class action would be the preferable procedure for resolving those common issues. The Court of Appeal did not use the words "duty of honest performance" in those paragraphs.

[37] At paragraphs 59-77 of the 2018 Court of Appeal Reasons, the Court of Appeal addressed whether the plaintiffs' pleading disclosed causes of action in the "remaining causes of action". There is no discussion of the breach of duty of honest performance in those paragraphs.

[38] At paragraph 80 of the 2018 Court of Appeal Reasons, the Court of Appeal stated its disposition on the breach of contract claim; it concluded that the breach of contract claim could continue in the proceeding as a certified class action provided that the plaintiffs created an appropriate subclass. The Court of Appeal said that "[t]his claim …. could include a breach of the duty of honest performance". This is

the first time the Court of Appeal referred to the breach of duty of honest performance.

[39] At paragraph 1 of the 2019 Court of Appeal Reasons, the Court of Appeal summarized its 2018 conclusions, including that breach of contract could continue as a certified claim and that the claim could include the breach of duty of honest performance. The Court of Appeal next refers to the breach of duty of honest performance in paragraph 18 of the 2019 Court of Appeal Reasons, where it stated: "the allegations made against Mac's in respect of breach of contract and breach of the duty of honest performance of contract remain standing."

[40] In stating the status of the breach of duty of honest performance in relation to breach of contract, the Court of Appeal used "could" which is often used as a conditional verb. The Court of Appeal did not state a condition to be satisfied in order to include it as an aspect of breach of contract, unless the condition is the creation of a subclass, to which the entire breach of contract claim was subjected. The Court of Appeal used "could" in relation to the certification of breach of contract, and the only condition attached to that certification is the creation of a subclass. I conclude that the Court of Appeal did not intend its disposition pertaining to breach of duty of honest performance to be conditional on an unstated condition.

[41] Although the Court of Appeal did not analyze the claim of breach of duty of honest performance often or in detail, when it did refer to it, the Court of Appeal referenced as included in the breach of contract claim. I conclude that the certification of breach of contract includes the breach of duty of honest performance. Therefore, the Court of Appeal has ruled that the plaintiffs have met their s. 4(1)(c) burden to establish that there are common issues in respect of the duty of honest performance.

[42] In reaching this conclusion, I am cognizant that the plaintiffs, in their notice of application, stated that the Court of Appeal did not address, in respect of s. 4(1)(c), whether the breach of duty of honest performance against Mac's raises common

issues. I have concluded otherwise. Despite the plaintiffs' position, it is not open to me to rule on an issue that the Court of Appeal has determined.

[43] Having found that the Court of Appeal has ruled that the plaintiffs have met their s. 4(1)(c) burden to establish that there are common issues in respect of breach of the duty of honest performance, I turn to the appropriateness of the common issue proposed.

Common Issue

[44] The plaintiffs seek the following common issue to be stated in relation to breach of the duty of honest performance:

> Did Mac's breach its duty to honestly perform the terms of the employment contract by misleading subclass members about the availability of employment?

[45] As noted above, Mac's asserts that this common issue cannot be stated because:

1. the evidence does not establish a common lie or common misrepresentation and so the plaintiffs have not met their evidentiary burden regarding the common issue; and
2. the facts as pleaded do not fall within the doctrine of breach of duty of honest performance of contract because the facts as pleaded relate to pre-contractual dishonesty.

[46] Mac's first objection is not a matter for this Court to consider given that I have concluded that the Court of Appeal ordered the breach of duty of honest performance certified as part of the breach of contract claim and thereby ruled that the s. 4(1)(c) burden to establish common issues has been met.

[47] I understand Mac's second objection to be that the pleadings do not disclose a claim for breach of duty of honest performance. However, there is no question that the Court of Appeal declared that they do in paragraph 3(a) of its order. Accordingly, that objection is not one that this Court can address.

[48] It is also possible to understand Mac's second objection to be that the form of common issue that the plaintiffs propose is not appropriate.

[49] This understanding of the objection has some force given that the Court of Appeal did not rule on any proposed common issue. The appropriateness of a specific common issue is not subsumed in a finding that the plaintiffs have met their burden to establish that the claims raise common issues. It appears to me that this specific common issue had not been proposed by the plaintiffs at the time of the appeal, further supporting the conclusion that the Court of Appeal did not address its appropriateness.

[50] There are requirements pertaining to the form of the common issue; broadly stated, the common issue must relate to the cause of action: see Justice Ward K. Branch and Mathew P. Good, *Class Actions in Canada*, 2nd ed. (Thomson Reuters, 2020) at 4.490.

[51] Mac' submits that the duty of honest performance does not apply to pre-contractual dishonesty.

[52] In *Bhasin*, Justice Cromwell stated that the duty of honesty in contractual performance "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (para. 73). Further, this duty is "a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance" and "operates irrespective of the intentions of the parties" (para. 74).

[53] In *Callow*, Justice Kasirer explained that the scope of the duty is controlled by requiring a link to the performance of contractual obligations or contractual rights (paras. 49-50). At para. 49, Kasirer J., commenting on *Bhasin*, stated that "[i]t is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance." I do not read this statement as limiting the doctrine to exclude pre-contractual dishonesty; rather, I

read it as highlighting the requirement for a direct link between the misleading conduct and the performance of the contract.

[54] In concurring reasons in *Callow*, at para. 130, Justice Brown said that contracting parties may not lie or mislead the other about matters directly linked to performance, citing *Bhasin* at paras. 73-74. The context, including the nature of the parties' relationship, is to be considered in determining whether the defendant made a misrepresentation to the plaintiff (at para. 133). Justice Brown also said at para. 131:

> … The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63 64). It follows that those representations sufficient to ground a claim for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.
>
> [Underlining added.]

[55] I do not interpret the underlined words to mean that the duty of honest performance only applies after contract formation. Rather, Brown J. was explaining that fraudulent misrepresentations are limited to misrepresentations made before the contract is formed, because a requirement of fraudulent misrepresentation is that the misrepresentation enticed the other party to form the contract. In other words, the temporal limit is on representations, not on the duty of honest performance.

[56] Mac's relies on *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1 for the proposition that a breach of the duty of honest performance cannot arise as a result of a statement made prior to contract formation. I note that the case was about the exercise of discretionary power under contracts, not about the duty of honest performance (see paras. 49-50). The distinction between these doctrines was confirmed in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, where the Court explained that the duty of honest performance is about honesty in all aspects of contractual performance, while the duty of good faith in exercising contractual discretion only relates to matters of contractual discretion. Accordingly, the statement at para. 51 of *Styles*, that the

"*Bhasin* principle … does not relate to the negotiation of the terms of the contract", is *obiter*.

