IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mackenzie v. Chartwell Asset Management Inc.,* 2024 BCSC 1185

Date: 20240704
Docket: S208955
Registry: New Westminster

Between:

Cheryl Mackenzie

Plaintiff

And

Chartwell Asset Management Inc. and Gregory Cameron

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:	S. Roxborough A. Tibbs C. Pabla, Articled Student
Counsel for the Defendant, G. Cameron:	J. Bank M. Skorah, K.C. N. Wood
No other appearances	
Place and Dates of Hearing:	New Westminster, B.C. November 20–24, 2023
Place and Date of Judgment:	New Westminster, B.C. July 4, 2024

Table of Contents

OVERVIEW 3
LEGAL FRAMEWORK 4
EVIDENCE 5
Ms. Mackenzie 5
Mr. Cameron 7
Documents 10
Mr. Gilkes 12
Regulatory Proceedings 13
ISSUE 1: DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION? 16
Legal Principles 16
The ANOCC 17
Analysis 20
ISSUE 2: IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS? 38
Legal Principles 38
Analysis 39
ISSUE 3: DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES? 40
Legal Principles 40
Analysis 42
WHETHER TO PERMIT AMENDMENT? 49
ORDER 51

Overview

[1] The plaintiff Cheryl Mackenzie applies to certify this action as a multi-jurisdictional class proceeding.

[2] The overall issue to be determined is whether Ms. Mackenzie has met the five 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] Ms. Mackenzie's claim is for lost monies that she and the proposed class invested through the defendant Chartwell Asset Management Inc. ("CAM"). Ms. Mackenzie alleges that she and the proposed class were "misinformed as to the actual nature of the investments". She alleges that the defendant Gregory Cameron, who is a director and founder of CAM, participated in the management of the investments and the giving of investment advice to her and the proposed class. Mr. Cameron disputes this. He states that the management of the investments and the giving of investment advice was done by the portfolio managers at CAM.

[4] Ms. Mackenzie initially named other defendants: Quadrus Investment Services Ltd., Matthew Cameron, David Nelson, Constantine Lycos, Eric Mayrhofer, Rob Charlton and Wah Bo Chew, some of whom were the portfolio managers at CAM. The action was discontinued against all of them. The only remaining defendants are CAM and Gregory Cameron. Unless indicated otherwise, a reference to Mr. Cameron in these reasons is to Gregory Paul James Cameron, and not his son Matthew Evans Cameron.

[5] CAM filed a response opposing the certification application, but by the time of this hearing, it no longer had counsel and did not attend the hearing. CAM adopted Mr. Cameron's response to application. According to counsel and Mr. Cameron, CAM is an empty shell. Despite this, Ms. Mackenzie pursued her certification application against CAM as well.

[6] For the reasons that follow, this application is adjourned to allow Ms. Mackenzie to apply to amend her pleadings and certification application. The causes of action alleged in the amended notice of civil claim ("ANOCC") are vague and broadly framed, sometimes without the required material facts, and for the most

part, are not sufficiently particularized. However, Ms. Mackenzie has identified more focused allegations which could be properly pleaded and may raise potential common issues. The interests of justice weigh in favour of Ms. Mackenzie being given an opportunity to focus her claims, apply to correct the deficiencies in her pleadings, and revise the proposed class definition and common issues.

Legal Framework

[7] 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.

[8] To certify this action as a class proceeding, Ms. Mackenzie has the onus of establishing all five requirements in s. 4(1) of the *CPA*. If she does, the Court must certify the proceeding. Those requirements are:

a) the pleadings disclose a cause of action;
b) there is an identifiable class of 2 or more persons;
c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
e) there is a representative plaintiff who:
    i) would fairly and adequately represent the interests of the class,
    ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[9] 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.

[10] The test under s. 4(1)(a) is the same as the test for striking pleadings. A pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no cause of action exists or the claim cannot succeed. The

test under s. 4(1)(b) to (e) is whether there is "some basis in fact" supporting each certification requirement: *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 Consultants v. Microsoft Corporation*, 2013 SCC 57 at paras. 99–103 [*Pro-Sys*]. 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.

[11] Although the threshold for certification is low, the certification process serves an important gatekeeping function in screening out 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.

Evidence

Ms. Mackenzie

[12] Ms. Mackenzie's evidence largely mirrors the allegations in paras. 5–22 of the ANOCC. These paragraphs describe her alleged interactions with Mr. Cameron and CAM. To avoid repetition, I will review those paragraphs of the ANOCC here, and her additional evidence. The remainder of the ANOCC will be reviewed under Issue 1, the pleadings requirement.

[13] Paragraphs 1–4 of the ANOCC are an overview, and plead that: the defendants "provided financial investment services and/or financial planning services to members of the public"; the proposed class members invested their money with the defendants, but "were misinformed as to the actual nature of the investments" and lost investment money; and the defendants "failed to comply with their professional duties".

[14] Paragraphs 5–9 of the ANOCC describe how Ms. Mackenzie came to know Mr. Cameron. Ms. Mackenzie is a realtor. She alleges that in 2007, she was approached by a friend, Bill Roberts, to assist in locating properties for a real estate investment trust ("REIT") to be constructed by his financial advisor Mr. Cameron. This would be an investment for Mr. Cameron's clients. Mr. Roberts and Mr. Cameron would also invest. Mr. Roberts was looking for real estate that would

provide a stable investment portfolio immune to stock market volatility. Ms. Mackenzie assisted in locating five properties that were acquired by the REIT. Paragraph 7 alleges that Mr. Cameron "managed individuals' investments through the investment company" CAM.

[15] In her affidavit, Ms. Mackenzie describes how she decided to invest with CAM. Through her work on the REIT, she and Mr. Cameron developed a cordial relationship. They met socially on occasion where they would discuss the REIT and sometimes other investments. Mr. Cameron advised her that her RRSP at a bank was invested in too many different stocks, and that stock advisors often act contrary to the best interests of the investors as they profit from trades. These discussions, their work on the REIT, and her knowledge of Mr. Cameron's existing clients such as Mr. Roberts, made Ms. Mackenzie comfortable with Mr. Cameron. She decided to open an RRSP account with CAM as she believed Mr. Cameron was competent, capable and understanding of her interests, and that he would protect them.

[16] At paras. 10–16 of the ANOCC, Ms. Mackenzie alleges that she originally invested with CAM in January 2009 when she transferred her RRSP to CAM. Mr. Cameron was her only contact regarding her investments. She told Mr. Cameron that her previous investments were "not yielding success" and she wanted a more predictable and less volatile investment. Mr. Cameron assured her that the defendants' primary concern was long-term retirement security and the investors' interests were his primary focus. Ms. Mackenzie originally invested half of her funds in the REIT and half in the "Life Settlement Fund" ("LSF"). She had no knowledge of how the defendants would manage these funds. In June 2010, Mr. Cameron suggested that she transfer all of her funds into the "Conservative Portfolio". Mr. Cameron "only mentioned" that this portfolio included the "High Income Fund" ("HIF"), and that overall it represented a better balance of risk. Ms. Mackenzie subsequently transferred 100% of her funds into the Conservative Portfolio.

[17] In her affidavit, Ms. Mackenzie states that Mr. Cameron's assurance to her was important because she was then 52 years old and she advised Mr. Cameron that she intended to retire at 65. She signed a "Know Your Client" form ("KYC Form") in January 2009; however, the handwriting on the KYC Form is not hers. The KYC

Form was completed during a meeting with Mr. Cameron and he guided her answers. Ms. Mackenzie states that she signed the form without really understanding her answers' potential implications.

[18] At para. 17 of the ANOCC, Ms. Mackenzie alleges that during the course of her investments, she found it difficult to obtain any meaningful information on how her funds were being invested. On a number of occasions, Mr. Cameron directed her to Matthew Cameron, who did not provide helpful information.

[19] In her affidavit, Ms. Mackenzie describes another interaction in about February 2015 when Mr. Cameron asked for her assistance as a consultant to help with refinancing one of the REIT properties. The property had received an unexpectedly high valuation and Mr. Cameron saw this as an opportunity to increase the mortgage, and remove approximately $1 million in equity. Ms. Mackenzie told Mr. Cameron she thought the money would be distributed to unitholders. He told her he was using the money to pay fees and redemptions.

[20] Paragraphs 18–22 of the ANOCC plead the discovery of the losses. Ms. Mackenzie alleges that in February 2017, she was informed by Mr. Cameron that 80% of the HIF, part of the Conservative Portfolio, was invested in a loan that had gone into default. Both the LSF and the REIT were not liquid, and as a result, all the funds were being frozen until they gained liquidity. Ms. Mackenzie discovered that the defendants "had made misrepresentations as to the nature of the investments", and she lost a substantial amount of her investments.

[21] In her affidavit, Ms. Mackenzie states that in September 2017, she made a complaint to FP Canada. Mr. Cameron was the subject of disciplinary action by the Financial Planning Canada Standards Council ("FPCSC") and entered into a joint settlement agreement. CAM, Mr. Cameron, Matthew Cameron and Wah Bo Chew were also the subject of disciplinary action by the BC Securities Commission ("BCSEC") and entered into a joint settlement agreement. I describe these later.

Mr. Cameron

[22] Mr. Cameron describes his employment in the financial services industry from 1994 to 2009. Amongst other certifications, since prior to 2009 and during the events of this lawsuit, he was a Certified Financial Planner ("CFP"). He worked through his

numbered company, which did business in partnership with two other numbered companies as Chartwell Financial Group ("CFG").

[23] In 2001, CAM was incorporated and registered as an Investment Council Portfolio Manager firm ("ICPM"), which is a discretionary investment firm. The BCSEC required CAM to be registered as a portfolio manager and that CAM have a person who was the portfolio manager. Mr. Cameron was not one of them. Since 2001, Mr. Cameron has been a director of CAM. In 2003, he became president and CEO. He states that in that role, he primarily dealt with CAM's finances and human resources. In 2009, the BCSEC established the need for an Ultimate Designated Person ("UDP") at an ICPM. From January 2010 to February 2018, he was the UDP.

[24] Mr. Cameron states that at no time was he involved with analyzing or selecting securities, or client portfolio structuring, or investor advising. That was the responsibility of and done by the portfolio managers at CAM, who were solely responsible for this.

[25] Mr. Cameron states that when he started referring his clients to CAM in 2001, he and one of the portfolio managers of CAM would arrange meetings between him and Mr. Cameron's clients. Mr. Cameron frequently attended those meetings, but before each meeting, he explained to his clients the difference between CFG and CAM, and that he was not licenced to give investment advice as a portfolio manager or to structure their investment portfolios or the underlying securities held by CAM. The CAM portfolio managers at those initial meetings also went over this. He then began to direct his efforts to other priorities for his clients, such as wills, estate and succession planning, life insurance and trusts. From December 2009, after relinquishing his mutual fund licence, he dealt only with segregated funds through Great-West Life.

