IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Linza v. Metric Modular,* 2023 BCSC 1196

Date: 20230714
Docket: S230655
Registry: New Westminster

Between:

Byron Linza

Plaintiff

And:

Metric Modular and Triple M Modular Ltd. and Triple M Housing Ltd.

Defendants

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

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard N. Chhina
Counsel for the Defendants, Metric Modular and Triple M Modular Ltd.:	M. LaFleche
Counsel for the Defendant, Triple M Housing Ltd.:	M. Watt S. Foster
Place and Dates of Hearing:	New Westminster, B.C. November 30 and December 1-2, 2022
Place and Date of Judgment:	New Westminster, B.C. July 14, 2023

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Introduction

[1] Mr. Linza applies to certify this action as a class proceeding against Triple M Housing Ltd. ("Housing"), on behalf of approximately 100 employees whose indefinite term employment contracts with Triple M Modular Ltd. dba Metric Modular ("Modular") were terminated between May and September 2020.

[2] The overall issue to be determined is whether Mr. Linza has met the requirements in the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], to have the action certified. All of the requirements are in issue.

[3] Mr. Linza alleges that the employment contracts were terminated without cause, notice, or payment in lieu of notice. He seeks damages for wrongful dismissal, alternatively damages for unjust enrichment, and punitive damages for alleged breach of duty of good faith and fair dealing. The terminations took place during the time that the insolvent Modular gave notice of an intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. Modular was ultimately deemed to have made an assignment into bankruptcy. The effect of these events is that the action against Modular is stayed and cannot proceed further.

[4] Mr. Linza alleges that Housing, which is not bankrupt, was a common employer of the proposed class members, along with Modular. As a result, he pursues all of the above claims against Housing. Alternatively, Mr. Linza alleges that this is an appropriate case to pierce the corporate veil to make Housing jointly and severally liable for the claims that would have been advanced against Modular.

[5] For the reasons below, I adjourn the application to certify to enable Mr. Linza to apply to amend his pleadings, and reformulate the class definition and proposed common issues. I will address the application under the following headings: Legal Framework, Evidence, the five certification requirements in the *CPA*, and Whether to Permit Amendment.

Legal Framework

[6] A certification hearing does not determine the merits of the action. The overall issue at a certification hearing is whether a class proceeding is the appropriate form for prosecuting the claims of the proposed class members: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.

[7] To certify this action as a class proceeding, Mr. Linza has the onus of establishing all five of the requirements in s. 4(1) of the *CPA.* If he does so, the Court must certify the proceeding. Those requirements are:

> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
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> (e) there is a representative plaintiff who
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> > (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.

[8] These requirements are interpreted generously to give effect to the advantages of class proceedings: judicial economy, access to justice, and behaviour modification: *Hollick* at paras. 14–15.

[9] The test under s. 4(1)(a) is the same as the test for striking pleadings. A plaintiff satisfies this requirement unless it is “plain and obvious” that the plaintiff’s claim cannot succeed. Pleaded facts must be assumed to be true unless they are patently unreasonable or incapable of proof: *Hollick* at para. 25; *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [*Pro-Sys*]; *Sherry v. CIBC Mortgage Inc*., 2020 BCCA 139 at para. 23.

[10] A plaintiff must plead the material facts in support of each cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22; *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 25; *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at paras. 39–45.

[11] The pleadings are read generously, with a view to amendment if necessary to cure deficient drafting. Novel but arguable claims should be permitted. However, the prospect of success must be reasonable, not speculative: *Sherry* at para. 24; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19 [*Atlantic Lottery*].

[12] No evidence is admissible in determining whether the pleadings disclose a cause of action. However, the Court may refer to documents incorporated by reference into the pleadings: *Shoppers Drug Mart Inc. v. Mang*, 2021 BCSC 928 at para. 14.

[13] The test under s. 4(1)(b) to (e) is whether there is "some basis in fact" supporting each of the certification requirements: *Hollick* at para. 25. The Court does not engage in a detailed weighing of evidence to assess the strength or merits of the claims; however, the assessment requires more than a "superficial level of analysis into the sufficiency of the evidence": *Pro-Sys* at paras. 99–100, 102–103. The Court should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.

[14] Although the threshold for certification is low, the certification process serves an important gatekeeping function in screening out those claims which are destined to fail at the merits stage: *Pro-Sys* at para. 103; *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31 [*Revolution*].

Evidence

The Parties

[15] Housing was incorporated in 1981 in Alberta and is extra-provincially registered in BC. It is in the business of manufacturing factory-built homes at a

facility in Lethbridge, Alberta. Housing has approximately 380 employees at its Lethbridge facility. The production employees are unionized.

[16] Modular was incorporated in April 2017 in BC. In May 2017, Modular purchased the assets of a modular construction manufacturing business operating as Britco Construction ("Britco"), which had been in business since 1977. Following the purchase, Modular's main business was multi-unit modular construction, typically for commercial use. Modular manufactured the buildings in facilities in Agassiz and Penticton, previously occupied by Britco. Modular's largest customer was the B.C. Housing Management Commission. In November 2017, Modular registered as a sole proprietorship to operate under the name "Metric Modular".

[17] Beginning in November 2017, Modular contracted with Housing to construct single family homes at the Penticton facility for delivery to Housing as fill-in work between commercial projects.

[18] Modular was experiencing financial difficulties. Modular closed the Penticton facility in December 2019. Following the closure of the Penticton facility, the manufactured homes Modular contracted with Housing to construct were completed in Agassiz. Challenging financial circumstances and the onset of the COVID-19 pandemic in the spring of 2020 led to the closure of Modular and the Agassiz facility.

[19] On June 1, 2020, Modular filed a notice of intention to make a proposal pursuant to s. 50.4 of the *BIA*. Subsequently, on September 30, 2020, Modular was deemed to have made an assignment into bankruptcy. Modular completed its ongoing projects between June and September 2020 as part of the wind down of the business. The assets of Modular were sold and its premises vacated.

[20] Housing and Modular had the same parent company and directors. Triple M Modular Limited Partnership was the sole shareholder of the common shares of Housing and of Modular. Housing continues to operate as a going concern.

Employment and Termination

[21] In April 2017, the employees of Britco were offered employment by Modular on completion of Modular's purchase of Britco's assets. The employees included sales, supervisory, administrative, and production staff. Mr. Linza was one of the production employees. He had commenced employment with Britco at its Agassiz facility in 2007.

[22] The terms of employment offered by Modular to the Britco production employees were the same as those in place with Britco, and included recognizing past service with Britco. The employees at the Agassiz facility were not unionized. In April 2017, Mr. Linza accepted employment with Modular in production.

[23] Modular also offered non-production salaried employees of Britco continued employment on substantially the same terms as they had with Britco. Modular subsequently hired salaried employees pursuant to individual letters of employment. The terms of those contracts are not in evidence.

[24] In 2018, the production employees at the Agassiz facility, including Mr. Linza, signed a new employment agreement with Modular to take effect May 1, 2018. The employment agreement is stated not to apply the following employees: plant manager, production superintendent, production supervisor, office staff, sub-contractors, and shop/yard clean-up personnel. The production employees received a new hourly wage rate and a retroactive wage payment.

[25] The employment agreement for each production employee included the following termination clause ("Termination Clause"):

> 9.1 The Employer may terminate an Employee's employment without just cause, and will fully discharge its severance obligations by providing such Employee with the statutory notice and/or pay in lieu of notice (at the Employer's discretion), pursuant to the provisions of the *BC Employment Standards Act*, as amended from time to time.

An identical Termination Clause was in the previous Britco terms of employment adopted in 2017.

[26] Between May 1 and September 30, 2020, the employment of 124 employees of Modular was terminated. It is unclear from the materials whether this figure includes about a dozen employees who were on leave, however the employment of all ended. By letter dated June 1, 2020, Modular terminated Mr. Linza's employment effective immediately. No payment in lieu of notice was made, including minimum amounts due under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. The reason given for the termination was the decision made by Modular to wind down operations due to the COVID-19 pandemic and already challenging economic conditions.

[27] Of the 124 employees, 92 were hourly paid production employees, and 32 were non-production salaried employees. Of the 124 employees, 12 were treated as having resigned from their employment. Modular offered six salaried employees a retention agreement to remain with Modular for a fixed period of time to complete the wind down of Modular's business. The trustee in bankruptcy hired three employees on a temporary basis to assist with the administration of the bankrupt estate. In August 2020, Housing purchased an assignment of Modular's contract for a project in Gibsons, BC, and hired four present or former employees of Modular to complete the project. Two of those employees were hired following the commencement of this action and signed releases in favour of Housing.

