# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lee v. Ocean Pacific Hotels Ltd.,*
2023 BCSC 1650

Date: 20230919
Docket: S213604
Registry: Vancouver

Between:

**Tonia Lee, Melissa Kramer, and Jerome Bansagon**

Plaintiffs

And

**Ocean Pacific Hotels Ltd.**

Defendant

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

Before: The Honourable Justice Blake

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | S. Quail<br>J. Wahba |
| Counsel for the Defendant: | I.G. Nathanson, K.C.<br>A. McMahon |
| Place and Dates of Hearing: | Vancouver, B.C.<br>May 9 and 10, 2023 |
| Written Reply of Plaintiffs: | May 16, 2023 |
| Written Reply of Defendant: | May 23, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 19, 2023 |

# Table of Contents

## I. INTRODUCTION

[1] This is an application brought for certification of a class action by the proposed representative plaintiffs: Tonia Lee, Melissa Kramer and Jerome Bansagon, who shall be referred to as the plaintiffs. They all worked for the defendant owner of the Pan Pacific Hotel, Ocean Pacific Hotels, Ltd. ("Ocean Pacific"), in July 2020. As a result of the significant impact of the COVID-19 pandemic on the hospitality industry, Ocean Pacific offered casual employment agreements to most of its regular hourly employees (the "Casual Agreement"). A term of the Casual Agreement was that employees continued to be eligible for extended health benefits from Ocean Pacific's carrier, Manulife Financial ("Manulife"), notwithstanding that casual employees were not normally eligible for those benefits. It also set out that eligibility for those benefits would be subject to and in accordance with the terms and conditions of the applicable plans and policies, and the continued approval of Manulife.

[2] Ocean Pacific offered the Casual Agreement to 156 employees, and ultimately 93 employees accepted the terms of the Casual Agreement. For the majority of the employees who signed the Casual Agreements, their extended health benefits were cancelled on January 2, 2021.

[3] In this proposed class proceeding, the plaintiffs seek to represent a class of current and former Ocean Pacific employees who signed the Casual Agreements (the "Class") and in doing so agreed to convert from regular to casual status in July or August 2020, in exchange for terms that included the continuation of extended health benefits, and whose extended health benefits were thereafter terminated in 2021. The plaintiffs say that Ocean Pacific breached the Casual Agreement (or breached an implied term of the agreement) and, in the alternative, breached its obligation to perform the Casual Agreement in good faith. They also say Ocean Pacific intentionally misled the plaintiffs about the length of time their extended health benefits would continue, and so breached its duty of honest performance of the Casual Agreement. Finally, for a subclass of the plaintiffs, they say Ocean Pacific fraudulently misrepresented its commitment to maintain the extended health

benefits for those who signed the Casual Agreement. The plaintiffs say they are entitled to remedies for these alleged causes of action, as well as punitive damages.

[4] The plaintiffs seek an order that the class proceeding be certified with Ms. Lee and Mr. Bansagon as representative plaintiffs of the proposed Class, and Ms. Kramer as a representative plaintiff of the proposed subclass.

[5] This certification application first came before me on April 20 and 21, 2022, and in reasons indexed as 2022 BCSC 1608 ("2022 Reasons") I determined that both the original notice of civil claim (the "NOCC"), and the proposed amended notice of civil claim, failed to plead the material facts necessary to support the elements of the causes of action pleaded, and so failed to disclose a cause of action as necessary for s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. Plaintiffs' counsel proposed further verbal amendments to the proposed amended notice of civil claim: I found those proposed amendments were vague, uncertain, and ambiguous, and I did not consider it appropriate to consider certifying the class action on the basis of those proposed further amendments. However, in my 2022 Reasons, I concluded that the pleading may be curable, and I gave the plaintiffs the opportunity to amend their pleadings to produce a potentially viable claim.

[6] The plaintiffs did amend their NOCC, and now seek leave to file an amended notice of civil claim in the form attached to the affidavit #2 of Ashley Fehr (the "Proposed ANOCC"). The plaintiffs' position is that they have satisfied s. 4(1) of the *CPA* and that the certification order must be granted.

[7] Ocean Pacific's position is that the Proposed ANOCC still fails to plead the necessary material facts to support the alleged causes of action and still fails to set out properly pled causes of action. Its position is that the Proposed ANOCC is seriously flawed, and that the "certification application is simply a claim in search of a cause of action that does not exist". Ocean Pacific also argues that the Class is overbroad, and that individual issues dominate for the common issues, and so a

class proceeding is not the preferred procedure. It argues this certification application should be dismissed in its entirety.

## II. FACTS RELEVANT TO THE CERTIFICATION APPLICATION

[8] The three proposed representative plaintiffs worked for Ocean Pacific as regular hourly employees until July 2020. Before the COVID-19 pandemic, Ocean Pacific employed approximately 254 regular hourly employees at the Pan Pacific Hotel.

[9] It is common ground that the COVID-19 pandemic had a devastating impact on the hospitality sector. A provincial state of emergency was declared in March 2020, and remained in force through the summer of 2021. As a result of the pandemic, most of the employees of the Pan Pacific Hotel ceased receiving shifts in March 2020.

[10] Under s. 1 of the *Employment Standards Act,* R.S.B.C. 1996, c. 113 [*ESA*] a temporary layoff cannot last longer than 13 weeks in any period of 20 consecutive weeks. This period was extended during the early stages of the pandemic to permit layoff of up to a maximum of 24 weeks, expiring on August 30, 2020. The *ESA* deems a layoff that lasts longer than the allowable period for a temporary layoff to be a termination.

[11] The terms and conditions of the Manulife plan for extended health benefits requires that in order for a regular hourly employee to be eligible for such benefits, they must be working more than 20 hours a week. Historically, on-call employees were not provided with any extended health benefits. As a result of the reduction in work available because of the COVID-19 pandemic, most of Ocean Pacific's regular hourly employees could no longer meet the hours required to be eligible for extended health benefits from Manulife. Under the terms of its contract with Manulife, Ocean Pacific was able to extend coverage for 120 days during a temporary or indefinite layoff (the "Grace Period"). Ocean Pacific says that by relying on this Grace Period, it was able to provide benefit coverage for its regular hourly

employees who were no longer able to work after March 2020 as a result of the pandemic.

[12] However, in July 2020, the Grace Period was expiring for the majority of Ocean Pacific's employees. The COVID-19 pandemic continued, and Ocean Pacific did not have sufficient work for most of its regular hourly employees.

[13] At the same time, an August 30, 2020 deadline for the end of the temporary layoff provisions under the *ESA* was approaching, which would result in a deemed termination of all regular hourly employees of Ocean Pacific who had not yet been called back to work as a result of the lack of work resulting from the pandemic.

[14] In July 2020 Ocean Pacific provided identical letters to 156 of its regular hourly employees, offering them the opportunity to convert from regular status to casual status. The letter stipulated that these employees would relinquish the hours and termination pay rights associated with their regular hourly status, and in return Ocean Pacific promised to continue their extended health benefit coverage, subject to the terms and conditions of the extended health benefits carrier, Manulife.

[15] Each of the Casual Agreements were identical in form. They stated that Ocean Pacific did not have the same volume of work to offer its employees as it had before, and proposed a new agreement on the following summarized terms:

a) the employee would perform any duties reasonably assigned to them;

b) their rate of pay and vacation entitlement would remain the same;

c) Ocean Pacific would no longer have any obligation to provide the employee with shifts, and the employee would have no obligation to accept shifts offered;

d) Ocean Pacific would continue the employees' benefits coverage, notwithstanding that casual employees are normally not eligible for benefits, subject to the terms and conditions and continued approval of the benefits carrier;

e) Ocean Pacific would pay the employee $250;

f) employment as a casual employee may be terminated by providing only the minimum entitlement (if any) required by applicable employment standards legislation; and

g) Ocean Pacific would consider qualified casual employees prior to other candidates for future positions if business resumed.

[16] With respect to subparagraphs (c) and (f) above, s. 65(1)(a) of the *ESA* provides that employers do not owe severance pay to casual employees who have the right to turn down shifts they are offered.

[17] Subparagraph (d) is the critical clause, and is found in clause 4 of the Casual Agreement:

> 4. Notwithstanding that casual employees are not normally eligible for benefits, the Hotel is pleased to offer you continued eligibility for benefits coverage, subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of our carrier.
>
> [Emphasis added.]

[18] Of the 156 full time hourly employees who were offered the Casual Agreement, 93 accepted.

[19] Throughout the month of July 2020, Ocean Pacific communicated with employees about the Casual Agreement. While many employees received initial information during group meetings held between July 7 and 10, 2020, some were advised during individual meetings with Eyal Dattel, the Director, Human Capital and Development, at Ocean Pacific. Each of the meetings included a question and answer session that was driven by the questions of the employees attending at that meeting. For those employees who attended in person, it appears they were given a letter at the meeting that set out the proposed terms of the Casual Agreement.

[20] Mr. Dattel answered individual questions by way of email, phone and through additional meetings. Additionally, he sent three email communications to the employees: on July 15, 2020, on July 20, 2020 and on July 22, 2020.

