

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mac's Convenience Stores Inc. v. Basyal*,
2025 BCCA 284

Date: 20250808
Docket: CA50297

Between:

Mac's Convenience Stores Inc.

Appellant
(Defendant)

And

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

Respondents
(Plaintiffs)

And

**Overseas Immigration Services Inc., Overseas Career and
Consulting Services Ltd., and Trident Immigration Services Ltd.**

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated
November 1, 2024 (*Basyal v. Mac's Convenience Stores Inc.*, 2024 BCSC 2007,
Vancouver Docket S1510284).

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Place and Date of Hearing:

Vancouver, British Columbia
April 7, 2025

Place and Date of Judgment:

Vancouver, British Columbia
August 8, 2025

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Justice Warren

Dissenting Reasons in part by:

The Honourable Justice Dickson (Page 26, para. 82)

Summary:

The respondent class members are temporary foreign workers who came to Canada to work for the appellant Mac's Convenience Stores Inc. Among other allegations, the workers allege that an immigration consultant retained by Mac's to assist in recruiting workers breached its fiduciary duty to them by charging them prohibited fees for jobs. Following certification but before trial, the parties agreed to have three common issues determined by way of summary trial, two of which Mac's appeals: (1) whether the consultant was acting as Mac's agent in the recruitment process and, if so, if Mac's as a non-fiduciary principal could be vicariously liable for the consultant's breach of fiduciary duty, and (2) whether a subclass of workers who arrived in Canada to find that there were no jobs for them had a duty to mitigate their losses by seeking alternative employment. The trial judge found that Overseas was acting as Mac's agent in recruiting the workers, that Mac's could be vicariously liable for any fiduciary breach by the consultant, and that the subclass members had no duty to mitigate their losses.

Majority (per Fenlon J.A.; Warren J.A. concurring): Held: Appeal allowed. Overseas had no actual or apparent authority to bind Mac's contractually; the judge fell into error by applying the colloquial concept of agency, rather than the test for agency at law which requires the agent to have authority to bind the principal contractually. Given the conclusion on agency, it is not necessary to consider the question of vicarious liability. In BC, employees with fixed-term contracts have a duty to mitigate their losses if terminated before the end of the fixed term unless that duty is ousted by the provisions of the contract. Here, the contracts expressly provided for a change of employer on early termination by Mac's, so a term ousting any duty to mitigate could not be implied into the contract. Whether there were practical barriers to mitigation was a question of damages to be assessed at trial.

Dissenting in part (per Dickson J.A.): The appeal with respect to common issue D3 should be dismissed. The trial judge did not err in finding that Overseas acted as Mac's agent. Overseas had actual authority to bind Mac's contractually by its actions in the multi-stage hiring process, and apparent authority, as Mac's communicated apparent authority to the workers by allowing Overseas to control all aspects of the hiring process.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The parties to this certified class action agreed to hold a summary trial to decide three common issues in advance of the full trial. The appellant Mac's Convenience Stores Inc. ("Mac's") challenges two of the three decisions.

Background

[2] The plaintiffs in the class proceeding are migrant workers who sought to come to Canada under the federal government's Temporary Foreign Workers

Program (the “Program”). They are from many countries of origin, but all were living and working in Dubai when they attended job fairs put on by the respondents Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and Trident Immigration Services Ltd. (related companies collectively referred to as “Overseas”). Overseas charged workers a fee of \$2,000 to attend a recruitment fair, or to begin the recruitment process. It charged a further \$5,500 to \$6,000 when the foreign worker obtained a visa to come to Canada under the Program.

[3] Mac's retained Overseas in 2012 to assist with filling positions at its convenience stores in Western Canada. Mac's agreed to pay Overseas a \$500 success fee for every temporary foreign worker hired for a cashier or food counter attendant position and \$1,500 for a supervisor.

[4] The plaintiffs allege Overseas charged them for jobs in contravention of the Program regulations and provincial employment standards legislation. Overseas denies any wrongdoing. It says the fees charged were for immigration consulting services such as assisting the plaintiffs with obtaining the work permits and work visas they required to live and work in Canada—charges that were entirely lawful.

[5] A subclass of the plaintiffs (the “Subclass Members”) claim they entered employment contracts with Mac's but, when they arrived in Canada, the jobs either did not exist or were not in keeping with the terms of their contract.

[6] The notice of civil claim was filed in 2015. The pleadings have been the subject of two appeals to this Court: *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235; *Basyal v. Mac's Convenience Stores Inc.*, 2019 BCCA 276. After winnowing away the chaff, the class proceeding was finally certified in breach of fiduciary duty and unjust enrichment against Overseas, and against Mac's in breach of contract, breach of the duty of honest performance, and vicarious liability for Overseas' breach of fiduciary duty. The latter claim is based on a pleading that Overseas acted as Mac's agent in the recruitment of the plaintiffs.

[7] It may be helpful at this point to describe the Temporary Foreign Workers Program more fully. The Program is jointly managed by Citizenship and Immigration

Canada and Employment and Social Development Canada, which I will refer to collectively as the "Government". It allows Canadian employers to hire foreign nationals to fill temporary labour and skills shortages when qualified Canadian citizens or permanent residents are not available.

[8] To qualify to hire temporary foreign workers, employers are required to apply to the Government for a labour market impact assessment, referred to as a labour market opinion. The Government then determines whether employment of a foreign national is likely to have a positive, neutral, or negative effect on the Canadian labour market. A labour market opinion authorizing the hiring of a temporary foreign worker depends on the employer satisfying the Government that the employer has tried but been unable to find a Canadian or permanent resident to fill the job, that the job offer is genuine, and that the employer has met job offer commitments to the temporary foreign workers it has hired in the past.

[9] To protect against abuse, employers who hire foreign workers under the Program are subject to strict rules governing how they treat those workers and the conditions for their employment. In order to obtain a positive labour market opinion, the prospective employer must submit a declaration agreeing to adhere to the applicable laws and regulations, to provide the foreign worker with substantially the same work and working conditions described in the application for the labour market opinion, and to take responsibility for the actions of any person recruiting foreign workers on their behalf. Under certain circumstances, temporary foreign workers who have worked in Canada under the Program may become eligible for permanent immigration status in this country.

The Summary Trial

[10] As noted, the parties asked the judge to decide three common issues in advance of trial.

[11] First, the plaintiffs sought determination of whether Overseas was Mac's agent in the recruitment process and, if so, whether Mac's was vicariously liable for any breach of fiduciary duty that might be established against Overseas. Second,

Mac's sought determination of whether the Subclass Members had a duty to mitigate by seeking alternative employment when the jobs they contracted for did not materialize. Third, Mac's asked the judge to determine whether any income the plaintiffs managed to earn during the notice period should be taken into account in assessing damages.

[12] In addressing the first common issue, the judge began by considering whether Mac's as a non-fiduciary principal could be held vicariously liable for breach of fiduciary duty by Overseas as its agent—a question which required her to assume both that Overseas was a fiduciary and that it breached its fiduciary duties by charging the plaintiffs fees. After reviewing the policy considerations behind the vicarious liability doctrine and developing a test to determine when a principal might be held vicariously liable for the wrongs of a fiduciary agent, the judge held that Mac's could be vicariously liable for fiduciary breaches by Overseas if the two were in an agency relationship. She then determined that Overseas was acting as Mac's agent in recruiting class members, including with respect to the charging of fees.

[13] Turning to the second common issue, the judge concluded that the Subclass Members had no duty to mitigate when their fixed-term contracts were terminated. In answering the third common issue, she held that any earnings during the two-year terms of the employment contracts were nonetheless to be taken into account in assessing damages.