Employment Standards Act **Proceedings**

[28] About half of the employees working at the Agassiz facility whose employment had been terminated filed complaints with the BC Employment Standards Branch ("ESB"), and were ultimately represented by the same counsel on this application.

[29] In September 2020, counsel requested the Director of Employment Standards to investigate and adjudicate the claims for termination and vacation pay owing pursuant to the *ESA* and whether Housing was liable for those wages as an associated employer under s. 95 of the *ESA.* A finding under s. 95 would permit the Director to treat Housing as an employer, and make it jointly and severally liable for wages owing.

[30] There are four requirements for a finding of associated employers. As it would apply to this situation, they are: (1) there is more than one corporation; (2) each is carrying on a business; (3) there is common control or direction; and (4) there is some statutory purpose for treating the corporations as one employer: *Invicta Security Systems Corp. (Re)*, BC EST #D349/96, 1996 CanLII 20960. The test is not the same as that for common employers under the common law.

[31] In February 2021, the Delegate of the Director gave notice that the Director was investigating: whether wages had been paid pursuant to the *ESA;* the possible association between Modular and Housing under s. 95*;* and the potential liability of the directors of Modular and Housing for wages and vacation pay owing pursuant to s. 96 of the *ESA*. That section makes a corporation's directors personally liable for up to two months unpaid wages of each employee in certain circumstances. Pursuant to a determination dated December 22, 2021 ("Determination"), the Delegate found that Housing was an associated employer.

[32] Housing filed an appeal of the Determination with the Employment Standards Tribunal. On July 21, 2022, the Tribunal cancelled the Determination's finding of associated employer ("Appeal Decision"). No reconsideration requests were filed. At this hearing, counsel advised that the Director is no longer pursuing an investigation into the potential liability of the directors under s. 96.

WEPP **and Mitigation**

[33] Proposed class members applied for and received payments under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 [*WEPP*], which provides for payment of outstanding eligible wages for up to seven weeks, in a prescribed amount, to individuals whose employer is subject to bankruptcy proceedings or receivership. Mr. Linza was paid $6,798.57 under *WEPP*. There is an issue between the parties as to whether *WEPP* payments are deductible from any damages award.

[34] Mr. Linza found other employment following his termination, and earned approximately $30,000 from the time of his termination to the end of 2020.

[35] I turn now to the requirements Mr. Linza must establish for certification.

Do the Pleadings Disclose a Cause of Action?

Wrongful Dismissal

[36] The common law implies a term in an indefinite employment contract that it will not be terminated without just cause, unless there is reasonable notice. Absent unconscionability or other legal reason, the implied term will be displaced by a clause that clearly specifies some other period of notice, and which complies with minimum statutory notice provisions. If the clause provides, or potentially provides, less than the minimum statutory notice, it is null and void: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 997–998, 1000, 1004–1005, 1992 CanLII 102; *ESA*, s. 4; *Shore v. Ladner Downs*, [1998] 52 B.C.L.R. (3d) 336, 1998 CanLII 5755 (C.A.); *Waddell v. Cintas Corp.*, 2001 BCCA 717.

[37] In paras. 8, 20–23, 26, 29–31 of the notice of civil claim ("NOCC"), Mr. Linza pleads that he is bringing this action as proposed representative of all persons employed by one or both of the defendants (or alternatively by each defendant) in "its Agassiz division" under contracts of indefinite duration (para. 8), which were "materially identical" for the purposes of this proceeding (para. 20), and which were terminated without just cause, notice or pay (para. 26), or any entitlements under the *ESA* (para. 29).

[38] The focus of argument was on Mr. Linza's answers to demands for particulars and on paras. 47–48 in the legal basis section of the NOCC which state:

> 47. All Class Members had contractual terms governing their entitlement to notice of termination without cause:
>
> (a) Some of the Class Members had [non]-binding and express contractual clauses speaking to this entitlement:
>
> (i) All of which were all illegal, and thus void ab initio;
>
> (ii) Some of which were illegal and thus void ab initio; and
>
> (b) In the alternative, those termination clauses which are binding were, nonetheless, breached and contractual damages are due as because of that breach.

> (c) For all other Class Members, the common law mandates that it was an implied term of their Employment Contract that each of them was entitled to reasonable notice of termination.
>
> 48. Each Class Member's termination:
>
> (a) was effected without notice or payment in lieu of notice, entitling the Class Members to damages for breach of contract at common law
>
> [Emphasis added.]

[39] Housing demanded particulars of how the employment contracts were "materially identical". Mr. Linza's answer was "They contained the same terms insofar as they are material to this claim". In a second demand, Housing requested particulars of the "written employment contract between the Defendants, or either of them, and the Plaintiff". Mr. Linza responded:

> …we do not agree that we have alleged something defined as "the written contract" but rather multiple contracts, which were partly in writing, and which are materially identical for the purposes of this action. To the extent those contractual terms relevant to the class are set out in writing, they appear at Exhibit C to the affidavit of Byron Linza dated October 13, 2020.

[40] Exhibit C to Mr. Linza's affidavit is 76 pages. It is a letter on Modular's letterhead enclosing a production employee contract between Modular and an employee, and the "Production Employee Handbook".

[41] Housing demanded particulars of the basis upon which the express contractual clause governing entitlement to notice of termination was void. Mr. Linza's answer was: "*Machtinger v. HOJ Industries*, 1992 1 S.C.R. 986. Making this clearly not a request for particulars." Housing also asked if the express contractual clause regarding entitlement to notice of termination was the two identical Termination Clauses in the 2017 and 2018 employment contracts. Mr. Linza's reply was:

> … there is a typographical error in paragraph 47(a). "binding and express" should read "non-binding and express." We confirm that the two examples in your letter are two examples of clauses not binding upon the class. …
>
> [Emphasis added.]

[42] Housing implicitly concedes that wrongful dismissal is properly pled for contractual damages limited to the Termination Clause, but submits the pleadings do

not support a claim based on an implied term of reasonable notice. In particular, Housing submits:

a) The pleadings are vague and confusing and Housing's attempts to seek clarity through demands for particulars were not fruitful;

b) The claim for wrongful dismissal is pled with respect to the employment contract of Mr. Linza, which has the Termination Clause which limits his entitlement to the statutory minimum in the *ESA*;

c) Mr. Linza has not pled any material facts or provided particulars that could result in the Court finding the Termination Clause is void. Mr. Linza's response to particulars only referred to *Machtinger*; and

d) There is nothing in the pleadings which addresses the terms of employment of the approximately 35 non-production salaried employees who were terminated. It is not clear how these contracts are materially the same.

[43] In my view, at first reading, paras. 47–48 of the NOCC are not entirely clear. The key is that the words "contractual terms" at the beginning of para. 47, is a reference to an express or an implied contractual term presumed by the common law. Reading the NOCC liberally with that understanding, it alleges the following. All of the employment contracts were indefinite term. Of these, there are two classes of contracts: (1) those with a Termination Clause which is, (a) void, resulting in a claim for damages based on an implied contractual term of reasonable notice, or (b) binding, resulting in a claim for damages based on the express contractual Termination Clause; and (2) those without a Termination Clause and for which the common law implies a term of reasonable notice.

[44] The NOCC is not drafted in reference to Mr. Linza's employment contract only, and is therefore not restricted to express contractual notice, nor does it fail to address claims of non-production salaried employees. The NOCC does not make any distinction between production employees and all other employees.

[45] I conclude that the NOCC pleads a claim for wrongful dismissal that is not bound to fail, whether damages are based on an enforceable Termination Clause or an implied term of reasonable notice.

[46] However, the pleadings are not sufficient with respect to the specific allegation that the Termination Clause is void (which affects the measure of damages only), because no material facts are pled in support of that allegation. The need for appropriately drafted pleadings is “foundational”. Pleadings are the parameters within which the action operates. They guide the discovery process, interlocutory applications and trial, ensure notice and fairness between the parties, and enable the parties and Court to know with precision the issues of fact and law to be decided: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, at paras. 21–23.