[26] In about 2008, before establishing the "Magna Funds" described below, CAM obtained an exempt market designation with the BCSEC. In or around 2010, there was a change to the securities industry regulations. As a result, starting in 2011, CAM was registered as an investment fund manager and an exempt market dealer. In late July 2017, CAM stopped operating and a new fund manager, Axcess Capital, took over management of the Magna Funds.

[27] Mr. Cameron states that there were five Magna Funds. All CAM clients who invested in a Magna Fund received an information memorandum ("Information Memorandum"). Three of those funds are: (1) the Magna High Income Fund ("HIF"), established to have five to ten investments with as little correlation to the stock market as possible and with as low volatility as possible; (2) the Magna Life Settlement Fund ("LSF"), established to invest in fractional interests in life insurance policies; and (3) the Magna Real Estate Investment Trust ("REIT"), established to invest in strip malls. Mr. Cameron states the portfolio managers created portfolios specific to each client, using different percentages of the Magna Funds and other securities available to the public.

[28] Mr. Cameron describes how he came to know Ms. Mackenzie, and his interactions with her when she invested with CAM. He first met Ms. Mackenzie when she was hired by Mr. Roberts with respect to the REIT. CAM had hired Mr. Roberts as a consultant to research strip malls for purchase. In 2008, Mr. Roberts and Ms. Mackenzie provided their research and recommendations to CAM.

[29] In January 2009, Ms. Mackenzie asked him to be referred to CAM. Mr. Cameron arranged a meeting with Mr. Nelson which he attended. Mr. Cameron denies that he gave investment advice at that meeting. He attended the meeting in a client-facing role to ensure Mr. Nelson answered all of Ms. Mackenzie's questions. He explained his role at CAM to Ms. Mackenzie, that he was not licenced to provide investment advice, and that this would be done by the portfolio managers. Mr. Nelson also explained this to Ms. Mackenzie. Mr. Nelson and Ms. Mackenzie reviewed or completed a number of documents. In about February 2009, he attended a second, similar meeting between Mr. Nelson, Ms. Mackenzie and her husband. I note here that Ms. Mackenzie states that she was not aware that there was any difference between CAM and CFG.

[30] Finally, Mr. Cameron states that Ms. Mackenzie was not a typical client of CAM as she had a close business relationship with CAM and its portfolio managers. Ms. Mackenzie was involved in the management of the REIT until September 2017. She was involved in purchasing and selling of properties, the transfer and renewal of mortgages on the properties, negotiations with lessees when leases came up for

renewal, and she worked with Mr. Nelson to build a valuation model which she was engaged in every two years starting in 2010. In February 2015, she was involved in re-mortgaging one of the REIT properties, and CAM paid her $10,000 for her services. Mr. Cameron also had lunch with Ms. Mackenzie and her husband two or three times a year, and they socialized occasionally. He assisted Ms. Mackenzie and her husband to purchase life insurance through CFG, and her husband purchased an investment through Great-West Life.

Documents

[31] Ms. Mackenzie's and Mr. Cameron's affidavits attach various documents which are described below.

Managed Account Application

[32] This is a CAM one-page form that Ms. Mackenzie signed, entitled "Account Application (Managed Account Program)". The form asks for information regarding the applicant's income, net worth, primary investment objective, attitude towards risk, and liquidity needs over the next five years. The form states:

> I hereby retain Chartwell Asset Management Inc. as my Investment Portfolio Manager. Prior to signing below I have read and understood the Investment Management Agreement as well as any information given to me by Chartwell Asset Management Inc. on the Magna Funds.

Investment Management Agreement

[33] This is a CAM one-page document that Ms. Mackenzie signed, entitled "Investment Management Agreement – Managed Account Program". The document includes several paragraphs of terms, one of which states:

> Our Responsibilities
>
> We will *manage the property in your account*. Transactions in your account will be effected by us on your behalf, on a discretionary basis. We will determine whether the purchase or sale of any property is suitable for you. You will not be permitted to engage in transactions for your account. We will use the Magna Funds, which are funds managed by us, in your account. … The appropriate allocation to each fund will be determined by us at our discretion on an on-going basis. We will ensure that the investments in your account are suitable for you. We will make that determination with the help of your financial planner, based on our investment objectives, risk tolerance level and individual personal and financial circumstances.

KYC Form

[34] This is a CAM one-page form that Ms. Mackenzie signed, entitled “Investor Profiling Questionnaire”. It asks questions on: investment objectives, goals and time horizon; age; stability of financial situation; years to retirement; number of dependents; level of investment knowledge; annual income; family net worth; lifestyle preferences; and investment risk preferences.

Summary Information Sheet

[35] This is a CAM one-page document that Ms. Mackenzie signed. It describes that CAM is the manager and fund advisor of the Magna Funds, directs the investments of the funds, and has discretion over the investments of the funds. It summarizes the return objectives, volatility objectives, and investment objectives for each of the Magna Funds. The document states:

> I have read and understood the information given to me by Chartwell Asset Management on the Magna Funds. I understand Chartwell Asset Management will use the Magna Funds in my managed account(s). … The appropriate allocation to each fund will be determined by Chartwell Asset Management at its discretion on an on-going basis, with Chartwell Asset Management always ensuring that the investments in my account(s) are suitable for me. Chartwell Asset Management will make that determination with the help of my financial planner, based on my investment objectives, risk tolerance level and individual personal and financial circumstances. …

Information Memorandum

[36] The memorandum for each of the REIT, HIF, and LSF state that: the fund does not trade on any exchange or market; no securities regulatory authority has assessed the merits; and it is a “risky” and “speculative” investment which “should be undertaken only by purchasers whose financial resources are sufficient to assume such risk and can afford a total loss of their investment”.

[37] Each memorandum describes that CAM is the promoter and investment manager of the fund, is a portfolio manager, and is the entity that manages, and provides investment analysis, advice, recommendations and decisions for the fund. The background of the principles of CAM are described, and this includes Mr. Cameron who is stated to be a CFP, and a Chartered Life Underwriter, with 17 years experience in the financial services industry.

Website Screenshot

[38] This is a one-page extract from chartwellasset.com. It is marketing material, and states that CAM focuses on “achieving positive returns with as little risk as possible in our Conservative and Moderate Portfolios”; and that CAM’s “goal is to provide all of our risk averse clients with low-volatility portfolios which generate consistently positive returns”.

Statements of Investments

[39] These are some of Ms. Mackenzie’s portfolio statements with CAM from January 2013 to December 2017. On all of the statements up to December 2016, Mr. Cameron of CFG is stated to be her financial planner, and after that date, Matthew Cameron of CFG is stated to be her financial planner. Under the heading “Portfolio Composition”, it is stated: “You are invested in the CONSERVATIVE MODEL PORTFOLIO”. The book value and current market value of the three Magna Funds in which Ms. Mackenzie was invested (the REIT, LSF and HIF) are stated, along with any transactions in the period. The market value up to December 2016 indicates an overall modest gain in her investments.

[40] A statement from Olympia Trust Company dated November 2022 shows that the total HIF and LSF market value is about $12,000. In the December 2016 statement from CAM, the book value of those same number of units is stated to be about $227,000. Ms. Mackenzie states that her total loss was about $207,000 after she received payment of about $15,000 from the sale of the REIT properties. Mr. Cameron states that the REIT sold its last property in 2021 and was closed.

Mr. Gilkes

[41] Mr. Gilkes is a consultant who provides advice on registration and compliance with securities legislation and regulations. His expert report was tendered by Mr. Cameron. Mr. Gilkes has over 40 years of experience in investigating and regulating firms, including at the Ontario Securities Commission. He participated in the creation of National Instrument 31-103 (“NI 31-103”) in 2009, which introduced a national registration and compliance regime for Canada’s capital markets. NI 31-103 came into effect in BC in September 2010.

[42] Mr. Gilkes' report was tendered for and is admissible to assist in understanding technical terms, and to provide the regulatory context for some of the other evidence on this application.

[43] Mr. Gilkes describes how CAM and the Magna Funds fit into the legislation and regulations over time, and the different registration designations and responsibilities of a fund manager, dealer, exempt market dealer, investment fund manager, and a portfolio manager. Mr. Gilkes was not asked to comment on the responsibilities of a UDP, which, in this case, was Mr. Cameron. I note that s. 5.1 of NI 31-103 states that the UDP must supervise and promote the activities of the firm that are directed towards ensuring compliance with securities legislation by the firm and each individual acting on the firm's behalf. Mr. Gilkes also opines that under section 14 of the *Securities Rules*, B.C. Reg. 194/97 (a regulation under the *Securities Act*, R.S.B.C. 1996, c. 418), CAM had a duty to deal fairly, honestly and in good faith with its clients. Individuals registered on behalf of CAM had the same duty to clients. This duty includes ensuring that investments are suitable for clients.

[44] Mr. Gilkes identifies the regulatory bodies which have oversight over an exempt market dealer, investment fund manager, and portfolio manager. In this case, it was the BCSEC. FP Canada is an accreditation and professional standards organization for CFPs, but is not a regulator in relation to firms or individuals regulated by the BCSEC.

[45] Mr. Gilkes opines that suitability determinations and investment strategies are individualized. There are three components to suitability: client due diligence, also referred to as Know Your Client ("KYC"); product due diligence, also referred to as Know Your Product ("KYP"); and the professional judgment of the registrant. Securities legislation requires registered firms to update KYC and KYP information. The standard of practice for portfolio managers at the time of this case was an annual review of the KYC information with a client.

Regulatory Proceedings

FP Canada

[46] The FPCSC published the report of disciplinary action against Mr. Cameron arising out of complaints involving seven of his clients. The October 2021 decision

accepting the joint settlement agreement states that Mr. Cameron was a CFP until March 2018, and operated his financial planning business through CFG. Mr. Cameron also "substantially owned, operated and controlled" CAM. CAM was the manager of the Magna Funds between January 2010 and February 2018, and Mr. Cameron was the UDP of CAM. The complainants, who were all classified as low-risk investors, alleged that Mr. Cameron recommended that they invest in the "Conservative Portfolio" of the Magna Funds, without adequately disclosing the risks of these investments and the increasing level of risk of the funds over time. The underlying investments were the HIF, LSF and REIT. It is noted that by March 2017, the investments of the HIF were "almost 85% held in a single entity". Mr. Cameron admitted the following:

> 21. While Mr. Cameron asserts that he was acting honestly, Mr. Cameron admits that he failed to recommend only those strategies that were prudent and appropriate for at least seven (7) of his clients, in that he recommended strategies to these clients whose objectives, personal circumstances and investment knowledge did not support such strategies… In addition, he admits that in doing so, he failed to place his clients' interests first …
>
> 25. While Mr. Cameron asserts that he was acting honestly, Mr. Cameron admits that, between 2008 and February 2017, he failed to adequately disclose the level of risks investing in a portfolio of mutual funds (the Magna Funds) and the increasing level of risk of these investments over time, to at least seven (7) of his clients, …

[47] Collectively, these failures were admitted to be contrary to various principles and rules of the *Code of Ethics* and *Standards of Professional Responsibility* that apply to CFPs. Among other sanctions, Mr. Cameron was permanently banned from seeking renewal or reinstatement of his CFP certification.