[21] On July 15, 2020, Mr. Dattel addressed a recent posting by Local 40, and confirmed:

> No associate is being forced to sign anything. The offers referred to are purely voluntary, as is clear from the language in the offers, and extend certain benefits to associates who choose to accept casual status. The Hotel will continue to respect the associate's date of hire, seniority in current designation, rate of pay and benefits status for those who sign such offers.
>
> Associates are encouraged in the offers to consider them carefully, obtain advice if they wish, and consider whether the offers are appropriate to their individual circumstances.

[22] On July 20, 2020, Mr. Dattel again addressed a recent posting from Local 40 and wrote:

> We wish to be clear: no associate has been forced to sign anything or will be forced to sign anything. The Pan Pacific Vancouver has extended a number of offers to associates intended to continue employment during this extraordinary time when COVID-19 has caused a severe reduction in business. These offers include continued benefits for all associates beyond the period when such benefits would normally be provided by the Hotel.
>
> The Pan Pacific Vancouver will continue to respect the associate's date of hire, seniority in current designation, rate of pay and benefits status for those who sign such offers.
>
> The Pan Pacific Vancouver will be returning existing associates to their original status as and when available, in priority over any external applicants.

[23] Finally, on July 22, 2020, Mr. Dattel again wrote, to address some questions raised regarding the Casual Agreements, and of importance to the proposed class action wrote:

> 4. For associates who sign, what are the exact terms (eligibility and coverage) of their benefit plan?
>
> Current Benefits, which are subject to the rules, regulations and policies of the Provider will remain the same. Currently we do not anticipate any changes to our existing policies. Specific questions should be directed to the Human Capital & Development department.
>
> [Emphasis added.]

[24] Mr. Dattel, in his affidavit #1 sworn December 3, 2021, deposed:

> 11. During each of these meetings with the employees, a question and answer sessions followed my presentation. In many of these meetings, the employees asked various questions. The content of such questions varied from meeting to meeting, but frequently included questions about the terms of the Casual Agreement regarding benefits. In response to questions, I stated, notwithstanding that casual employees are not normally eligible for benefits, the Hotel would offer continued eligibility for benefits coverage, subject to the terms and conditions of the applicable plans and policies and the continued approval of our benefits carrier.
>
> 12. The questions about benefits sometimes included questions about what would happen if the employee was not given any hours, and how long the benefits would last in those circumstances. I tried to be consistent in explaining that the availability of benefits depended on Manulife but as the questions varied from session to session, my exact responses depended on what questions I was asked. I recall explaining that at that point we did not know how long the benefits would last because the future was uncertain.
>
> …
>
> 22. The Hotel sought and obtained an extension to the 120-day Grace Period from Manulife. That extension expired for most employees on January 2, 2021. As a result, all of the Hotel's employees who signed Casual Agreements received benefits through to at least January 2, 2021, unless their employment was terminated before that date by the Hotel or as a result of the employee's retirement or resignation.

[25] Although the date of the request is unspecified, Ocean Pacific sought and obtained an extension to the Grace Period from Manulife. That extension of coverage expired for most employees on January 2, 2021. Ms. Kramer and Mr. Bansagon depose that Ocean Pacific did not advise them until December 8, 2020 that their extended health benefits coverage would expire in January 2021. Ms. Lee deposed that she heard about this in December 2020 from some of her coworkers.

[26] Ocean Pacific did not adduce evidence of any efforts made to seek another extension. Mr. Dattel, in his affidavit #1 sworn December 3, 2021 and affidavit #2 sworn May 1, 2023, provides details of individual employees and their individual circumstances, and his individual meetings with certain employees. This evidence is discussed further below under "Section 4(1)(c): Common Issues".

## III. THE ACTION

### A. Withdrawal of Admissions

[27] At the first certification application, the plaintiffs purported to withdraw two judicial admissions they made in the original NOCC, without consent or leave of the Court. Specifically, at that time, they purported to withdraw:

a) the admission in para. 18(b), that "As of January 2, 2021, a condition came into effect that employees must work a minimum 20 hours per week to remain eligible for benefits coverage"; and

b) the admission in para. 45, that "The defendant told Class Members it would continue their benefits as long as Manulife would continue to approve this coverage".

[28] Admissions serve a critical purpose in our adversarial system of litigation. They are concessions, deliberately made to an opponent: *British Columbia Ferry Corp. v. T & N plc,* 31 C.P.C. (3d) 379 at para. 14, [1993] B.C.J. No. 1827 (S.C.). Put colloquially, they remove an issue as between the parties. An admission results in a fact that is agreed to, and so no longer needs to be proven at trial. I am satisfied that each of the paragraphs of the Proposed ANOCC that the plaintiffs seek to withdraw were judicial admissions, which could not be withdrawn by the plaintiffs without either consent of Ocean Pacific or leave of this Court.

[29] A party may apply pursuant to Rule 7-7(5)(c) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*] to withdraw an admission, and this Rule gives this Court the discretion to allow a party to withdraw an admission made in a pleading. However, at the first certification application, in reply, the plaintiffs confirmed that they no longer sought to withdraw these two judicial admissions. In my 2022 Reasons, I clearly noted that with respect to these two judicial admissions, any future amendment to the NOCC would have to be determined on an appropriate application brought by the plaintiffs: 2022 Reasons at para. 79.

[30] Notwithstanding this clear direction, the plaintiffs did not bring an application for leave to withdraw those two judicial admissions pursuant to Rule 7-7(5)(c), but nonetheless attempted to inappropriately withdraw those admissions in the Proposed ANOCC without either consent of Ocean Pacific or leave of this Court. The law is clear that not having brought a successful application, a party is not entitled to withdraw an admission made in a pleading: *Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.,* 2020 BCSC 2043 at para. 54.

[31] Initially, in reply, the plaintiffs took the position that the statements at issue were not judicial admissions (notwithstanding I had clearly directed in my 2022 Reasons that any attempt to withdraw either would need to be dealt with by way of the plaintiffs' bringing the appropriate application pursuant to Rule 7-7(5)(c)).

[32] Subsequently, in written reply, the plaintiffs advised that they were content to withdraw their proposed amendments which inappropriately purported to withdraw the two judicial admissions.

[33] Had the plaintiffs wished to withdraw those two judicial admissions, as they sought to do in the Proposed ANOCC, they were required to bring the appropriate application. They failed to do so. In these circumstances, Ocean Pacific is entitled to rely on each of the admissions in support of its response to notice of application, its response to civil claim, and in pursuing its theory of the case. Each of the two judicial admissions may be highly relevant to Ocean Pacific's argument, both on this certification application, and at any eventual trial on the merits.

### B. Proposed Amended Notice of Civil Claim

[34] In the original NOCC the plaintiffs' theory of the case was that Ocean Pacific had obligations to the plaintiffs to ensure extended health benefits continued "indefinitely". They developed three alternative theories as to why Ocean Pacific "did not warn Class members that they were giving up their regular employee status for benefit continuation that would only extend 5–7 months":

a) Ocean Pacific did not check with Manulife to confirm how long Manulife would continue to cover those employees covered by the Casual Agreement;

b) Ocean Pacific did check with Manulife, and Manulife confirmed the coverage would expire in January 2021, and Ocean Pacific did not advise the Class members; or

c) Ocean Pacific chose to unilaterally terminate the extended health benefits available under the Casual Agreements.



[35] At the hearing for the first certification application, the plaintiffs reframed their claim, and sought leave to file an amended notice of civil claim. However, in reply, plaintiffs' counsel acknowledged that Ocean Pacific had identified significant deficiencies in their proposed pleading, and verbally set out numerous further proposed amendments to their NOCC. In my 2022 Reasons, I concluded that the original NOCC failed to satisfy s. 4(1)(a) of the *CPA.* I further concluded the proposed potential further amendments were not set out "with the necessary specificity and clarity to consider the certification application on the basis that specific amendments to the NOCC made in the future would allow for certification at this time" and I determined it was inappropriate to consider such amendments: 2022 Reasons at para. 51.

[36] The plaintiffs now have a new theory of their case: that there was an implied term in the Casual Agreement that Ocean Pacific would take reasonable steps to obtain the insurer's continued approval to provide extended health benefits to Class members: see Proposed ANOCC at paras. 48, 49, 50, 50a, and 50b.