[57] I do not accept that the duty of honest performance has been explicitly limited to dishonest behaviour after the parties enter into the contract or commence its performance. In my view, any temporal limitations of the doctrine are an open question best suited for determination at trial.

[58] The plaintiffs' allegations are not bound to fail given the description of the doctrine set out in *Bhasin* and explained in *Callow.* Contracting to supply employment when the jobs, to the knowledge of the contracting employer, would not or might not exist when the contracting employee is to start work can be said to be directly linked to the performance of the contract of employment.

[59] In any event, the plaintiffs' allegations include that Mac's breached the contract by not providing employment within the terms of the contract and the Subclass' work permits and by misleading some of the Subclass members about the availability of employment. The facts alleged in support of these pleadings are not temporally inconsistent with breaches at the time of and/or after contract formation and so are not limited to acts that took place before the contracts were formed. Accordingly, the common issue is appropriate even if Mac's submission on the temporal scope of the duty of honest performance is accepted.

[60] I conclude that breach of the duty of honest performance common issue proposed by the plaintiffs is appropriate. I reiterate that in making this ruling, I am not making a decision on the parameters of the duty one way or another. That is an issue for trial.

Liability of Mac's for Unjust Enrichment of Its Alleged Agents, Overseas

The Court of Appeal's Order

[61] The Court of Appeal's order does not address the plaintiffs' claim that Mac's is liable, as Overseas' principal, for Overseas' unjust enrichment. Paragraph 3(b) of the Court of Appeal's order provides that the plaintiffs have pleaded that Mac's is in

an agency relationship with Overseas in respect of the claim for breach of fiduciary duty. At paragraph 4, the Court of Appeal struck the claims in conspiracy, breach of fiduciary duty as against Mac's, unjust enrichment against Mac's and breach of contract in connection with Article 11 of the Employment Agreement and the *Employment Standards Act,* R.S.B.C. 1996, c. 113, because those claims had not been pleaded.

[62] The plaintiffs submit that because the Court of Appeal ordered that the plaintiffs have pleaded an agency relationship between Mac's as principal and Overseas as agent in respect of the claim of breach of fiduciary duty against Overseas, it follows that the Court of Appeal meant to or would order the same thing in respect of unjust enrichment. They submit it is open to this Court to do so as one of the "remaining issues regarding certification of the pleaded causes of action" remitted to this Court.

[63] Mac's argues that by striking the claim in unjust enrichment against Mac's, and not including unjust enrichment in the portion of the order dealing with Mac's liability for its agents' breach of fiduciary duty, the Court of Appeal ordered that nothing in relation to unjust enrichment could be claimed against Mac's.

[64] I conclude that both interpretations are possible on the order as worded and therefore there is ambiguity.

Resolution of the Ambiguity

[65] Starting with the Court of Appeal's order, the plaintiffs argue there is no logical difference between agency in relation to breach of fiduciary duty and agency in relation to unjust enrichment. Accordingly, by finding that agency was pleaded, the Court of Appeal must have made that determination in relation to both breach of fiduciary duty and unjust enrichment, leaving this Court to confirm that in relation to unjust enrichment and to address common issues with regard to both.

[66] Mac's argues that by striking the claim in unjust enrichment against Mac's, the Court of Appeal's order must be interpreted to direct that nothing in relation to

unjust enrichment, either directly or through liability for its agents' unjust enrichment, could be claimed against Mac's.

[67] There is a difference between claiming a principal to be liable for its agent's breach of fiduciary duty versus its agent's unjust enrichment. Breach of fiduciary duty gives rise to compensatory damages or disgorgement damages while unjust enrichment gives rise to restitutionary damages or disgorgement damages: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 115.

[68] The question arises as to whether a principal can be held liable for its agent's conduct that gives rise to restitutionary damages or disgorgement damages in circumstances where the principal did not pay the money that forms the subject of the claim such that it would be required to make restitution or disgorge an amount it did not receive. The case relied upon by the plaintiffs, *Thiessen v. Clarica Life Insurance Co.*, 2002 BCCA 501, at para. 31, does not answer this question. The Court of Appeal did not directly address this question while considering the unjust enrichment claim made against Mac's directly or when it addressed the claim that Mac's is liable for its agent's breach of fiduciary duty. The Court of Appeal considered the claim of breach of fiduciary duty against Mac's separately from the claim of Mac's as principal in respect of the alleged breach of fiduciary duty by Overseas.

[69] The Court of Appeal overturned the order of the certification judge which stated common issues of whether Mac's was liable for its agents charging and collecting the recruitment fees which were the factual basis for the unjust enrichment claim. The Court of Appeal substituted its own order, in which it said that the plaintiffs have pleaded agency in respect of breach of fiduciary duty. The Court of Appeal's order does not expressly direct this Court to address agency and unjust enrichment. It does not make sense that the Court of Appeal would address agency for breach of fiduciary duty and leave it to this Court to address agency for unjust enrichment if there was no difference between the bases of the two claims.

[70] Accordingly, it does not stand to reason that because the Court of Appeal allowed the plaintiffs to pursue Mac's for Overseas' breach of fiduciary duty, the plaintiffs must also be able to pursue Mac's for Overseas' unjust enrichment. Nor does it stand to reason that because the Court of Appeal struck the claim of unjust enrichment against Mac's, it also precluded a claim that Mac's is liable for Overseas' unjust enrichment.

[71] I cannot resolve the question of whether the claim that Mac's is liable for its agents' unjust enrichment was a "remaining certification issue" to be addressed by this Court by reference to the order itself. I therefore turn to the Court of Appeal's reasons.

[72] To understand the Court of Appeal's reasons, it is necessary to start with the certification judge's order and reasons. The certification judge held that the agency pleading met s. 4(1)(a) of the *Class Proceedings Act*. The certification judge held that the claim against Mac's in unjust enrichment was not bound to fail on the basis that there was no pleading that Mac's directly received the recruitment fees because the plaintiffs pleaded that Overseas collected the recruitment fees as Mac's agents. The order included this common issue: "were the defendants, or any of them, unjustly enriched by having the Class pay recruitment fees?" In respect of agency, the order included this common issue: "is Mac's liable for their agents charging and receiving recruitment fees from class members?" The certification judge's order does not describe a link between the cause of action against Overseas, the claim of agency and the common issues, i.e. that the plea of liability through agency applied to the claim of Overseas' unjust enrichment.