BC Securities Commission

[48] The BCSEC settlement agreement and orders, indexed at 2022 BCSECCOM 52, were made in early 2022. The settlement agreement was entered into by CAM, Mr. Cameron, Wah Bo Chew, and Matthew Cameron. The following are excerpts:

> 7. In its capacity as an investment fund manager, Chartwell managed investment funds, including the Magna High Income Fund (the Income Fund).
>
> 8. Between March 2010 and March 2011, the Income Fund advanced US$5 million (the Loan) to the Health Capital Receivables Funding Special Purpose Corporation I (Health Capital) pursuant to a loan agreement (the Loan Agreement). From 2010 to 2016, the Loan comprised a large

proportion of the Income Fund's investments. The Loan was an illiquid investment.

9. By approximately 2014, Health Capital had stopped making timely interest payments owed to the Income Fund when due. Between March 2014 and May 2015, the Loan Agreement was restructured three times. In July 2016, Health Capital defaulted on the Loan Agreement. In 2017, Chartwell suspended redemptions of the Income Fund.
10. As an investment fund manager, Chartwell was required to calculate the net asset value of the Income Fund. Chartwell was required to exercise a degree of care, diligence and skill in carrying out that duty.
11. From 2010 to 2016, Chartwell did not have sufficient information about Health Capital to support its calculation of the value of the Income Fund. Beginning in or around 2010, Health Capital stopped providing reporting documents in a timely manner, and by 2012, it stopped providing reporting documents altogether.
12. Between 2010 and 2016, Chartwell did not re-evaluate the Income Fund's valuation despite the presence of risk indicators relating to the Loan to Health Capital, which included:

    (a) missed or late interest payments by Health Capital;

    (b) missed or late principal repayments by Health Capital;

    (c) requests by Health Capital for an extended or modified payment schedule; and

    (d) lack of financial information about Health Capital.
13. By calculating the net asset value of the Income Fund without having sufficient information to do so and by failing to re-evaluate the Income Fund's valuation despite the presence of risk indicators, Chartwell failed in its duty as an investment fund manager to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, contrary to section 125(b) of the Act.
14. While Gregory Paul James Cameron and Wah Bo Chew were directors of Chartwell, and while Matthew Evans Cameron was an employee of Chartwell, each authorized, permitted or acquiesced in Chartwell's contravention of section 125(b) of the Act. By operation of section 168.2(1) of the Act, Gregory Paul James Cameron, Wah Bo Chew and Matthew Evans Cameron also contravened section 125(b) of the Act.

[49] Section 168.2(1) of the *Securities Act* states:

> If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

[50] Amongst other sanctions, CAM was permanently prohibited from acting as a registrant or promoter, and Mr. Cameron was prohibited for 15 years from being a

director or officer of any issuer or registrant, or being a registrant or promoter, with limited exceptions, and was ordered to pay $100,000 to the BCSEC.

[51] With that review of the evidence, I turn to the requirements Ms. Mackenzie must establish for certification.

Issue 1: Do the Pleadings Disclose a Cause of Action?

Legal Principles

[52] A pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no cause of action exists or the claim cannot succeed. No evidence is admissible in determining whether the pleadings disclose a cause of action. Pleaded facts must be assumed to be true unless they are patently unreasonable or incapable of proof: *Hollick* at para. 25; *Pro-Sys* at para. 63; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 23.

[53] The Court may refer to a document incorporated by reference into a pleading if it forms an integral part of the factual matrix of the claim: *Shoppers Drug Mart Inc. v. Mang*, 2021 BCSC 928 at para. 14; *Del Giudice v. Thompson*, 2024 ONCA 70 at para. 18; *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at paras. 85–87 [*Jensen FC*], aff'd 2023 FCA 89 [*Jensen FCA*], leave to appeal to SCC ref'd, 40807 (11 January 2024).

[54] A plaintiff must clearly plead the material facts in support of each cause of action: Rule 3-1(2)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22; *Sherry* at para. 24. Bald legal conclusions are not allegations of material fact and cannot support a cause of action: *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at paras. 39–45.

[55] As set out in *Jensen FC*:

> [83] There is no bright line between evidence, material facts and bald allegations; they are rather points on a continuum (*Mancuso*, at paragraph 18). It is the responsibility of the certification judge, looking at the pleadings as a whole and at all the circumstances, to ensure and be satisfied that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[56] Pleadings are read generously, with a view to allowing for reasonable proposed amendments 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*].

The ANOCC

[57] I will first review the entirety of the remainder of the ANOCC. Starting at the section of the ANOCC that addresses the discovery of the losses, the ANOCC states:

> 20. Cheryl believed the Defendants would comply with professional standards and the expressed and implied terms of their relationship and invested with the Defendants on that basis.
>
> 21. In February of 2017, Cheryl discovered that the Defendants had made misrepresentations as to the nature of the investments made on her behalf and that she lost a substantial amount of her investments.

[58] The next section describes the named defendants, including those who are no longer parties. With the exception of Mr. Charlton, the ANOCC pleads that these persons were involved in the management of funds invested with CAM. With respect to CAM and Mr. Cameron, the ANOCC pleads:

> 23. The Defendants are directly connected as financial planners, investment advisors, and, or related, parent or wholly-owned subsidiary investment companies. …
>
> 24. Chartwell Inc. is a corporation … that provided investment services.
>
> 26. Mr. Cameron was a director and founder of Chartwell Inc. during the Class Period, as below. Mr. Cameron was involved in management and control of the investment funds provided by the Plaintiff and other Class Members.

[59] Paragraph 33 defines the proposed class as:

> 33. All persons in Canada, including but not limited to an individual, corporations, and estates, who, at any time, invested with Chartwell Inc., Class(es), or Sub-Class(es) to be determined by the Court …

[60] The next section of the ANOCC is entitled “the Defendants’ Wrong Doings”. The first few paragraphs again generally describe the roles of the defendants, including those persons who are no longer parties. With respect to CAM and Mr. Cameron, the ANOCC pleads:

> 34. Chartwell Inc. was an investment management firm, established to provide institutional quality money management to individuals and institutions. Chartwell Inc. offered investment management services through a Managed Account Program as well as through individual investment funds.
>
> …
>
> 37. Mr. Cameron [list of persons no longer defendants, and which collectively with Mr. Cameron are defined as the "Individual Defendants"] were all employees and, or members and, or agents of Chartwell Inc. during the Class Period and participated in the investment strategy and, or investment advice and, or management of investment funds provided by the Plaintiff and, or Class Members.
>
> 38. Chartwell Inc. and the Individual Defendants owed the Plaintiff and, or Class Members a contractual and fiduciary duty of care to exercise professional care, skill, and diligence when providing financial planning services, investment advice, and managing clients' investments.
>
> 39. Mr. Cameron and other members of the Individual Defendants failed to adequately disclose the level of risk that the Plaintiff and Class Members were being exposed to and actively took steps to reduce any perception of risk.
>
> 40. Chartwell Inc. described its Conservative Portfolio as having as little risk as possible. The Conservative Portfolio included the High Income Fund, which had a majority of its investment in one (1) loan that defaulted.
>
> 41. Chartwell Inc. and the Individual Defendants deceived the Plaintiff and Class Members as to the amount of risk in the funds that they had invested.
>
> 42. Mr. Cameron and other members of the Individual Defendants completed "Know Your Client" forms, which outline the clients' willingness to accept certain levels of risk in investments, without the Plaintiff and Class Members advising or accepting the level of risk shown on the forms.
>
> 43. The Defendants failed to exercise professional care, skill, and diligence when providing investment advice to the Plaintiff and other Class Members and when making investments on behalf of the Plaintiff and other Class Members.

[61] The next section of the ANOCC is entitled "The Plaintiff's Harm" and pleads:

> 44. The Plaintiff and Class Members sustained substantial financial losses as a result of the Defendants actions.
>
> 45. Had the Plaintiff and Class Members known that the Defendants would not uphold their contractual and fiduciary duties when investing the Plaintiff and Class Member's funds, they would not have provided the funds to the Defendants.
>
> 46. The Plaintiff and Class Members were harmed by losing substantial amounts of money to high risk investment strategies that were not disclosed and, or not part of the suggested investment strategy agreed upon by the Plaintiff and Class Members.
>
> 47. The Plaintiff and Class members have also experienced mental distress as a result of the aforementioned.

[62] In the Relief Sought section of the ANOCC, para. 48, Ms. Mackenzie claims general and special damages, and punitive or aggravated damages.

[63] Finally, the Legal Basis section of the ANOCC states:

> 49. The Defendants owed the Plaintiff and other Class Members a contractual and fiduciary duty of care to exercise professional care, skill, and diligence when providing financial planning services and investment advice to the Plaintiff and other Class Members and when making investments on behalf of the Plaintiff and other Class Members.
>
> 50. The Defendants owed the Plaintiff and other Class Members the following contractual and fiduciary duties:
>
> a. To determine the general investment needs and objectives including the level of risk comfortable being accepted by the Plaintiff and other Class Members;
>
> b. Take a customized, strategic approach specifically focused on meeting the unique needs and concerns of the Plaintiff and other Class Members;
>
> c. To make changes to the portfolio to accommodate changes in the circumstances and objectives of the Plaintiff and other Class Members;
>
> d. To determine the appropriateness of the investment portfolio of the Plaintiff and other Class Members in light of the above;
>
> e. To accurately and diligently ascertain and transmit to the Plaintiff and other Class Members all relevant information about the investments they advised the Plaintiff and other Class Members to purchase; and
>
> f. To comply with applicable legislative and regulatory requirements.
>
> 51. The Defendants breached their duty of care that the Defendants owed to the Plaintiff and other Class Members.
>
> 52. The professional negligence of the Defendants caused loss and damage to the Plaintiff and other Class Members.
>
> 53. The Defendants had a fiduciary relationship with the Plaintiff and other Class Members. The Defendants breached the fiduciary duties owed to the Plaintiff and other Class Members and as a result caused loss and damage to the Plaintiff and other Class Members.
>
> 54. The Defendants made fraudulent or, in the alternative, negligent misrepresentations to the Plaintiff and other Class Members which were relied on by the Plaintiff and other Class Members to their detriment.

