IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Creery v. Match Group LLC,*
2024 BCSC 149

Date: 20240201
Docket: S213988
Registry: Vancouver

Between:

Kevin Creery

Plaintiff

And

Match Group LLC

Defendant

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiff:	S. Turner S. Jaworski R. Matheuszik
Counsel for the Defendant:	D. Neave R. von Ruti
Place and Dates of Hearing:	Vancouver, B.C. April 24-28, 2023 June 23 & 26, 2023 October 6, 2023
Place and Date of Judgment:	Vancouver, B.C. February 1, 2024

Introduction

[1] The plaintiff, Mr. Creery has brought an application seeking to certify this action as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "certification application").

[2] Originally this action was commenced by Mr. Jacob Breum, in April 2021, against the defendants identified as Match Group Inc. f/k/a Tinder Inc. and Match Group LLC ("Tinder") (the "NOCC").

[3] Tinder is a means of 'connection between prospective romantic partners'. It is a 'prominent dating app' available for public consumption in many countries, including Canada. There is no cost to use Tinder. It is alleged Tinder generates income by selling to consumers what have been referred to as Premium Features. These features are also referenced as 'add ons'. A consumer pays fees, monthly or otherwise, for a particular feature. It is also common ground that the price of these features has an age component. The cost to a consumer under the age of 29 is lower than the cost to purchase by a consumer over 29 years of age. This is also referenced from time to time by the defendant as a 'youth discount'. One such feature available to consumers is referenced as 'Tinder Gold'.

[4] It is, or at least was, alleged by Mr. Breum that he purchased Tinder Gold and alleged the circumstances of that purchase and sale of Tinder Gold is in violation of British Columbia legislation, namely the *Business Practises and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*"); and other similar provincial consumer protection legislation throughout Canada.

[5] Mr. Breum sought to certify the action as a class proceeding.

[6] The allegations contained in the NOCC fell broadly into two categories of complaint.

[7] Mr. Breum alleged the defendants pursued a course of manipulative and deceptive practices to 'induce and compel' users to purchase the Premium Features.

The word fraud is not contained in the pleadings but it is clearly alleged there was deliberate unlawful conduct of deception and dishonesty, on the part of Tinder, for the purposes of inducing the consumer to purchase the product. In other words, fraud.

[8] The second category of allegation was more benign. It alleged Tinder discriminated against its users based upon their age, in violation of the *BPCPA*.

[9] In May 2022, the defendant brought an application to strike the NOCC as disclosing no reasonable cause of action; or alternatively on the basis the claim was unnecessary, frivolous, vexatious or otherwise an abuse of process (the "motion to strike"). This application was brought pursuant to Rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[10] In February 2023 however, pending the motion to strike, an amended notice of civil claim was filed (the "ANOCC"). Mr. Kevin Creery replaced Mr. Breum as plaintiff. In addition the sole remaining defendant is Match Group LLC. The allegation sounding in fraud was largely abandoned. The claim now primarily rests on what is referenced as age discrimination. It is now alleged Tinder has "willfully concealed the age based discrimination from its users and class members". This, it is alleged, amounts to "unfair and unconscionable business practises" per *BPCPA*; and other provincial legislation. It is said Tinder knew or ought to have known this concealment amounted to such a prohibited practice.

[11] In addition, shortly thereafter, on February 15, 2023, the plaintiff filed an amended notice of application for certification, now relating to the ANOCC.

[12] In any event, upon the application for certification coming on for hearing in April 2023, the plaintiff also presented to the court an unfiled proposed further amended notice of civil claim (the "FANOCC") (the "amendment application"); to be heard as part of the certification application. The defendant opposed the amendment application and the certification application.

[13] The application to strike the NOCC remained extant. The defendant announced it relied on its written submission in this regard not only relating to the NOCC, but as well the ANOCC. Indeed, ultimately, the defendant relied on the same written material in opposing the application to amend relating to the FANOCC.

[14] At the hearing, the parties purported to address the amendment application; the motion to strike, and the requirements for certification pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; namely those set out in s. 4:

> (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following: …

[15] The parties appeared content to proceed with the simultaneous hearing of all applications, notwithstanding there was no certainty as to the form of the pleadings that purported to be the subject matter of the certification application. The advice to the court by the parties was that this approach was business as usual in class proceeding litigation. In addition, the defendant signalled its intention to file an application for summary judgment to perhaps be heard, as well, during the course of the hearing of the applications.