[37] In the Proposed ANOCC, while the plaintiffs purported to withdraw the admission in para. 18(b), I have already determined that was not appropriate. Accordingly, retaining that admission, in the Proposed ANOCC, the plaintiffs plead new material facts, including:

*Termination of benefits*

> 18. The defendants did not communicate details of its arrangements with the benefits provider, Manulife, with employees, but the plaintiffs are aware of the following facts:
>
> a. At some point in or prior to July 2020, the defendant changed the terms of its agreement with the benefits provider, Manulife, so that it could provide coverage to casual employees who signed the Casual Agreements. This coverage was not contingent on employees working a certain number of hours per week. The normal terms of the defendant's agreement with Manulife included that benefits were only available to employees who worked a minimum of 20 hours per week. Manulife would continue to provide benefit coverage to employees who worked fewer than 20 hours per week during a grace period of 120 days, which ran from some point in the spring of 2020 to some point in the summer of 2020.
>
> b. As of January 2, 2021, a condition came into effect that employees must work a minimum 20 hours per week to remain eligible for benefits coverage. At some point in or around July 2020, the defendant sought and obtained an extension of the 120-day grace period. Manulife agreed to extend the grace period until January 2, 2021.
>
> c. The defendant did not ask Manulife to extend the grace period beyond January 2, 2021. The defendant had no communication with Manulife at all about whether the grace period could be extended further. The defendant merely let the January 2, 2021 end-date come and go with no further action on its part. From that date on, Class members who worked less than 20 hours per week lost their extended health benefits.
>
> d. The defendant did not tell Class members, at any time, that it had only arranged a temporary grace period with Manulife to continue their extended health benefits while they worked less than 20 hours per week, nor did it tell them that it had decided not to seek a further extension of the grace period.
>
> e. The defendant knew, or reasonably ought to have known, that Class members understood the contract to offer them ongoing benefit coverage for the duration of the Casual Agreements, subject to the continued approval of the carrier, and knew, or ought reasonably have known, that it was important for the Class members to know that the continued approval was temporary. The defendant knew, or reasonably ought to have known, that the possibility of continuing extended health benefit coverage was the key value of the Casual Agreements in exchange for which Class members gave up their entitlements to severance pay on termination of their employment.
>
> f. The defendant knew or reasonably ought to have known that the information that the coverage was temporary, and the information that the defendant would not keep requesting extensions from Manulife to continue this coverage longer, would significantly change Class members' evaluation of the trade-off they were being offered in the Casual Agreements. The defendant intentionally withheld this information from Class members so that they would be more likely to accept the Casual Agreement.

[38] In the Proposed ANOCC, the plaintiffs now advance the following causes of action: breach of contract and in the alternative breach of an implied term of the

contract; breach of the duty of good faith contractual performance; breach of the duty of honest performance; and fraudulent misrepresentation. They also seek punitive damages.

[39] They now frame their claim for breach of contract, and the alternative claim for breach of the duty of good faith contractual performance, in the Proposed ANOCC as:

> *Breach of contract*
>
> 50. ~~If the defendant unilaterally terminated Class members' benefit coverage, rather than continuing for as long as Manulife would approve it, then the defendant breached the Casual Agreement.~~ The term in the Casual Agreements that the defendant would "offer continued eligibility for benefits coverage, subject to …the continued approval of [the] carrier" created an implicit obligation for the defendant to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members. It was not possible for the defendant to provide "continued eligibility for benefits coverage" as promised without making that ask. Therefore, when the defendant took no steps at all to seek continued coverage beyond January 2, 2021, it breached this implied term of the Casual Agreements.
>
> *Breach of the duty of good faith contractual performance*
>
> 50a. In the alternative, if the Casual Agreements did not have an implicit term obligating the defendant to take reasonable steps to seek continued approval of the carrier to continue extended health benefits for Class Members, then the defendant was required to take such steps pursuant to its obligation to act in good faith in performance of its obligations in the Casual Agreements. **[specifically its obligation to exercise its contractual discretion in good faith].**
>
> 50b. A party to a contract is required to carry out its contractual obligations in a good faith manner, with appropriate regard for the legitimate contractual interests of the other party. The defendant was required to carry out its contractual obligation to "offer continued eligibility for benefits coverage, subject to …the continued approval of [the]carrier" in a manner that demonstrated appropriate regard for the legitimate contractual interests of the Class members. At a bare minimum, this duty required that the defendant ask the carrier to continue its approval of Class members' benefit coverage beyond January 2, 2021. **[if indeed the defendant had discretion under the terms of the contract as to whether or not it would make this request].**

[40] In reply, the plaintiffs proposed that if the pleadings were found not to be sufficiently specific, then there were straightforward amendments to paras. 50a and 50b, as identified in square brackets above.

[41] They have amended the legal basis for the claim of breach of the duty of honest performance, and now frame it in the following manner:

> *Breach of the duty of honest performance*
>
> 48. Parties to contracts, including employment contracts, must not lie or knowingly mislead each other about matters directly linked to the performance of the contract. Dishonest conduct that breaches this duty includes omissions, particularly where a party engages in active communications that it knows or reasonably ought to know would cause the other party to draw an incorrect inference. In such circumstances, a party may have a positive obligation to dispel the incorrect inference it knows or reasonably ought to know the other party has drawn. Failing to do so is in breach of the duty of honest performance of a contract.
>
> 49. The continuation of benefits is a matter directly linked to the performance of the contractual terms of the Casual Agreement. ~~To the extent that the defendant lied or knowingly misled the Class members about the limited continuation of their benefits, it breached the duty it owed them of honest performance.~~ The defendant intentionally and dishonestly withheld information it had an obligation to share with the Class members about the continuation of benefits: that it had only arranged a temporary grace period, which would come to an end, and that it did not intend to take reasonable steps to extend the grace period for as long as it could obtain Manulife's agreement to do so. Withholding this information meant that Class members would be (and were) left with an inaccurate impression of the value of the Casual Agreements, so that they would be more likely to accept the trade-off of giving up their severance entitlements in exchange for continued benefit coverage.

[42] The plaintiffs have also amended the legal basis for their claim on behalf of the subclass for fraudulent misrepresentation. In the Proposed ANOCC, while the plaintiffs attempted to withdraw the admission in para. 45, I have already determined that was not appropriate. Accordingly, retaining that admission, in the Proposed ANOCC, the plaintiffs plead:

> 44. The July 22, 2020 representation that benefits would "remain the same" ~~continue~~ and that ~~no changes were expected~~ it did not expect changes was false. The defendant knew that changes were expected, because it knew that Manulife would terminate benefit coverage per the information Manulife had provided. The defendant knew that benefits would not remain the same and it did expect changes. The defendant knew that the representation was false.
>
> 45. ~~Similarly, the defendant fraudulently misrepresented if, in fact, Manulife was content to continue benefit coverage indefinitely and the defendant unilaterally terminated it in order to limit premium costs.~~ The defendant told Class Members it would continue their benefits so long as Manulife would continue to approve this coverage ~~knowing that in fact Manulife would~~

> ~~continue this coverage indefinitely and the defendant itself would decide whether and when to end coverage.~~
>
> 46. The defendant plainly intended the ~~C~~Subclass members to act upon this representation~~, as it was made as part of an offer of new terms of employment. The defendant required Class members to respond and either accept or decline the offer.~~ It made this representation in the context of explaining the terms of the Casual Agreement, which it had offered to them and required them to decide whether to accept or decline.
>
> 47. The plaintiff induced the ~~C~~Subclass members to act on this representation to their detriment. In exchange for the promise of continued benefits, they gave up their rights and entitlements as regular-status employees, to the defendant's benefit and to their own detriment. The Casual Agreement offered consideration in the form of a one-time $250 payment and the continuation of benefits in exchange for giving up the rights flowing from regular employee status, including severance pay. Subclass members did not accept these terms until after they received the July 22, 2020 email. Liability for fraudulent misrepresentation is established where a fraudulent misrepresentation is one of several factors inducing plaintiffs to act. Even if Subclass members relied on other aspects of the Casual Agreement (such as the one0time payment of $250), or other communications about the Casual Agreements, the July 22, 2020 representations can be inferred to have been at least a factor in all Subclass members' decisions to accept the terms as they did not accept the terms until receiving that email.

[43] Finally, the plaintiffs continue to seek punitive damages on the basis that Ocean Pacific's conduct toward the Class members "was high-handed, reckless, callous, willful, reprehensible and entirely without care for Class members' precarious position in a sector hard-hit by COVID-19". Their position is that Ocean Pacific's behaviour in these circumstances "was particularly egregious because it involved the cancellation of health benefits during a time of significant health risks for those working in the hospitality sector and service sector more broadly": Proposed ANOCC at para. 51.

## IV. CERTIFICATION APPLICATION REQUIREMENTS

[44] Section 4(1) of the *CPA* lists the requirements to be met for certification of a class proceeding:

> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.



[45] If all of the requirements in s. 4 are met, the court must certify the action. Certification of an action as a class proceeding is not a comment on the merits of the claim, but rather a determination of whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*]. Certification criteria are evaluated generously, with the aim of furthering the principal goals of class actions: behaviour modification; judicial economy and access to justice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109, citing *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 14–15 [*Hollick*].

[46] I note the certification test under Ontario's class action legislation, found at s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 is similar although not identical to the *CPA.* While some differences between the Ontario legislation and the *CPA* exist, as acknowledged in *Rumley v. British Columbia,* 2001 SCC 69 at para. 25, the requirements for certification are substantively similar. It is for this reason that courts and parties in class action proceedings in B.C. often cite cases from Ontario.

[47] The certification analysis does not involve a consideration of the merits of the claim. The question at certification is not whether a claim is likely to succeed but rather whether the suit is appropriately brought as a class proceeding: *Hollick* at para. 16.

[48] The plaintiffs acknowledge s. 4(1)(a) of the *CPA* requires both that the proposed causes of action are properly pleaded, and that there is some prospect that they might succeed at trial.