[73] In the 2018 Court of Appeal Reasons, the Court identified several deficiencies in the plaintiffs' pleadings, including that the plaintiffs did not plead that Mac's received recruitment fees. The Court of Appeal gave the plaintiffs the opportunity to amend their pleadings after a "thorough 're-think'" of the case" (at para. 78 of the 2018 Court of Appeal Reasons). The Court of Appeal directed the plaintiffs to reconsider, and if they deemed appropriate, address agency and unjust enrichment at para. 80 of the 2018 Court of Appeal Reasons where Newbury J.A., for the Court,

stated her disposition of breach of contract against Mac's and breach of fiduciary duty against Overseas and then stated:

> …
>
> 3. As for the remaining causes of action, I would stay the action pending the plaintiffs' amendment of the NOCC such that the material facts relating to each cause and the existence of an agency relationship (if counsel wishes to pursue that allegation) are clearly stated. …

[74] The parties returned to make submissions in 2019 on the plaintiffs' proposed second amended notice of civil claim. Ultimately, the plaintiffs did not file that version of the amended notice of civil claim. The amended pleading on this application is also styled the "second amended notice of civil claim". It is not clear how the proposed second amended civil claim before the Court of Appeal in 2019 compares to the one proposed on this application although it is clear there are some differences.

[75] In the 2019 Court of Appeal Reasons, the Court of Appeal addressed the claim of unjust enrichment as against Mac's, addressed the claim of fiduciary duty as against Mac's and addressed the claim that Overseas were Mac's agents. The Court of Appeal held that the plaintiffs did not plead the required facts to claim unjust enrichment against Mac's. The Court of Appeal held that deficiency could not be addressed by the agency claim (i.e. by claiming that the fees were paid to its agent). In my view, that finding pertained to the unjust enrichment claim against Mac's, not the claim that Mac's is liable for the unjust enrichment of its agents.

[76] The 2019 Court of Appeal Reasons, at paras. 15-17, addressed Mac's liability for its agents, Overseas, in relation to breach of fiduciary duty. In its discussion of the amended pleadings pertaining to agency, the Court of Appeal stated that the facts pleaded to establish agency were sufficient to put into issue whether Mac's was liable for Overseas' alleged breach of fiduciary duty. The Court of Appeal also observed that such a finding could not make Mac's a fiduciary.

[77] The 2019 Court of Appeal Reasons did not specifically address the agency and Mac's liability for Overseas' alleged unjust enrichment. Nor did the Court of

Appeal say that it was remitting Mac's liability for its agents' unjust enrichment to be addressed by this Court.

[78] It appears that the parties did not squarely address a claim that Mac's was liable to the plaintiffs for Overseas' unjust enrichment through the doctrine of agency before the certification judge or the Court of Appeal. It is not possible to confirm that from the Court of Appeal's reasons, but the circumstances and the description of the pleadings in the reasons cause me to conclude that was the case.

[79] In my view, it is not reasonable to conclude that the plaintiffs put an amended pleading that Mac's should be liable for its agents' unjust enrichment before the Court of Appeal, but the Court of Appeal decided to remit it to this Court to decide without stating that and explaining why. I therefore conclude that the proposed second amended notice of civil claim before the Court of Appeal did not plead that Mac's is liable for the alleged unjust enrichment of Overseas.

[80] Having reached this conclusion, the question becomes whether this Court should entertain amendments that the plaintiffs did not previously propose despite the opportunity afforded to them by the Court of Appeal.

[81] In my view, this Court should not entertain these amendments. As the Court of Appeal explained at paragraph 45 of the 2018 Court of Appeal Reasons, the discretion to allow amendments should be exercised liberally but also judicially, and take into account fairness to the defendants and the "length of time the plaintiff has to 'get it right'", citing *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44. Fairness to the defendants demands that the issues before the Court of Appeal be addressed in that court unless the Court of Appeal remitted them to this Court, and I have found it did not remit this issue.

[82] In addition, the defendants should not have to address pleadings that are a moving target that never stops moving. With regard to agency and unjust enrichment, the target stopped moving after the Court of Appeal allowed the plaintiffs an opportunity to amend their pleadings and then issued its order setting

aside the order of the certification judge and substituting its order, which did not include a declaration that this claim met the s. 4(1)(a) criteria.

[83] For the reasons I have expressed, I dispose of certain proposed amendments in the second amended notice of civil claim relating to this claim as follows:

1. Para. 7 – the words "its agent Overseas in committing these torts" must be replaced with "its agents' Overseas' breach of fiduciary duty".
2. Para. 79 f. – the claim that Mac's is liable for its agents' unjust enrichment as against the Class members is not allowed; and
3. Para. 83 – the plaintiffs may not seek an order that Mac's provide an accounting and restitution of all funds received by the Defendants from fees paid to Overseas and Trident.

[84] I do not allow proposed common question C.(iii).

Liability of Mac's for Breach of Fiduciary Duty of Its Alleged Agents, Overseas

[85] Mac's asserts that although the Court of Appeal held that the plaintiffs' pleadings were sufficient to plead agency, the plaintiffs' claim that Mac's is liable for Overseas' breach of fiduciary duty by way of agency fails to satisfy the certification requirements under the *Class Proceedings Act.*

[86] I consider the Court of Appeal's order to be clear that the plaintiffs' pleadings satisfy s. 4(1)(a) of the *Class Proceedings Act* with regard to the claim that Mac's is liable for Overseas' breach of fiduciary duty. Given that the Court of Appeal did not state that this claim is certified, and given that the common issues criterion was the only other certification requirement under appeal, I am of the view that s. 4(1)(c) remains to be determined by this Court. That includes whether this claim gives rise to a common issue and if so, how to state the common issue or issues.

[87] Mac's asserts the claim does not give rise to common issues and the claim cannot be certified because the allegation of agency cannot be decided on a class wide basis.

[88] There are two categories of agency: actual and apparent. Actual agency arises from express or implied authority granted by the principal to the agent on which authority the agent consents to act. Apparent agency arises where the principal communicates the authority for the agent to bind the principal to a third party: 2018 Court of Appeal Reasons, para. 65, citing F.M.B. Reynolds*, Bowstead and Reynolds on Agency* (17th ed., 2001). The term apparent agency and the manifestation of its authority, apparent authority, are referred to interchangeably in the jurisprudence.

[89] Mac's submits that the plaintiffs have not met their burden to adduce evidence that either actual agency or apparent agency can be decided commonly. Mac's argues there is no basis in fact to support a common issue on the scope of authority alleged by the plaintiffs. Mac's asserts the plaintiffs do not allege a common representation that supports a common issue on apparent agency. Mac's argues that, in absence of express authority underlying actual agency, individual inquiries would be required to establish apparent agency for each Class member. Mac's also submits that agency liability established through post-conduct ratification cannot be decided commonly.