[16] While the parties were content to proceed in this fashion, the court was not so content. Ultimately the parties agreed, albeit perhaps reluctantly, to focus their submissions, and to seek an initial decision from the court on the state of the pleadings; before embarking upon the certification application and any suggestion of a summary judgment application.

[17] In my view this was, and is, the appropriate approach, at least in the particular circumstances at bar. The policy considerations underpinning the class proceedings legislation quite properly focus on providing timely and affordable access to justice. Courts must be ever mindful of these goals concerning sequencing of applications, and the hearing and determination of applications in the course of the litigation.

[18] That said, the proceeding before the court is not a class proceeding. It is, at this point, a claim by Mr. Creery. In this context, the simultaneous hearing of a mosh pit of applications, the outcome of each, in whole or in part, informed by the result of the other; is not consistent with the court's overarching duty to facilitate the fair and orderly unfolding of proceedings. The approach inevitably required submissions of a hypothetical nature; necessitated by the unresolved state of the pleadings. It was, at least from my perspective, not entirely satisfactory.

[19] In the result, these reasons address two applications. The application to amend and file the FANOCC; and the defendant's resistance to the amendment application, in the form of the motion to strike the proposed FANOCC. In the event the FANOCC amendments do not survive the challenge; it is clear the ANOCC would not survive. Similarly, the outcome of the applications is determinative as it relates to the claims pursuant to other provincial legislation.

[20] For the reasons that follow I have concluded it is not plain and obvious that the plaintiff's causes of action under ss. 4-5, 8-9 of the *BPCPA* are bound to fail. It is also my view that the material does not support a conclusion that it is appropriate to dismiss the action as frivolous, vexatious, unnecessary or otherwise an abuse of process. Subject to my findings below, I allow the amendment and dismiss the motion to strike.

[21] I also find however that the claim in unjust enrichment and the allegations relating to alleged breaches of s. 380(2) of the *Criminal Code of Canada* are fatally deficient and are struck.

The Proposed Pleadings: FANOCC

[22] The material aspects of the pleadings are as follows:

> 1. The advent of smartphones has led to new means of connection between prospective romantic partners, including through the use of so-called "dating apps". Foremost among these is Tinder, designed and operated by the Defendant. Unlike in real-life interactions, connections between users are mediated through the Tinder App. The Tinder App is free to use, but Tinder makes money by selling Premium Features. From a time unknown to the Plaintiff but well known to the Defendants, contrary to consumer protection legislation in British Columbia and other Canadian provinces, the Defendants have unlawfully and secretly discriminated against users based on age by charging Class Members age 29 and over more for the Premium Features. Through this suit, Canadian Tinder users age 29 and older seek to hold the Defendants accountable for this unlawful conduct, and to recover their losses.
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> …
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> 17. Tinder sells the Premium Features directly to users of its app and website, and is a supplier of those services. Users of the Tinder app and website purchase the Premium Features and are consumers of those services. The nature of the Tinder service and the Premium Features, online dating services, is such that the purchase of the Premium Features is by nature for personal use.
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> …
>
> 19. At all times, the terms of the consumer transaction were dictated by Tinder, and were presented to consumers including the plaintiff and class members on a "take it or leave it basis".
>
> …
>
> 20. At all times Tinder willfully concealed the fact that they charged users age 29 and over more for the exact same Premium Features as users under the age of 29. The defendants did not disclose this age-based differential pricing on the Tinder app or the Tinder website. The Plaintiff and Class Members were unable to understand or appreciate this aspect of the consumer transaction because it was not apparent to them.
>
> 21. At all times the defendant failed to disclose the existence of age-based differential pricing, leaving the Plaintiff and Class Members ignorant of the existence of this pricing practice. This ignorance arose from the inequality of bargaining power between Tinder and Class Members, as Tinder at all times controlled every aspect of the Tinder app and Tinder website, and the terms of the consumer transactions related to the Premium Features therein.