[64] Paragraphs 55 and 56 allege that as a result of the defendants' acts and omissions, Ms. Mackenzie and the proposed class have suffered damages, including economic loss, and inconvenience and mental distress, which were foreseeable.

[65] Paragraphs 57 to 60 claim punitive damages:

> 57. The Defendants have acted in such a high-handed, wanton, and reckless manner as to warrant a claim for punitive damages.
>
> 58. The Defendants failed to uphold their fiduciary duty owed to the Plaintiff and Class.
>
> 59. Punitive or exemplary damages ought to be awarded to the Class to discourage breaches in the fiduciary duty of investment advisors in the future.
>
> 60. An award of punitive or exemplary damages should be made on a lump sum basis to be distributed among members of the Class in whatever manner the common issues trial judge deems appropriate.

Analysis

[66] The parties identify five potential causes of action alleged in the ANOCC: (i) negligence; (ii) negligent misrepresentation; (iii) fraudulent misrepresentation; (iv) breach of fiduciary duty; and (v) breach of contract.

[67] A number of the parties' arguments are the same or similar for each potential cause of action, and to avoid repetition, I will address those first.

[68] Ms. Mackenzie argues that all of the elements for each cause of action are sufficiently pleaded. Her written submissions largely repeat the allegations in the ANOCC, and she argues that the defendants failed to:

> … accurately and diligently ascertain and transit to the class all relevant information about the investments they advised the class to purchase, when it came to their attention, and which could negatively impact the legitimate contractual interests of the proposed class.

Further, that the defendants' lack of care in "calculating the net asset value" of the HIF caused harm.

[69] When questioned as to what investments are in issue and what exactly the claims are, Ms. Mackenzie submitted that the HIF and loan and the circumstances in the FPCPC and BCSEC rulings are an important and central part of the case. However, she also submitted that she was operating under an "information deficit" as she did not yet have discovery, and was not limiting her claims to those circumstances. Ms. Mackenzie submitted that there should be a liberal approach to pleadings, and the Court should be cautious in striking pleadings when Ms. Mackenzie may not yet have all information. Later, she submitted that should the Court find that she has not adequately pleaded a cause of action, she should be

given an opportunity to amend, although she maintained that she had adequately pleaded all causes of action.

[70] Mr. Cameron argues that for each cause of action, the ANOCC: (i) does not plead sufficient or any material facts to support the causes of action alleged, and instead makes conclusory allegations; or (ii) to the extent facts are pleaded, they are vague and general, without sufficient particulars. He submits that it is difficult to discern what the specific allegations are.

[71] I generally agree with Mr. Cameron's position. The difficulties with this certification application begin and end with the generally vague and broad nature of the allegations in the ANOCC, which are in many instances not supported by pleaded material facts. Those difficulties flow through to the proposed class definition, and equally vague and broad proposed common issues.

[72] I will later review the pleadings for each cause of action, but highlight now some examples. First, the ANOCC alleges that the proposed class "were misinformed" and the defendants "made misrepresentations" as to the nature of the investments (paras. 2 and 21). Other than one alleged misrepresentation (for which other elements are missing) the alleged misrepresentations and their particulars (as required by the *SCCR*) are not pleaded. There is only a general allegation that the "investments" (without identifying which) were "high risk" and that inferentially, at some point, there were representations, or representations by omission. Second, the ANOCC alleges that there were "expressed and implied terms" of a contract with Mr. Cameron. However, the existence of the contract, the material terms, and which were breached, are not pleaded. Third, as a director of CAM, Mr. Cameron is alleged to have been "involved in" and "participated in" management of investment funds (paras. 30 and 37). There are no facts pleaded as to what he is alleged to have done that amounts to an independent tort. Fourth, the ANOCC contains several paragraphs where it is alleged that the defendants owed contractual, common law or fiduciary duties of care, and that these were breached, or that the defendants made fraudulent or negligent misrepresentations (paras. 38, 43, 49, 51, 53, 54). These are conclusory legal allegations and not material facts. For example, no facts are

pleaded which could support that an *ad hoc* fiduciary duty arose with respect to Mr. Cameron.

[73] As a final example, Ms. Mackenzie alleges that the defendants owed the "contractual and fiduciary duties" set out at para. 50. At the hearing, the parties treated this paragraph as also describing the alleged duties of care in negligence. Paragraph 50 is a general pleading of KYC and KYP duties, without reference to any specific investment, action or omission. Paragraph 51 alleges that "the defendants breached their duty of care" without more. These allegations individually or collectively could refer to any investment, at any time, in the 17-year period CAM operated, in the multitude of unique circumstances that could arise for each individual investor, and do not provide the defendants with any meaningful information as to what it is alleged they did or did not do. Pleadings such as para. 50 may not always be insufficient. For example, if there were preceding paragraphs in a pleading that identified material facts that would inform and narrow those allegations, so it was clear what was being referred to, it is possible they could be sufficient. But in this case, those facts are generally missing. The only paragraphs of the ANOCC that provide more focused information regarding these allegations are those concerning: (i) Ms. Mackenzie's personal interactions with Mr. Cameron, (ii) the Conservative Portfolio being unsuitable for Ms. Mackenzie; and (iii) that unbeknownst to Ms. Mackenzie, a loan in the HIF went into default, which implies that this was either a risky investment, or became risky over time (paras. 15, 18 and 20). However, Ms. Mackenzie does not wish to limit her allegations to this.

[74] While I appreciate that there is usually limited ability for discovery prior to a certification hearing, that does not relieve Ms. Mackenzie from investigating her claim and pleading the material facts of a viable cause of action. More than seven years have passed since Ms. Mackenzie was informed that her investment funds were frozen and the HIF loan had gone into default. There was no evidence at the hearing that she tried to obtain information but could not do so. Nor was there ever an application to seek discovery. As stated in *Imperial Tobacco* at para. 22:

> … 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.

[75] The need to appropriately draft 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.

[76] The Court cannot certify vague and broad proposed common issues, based on equally vague and broad pleadings, some of which are not properly pleaded at all, and wait to see if and how issues get narrowed at a common issues trial. The pleadings must define the issues with sufficient precision to be both manageable and fair to both parties, and to enable to Court to determine whether there is some basis in fact for common issues.

[77] I turn now to Mr. Cameron’s second argument which applies to several causes of action. He argues that the pleadings regarding his involvement in CAM should not be presumed to be true because they are contrary to the Managed Account Program documents which have been adopted by reference into the ANOCC. He submits that an action should not be certified based on Ms. Mackenzie’s misunderstanding of Mr. Cameron’s role. Mr. Cameron states that he was not the portfolio manager of CAM, and did not participate in the management of the investment funds or giving of advice. While I agree that the Managed Account Program documents have been incorporated by reference, I do not view those documents as conclusive of what Mr. Cameron may or may not have done, such that it is plain and obvious that the alleged facts cannot be assumed to be true. This is not the type of situation, as discussed in *Jensen FC* at para. 86–87, where a document is quoted inaccurately, or where a plaintiff alleges that a document states something that on a plain reading it does not. Ms. Mackenzie does not make such allegation. She alleges that CAM offered investments through a Managed Account Program. It is not inconsistent with those documents that Mr. Cameron was also providing advice to her, despite that he was not a portfolio manager with CAM. In

effect, Mr. Cameron's argument asks the Court to weigh evidence. This is not a pleadings issue.

[78] Mr. Cameron's third argument which applies to all of the tortious causes of action alleged, is that he is being sued in his capacity as a director of CAM, and not in his capacity as a CFP operating through CFG, and that there are no independent torts pleaded against him, but only undifferentiated allegations against "the defendants".

[79] In *The Owners, Strata Plan KAS 3410 v. Meritage Lofts Inc.*, 2022 BCCA 109 [*Meritage Lofts*], the Court summarized the legal principles regarding the liability of corporate principals or employees in tort for their actions or omissions in carrying out acts of and for a company:

> [27] One of the established principles upon which Messrs. Chahal and Minhas rely is the principle that a company is an independent entity with legal personality separate from its owners and principals: *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20–26; *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121 at para. 19. While companies necessarily act through human agents, corporate owners and principals are not personally liable for the tortious conduct of a company merely by virtue of their status as owners and principals: *Merit Consultants* at para. 14. On the contrary, the corporate veil is rarely pierced and corporate owners and principals are rarely found liable for actions ostensibly carried out under a corporate name in the absence of findings of fraud, deceit, dishonesty or want of authority. Although findings of liability are always fact-specific, corporate owners, principals and employees are protected from personal liability when acting within the course of their employment unless "it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own": *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 129 D.L.R. (4th) 711 at 720, 1995 CanLII 1301 (Ont. C.A.), (leave to appeal to SCC ref'd [1996] S.C.C.A. No. 40).
>
> [28] In other words, while companies and their owners, principals and employees have separate legal personalities, the rule that persons are responsible for their own tortious conduct applies even when they are acting *bona fide* within the course of employment in pursuit of corporate purposes and the company is vicariously liable for their actions: *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 1999 CanLII 1527 (ON CA), 168 D.L.R. (4th) 351 at paras. 9, 18, 1999 CanLII 1527 (Ont. C.A.), (leave to appeal to SCC ref'd [1999] S.C.C.A. No. 124*); John A. Neilson Architects* at para. 66. Reflected in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 1992 CanLII 41, this general principle does not concern the prospect of piercing the corporate veil. Rather, it is concerned with personal causes of action in tort that are independent of corporate liability: *ADGA Systems* at para. 15. It is also subject to the policy-based exception in *Said v. Butt*, [1920] 3 K.B. 497, namely, an employee of a

> company that breaches a contract will not be held personally liable for the tort of inducing breach of contract or any other claim that amounts to a disguised attempt to make a non-party liable on a contract: *Hildebrand v. Fox*, 2008 BCCA 434 at para. 70, (leave to appeal to SCC ref'd [2009] S.C.C.A. No. 1).

[80] To "establish an independent cause of action against a corporate owner, principal or employee, material facts sufficient to support a personal tort claim apart from any corporate liability must be specifically pleaded". It is not sufficient to plead undifferentiated allegations against the corporation and those persons: *Meritage Lofts* at para. 29.

[81] As I will discuss below, except in so far as Ms. Mackenzie alleges personal interactions with Mr. Cameron, the ANOCC makes undifferentiated allegations against CAM and him. Ms. Mackenzie has not pleaded material facts to support an independent cause of action in tort against Mr. Cameron, largely because she has failed generally to properly plead material facts. This flows from the generally vague and broad allegations in the ANOCC.