The General Rule Against Litigating in Slices

[14] Before turning to the grounds of appeal, I digress to comment on the wisdom of the general rule against litigating issues piece-meal: *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. In the present case, the judge expressed significant reservations about deciding some common issues ahead of the rest, saying:

[20] The common issues sought to be tried summarily are related to other common issues. For example, the common issue pertaining to vicarious liability is only engaged if the answer to other common issues—whether Overseas had a fiduciary duty and whether Overseas breached it—are yes. The mitigation common issue only applies if Mac's failure to provide jobs to the subclass is found to be a breach of contract.

[21] This interrelation of the issues gives rise to the concern about litigating in slices, and so mandates against suitability for summary trial determination. In addition, these issues may be moot if other issues are not decided in favour of the representative plaintiff, accordingly these summary trials may not be an efficient use of court resources...

[Emphasis added.]

[15] However, ultimately, the judge acceded to the parties' request, saying:

[21] ... However, no party has suggested that trying these issues summarily, while the related issues are outstanding, will introduce complexity or result in potentially conflicting findings of fact. The parties are much more familiar with the factual matrix as a whole, including what evidence will be led on other issues, than the Court is at this stage. I infer that because all of the parties agree that these matters are appropriate for summary trial determination, they will not be leading evidence at the trial of the other common issues that is embarrassing given the findings of fact the court must make on this summary trial.

[Emphasis added.]

[16] I appreciate that case management judges are owed considerable deference: *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 at para. 23. However, in this case, quite apart from the potential mootness of the question the judge was asked to address on a limited record, it is difficult to see how deciding the first common issue could assist the parties in settling the case—their justification for litigating in slices. That is so because a positive answer to the first common issue necessarily left the foundational assumptions in dispute—whether Overseas was a fiduciary and whether it had breached fiduciary duties.

[17] Further, final determination of a common issue gives rise to a right of appeal. In hard-fought class actions, such rights are generally acted upon. In deciding whether to sever issues, the potential for delay posed by yet another trip to this Court before trial must be factored into the advisability of severance.

[18] Finally, answering the first common issue required the judge to determine the novel and complex question of whether, given the distinct nature of legal and equitable relationships and remedies, a non-fiduciary principal could be vicariously liable for an agent's breach of their fiduciary duties. Although the parties assured the judge that they would not be leading evidence at the full trial that might call into

question the judge's findings at the summary trial, there was no certainty that would be so. At the full trial the parties would have to lead evidence establishing that Overseas was a fiduciary, including the nature of the duties owed by an immigration consultant and the way in which they were expected to meet those duties in carrying out their work. Could it safely be assumed that this context could have no impact on the judge's assessment of whether Mac's as a principal should be liable for Overseas' conduct, the factors to be considered, and the type of test that should be applied?

[19] When these concerns were raised with counsel at the hearing of the appeal, they acknowledged that it was open to this Court to find that the first common issue was not suitable for determination by summary trial and to set aside the judge's decisions on that basis. I find it unnecessary to consider that option because I have concluded that the "embedded" issue of whether Mac's and Overseas were in an agency relationship is dispositive of the first common issue without the need to address whether a non-fiduciary principal can be vicariously liable for a fiduciary agent's breach of their fiduciary obligations. I will say only that the judge's concerns about severing the first common issue proved well-founded. In my respectful view, proceeding in this way was not an efficient use of court resources.

On Appeal

[20] Only the first and second common issues decided at the summary trial are in issue on this appeal. Mac's contends the judge's decisions on those issues cannot stand because she made three errors, which I would restate slightly as follows:

1. Concluding that a non-fiduciary principal may be vicariously liable for an agent's breach of fiduciary duty;
2. Concluding that Overseas was acting as Mac's agent in the entire recruitment process based on either actual or apparent authority; and
3. Concluding that the Subclass Members had no duty to mitigate under their fixed-term contracts of employment with Mac's.

[21] As noted, I have concluded that it is unnecessary to address the first ground of appeal because the second ground of appeal is dispositive of the vicarious liability aspect of the first common issue. I turn, then, to the second ground of appeal.

1. Was Overseas Acting as Mac's agent?

[22] Before turning to the judge's reasons and the parties' positions, it is helpful to consider the unique nature of agency at common law.

[23] Professor Fridman in *The Law of Agency* (5th ed. 1983) describes agency this way:

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

[Emphasis in original.]

[24] The Supreme Court of Canada adopted this definition in *R. v. Kelly*, [1992] 2 S.C.R. 170. That case involved a financial advisor who accepted undisclosed commissions from a development company for selling the development company's units to his clients. The Court had to apply s. 426 of the *Criminal Code* (corruptly accepting a reward or benefit), the first element of which requires the Crown to establish that the accused was in an agency relationship with the victims.

[25] Broadly speaking, there are two ways in which an agency relationship may be created: first, by the grant of actual authority and, second, through the grant of apparent authority.

[26] Actual authority includes both the authority the principal expressly gives the agent by the terms of an oral or written agreement and authority that the principal has consented to by implication in the grant of actual authority: Fridman's *Canadian Agency Law*, 3rd ed (Toronto: LexisNexis, 2017) at 73, 77.

[27] Agency based on apparent authority occurs where: 1) the principal makes a representation to a third party that the agent has authority to enter into a contract or dispose of property on the principal's behalf; 2) the principal intends the third party to

act on the representation; and 3) the third party does act on it to its prejudice. In effect, the law imposes an agency relationship on the principal and agent even though they did not expressly enter into such an arrangement because the principal by their conduct should be estopped from denying an agency relationship in these circumstances.

[28] It is important to recognize that, in common parlance, “agency” is often used loosely to refer to anyone acting on someone’s behalf. But at common law it has a precise meaning, scope, and purpose. The foundational element—the essence—of a true principal and agent relationship is the power of the agent to affect the legal position of the principal by entering into contracts with third parties that bind the principal: *Fridman’s Law of Agency* (4th ed) at 8, 9, 12–14 [*Fridman 4th Ed*]; *Trophy Foods Inc. v. Scott*, 1995 NSCA 74 at 14–15.

[29] The use of agency in its colloquial sense can lead to confusion. For example, this Court in *Penderville Apts. Development v. Cressey Development Corp.*, (1990), 43 B.C.L.R. (2d) 57, 1990 CanLII 170 (C.A.) [*Penderville*] appears to apply a broader definition of agency. In that case, the appellants applied to examine the solicitor of the respondent, who had negotiated the agreement in issue. Under Rule 27(4) of the Rules of Court then in place, “[a] person who is or has been a director, officer, employee, agent or external auditor of a party may be examined for discovery ...”.

[30] The chambers judge below had applied the test for an “agent” in the legal sense and concluded that the solicitor was not the respondent’s agent because he had no power to bind the respondent. In this Court, Madam Justice Southin held that, in addition to that form of agency, there is a secondary meaning to the term “agent” in which “anyone who does something for another is for that very limited purpose an ‘agent’”. As the solicitor was an agent of the respondent in that secondary sense, he was subject to examination under Rule 27(4).

[31] Care must be taken in reading cases like *Penderville* in which the court is asked to interpret the term “agent” within the specific context of a statute or contract. In such cases, the court is concerned with the intention of the legislature or the parties, and thus the potential for use of “agency” in a colloquial sense must be

considered (see, for example, *Germyn v. Federici*, (1995), 2 B.C.L.R. (3d) 138, 1995 CanLII 1194 (C.A.); *Roscco Ventures Ltd. v. British Columbia*, 2007 BCCA 36 [Roscco]; *Dawson v. Tolko Industries*, 2010 BCSC 346).

[32] In *Roscco*, this Court had to decide whether “agent” as used in Rule 27(4) included a subcontractor of a party. In concluding that the subcontractor was not an agent under Rule 27(4) on the facts of that case, the Court interpreted *Penderville* as applying a definition of “agent” for the purposes of Rule 27(4) that is different from an “agent” at common law:

[15] In both *Penderville Apts.* and *Karl's Sporthaus*, the most that could be said, in the words of O'Halloran J.A. in *Bell v. Klein (No. 3)*, was that the solicitor and the adjuster could in a permissible sense be regarded as “agents” even though they were not, or had not been, agents in the classical sense that agency is, in law, understood. It appears it could be said of each that he was the one person closely connected to the party to be examined best informed of matters which could define and narrow the issues.