[49] The legal adequacy of a claim in a proposed class action is determined using the same test as applied on an application under Rule 9-5(1) to strike a pleading for failure to disclose a reasonable cause of action: whether, assuming the facts pleaded to be true, it is plain and obvious that the claim cannot succeed: *Webster v. Robbins Parking Service Ltd.,* 2016 BCSC 1863 at para. 32 [*Webster*], citing *Pro-Sys* at para. 63. This is a low threshold; pleadings are to be read generously: *Webster* at para. 32. The Court of Appeal in *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 recently set out the test as:

> [24] When deciding whether pleadings disclose a cause of action, the judge should read them generously, err on the side of permitting novel but arguable claims to proceed and accommodate inadequacies in form to the extent reasonable by allowing for proposed amendments to cure deficient drafting. Nevertheless, for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: *Imperial Tobacco* at paras. 21 – 25; *Sandhu v. HSBC Finance Mortgages Inc.,* 2016 BCCA 301 (B.C.C.A.) at paras. 44 – 46. In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. As Chief Justice McLachlin explained in *Imperial Tobacco,* the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: at para. 22.
>
> [25] Difficult questions of law sometimes arise on the pleadings, including complex questions of statutory interpretation. If reasonably possible, the judge should address such questions directly at the certification stage and thus ensure that judicial and other resources are not squandered. However, this does not necessarily mean that the certification judge should purport to resolve all such questions at an early stage of a class proceeding. The only issue for resolution at the certification stage is whether the test for striking-out pleadings articulated in *Hunt v. T & N plc* has been satisfied. However novel or weak a claim may seem, if it is arguable the certification judge should not engage in a merits-based analysis of the claim: *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 (B.C.C.A.) at para. 64; *Jiang v. Peoples Trust Co.,* 2017 BCCA 119 (B.C.C.A.) at paras. 56 – 70.

[50] Assertions that are manifestly incapable of proof need not be assumed to be true: *Young v. Borzoni*, 2007 BCCA 16 at para. 30. To be certified, a claim must have a reasonable prospect of success, not a speculative one: *Sherry* at para. 24.

[51] An effectively pleaded cause of action must include sufficient material facts pleaded to support each element of the cause of action: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54; *Basyal v. Mac's Convenience Stores Inc.,* 2018 BCCA 235 at para. 39. Speculation or "bald conclusory assertions" are not material facts: *Kindylides v. Does*, 2020 BCCA 330 at paras. 35-36. The material facts giving rise to the claim, or that relate to the matters raised in the claim, must be concisely set out. Neither evidence nor argument is appropriate: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at para. 44 [*Mercantile Office*].

[52] With respect to the remaining subsections of s. 4(1)(b)–(e), the plaintiffs must show "some basis in fact" to establish that the certification requirements have been met: *Hollick* at para. 25. This requires the assessment of evidence: *Pro-Sys* at para. 103. The plaintiffs bear the evidentiary burden of providing evidence to show "some basis in fact": *AIC Limited v. Fischer*, 2013 SCC 69 at para. 1 [*Fischer*]. In assessing whether this standard has been met, the court should not engage in any detailed weighing of the evidence but rather should confine itself to determine whether there is some basis in the evidence to support the certification requirements: *Fischer* at para. 43.

[53] With respect to s. 4(1)(b) the class definition, everyone in the class need not share the same interest in the resolution of the asserted common issues. However, the class cannot be unnecessarily broad. As set out by the Supreme Court of Canada in *Hollick* at para. 21 "…that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue". The definition of the class must have objective criteria that do not depend on the outcome: *Escobar v. Ocean Pacific Ltd.,* 2021 BCSC 2414 at para. 98 [*Escobar*], citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38. *Escobar* is described by the plaintiffs as a companion class action to the within action, arising out of similar facts with similar parties.

[54] The purpose of the requirement that there be an identifiable class was summarized as being able to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment: *Escobar* at para. 92, citing *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82.

[55] With respect to s. 4(1)(c), the common issues, an issue is common if it can be resolved across the entire class: *Wright v. Horizons ETFS Management (Canada) Inc.,* 2021 ONSC 3120 at para. 116; *Hollick* at para. 18. It must be possible to answer the common issue in a manner which is capable of extrapolation, in the same way, across the whole class: *Charlton v. Abbott Laboratories*, 2015 BCCA 26 at para. 85. A common issue "is one whose resolution will avoid duplication of fact-finding or legal analysis", and it "need not be determinative of liability and may leave many individual issues to be decided, provided that its resolution advances the litigation for (or against) the class": *Kirk v. Executive Flight Centre Fuel Services Ltd.,* 2019 BCCA 111 at para. 65 [*Kirk*], leave to appeal to SCC ref'd, 38678 (17 October 2019). However, an issue is not common if it is "dependent upon individual findings of fact that have to be made with respect to each class member": *Kirk* at para. 65; *Charlton* at para. 85.

[56] In satisfying the "some basis in fact" standard at the common issues stage, the plaintiffs must show there is "some hope on the part of the plaintiffs at the outset that there would in fact be a single finding in favour of the entire class": *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879 at para. 132, cited with approval in *Trotman v. WestJet Airlines Ltd.,* 2022 BCCA 22 at para. 59. The test can be applied flexibly, and a "common question may require nuanced and varied answers based on the individual members": *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 46. Nonetheless, the plaintiffs must still provide "some evidence that the proposed common issue can be answered on a class-wide basis": *Trotman* at para. 57, citing *Grossman v. Nissan Canada*, 2019 ONSC 6180.

[57] With respect to s. 4(1)(d), the preferability of the class proceeding, s. 4(2) of the *CPA* provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[58] In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 24–26, Justice Dickson set out the principles that govern this preferability analysis:

a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims; and

b) whether a class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution (such as court processes or non-judicial alternatives).

[59] Again, the plaintiff has the burden to show some basis in fact that the class proceeding is preferable: *Fischer* at para. 1. The analysis must consider the common issues in the context of the entire action: *Hollick* at para. 30. Even if there are important individual issues for resolution, a class-action proceeding may still provide significant advantages in judicial economy and efficiency. In the right circumstances, they may provide simplified structures and procedures for resolving those individual issues, as compared to a multiplicity of individual civil actions: see e.g., *Scott v. TD Waterhouse Investor Services (Canada) Inc.,* 2001 BCSC 1299 at paras. 116, 137–140. Section 27 of the *CPA* sets out how individual issues may be determined, and s. 27(3) directs the court to “choose the least expensive and most

expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass".

## V. ANALYSIS

### A. Section 4(1)(a): Do the Pleadings Disclose a Cause of Action

[60] The plaintiffs now characterize the "key dispute" between the parties as whether the pleadings disclose that there was an implied term in the Casual Agreement that Ocean Pacific had a contractual obligation to seek Manulife's approval of continued extended health coverage. This analysis is relevant for all of the proposed causes of action.

#### 1. Breach of Contract

[61] The plaintiffs plead, in paras. 18(a)–(c) of the Proposed ANOCC, that:

a) at some point in or prior to July 2020, Ocean Pacific entered into an agreement with Manulife, which allowed it to provide coverage to those employees who signed the Casual Agreement, and for those employees who signed the Casual Agreement but worked less than 20 hours per week, to nonetheless be entitled to extended health benefits;

b) at some point in or around July 2020, Ocean Pacific sought and obtained an extension of the Grace Period until January 2, 2021; and as of January 2, 2021, a condition came into effect that employees must work a minimum 20 hours per week to remain eligible for extended health benefit coverage; and

c) Ocean Pacific did not ask Manulife to further extend the Grace Period beyond January 2, 2021.

[62] The Casual Agreement clearly provided that continuing eligibility for extended health benefits was being provided "subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of our carrier": clause 4 of the Casual Agreement.

[63] The plaintiffs no longer argue that Ocean had obligations to ensure extended health benefits continued “indefinitely”. Their claim as it is currently formulated is that a proper interpretation of the Casual Agreement, where Ocean Pacific promised to continue extended health benefits subject to Manulife’s approval, is that it was clear that Ocean Pacific must ask Manulife for that approval. In the alternative, they say it was “an implicit obligation for the defendant to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members”: Proposed ANOCC at para. 50. The plaintiffs concede that this pleading is not clearly broken out as either a contractual term, or in the alternative, an implied term.

[64] When interpreting a contract, the intention is to discover and give effect to the mutual intention of the parties. If there is no ambiguity in the words of the contract, then the intention of the parties is to be determined objectively, attributing plain and ordinary meaning to the words of the contract: *Perrin v. Shortreed Joint Venture Ltd.,* 2009 BCCA 478 at para. 23. The intention of the parties must also be determined from the words of the contract read as a whole, unless to do so would result in an absurdity: *Perrin* at para. 24. The factual matrix of a contract is also important in determining the correct interpretation of contractual terms: *Perrin* at para. 25.

[65] I am satisfied that there was no express contractual term contained within the Casual Agreement that Ocean Pacific had a contractual obligation to seek Manulife’s approval of continued extended health coverage.

[66] However, that is not the end of the issue. Terms may be implied into a contract. The authority of the court to imply particular terms in contracts was discussed in *Olympic Industries Inc. v. McNeill*, 1993 CanLII 318 at para. 25, 86 B.C.L.R. (2d) 273 (C.A.), quoting an oft-cited passage from *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33 (H.L.) at 52–53 which explained the power of the court to imply particular terms in contracts as follows:

> .... There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the

> parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the party should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts.



[67] No term may be implied into a contract if it is inconsistent with an express term of the contract: *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 81, 1995 CanLII 72. A term may be implied in a contract: (1) based on custom or usage; (2) as the necessary legal incident of a particular kind of contract; or (3) based on the parties' presumed intentions, where the term is necessary to give business efficacy to the contract: *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 at paras. 53–55, leave to appeal to SCC ref'd, 36402 (22 October 2015).