[82] Finally, Mr. Cameron's fourth argument that applies across claims, is that the causes of action alleged against him are based on Ms. Mackenzie's specific individual interactions with him, and the ANOCC does not indicate how those causes of action could have commonality with the proposed class. This is an argument that is better addressed in Issue 3, the common issues requirement. For the pleading requirement, the focus is on whether Ms. Mackenzie has properly pleaded that she has a cause of action against the defendants: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2010 BCSC 1699 at para. 107, rev'd on other grounds 2012 BCCA 193; *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 at para. 10 (Ont. S.C.); *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at paras. 36–37.

[83] I turn to discuss the five causes of action alleged.

Negligence

[84] The elements of a claim of negligence are: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff sustained

damage; and (4) the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[85] In this case, there is no issue that the ANOCC pleads the third and fourth elements. The parties' submissions focused on whether the ANOCC pleads material facts to support a duty of care, and breach of the standard of care.

[86] Ms. Mackenzie's claim is for pure economic loss in the form of lost investments. There is no general right to claim for negligent infliction of pure economic loss. However, the law recognizes three categories where a duty of care in tort for pure economic loss may arise, one being negligent misrepresentation or performance of a service: *688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, at paras. 19–21 [*Maple Leaf*]. The allegations in this case fall into that category. A duty of care cannot be established simply by showing that a claim fits within a category. It is still necessary to show that the relationship is sufficiently proximate to give rise to a duty of care. If the relationship is alleged to be one that has been previously judicially recognized as doing so, a plaintiff must show that the relationship in issue bears "the requisite closeness and directness", such that it falls within that previously established relationship or is analogous to one: *Maple Leaf* at paras. 22–23. Within this category, the scope and purpose of the defendant's undertaking and the plaintiff's reliance are determinative of the proximity analysis: *Maple Leaf* at paras. 31–35.

[87] Ms. Mackenzie submits that the relationships in this case are the same or analogous to those where a duty of care for economic loss has been previously recognized. Courts have recognized a duty of care owed by investment advisors: *Brandt v. Moldovan*, 2013 BCSC 1218 at para. 90, rev'd in part on other grounds 2014 BCCA 364. Further, class actions against investment firms for investment losses have been certified in this province: *Collette v. Great Pacific Management Co.*, 2004 BCCA 110.

[88] Mr. Cameron argues that there are no facts pleaded which could support a sufficiently proximate relationship between him and Ms. Mackenzie that could give rise to a duty of care. *Brandt* and *Collette*, relied upon by Ms. Mackenzie, are

distinguishable. Those concern claims against qualified investment advisors in their capacity as investment advisors.

[89] I will first address the duty of care alleged to be owed by CAM. In my view, it is not plain and obvious that the ANOCC does not plead facts which could support a proximate relationship giving rise to a duty of care in negligence owed by CAM to Ms. Mackenzie. The investment advisor firm/client relationship has been judicially recognized as one that could give rise to a duty of care, for example, in *Brandt* and in *Collette*. Ms. Mackenzie pleads that Mr. Cameron managed individuals' investments through CAM (para. 7). She sets out her personal interactions with him (discussed below). The ANOCC pleads that CAM provided financial investment services and Ms. Mackenzie invested with them through a Managed Account Program (paras. 1, 24 and 34). The Managed Account Program documents state that CAM is managing the client's investment funds in a discretionary account, where it is possible to infer an undertaking and reliance. All of these alleged facts could support the allegation at para. 38, that CAM owed Ms. Mackenzie a duty of care. The material circumstances of the discretionary account relationship should be specifically pleaded rather than having to refer to a document, but in my view, the other facts pleaded are by themselves sufficient.

[90] I turn to duty of care alleged to be owed by Mr. Cameron. There are two aspects to the claim against him. The first concerns his personal interactions with Ms. Mackenzie; the second concerns all the other vaguely pleaded allegations of his "involvement" and "participation" as a director in the acts or omissions of CAM.

[91] Addressing first the personal interactions between Mr. Cameron and Ms. Mackenzie, in my view, it is not plain and obvious that the ANOCC does not plead material facts which could support an investment advisor/client relationship between them of sufficient proximity to give rise to a duty of care. Ms. Mackenzie alleges that Mr. Cameron provided financial investment services through CAM (paras. 1 and 7). She pleads particulars of her interactions with Mr. Cameron and that: he was "her only source of contact"; she communicated her financial objectives to Mr. Cameron; he made assurances to her regarding what the defendants would undertake; and he provided her with investment advice regarding her investments

(paras. 10–16). He was the person who advised her to transfer all her funds into the "Conservative Portfolio" as it represented a better balance of risk, and, although not expressly stated, the inference is that Ms. Mackenzie relied on that advice by doing so shortly after. Ms. Mackenzie alleges that Mr. Cameron participated in completion of the KYC Form. These alleged facts can animate the more general allegations of duty of care in paras. 38, 49 and 50. It follows that I also find that Ms. Mackenzie has pleaded a duty of care supporting an independent tort claim against Mr. Cameron arising out of her personal interactions with him.

[92] I turn to the second aspect of the claim against Mr. Cameron, being his alleged participation in the management of CAM. In my view, other than what Ms. Mackenzie has alleged with respect to her personal interactions with Mr. Cameron, the ANOCC does not plead an independent claim in negligence against him for that alleged participation. There are no facts that describe with any specificity what he is alleged to have done that is independently tortious. There are only undifferentiated allegations against Mr. Cameron and CAM. The ANOCC suffers the same deficiency as the pleadings in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, as described in *Meritage Lofts*, where the pleadings "simply introduce the individuals as directors or employees of their corporations and then allege that they owed the same duties, committed the same breaches, and caused the same damages as their companies".

[93] With respect to the breaches of the standard of care, I have already discussed the difficulty with the vague allegations at paras. 50 and 51 of the ANOCC. Those allegations could refer to any investment at any time, and do not contain the specificity required to enable the defendants or the Court to know with precision the issues of fact and law to be decided. However, as Issue 1 is focused on Ms. Mackenzie's cause of action, and taking a generous approach to the ANOCC, there are facts pleaded which could animate those paragraphs. As discussed previously, these are: (i) Ms. Mackenzie's personal interactions with Mr. Cameron; (ii) the Conservative Portfolio being unsuitable for Ms. Mackenzie; and (iii) that unbeknownst to Ms. Mackenzie, the HIF was risky or became risky over time as a result of the loan. However, beyond this, there are no material facts pleaded.

[94] To summarize, reading the ANOCC generously, Ms. Mackenzie has sufficiently pleaded facts, which if true, could support a duty of care in negligence owed to her by CAM and Mr. Cameron arising out of her personal dealings with CAM and Mr. Cameron, and restricted to the areas I have indicated (the Conservative Fund which includes the HIF). The material facts pleaded are sparse, but come within the otherwise broad allegations in paras. 50–51. The allegations in those paragraphs are otherwise not supported by material facts. For example, there are no other investments identified. Ms. Mackenzie has not pleaded an independent claim in negligence against Mr. Cameron beyond her personal interactions with him, for his involvement in or participation in the management of investments at CAM. I will address later whether Ms. Mackenzie should be given an opportunity to amend.

[95] Finally, if as submitted by Ms. Mackenzie at this hearing, she is relying upon the circumstances of the FPCSC and BCSEC rulings as the basis of her claim, they are not adequately pleaded. For example, as discussed previously, her written submissions alleged that the defendants were negligent in “calculating the net asset value” of the HIF. That allegation is not in the ANOCC, and nor are any facts pleaded to support it.

Negligent Misrepresentation

[96] The five elements of a claim of negligent misrepresentation are:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 1993 CanLII 146; *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 121 [*Valeant*].

[97] Rule 3-7(2) and (18) of the *SCCR* requires that the effect of any document or purport of any conversation, if material, must be stated briefly, and that full particulars of fraud or a claim of misrepresentation, with dates and items if applicable, must be stated in the pleading.

[98] In *Cantlie v. Canadian Heating Products*, 2017 BCSC 286, Justice Harris, then of this Court, described the level of particularity required:

> [213] When drafting pleadings alleging negligent misrepresentation, parties must set out with "careful particularity" the elements of the claim: *Lysko v. Braley*, 2006 CanLII 11846 (ON CA), [2006] O.J. No. 1137 (C.A.) at para. 30. *Supreme Court Civil Rule* 3-7(18) requires a party pleading misrepresentation to state full particulars in the pleadings. It states: […]
>
> Such particulars should usually include the alleged misrepresentation itself; when, where, how, by whom and to whom it was made; its falsity; the inducement; the intention that the plaintiff should rely upon it; the alteration by the plaintiff of his or her position relying on the misrepresentation; and the resulting loss or damage to the plaintiff: *Rahn v McNeill* (1987), 1987 CanLII 2507 (BC SC), 19 B.C.L.R. (2d) 384 at 392.

[99] Where a plaintiff pleads a representation by omission, in some circumstances this may be sufficient for a claim in negligent misrepresentation: *Cantlie* at para. 215.

[100] Reading the ANOCC generously, in my view, Ms. Mackenzie has pleaded material facts in paras. 5–22 of the ANOCC that could support a special relationship between her and CAM and Mr. Cameron, for the same reasons as discussed with respect to duty of care for the negligence claim. However, Ms. Mackenzie has failed to plead the material facts supporting the other elements: what the misrepresentations are, including the full particulars as required by Rule 3-7(2) and (18) of the *SCCR*; and/or how the defendants were negligent in making those misrepresentations; and/or how she relied on the misrepresentations to her detriment.

[101] Paragraphs 2 and 21 make bare assertions that Ms. Mackenzie was "misinformed" and the defendants "made misrepresentations as to the nature of the investments" without identifying what those are. Paragraph 15 alleges that when Mr. Cameron recommended that she transfer all of her funds to the HIF, he "only mentioned" that the portfolio included the HIF and "overall it represented a better balance of risk". This could possibly be a misrepresentation as to the level of risk in

the HIF, but there are no material facts pleaded as to how it is inaccurate or how Mr. Cameron was negligent. Paragraphs 39–41 allege that Mr. Cameron "failed to adequately disclose the level of risk", and the defendants "actively took steps to reduce any perception of risk" and they "deceived" Ms. Mackenzie and the proposed class "as to the amount of risk in the funds they had invested". These are bare conclusory assertions. How Mr. Cameron failed to disclose the risk, or what he should have disclosed, or what active steps the defendants took, are not pleaded. Paragraph 40 alleges that CAM "described its Conservative Portfolio as having as little risk as possible". Presumably that is a reference to the CAM website, but there are no material facts pleaded that Ms. Mackenzie relied upon that. Paragraph 54 is a conclusory allegation that the defendants made "fraudulent, or in the alternative, negligent misrepresentations". Other than the reference to the discussion concerning the HIF, and the funds in the "Conservative Portfolio" these are general allegations that could refer any representation, made at any time, and do not contain the full particulars that are required by the *SCCR*.