...

[17] I consider the broad statement made by Southin J.A. in the *Penderville Apts.* case is to be taken to mean that anyone who does something for another in a representative capacity (as in that case) is for that very limited purpose an “agent” within the meaning of the rule regardless of whether that person was authorized to affect contractual relations.

[Emphasis added.]

[33] Halsbury's Laws of Canada (online), *Commercial Law I (Agency)*, ““Agency” in general terms” (HAY-5) (2024 Reissue) also demonstrates that the term “agent” is often used to describe relationships that are not in law a true agency:

The word “agent” is one of wide signification. In a general sense, it applies to anyone who by authority performs an act for another. It includes many classes of persons to which particular descriptive designations are given, such as factors, brokers, barristers and solicitors, cashiers of banks, clerks, consignees and so forth. The outstanding feature of an agent's employment in a legal sense is that the agent is employed primarily to bring about business relations between the principal and third persons, and this characteristic is perhaps the most distinctive mark of the agent as contrasted with others, not agents, who act in representative capacities. For almost a century, cases have appeared in the law reports illustrating the fact that the word “agent” is often used in business as meaning one who has no principal but who on his own account offers for sale some particular article having a special name. Strictly speaking, however, “agency” is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in

the business world, its significance is by no means thus restricted. A person may be spoken of as an "agent" and no doubt in the popular sense may be said to be an "agent", although when it is attempted to suggest that such a person can create the legal obligations that attach to agency at law, that use of the word is only misleading. Whether the legal relationship exists is a question of fact, requiring proof by the party alleging that it does.

The term is often used in statutes in either a broader or a more restricted sense than that commonly given it. Where it is used in a statute its significance is generally to be determined by a study of the context, so that where the word is found in association with others the maxim *noscitur a sociis* may be applied to give it a limited or particular meaning.

[Emphasis added.]

[34] I have developed this point at some length because resolution of this ground of appeal turns on a sound grasp of the nature of agency at law. In my respectful view, the judge fell into error in this case because the parties failed to clearly distinguish between agency at law and agency in common parlance. It is the former that is pleaded and relied on by the plaintiffs in the underlying action, and it is agency at law that they must prove.

[35] Agency in this sense is distinct from other relationships which involve one person acting on behalf of another, such as employees tasked with responsibilities to be carried out in furtherance of their employer's objects, or independent contractors retained to provide particular services. As Fridman 4th Ed notes, agency should not be confused with other legal relationships that may expose another person to liability (at 24):

Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve that other in liability, yet the nature of the relationship, and the kind of acts in question, are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency, unless at any given time, a servant or independent contractor is being employed as an agent, when he should be called such. In other words, the term "agent" should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts or the disposition of property: but who may, incidentally, affect the legal position of his principal in other ways.

[Italics in original; underlining added.]

[36] In short, not every person who acts on behalf of another person, even if they may expose the other to liability, is an agent in law. An employee or independent

contractor may also be an agent in law in particular circumstances, but that will depend on whether the employee or contractor has been granted actual or apparent authority to contractually bind the person who hired them: see *Thiessen v. Clarica Life Insurance Co.*, 2002 BCCA 501 at para. 41.

[37] As *Fridman* 4th Ed states at 13:

Once it is recognised that the essence of agency is this power to affect the principal's legal relations with the outside world, the law of agency can be more readily understood.

[38] I turn now to the question of whether Overseas is Mac's agent in this case based on actual authority.

a. Was Overseas Mac's Agent Based on Actual Authority?

[39] The judge began her analysis by setting out the correct test for agency, saying:

[82] In *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95 at para. 42, the Court of Appeal adopted the description of agency set out in G.H.L. *Fridman, Canadian Agency Law*, 3rd ed. (Toronto, Ontario: LexisNexis Canada Inc., 2017) at 5 which provides that agency exists when the law considers that the agent represents the principal in "such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property".

[Emphasis added.]

[40] However, the judge then moved immediately to identifying the terms of the oral agreement and whether it amounted to the grant of express authority: at paras. 83–84. In particular, she considered Mac's alternative argument that Mac's did not authorize Overseas to collect recruitment fees from class members "so there is no actual agency" covering that conduct: at para. 128.

[41] The judge's failure to consider the essential characteristic of agency is evident in her response to this argument:

[129] This submission is misplaced. The question of existence of actual agency authority does not depend on an agreement that the agent would do the very thing that is the subject matter of the litigation. The question is whether there was an agreement between the parties to the alleged agency for one to act on the other's behalf for a purpose, in this case to recruit

workers under the TFWP. Whether the specific act, in this case, the charging of allegedly unlawful fees, was done as part of the authority of that agency, must be answered in relation to determine if vicarious liability will attach: *Keddie* at para. 21, citing G.H.L. Fridman, *The Law of Agency*, 7th ed. (London: Butterworths, 1996), at p. 315.

[Emphasis added.]

Respectfully, this reasoning reflects a colloquial use of agency but is not consistent with agency in law.

[42] It is significant that at no point did the judge find that Overseas could bind Mac's contractually. To the contrary, it was common ground that Mac's reserved to itself the execution of the employment contracts. The judge found that, under the terms of the oral agreement between Mac's and Overseas, Overseas was to:

- pre-screen candidates;
- recruit qualified candidates;
- provide videoconferencing for personal interviews;
- settle selected candidates;
- complete all documents for business and immigration required federally and provincially;
- undertake the labour market opinion process;
- organize job fairs where a representative of Mac's could meet and interview foreign workers; and
- facilitate communications between Mac's and foreign workers that Mac's decided to hire under the Program.

(at paras. 133–134.)

[43] Because the judge focused on the scope of the work to be done by Overseas, she minimized the significance of the execution of the employment contracts, describing that step as “a mere formality”: at para. 144.

[44] My colleague Justice Dickson is of the view that the judge implicitly found that Mac's and Overseas agreed Overseas could bind Mac's to hire employees, noting that the making of a legally binding contract involves a multi-step process, including offer, acceptance, consideration, and an intention to create legal relations. Emphasis is placed on Overseas' role in providing Mac's with documents to sign, which were then conveyed by Overseas to the prospective employee.

[45] I agree that, in order for a contract to be formed, the above elements must be established. But I must respectfully disagree that Overseas' role in conveying offers of employment—by forwarding a contract signed by Mac's which could be accepted by a prospective employee—amounted to a grant of actual authority for Overseas to bind Mac's. All of the steps in the process of contracting must occur before a binding contract is formed. As the judge found at para. 144, Mac's reserved to itself the identification of those to be offered jobs, and the signing of the employment contracts. Whether the contract was signed by Mac's first, thereby constituting an offer, or in some other sequence, Mac's' actions were a necessary step before the contract could be legally binding.

[46] My colleague also places less significance on the signing of the contract, noting that Mac's did not consider itself “bound to a particular employee unless and until they commenced the job”. However, the contracts of employment included a term making employment conditional on the employee obtaining a work permit and any visa necessary to obtain entry into Canada.

[47] There is no doubt that the process of hiring a foreign worker involved a myriad of steps, and that Mac's retained Overseas to represent it and act on its behalf throughout much of the process. But none of the many steps that Mac's and Overseas agreed Overseas was authorized to take on Mac's behalf—finding potential candidates, screening, setting up interviews, and acting as a go-between in

the exchange of documents, gave Overseas actual authority to bind Mac's to a contract.