[90] Before addressing those submissions, I will review the legal principles pertaining to common issues.

Common Issues – Legal Principles

[91] Section 1 of the *Class Proceedings Act* defines common issues as "common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts". To satisfy s. 4(1)(c) of the *Class Proceedings Act*, the proposed representative plaintiff must show "some basis in fact" that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members": *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 25, also see *Pro-Sys Consultants Ltd. v. Microsoft Corp*. 2013 SCC 57 at paras. 101-102.

[92] In *Microsoft* at para. 108, the Court discussed commonality, incorporating principles set out in its earlier decision, *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, including that an issue will be common only where its resolution is necessary to the resolution of each class member's claim but it is not essential that the class members be identically situated *vis-à-vis* the opposing party.

[93] The Court in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45-46 clarified some of its earlier statements about commonality with regard to common success, explaining that success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another. Questions can be considered common even if the answers to those questions vary between class members. Even a significant difference among class members does not necessarily defeat a finding of commonality. If material differences eventually emerge, they can be addressed then as required: *Dutton* at para. 54, *Microsoft* at para. 112.

[94] In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members: *Microsoft* at para 110. The Court of Appeal, in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, explained that the "'some basis in fact' standard does not require the court to weigh and resolve conflicting facts and evidence" and that the court is ill-equipped to resolve conflicting evidence at the certification stage (at paras. 19-20, citing *Microsoft*, at paras. 102-105).

Scope of Authority

[95] Mac's submits that the plaintiffs have not led evidence to support a common issue with regard to apparent agency, citing two shortcomings. First, Mac's asserts the evidence does not demonstrate actual agency between Mac's and Overseas by Mac's conferring express authority to Overseas to charge the recruitment fees. Second, Mac's asserts that the evidence does not demonstrate that the alleged agency relationship existed between Mac's and Overseas in a manner common to each member of the Class.

[96] The plaintiffs submit that Mac's position calls on me to overturn the decision of the certification judge as he certified a common issue in relation to this issue and the Court of Appeal did not substitute one. In addition, they submit that they have led evidence that this issue is common to all Class members and Mac's position calls for me to weigh competing evidence.

[97] I agree with the plaintiffs that it would be an affront to *res judicata* and *stare decisis* to decide certification matters differently than the certification judge unless the Court of Appeal order clearly mandates a different result with regard to those issues. If it is not clear that a different result must follow, reconsideration of those matters puts this Court in the position of an appellate court reviewing the decision of the certification judge. That cannot be what the Court of Appeal intended.

[98] With regard to the questions of whether the certification judge decided this issue and whether the Court of Appeal overturned that aspect of his decision, the certification judge found that the pleadings regarding agency and breach of fiduciary duty met the requirement of s. 4(1)(a) of the *Class Proceedings Act*. With regard to common issues, the certification judge referred to the evidence that Mac's signed forms authorizing Overseas to act on its behalf for every labour market opinion application for each Class member and Appointment of Representative forms, appointing the principal of Overseas as its representative.

[99] The Court of Appeal held that the plaintiffs have pleaded that Mac's was in an agency relationship with Overseas in respect of the claim for breach of fiduciary duty. The current proposed pleading has amendments with regard to the facts and legal basis for the claim of agency including in relation to breach of fiduciary duty. I infer that these amendments are substantively the same as those before the Court of Appeal in 2019, because of the similarity between the current proposed amendments and the description of the amendments in the 2019 Court of Appeal Reasons.

[100] As I have already stated, the Court of Appeal made a general observation that the common issues would likely need to be revisited. The common issues the

plaintiffs currently propose in relation to Mac's liability for Overseas' breach of fiduciary duty are different than the common issues that the certification judge stated. That is not a complete answer to the plaintiffs' position because, as I have already stated, the form of the common issue is a different matter from whether the evidence supports any common being stated. However, since the nature of the claim has shifted since the certification judge's order, the 2019 Court of Appeal Reasons, the amendments proposed to the notice of civil claim, and the new proposed common issues, I conclude this issue is not *res judicata* or calling on this Court to review the certification judge's decision. Rather, because of the shifts, it is appropriate to consider whether the plaintiffs have satisfied their burden to demonstrate that common issues can be stated. If the evidence supports common issues, I will address whether the proposed common issues are appropriate.

Commonality – Actual Agency

[101] The plaintiffs rely on evidence that the plaintiffs were hired under the Temporary Foreign Worker Program, the terms of which required the hiring employer to seek a labour market opinion for each position it seeks to fill. The evidence is that Mac's signed standard forms to appoint Overseas to obtain the labour market opinions for each hire and forms appointing the principal of Overseas as its representative in connection with the negotiation and issuance of labour market opinions. The evidence of the representative plaintiffs include each of these forms signed by Mac's in connection with their employment. The forms state: "I am aware that I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf" and "I, hereby, agree to ratify and confirm all that my representative shall do or cause to be done by virtue of this appointment".

[102] Mac's submits that these common forms are not evidence of actual agency because the statements in the forms are not by Mac's to Overseas; rather they are representations made by Mac's to the government of Canada. Mac's made the same argument on the issue of whether the pleading of these facts disclosed a claim of apparent agency to the Court of Appeal. The Court of Appeal held that was a matter to be decided a trial.

[103] The labour market opinion authorization forms are clearly evidence relating to whether Mac's told the government of Canada that Overseas were its agents whereas actual agency is determined by whether Mac's told Overseas that Overseas was Mac's agent. Nevertheless, I accept that the forms are some evidence that Mac's appointed Overseas to be its agents, and did so for each labour market opinion and therefore for each Class member. While there is no evidence that Mac's advised Overseas or that Overseas knew Mac's was appointing them for each labour market opinion, that is not fatal at this stage because the evidence that the plaintiffs have led is "some evidence".

[104] Mac's also asserts that the authorization given in the labour market opinion forms is not broad enough to cover the breaches of fiduciary duty that the plaintiffs allege Overseas committed and for which they allege Mac's is liable because there is no evidence that Mac's authorized Overseas to collect recruitment fees. In my view, it is enough at this stage that the plaintiffs have shown that there were authorizations in a form common to all of the representative plaintiffs and required for all positions that fall within the scope of the proposed Class, designating Overseas to act on behalf of Mac's in relation to the hiring of the Class members. Whether the wording is wide enough to cover Overseas' charging recruitment fees is an inquiry into the merits of the agency claim. It does not go to whether there is some evidence to demonstrate that it can form the basis of a common question.