[47] Mr. Linza’s answer to Housing’s demand for particulars regarding the basis upon which the Termination Clause is void, does not assist him. Mr. Linza referred only to *Machtinger*. While the reference to *Machtinger* might be understood by employment law lawyers to suggest that there would be argument regarding minimum statutory entitlements, there are still no facts pled (e.g. which entitlements), and only the legal conclusion. Further, Mr. Linza’s answer to the demand for particulars that the Termination Clause is only “one example” of clauses which are void, suggests there may be some other basis for the Termination Clause to be void. Finally, although particulars may be considered, reliance upon particulars should not be necessary when assessing whether a cause of action has been pled: *Halvorsen v. British Columbia (Medical Service Commission)*, 2010 BCCA 267 at para. 40.

[48] In reply submissions, Mr. Linza eventually identified the basis for the Termination Clause being void as being that it potentially did not provide for the entitlements in s. 63 (individual length of service termination) and s. 64 (group terminations) of the *ESA*. No amendments to the pleadings were proposed by him, but he submitted that the Court should permit him to amend his pleadings if any of his pleadings were defective.

[49] Although Mr. Linza's reply submission was specific about the basis upon which the Termination Clause was void, his replies to requests for particulars suggest a reluctance to commit to specific factual allegations. In the circumstances, the Court should not certify an action on amendments that have yet to be presented: *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414 at para. 14; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44, 118. Further, Housing should have an opportunity to make submissions on whether any proposed amended claim is viable.

[50] In summary, while the pleadings disclose a cause of action for wrongful dismissal, there are no facts pled to support the allegation in para. 47(a) that the Termination Clause is void. That particular allegation is defective. I address whether Mr. Linza should be granted leave to amend his pleadings at the end of these reasons.

Unjust Enrichment

[51] In the alternative, Mr. Linza claims damages based on *quantum meruit* for unjust enrichment. The three elements of a cause of action for unjust enrichment are: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) absence of juristic reason for the enrichment and the corresponding deprivation: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30; *Kerr v. Baranow*, 2011 SCC 10 at para. 32; *Atlantic Lottery* at para. 69.

[52] A contract between parties is a recognized juristic reason to deny recovery: *Kerr* at para. 41; *Garland* at para. 44.

[53] The NOCC alleges the following facts relevant to this claim:

> 31. As a result of the foregoing, the Class Members have suffered and will continue to suffer damage, loss and expense, including loss of compensation and/or benefits to which they would have been entitled during each of their periods of reasonable notice, including loss and/or diminishment of … [list of contractual benefits].
>
> 32. The defendants, including their controlling minds… deliberately set about conducting these matters in a way calculated to deny the Class Members of

> not only reasonable notice, but also of any damages against their nominal employer – Metric Modular.
>
> 33. There is no justifiable reason Triple M Modular and/or Triple M Housing should be so enriched.
>
> 34. There is no justifiable reason the Class Members should be so deprived.

[54] Paragraph 49 in the legal basis section of the NOCC alleges that "the circumstances set out herein" satisfy the three elements of a claim for unjust enrichment.

[55] Mr. Linza did not advance an argument regarding this claim at the hearing, nor did he propose a common issue related to unjust enrichment.

[56] Housing submits that if Mr. Linza has abandoned this claim, it should be dismissed on that basis. In the alternative, this claim is bound to fail as it is based on the terms of the employment contracts. The NOCC does not claim or plead material facts that could support a viable claim based on unjust enrichment such as: for unpaid work performed, as in *Fulawka v. The Bank of Nova Scotia*, 2012 ONCA 443, leave to appeal to SCC ref'd, 34932 (20 March 2013); or where the entire employment contracts are alleged to be void or unenforceable. In the absence of such allegations in the pleadings, there is a juristic reason for any alleged enrichment, being the contracts.

[57] The two broad sets of circumstances where claims for unjust enrichment and breach of contract can properly coexist, are: (1) where the "purported benefit was found (or, at the certification stage, pleaded) to have been provided to the defendant extra-contractually, or beyond the scope of the contract" and (2) where "some issue in relation to the validity or enforceability of the contract in question is raised" such as "illegality, capacity, or frustration": *Revolution* at paras. 42–51.

[58] In *Flesch v. Apache Corporation*, 2022 ABCA 374 at paras. 59–61, a class proceeding, the plaintiff claimed damages for stock benefits not paid under alleged employment contracts (and also made a claim of common employer which I will return to later). The Court noted that there were "no circumstances alleged in which a claim for unjust enrichment would be available for which the contractual claim

would not provide". The claim for unjust enrichment did not provide any incremental benefit to proposed class members, and was a "hollow cause of action".

[59] In this case, neither of the two broad categories of circumstances in which claims in contract and unjust enrichment can coexist, have been pled. Mr. Linza does not claim for damages beyond the terms of the employment contracts, whether based on the Termination Clause or an implied term of reasonable notice. Mr. Linza does not allege that he and the proposed class members did work outside the terms of the employment contracts or that the employment contracts are entirely void or unenforceable. The damages claimed are entirely governed by the contracts. There is no prospect in the circumstances pleaded that the claims for wrongful dismissal could fail, while a claim in unjust enrichment could succeed. If there is an enrichment, the employment contracts are a juristic reason for the whole of the damages claimed.

[60] It is plain and obvious that the NOCC does not disclose a viable claim for unjust enrichment. The claim is bound to fail.

Common Employer

[61] The common employer doctrine has traditionally been an allegation by an employee that he or she is employed by more than one related corporation. Mr. Linza alleges that in addition to being employed by Modular, the proposed class members were also employed by Housing.

[62] The leading BC case is *Sinclair v. Dover Engineering Services* (1987), 11 B.C.L.R. (2d) 176, 1987 CanLII 2692 (S.C.), aff'd [1988] B.C.J. No. 265, 1988 CanLII 3358 (C.A.). In that case, the plaintiff alleged that both of two closely related companies were his employer. While the employee did work for one company and the public would have been led to believe he was an employee of that company, the alleged common employer had for years paid and issued T4 slips in its name to the plaintiff, contracted with or enrolled in extended health and government programs for the benefit of the plaintiff, and invoiced the other company for the plaintiff's services. The Court found that all the circumstances supported an inference that the plaintiff

was employed by both companies. The issue was not one of piercing the corporate veil or vicarious liability, but whether in all of the circumstances the plaintiff and the alleged common employer had entered into a contract of employment: *Sinclair* CA at para. 9.

[63] Simply being a related corporation does not make a corporation a common employer. A related corporation will be found to be a common employer only where it is established that there was an intention to create an employer/employee relationship between the employee and the related corporation. This is a question of contractual formation. The parties' subjective thoughts are irrelevant. The question is assessed objectively: "did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged?". What is relevant is "how each party's conduct would appear to a reasonable person in the position of the other party.": *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, at paras. 2, 49–65, leave to appeal to SCC ref'd, 39834 (10 March 2022).

[64] Relevant factors in determining whether there was the intention to create an employment contract include "conduct that reveals where effective control over the employee resided", and "the existence of an agreement specifying an employer other than the alleged common employer(s)": *O'Reilly* at paras. 53, 65.

[65] The test for common employer has been described as having two prongs: (1) whether a corporation had sufficient interrelationship and common control with the nominal employer; and (2) whether the employee held a reasonable expectation that the other company was party to the employment contract, meaning the evidence shows that there was an objective intention to create an employer/employee relationship between the employee and the related corporation: *Scamurra v. Scamurra Contracting*, 2022 ONSC 4222 at paras. 65, 71–73.

[66] Paragraph 6 of the NOCC alleges that Modular and Housing have "common directors, owners and/or management" and that they hold themselves out as "common employers and/or members of … a Triple M Company". Paragraph 23

alleges that the proposed class members were employed by “the defendants” pursuant to employment contracts.

[67] Paragraphs 24 and 25 provide particulars of how Housing is alleged to have conducted itself or represented that it is a common employer. Paragraph 24 pleads that the defendants expected the proposed class members to abide by a series of policies set out in “various human resources documents”, including the Production Employee Handbook, which “the defendants” authored. Sub-paragraphs (b) to (g) refer to, or characterize, excerpts in the Handbook in support the allegation of common employer. Paragraph 25 sets out further particulars against “the defendants (and/or their mother corporations)”. These are:

> (a) The defendants’ own social media posts hold the defendants out to the world as interchangeable entities.
>
> (b) The defendants consistently represented the same via presentations, written communications, emails (including stock signature lines) and a variety of other written communications with the Class Members.
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> (c) Communications published by the companies described “Triple M Housing” as the employer and the other entities as ‘divisions’.
>
> (d) In the case of Metric Modular, having a slogan “A Triple M Company” displayed right on its logo.
>
> (e) the defendants had a road-side sign in front of the Penticton facility. On that sign (i.e. on one solid piece of plastic, purchased as one item from a sign manufacturer) it holds the facility out as “Metric Modular” and “Triple M Housing” simultaneously.
>
> (f) A press release from the website “metricmodular.com” expressly states that Triple M Housing and Metric Modular have “join[ed]” and details how they operate as one company.
>
> (g) The companies would ship all of their products in custom branded wrap with the “Metric Modular” and the “Triple M Housing” logos on it.
>
> (h) The defendants used the Agassiz facility to conduct Housing business including (without limitation) board meetings.
>
> (i) The defendants routinely treated employees of one corporation as interchangeable with employees of the others. This includes, without limitation, Sim Bains, Rick Weste, Rod Weinkauf and Miguel Verstaskis.