[48] The closest the judge came to considering this foundational requirement of agency, was in relation to the forms submitted to the Government to obtain the labour market opinion, which included an "Appointment of Representative" form and a "Declaration of Employer" form (attached to these reasons in full as Appendix A). The judge relied on these documents both to determine the terms of the agreement between Overseas and Mac's and to find that Mac's had entered into an actual agency with Overseas. However, nothing in these documents authorized Overseas to bind Mac's contractually.

[49] The relevant portion of the Appointment of Representative form appoints Overseas as representative to act on Mac's behalf "in order to obtain from [the Government] a labour market opinion". It also states that Mr. Higuchi of Mac's, "hereby, agree[s] to ratify and confirm all that my representative shall do or cause to be done by virtue of this appointment".

[50] The Declaration of Employer form included the following statement:

I am compliant with, and agree to continue to abide by federal/provincial/territorial legislation related to the foreign worker's recruitment applicable in the jurisdiction where the job is located. I declare that all recruitment done or that will be done on my behalf by a third-party, was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting foreign workers on my behalf.

[Emphasis added.]

[51] Both forms required Mac's to be responsible for the actions of its representative. However, assumption of liability is not enough to create an agency relationship. Liability for the actions of another is a consequence of a principal and agent relationship, but it does not on its own mean that a party who has assumed liability for the actions of someone acting on his behalf is a principal. Relying on liability alone to ground an agency relationship conflates the effect of an agency relationship with its formation.

[52] In summary, nothing in the forms grants Overseas the power to contractually bind Mac's, which is a pre-requisite to the establishment of an agency relationship. Whether Mac's assumption of liability is restricted to regulatory penalties under the Program regulations, or could extend more broadly to damages suffered by temporary foreign workers as a result of the actions of Overseas in the recruitment process, is a question that I make no comment on. It was neither raised in the hearing below nor argued before us. The only point to be drawn on this appeal is that Mac's assumption of responsibility for the actions of Overseas is insufficient to create an actual agency.

[53] I turn now to the question of whether Mac's could be liable for Overseas' breaches pursuant to apparent authority.

b. Was Overseas Mac's Agent Based on Apparent Authority?

[54] To summarize, apparent authority arises from a representation on the part of the principal, through words or conduct, that leads a third party to believe that the agent has the authority in question: *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 at para. 28. The representation must be that of the principal, not that of the agent: *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826 at para. 42. The third party must rely on the principal's representation to its prejudice: *Fridman's Canadian Agency Law* (3rd ed) at 86.

[55] Because the third party's reliance on the principal's representation is foundational to the creation of apparent agency, the timing of the representation matters. If the wrongful conduct in issue has occurred prior to a representation from the principal, liability does not arise because reliance on the putative principal's representation cannot be established: *Canadian Laboratory Supplies v. Engelhard Industries*, [1979] 2 S.C.R. 787. In short, the representation must be the proximate cause of leading the party to whom it is made into the mistake that caused their loss or injury: *Fridman* at 64.

[56] In this case, the plaintiffs argue that Mac's communicated apparent authority by allowing Overseas to control all aspects of the hiring process, including screening

their CVs, determining who received an interview, communicating the offers, conveying the employment contracts, arranging for travel, telling the class members when to travel and how to travel, and arranging for accommodation, thereby leading them to believe that Overseas was collecting fees from them as Mac's agent. The judge agreed, finding that because Overseas had been involved in recruitment and arranged for items Mac's had contracted to provide, such as travel and accommodation, "Mac's communicated to the class members that Overseas had the authority to recruit the class members through [the Program] on behalf of Mac's": at para. 150.

[57] However, the steps relied on by the judge and the plaintiffs occurred after the plaintiffs had retained Overseas to assist them with obtaining work in Canada and after they had each agreed to pay fees to Overseas in two instalments. The wrong they complain of, the payment of such fees, thus occurred prior to the parties even being introduced to Mac's as a potential employer. In short, the judge made no finding that Mac's held Overseas out as its agent authorized to enter into contracts to collect fees on its behalf before the plaintiffs committed themselves to that step. Apparent agency is therefore not made out.

[58] My colleague in coming to a contrary conclusion states "the judge found that Overseas organized and operated the relevant job fairs for Mac's, and thus that their close association was made apparent to prospective temporary foreign workers from the outset" [her emphasis]. Again, I must respectfully disagree. The judge did not refer to the job fairs in her analysis of apparent authority (paras. 147 to 151). She did find that Overseas held job fairs for Mac's (at para. 94 while reviewing evidence pertaining to actual authority), but she did not make a clear finding that the job fairs were held exclusively for Mac's. More importantly, she made no finding that the plaintiffs who attended the job fairs understood that Overseas was there as Mac's agent. Indeed, counsel for the respondents conceded at the hearing of the appeal that there was no such evidence. All of the evidence they relied on related to Mac's conduct after the plaintiffs had entered into the impugned fee agreements with Overseas.

[59] In summary on this ground of appeal, I respectfully conclude that the judge erred in finding that Overseas and Mac's were in an agency relationship either on the basis of actual or apparent authority. It follows that the judge's answer to the first common issue concerning Mac's vicarious liability for Overseas' breach of fiduciary duty based on agency cannot stand.

2. Did the Judge Err in Concluding that the Subclass Members Had no Duty to Mitigate Under their Contracts of Employment with Mac's?

[60] The common issue the judge was asked to determine is as follows:

A3 Where Subclass members' employment was terminated prior to the completion of the 24-month fixed term set out in the contract, were they required to mitigate their losses?

[61] The judge began by reviewing the evidence of the Subclass Members, finding that their work permits allowed them to work at a particular location, in a particular position, with a specific employer, Mac's. For example, Mr. Basyal's work permit permitted employment as a cashier at Mac's Convenience Stores Inc. doing business as Subway in Edmonton. He deposed that in May 2014, a few weeks after he arrived in Vancouver, Overseas told him there was no work for him with Mac's but they could send him to work on a farm. He refused because he was not legally permitted to work anywhere other than as specified on his work permit. Overseas then told him they had work for him at a bottle depot in Calgary and that he would obtain a new work permit when he got there, which he never received. Mr. Basyal worked 40 hours per week at the bottle depot, without being paid, until June 2014 when the Canadian Border Services Agency detained him for working illegally. At that point, he was placed in handcuffs and eventually taken to a homeless shelter in Calgary and then Vancouver: at paras. 179–180.

[62] Similarly, Ms. Tesorero's work permit allowed her to work as a food service supervisor at Mac's Convenience Stores Inc. doing business as Subway in Calgary. She deposed that when she arrived in Calgary she had nowhere to live and was not provided with accommodation. She stayed for six months following up on the job she was supposed to be working at, without success. Eventually, she decided to return

to Dubai because she was not able to work legally for any employer other than the one indicated on her work permit: at paras. 181–182.

[63] The judge also considered Overseas' evidence about legal alternatives for work available to the plaintiffs:

[187] Mr. Bansal [of Overseas] deposed that temporary foreign workers for whom jobs were not available were “technically legally permitted to remain in Canada, but could not work other than as was indicated on their work permits”. Mr. Bansal deposed that Overseas offered to get them included on a new labour market opinion (later called a labour market impact assessment) with a different employer but the process could take three or four months to get the labour market impact assessment and a further three to four months to get a new work permit. He deposed that the time for this process would be cut in half for farm jobs. He deposed that if a worker was “unwilling to wait” for a new labour market impact assessment or a work permit, Overseas would offer them an airplane ticket to the place from which they came to Canada.

[Emphasis added.]

[64] Turning to the governing law, the judge began by recognizing that employment contracts are subject to the ordinary rules of contractual interpretation: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 1999 CanLII 657 at paras. 30, 34 [Wells]. She observed that, as per *Wells* at paras. 33 and 34, where the contract was executed in a regulatory or legislative environment, it is appropriate to consider that context when interpreting the contract: at para. 191.