[105] Mac's representative deposed that Mac's never authorized Overseas to charge or collect any payments from temporary foreign workers in exchange for securing employment with Mac's. In my view, Mac's is asking me to weigh this more specific evidence against the general acknowledgement of responsibility for Overseas' actions in recruiting foreign workers described above. Weighing evidence is not permissible to determine whether the plaintiffs have met the some basis in fact test.

Commonality - Apparent Agency

[106] Mac's submits that in order for apparent agency to form the basis for a common question, there must be evidence of a common representation that Overseas' was authorized to collect the recruitment fees on behalf of Mac's.

[107] The law of apparent authority is helpfully summarized by G.H.L Fridman, *Canadian Agency Law*, 3rd ed. (Toronto: LexisNexis Canada Toronto, 2017) at 86-87. The following points are relevant:

- To permit a third party to assert the existence of such authority, it must be proved that the third party relied on the relevant representation, and that such reliance led to an alteration of the third party's position to his or her detriment.
- Ostensible or apparent authority is based on the doctrine of estoppel and creates a legal relationship between the principal and a third party by means of a representation made by the principal to the third party in whole or in part.
- It must be shown that the principal, deliberately, or intentionally, held out the one dealing with the third party as his or her agent.
- A holding out giving rise to apparent authority in the agent may also happen where an agent with actual authority exceeds such authority by doing something that can usually and reasonably be understood by a third party to be within such authority even though, in the circumstances, it is not, although the third party is unaware of this.

[108] The last point was confirmed by the Court of Appeal in *Thiessen* at para. 31.

[109] In order to establish apparent agency as a common issue, there must be some form of common representation or common facts on which the Class members would perceive apparent authority. I agree with Mac's that the case cited by the plaintiffs in support of certifying apparent agency as a common issue, *Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants)*, 2012 BCSC 328, is not determinative. The authorities cited in *Dominguez* do not concern apparent agency.

[110] However, Fridman's explanation of apparent agency and the adoption of the apparent authority proposition by the Court of Appeal in *Thiessen* demonstrate that the representation relied on by the third party to establish apparent agency can be general in character. Accordingly, I do not accept Mac's submission that the lack of evidence of a common agency representation specific to recruitment fees means there is no evidence of a common representation. Nor do I accept that a common representation must be a statement or one single representation made to every Class member in exactly the same terms or manner. Common behaviour by the principal with regard to the Class members may satisfy the commonality requirement for apparent authority.

[111] The plaintiffs deposed that they had to pay a fee to Overseas to be considered for a job with Mac's. The plaintiffs either had interviews with Mac's arranged by Overseas, or were made job offers directly by Overseas without an interview. Overseas sent the plaintiffs their job offers and employment contracts. The plaintiffs deposed that Overseas communicated with them regarding their travel to Canada.

[112] I conclude that there is some evidence of a common representation and/or common behaviour to support apparent authority as a common issue.

[113] Mac's also argues that to determine whether individual Class members understood Overseas to have authority on behalf of Mac's requires consideration of individual Class members' reliance of the representations made to them.

[114] In *Class Actions in Canada*, the authors stated the following at para. 4.630:

> 4.630 Whether reliance in a misrepresentation case can be certified is also fact dependent. In *Lewis v. Cantertrot Investments Ltd*., [2005] O.J. No. 3535 (Ont. S.C.J.), the plaintiffs sought to represent a class consisting of the purchasers of residential condominium units who alleged damages for misrepresentation with respect to monthly assessments and maintenance fees. The court was prepared to certify "reasonable reliance" as a common issue, framing it as follows at para. 19:
>
> > Absent any other material representations, or material facts within the knowledge of a class member, would it have been

> reasonable for such a member to have relied on such misrepresentations in making the decision to purchase a unit?

[115] This statement supports that reliance can be decided as a common issue in the circumstances of this case.

[116] I conclude that the plaintiffs have led some evidence of apparent authority that supports that it can be decided commonly.

Post Conduct Ratification

[117] Mac's acknowledges that agency may be established through post-conduct ratification. Mac's submits that post-conduct ratification requires that the principal has full knowledge of the agent's dealings with the third party and that the principal accepts and recognizes each act committed outside of the agency relationship.

[118] Mac's submits that the appointment form and the labour market application forms are not evidence of ratification by Mac's because they do not describe the specific activities that Overseas undertook and have no reference to recruitment fees. Mac's also submits that these forms cannot amount to post-conduct ratification because the recruitment fees alleged to have been collected would have been collected after the forms were signed. Mac's also submits that the evidence is that its affiant knew that Overseas was charging for fees for assisting Class members with processing immigration documents and navigating the process, which is different from being aware that Overseas was charging recruitment fees.

[119] This submission is about the merits of whether the fees charged were recruitment fees and whether there was post-conduct ratification, not whether there is some basis to support that it is a common issue. In my view, the evidence discloses that it is a common issue for the same reasons given above.

Form of Common Issues

[120] Mac's did not take issue with the form of the agency related common questions proposed by the plaintiffs. I accept that they are reasonable.

Claims Against Overseas and Trident

[121] The application response of Overseas and Trident refers to both Overseas and Trident as the "Application Respondents". However, the parts of the application response in which they collectively take a position is in the statement of the orders consented to, the orders opposed, the orders on which no position is taken, the factual basis, and the time required for the application to be heard. From the commencement of the submissions under the heading "Legal Basis" on page 2 to the end of that section on page 7 (i.e. for the entirety of the submissions section of the application response), the submissions relate entirely to Overseas, not Overseas and Trident and not the "Application Respondents".

[122] Accordingly, while Trident has joined on which orders are consented to, which are objected to and on which no position is taken, it has not made any submissions.

Breach of Fiduciary Duty

[123] The original notice of civil claim included claims against all defendants for breach of fiduciary duty. The second amended notice of civil claim pleads breach of fiduciary duty against Overseas only. Overseas submits that for the Subclass, breach of fiduciary duty has not been pleaded and is bound to fail.

[124] The certification judge certified the breach of fiduciary claims against all defendants and stated common issues in regard to them.

[125] The Court of Appeal's order is that "[t]he certification of the class action as against Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd. for breach of fiduciary duty is confirmed." As an aside, it is not apparent why Trident is included in this part of the order since the second amended notice of civil claim proposed on this application does not plead breach of fiduciary duty against Trident. It may be that in the version before the Court of Appeal, the plaintiffs did plead breach of fiduciary duty against Trident.

[126] In any event, in the current version of the second amended notice of civil claim, the plaintiffs plead breach of fiduciary duty against Overseas alone so I will address it in that manner.