22. Tinder discriminates against its users based on their age. Specifically, Tinder charges a higher price to users for the same Premium Features based on their registered age in the Tinder App, as shown below:

Users under age 29	**Users age 29 and older**
Get Tinder Gold® 6 months $10.00/mo … $59.99	*Get Tinder Gold®* 6 months $20.00/mo … $119.99
Get Tinder Plus® 6 months $6.66/mo … $39.99	*Get Tinder Plus®* 6 months $13.33/mo … $79.99

…

25. Tinder has willfully concealed the age-based pricing discrimination from its users and Class Members. On February 6, 2022, Tinder publicly acknowledged its age-based pricing discrimination and announced it would stop the practice by the end of Q2 2022.

…

28. The Plaintiff and Class members have suffered damages and loss due to the age-based pricing in the amount of the difference between what Tinder charged users under the age of 29 years old for the Premium Features, and the higher price that it charged Class Members for the exact same features without their knowledge. Tinder has obtained a corresponding benefit in the form of the difference between what it charged users under the age of 29 years old for the Premium Features, and the higher price that it charged Class Members for the exact same features without their knowledge. Those benefits were acquired by the Defendants from the Plaintiff and Class Members as a result of their contraventions of the *BPCPA* and related consumer protection legislation, set out below in Part 3. …

LEGAL BASIS

…

40. Tinder is a “supplier”, within the meaning of s. 1 of the *BPCPA*. The *BPCPA* does not require privity of the contract between suppliers and consumers.

> 41. The payment for the purchase of Premium Features is a "consumer transaction", within the meaning of s. 1 of the *BPCPA*.
>
> 42. By the conduct set out above, Tinder has breached ss 4-5 and 8-9 of the *BPCPA*, and its actions constitute unfair and unconscionable business practices. Tinder knew or ought to have known that charging Class Members more for the same services while willfully and deliberately concealing the overcharge from Class Members was and is unconscionable.
>
> 43. As a result of Tinder's action, the Plaintiffs and Class Members have suffered damages and loss in the amount of the overcharge.
>
> 44. In particular, Tinder's actions have breached *inter alia* the *BPCPA*, s 8, whether or not the factors in ss 8(3) are present in any individual case, and under s-ss 8(3) (b), (c) and (e).
>
> 45. Specifically, Tinder took advantage of the inability of consumers per *BPCPA*, s-s 8(3)(b), including the Plaintiff Creery and Class Members, to reasonably protect their own interests because of their ignorance or inability to understand the character or nature of the consumer transaction and Tinder's misconduct within it, as set out above, based on their total control over the service and their deliberate concealment of the higher price they were charging the Plaintiff and Class Members for the same service. This informational imbalance constituted an inequality of bargaining power between Tinder on the one hand and the Plaintiff and Class Members on the other. This inequality of bargaining power resulted in an undue advantage for Tinder and an improvident bargain for Class Members who unwittingly paid more than non-Class Members for an identical service. …
>
> [Emphasis in original.]

Analysis

The Plain and Obvious Standard

[23] The requirements under s. 4(1)(a) of the *BPCPA* and on a motion to strike under Rule 9-5(1)(a) are assessed under the same standard: the plain and obvious standard: *Live Nation Entertainment Inc. v. Gomel*, 2023 BCCA 274 at para. 61. A plaintiff satisfies this requirement unless it is plain and obvious that their claim cannot succeed: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25, *Pro-Sys Consultants Inc. v. Microsoft Corporation*, 2013 SCC 57 at para. 63. In other words, the plaintiff must satisfy the judge that the action is not bound to fail: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17.

[24] In my view, the jurisprudence reflects the proposition that striking a pleading pursuant to Rule 9-5(1)(a) is a drastic and heavy-handed remedy and ought to be only granted in glaring circumstances.

[25] In deciding whether pleadings disclose a cause of action, the judge should read the pleadings generously (*Finkel*, at para. 17); the focus is on form over substance: *Hollick* at para. 16. In reading the pleadings in this way, the court should consider whether inadequacies in form could be remedied by amendment: *Finkel* at para. 17. The court must take all pleaded facts to be true unless they are incapable of proof: *Watson v. Bank of America Corp.*, 2014 BCSC 532 at para. 60; *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para. 54. Accordingly, the court does not assess any evidence on an application for certification or motion to strike.

[26] The approach does not allow for an extensive assessment of the frailties or complexities that a plaintiff may face in establishing its case at trial. In addition, s. 10(1) of the *BPCPA* gives the court the power to decertify the action at any time if the conditions for certification are no longer met, allowing the court to respond to additional information that may come to light after certification: *Pro-Sys*, at para. 105.