[65] The judge noted there was a lack of clarity in the jurisprudence as to whether an employee has a duty to mitigate where the contract is for a fixed term and the contract does not provide for payment of the balance of the term on termination. In *Howard v. Benson Group Inc.*, 2016 ONCA 256 at para. 44 [Howard], the Court of Appeal for Ontario held that in such cases a liquidated damages clause obliging the employer to pay the employee to the end of the fixed term is implied and there is accordingly no duty on the employee to mitigate.

[66] However, in *Carr v. Fama Holdings Ltd.*, (1989), 63 D.L.R. (4th) 25 at 18, 1989 CanLII 240 (B.C.C.A.), this Court clearly stated that dismissing an employee who has a fixed term contract does not require the employer to pay the employee for

loss that could be avoided—in other words, the usual rule that a dismissed employee has a duty to mitigate applies to fixed term contracts.

[67] The judge next considered *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 [*Quach*]. In that case, this Court rejected the reasoning of the Ontario Court of Appeal in *Howard* that, if a fixed term contract is silent as to an employer's obligations, on early termination compensation for the full term must be paid. In *Quach*, Madam Justice Saunders, writing for the Court, reviewed the authorities in this province relating to fixed term contracts, including *Neilson v. Vancouver Hockey Club Ltd.* (1988), 51 D.L.R. (4th) 40 (B.C.C.A.), and concluded:

[39] The result of these authorities, in my view, is that in British Columbia, on the authority of *Neilson*, the fixed-term nature of a contract does not entitle the employee to damages in the full amount of unpaid wages for the balance of the term without deduction of monies earned elsewhere during the term, absent a provision otherwise. In this way *Neilson* is at odds with *Howard* but not *Bowes*.

[68] I agree with the judge's conclusion that, absent a term to the contrary, an employee under a fixed term contract has a duty to mitigate.

[69] Having clarified the governing law, the judge identified the real question before her: whether the terms of the contract oust the duty to mitigate expressly or by way of a provision for liquidated damages. She began her analysis by observing that the contract does not expressly oust the duty to mitigate. She then asked whether the contract, interpreted in the context of the Temporary Foreign Workers Program, contained an implied term to oust that duty, saying:

[206] ... these contracts must be interpreted taking into account that the worker could only work as specified on the work permit. While in some cases the geographical limitations were province wide, in all cases the employer was Mac's. If Mac's did not have employment for the subclass member, then the subclass member could not work in accordance with the work permit. Accordingly, the contract must be interpreted that there was no duty to mitigate to look for or take work that was not in compliance with the work permit.

[207] The evidence of Mr. Bansal is that going through the process of obtaining a new work permit had to be preceded by obtaining a new labour market opinion or a labour market impact assessment. This would take six to

eight months for work other than farm jobs or where an employer had an unnamed labour market opinion.

[Emphasis added.]

[70] The judge concluded the contracts must be read as impliedly ousting the duty to mitigate, saying:

[209] Given the vulnerability of the subclass members at the time they entered into the contracts and the evidence of their reasons for being willing to travel to Canada to take relatively low paying jobs, it is not reasonable to conclude that there was an agreement that they would mitigate by taking work as farm labourers if the agreed to jobs did not materialize. Nor is it reasonable to conclude that they agreed to mitigate by taking advantage of unnamed labour market opinions that other employers had. There is simply no evidence that either Mac's or the subclass members had any information about that when they entered into the contracts. Finally, it is not reasonable to conclude that Mac's and the subclass members agreed that if the jobs contracted for were not available, the subclass members would mitigate by remaining in Canada, unemployed and unhoused, undertaking a 6-8 month process to be in a position to legally work.

[Emphasis added.]

[71] In summary, the judge found that the formation of the employment contracts in the context of the Program required the contracts to be interpreted as ousting the duty to mitigate because the duty would require the Subclass Members to either behave unlawfully, thereby putting them at risk of detention by the CBSA, or to wait for six to eight months to obtain a new work permit when they were without income or housing: at paras. 209, 211, 213. She reasoned that imposing an obligation on Subclass Members to mitigate in these circumstances led to a practical absurdity: at para. 212.

[72] Contractual interpretation, including the implication of terms, is a question of mixed fact and law reviewable on a deferential standard of palpable and overriding error absent an extricable question of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50.

[73] The task before the judge on this common issue, as she recognized, was one of contractual interpretation. Terms cannot be implied into a contract merely because it seems fair or convenient. The terms must be necessary to give efficacy to the contract, or to avoid incoherence: *Bao v. Welltrend United Consulting Inc.*, 2025

BCCA 3 at para. 23, citing *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 1999 CanLII 677.

[74] In implying a term into the contract ousting the duty to mitigate, the judge did not consider whether implying such a term would be inconsistent with the express terms of the contract. In my respectful view, the judge fell into error in so doing.

[75] In this regard, it is significant that the contract expressly addresses the potential for temporary foreign workers to change jobs:

14. If there is a termination of the employer-employee relationship and the EMPLOYEE is hired by a NEW EMPLOYER who has a neutral or positive Labour Market Opinion under the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C & D) of the Temporary Foreign Worker Program, The EMPLOYEE shall release the ORIGINAL EMPLOYER with the obligation of his/her return transportation cost to his/her country of permanent residence. The NEW EMPLOYER is responsible for the EMPLOYEE's transportation costs to the new location of work in Canada and back to the EMPLOYEE's country of permanent residence. The EMPLOYER is obliged to and responsible for paying the transportation costs (i.e. the ORIGINAL EMPLOYER pays incoming transportation costs and the NEW EMPLOYER pays for the return transportation costs to the country of permanent residence). These costs cannot be passed on to the EMPLOYEE (i.e. EMPLOYEE pays for its own transportation on behalf of the EMPLOYER and is reimbursed at a later date). Under no circumstances are transportation costs recoverable from foreign workers.

Temporary foreign workers who change jobs must ensure that their work permits are modified accordingly and EMPLOYERS who hire temporary foreign workers already in Canada must apply to ESDC/Service Canada for a Labour Market Opinion (LMO) and obtain a neutral or positive LMO.

[Emphasis added.]

[76] These terms are not consistent with the judge's finding that there was no evidence the Subclass Members had any information about taking advantage of labour market opinions held by other employers when they entered into their contracts: at para. 209. That option is expressly identified in the contract, as is the requirement that the employer pay for the worker's travel costs to return home.

[77] Having said that, I agree with the judge that the nature of the Program, and in particular the restrictive nature of the Subclass Members' work permits, would undoubtedly make finding other lawful work difficult. The judge's findings about how long that process could take in its entirety—six to eight months—and the availability

of and access to such work will have to be considered in the assessment of whether Mac's can prove a failure on the part of the plaintiffs to mitigate. On the record before us, the barriers to mitigation appear to have been significant. However, that practical reality is not determinative of whether a duty exists. It is the defendant's burden—and will be Mac's' burden at trial—to prove that the employee has not taken reasonable steps to avoid loss. In the circumstances of this case, all of the factors the judge identified will have to be considered in assessing mitigation and may well make it difficult for Mac's to meet its burden.

[78] I note as well that the difficult situation the plaintiffs found themselves in—having travelled to Canada willing to take on low-paying jobs in convenience stores, only to be left without work or assistance—is the basis of their claim for compensatory, aggravated, and punitive damages for breach of contract, breach of honest performance, and breach of fiduciary duty.

[79] Given the vulnerability of the employees and the practical challenges they faced in mitigating, my conclusion that the Subclass Members had a duty to mitigate under the contract may make little practical difference to the measure of damages at the end of the day. But it is important nonetheless to distinguish between the duty to mitigate and the capacity for mitigation.

[80] In summary, I conclude that the judge erred in principle by applying a term into the contract ousting the duty to mitigate given the express terms providing for an employee to change jobs or return home.