[68] Where a cause of action relies upon an implied term, the pleading must include the factual basis for the term: *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 71, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd, 36584 (17 March 2016).

[69] Ocean Pacific argues it is not appropriate to imply the term the plaintiffs seek into the Casual Agreement and argues that the Proposed ANOCC suffers from two pleadings defects:

a) a failure to specifically state the term the plaintiffs say is implied, and the factual basis for the implied term; and

b) the implied term is inconsistent with the express terms of the Casual Agreement.

[70] First, Ocean Pacific argues that the Proposed ANOCC does not include material facts capable of establishing an implied obligation that Ocean Pacific must "take reasonable steps to obtain the insurer's continued approval to provide extended health benefits to Class members": Proposed ANOCC at para. 25(b)(ii). I cannot agree. I am satisfied that the Proposed ANOCC has set out, in para. 18, material facts capable of establishing the implied term.

[71] Further, I am not persuaded that the alleged term is inconsistent with the express terms of the Casual Agreement. The plaintiffs do not argue that Ocean Pacific had the obligation to seek modifications to the plan with Manulife, nor do they argue it had the obligation to ensure entitlement to extended health benefits continued indefinitely. Rather, they merely argue that Ocean Pacific had the obligation to request that Manulife continue the extended health benefit coverage. I am not persuaded that, as Ocean Pacific argues, the Proposed ANOCC runs "directly contrary to the literal terms of the Casual Agreement".

[72] I am satisfied that at this stage the plea of the plaintiffs, as set out in para. 50 of the Proposed ANOCC, that there is an implied term that Ocean Pacific was required to ask Manulife it would consider extending its coverage of extended health benefits to those employees covered by the Casual Agreement after January 2, 2021, is not bound to fail.

### 2. Breach of the Duty of Good Faith Contractual Performance

[73] In the alternative, the plaintiffs argue that if Ocean Pacific was not contractually obligated to request Manulife's approval of an extension, then it was nonetheless obligated to make that request pursuant to its duty to act in good faith in performance of its contractual obligations. In reply, the plaintiffs proposed amendments to paras. 50a and 50b of the Proposed ANOCC, to make it clear that their allegation of breach of this duty was related to Ocean Pacific's exercise of its contractual discretion (see para. [39] above).

[74] There is no claim known to law relating to a broad duty of "good faith contractual performance": *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 37 and 90 [*Bhasin*]. Rather, as the Supreme Court recently confirmed:

> [52] … Careful reference to the specific doctrine at issue in each case is critical … it is no test for the content of the duty of good faith to say that one has to have appropriate regard for the legitimate contractual interests of the counterparty – because appropriate regard is a broad phrase that covers a variety of different levels of conduct depending on the circumstances
>
> *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*].

[75] The organizing principle of good faith performance provides a standard, and from that standard more specific legal doctrines may be derived: *Wastech* at para. 51, citing *Bhasin* at paras. 48 and 66. Careful reference to the specific doctrine at issue is critical: *Wastech* at para. 52. The plaintiffs plead a cause of action of a duty to exercise contractual discretion in good faith.

[76] The duty to exercise contractual discretion in good faith arises from the organizing principle that parties must perform contractual duties, and exercise contractual rights, honestly and reasonably, and not capriciously or arbitrarily: *Wastech* at para. 62. The Supreme Court of Canada explained the duty to exercise contractual discretion in good faith in *Wastech* as follows:

> [62] … The answer can best be traced to the "standard" that underpins and is manifested in the specific legal doctrine requiring that where one party exercises a discretionary power, it must be done in good faith. Expressed as an organizing principle, this standard is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily (*Bhasin*, at paras. 63 – 64). Accordingly, a discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes a breach of contract. Even unfettered, the discretionary power will have purposes that reflects the parties' shared interests and expectations, which purposes help identify when an exercise is capricious or arbitrary, to stay with this same example. Like the duty of honest performance considered in *Bhasin* and *Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights. When the good faith duty is violated, the contract has been breached. The question is what constraints this particular duty puts on the exercise of contractual discretion.

> [63] Stated simply, the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably.

[77] The duty to exercise contractual discretion in good faith further arises from the existence of discretion of either party to a contract. The duty requires the parties to exercise their contractual discretion consistently with the purposes for which that discretion was conferred: *Wastech* at para. 68.

[78] Ocean Pacific argues that to properly plead a cause of action of a duty to exercise contractual discretion in good faith, the plaintiffs must plead material facts necessary to establish that Ocean Pacific enjoyed a contractual discretion pursuant to the terms of the Casual Agreement, and must identify the purpose for which that discretion was granted. In reply, the plaintiffs proposed the amendments to paras. 50a and 50b in the Proposed ANOCC, to identify what they say was Ocean Pacific's contractual discretion. Those proposed amendments are set out in para. [39] above.

[79] However, the plaintiffs do not plead any material facts necessary that establish that Ocean Pacific had the contractual discretion under the Casual Agreement to make a request of Manulife to continue its approval of the extended health benefit coverage for those employees covered by the Casual Agreements. Ocean Pacific argues that the "core of the plaintiffs' case is that the defendant was required to seek a further extension of the Grace Period, which is inconsistent with a pleading of a discretion as to whether it would seek an extension". I agree. I am accordingly satisfied that the alleged cause of action of a duty to exercise contractual discretion in good faith is bound to fail.

### 3. Breach of the Duty of Honest Performance

[80] The plaintiffs argue that Ocean Pacific intentionally breached its duty of honest performance.

[81] The plaintiffs plead material facts that allege that Ocean Pacific was dishonest in the statements it made to employees about the terms of the Casual

Agreements, and omitted to advise them of the length of coverage it had obtained with Manulife: Proposed ANOCC at para. 18. They say that Ocean Pacific intentionally and dishonestly withheld the information that it had only arranged a temporary Grace Period, and it did not intend to take reasonable steps to seek an extension for as long as it could obtain Manulife's agreement to do so: Proposed ANOCC at para. 49. They claim that "[w]ithholding this information meant that Class members would be (and were) left with an inaccurate impression of the value of the Casual Agreements, so that they would be more likely to accept the trade-off of giving up their severance entitlements in exchange for continued benefit coverage": Proposed ANOCC at para. 49.



[82] The duty of honest performance relates to honesty in contractual performance: *Wastech* at para. 55. To establish a claim in breach of the duty of honest performance, the plaintiffs must plead material facts which establish that the defendant lied, or knowingly misled the plaintiffs about a matter directly related to the performance of the contract: *Bhasin* at para. 73. Dishonest conduct may include various types of dishonest conduct, and may include omissions: *CM Callow Inc. v. Zollinger*, 2020 SCC 45 at paras. 90–91 [*Callow*]. Misleading may occur through actions, or by failing to correct a misapprehension caused by misleading conduct. Dishonest or misleading conduct is not confined to lies, but may include half-truths, omissions, and even silence, depending upon the circumstances; such an analysis is a highly fact-specific determination: *Callow* at paras. 90–91.

[83] Ocean Pacific argues that the claim must fail because the duty of honest performance only applies to the performance of a contract, and not to the negotiation or terms of the contract. Its position is that pre-contractual representations are not captured by this doctrine, and such representations remain the concern of the tort of misrepresentation. In support of this position, it cites *Larizza v. Royal Bank of Canada*, 2018 ONCA 632 at para. 14; *Wonderville Child Centre Inc. v. Highwood Enterprises Ltd.,* 2018 BCSC 1759 at para. 72. It argues the plaintiffs have failed to identify any statements made concerning the performance of the Casual Agreement which were dishonest. Its position is that the plaintiffs must be able to point in the

pleadings to a contractual obligation or right that Ocean Pacific performed, or exercised, dishonestly.

[84] In these circumstances, I cannot accept this argument. It is clear from the Proposed ANOCC that the plaintiffs' claim is that the employment agreement and the Casual Agreement must be taken together collectively, and as such, they are an existing employer-employee contractual relationship. They say within that existing contractual relationship, Ocean Pacific intentionally and dishonestly withheld important information from the plaintiffs about the value of what was on offer if they entered into the Casual Agreements, so that they would be more likely to accept the Casual Agreement.

[85] I cannot conclude that this claim is bound to fail. While the claim may be novel, there is some prospect it might succeed at trial.

### 4. Fraudulent Misrepresentation

[86] The plaintiffs argue that for those Class members who signed the Casual Agreements after receiving the July 22, 2020 email from Mr. Dattel, Ocean Pacific made a fraudulent misrepresentation. While the plaintiffs initially thought Ocean Pacific agreed they had a proper cause of action in fraudulent misrepresentation, Ocean Pacific's response to application made clear it did not consent to any of the relief sought by the plaintiffs. This was again made clear in Ocean Pacific's written submissions and oral argument.

[87] A claim of fraudulent misrepresentation requires that there be:

a) a false representation of fact;

b) made without knowledge of its falsehood or recklessly, without belief in its truth;

c) with the intention that it should be acted upon by the plaintiff; and

d) the false representation induces the plaintiff to act on it to his or her detriment.

See *Canon v. Funds for Canada Foundation,* 2012 ONSC 399 at para. 186.