[102] As discussed previously, at the hearing Ms. Mackenzie pointed to the circumstances in the FPCSC and BCSEC settlement agreements, but again was reluctant to abandon general non-specific allegations that the defendants made misrepresentations generally regarding investments without identifying them. When questioned as to what exactly the misrepresentation was, and where there was any class-wide misrepresentation, Ms. Mackenzie referred to the Summary Information Sheet (which refers to all five Magna Funds), and the quarterly Statements of Investments received by Ms. Mackenzie showing the market value of the HIF, as misrepresentations that were made to the class. These are not pleaded.

[103] A misrepresentation is an element that must be pleaded with sufficient detail to allow the proceedings to be both manageable and fair. These are important. To give one example, if the allegation is that a misrepresentation was made regarding the risk of the HIF, the timing of that representation is important. The circumstances of when and why the HIF loan went into default may be relevant to the truth or inaccuracy of a statement. It may be that a representation was true on a certain date, but inaccurate later. Or, if the representation was made at a later date (for example, if the market value shown on Statements of Investments is alleged to be inaccurate),

it may be that there is no detrimental reliance. It may be that the loan was already fully advanced, and little could be done. On the latter point, while a pleading of reliance might be inferred from the allegation that Mr. Cameron advised Ms. Mackenzie to transfer all of her funds into the Conservative Portfolio (this could be cured by an amendment), there are no material facts supporting reliance for any other alleged unspecified misrepresentation.

[104] To summarize, Ms. Mackenzie has not properly pleaded a claim for negligent misrepresentation against CAM or Mr. Cameron. Reading the ANOCC generously, Ms. Mackenzie has pleaded facts concerning the CAM website, the HIF and the Conservative Portfolio that included the HIF, such that with amendment and particularization, there might be a properly pleaded claim. Presently, however, there is not. Further, Ms. Mackenzie identified at this hearing the statements in the Summary Information Sheet and quarterly Statements of Investments as misrepresentations but they are not pleaded. I will address later whether Ms. Mackenzie should be given an opportunity to amend.

Fraudulent Misrepresentation

[105] The elements of fraudulent misrepresentation are:

> a) a false representation has been made;
>
> b) the false representation was made either (1) knowingly; (2) without belief in its truth, or (3) recklessly, that is, “careless whether it be true or false”;
>
> c) that false representation actually induced the plaintiff to act upon it; and
>
> d) the plaintiff’s actions resulted in loss.

See *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at paras. 18–21; *Valeant* at para. 122.

[106] The parties to a large extent adopted their submissions on negligent misrepresentation.

[107] In my view, the analysis is the same as for the negligent misrepresentation claim. Ms. Mackenzie has failed to plead a cause of action for fraudulent misrepresentation against CAM or Mr. Cameron. In addition, there is a complete absence of some of the elements (e.g. the requisite intent and inducement). Reading the ANOCC generously, Ms. Mackenzie has pleaded facts concerning the CAM

website, the HIF and the Conservative Portfolio that included the HIF, and in argument has identified alleged misrepresentations (not in the ANOCC), such that with amendment and particularization, there possibly could be a properly pleaded claim. I will address later whether Ms. Mackenzie should be given an opportunity to amend.

Breach of Contract

[108] As succinctly described in *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649:

> [91] A claim for breach of contract must contain sufficient particulars to identify: (a) the nature of the contract; (b) the parties to the contract; (c) the facts supporting privity of contract between the plaintiff and defendant; (d) the relevant terms of the contract; (e) which term or terms that were breached; and (f) the damages that flow from the breach.

See also *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 at para. 35.

[109] Ms. Mackenzie argues that she and the proposed class members "each has one or more contractual agreements" with the defendants and that the defendants have "breached those agreements by engaging in the "Defendants' Actions". She describes the Defendants Actions, which are essentially her allegations in the tort claims, submitting that these can "be subsumed within the breach of contract analysis".

[110] Mr. Cameron argues that the ANOCC does not plead a claim in contract against him. There is no pleading of any of the required elements, or material facts supporting them. Rather, as alleged, CAM was retained by Ms. Mackenzie and the proposed class. Further, without pleading any supporting material facts, such as the terms of the alleged contract, the ANOCC pleads a breach of alleged contractual duties (paras. 50–51) which are the same as the allegations of common law and fiduciary duties of care.

[111] The paragraphs of the ANOCC which could possibly relate to breach of contract are the same as those for negligence with some additions. Paragraphs 20 and 45 refer to the "expressed and implied terms" of Ms. Mackenzie's relationship with CAM and Mr. Cameron, but those are not identified. Paragraph 34 alleges that CAM "offered investment management services through a Managed Account

Program as well as through individual investment funds". This is an allegation of a contract with CAM. Paragraphs 38 and 49 allege that CAM and Mr. Cameron owed Ms. Mackenzie and the proposed class "a contractual and fiduciary duty of care" but this is a bald legal conclusion and not a material fact. Paragraph 46 alleges that the proposed class lost money to investment strategies that were not "agreed upon" by Ms. Mackenzie, but again no terms of the agreement are pleaded. Paragraphs 50–51 allege that the "contractual and fiduciary" duties, which are generally KYC and KYP duties, were breached, but no facts are pleaded establishing those as express or implied terms of a contract.

[112] In my view, reading the ANOCC generously, the ANOCC pleads that Ms. Mackenzie entered into a contract with CAM only because it refers to the Managed Account Program documents, which are adopted by reference into the pleadings. However, the express material terms of that contract, or the "implied terms", and when and how they were breached, are not pleaded.

[113] Turning to Ms. Mackenzie's claim against Mr. Cameron, in my view, it is plain and obvious that the ANOCC does not plead a claim in contract against him. There is no allegation that Ms. Mackenzie had a contract with him. Even if the pleadings identified above could be read as alleging that there was a contract with Mr. Cameron, there are no material facts describing the nature of the contract, the relevant express or implied terms of the contract, and how and when those terms were breached.

[114] In summary, Ms. Mackenzie has failed to properly plead a contract against the defendants. She pleads the existence of a contract with CAM, and it is possible with amendment she could properly plead the material terms and a claim for its breach. I will address later whether Ms. Mackenzie should be given an opportunity to amend.

Breach of Fiduciary Duty

[115] The general characteristics of a fiduciary relationship are:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

See *Frame v. Smith*, [1987] 2 S.C.R. 99 at para. 60, 1987 CanLII 74.

[116] There are traditional categories of relationships, referred to as *per se* fiduciary relationships, where at least some inherent rebuttable fiduciary obligation is presumed. An example of this is the solicitor-client relationship: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 33 [*Elder Advocates*]. If the relationship does not fall within one of the *per se* categories, then an *ad hoc* fiduciary duty must be established. As stated in *Elder Advocates*:

> [36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[117] In *Del Giudice v. Thompson*, 2021 ONSC 5379; aff'd 2024 ONCA 70, the Court summarized:

> [188] The indicia for an *ad hoc* fiduciary relationship, which are not a comprehensive code, but rather guidance to a court in analyzing the legal classification of a relationship are: (a) the alleged fiduciary has scope for the exercise of some discretion or power; (b) the alleged fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal interest; (c) the alleged beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (d) the alleged fiduciary either implicitly or expressly has undertaken or accepted a responsibility to act in the best interest of the alleged beneficiary and to act in accordance with a duty of loyalty. The degree of discretionary control must be equivalent or analogous to direct administration of that interest.

[118] Due to the wide variety of broker/client (or in this case financial advisor/client) relationships, they are not *per se* fiduciary relationships. The circumstances can range from complete reliance and vulnerability, to total independence where the broker simply processes orders. As a result, an *ad hoc* fiduciary relationship must be established based on the circumstances of the relationship at issue*: Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 419–420, 1994 CanLII 70.

[119] With respect to a fiduciary duty alleged to be owed by CAM, para. 34 of the ANOCC refers to the Managed Account Program, and those documents are adopted

by reference into the pleadings. Those documents show that CAM was managing Ms. Mackenzie's investments in a discretionary account, where it may be possible to infer that: (a) CAM has scope for the exercise of discretion or power; (b) CAM can unilaterally exercise that power or discretion so as to affect Ms. Mackenzie's legal interest; (c) Ms. Mackenzie is peculiarly vulnerable to CAM holding that discretion or power; and (d) CAM has undertaken and accepted a responsibility to act in the best interest of Ms. Mackenzie and to act in accordance with a duty of loyalty. The terms of that agreement also indicate that the investments would be made in consultation with the client's financial planner. However, no facts supporting these indicia are pleaded in the ANOCC.

[120] With respect to the fiduciary duty alleged to be owed by Mr. Cameron, in my view, the pleadings fail to plead any material facts to support the indicia of an *ad hoc* fiduciary relationship. The ANOCC does not allege material facts which could support the conclusion that: Mr. Cameron had the scope for exercise of discretion or power, which he could unilaterally exercise so as to affect Ms. Mackenzie's interest; that Ms. Mackenzie was peculiarly vulnerable to Mr. Cameron; or that Mr. Cameron either implicitly or expressly undertook or accepted a responsibility to act in the best interest of Ms. Mackenzie and to act in accordance with a duty of loyalty.

[121] In summary, Ms. Mackenzie has failed to properly plead a claim for breach of fiduciary duty against the defendants. Based on the discretionary account, it is possible that she might be able to plead a claim against CAM if the ANOCC were amended. I will address later whether Ms. Mackenzie should be given an opportunity to amend.

Punitive Damages

[122] Although punitive damages are not a cause of action, I address the pleadings with respect to that claim here, because it has the same difficulties as the other claims. 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.

[123] 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).

[124] Ms. Mackenzie submits that the fact which support this claim are those that underly other allegations such as fraudulent misrepresentation.

[125] The claim for punitive damages is set out at paras. 57–60 of the ANOCC. In my view, the pleadings do what *Whiten* states is insufficient. Paragraph 57 alleges that "the Defendants have acted in such a high-handed, wanton, and reckless manner as to warrant a claim for punitive damages" and para. 58 alleges that "the Defendants failed to uphold their fiduciary duty". There are no facts pled to support the conclusory allegations of high-handed malicious conduct: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 140. The pleadings do not inform Mr. Cameron or CAM of what they individually are alleged to have done that would merit punitive damages, so that they know the case to meet. It is not sufficient for Ms. Mackenzie to vaguely plead allegations such as fraud, and argue that this supports the pleading for punitive damages. She must identify with some particularity the acts or omissions she alleges support such a claim, and tie those to her claim for punitive damages.