Disposition

[81] I would allow the appeal and answer the common issues as follows:

1. The answer to common issue D3 (if the answer to D2 [Did Overseas and Trident Immigration breach this fiduciary duty?] is yes, was Overseas acting as agent of Mac's when it breached its fiduciary duty, and, if so, is Mac's liable for the actions of its agent?) is no, Overseas was not Mac's agent and is not liable for the actions of Overseas on the basis of agency.

2. The answer to common issue A3 (where Subclass Members' employment was terminated prior to the completion of the 24-month fixed term set out in the contract, were they required to mitigate their losses?) is yes.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Warren"

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[82] I have had the privilege of reading the draft reasons for judgment of my colleague, Justice Fenlon. I agree with her analysis and conclusion on common issue A3 regarding the duty to mitigate. I also agree with her helpful description of the nature of agency relationships at common law. However, with great respect, I do not agree that, in answering common issue D3, the summary trial judge erred in concluding that Overseas was acting as Mac's agent. Reading the reasons generously and as a whole, I am satisfied that the judge applied the correct legal test for agency and found that Overseas was authorized to bind Mac's contractually to class members by its actions in the multi-step hiring process conducted under the Temporary Foreign Workers Program, which findings were available on the evidence.

[83] Justice Fenlon has summarized the key legal principles, the salient background, and various aspects of the judge's reasons. I will not repeat those efforts. However, to assist in explaining why I have reached a different conclusion on the agency issue, I will review this Court's decisions in *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 and *Thiessen v. Clarica Life Insurance Co.*, 2002 BCCA 501, in some detail, and expand upon the judge's reasons for finding that actual and apparent agency were made out.

Discussion

Keddie v. Canada Life Assurance Co.

[84] *Keddie* is a leading authority on the vicarious liability of insurance companies for wrongful conduct committed by representatives alleged to be their agents. The issue for determination was whether the trial judge erred in concluding that the respondent insurance company, Canada Life, was not vicariously liable for misappropriation of the appellant's funds by Kim Horne, a licensed insurance broker who placed business with Canada Life. This Court upheld the trial finding of no vicarious liability. In doing so, it analysed the conditions under which a principal is to

be held liable for the conduct of its agent, and clarified the law on the actual and apparent authority of agents for purposes of imposing vicarious liability.

[85] In their written agreement, Canada Life explicitly denied Mr. Horne the authority to bind it to third parties. Accordingly, the Court found, Mr. Horne was not acting within his actual authority when he misappropriated the appellant's funds. As to Mr. Horne's apparent authority, the Court agreed with the trial judge that there was no "conduct or representation emanating from Canada Life which would suggest to persons in the position of the appellant that Mr. Horne was acting as Canada Life's agent": at para. 31. Rather, it stated, the appellant appeared "to have been taken in by Mr. Horne personally rather than to have acted on the strength of, or in reliance on, his association with Canada Life or any other organization": at para. 37.

[86] In conducting its analysis, the Court noted that Canada Life had stated correctly that "the contract between the insurance company and the customer is technically made directly between the parties, and not through the broker in any official capacity": at para. 40 (emphasis added). However, it observed, in practice the customer interacted with the insurance company only through the broker, which arguably militated in favour of imposing some responsibility on the company for misconduct committed in the course of carrying out that economic activity.

[87] The Court went on to emphasize the distinction between insurance "brokers" and "agents" drawn in some American authorities. In those authorities, an insurance broker is characterized as a "middleman between the insured and insurer [who] solicits insurance business from the public under no employment from any special company": at para. 41, citing *Galiher v. Spates*, 262 N.E.2d 626 at 628 (Ill. Ct. App. 4th Dist. 1970). However, "[i]nsurance agents have a fixed and permanent relation to the companies they represent and have certain duties and allegiances to such companies", and "[w]hether a person is an agent or a broker is determined by his acts or what he does": at para. 42, citing *Galiher* at 628.

[88] The Court endorsed this distinction for vicarious liability purposes in the insurance context. After quoting from the salient authorities, Madam Justice Rowles said this:

[43] It seems to me that the distinction made between a broker and an agent corresponds to the way in which insurance is sold. Insurance brokers market themselves to the public explicitly on the basis that they are independent and beholden to no particular insurance company. Insurance brokers, by the nature of their business, appeal to the public, in part, by denying an agency relationship and the loyalty to an insurance company which such a relationship implies. In taking that stance, a broker would reduce the appearance to persons such as the appellant of acting as an agent for any particular company.

[44] In the present case, Mr. Horne was entitled to sell products from several companies and the appellant was aware of this fact.

[45] It is also important to recognize that if Canada Life were to be found liable in the absence of its saying or doing anything to suggest to the outside world that Mr. Horne was its agent, the company would, in effect, be made to act as an insurer for all misconduct committed by Mr. Horne and all brokers like him.

[46] In my opinion, to extend vicarious liability on the facts of this case cannot be justified on the jurisprudence.

[89] Based on the foregoing analysis, the Court dismissed the appeal.

Thiessen v. Clarica Life Insurance Co.

[90] As in *Keddie*, the issue in *Thiessen* was whether vicarious liability should be imposed on an insurance company for misappropriation of funds by a company representative. Specifically, the Court considered whether the appellant insurance company, Clarica Life, was vicariously liable for a theft committed by its licenced representative, Carey Dennis, an independent contractor.

[91] The trial judge in *Thiessen* imposed vicarious liability based on the policy analysis in *Bazley v. Curry*, [1999] 2 S.C.R. 534, despite having concluded that Mr. Dennis was not acting with actual or apparent authority as Clarica Life's agent when he took the plaintiffs' money for his own benefit rather than forwarding it to Clarica Life. In reaching her conclusion on agency, she found that Mr. Dennis' authorized role was restricted to forwarding applications and funds to Clarica Life, pursuant to a written agreement that provided that he was not authorized to bind

Clarica Life in any way not expressly authorized. She also found that there was no proof Clarica Life had represented to the plaintiffs that Mr. Dennis was an agent able to bind it by issuing a policy on behalf of the company. Consequently, she held that vicarious liability did not apply on a traditional agency analysis, as informed by this Court's decision in *Keddie*.

[92] On cross-appeal, the plaintiff-respondents challenged the judge's finding that Mr. Dennis was not acting with apparent authority as a sales agent of Clarica Life when he took their money. The Court accepted their position and described the fundamental issue as whether the judge "correctly understood the concept of agency that underlies the imposition of vicarious liability on a principal": at para. 30. The Court went on to endorse a "useful discussion of this concept" in Fridman, *Law of Agency*, (1996) Butterworths: Toronto (7th ed.) at 115, which included statements that: "[s]ometimes the fact that an agent is entrusted with certain duties in the normal course of his work may amount to an implied representation of authority to act in a certain way"; "permitting the agent to act in some way in the conduct of the principal's business with other persons thereby representing that the agent has the authority which an agent so acting in the conduct of the principal's business usually has" will create apparent authority; and a principal "cannot escape from liability merely because the agent may have abused the authority or betrayed his trust": at para. 31.

[93] Given the foregoing, the Court held that the judge had "failed to consider the authority 'the outside world' would reasonably infer Mr. Dennis had were they in the shoes of [the plaintiffs]" and took "too narrow a view of the ostensible or apparent authority required to impose liability vicariously in her traditional agency analysis": at para. 32. In particular, the Court found, the judge erred by looking "only to the principal's perspective, not to that of the vulnerable customer of that principal in the context of the business being done": at para. 33. Moreover, the Court stated:

[33] ... The customer was vulnerable for a variety of reasons, including the distribution system Clarica Life set up for the sale of its accumulation annuities, the powers it gave to its authorized representative in practice with regard to those annuities, the trust its referral policy and approved advertising encouraged its customers to repose in its authorized representatives, the lack

of any effort to supervise the performance of those representatives, and the lack of notice to customers of any limitation on their authority to bind Clarica Life.