[27] The plain and obvious standard is therefore low, with a view to allowing class action claims—including novel claims and those that may require an expansion of the law as it currently stands—to go forward if they have any chance of success: *Finkel* at para. 17 and *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at para. 53. The same applies on a motion to strike pleadings, a claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. The absence of jurisprudence fully settling an issue may actually be a good reason to resist striking a claim at the pleadings stage: *Finkel* at para. 17, citing *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, aff'd 2012 ONSC 463 at paras. 61, 74. Although the plain and obvious standard is low, "merely symbolic scrutiny of the claim will not suffice": *Finkel* at para. 15, citing *Sherry* at para. 51.

The *BPCPA* Claims

[28] The alleged breaches of the *BPCPA* plead by the plaintiff will be discussed below. The Supreme Court of Canada's statement in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37 must frame the analysis. The Court held that the *BPCPA* must be interpreted generously in favour of consumers, given its statutory purpose of consumer protection. Further, our Court of Appeal in *Finkel* at para. 58 set out the *BPCPA*'s other legislative objectives, including consistency and fairness for all participants in the consumer marketplace. These principles should inform the plain and obvious analysis of the plaintiffs pleadings.

Section 171: Loss and Damages

[29] The defendant took issue with fact that the plaintiff had not plead in the ANOCC that the plaintiff or prospective class members suffered any loss or damage as a result of the transaction at issue. The defendant says that the plaintiff erroneously plead only that the plaintiffs "would have" a claim for damages under s. 171 of the *BPCPA*, which is found at para. 50 of the ANOCC and para. 51 of the FANOCC.

[30] In the proposed FANOCC, the plaintiff adds the following paragraphs:

> 28.The Plaintiff and Class Members have suffered damages and loss due to the age-based pricing in the amount of the difference between what Tinder charged users under the age of 29 years old for the Premium Features, and the higher price that it charged Class Members for the exact same features without their knowledge. Tinder has obtained a corresponding benefit in the form of the difference between what it charged users under the age of 29 years old for the Premium Features, and the higher price that it charged Class Members for the exact same features without their knowledge. Those benefits were acquired by the Defendants from the Plaintiff and Class Members as a result of their contraventions of the *BPCPA* and related consumer protection legislation, set out below in Part 3.
>
> …
>
> 43. As a result of Tinder's action, the Plaintiffs and Class Members have suffered damages and loss in the amount of the overcharge.

[31] In my view, the defendant correctly pointed out the deficiencies in the plaintiff's pleadings. The plaintiff has remedied the issue by alleging that the plaintiff suffered loss or damage due to the defendant's breaches under the *BPCPA*.

[32] As stated, the loss is the amount of the difference between what Tinder charged users under the age of 29 years old for the Premium Features, and the higher price that it charged Class Members for the exact same features without their knowledge. While the language of "would have" in para. 50 of the ANOCC remains in para. 51 of the FANOCC, given the plain and obvious standard and the requirement that courts permit amendment where possible, the plaintiffs claim should not be struck for a matter of poor drafting and choice of language.

[33] The substance is in essence the same had the plaintiff simply plead that he and class members "have" a claim under s. 171. Further, by adding paras. 28 and 43 to the FANOCC, the plaintiff adequately addresses the defendant's arguments and the stated deficiencies, such that they have now plead the material facts required for a claim for damages under s. 171 of the *BPCPA*.

Sections 4 and 5: Deceptive Practices

[34] The plaintiff also says that Tinder has engaged in deceptive practices under ss. 4 and 5 of the *BPCPA*, which, of relevance to the case at bar, sets out the following:

> **Deceptive acts or practices**
>
> 4 (1) In this Division:
>
> "deceptive act or practice" means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> "representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.
>
> (2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

> (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
>
> …
>
> (b) a representation by a supplier
>
> (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,
>
> …
>
> (c) a representation by a supplier about the total price of goods or services if
>
> (1) a person could reasonably conclude that a price benefit or advantage exists but it does not,
>
> **Prohibition and burden of proof**
>
> 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[35] It is apparent, under s. 4, there are two elements to a deceptive act: (1) representations or conduct which (2) has the "capability, tendency or effect of deceiving or misleading a consumer." Without limiting section 4(1), ss. 4(3)(b) and (c) provide factors that are indicative of deceptive practices, but they require a plaintiff to show the same elements as s. 4 generally.