[68] Paragraph 45 of the legal basis section pleads that the facts in the NOCC establish that Housing and Modular operated as common employers and are jointly

and severally liable for the contractual damages arising from the wrongful dismissals.

[69] Housing demanded particulars of most of the allegations in para. 25. These were generally objected to by Mr. Linza as a request for documents and evidence, and a matter for discovery. In answer to the basis on which Mr. Linza alleges that the proposed class members were employed by Housing, Mr. Linza responded that they "provided services for, and took direction from the defendants". In answer to how the defendants treated employees of one corporation as interchangeable with employees of the other, Mr. Linza answered "By acting as though they owed duties to each of the defendants and as though either defendant could issue directions, payment and/or tax records."

[70] Housing submits that:

a) Mr. Linza has not pled facts regarding the relationship between Housing and himself (or the proposed class members) which could show an intention to create an employer/employee relationship. For example, the NOCC pleads there was a sign at the Penticton facility, yet Mr. Linza and the other proposed class members worked in Agassiz; and

b) The NOCC fails to distinguish between the two defendants. Mr. Linza has not alleged specific conduct against a specific defendant. Mr. Linza refers to Modular and Housing collectively throughout the NOCC as the "defendants". Housing submits that a pleading that simply lumps different corporate entities together without identifying specific acts undertaken by each is not a viable claim in law, and refers to *Marshall* at para. 65 and *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para. 116, aff'd 2013 ONSC 1169. Housing submits that it should be able to know what it is alleged to have done and when: *Burns v. RBC Life Insurance Company*, 2020 ONCA 347 at para. 16.

[71] In my view, the NOCC discloses a cause of action against Housing for wrongful dismissal on the basis that it is a common employer. Paragraphs 24 and 25

plead facts that if true, could support the claim that Housing, and Mr. Linza and the proposed class members, intended to enter into contractual relationships. On the facts alleged, the claim is not bound to fail. In stating this, I am not determining the merits of the allegations or if the alleged facts are true. They are contested by Housing.

[72] I do not accede to Housing's argument that there is some lack of clarity in the allegations against it because the NOCC refers to "the defendants". The nature of the allegations is that both Housing and Modular were employers. Paragraph 6 alleges that "each of" the defendants held themselves out as common employers. Paragraph 24 is reasonably interpreted as alleging that both Housing and Modular published the Production Employee Handbook. Paragraph 25 refers to "the defendants" but again I do not see any lack of clarity, because the allegation is that Housing did all of these acts.

[73] The circumstances and pleadings in *Marshall* and *Martin* are distinguishable from the pleadings here. While I agree that these case authorities support that pleadings which simply lump different corporate entities together without identifying specific acts undertaken are not proper, those were both cases in which it was not clear what the allegation was against each defendant. In *Marshall*, an action alleging misrepresentations concerning unpaid coupons, the only apparent allegation against one set of defendants was that they had an ownership interest in a group of central defendants. In *Martin*, a drug product liability case, there were inconsistent pleadings and an allegation of enterprise liability against a number of defendants. An example of the pleading was the business of each defendant was "inextricably interwoven with that of the other and each is the agent of the other for the purpose of research, development, manufacture, marketing, sale and/or distribution of Seroquel" without specifying what role each played, or recognizing the different types of negligence pled.

Punitive Damages

[74] To succeed in a claim for punitive damages, a plaintiff must allege an actionable wrong and misconduct that is malicious, oppressive and high handed, such that it offends the Court's sense of decency: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36, 78–82. The failure of an employer to satisfy its implied obligation of good faith and fair dealing in the manner of dismissal, may satisfy the requirement of an actionable wrong: *Nishina v. Azuma Foods (Canada) Co.*, 2010 BCSC 502 at paras. 260–64.

[75] The facts in support of a claim for punitive damages must be pled with some particularity. Pleadings simply stating conduct was harsh, vindictive, reprehensible and malicious or their pejorative equivalent, are conclusory rather than explanatory: *Whiten* at para. 87. Speculation or bald conclusory assertions are not material facts: *Kindylides v. Does*, 2020 BCCA 330 at para. 34, leave to appeal to SCC ref'd, 39728 (14 October 2021).

[76] The NOCC alleges the following relevant to this claim:

> 27. The termination resulted directly from the actions of the defendants, including (without limitation) preferential accounting practices used to favour Triple M Housing with the express intended purpose of disentitling the Class Members to any severance.
>
> 28. In the alternative this was done recklessly without lawful excuse.
>
> …
>
> 32. The defendants, including their controlling minds …. deliberately set about conducting these matters in a way calculated to deny the Class Members of not only reasonable notice, but also of any damages against their nominal employer – Metric Modular.
>
> …
>
> 35. The defendants failed to discharge their obligations of good faith, honesty and fair dealing to the Class members in effecting the terminations of all Class members by acting in a high-handed, outrageous, reckless, wanton, careless, deliberate, callous, disgraceful, willful, manner and with disregard for the rights of the Class Members.
>
> 36. The defendants engaged in common and/or systemic conduct in their dealing with the Class Members in relation to the termination of employment and deprivation of the Class Members to working notice, payment in lieu and/or legal recourse against them or (in the alternative) deliberately trying to

> foist that liability upon an entity about to go bankrupt, thus deliberately rendering any such entitlements nugatory.
>
> [Emphasis added.]

[77] The legal basis section of the NOCC states:

> 50. At common law it was an implied term of the Employment Contracts that the defendants owed the Class Members a duty of good faith and honesty in their dealing with the Class Members.
>
> 51. The defendants' conduct as set out herein breached their duties of good faith and honesty owed to the Class Members, warranting an award of punitive damages.
>
> 52. Breach of statutory rights too can form the basis of a punitive damages award.
>
> *McKinley v. BC Tel*, 2001 S.C.R. 161 at para. 89.
>
> 53. The defendants' conduct as described above was callous, reprehensible, high-handed and worthy of rebuke, and as such, further renders Triple M liable to pay punitive damages.

[78] Housing demanded particulars. Mr. Linza's responses generally were that the demands were inappropriate as it was information solely within the control of Housing and no document discovery or examinations for discovery had taken place. To the extent Mr. Linza provided particulars, they were Housing's alleged: "unlawful attempt to conceal its dealings from class members"; "bankrupting one company and telling our clients that they had no recourse"; "lying to the class members and hiding money due to them"; and "denying payment of and hiding the rightful entitlements of +100 employees".

[79] Mr. Linza submits that the NOCC sufficiently pleads a cause of action for breach of the implied contractual duty of good faith and fair dealing, and facts sufficient to support a claim for punitive damages. In particular Mr. Linza submits:

a) Punitive damages may be awarded for wrongful dismissal: *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133; and *Nishina*; and

b) While liability for *ESA* entitlements is within the exclusive jurisdiction of the Director subject to an appeal to the Tribunal (*Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 104, leave to appeal to SCC ref'd,

32704 (9 October 2008)), this Court has jurisdiction to award punitive damages for not paying the *ESA* entitlements. In oral submissions Mr. Linza submitted that not paying the minimum statutory entitlements required by the *ESA,* in the midst of a global pandemic, is a sufficient factual basis on its own to support a claim for punitive damages. It is more so when Housing engaged in "preferential accounting practices" and "common and/or systemic conduct" to deprive the proposed class members of payments due to them.

[80] Housing submits that:

a) There is no pleading providing a basis for the existence or alleged breach of duty of good faith and fair dealing owed by Housing to the employees of Modular;

b) The pleadings are bald conclusory allegations, and the pleadings and particulars do not describe conduct that could be characterized as malicious, oppressive, or high-handed; and

c) The claim for punitive damages based on failure to pay statutory entitlements is bound to fail because Housing did not owe a statutory obligation to the employees of Modular, and therefore could not have breached those statutory rights. The Tribunal's Appeal Decision cancelled the finding in the Determination that Housing was an associated employer.