[127] Overseas does not dispute that the Court of Appeal's order provides that the pleadings disclose a cause of action in breach of fiduciary duty. However, it argues that the order does not take into account the creation of the Subclass or the current amendments. It argues if the facts pleaded by the plaintiffs in relation to the Subclass are taken to be true (i.e. that the Subclass were offered contracts of employments with Mac's), then the claims against Overseas for breach of fiduciary duty are bound to fail because a non-party to a contract cannot be a fiduciary with regard to the contract.

[128] I do not accept the submissions of Overseas. The Subclass was created in the same order in which the Court of Appeal confirmed certification against Overseas for breach of fiduciary duty. The confirmation clearly related to the class as certified by the certification judge. The Subclass is a subset of that class. There is no ambiguity in the Court of Appeal's order on this issue.

[129] I was advised that this issue was not argued before the Court of Appeal. Counsel for Overseas on this application was not counsel on the appeal. Notwithstanding, Overseas' submission implicitly asserts that the Court of Appeal was wrong to certify breach of fiduciary duty against them. Overseas ought to have raised the issue as to whether the creation of the Subclass undermines the viability of the breach of fiduciary claim with the Court of Appeal at the 2019 hearing. They cannot raise it with this Court given the Court of Appeal's order clearly includes that the claims brought against Overseas in breach of fiduciary duty disclose a cause of action.

Unjust Enrichment

[130] The original notice of civil claim included claims against Overseas and Trident for unjust enrichment. Those claims were certified by the certification judge and common issues were stated.

[131] In the 2018 Court of Appeal Reasons, under the heading "Unjust Enrichment and Waiver of Tort?", at paragraph 74, the Court addressed unjust enrichment in relation to Overseas and Trident. The Court of Appeal concluded that the plaintiffs' pleading did not explain what unlawful or illegal act they assert against Overseas and Trident. As already noted, at paragraph 80 point 3, the Court of Appeal stayed the action pending the plaintiffs' amendment of the notice of civil claim to state the material facts relating to each cause of action and the alleged agency relationship. That disposition appears to include the opportunity to amend to address the failure to plead that it was illegal for Overseas and Trident to charge the plaintiffs for jobs.

[132] Overseas does not contest that the claim is now properly pleaded, but they do contest that it raises common issues. Overseas submits that the claims against it all hinge on one common issue: whether it unlawfully collected fees. They argue that the evidence does not support a finding that the Class members had common experiences with Overseas. This argument focusses on the following proposed common question:

> Were the fees paid by the Class Members to Overseas and/or Trident Immigration fees for employment, prohibited by employment standards legislation, or are they fees for immigration and settlement assistance?

[133] Overseas also submits that a class proceeding would not be the preferable procedure for resolution of any common issue that could be stated about recruitment fees.

Common Issues

[134] Given that Overseas does not dispute the current pleading discloses a claim in unjust enrichment, the issue is whether common issues can be stated and if so, what they are. Overseas asserts that the plaintiffs' evidence does not support a common issue with regard to recruitment fees.

[135] The Court of Appeal's order does not address that issue. But, the Court of Appeal noted in the 2018 Court of Appeal Reasons at paragraph 59, the unjust enrichment claim turns on the nature of the recruitment fees. The plaintiffs allege

that the recruitment fees are fees for jobs. Overseas asserts that any fees paid to them or to Trident were for immigration services. At paragraph 59 of the 2018 Court of Appeal Reasons, the Court of Appeal stated that issue should be a common question and at paragraph 74 of the same reasons, it stated that the issue will be a common issue.

[136] Accordingly, the submissions of Overseas that no common issue can be stated is contrary to the reasons of the Court of Appeal. That disposes of the issue.

[137] As to the form of the common issue, I find that the question the plaintiffs propose under the heading "B. Fees" is consistent with what the Court of Appeal stated ought to be a common question. The questions the plaintiffs propose under the heading "C. Unjust Enrichment" have not been contested other than on the basis that common questions cannot be stated with regard to fees. I conclude the plaintiffs' common questions under both headings are appropriate.

Preferable Procedure

[138] The certification judge decided that a class proceeding would be the preferable procedure for resolution of the common issues. Overseas and Trident did not argue that the certification judge erred in that regard before the Court of Appeal. For that reason, at first glance, it is not a remaining issue regarding certification that the Court of Appeal remitted to this Court.

[139] However, the Court of Appeal's order is sweeping in the sense that it overturns the certification judge's order and substitutes it own order. It did not substitute an order on preferable procedure with regard to the unjust enrichment claims against Overseas and Trident. The common issues have changed, so the analysis as to whether a class proceeding is preferable for the resolution of these common issues may also have changed.

[140] For this reason, it the Court of Appeal's order is not clear. I turn to its reasons and the surrounding circumstances to resolve the ambiguity.

[141] Its reasons do not assist because preferable procedure was not argued on appeal.

[142] The factor that is most significant in the surrounding circumstances is that Overseas and Trident have not submitted why the preferable procedure analysis is different for these common issues from those the certification judge certified. Without such a submission, this Court is essentially asked to come to a different result than the certification judge. I do not accept that the Court of Appeal intended this result. I conclude that preferable procedure was not remitted to this Court to determine.

Factual Amendments to the Notice of Civil Claim

[143] Mac's submits that the plaintiffs have included amendments to the factual basis section of the proposed second amended notice of civil claim without proffering evidence to support them. They assert the factual amendments at paragraphs 51, 53 and 55 of the proposed second amended notice of civil claim should be refused.

[144] I do not accept this submission. Pleadings do not have to be supported by evidence, nor do amendments to pleadings. Amendments are allowed as are necessary to determine the real question between the parties. In deciding whether to grant leave to amend pleadings, the court does not hear evidence and considers the pleadings assuming the facts pled are true: *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17, citing *Victoria & Grey Metro Trust Co. v. Fort Gary Trust Co.* (1988), 30 B.C.L.R. (2d) 45 (S.C.) at 46; and *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.), [1988] B.C.J. No. 515 at paras. 22-27.

[145] I allow the proposed factual amendments at paragraphs 51, 53 and 55 of the second amended notice of civil claim.

Litigation Plan

[146] The purpose of the litigation plan is to set out a framework for how the case may proceed. While the complexity of the case should generally be addressed in the litigation plan at the time of certification (the present stage of this case), it is not

necessary that the plaintiffs detail every step that will be required in the proceeding. It is anticipated that the litigation plan will require amendments as the case proceeds: *Service v. University of Victoria*, 2019 BCCA 474 at para 67; *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para 253; and *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para 57.

[147] The certification judge approved a litigation plan that I understand to be in substantially the same form as the one currently proposed, except that the plaintiffs have amended it to address concerns that Mac's raised subsequent to the appeal. The litigation plan was not an issue on the appeal.