[36] In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260, our Court of Appeal held that a positive statement is not required for there to be a representation made under s. 4; an omission or non-disclosure of a material fact is sufficient to constitute a representation: paras. 73 and 80. Further, the plaintiff need not plead that they relied on the representation, as reliance is not a necessary precondition to a cause of action under ss. 4-5: *Sutherland v Electronic Arts Inc.*, 2023 BCSC 372 at para. 72, citing *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699 at para. 61; *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at para. 97.

[37] The plaintiff pleads in the FANOCC:

> 48. In addition, Tinder's actions have breached inter alia the BPCPA, s. 4. Specifically, Tinder's representations in connection with the promotion of the

> Premium Features, breached in s. 4, including s-ss 4(3)(b)(vi) and (c)(i), whether or not the factors in ss 4(3) are present in any individual case.
>
> 49. Specifically, per BPCPA, s-s 4(3)(b)(vi), the failure to disclose to Class Members that a lower price was being charged to users less than 29 was a failure to state a material fact, with a misleading effect, because it allowed Class Members to be given the impression that they were paying the same price for Premium Features as other users, when they were not.

[38] The material facts the plaintiff pleads in support of his claim are:

a) Tinder discriminates against its users based on their age (para. 22);

b) Tinder charges nearly twice as much for Premium Features—for the exact same service—to users over age 29 solely because of their age and this differential treatment is not disclosed to users who are in either age category (para 23);

c) at all times, Tinder willfully concealed the fact that they charged users age 29 and over more for the exact same Premium Features as users under the age of 29. The defendants did not disclose this age-based differential pricing on the Tinder app or the Tinder website. The plaintiff and prospective class members were not aware of this aspect of the transaction (para. 20);

[39] In my view, the FANOCC contains the material facts required for a claim under s. 4-5 of the *BPCPA*. The plaintiff says the “representation” was Tinder’s failure to disclose the differential pricing scheme to the plaintiff or other class members, which is an acceptable claim given that an omission can be considered a representation: *Stanway* at paras. 73 and 80. The plaintiff says that this omission was misleading because class members would have thought they were paying the same price for Premium Features as other users. This appears to fit squarely in what is required at the pleadings stage for a cause of action under s. 4-5.

[40] With regard to s. 4(3)(c)(i), the plaintiff has not plead the requisite material facts. However, this failure is not fatal to the pleadings under ss. 4-5 generally, as s. 4(3)(c)(i), as noted above, simply sets out indicia of deceptive practices.

[41] Of course, the plaintiff may struggle at trial to demonstrate how Tinder's actions were misleading—one can imagine that these types of pricing schemes exist everywhere without issue; however, the question of how is a matter for a trial on the merits.

Sections 8 and 9: Unconscionable Acts or Practices

[42] The plaintiff also pleads that Tinder has engaged in unconscionable acts or practices under s. 8-9 of the BPCPA, which is set out, as relevant to this claim, as follows:

> **Unconscionable acts or practices**
>
> **8** (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect the consumer or guarantor's own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> **Prohibition and burden of proof**
>
> **9** (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

[43] Section 8 of the *BPCPA* does not define an "unconscionable" act or practice.

[44] Our Court of Appeal confirmed in *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 54 that the elements of unconscionability under s. 8 of the *BPCPA* are the same as at common law.

[45] At common law, unconscionability is an equitable doctrine used to set aside unfair agreements that were formed due to an inequality of bargaining power: *Uber Technologies v. Heller*, 2020 SCC 16 at para. 54. The doctrine has two elements: an inequality of bargaining power and a resulting improvident bargain: *Uber* at paras. 64-65.

[46] As the Court clarifies in *Uber*, inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process: para. 66. The inequality can be a matter of differences in wealth, knowledge or experiences, but can also apply to a wide variety of transactional weaknesses, either personal or circumstantial: para. 67.

[47] As to the second element, a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable: *Uber* at para. 74. Such improvidence is determined by undertaking a contextual inquiry and "the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized": *Uber* at para. 75.