[81] In my view, the allegation that Housing owes a duty of good faith and fair dealing, arises from the allegation that it is a common employer, and is therefore sufficiently pled.

[82] Simply not paying *ESA* entitlements, even in the midst of the pandemic, and in the context of a contested common employer allegation, is not conduct that on its own could support punitive damages. There is nothing in that alleged fact alone that is inherently malicious, oppressive and high handed. However, if this alleged fact was combined with material facts which could support improper conduct to strip

Modular of assets, this could be sufficient to support a claim for punitive damages, and such a claim would not be bound to fail.

[83] The difficulty is that the pleadings of improper conduct to strip Modular of assets, are bald conclusions and do not allege material facts in support of those conclusions. When all of the pejorative descriptors are removed, the NOCC does not allege anything more than the conclusions that Housing engaged in “preferential accounting practices” and “common and/or systemic conduct” to strip Modular of assets so it could not pay statutory and/or contractual pay in lieu of notice. The answers to particulars did not provide further alleged facts.

[84] There are no facts pled that identify what those preferential accounting practices or conduct were. They could be almost anything, ranging from the completely legitimate to the improper. For example, if the preferential accounting practice was that Housing and Modular had a beneficial tax structure, it may not be improper at all. On the other end of the spectrum, if the allegation was that Modular transferred assets to Housing at below market value, then this might support an allegation of improper conduct, but in the context of the bankruptcy other factors would have to be considered. The underlying transaction on which a claim for punitive damages would be based, may well be a claim which vested in the trustee of Modular for the benefit of all creditors.

[85] The pleadings and particulars provided are not sufficient in informing Housing of what it is alleged to have done and when, so that it knows the case it has to meet. The pleadings do not sufficiently define the issues so that the Court and the parties could define the facts to be determined, determine the parameters of relevance, and the scope of discovery. *Whiten* requires that the facts supporting a claim for punitive damages be pled with “some particularity”, and the pleadings do not satisfy this requirement.

[86] During argument, there was a discussion of what exactly the allegation was. Pleadings should be read generously, with a view to amendment if necessary to cure deficient drafting. Counsel was not able to identify any preferential accounting

practice or conduct, and said this was something he was hoping to investigate through discovery. The words in *Imperial* at para. 22 are applicable:

> … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[87] Finally, I do not accede to Housing's argument that punitive damages could not be based on its alleged failure to pay statutory entitlements because the Tribunal has cancelled the determination that it is an associated employer. The pleading is not restricted to failure to pay *ESA* entitlements, and a s. 95 determination does not preclude a finding a common employer. However, again I am not deciding the merits, but simply concluding that this aspect of Mr. Linza's allegation would not be bound to fail on this basis alone.

[88] In summary, while the NOCC pleads an implied duty of good faith and fair dealing in the manner of termination, it does not properly disclose a cause of action because there are no material facts pled which support the breach of such duty which could lead to a claim of punitive damages. There are no material facts pled which support the conclusory allegations that Housing participated in preferential accounting practices or systemic conduct, and on which the Court could assess whether they were malicious, oppressive and high handed.

Piercing the Corporate Veil

[89] The claim to pierce the corporate veil is not a cause of action, but is a claim for a remedy. However, as the parties made submissions regarding the adequacy of the pleadings with respect to this remedy, I will address those arguments here.

[90] A corporation is a separate legal entity distinct from its shareholders, agents, directors and officers: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when the corporate veil will be lifted to find a related corporation liable for another is

"highly fact dependent and does not admit of any clear test or rules": *XY, LLC v. Zhu*, 2013 BCCA 352 at para. 86. In *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 at 10–11, Justice Wilson described it this way:

> … The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L. C. B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112.

[91] A corporation's separate legal personality "will not be lightly disregarded": *Edgington v. Mulek Estate*, 2008 BCCA 505 at para. 21. Generally, the corporate veil may be lifted when the corporate form has been used as a shield for fraudulent or illegitimate purposes: *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 at paras. 36–41, 1989 CanLII 230 (B.C.C.A.); *Edgington* at paras. 22–26; *XY, LLC* at paras. 86, 90–91; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, 1996 CanLII 7979 (Ont. S.C.J.).

[92] Paragraph 46 of the NOCC alleges that "the facts set out herein" warrant piercing the corporate veil. Reading the NOCC generously, I read that as all of the facts in Part 1 of the NOCC previously reviewed. In argument, Mr. Linza referred to the same allegations that he submitted supported a claim for punitive damages. This was the preferential accounting practices and systemic conduct. Mr. Linza submits that this is sufficient to plead that Housing "used the corporate veil" to shield itself from its obligations as a common employer.

[93] Housing submits that the NOCC does not plead the material facts required for a claim to pierce the corporate veil. A fraudulent or improper purpose must be present in order for the corporate veil to be pierced, and this alleged fact has not been pled.

[94] In my view, the pleading is not sufficient. At its highest, the NOCC makes the same allegations as were made for punitive damages, and suffers from the same defect. There are no facts pled which identify what those preferential accounting practices or conduct were, and against which the Court could assess whether

Modular was being used by Housing for a fraudulent or improper purpose, such that it could support a remedy to pierce the corporate veil.

Summary

[95] The claims which are presently properly pled are wrongful dismissal (with the exception that the allegation that the Termination Clause is void is presently defective because it does not plead material facts), and the claim that Housing is a common employer. The claim of unjust enrichment is not a viable claim and is bound to fail. The claim of breach of duty of good faith resulting in a claim for punitive damages and the claim to pierce the corporate veil are not sufficiently pled as they do not state material facts in support of the allegations of preferential accounting practices or systemic conduct.

Is there an Identifiable Class of Two or More Persons?

[96] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons. The definition of the class is important because it identifies the persons entitled to notice, entitled to relief (if granted), and who are bound by the judgment. The proposed class definition must: (1) identify potential class members by objective criteria; (2) that bear a rational relationship to the common issues asserted by all class members; and (3) should not depend on the outcome of the litigation: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Western Canadian*]; *Hollick* at paras. 17, 20.

[97] The plaintiff need not show that “everyone in the class shares the same interest in the resolution of the asserted common issue” but must show 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”: *Hollick* at paras. 20-21.

[98] Prior to this hearing, Mr. Linza revised his definition of the proposed class to the following:

> Each person employed by the defendants in their Agassiz facility pursuant to a contract of indefinite duration who was terminated without cause by letter

> referring to any of the circumstances giving rise to action number VLC-S-B 200257 in the period May 1 to September 30, 2020, inclusive and without provision of the notice due under their contract but excluding any such person who has otherwise settled or waived their claim for resultant damages.
>
> [Emphasis added.]

[99] Mr. Linza submits that this definition of the proposed class would not include any persons who: were terminated for just cause; resigned; were unionized employees in a bargaining unit; or, who have already entered into releases with the defendants in respect of the issues set out in this action.

[100] Housing submits that:

a) The proposed class definition is impermissibly merits-based as the phrase "employed by the defendants in their Agassiz facility" presumes a finding of common employer;

b) The definition is overly broad and would include employees with divergent interests. It would include: both production and salaried employees; the employees who were temporarily hired on fixed term agreements as part of the wind down of Modular; employees who had their employment terminated but immediately obtained re-employment; and employees who either retired or were unable to work following termination. Paragraph 47 of the NOCC expressly indicates that the proposed class members were bound by different contracts. It is not possible to evaluate Mr. Linza's assertions of differences or similarities between Mr. Linza's employment contract and those of other employees for the purposes of assessing the class definition; and

c) The wording is unclear. The letter referring to the "circumstances of" a court action is uncertain as some employees were terminated in May 2020 prior to the proposal. The words "settled or waived" are unclear.

[101] In reply, Mr. Linza submits that Housing's categorization of the divergent interests are issues that affect quantum of damages rather than the proposed common issues. Courts have allowed for individual assessments of damages after

the determination of the common issues in employment cases: *Gregg v. Freightliner Ltd.*, 2003 BCSC 241. With respect to employees temporarily re-hired by Modular, if necessary, the issue can be resolved by creating two subclasses.

[102] In my view, Housing's concerns regarding the merits-based definition are well-founded. However, as discussed at this hearing, deleting the words "by the defendants" and "their" in the definition would address this concern.