[94] In the circumstances, the Court rejected Clarica Life's submission that the plaintiff-respondents had relied on a misrepresentation by Mr. Dennis as to his authority, not on his apparent authority garnered from their course of dealing with the company: at para. 34. In particular, the Court emphasized the findings that: the plaintiff-respondents considered Mr. Dennis "not as 'independent' of Clarica Life but as its agent", leading "inexorably to a finding of apparent authority to invest monies in Clarica Life accumulation annuities"; that "Mr. Dennis had the agency power to receive monies for that purpose"; and that Clarica Life was only prevented from delivering a document evidencing the investment to the plaintiffs by Mr. Dennis' failure to remit the monies: at para. 35. It also distinguished *Keddie* on the basis that the defalcating broker in that case had explicitly marketed himself as independent of any insurance company, and Mrs. Keddie had been taken in by him personally, not by reliance on his association with the defendant company: at paras. 38–40.

[95] The Court went on to observe that although Mr. Dennis was not actually authorized to bind Clarica Life without written authorization, he could effectively bind Clarica Life to a policy in practice:

[40] Mr. Dennis was agent of Clarica Life, albeit one with very limited express authority. His contracted task was to market Clarica Life's financial products for a commission and to do so in accordance with his agency agreement. Under that agreement, he was not authorized to make any policy, quote other than the published premium rates, or bind Clarica Life in any way it did not expressly authorize in writing. Yet, the agent's manual establishes that Mr. Dennis had in practice more authority with regard to accumulation annuities than would flow naturally from the agency agreement. These annuities were to be handled electronically from his personal computer. He could effectively bind Clarica Life to an accumulation annuity policy on receipt of funds by the simple act of making an electronic application...

[96] In the result, the Court affirmed that, generally speaking, an employer of an independent contractor will only be liable for torts committed by the latter when the independent contractor is also an agent, and upheld the judge's order on the basis of the traditional agency analysis undertaken in *Keddie*: at paras. 41–42.

Reasons of the Summary Trial Judge

[97] As my colleague notes, the judge expressed reservations at the outset about deciding some common issues ahead of others. In doing so, she commented on some of the evidence and the extent to which it related to matters that would require resolution on the summary trial. For example, she noted there was evidence that Mac's did not have records of interviewing some persons who were subsequently offered jobs, and stated that such evidence would be relevant "to the allegations of the existence and/or extent of an agency relationship between Mac's and Overseas": at para. 11.

[98] After finding it was appropriate to decide the common issues identified by the parties, the judge reviewed the legal principles that govern breach of fiduciary duty and vicarious liability. She concluded that, subject to modified *Bazley* factors, "vicarious liability for breach of fiduciary duty of an agent undertaking the enterprise of the principle under actual or apparent authority is available": at para. 81. Then, under the heading "Whether Mac's was Overseas' Principal in Recruiting Class Members", she dealt with the agency issue.

[99] The judge began this aspect of her analysis by setting out the correct legal test for agency, citing this Court's decision in *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95. After also setting out the ways in which an agent's authority may arise, she conducted a detailed review of the evidence regarding Mac's' retainer of Overseas to recruit temporary foreign workers under the Temporary Foreign Workers Program, known by the acronym TFWP. For example, the judge noted, the evidence was that Mac's agreed to pay Overseas a "success fee" for every temporary foreign worker hired, in exchange for which "Overseas undertook the labour market opinion process and worker recruitment", and that "Overseas organized a number of job fairs in Dubai for Mac's starting in November 2012 and running into 2013": at paras. 92, 94 (emphasis added).

[100] The judge also noted various aspects of the evidence of Mac's deponent, Mr. Higuchi:

[98] ... Mr. Higuchi deposed that Overseas introduced prospective temporary foreign worker candidates to Mac's and set up interviews by phone or in person. Some interviews were in Canada and some were in Dubai at job fairs organized by Overseas. Mr. Higuchi deposed that he communicated with Overseas, not the temporary foreign worker candidates, about the jobs that were available.

[99] Mr. Higuchi deposed that if he thought the candidate was suitable after the interview, Overseas communicated the job offer to the candidate through a contract that Mr. Higuchi signed on behalf of Mac's. Overseas provided the contacts to him to sign and he returned those signed contacts to Overseas. Mr. Higuchi deposed that Overseas did not always advise him whether a specific candidate had accepted the employment contract. Mr. Higuchi deposed that Overseas did not sign any employment contracts with class members on behalf of Mac's.

...

[114] Mr. Higuchi deposed that the employment contracts signed by Mac's with class members were based on a template prescribed by Service Canada.

...

[118] Mr. Higuchi did not dispute that he signed the employment contracts appended to the affidavits of Mr. Cajés, Mr. Basyal, Mr. Khadka and Ms. Tesorero. He deposed that at some point he told Overseas that Mac's did not have jobs for Ms. Tesorero and Mr. Khadka. He deposed that he asked that their names be removed from the labour market opinions. His evidence is only consistent with this being communicated to Overseas and not to the employees with whom he had signed contracts. I note that when Ms. Tesorero contacted Mr. Higuchi directly, after travelling to Canada for her job, he told her that Mac's did not have a job for her

...

[126] Mr. Higuchi deposed that on December 19, 2013, he told Overseas that Mac's had no available position for the labour market opinion to which Ms. Tesorero was named and asked that her name be removed from the labour market opinion.

[101] In addition to Mr. Higuchi's evidence, the judge reviewed the evidence of Overseas' deponent and the representative plaintiffs, as well as the Service Canada forms and attestations in which Overseas was identified as the "third party". Among other things, she noted the evidence was that Overseas sent the job offers and employment contracts signed by Mac's to the representative plaintiffs, who received a copy of a positive labour market opinion identifying Overseas as the "third party" at the same time. She also concluded that the contracts Mac's signed were standard form contracts that were the same for all class members: at paras. 115–116.

[102] Following this evidentiary review, the judge asked whether there was an agreement between Mac's and Overseas for Overseas to act on Mac's behalf for the purpose of recruiting workers under the TFWP. As my colleague notes, in response to Mac's argument that there was no actual agency because it did not authorize Overseas to collect recruitment fees from class members on its behalf, the judge stated that the existence of actual agency authority did not depend on an agreement that the agent would engage in the wrongful conduct alleged and framed the question for determination as "whether there was an agreement between the parties to the alleged agency for one to act on the other's behalf for a purpose, in this case to recruit workers under the TFWP": at para. 129.

[103] Unlike my colleague, I do not read para. 129 as evidencing a failure by the judge to consider the essential characteristic of agency, namely, the power to bind Mac's contractually. Nor do I read it as evidencing a colloquial use of the term agency. Although her language was not as precise as it might have been, as I read her reasons the judge was simply stating, correctly, that to establish agency it was not necessary to prove actual authority to engage in the impugned conduct in question and that it would be necessary to determine the scope of the actual authority granted by Mac's and exercised by Overseas for purposes of the vicarious liability analysis mandated in *Keddie*. In my view, that is apparent when para. 129 is read together with para. 130, where, in discussing *Keddie*, the judge stated:

[130] ... The agency question was whether the broker was Canada Life's agent for the purpose of selling life insurance, not whether the broker was Canada Life's agent for the purpose of misappropriating funds. If the agency was proved, the vicarious liability question would be whether the agent's misconduct occurred while acting within the scope of authority: *Keddie* at para. 21.

[Emphasis added.]

[104] As I will explain further, I interpret the judge's use of the words "to recruit" and "recruitment" in para. 129 and elsewhere as a shorthand description of the multi-step process involved in hiring a temporary foreign worker by or on behalf of Mac's under the TFWP. In other words, they are references to the process of making a binding contract of employment with a prospective employee, which involved considerably more than Mac's signing a standard form contract required by Services Canada.