[88] The plaintiffs say the written representation set out in the July 22, 2020 email from Mr. Dattel is the fraudulent misrepresentation that is actionable. In that email, Mr. Dattel wrote:

> 4 . For associates who sign, what are the exact terms (eligibility and coverage) of their benefit plan?
>
> Current Benefits, which are subject to the rules, regulations and policies of the Provider will remain the same. Currently we do not anticipate any changes to our existing policies. Specific questions should be directed to the Human Capital & Development department.
>
> [Emphasis added.]

[89] In their Proposed ANOCC, they plead that the statement "Currently we do not anticipate any changes to our existing policies" was false. Specifically they plead:

> 17a. These statements was [sic] false. The defendant knew that current benefits would not remain the same: current benefits as at the date of the email included a provision that employees could have extended benefit coverage while working less than 20 hours per week, and the defendant knew that provision was only temporary and would change at some point. The defendant did anticipate changes. The defendant knew, and did not tell its employees, that Manulife had only agreed to a grace period and not to an enduring change to the terms of the plan that would provide ongoing coverage to casual employees working less than 20 hours per week.
>
> 17b. There was no reason for the defendant not to share this information with employees other than to mislead them about the value of the Casual Agreements so that they would be more likely to enter into Casual Agreements and release the defendant from the obligation to pay severance pay, which would otherwise be very costly.

[90] A claim for fraudulent misrepresentation requires that the representation be a statement of fact, not a statement of future intention: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 14. A representation as to a future event is not actionable: *0956375 BC Ltd. v. Regional District of Okanagan-Similkameen*, 2020 BCSC 743 at para. 171, citing *PSD Enterprises Ltd. v. New Westminster (City),* 2012 BCCA 319 at para. 66 and *PD Management Ltd.* at paras. 14–20. There is a difference between a representation and a contractual promise in that only

representations engage the tortious liability for misrepresentation: *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72 at para. 44.

[91] If a claim of fraudulent misrepresentation is alleged, then the presence of a dishonest state of mind is a material fact that must be expressly pleaded: *Mercantile Office* at para. 40.

[92] The plaintiffs argue that the statement "currently we do not anticipate any changes to our existing policies" was a representation, in that it was expressing a statement of Ocean Pacific's current state of knowledge. They argue this was a fraudulent misrepresentation on the basis that they say at that time Ocean Pacific did anticipate a future change.

[93] However, I am satisfied that the alleged fraudulent misrepresentation relied upon by the plaintiffs was a representation as to a future event, and as such, it is not actionable at law. Further, even if the representation were not construed as in relation to a future event, the representation itself made clear that Ocean Pacific was unable to make any representation with respect to future entitlement. On that basis, the claim based on fraudulent misrepresentation is bound to fail.

### 5. Punitive Damages

[94] Punitive damages are reserved for extraordinary cases, where the defendant's conduct warrants punishment: *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 at para. 36. To succeed in a claim for punitive damages, the plaintiffs must allege misconduct that is malicious, oppressive and high-handed, such that it offends the court's sense of decency: *Kirk* at para. 139, citing *Whiten* at para. 36 and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 19, 1995 CanLII 59. Punitive damages are to be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensive misconduct that departed "to a marked degree from ordinary standards of decent behaviour": *Whiten* at para. 94. The facts said to justify punitive damages must be pleaded with some particularity: *Whiten* at para. 87.

[95] Not every case of misrepresentation or breach of the duty of honest performance will give rise to punitive damages: *Haack v. Secure Energy (Drilling Services) Inc.,* 2021 ABQB 82 at paras. 661–662.

[96] The plaintiffs, in the Proposed ANOCC, plead that Ocean Pacific engaged in conduct that was "high-handed, reckless, callous, willful, reprehensible and entirely without care for Class members' precarious position in a sector hard-hit by COVID- 19". To support this legal conclusion, the plaintiffs rely upon the following material facts from paras. 17–18 of the Proposed ANOCC:

a) Ocean Pacific misled those employees who signed after receiving the July 22, 2020 email from Mr. Dattel as to the value of the Casual Agreements;

b) it intentionally did so to encourage employees to accept the Casual Agreement, and it "specifically emphasized the continuation of benefits in order to induce employees to accept the terms of the Casual Agreements";

c) some employees relied, at least in part, on the representations in that email;

d) Ocean Pacific knew, or reasonably ought to have known, that the possibility of continuing extended health benefit coverage was "the key value of the Casual Agreements in exchange for which Class members gave up their entitlements to severance pay on termination of their employment"; and

e) Ocean Pacific intentionally withheld the information that the coverage was temporary, so that Class members would be more likely to accept the Casual Agreements.

[97] The Proposed ANOCC makes clear that Ocean Pacific's wrongful conduct is alleged to be deceiving the Class members about the likely continuation of their extended health benefits, and so intentionally creating an inaccurate impression

about the value of what was on offer. The plaintiffs argue that "intentionally misleading one's employees in order to get out of the obligation to pay them severance pay when they lose their jobs in a global pandemic is reprehensible conduct". They say that is particularly so when Ocean Pacific failed to take reasonable steps to obtain a further extension to the Grace Period after it expired in January 2021. In all of the circumstances, I find that the claim for punitive damages is not bound to fail.

### B. Section 4(1)(b): Identifiable Class

[98] In their notice of application filed November 5, 2021, the plaintiffs proposed a Class definition of:

> All current and former employees of the Pan Pacific hotel who agreed to convert from regular to casual status in July or August 2020 in exchange for terms that included continuation of benefits, and whose benefits were thereafter terminated (the "Class").

[99] Ocean Pacific objected to this class definition as being overly broad. Ocean Pacific suggested alternate language for a lass definition that would be acceptable to them. The plaintiffs were opposed to the definition suggested by Ocean Pacific.

[100] The plaintiffs now propose a Class definition of:

> All current and former employees of the defendant who agreed to convert from regular to casual status in July or August 2020 in exchange for terms that included continuation of benefits, and whose benefits were thereafter terminated despite maintaining their casual employee status at the time their benefits were terminated (the "Class").

[101] Ninety-three regular hourly employees signed the Casual Agreement. Of those, four employees are on medical leave, 17 employees continuously received extended health benefits, and more than 40 employees whose extended health benefits were terminated have subsequently had their coverage reinstated as they receive sufficient hours. A further seven employees have resigned or retired. Finally, five employees were offered enough hours to have their extended health benefits coverage reinstated, but chose not to accept those hours. Ocean Pacific estimates that the Class size is 60 members.

[102] Ocean Pacific continues to argue the proposed Class is overly broad as it continues to contain employees who would have been provided extended health benefits but for their choice not to accept shifts that would have qualified them for eligibility for extended health benefits, and whose benefits were terminated as a result. It did not propose any alternative wording to the Class definition at this hearing. In reply, counsel for the plaintiffs argued that all members of the proposed Class share an interest in the resolution of the common issue, even those they may have "different remedial entitlements than the rest of the Class".

[103] Class members may have different remedial entitlements to damages. Arguments will inevitably be made by Ocean Pacific that those five employees who refused to accept shifts offered by them that, if accepted, would have permitted them to maintain their extended health benefits, failed to mitigate their damages. However, I am satisfied that at the certification stage it is appropriate to define the Class on the terms put forward by the plaintiffs.

[104] As I have found that the claim of fraudulent misrepresentation is bound to fail, it is not necessary to consider the proposed subclass.

### C. Section 4(1)(c): Common Issues

[105] Having determined that the causes of action of a breach of the duty to exercise contractual discretion in good faith and fraudulent misrepresentation are bound to fail, I will only consider those causes of action I have found are not bound to fail.

#### 1. Preliminary Issue: Effect of Mr. Dattel's Attestation

[106] With respect to s. 4(1)(c), as already noted, the plaintiffs must show "some basis in fact" to establish that the certification requirements have been met: *Hollick* at para. 25. This requires an assessment of evidence: *Pro-Sys* at para. 103. The plaintiffs bear this evidentiary burden.

[107] Section 5(5)(b) of the *CPA* requires that a person filing an affidavit in a certification application must not only set out the material fact on which the person

intends to rely at the hearing of the application, but also "swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding". Mr. Dattel swore such an attestation in his affidavit #2.

[108] The plaintiffs rely on this attestation and say it is "some basis in fact" to find that:

a) Ocean Pacific did not have any individual conversations with employees about extended health benefits other than those specifically described in Mr. Dattel's two affidavits; and

b) Ocean Pacific did not request an extension of the Grace Period from Manulife.

[109] Materiality pursuant to s. 5(5)(b) of the *CPA* is to be assessed in relation to the issues on certification, and not the merits of the underlying claim. It imposes an obligation on a deponent to disclose all material facts; however, it does not impose an obligation to provide all relevant facts. A material fact has been described as an "ultimate fact", with respect to the fact that is in dispute. In contrast, relevant facts are those facts that tend to prove or disprove a material fact: *Bhangu v. Honda Canada Inc.,* 2021 BCSC 794 at paras. 10–15.

[110] Justice Horsman succinctly addressed this issue recently in *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127:

> [76] …The phrase "material to the application" must be understood by reference to the scope of the certification hearing, which is about the form of action and not the merits of the underlying claim: *Bhangu v. Honda Canada Inc.,* 20221 BCSC 794 at para. 10. Section 5(5)(b) does not require a proposed representative plaintiff to produce medical records that are not necessary to inform the issues on certification.