[103] With respect to Housing's overbreadth argument, the concerns raised by Housing relate to damages to be assessed, and could be addressed after a common issues trial. I also do not conclude that the proposed class members will have divergent interests to the extent that they would not share the same interest in the resolution of the proposed common issues. Overbreadth is related to the need for there to be a rational relationship between the objective criteria and the common issues asserted. The most important proposed common issue is whether Housing is a common employer because without this being established at a common issues trial, there is no possible recovery. All of the proposed class members would share an interest in that issue.

[104] However, as I will discuss under the common issues section of these reasons, there is an issue whether non-production employees could be included in the class, so the definition would possibly have to be amended to address this concern. I am also concerned that there is no basis in fact regarding the terms of employment of the non-production employees, and as previously discussed under the section addressing the wrongful dismissal pleadings, Mr. Linza through his answers to particulars, appears reluctant to commit to specific factual allegations about what is material.

[105] Finally, the wording could be clearer. For example, the wording "without cause" has a legal meaning that may not be clear to an employee who was told he or she was being terminated because of economic circumstances and the insolvency proceedings. Further, "settled or waived" encompasses legal conclusions. The words "notice due under their contract" would similarly not be clear

as it presumes the reader would know wrongful dismissal law. The reference to the bankruptcy court file number is not informative. In summary, the wording could be clarified to use more plain language and to take into account these possibilities.

[106] There are clearly two or more individuals who have the same interests as Mr. Linza. The 92 production employees who have identical contracts have the same interest in establishing Housing as a common employer. Were I to have concluded that this application should be granted at this time, subject to submissions of counsel, I would have considered amending the class definition: *Caputo v. Imperial Tobacco Ltd.*, (2004), 236 D.L.R. (4th) 348 at para. 41, 2004 CanLII 24753 (Ont. S.C.J.). The definition proposed by Mr. Linza (amended to address the above concerns) could be made more explicit and similar to class definitions approved in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389, 1999 CanLII 15076 (Ont. S.C.J.) and *Gregg*. However, given the result of the application, and the concerns I have highlighted regarding the non-production employees, it is not necessary to go further than to conclude that the current definition requires amendment.

Do the Claims of the Class Members Raise Common Issues?

[107] Section 4(1)(c) requires that the claims of the class members raise "common issues, whether or not those common issues predominate over issues affecting only individual members". Section 1 of the *CPA* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[108] Section 7 of the *CPA* states that the Court must not refuse to certify a proceeding merely because of one or more of the following:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;

> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[109] A non-exhaustive list of principles which guide the proposed common issue assessment were summarized in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140:

> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: …
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: …
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues: … the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: …
>
> E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: …
>
> F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: …
>
> G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: …
>
> H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: …
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: …
>
> J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis

> of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": …
>
> [Case citations omitted.]

[110] Mr. Linza proposed the following common issues:

> 1. Are the defendants common employers?
>
> 2. Was the employment of each of the class member subject to a contract that was terminable without cause only upon contractual notice?
>
> 3. Did the defendants terminate the employment contracts of the class members without notice or cause?
>
> 4. Are the class members entitled to damages from the defendants equal to the compensation they would have earned during a period of contractual notice?
>
> 5. Are the class members entitled to punitive damages?
>
> 6. Should this Court lift the corporate veil to affix liability to Housing?

[111] Although I have only found that the wrongful dismissal (with the one exception) and common employer claims are sufficiently pled, I will address all of the proposed common issues. I have reordered the issues because the common employer issue is the most important and would have to be determined first in any common issues trial. A finding that Housing is not a common employer would make it unnecessary to determine the common issues regarding wrongful dismissal as there would be no basis to recover damages against Housing.

Proposed common issue #1: Are the defendants common employers?

[112] Mr. Linza submits that determining whether Housing is a common employer requires a broad contextual analysis of the relationship between Housing and Modular, and the proposed class members, that can be resolved as an objective matter on a global basis, and without requiring individual determinations.

[113] Housing submits that this issue requires individual fact finding and determinations as to whether in all the circumstances, there was an objective intention by each employee and Housing to have an employer/employee relationship. Evidence that could be relevant to a determination includes: the job title

and duties of each employee; each employee's interaction with representatives of Housing and the business of Housing; and the basis on which the employee asserts the existence of an intention to create a contract of employment with Housing.

[114] Mr. Linza swore an affidavit which provides a basis in fact that there are some circumstances that are common, at least amongst production employees. He references: the Production Employee Handbook and the package of company policies which he states "contain numerous interchangeable references to different company names throughout them"; the wrapping on products shipped which included the Housing and Modular logos; some social media posts and excerpts from websites; a letter sent by the CEO of the "Triple M Group of Companies" regarding measures it was taking with respect to the COVID-19 pandemic; and company register searches. However, there is no basis in fact that other factors are common to the proposed class, for example job duties, who directed employees, or the circumstances of non-production salaried employees, or the circumstances of non-production employees.

[115] Mr. Linza also filed affidavits from Calvin Benson, Gary Dewhirst, and Nicholas Laan which reference entirely different evidence. While at a high level these may support direction of Modular by Housing, they also support that the assessment of the common employer issue could turn into individual determinations.

[116] All three of these individuals prefaced the following evidence as being the basis upon which they allege that Housing was their employer. Mr. Benson, who is a manager (and therefore possibly not one of the 92 production employees), states that he attended monthly leadership meetings where Modular and Housing business was discussed, and where the president of Housing attended and provided direction to various Modular departments. He describes a particular project he worked on with certain other Housing employees, at the direction of the president of Housing. He described another project where a team was formed from Housing and Modular employees and where certain Modular employees were called upon to provide business and technical support. Mr. Dewhirst, who was an Environmental Health

and Safety Supervisor (also possibly not a production employee) described that he was requested to attend the Housing facility in Lethbridge in 2017 to conduct a safety audit following a serious industrial accident. He was told to sign in as a "safety consultant" and was paid by Modular. Mr. Laan was a senior manager (also possibly not a production employee) and he describes attending reoccurring and confidential project management meetings where the vice president and president of Housing were in attendance, and where the president provided direction. He describes that the vice president of Housing became the new plant manager at the Penticton facility and the Agassiz facility when previous plant managers left those positions.

[117] Counsel located two case authorities where the issue of whether a defendant was a common employer was certified. These are *Sommerville v. Catalyst Paper Corp.*, 2011 BCSC 331 and *Flesch*. There are at least two others: *Montague v Pelletier*, 2018 ABQB 1047, and *Berg v Canadian Hockey League*, 2017 ONSC 2608, var'd 2019 ONSC 2106 (Div. Ct). I will review each.

[118] In *Sommerville*, the plaintiff sought to certify an action for breach of contract resulting from changes the employer had made to a compensation plan. At para. 4, Justice Kelleher discussed that the defendant was not properly named and the defendant did not oppose an amendment to the style of cause to substitute the correct defendants. Justice Kelleher stated that the "plaintiff prefers not to agree to such an amendment because it wishes to bring a motion declaring these entities to be a 'common employer'. Therefore the style of cause will remain as it is for the time being". Thereafter, there is no mention of "common employer" except that the discussion at paras. 29–30 suggests that it was either not contested or admitted. The relevant common issue certified for the three subclasses was "Were the members of Class … employed by the defendant? (After amendment, by each of the defendants.)". The defendant did not oppose this common issue in relation to any of the three subclasses (see paras. 49, 50, 63), and in the result, it was certified.

[119] In *Flesch,* the plaintiff claimed damages for alleged stock benefits not paid after the sale of the shares of the employer to another company. In addition to the

employment contract, there was a written plan for stock benefits with the parent company which was alleged to be a common employer. There was a basis in fact that the same documents applied across the class. The plaintiff alleged that the stock benefits were determined pursuant to the plan by the parent company, with input from the employer. The plaintiff alleged that these factors showed an objective common intention by the employer and parent company to each have an employment relationship with the employees, and a review of the terms of the documents supported this intention: para. 48. The relevant common issues certified were:

> (1) In relation to the sale of the shares of Apache Canada by Apache Corporation (“Apache”) to Paramount Resources Ltd. (“Paramount”) which sale closed on August 18, 2017 (the "Share Acquisition Date"), what contractual obligations (including good faith) did the Defendants or any of them, jointly or severally, owe to Class members regarding their unvested awards of restricted stock units, stock options and performance awards (collectively “the Unvested Awards”) issued under the Apache Omnibus Compensation Plan (“the Plan”) to Class Members prior to the Share Acquisition Date?
>
> (2) Were any contractual obligations, as identified in paragraph … (1) above, breached by the Defendants, or any of them? Are the Defendants, or some of them, jointly or severally liable for any breach of these contractual obligations?