[48] Assuming the plead facts to be true, in my view, it is not plain and obvious that the claim is bound to fail. At para. 45 of the FANOCC, the plaintiff pleads the following:

> 45. Specifically, Tinder took advantage of the inability of consumers per *BPCPA*, s. 8(3)(b), including the Plaintiff Creery and Class Members, to reasonably protect their own interests because of their ignorance or inability to understand the character or nature of the consumer transaction and Tinder's misconduct within it, as set out above, based on their total control of the service and their deliberate concealment of the higher price they were charging the Plaintiff and Class Members for the same service. This informational imbalance constituted an inequality of bargaining power between Tinder on the one hand and the Plaintiff and Class Members on the other. This inequality of bargaining power resulted in an undue advantage for Tinder and an improvident bargain for Class Members who unwittingly paid more than non-Class Members for an identical service.

[49] In support of its claims that the transaction between the prospective representative plaintiff and the defendant was unconscionable, the plaintiff pleads in the FANOCC the following material facts:

a) Tinder sells the Premium Features directly to its app and website users and is a supplier of those services (para. 17);

b) Tinder dictated all terms of the consumer transaction and were presented to consumers on a take it or leave it basis (para. 19);

c) Tinder willfully concealed the fact that they charged users age 29 and over more for the exact same Premium Features as users under the age of 29, and thus the plaintiff and class members were unable to understand or appreciate this aspect of the transaction (para. 20);

d) the plaintiffs were ignorant to the existence of the differential pricing scheme because Tinder controlled every aspect of the Tinder app, the Tinder website, and all terms of the consumer transactions related to the Premium Features therein (para. 21);

e) Tinder charged nearly twice as much to users over age 29 solely because of their age (para. 23); and

f) that Tinder employed its total control over the Tinder app to exploit their users (para. 24).

[50] In my opinion, the plaintiff has plead the elements required for a claim in unconscionability. The plaintiffs claim clearly suggests that there was an inequality in bargaining power stemming from the plaintiffs lack of knowledge about the price differential. The improvident bargain arose because the plaintiff and prospective class members did not know about the price differential—they paid nearly double the price for the exact same service. It may well be difficult at trial for the plaintiff to prove that the advantage Tinder received from charging the higher price was

'undue'; however, the question at the stage is not whether the claim is likely to succeed.

[51] Considering that material facts are not evidence (*Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 49), in my view, these material facts, if proven, could prove a claim of unconscionability. For example, at trial, the plaintiff could lead evidence to demonstrate that Tinder has total control over its app features. The plaintiff could also show that Tinder showed one price to some users and another to others for the same service, such that users would be ignorant to the improvidence of the bargain being offered. It cannot be said, in my view, these material facts are incapable of proof.

[52] Given my view of the plaintiffs claims under s. 8 of the *BPCPA* generally, I do not consider it necessary to independently consider each of ss. 8(3)(b), (c), and (e), as the common law test for unconscionability still applies. As with s. 4 of the *BPCPA*, these subsections provide factors to determine whether an unconscionable act or practice has been committed and s. 8(3) specifically indicates that they do not limit the general provision.

[53] In *Pantusa v. Parkland Fuel Corporation*, 2022 BCSC 322, this court considered a plaintiffs pleading that an unconscionable bargain resulted from the defendant's alleged overcharging the plaintiff for a consumer product. The plaintiff plead that the defendants dictated the terms by which wholesale gasoline was priced and sold at all material times and the plaintiff and proposed class did not have any visibility or transparency regarding the basis for the pricing, nor the imposition of the additional overcharge. The plaintiffs also plead that "the Defendants took advantage of the inability of consumers, per the *BPCPA*, s-s 8(3)(b), including the Plaintiff and consumer subclass members, to reasonably protect their own interests because of their ignorance or inability to understand the character or nature of the consumer transaction and Defendants' misconduct underlying it in the form of the imposition of the Marginal Barrel Pricing Scheme, including the use of the PNW Spot Price

specifically, and the further imposition of the Additional Overcharge, resulting from the Defendants' total control over the wholesale gasoline supply and pricing to the Retail Gasoline Market."

[54] The Court agreed that the plaintiffs had properly plead a standalone cause of action for unconscionable acts or practices under the *BPCPA*: para. 100. In light of the jurisprudence that cautions against dismissing an action at the pleadings stage in the face of a novel claim and those calling for a broad and liberal interpretation of the *BPCPA*, Justice Milman would have been reluctant to dismiss the pleadings: para. 111. However, the claim was ultimately struck as the defendants brought a motion for summary trial under Rule 9-6 and he was required to determine the issue with reference to the evidence.