[126] In summary, the claim for punitive damages is not sufficiently pleaded against CAM or Mr. Cameron.

Summary

[127] As set out in the lengthy discussion above, the pleadings are deficient in multiple ways. Although, on a generous reading, a limited negligence claim meets the minimum plain and obvious test, the ANOCC is not focused, and does not plead the material facts to support what Ms. Mackenzie alleges is an important part of her allegations, being the circumstances in the FPCSC and BCSEC rulings. Further, Ms. Mackenzie wishes to keep her pleadings vague and not limit her claims to this,

but does not identify other specific claims or even what other specific investments are in issue. It is an untenable position at a certification hearing.

[128] Given the circumstances in the FPCSC and BCSEC rulings and settlement agreements, it is possible there are more focused allegations within the broad allegations that could satisfy the pleadings requirements if the ANOCC were appropriately amended. It is also possible that pleadings which disclose a claim but are not as specific as they could be, would be manageable if they were combined with proposed common issues that were appropriately narrowed to be based on common circumstances. However, Ms. Mackenzie's failure to identify the gravamen of her allegations in the ANOCC and plead the material facts which support them, or having recognized what the gravamen is, to limit the ANOCC and her common issues to that, creates difficulties for not only the pleadings certification requirement, but also the other certification requirements.

[129] Given the above, and my conclusion that Ms. Mackenzie should be given an opportunity to apply to amend, I will briefly discuss the next two certification requirements, but only to the extent that they highlight the difficulty with the pleadings, and why they are generally not met. In the circumstances, it is premature to address the last two certification requirements.

Issue 2: Is there an Identifiable Class of Two or More Persons?

Legal Principles

[130] Section 4(1)(b) of the *CPA* requires that the plaintiff establish that there is an identifiable class of two or more persons.

[131] The definition of the class is important because it identifies the persons who are: entitled to notice; entitled to relief (if granted); and bound by the judgment. The proposed class definition: (1) must clearly identify potential class members by objective criteria; (2) must bear a rational relationship to the common issues asserted by all class members; and (3) should not depend on the outcome of the litigation (i.e. it cannot be merits-based): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38; *Hollick* at paras. 17, 20.

[132] The plaintiff need not show that “everyone in the class shares the same interest in the resolution” of the 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.

Analysis

[133] The ANOCC and Ms. Mackenzie’s certification application defines the proposed class as:

> All persons in Canada, including but not limited to an individual, corporations, and estates, who, at any time, invested with Chartwell Inc., Class(es) or Sub-Class(es) to be determined by the Court (hereinafter collectively referred to as the "Class Members'" or "Class”).

[134] Ms. Mackenzie refers to the FPCSC decision as establishing some basis in fact for two or more persons who invested with CAM and who had dealings with Mr. Cameron. At this hearing, Ms. Mackenzie acknowledged that the definition could perhaps be amended to restrict the dates to a period from when the Magna Funds came into existence to when Axcess took over management of the Magna Funds in 2017. However, Ms. Mackenzie did not suggest any revision, consistent with her reluctance to focus the allegations to the HIF or other circumstances, and her wish to leave the allegations as broadly framed.

[135] Mr. Cameron argues that the proposed class is overbroad. While the more focused allegations in the ANOCC are related to the “Conservative Portfolio” and the HIF, and the level of risk that particular portfolio involved, Ms. Mackenzie seeks certification on behalf of all person who at any time invested with CAM, irrespective of whether the person invested in a Conservative Portfolio or the HIF. Further, any definition which includes a reference to those who invested in the Conservative Portfolio in accordance with their own unique low-risk objectives and who then lost money because the investment portfolio was unsuitable for them, would require inherently individualized inquiries that cannot be resolved by objective means.

[136] In my view, the proposed definition exemplifies the difficulty with the broad pleadings. If, as Ms. Mackenzie submits, the basis of her claim is on the HIF, then the definition is overbroad as it would include all persons who ever invested in CAM from 2001 to 2017, whether or not they invested in the HIF, which was only in

existence from about 2009. Any definition based on being a low-risk investor or someone who was invested in a Conservative Portfolio would likely not be determinable by objective means unless there was a set Conservative Portfolio but that evidence was not tendered on this application.

[137] At this stage, given Ms. Mackenzie's submission that she ought to be given an opportunity to amend, and my conclusions on that issue, I need not address this further, other than to state that the definition needs amendment. There is some basis in fact that more than two persons invested in the HIF.

Issue 3: Do the Claims of the Class Members Raise Common Issues?

Legal Principles

[138] 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;

[139] 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.

[140] The plaintiff must adduce some basis in fact that the proposed common issue actually exists and can be answered in common on a class-wide basis: *Jensen FC* at paras. 198–208, aff'd *Jensen FCA* at paras. 77–94; *Felker v. Teva Branded Pharmaceutical Products*, 2022 BCSC 1813 at paras. 154–156.

[141] 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": …
>
> [Citations omitted.]

[142] It is an error to certify common issues based on deficient pleadings in anticipation of broad unspecific amendments: *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 118.

Analysis

[143] Ms. Mackenzie sought certification of 12 alleged common issues. These are:

> (a) Whether the defendants owed a duty to the proposed class members to exercise professional care, skill, and diligence when providing financial planning services and investment advice to them? If yes, whether the defendants breached the standard of care?
>
> (b) Whether there are damages suffered by the plaintiff and proposed class members?
>
> (c) Whether the defendants misrepresented to Ms. Mackenzie and the proposed class members that their investment strategies are of low risk and conservative?
>
> (d) Whether the defendants' misrepresentations were fraudulent, or alternatively negligent?
>
> (e) Whether the proposed class members relied on the defendants' misrepresentations?
>
> (f) Whether the defendants complied with applicable legislative and regulatory requirements?
>
> (g) Whether the defendants had a fiduciary duty towards proposed class members? If yes, whether the defendants breached the fiduciary duty?
>
> (h) Whether the defendants had an implied or express contractual duty to exercise professional care, skill and diligence when providing financial services, and investment advice to the proposed class members? If yes, whether the defendants breached the contractual duty?
>
> (i) Whether the defendants should pay exemplary or punitive damages, and if so, how much, and to whom, and how should it be distributed?
>
> (j) Whether Ms. Mackenzie and the proposed class suffered damages, and if so, what is the appropriate measure of damages?
>
> (k) Whether Ms. Mackenzie's and the proposed class' damages were caused by the defendants' negligence?
>
> (l) Whether the defendants be required to disgorge the revenues they received from their business to Ms. Mackenzie and the class members, and if so, how much and should this disgorgement be made in the aggregate and how should this disgorgement be distributed among the proposed class?

[144] In addition, Ms. Mackenzie submits that proposed common issue (a) is a "preliminary fact finding" issue that will require a determination of whether the defendants did any of the following "Defendants' Actions", being:

(i) Failed to accurately and diligently ascertain and transmit to the class all relevant information about the investments they advised the class to purchase.

(ii) Failed to determine the general investment needs and objectives including the level of risk comfortable being accepted by the class.

(iii) Failed to take a customized, strategic approach specifically focused on meeting the unique needs and concerns of the plaintiff and other class members.

(iv) Failed to make changes to the investment portfolio to accommodate changes in circumstances and objectives of the class.

(v) Failed to determine the appropriateness of the portfolios of the class in light of (d), (e), and (f).

(vi) Failed to re-evaluate the Magna High Income Fund's valuation despite the presence of risk indicators.

(vii) Calculated the net asset value of the Magna High Income Fund without having sufficient information to do so.

(viii) Failed to comply with applicable legislative and regulatory requirements.

(ix) Advised the class to make investments that the defendants deemed low-risk but in fact entailed high risks.

(x) Made statements to the class that their investments were low-risk when in fact they were high-risk.

(xi) Distributed summary sheets of funds that showed investments that the defendants advised the class to make as being low risk/less volatile when they entailed high risks.

(xi) Distributed summary sheets of funds that showed investments that the defendants advised the class to make as being low risk/less volatile when they entailed high risks.

(xii) Represented to the class, through the CAM website, that the company focuses on achieving positive returns with little risk.

[145] Ms. Mackenzie argues that all of these issues are "inherently common", that the FPCSC and BCSEC rulings and settlement agreements provide some basis in fact that the issues are common, and that significant judicial economy will be achieved by certifying them. She submits that *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232, aff'd 2006 BCCA 96, is an example of an investment case where similar issues were certified.

[146] Mr. Cameron submits that for each alleged common issue, Ms. Mackenzie has failed to establish that a common issue exists and that it can be answered in common on a class-wide basis. Mr. Cameron argues these are all "inherently individualized" issues that will inevitably require individual trials. Ms. Mackenzie's allegations are based on her own individual interactions with him. There is no basis

in fact of Mr. Cameron giving standard advice generally across the class. Aside from Ms. Mackenzie, no other proposed class member provided affidavit evidence as to their dealings with CAM or Mr. Cameron. Further, even if the Court accepts that there is some basis in fact that Mr. Cameron engaged in common advice or activities, these will require an individualized assessment for each member of the proposed class. Mr. Cameron refers to each of the allegations at para. 50 of the ANOCC, and those concerning the filling out of KYC Forms (para. 42) which are mirrored in the "Defendants' Actions" above. Each requires individualized determinations for each proposed class member, considering their own unique investment goals, time horizons, financial situation and holdings, risk profiles, investment knowledge and amounts to be invested, knowledge of CAM, and how those affected their decision to invest, when, and any causation or reliance.

[147] Finally, he submits that with respect to the FPCSC determination, his admissions are highly individualized and cannot be used to provide a basis in fact to support the common issues. This does not provide any basis in fact that the proposed class members are all the same type of investor, that they each received the same advice from Mr. Cameron, and that they each relied on that advice when investing in CAM. Rather, these admissions relate to his interactions with seven specific individuals. These individuals were all found to be "low-risk investors" based on their specific circumstances. There is no evidence to suggest that the proposed class members all had the same risk profile.

[148] Mr. Cameron submits that the BCSEC joint settlement has no bearing on this action. Nothing in the ANOCC refers to it. At this hearing, Ms. Mackenzie confirmed she is not seeking to base a claim on the *Securities Act*, but only the circumstances identified in the rulings and settlement agreement.

[149] Mr. Cameron refers to a number of case authorities that concerned misrepresentation or breach of fiduciary duty arising from investments, and the circumstances that make certification of such claims more or less likely.

[150] In *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790 [*Samos*], Justice Bauman, then of this Court, observed that, from a review of the cases granting certification, certain themes arose: "in each case, the central allegation concerned essentially a single transaction" (at para. 81); the proposed class "was largely

homogenous; the same fraud or misrepresentation was made to all", causing loss (para. 91); and "each class member's loss was easy to quantify", as the amount invested less the amount realized when the fraud or misrepresentation became generally known (at para. 92).