[111] Ocean Pacific argues that the question of whether it requested an extension of the Grace Period from Manulife is material to the underlying claim, but it is not material to the application for certification. I agree, and I find that I cannot make this inference sought by the plaintiffs.

[112] However, the issue of conversations Mr. Dattel had with individual employees is material to the application for certification. It goes to the heart of whether there is some basis in fact that the proposed common issues are appropriate to be determined on a class wide basis. I am satisfied that given Mr. Dattel swore the required attestation I can infer that he did not have any other material conversations with employees about the Casual Agreement, other than those he specifically describes in his two affidavits.

### 2. Evidence

[113] There is no dispute between the parties that the COVID-19 pandemic had a significant impact on the hospitality sector.

[114] Mr. Dattel explained that regular hourly employees, who work more than 20 hours a week, are provided with extended health benefits through Manulife, but before the summer of 2020 “on-call” employees were not provided with any extended health benefits, regardless of how many hours they worked. This requirement that they work more than 20 hours a week was set out in the employment contracts of the plaintiffs.

[115] Ocean Pacific’s contract with Manulife provided an exception for temporary or indefinite layoffs, where an additional 120 days of coverage could be provided at Ocean Pacific’s option. Ocean Pacific exercised this option, and continued to provide extended health benefits for its regular hourly employees from March 2020 to July 2020.

[116] However, at the end of July 2020, this Grace Period was expiring. As already noted, in July 2020 Ocean Pacific made identical offers of casual employee status to 156 regular hourly employees.

[117] Between July 7 and 10, 2020, Mr. Dattel held meetings with many of the regular hourly employees, and at those meetings he relied on detailed speaking notes. He discussed the impact of COVID-19 on the tourism and hotel industry, and on Ocean Pacific in particular, and he offered them the opportunity to enter into the

Casual Agreements. At the end of reading from his speaking notes, he read aloud the terms of the proposed Casual Agreement.

[118] At these meetings questions came up. On this issue Mr. Dattel's evidence is set out in para. [24] above. He was clear that he relied upon detailed speaking notes at the meetings he held between July 7 and 10, 2020, that he read aloud from the Casual Agreement at the end of each meeting, and he tried to be consistent in explaining that the availability of the extended health benefits depended upon Manulife.

[119] Some employees were unable to attend the meeting in July, and for those individuals he had individual meetings, and explained the circumstances in the same terms he had at the larger meetings.

[120] Mr. Dattel had follow-up meetings with groups of employees, and with individual employees, and he received further questions from employees in person, by email, and by telephone. In his affidavits, he describes individual meetings and individual questions he had with employees.

[121] The details of the three emails he sent to all of the regular hourly employees being offered the Casual Agreement are set out in detail at paras. [21]–[23] above.

[122] There is no allegation that any of the proposed Class members signed different Casual Agreements, and the parties agree each of them signed identical agreements.

[123] As already noted, both Ms. Kramer and Mr. Bansagon deposed that the first warning they received from Ocean Pacific that Manulife may not continue to provide their extended health benefit coverage was on December 8, 2020. Ms. Lee did not depose to that, but rather explained that she heard from some of her coworkers in December 2020 that some of their extended health benefits were being cut off, and was concerned that may happen to her.

### 3. Breach of Contract

[124] The plaintiffs seek the following to be certified as common issues for all Class members:

> *Breach of contract*
>
> 4 Did the defendant fail to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members?
>
> 5 If so, did that conduct amount to a breach of the contracts between the defendant and each Class member?
>
> 6 If so, what remedies are the Class members entitled to?

[125] Given my determination there was no express term requiring Ocean Pacific to seek the continued approval of the carrier, I would rephrase question 5 as "If so, did that conduct amount to a breach of an implied term in the contracts between the defendant and each Class member?"

[126] Ocean Pacific argues that proposed common issue 4 requires that the court imply a term into the contract between Class members and Ocean Pacific, which is not a common issue as it would require consideration of the individual intentions and circumstances of each Class member. Ocean Pacific argues that determining whether the proposed implied term is consistent with the parties' intentions would require an assessment of the circumstances surrounding the formation of each contract, including one-on-one communications between Ocean Pacific and the individual Class members.

[127] While Ocean Pacific admits common issue 5 is a question of law that could be resolved on a class-wide basis, it says because that common issue depends on common issue 4, it cannot be certified.

[128] Ocean Pacific relies upon case law where courts have held that common issues involving an implied term arising from the parties' presumed intentions are not amenable to determination on a class-wide basis: *Marshall* at para. 207; *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College),* 2008 CanLII 1539 at para. 115, 163 A.C.W.S. (3d) 701 (Ont. S.C.J.)*; Anderson v. Bell Mobility Inc.*,

2010 NWTSC 65 at para. 59*; Nadolny v. Peel (Region),* 2009 CanLII 51194 at paras. 70–71, 180 A.C.W.S. (2d) 783 (Ont. S.C.J.); and *Fairview Donut Inc. v. The TDL Group Corp.,* 2012 ONSC 1252 at paras. 281–291, aff'd 2012 ONCA 867, leave to appeal to SCC ref'd 35207 (16 May 2013).

[129] However, this is an unusual set of circumstances. The Casual Agreement was offered to the regular hourly employees by Ocean Pacific through a series of meetings, for which Mr. Dattel used detailed speaking notes. The extended health benefits offered were through a group plan Ocean Pacific obtained from Manulife. Mr. Dattel emailed all of the regular hourly employees the same three emails on July 15, 2020, on July 20, 2020 and on July 22, 2020. Each of the regular hourly employees who accepted the Casual Agreement signed an identical contract, and all signed the contract over the period of a month: from July 7, 2020 to August 6, 2020.

[130] I am satisfied that the plaintiffs have established some basis in fact that there is an implied term in the Casual Agreement that Ocean Pacific, having agreed to continue extended health benefits for as long as Manulife would approve them, had to request that Manulife continue approving those benefits. Ocean Pacific argues that this implied term seeks to confuse the core issue: it argues an obligation to seek modifications to the group plan to enable continued eligibility for extended health benefits without working 20 hours per week is substantively no different from the implied term that Ocean Pacific was obliged to request that Manulife continue its approval. However, that is a matter to be resolved at the trial of the common issues, where inevitably evidence from not just Ocean Pacific but also Manulife will be adduced.

[131] Ocean Pacific also argues that common issue 6 cannot be certified as a common issue, as the plaintiffs have not advanced any evidence that they have suffered any loss or damage, let alone that such loss or damage can be assessed across the entire Class.

[132] It is accepted that remedies only exist to compensate a party for loss. Even if it is a common issue as to whether the Class members are entitled to remedies,

Ocean Pacific argues the plaintiffs have not presented any evidence as to the losses suffered by the proposed representative plaintiffs, nor any evidence that those losses were incurred on the same basis across the whole proposed Class. It argues that this is fatal to a certification application: *Chow v. Facebook, Inc.,* 2022 BCSC 137 at paras. 100–101; *Setoguchi v. Uber VB*, 2021 ABQB 18 at para. 33, aff'd 2023 ABCA 45.

[133] However, in some cases the court has certified the question of entitlement to damages, particularly where certifying that question will meaningfully advance the litigation: *Escobar* at para. 175; *Isaacs v. Nortel Networks Corp.,* 2001 CanLII 28314 at para. 35, 16 C.P.C. (5th) 69 (Ont. S.C.J.).

[134] I do not agree with Ocean Pacific that the plaintiffs have presented no evidence as to the losses suffered by the proposed representative plaintiffs. While there is no evidence identifying the specific quantum of the proposed representative plaintiffs' losses, it is clear that their losses are based upon the loss of entitlement to severance benefits (given up when they entered into the Casual Agreement), and the loss of entitlement to extended health benefits when they were later terminated in 2021.

[135] I find that while the calculation of damages is necessarily individual, the determination of whether they are available to the Class is common: *Escobar* at para. 174. I am satisfied that the proposed representative plaintiffs have provided sufficient evidence to satisfy the low test that they provide some basis in fact that they each suffered loss, in particular, the loss of being able to claim severance had they not signed the Casual Agreements.

[136] I certify the following as common issues:

> *Breach of contract*
>
> 4 Did the defendant fail to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members?
>
> 5 If so, did that conduct amount to a breach of an implied term in the contracts between the defendant and each Class member?

6 If so, what remedies are the Class members entitled to?

### 4. Breach of the Duty of Honest Performance

[137] The plaintiffs seek the following to be certified as common issues:

> *Breach of the duty of honest performance*
>
> 1 Did the defendant intentionally mislead the Class members about the limited continuation of their benefits?
>
> 2 If so, did that conduct amount to a breach of the defendant's duty of honest performance of its contractual obligations toward Class members?
>
> 3 If so, what remedies are the Class members entitled to?

[138] As I concluded above, I am satisfied that the plaintiffs have established some basis in fact that Mr. Dattel made best efforts to provide consistent information to all of the regular hourly employees being offered the Casual Agreements. I am also satisfied they have established some basis in fact that in the individual conversations Mr. Dattel had with employees, he likewise provided consistent information.

[139] Ocean Pacific argues that these common issues should not be certified as "all of the employees in the proposed class also received oral representations regarding the availability of benefits, the content of which varied between individual members of the class". It argues this case is analogous to *Marshall* and *Webster*: *Marshall* at para. 165 and *Webster* at para. 180.