[120] In *Montague*, the plaintiff sought to certify a class action against directors of a related company for unpaid wages and for an unsatisfied judgment for unpaid Retention Bonuses under the *Alberta Business Corporations Act,* R.S.A 2000, c. B-9 [*ABCA*]. The defendants sought summary dismissal of the claim, and if that was not successful, took no position on the certification of the action and presented no oral arguments opposing certification: at para. 145. The defendants’ application for summary dismissal was dismissed so the Court went on to consider whether the plaintiff had met the burden to certify the action as a class proceeding.

[121] The plaintiff mainly relied on the cause of action under the *ABCA*. The basis in fact that permitted the common employer issue to be certified as a common issue was explained as follows:

> [155] Montague relies on the common employer doctrine to affix PPEC's directors with liability for wages (the Retention Bonuses) owed to employees of PPECC, Pacer, or Promec. … The information before me is that PPEC owns 100% of the shares of PPECC. PPECC does not own any assets. PPECC's role was to provide the labour force to service PPEC's construction contracts. PPECC had no independently generated revenue of its own. PPEC funded PPECC's entire payroll. PPECC appears to be essentially an asset-less paymaster, not dissimilar to the facts of *Downtown Eatery (1993) Ltd v Ontario* (2001), 54 OR (3d) 161, 2001 CanLII 8538 (Ont CA). Similar, albeit different, levels of operational and logistical integration also existed between Pacer and PPEC, as well as Promec and PPEC.

[122] The issues certified included whether PPEC is an employer of the proposed class members (or a portion thereof) for the purposes of section 119 of the *ABCA*. Justice Campbell noted that '[e]ach of the issues arises from the similar employment arrangements the various Proposed Class Members had with PPEC and its affiliates and they arise from the non-payment of the Retention Bonus in December 2014": para. 170.

[123] In *Berg*, the plaintiffs were junior hockey players who claimed against the Ontario Hockey League ("OHL"), the Canadian Hockey League ("CHL"), and the clubs of the OHL. The OHL is a regional league of the CHL. The core question was whether the proposed class members were employees such that they were entitled to receive statutory benefits under employment standards legislation. The plaintiffs alleged that they signed a standard player agreement ("SPA"), which set out the obligations of the players, the clubs, the OHL, and CHL. The defendants did not challenge that there was some basis in fact that the players of the OHL had a common experience and a common type of relationship with them. The commonality included that all of the proposed class members signed the SPA which was mandated and reviewed by the OHL, each club set one common schedule for all its players, and the players worked similar hours and were paid in similar ways. The proposed certified common issue relating to common employer was: "Are the Defendant Clubs, the OHL, and/or the CHL a common employer, either under statute or at common law?": at paras. 172, 175.

[124] In my view, *Sommerville* is distinguishable because of its unique circumstances, and does not address the issues raised here. In each of the three other cases, the written documents were a significant basis for the claim of common employer and were common across the class. Also, it appears that either no argument was advanced that individual determination was required, or that the employment circumstances differed materially between class members, or there was a finding of some basis in fact of commonality in the circumstances of employment. In my view, that is the critical issue here because Mr. Linza argues that the issue of common employer can be reduced or advanced on the basis of common circumstances only, and Housing argues that it cannot.

[125] In reply submissions, Mr. Linza acknowledged that a proposed common issue related to the common employer issue would not be appropriate if it requires an assessment of individual circumstances. He submitted that if this were an individual trial, he would want to lead evidence of individual circumstances, but that is not what he is proposing. He submits something narrower, and that the issue could be advanced and determined only on the basis of "common" as opposed to individual circumstances. Mr. Linza submits that the written employment contract (which I interpret to include the Production Employee Handbook) serves as the evidentiary basis to understand the broader commercial relationship between all parties. Mr. Linza argues that the defendants through their "conduct, written policies, corporate structure, commonality of controlling individuals and public interconnectedness", operated and represented themselves as common employers. The focus was on how Housing represented itself globally. In argument, the "common" circumstances that were suggested were the terms of the Production Employee Handbook, and perhaps some of the alleged circumstances in para. 25 of the NOCC, and the fact that Modular had contracted with Housing and had conducted work on behalf of Housing at the Agassiz facility. However, beyond this they were not clearly identified.

[126] As presently framed, there are three difficulties with the proposed common issue. First, the common issue is not specific enough regarding the basis of the

claim, and does not reflect Mr. Linza's reply argument. The focus of this argument was restricted to conduct and global representations of Housing to the proposed class, and not on any individual circumstance.

[127] Second, while there is some basis in fact to establish that the production employees received the Production Employee Handbook, the Handbook itself states that it does not apply to non-production employees. It therefore does not apply to about 25% of the proposed class who are salaried employees. There is no basis in fact to establish this alleged common circumstance existed for those employees. This is the circumstance I referred to in the class definition section of these reasons, and the need for there to be a rational connection between the proposed common issue and the proposed class. This may require a narrowing of the proposed class.

[128] Third, the wide wording of the issue could break down into individual determinations. The affidavits of Mr. Benson, Mr. Dewhirst and Mr. Laan exemplify the potential difficulty. Housing cannot be not unfairly restricted in its right to tender relevant evidence.

[129] However, having said the above, there is a basis in fact for some common circumstances (for example the Production Employee Handbook), and conduct or representations of Housing. If the common employer argument were advanced on the basis of these only, as suggested by Mr. Linza in reply, there is a possibility of a common issue.

[130] In stating the above, I am not deciding that such an issue can necessarily be properly framed and will be certified. I am only acknowledging that the case authorities reviewed above have certified a common employer issue, and that there is some basis in fact that 92 production employees had the same employment contract with Modular, and received or were bound by the same Production Employee Handbook, and the Handbook on the basis of para. 24 of the NOCC, appears to be a significant basis of the allegation of common employer. I am also acknowledging that the Court must view the certification criteria flexibly, with the three advantages of class proceedings in mind, and the significant interests at stake.

There was a discussion at the hearing of how such a common issue could be determined, but I did not receive the details needed. I will return to this, at the conclusion of these reasons when I discuss whether Mr. Linza should be given an opportunity to amend.

[131] In summary, commonality only exists when the evidence establishes some basis in fact to find that all of the employees in the proposed class are sufficiently similar that the determination of the proposed common issue could be made for the class as a whole and without regard to the specific circumstances of individual employees. The fact that an issue can be framed broadly as a claim or a cause of action, does not itself make it a common issue. As presently framed, the common issue does not reflect the argument advanced in reply and is not yet suitable for possible certification.

Proposed common issue #2: Was the employment of each of the class member subject to a contract that was terminable without cause only upon contractual notice?

[132] It must be remembered that when Mr. Linza refers to “contractual notice” he means: (1) the express Termination Clause; or (2) if the employment contract does not contain the Termination Clause (or if it was void if an amendment were permitted), the implied contractual term of reasonable notice. In other words, the last part of the proposed common issue would read “…that was terminable without cause only upon express contractual notice or an implied contractual term of reasonable notice?”

[133] While this is a common issue, it is a matter of settled law. All proposed class members would be indefinite term employees. As discussed previously, absent a clear enforceable term respecting notice, the common law implies a term in an indefinite employment contract that it will not be terminated without just cause, unless there is reasonable notice: *Machtinger*.

[134] A similar situation arose in *Le Feuvre v. Enterprise Rent-A-Car Canada Company*, 2022 ONSC 4136, aff’d 2023 ONSC 3425. The plaintiff proposed two

common issues which asked first, whether the provincial employment standards legislation relating to overtime pay formed part of the express or implied terms of the contracts of employment, and second, if they purported to exclude eligibility for overtime, whether they were void. Justice Morgan acknowledged the questions were common, but stated that they "require no real answer". The propositions had been established as "self-evident" in previous case authorities. Asking questions such as those did not significantly advance the action as it does not engage any "analysis or controversy": at para. 30. In *Tonn v. Sears Canada Inc*., 2016 BCSC 1081 at paras. 68-85, a similar common issue was proposed. Justice Griffin (as she then was) commented that given how basic the proposition was, she queried how it could significantly advance the claim.

[135] While I acknowledge a similar issue was certified in *Gregg*, it was conceded and other common issues were certified. In this case, there is no controversy, and answering the proposed common issue would not significantly advance this litigation: *Hollick* at para. 32.

Proposed common issue #3: Did the defendants terminate the employment contracts of the class members without notice or cause?

[136] To be successful in the wrongful dismissal claim, each member of the proposed class would have to establish this alleged fact. It is therefore common.