[151] Mr. Cameron submits that subsequent cases exemplify this, including *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (regarding one common written representation); and *0116064 B.C. Ltd. v. Alio Gold Inc.*, 2022 BCCA 85 (regarding a limited number of representations, and one common transaction).

[152] In reviewing the cases denying certification, in *Samos*, Bauman, J. noted the "marked reluctance to certify actions where there would be the need to resolve a number of issues individually, where there are differences in the claims or conflicts of interest between the proposed class members, and where, in misrepresentation cases, there is no commonality as to the representation received or the timing of receipt": *Samos* at para. 107.

[153] Mr. Cameron argues that, generally, a negligent misrepresentation claim in securities cases is unsuitable for determination, because it is a reliance-based claim that gives rise to individual issues of causation and reliance that are not manageable in a class proceeding: *Bayens v. Kinross Corporation*, 2014 ONCA 901 at para. 136.

[154] Mr. Cameron submits that where misrepresentations are not common to the class, various individual issues arose: (1) what are the representations that were made or known to each investor, and when; (2) the investment experience and sophistication of each investor at the relevant times; (3) what recommendations were made to each investor; (4) the connection, if any, between the alleged misrepresentations and each investor's decision to invest; (5) what units or shares were held by each investor at the relevant times; and (6) the date of acquisition and price for each investor's investment: *Bayens* at para. 128.

[155] Mr. Cameron further argues that cases involving allegations of negligence and breach of contract for an investment advisor's failure to properly advise clients based on KYC documents are highly fact specific: *Miller v. RBC Dominion Securities Inc.*,

2023 BCCA 324; and *Connor Financial Services International Inc. v. Carver*, 2015 BCSC 2320.These are not certification cases, but exemplify the inquiry required.

[156] Finally, Mr. Cameron submits that where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) a workable methodology for determining those issues on a class-wide basis. In this case, the proposed class members' claims for lost investments will also be individualized, as quantifying those losses will require an assessment of what the investors would have done and when, if the defendants did not commit their alleged wrongdoing. The claims for inconvenience and mental distress are also individualized.

[157] I generally agree with Mr. Cameron's analysis of the case authorities regarding certification applications where investments are involved. They are highly fact dependent. I have already found that Ms. Mackenzie has not pleaded a viable cause of action for almost all of these issues. Given the conclusion on the pleadings and my ultimate decision to allow Ms. Mackenzie to apply to amend, I do not intend to address all of them, but to generally address some of the difficulties and why on the present broad framing of those issues, in the context of the broad pleadings, they are not common issues that can be determined on a class-wide basis.

[158] I start with proposed common issue (a), which is the only proposed common issue supported by a properly pleaded cause of action. This issue is whether the defendants owed a duty of care to the proposed class, and if so, if it was breached. Within this, Ms. Mackenzie incorporates the further 12 issues concerning the "Defendants' Actions" to be determined. Ms. Mackenzie submits that these are focused on the defendants' actions and are "inherently global" and to the extent evidence might be required from the plaintiff, there are "small and finite set of categories" into which class members fall. She did not identify what those categories were.

[159] I do not agree that they are all inherently common. As presently framed, almost all of these require individual determinations. Looking only at common issue (a), it is a question of mixed fact and law. Either by itself, or in combination with the vague allegations in the ANOCC, it is too broadly framed. It could refer to a myriad of

circumstances that are not common. The duty and standard of care that is owed depends on the individual facts of each situation. Accepting that a class or sub-class of individuals may have entered into the same Managed Account Agreement with CAM, there is no basis in fact that they had the same advisor as Ms. Mackenzie, or received the same advice, or had the same investment objectives. Even for those who had interactions with Mr. Cameron, there is no basis in fact that they were similarly situated with respect to all of the many factors that go into determining the existence and scope of the duty of care and the standard of care.

[160] Considering the twelve "Defendants' Actions", most of them require individualized inquiries. For example, for issue (i), without specifying in the pleadings what information the defendants should have provided to the class (which would effectively narrow the issue), what is "relevant" could be anything. What is relevant to one investor may not be to another. As another example, issue (iii) is whether the defendants "failed to take a customized, strategic approach specifically focused on meeting the unique needs and concerns of the plaintiff and other class members". There is no basis in fact of "common", "unique needs and concerns". This can only require individual determination. Issues (ix) and (x) do not identify what investment(s) are referred to. Given the vague pleadings and Ms. Mackenzie's wish to keep those pleadings broad, it could be any investment at any time. There is nothing that effectively narrows that issue. There is no basis in fact that this is a common issue that can be answered across the class.

[161] Some of the twelve Defendants' Actions could be common issues if the pleadings supported them. Issues (vi) and (vii) ask whether the defendants failed to re-evaluate the HIF fund's valuation despite the presence of risk indicators, and calculated the net asset value of the HIF without having sufficient information to do so. Those allegations are not made in the ANOCC. There is some basis in fact in the BCSEC ruling and settlement agreement that these would be common, and could be answered on a class-wide basis as they would not require evidence from individual class members nor individual determination. As another example, issue (xi) refers to the Summary Information Sheets containing negligent misrepresentations, but this has not ben pleaded. If there were some basis in fact that these were distributed class-wide (as suggested by Ms. Mackenzie in oral submissions), there is potentially

a common issue that could be crafted, although there would likely still be an issue whether reliance could be determined on a class-wide basis. I also note that the Summary Investment Sheet refers to all five Magna Funds not just the HIF.

[162] Returning to the proposed common issues, issue (b) asks whether the defendants have suffered damages. That depends entirely on the allegation. If the allegations remain broad, then it could be for any investment, and there is no basis in fact for it being common or capable of being answered in common across the class.

[163] Common issues (c) to (e) address the misrepresentation claims which have not been properly pleaded, so there is no claim to support the proposed issues. However, putting that aside for the moment, in reply submissions, Ms. Mackenzie pointed to the market value of the HIF stated on her quarterly Statements of Investments, as being a misrepresentation that was likely made to the proposed class. The market value representation could potentially be a misrepresentation, if it was pleaded. There might be some basis in fact for a narrower question, such as whether the representation was false or inaccurate, or which might address the defendants' knowledge.

[164] Ms. Mackenzie did not address how reliance might be determined on a class-wide basis. Whether it could, depends on the alleged misrepresentation. Reliance or inducement are typically individualized inquiries. However, in some cases plaintiffs have worked around this. For example, in *Collette*, the pleadings and common issues which were ultimately certified were very narrowly framed in order to overcome the need for individual inquiries. Ms. Mackenzie submitted that her allegations were similar to those as in *Collette*. I do not agree. The pleadings and certified common issues in *Collette* were focused on two specific investments, specific allegations of breach of the standard of care, and a specific time period.

[165] Similar difficulties arise with the other common proposed issues, which broadly ask if the cause of action is established. The difficulties flow from the broadly framed allegations, which lack the material facts supporting them, and the circumstances for considering whether there is some basis in fact that the issue is common and can be determined on a class-wide basis without individual inquiries.

[166] Finally, I do not agree with Ms. Mackenzie's submission that her pleadings and common issues are similar to those in *Sharbern*. That case, like *Collette*, was very focused on specific allegations. The fiduciary duty in that case was alleged to arise out of one common document and the plaintiffs were not relying upon any other circumstances to establish the duty. The misrepresentation claims were specific and were contained in offering memoranda provided to the class.

Whether to Permit Amendment?

[167] Ms. Mackenzie submits that if her pleadings or materials are not sufficient for certification, rather than dismissing her application, she should be permitted to seek leave to amend and the hearing should be adjourned for that purpose.

[168] Not surprisingly, Mr. Cameron opposes any adjournment of this hearing, or opportunity for Ms. Mackenzie to apply to amend her pleadings and certification materials. He argues that extensive submissions were exchanged between the parties in advance of this hearing, and Ms. Mackenzie did not at any time propose or suggest any amendments to her pleadings, or the common issues in advance of the hearing, or during the hearing.

[169] 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".

[170] The issue is whether it is in the interests of justice to adjourn this hearing and permit Ms. Mackenzie to apply to amend her pleadings and common issues. Relevant factors include the length of time Ms. Mackenzie 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; *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* 2021 BCCA 85 at paras. 59–60; *Sandhu* at paras. 44–46.

[171] This is not a situation where, after multiple attempts, Ms. Mackenzie has been unable to plead facts that could found a cause of action, such that the Court might conclude there are no such facts and dismiss the opportunity to further apply to amend. Ms. Mackenzie did not provide specific proposed amendments to the

pleadings; however, the nature of the amendments was not entirely left open either. Ms. Mackenzie identified potential focused claims, arising out of the FPCSC and BCSEC rulings and settlement agreements, which possibly could be amenable to a class proceeding. I am not deciding this, but only acknowledging the possibility.

[172] Ms. Mackenzie's counsel stated candidly that the broad pleadings were a tactical decision because they do not know how claims will evolve as they are contacted by proposed class members. While that concern may be understandable at the very beginning, it does not obviate the need to properly plead causes of action, or more to the point, to address the deficiencies which were brought to their attention prior to the certification hearing.

[173] If this were not a certification application and simply an application to amend the ANOCC, leave would typically be liberally given, assuming there was no non-compensable prejudice to the defendant. However, this comes late in the day, after large amounts of time and resources have been consumed. Between the parties, over 200 case authorities and hundreds of pages of written argument were filed. There was a case management order for the exchange of submissions in advance of the hearing, in part to avoid situations like this. Mr. Cameron's submissions were detailed and pointed out the deficiencies in Ms. Mackenzie's pleadings and materials. Ms. Mackenzie apparently did not agree with that position, but I have accepted many of Mr. Cameron's arguments.

[174] I have also considered the objectives of class proceedings, and in particular access to justice. Ms. Mackenzie and the proposed class have significant interests at stake. Ms. Mackenzie states that she lost over $200,000, her retirement savings. Others in the proposed class may have as well. The seven people who complained to the FPCSC are stated to have lost $1 million. In my view her interests and those of the proposed class should not be prejudiced because of what is essentially, at this stage, a pleadings problem, where there are potential viable claims which have been identified, that could be pleaded.

[175] Considering all of the above, I conclude that the interests of justice weigh in favour of Ms. Mackenzie being given an opportunity to apply to amend her pleadings and certification materials.

Order

[176] Ms. Mackenzie's certification application is adjourned. If she wishes to apply to amend her pleadings and certification materials, she has 90 days from the date of these reasons to file and serve her application materials. Ms. Mackenzie is directed to within one week obtain from Supreme Court Scheduling a date for a case planning conference to be convened at 9:00 a.m. within the next 45 days.

"Norell J."