[148] Since the post-appeal changes, Mac's has raised further issues. It now argues that the litigation is boilerplate, does not tackle the complexity of the proceedings including that individual issues dominate the proceeding. It argues the plan lacks a procedure for determining what portion of the fees paid by Class members were for jobs and what portion were for immigration services.

[149] Subject to the appropriateness of changes to the litigation plan to reflect changed circumstances, and with the exception of the new portions to which Mac's takes no objection, Mac's position appears to call on me to overturn the certification judge. I decline to do so.

[150] However, I am now the case management judge and so changes to the litigation plan can be sought before me as the case progresses so long as they are warranted by the evolution of the proceedings

[151] The complexity of the litigation and the role of a procedure for determining fees for jobs versus fees for immigration services have not changed since the certification judge approve the litigation plan. No changes are warranted on those issues.

[152] Mac's also submits there should be a summary trial on the duty to mitigate common issue. Mac's says it should occur prior to notice being given, and those steps should be included in the litigation plan. I address those issues below in

relation to notice. For the reasons given below, it is not appropriate to include them in the litigation plan at this time.

[153] Mac's seeks inclusion of a procedure for an application to obtain third party records from Service Canada for information about Class members. Mac's submits that the plaintiffs should make such an application because it is unlikely that Mac's will have records about plaintiffs who did not receive jobs from Mac's. Mac's says that Service Canada will have records of work permits pertaining to jobs with Mac's and jobs with other employers that would be relevant to the failure to mitigate issue. The plaintiffs submit that Mac's should produce its records and not require the plaintiffs to seek such records from Service Canada. If Mac's records are incomplete, and/or Mac's wishes to obtain information from a third party, it can apply to obtain it.

[154] The parties' positions reveal a threshold dispute about whether the plaintiffs should be required to make such an application or whether it is an application that Mac's should make. That may have to be the subject of an application before me if the parties cannot work it out. The scope of what is sought may also be informed by the document discovery that Mac's makes. It is premature to include it in the litigation plan at this stage.

[155] I conclude that this litigation plan meets the requirements of a case at this stage.

Notice of Certification

[156] The plaintiffs seek an order that the costs of notice be initially born by the plaintiffs but reimbursed by the defendants within seven business days of being provided copies of invoices for the amounts expended to provide notice by mail, email, text message, through contact information obtained by skip tracker, by newspaper in certain newspapers in Dubai, The Philippines and Nepal, through advertisements on Facebook and through plaintiffs' counsels' maintenance of dedicated email addresses, and webpages.

[157] The defendants did not raise any objections to this proposal.

[158] The only objection pertains to timing of the notice. Mac's submits that notice should be delayed pending a common trial on the common issue of whether the Subclass members had a duty to mitigate the breach of contract. Mac's submits that the result of the summary trial should be included in the notice so that the Subclass members know whether they had a duty to mitigate. Mac's says that if the Subclass members do have a duty to mitigate, they will know whether they stand to benefit from the resolution of the other common issues.

[159] Section 19 of the *Class Proceedings Act* requires notice of certification be given to class members unless the court dispenses with notice after considering factors set out in s. 19(3). Section 20 of the *Class Proceedings Act* provides for notice of the determination of the common issues. It is clear then, that the legislature intended that there to be separate notices of certification and for determination of the common issues unless after considering the section 19(3) factors the court dispenses with notice of certification. Mac's position on this application is to combine notice of certification with the determination of one of the common issues.

[160] Proceeding in this manner is not precluded by the legislation because it gives the court discretion to determine when the notice should be given and its content. It also gives the court discretion to waive notice or not include some of the content which is *prima facie* mandated by the legislation. However, delaying notice of certification until after a common issue has been determined is unusual except in the case of a certification order that is combined with settlement. That is for good reason: the Class members and Subclass members should have the information that will inform their decision on opting out before common issues are decided in a manner that binds them. I conclude that there must be a compelling reason to depart from legislation's default that there be separate notice of certification and determination of common issues. The s. 19(3) factors assist in determining whether a reason is compelling.

[161] The rationale that Subclass members will benefit from knowing the answer to the mitigation common issue, might be said to fall into s. 19(3)(h) "any other relevant matter". However, it is not compelling given that, by definition, each common issue advances the litigation for all Class members or Subclass members and so the determination of a common issue is always informative to Class members or Subclass members about their potential benefit. If Mac's submission is correct, then it is always preferable to determine common issues before giving notice of certification. That rationale is not compelling because it does not accord with the reason for the default procedure set out in the legislation; i.e. permitting class members to opt out before common issues are decided in a manner that binds them.

[162] In addition, where, as here, there is no agreement that a summary trial is appropriate on the common issue, delaying notice of certification for a summary trial that might not take place is not appropriate. The potential for an appeal of a summary trial order also weighs against delaying notice of certification until the common issue has been determined.

[163] The parties did not address the opt-out date. I direct the parties to confer on an opt-out date and to address it with the Court in the same manner and at the same time as the submissions pertaining to Subclass representative plaintiffs.

[164] Subject to addressing the opt-out date and the Subclass representative plaintiffs, notice shall be issued now in the form and the manner proposed by the plaintiffs.

Conclusion

[165] The plaintiffs' application to amend the amended notice of civil claims is allowed except:

1. Para. 7 – the words "its agent Overseas in committing these torts" must be replaced with "its agents' Overseas' breach of fiduciary duty".
2. Para. 79 f. – the claim that Mac's is liable for its agents' unjust enrichment as against the Class members is not allowed.

3. Para. 83 – the plaintiffs may not seek an order that Mac's provide an accounting and restitution of all funds received by the Defendants from fees paid to Overseas and Trident.

[166] The management of the class action requires there be a certification order that is comprehensive and can act as a guide in the progress of the litigation. Based on the order of the Court of Appeal and the determinations I have made on this application, I make the following comprehensive certification order:

1. This claim is certified as a class proceeding as of the date of this order and, pursuant to s. 44(4) of the *Class Proceedings Act*, all persons who would have been Class members and all persons who would have been Subclass members, but for not being British Columbia Residents, are included as members of the Class and, if applicable, the Subclass.

2. The Class is defined as:

   All persons who, on or after December 11, 2009, to the opt-out date set by the Court made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. (collectively, "Overseas"), and/or Trident Immigration Services Ltd. ("Trident Immigration") in exchange for employment at Mac's and who were thereafter provided with employment contracts offering employment at Mac's Convenience Stores operated by Mac's Convenience Stores Inc., in British Columbia, Alberta, the Northwest Territories and Saskatchewan ("Western Canada") under Canada's Temporary Foreign Worker Program, which offer they accepted (the "Class").