[137] Housing submits that this is an admitted fact, so it is not a common issue: *Bruce Estate v. Toderovich*, 2010 ABQB 709 at para. 60, aff'd 2014 ABCA 44. However, in *Fulawka*, the Court held that "in the absence of a certification order, any admission fails to bind the defendant vis-à-vis the proposed class in any meaningful way": at para. 87. In *Fulawka*, the defendant had made a "strategic concession" for the first time on a second appeal from a certification order as an attempt to have the order overturned: at para. 87.

[138] In this case, I am satisfied that this alleged fact likely would not be an issue. The affidavit of Mr. Branch, the former president of Modular, and which was filed by

Housing, details the terminations. There is no suggestion of strategic admissions to defeat the certification application.

[139] Despite that this is a common factual issue, assuming the admission would be made to a certified class, it is not an issue that would advance the litigation: *Hollick* at para. 32.

> **Proposed common issue #4: Are the class members entitled to damages from the defendants equal to the compensation they would have earned during a period of contractual notice?**

[140] Whereas proposed issue #2 seeks to certify an issue which would simply confirm the law regarding entitlement to damages if a certain event occurs (termination without cause and notice), and proposed issue #3 seeks to certify the occurrence of that event, proposed common issue #4 seeks to certify the method or quantum of damages which would flow from proposed issues #2 and #3.

[141] There are three difficulties with this proposed common issue as drafted.

[142] First, it is unclear. It appears to have two aspects: it is either a question regarding the legal principles to be applied; or it is seeking a determination of individual damages; or both.

[143] Second, to the extent the proposed issue could be interpreted as seeking guidance from the Court regarding general legal principles that are applicable to this case, it would not move this litigation forward in a meaningful way. It is a matter of settled law that a wrongful dismissal claim is a claim for damages for the income and benefits an employee would have received had the employer not breached the implied or express term to provide reasonable notice: *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at para. 53. However, it is also settled law that damages are not necessarily “equal” (as stated in the proposed common issue) to the compensation an employee would have earned. There are other issues such as mitigation and any compensating benefits that may need to be taken into account.

[144] A similar proposed common issue was rejected by Justice Kelleher in *Sommerville* at paras. 55–56, where he concluded that the plaintiff was seeking guidance from the court regarding general legal principles which would not move the litigation forward in a meaningful way.

[145] Third, to the extent that the issue is intended to be a determination of damages, it cannot be a common issue because it would require individual determination. For those without a Termination Clause (or if an amended pleading were permitted for an allegation that the Termination Clause was void), the proposition advanced in the question may be the starting point of the assessment of damages, but it is not the only factor that goes into a proper award. If there is no Termination Clause, the assessment includes consideration of the character of the employment, the length of employment, the age of the employee, and the availability of similar employment having regard to the employee's experience, training and qualifications: *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (Ont. H.C.). It would also include a consideration of mitigation efforts, whether they were successful or not, and if so the amounts earned or which could have been earned. Finally, there is an issue between the parties as to whether *WEPP* payments are deductible. The employee may be in receipt of other compensating benefits. If the employment contract has an enforceable Termination Clause then mitigation would not be as significant a factor. A similar proposed common issue was rejected in *Tonn* at paras. 112-115, as requiring individual determination.

[146] In summary, all three of the proposed common issues related to wrongful dismissal are framed broadly and on their own, without a common employer issue, would not advance the litigation, or require individual determination. Part of this flows from the lack of specificity in the pleadings; for example, the lack of a pleaded basis upon which the Termination Clause is void. In reply argument Mr. Linza identified a common issue as whether the Termination Clause was void on its face for failing to provide the minimum entitlements in s. 63 and s. 64 of the *ESA*. That may be a properly certifiable issue but the wording was not proposed. There may be others.

Proposed common issue #5: Are the class members entitled to punitive damages? and Proposed common issue #6: Should this Court lift the corporate veil to affix liability to Housing?

[147] I will briefly address these together even though I have found that the pleadings are insufficient with respect to the related claims. As discussed previously, central to both of these claims is the allegation that Housing participated in preferential accounting practices and systemic conduct that stripped Modular of its assets.

[148] Recognizing that the criteria is not a merits-based inquiry, there must be some basis in fact supporting an award of punitive damages before it is certified as a common issue: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, leave to appeal to SCC ref'd, 39882 (17 March 2022), at paras. 173, 175; and *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at paras. 140–42.

[149] It is an error in principle to certify a common issue for punitive damages solely on the basis of allegations contained in the pleadings: *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at para. 7.

[150] I have already found the pleadings are insufficient with respect to these claims because they do not plead material facts. There is also no basis in fact in the materials filed on this application to support such claims. At the hearing, I asked counsel to identify any basis in fact for the preferential practices or systemic conduct. He candidly and properly admitted there was none. There is no basis in fact on this application that the trustee in bankruptcy concluded that there was a reviewable transaction or suspect accounting practices. Even if I were to have found that the claim of breach of duty of good faith leading to punitive damages was properly pled, or that the claim to pierce the corporate veil was properly pled, the common issues related to them would not be certified for lack of any basis in fact supporting these as common issues.

Is a Class Proceeding the Preferable Procedure? and Is there an Appropriate Representative Plaintiff?

[151] Given my findings above, and the conclusion I have reached below as to whether Mr. Linza should be granted leave to apply to amend his pleadings and to amend his application materials, it would be premature to address the fourth and fifth certification criteria above. I defer those to return of this application.

Whether to Permit Amendment?

[152] I conclude that the application as currently framed, is not yet suitable for certification. It is possible that it could be. Mr. Linza himself identified in reply how pleadings and common issues might be amended. If Mr. Linza wishes to proceed further, he must initiate those amendments with proper notice to Housing with an opportunity to respond.

[153] Section 5(6) of the *CPA* states that a court "may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence". Mr. Linza submitted that if his pleadings or materials are not sufficient he should be granted leave to amend.

[154] The issue is whether it is in the interests of justice to permit Mr. Linza to do so. Relevant factors include the length of time Mr. Linza has had to properly plead the allegations and whether the deficiencies are fundamental rather than merely technical: *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 26; *Revolution* at paras. 59–60; *Sandhu* at paras. 44–46.

[155] At stake are the interests of approximately 100 individuals who were dismissed without notice or cause or any statutory entitlements during the height of the pandemic. This action has been in existence for some time, but part of that is because of the proceeding at the ESB, which in my view was reasonable to pursue. Mr. Linza has not previously filed an amended pleading, and this is his first request to amend.

[156] It is possible that there could be fashioned be an appropriate common issue with respect to the important common employer issue given the commonality of the employment contract, the Production Employee Handbook, and some of the circumstances in paras. 24-25 of the NOCC. This is the most important issue in the litigation, and I must approach this flexibly with the advantages of class action proceedings in mind. There is enough basis in fact in the record that I cannot conclude that the deficiencies are foundational. In my view, it is in the interests of justice that Mr. Linza should be given an opportunity to reframe the common issue consistent with his reply submissions. This may involve a narrowing of common issues, but as he acknowledged, it cannot result in individual determinations.

[157] Further, it is in the interests of justice that Mr. Linza be given an opportunity to apply to amend the pleadings with respect to the Termination Clause, and to redraft the common issues with respect to wrongful dismissal, which may well exist, that would advance the litigation. I note here Mr. Linza's vague responses to particulars and I would expect that to be addressed.

[158] I have considered whether any leave should be granted with respect to the unjust enrichment claim. As no common issue was advanced, I decline to grant leave with respect to it. The pleadings with respect to unjust enrichment are struck.

[159] Finally, as for the claims of punitive damages and breaching the corporate veil, as the pleadings are not sufficient and there is no basis in fact for the claims, I am reluctant to grant leave to amend, but will do so given the interests at stake.

[160] I have considered the effort that Housing put into this certification motion, and that Mr. Linza is being given a second opportunity. However, in argument he did identify what could possibly be appropriate pleadings and common issues, and when these are balanced against the interests of the proposed class, the interests of justice favour an adjournment and the opportunity to amend.

Order

[161] The pleadings with respect to unjust enrichment are struck. The application is adjourned. Mr. Linza has 60 days to file and serve an application to amend pleadings (or counsel may be able to agree on amendments), and to amend his application materials. Housing has 30 days to respond. Counsel are directed to secure a one-day continuation of this hearing to take place following exchange of materials. If counsel feel a case management conference is required, they may make arrangements through Supreme Court Scheduling.

"Norell J."