[140] In these circumstances, I find that the evidence discloses a basis in fact for these common issues. There is evidence of an identical contract, identical communications sent to all Class members, and similar, if not necessarily identical, communications between Mr. Dattel and individual Class members about the Casual Agreements. Mr. Dattel did not depose that the information he gave to different employees differed in any material manner; rather, the totality of his evidence leads me to infer he made best efforts to be consistent with the information he gave to employees. For the reasons already set out above, I am satisfied the evidence discloses a basis in fact for a determination of the issue of entitlement to remedies.

[141] I certify the three common issues above as common issues.

### 5. Punitive Damages

[142] The plaintiffs seek the following, as modified in oral agreement, to be certified as common issues:

> *Punitive Damages*
>
> 9. Was the defendant's conduct high-handed, malicious, arbitrary, or highly reprehensible such that punitive damages are warranted?
>
> 10. If so, and if the aggregate compensatory damages awarded to Class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what is the appropriate quantum of punitive damages in this case?
>
> 11. If the answer to question 9 is yes, and for consideration once all other common issues have been decided, and once all individual damages have been assessed, can an aggregate award pursuant to s. 29 of the *Class Proceedings Act* be made as regards punitive damages?

[143] The parties agreed these three common issues could only be considered after all the other common issues were decided, and once all individual damages were assessed.

[144] Ocean Pacific again argues that the overall liability for punitive damages requires a consideration of communications with each proposed Class member. It argues that certifying this as a common issue is both unnecessary and unhelpful. It submits that it is unnecessary because "[t]he failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found": *Pro-Sys* at para. 134. It submits that it is unhelpful because s. 29 of the *CPA* can only be applied once all individual issues are resolved, and so these common issues cannot be decided at the initial common issues trial.

[145] I note that it is not unusual for punitive damages to be certified as a common issue: *Escobar* at para. 181, citing *Sherry* at para. 43.

[146] For the reasons already set out above, the evidence of the communications with each proposed Class member provides some basis in fact for concluding that the nature of those communications can be tried as a common issue. Likewise, the

evidence of Ocean Pacific's conduct, and its decision to offer the Casual Agreement to its regular hourly employees, is the subject of a common body of evidence. I am satisfied that there is some basis in fact to conclude that those communications, in the circumstances, are a common set of facts upon which to consider punitive damages.

[147] I adopt and rely upon Justice Matthews' comments in *Escobar* as to why it is necessary and helpful to certify these as common issues at this stage. She wrote:

> [194] While it may not be necessary in the sense that the trial judge retains the discretion to determine damages in the aggregate regardless of the formulation of the common issues, it might be helpful.
>
> [195] It is appropriate for the parties and the Class members to be of the common understanding that a party will be seeking to have damages assessed in the aggregate. It is not a matter that must be set out in the pleadings. As such, stating so in the certification order is appropriate.
>
> [196] In addition, the *Class Proceedings Act* provides for statistics to be used to assess damages in the aggregate and provides for methods of distribution to the class (see ss.30 – 33). The class receives notice of certification. The purpose of notice is served if the class knows that, at least provisionally, one or more types of damages may be assessed in the aggregate and therefore their awards and the manner of distribution to them may be based on statistics and other tools provided in the legislation. This information may assist class members with their decision whether to opt out.

[148] I certify the three common issues above as common issues.

### D. Section 4(1)(d): Preferable Procedure

[149] With respect to the preferability analysis required pursuant to s. 4(1)(d) of the *CPA,* the Court must consider all relevant matters, including those factors enumerated in s. 4(2) of the *CPA.* The principles governing this analysis have been described as whether a class proceeding would be a fair, efficient and manageable method of advancing the claims, and whether a class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution.

[150] Ocean Pacific argues that a class proceeding is not the preferable procedure for resolving the claims advanced because the individual issues predominate over the common issues. However, this position depends upon the court accepting its

position on the s. 4(1)(a) (causes of action) and s. 4(1)(c) (common issues) analysis. For reasons already set out, I am satisfied that the plaintiffs have established their causes of action for breach of an implied term of the Casual Agreement, breach of the duty of honest performance with respect to the Casual Agreement and punitive damages are not bound to fail. I am also satisfied they have established some basis in fact to support their position that the common issues related to each of these causes of action are, in fact, common. The only individual issue to be determined in this case is the assessment of damages.

[151] Even though there will necessarily need to be individual damage assessments, I find this class action proceeding still provides significant advantages in judicial economy and efficiency. I am satisfied that this class proceeding is a fair, efficient and manageable method to advance the claims of the plaintiffs.

[152] Further, as this class proceeding evolves, I expect the parties will be able to make submissions with respect to s. 27 of the *CPA,* in particular s. 27(3), as to the least expensive and most expeditious method of determining the remaining individual issues. Notwithstanding those individual damage assessments, a class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution, such as 93 separate trials.

[153] In relation to preferable procedure, Ocean Pacific also argues that the litigation plan makes no specific plan to simplify, or streamline, the resolution of the individual damage claims. That issue is discussed further below.

### E. Section 4(1)(e): Representative Plaintiff

[154] Ocean Pacific made no submissions that any of the proposed representative plaintiffs were inappropriate. I am accordingly satisfied that both Tonia Lee and Jerome Bansagon are appropriate representative plaintiffs for the Class. As I have not certified the proposed subclass, I do not appoint Melissa Kramer as a representative plaintiff.

[155] In its application response Ocean Pacific argued that the proposed representative plaintiffs failed to satisfy s. 4(1)(e)(ii) of the *CPA,* which requires that they produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding". It argued that the proposed litigation plan fails to propose a workable method for addressing the individual issues that will remain at the end of any common issues trial. However, it did not make this argument in any detail in either its written submissions or oral argument.

[156] Justice Matthews noted that "[a]ssessment of the detail necessary to address complexity of individual issues in litigation plans is contextual": *Escobar* at para. 247. In this case, I do not see the criticisms of Ocean Pacific to be such that the case should not be certified. I am satisfied the litigation plan is adequate, although incomplete, at this stage. It provides for a process for determining individual issues following the resolution of the common issues "to be determined [based] on the nature and scope of the remaining individual issues". I expect the representative plaintiffs will revise their litigation plan in due course, with the benefit of these reasons, and at that time will provide further details anticipating the potential individual issues.

## VI. CONCLUSION

[157] The plaintiffs have leave to file the Proposed ANOCC, attached as Exhibit A to Affidavit #2 of Ashley Fehr, with the following amendments:

a) the admission in para. 18(b), that "As of January 2, 2021, a condition came into effect that employees must work a minimum 20 hours per week to remain eligible for benefits coverage" may not be deleted; and

b) the admission in para. 45, that "The defendant told Class Members it would continue their benefits as long as Manulife would continue to approve this coverage" may not be deleted.

[158] The revisions proposed by the plaintiffs in reply to para. 50a and para. 50b were not relevant nor necessary, and so those proposed amendments are not allowed.

[159] The plaintiffs have met the requirements for certification, and I certify the claim as a class proceeding, and appoint Tonia Lee and Jerome Bansagon as the representative plaintiffs for the following Class:

> All current and former employees of the defendant who agreed to convert from regular to casual status in July or August 2020 in exchange for terms that included continuation of benefits, and whose benefits were thereafter terminated despite maintaining their casual employee status at the time their benefits were terminated (the "Class").

[160] I decline to order certification of the proposed subclass for the reasons set out above regarding the allegations of fraudulent misrepresentation, and so I decline to appoint Melissa Kramer as the representative plaintiff for that proposed subclass.

[161] The common issues certified are:

*Breach of the duty of honest performance*

1. Did the defendant intentionally mislead the Class members about the limited continuation of their benefits?
2. If so, did that conduct amount to a breach of the defendant's duty of honest performance of its contractual obligations toward Class members?
3. If so, what remedies are the Class members entitled to?

*Breach of contract*

4. Did the defendant fail to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members?
5. If so, did that conduct amount to a breach of an implied term in the contracts between the defendant and each Class member?
6. If so, what remedies are the Class members entitled to?

*Punitive Damages*

7. Was the defendant's conduct high-handed, malicious, arbitrary, or highly reprehensible such that punitive damages are warranted?
8. If so, and if the aggregate compensatory damages awarded to Class members does not achieve the objectives of retribution, deterrence

and denunciation in respect of such conduct, what is the appropriate quantum of punitive damages in this case?

9. If the answer to question 7 is yes, and for consideration once all other common issues have been decided, and once all individual damages have been assessed, can an aggregate award pursuant to s. 29 of the *Class Proceedings Act* be made as regards punitive damages?

[162] A certification order must state the nature of the claims, the relief sought, the means of opting out and the opt-out period. The plaintiffs proposed a notice to Class members addressing those issues, but the parties did not make submissions on the terms of the certification order nor the contents of the notice. Accordingly, the parties should make submissions on these matters, taking into account these reasons for judgment and the common issues I have certified, prior to the certification order being entered. If they are able to agree on the matters necessary to finalize the certification order, they may address them by way of written submissions. After reviewing those written submissions, I will advise if I require an oral hearing. However, if the parties do not agree on those issues, they are to arrange for an appearance before me to address them.

"Blake, J."