Criminal Code **Claim**

[55] The plaintiff pleads a claim of unjust enrichment under s. 380(2) of the *Criminal Code* at paragraph 51 of the FANOCC:

> 50. The Plaintiff Creery and Class Members have an interest in the funds received from them by Tinder on account of the Premium Features and obtained in breach of ss 4-5, 8-9 and which are not binding per s 10(1), and they are entitled to the restoration of those amounts. The Plaintiff and Class Members would have a right to make a claim for damages under the *BPCPA*, s. 171 and a claim for unjust enrichment for which the unlawful act is a breach of the *Criminal Code*, s. 380(2).

Section 380(2) of the *Criminal Code* states the following:

> **Affecting public market**
>
> **(2)** Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[56] To summarize, the plaintiffs claim in unjust enrichment suggests that the unlawful act underlying the reason for enrichment is breach of the *Criminal Code*, namely, s. 380(2) that prevents fraud that affects the public market price of anything offered for sale to the public. I agree with the defendants that it is plain and obvious that this cause of action is bound to fail and should be struck accordingly.

[57] As noted in the defendant's submissions, the elements of an unjust enrichment claim are: (a) an enrichment of the defendant; (b) a corresponding deprivation of the plaintiffs; and (c) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[58] This issue can be resolved on the basis of the "absence of juristic reason" analysis. As set out in Garland at para. 44 and confirmed in *Pacific National Investments Inc. v. Victoria (City)*, 2004 SCC 75 at para. 23, the existence of a contract is an established category of juristic reason that denies the plaintiff recovery under the doctrine of unjust enrichment. The expression of "juristic reason" is a matter of law rather than conscience: *Pacific National Investments* at para. 23 and, applying the *Garland* test, the facts of this case do not fit within the doctrine of unjust enrichment accordingly.

[59] Although the juristic reason analysis resolves the issue, I also point to the plaintiffs failure to plead any particulars regarding the criminal fraud allegation as further reason that this cause of action must be struck. Rule 3-7(18) requires a party pleading fraud to set out full particulars including dates. The plaintiff has failed to do so.

[60] The defendant also relies on Rule 9-5(1)(b) and (d) of the *Supreme Court Civil Rules*. The defendant invites the court to dismiss the action with costs.

[61] I do not identify a pleading that can be properly characterized as frivolous or vexatious. The basis of this aspect of the application, in my view, really rests on the proposition that the claim is bound to fail, and, as such, to allow the claim to continue amounts to an abuse of process.

[62] In particular, one of the central features to the claim of the plaintiff is the allegation the price differential, or youth discount, was not disclosed to Mr. Creery, and presumably others in the putative class. The price differential, it is alleged, was concealed from the consumer.

[63] The defendant points to evidence before the court that the pricing schemes were a matter of public knowledge; or, at least, the information was publicly available. The plaintiff alleges, or at least submits, this particular information was not clearly made available to consumers on the website when they engaged with Tinder in purchasing the product.

[64] Abuse of process is a broad and flexible doctrine animated by the court's inherent jurisdiction and residual discretion to address circumstances that threaten the integrity of the court process, or the administration of justice more generally.

[65] It is a remedy that is available to the court to prevent misuse of the court's process; to address what otherwise would be manifest unfairness, or circumstances that may bring the administration of justice into disrepute. A finding in this regard, particularly in the early stages of a proceeding, should be founded on clear and compelling evidence or information. In this regard there is a significant burden on the party seeking such a finding.

[66] The specific circumstances that may give rise to a finding of abuse of process are not circumscribed. Traditionally it is invoked where it is established the proceedings are perpetrating a fraud or deception on the court; or when the legitimate process of the court is being exploited for an ulterior, improper, or collateral purpose; or where it is a claim manifestly without foundation.

[67] I am not persuaded, on the record before the court, it is plain and obvious the claim amounts to an abuse of process. The issue of the transparency concerning pricing was the topic of a good deal of exchange during the hearing. Certainly the point taken by the defendant may well prove to be a significant evidentiary hurdle facing the plaintiff. I am not prepared however to conclude it is an issue that can, or should, be resolved in this context.

[68] As stated, the application of the plaintiff to amend is largely granted. The application of the defendant to strike is largely dismissed. I would invite counsel to

contact Supreme Court Scheduling and arrange a case management conference to discuss next steps.

"Crossin J."