3. The Subclass for the breach of contract claim is defined as:

   All persons who, on or after December 11, 2009, to the opt-out date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and/or Trident Immigration Services and who thereafter:

   i. entered into binding contracts (i.e. contracts in respect of which all conditions precedent were satisfied or waived) of employment with Mac's Convenience stores to work in Western Canada under Canada's Temporary Foreign Worker Program;

   ii. obtained a valid work permit and (where required) travel visas to enter Canada to undertake such employment;

   iii. validly entered Canada and reported to work as required by their contracts of employment, and

iv. were not provided by Mac's with work at all, or were not provided with work in the amount specified in the contract of employment or in respect of whom Mac's failed to pay expenses related to accommodation or travel costs which Mac's was obligated to pay under such employment contracts.

(the "Subclass").

4. [Names of Class representative plaintiffs] are appointed representative plaintiffs of the Class.

5. [Name or names of Subclass representative plaintiff(s)] are appointed representative plaintiffs of the Subclass.

6. The nature of the claims asserted on behalf of the Class and Subclass are as follows:

i. breach of contract against Mac's on behalf of the Subclass members;

ii. breach of the duty of honest performance against Mac's on behalf of the Subclass members;

iii. breach of fiduciary duty against Overseas on behalf of the Class members;

iv. unjust enrichment against Overseas and Trident Immigration Services Ltd. on behalf of the Class members; and

v. Mac's is liable for the actions of its agents Overseas as regards the claim of breach of fiduciary duty.

7. The relief sought is:

i. Declarations that:

(1) Mac's breached the terms of its contracts of employment with the Subclass members;

(2) Mac's owed to the Subclass members a duty to honestly perform the terms of their employment contracts, and that Mac's breached this duty;

(3) at all material times Overseas Immigration Services Inc. and Overseas Career and Consulting Ltd. (collectively, "Overseas"), its officers, directors, employees, agents or representatives were acting as agents for Mac's in the recruitment of the Class members under the Temporary Foreign Worker Program;

(4) Overseas owed a fiduciary duty to the Class members, and that Overseas breached this fiduciary duty;

(5) Overseas and Trident Immigration Services Ltd ("Trident Immigration") have been unjustly enriched to the deprivation of the Class members; and

(6) Mac's is liable for its agents' breach of fiduciary duty;

ii. an order that Mac's identify each Class member from its records and pay compensatory damages into a fund for distribution:

(1) the amount of all outstanding wages and benefits payable under the terms of the contracts of employment for each Subclass member;

(2) the amount of the recruitment fees paid by the Class members; and

(3) the cost of return airfare for some of the Subclass members between Canada and their home countries;

iii. an order that Overseas and Trident Immigration identify each Class member from their records and pay damages into a fund for distribution to the Class members, in the amount of Recruitment Fees paid by the Class members;

iv. an order that all Defendants pay to the Class members:

(1) general damages;

(2) aggravated damages; and

(3) punitive damages;

v. Overseas and Trident provide an accounting and restitution for all funds they received from fees paid to them by Class members;

vi. costs, including for the administration of the plan of distribution for the recovery in this action; and

vii. pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

8. The common issues are:

A. Breach of Contract

1. What are the relevant terms (express, implied or otherwise) of the Subclass' members' employment contracts with the Defendant Mac's respecting:

a. wage rate;

b. hours of work;

c. length of the contract;

d. recruitment fees; and

e. payment of two-way air transportation.

2. Did Mac's breach any of the foregoing contractual terms? If so, how?

3. Where Subclass members' employment was terminated prior to the completion of the 24-month fixed term set out in the contract, were they required to mitigate their losses?

4. Did Mac's breach its duty to honestly perform the terms of the employment contract by misleading Subclass members about the availability of employment?

5. Are Subclass members able to recover damages in excess of the minimum notice period in the employment contract?

6. Is Mac's entitled to set off salary earned by the Subclass members during the notice period or otherwise, even if the Subclass members had not duty to mitigate?

B. Fees

1. Were the fees paid by the Class members to Overseas and/or Trident Immigration fees for employment, prohibited by employment standards legislation, or are they fees for immigration and settlement assistance?

C. Unjust Enrichment

1. Was there any juristic reason for Overseas and/or Trident Immigration to charge the Recruitment Fees?

2. Were Overseas and/or Trident Immigration unjustly enriched by having the Class members pay the Recruitment Fees?

D. Breach of Fiduciary Duty

1. Did Overseas and Trident Immigration have a fiduciary duty to the Class members' as Regulated Canadian Immigration Consultants?

2. Did Overseas and Trident Immigration breach this fiduciary duty?

3. If the answer to D 2. is yes, was Overseas acting as agent of Mac's when it breached its fiduciary duty and, if so, is Mac's liable for the actions of its agent?

E. Remedy & Damages

1. If the answer to any of the common issues is "yes", what remedies are Class members entitled to?

2. If the answer to any of the common issues is "yes", are the defendants liable on a class-wide basis?

3. What is the appropriate method of procedure for distributing the damages award to the Class?

4. Is the Class entitled to an award of aggravated or punitive damages based upon the Defendants' conduct and, if so, in what amount?

5. If the answer to E 4. is "yes, what is the appropriate method of procedure for distributing any aggravated or punitive damages to the Class?

9. Notice of certification shall be given to the Class and Subclass is to be given in the manner and form set out in Appendices B, C, and D of this order [Exhibits D, E and F to the affidavit #3 of Kevin Shano].

10. The Opt out Date is [insert opt-out date]. No person may opt out of this proceeding after the Opt-out Date.

11. No later than two weeks after the Opt-out Date, plaintiffs' counsel will provide defendants' counsel with a complete list of all individuals who have opted out.

12. Within 30 days of this Order, the defendants, each of them, will provide plaintiffs' counsel with a Class list (in Excel format) of all Class members, updated to the date of this order, listing the following information for each Class member:

(a) full name;

(b) date of birth;

(c) country of origin; and

(d) last known:

1. residential address for Canada, the United Arab Emirates and their country of origin;

2. telephone number for Canada the United Arab Emirates and their country of origin;

3. email addresses;

4. Facebook name and handles;

5. Skype user names; and

6. other social media contact information;

(e) any other information that may be used to contact the Class members by any medium;

(f) all Labour Market Opinion applications related to the Class members;

(g) all naming sheets, including all drafts, prepared for or sent to Citizenship and Immigration Canada named Class members; and

(h) all Priority Lists created by Overseas and all Priority Lists exchanged between Mac's and Overseas.

"Matthews J."