[105] After discussing the agency question in *Keddie*, the judge identified the question on the existence of actual authority as “whether Mac’s and Overseas agreed that Overseas would act as Mac’s agent to recruit temporary foreign workers for Mac’s”: at para. 131. The deponents for Mac’s and Overseas gave no evidence regarding the terms of their oral agreement. However, the judge found that Mac’s and Overseas had an agreement on the “topic” of Overseas assisting Mac’s “in filling labour needs with foreign workers”: at para. 132. Then she reviewed the evidence with respect to the services that Overseas offered to provide to Mac’s, which included recruitment of qualified candidates, and found that their oral agreement included the provision of those services: at paras. 133–134.

[106] Next, the judge discussed the Service Canada forms in which Mac’s appointed Overseas as its representative to submit labour market opinion applications and attested to its assumption of responsibility for the actions of any person recruiting temporary foreign workers on its behalf. She rejected Mac’s argument that the representative plaintiffs had failed to prove Overseas knew that Mac’s had appointed it as representative and thus that the forms could not be evidence of actual agency. Rather, the judge held, “the forms are evidence of some of the terms of the agreement between Mac’s and Overseas about what Overseas would do and how it would do it, namely with Mac’s authority to act as its representative as described in the form”: at para. 137 (emphasis added). In addition, she held, the forms were “admissible for the truth that Overseas was aware that Mac’s had appointed Overseas and agreed that it would be held responsible for the actions of any person recruiting foreign workers on its behalf”: at para. 138.

[107] The judge also rejected Mac’s’ argument that the attestations in the Service Canada forms expressly limited the scope of the alleged agency to the temporary foreign worker application:

[139] ... It is not clear what Mac’s means by this. The evidence demonstrates that bringing a worker to Canada under the TFWP does not involve a single application, rather it involves many steps.

[Emphasis added.]

[108] At this point in her analysis, the judge conducted a further review of the evidence. She noted that to obtain a labour market opinion and employ a prospective worker under the TFWP, in addition to signing a written contract, Mac's was obliged to cover their travel costs and assist them with finding suitable accommodation, which services Overseas had agreed to provide: at para. 140. Moreover, she stated, when Mac's thought candidates were suitable, it signed employment contracts that it received from Overseas and returned those contracts to Overseas: at para. 141. She stated further that: Mac's did not interview all candidates to whom jobs were offered and concerning whom it signed contracts; where Mac's conducted interviews, all communications leading up to the employment contract except the interview were between Overseas and the prospective employees; and communications with class members regarding their Mac's employment took place through Overseas even after the contracts were signed: at paras. 142–143.

[109] The judge went on to say this:

[144] Mac's "enterprise" was to hire temporary foreign workers. Several of the steps involved in that enterprise were necessary steps; someone had to do them and Mac's retained Overseas. The work Overseas was retained to do included identifying candidates, reviewing their qualifications, interviewing them, offering jobs to those who Mac's identified, having a labour market opinion prepared with regard to the position that was to be offered, arranging for travel for the temporary foreign worker, and assisting with finding accommodation. For most of these steps, with the exception of the interviews in some cases, the identification of those to be offered jobs, and signing the contracts, Mac's delegated completely to Overseas. On the evidence as a whole, the signing of the contracts was a mere formality. If Overseas did not undertake the vast majority of the steps to recruit the class members and put them in a position to arrive in Canada as approved temporary foreign workers, Mac's would not be able to meet its employment needs with the class members.

[Emphasis added.]

[110] The judge rejected Mac's argument that its attestations in the Service Canada forms were only for the purpose of a "TFW application":

[145] ... both because the evidence does not disclose a process known as a TFW application, and because the application for a labour market opinion is not separable from the myriad of obligations on an employer undertaking to

recruit workers under the TFWP, which Mac's retained Overseas to do on its behalf consistent with what it told Service Canada.

[Emphasis added.]

[111] The judge expressed her conclusions on actual authority this way:

[146] I conclude, on the basis of this ample evidence, that Mac's and Overseas had an agreement that Overseas would undertake recruitment of class members as temporary foreign workers for Mac's and on behalf of Mac's and as Mac's agent and Mac's turned its mind to accepting responsibility for Overseas' compliance with provincial and federal laws pertaining to recruitment.

[Emphasis added.]

[112] As to Overseas' apparent authority, the judge found it was proven:

[149] For the same reasons I gave pertaining to actual authority, the authority in question is not whether Mac's gave Overseas the authority to charge the Overseas' fees, the question is whether there was an agreement between Mac's and Overseas that Overseas would act on behalf of Mac's to recruit workers under the TFWP.

[150] The representative plaintiffs argue that Mac's communicated apparent authority of Overseas to the class members by allowing Overseas to control all aspects of the hiring process so far as the class members could see including screening their CVs, determining who received an interview, communicating the offers, conveying the employment contracts, arranging for travel, telling the class members when to travel and how to travel, and arranging for accommodation. Several of these matters, including the payment for travel and accommodation in Canada on arrival, are matters that the TFWP program required Mac's to be responsible for and are addressed in the employment contract between Mac's and the subclass members. I agree that because the subclass members' experiences were that Overseas was undertaking matters that Mac's had contracted with the subclass members to undertake and which were directly related to the subclass members recruitment and prospective work for Mac's through the TFWP, Mac's communicated to the class members that Overseas had the authority to recruit the class members through the TFWP process on behalf of Mac's.

[Emphasis added.]

[113] Given her findings on Overseas' actual and apparent authority, the judge then turned to whether the principal/agent relationship gave rise to vicarious liability for Overseas' assumed fiduciary breach.

Analysis

[114] I see no legal or factual error in the judge's agency analysis. In my view, she was aware of the correct legal test for agency, which she applied to the facts as she found them based on the evidence as a whole. As I read her reasons, the judge found that Overseas was both an independent contractor for Mac's and an agent authorized to act on Mac's' behalf in the multi-step hiring process involved in making binding employment contracts with temporary foreign workers under the TFWP.

[115] In other words, I do not agree with my colleague that "at no point did the judge find that Overseas could bind Mac's contractually". While it is true that she did not state in so many words that Overseas was authorized to bind Mac's by its actions in the hiring process, that is the clear import of her reasons, read generously and as a whole. As I see it, that finding was implicit and available on the evidence for the reasons that she gave.

[116] Significantly, unlike in *Keddie* and *Thiessen*, there was no written agreement in this case setting out the precise nature of the authority granted to or withheld from the alleged agent by the alleged principal. Accordingly, the judge was required to examine the entire body of evidence to draw reasonable inferences and make factual findings on the extent to which Mac's empowered Overseas to hire temporary foreign workers on its behalf, if any, and thus to bind it to prospective employees. It is important in this regard to recall that the making of a legally binding contract involves a process that has several essential elements, including offer, acceptance, consideration, and an intention to create legal relations. While the agreement ultimately reached may be evidenced in writing, it is the process, not the document, that creates the legal obligation.

[117] In my view, the judge was entitled to conclude that Mac's' signing of the standard form contracts required by Services Canada was "a mere formality" in the multi-step process of hiring a temporary foreign worker. This is particularly so in light of the evidence that Overseas provided Mac's with the standard form contracts, Mac's signed and returned them to Overseas, and then Overseas, on Mac's' behalf,

conveyed offers of employment to prospective employees, an integral aspect of the contract-making process.

[118] Given the nature of the evidence, I cannot agree with my colleague that “it was common ground that Mac's reserved to itself the execution of the employment contracts” (emphasis added), and thereby expressly limited its grant of authority to Overseas in the sense discussed in *Keddie* or *Thiessen*. Nor can I agree that the judge “minimized the significance of the execution of the employment contracts”. As I have emphasized, Mac's was obliged by Services Canada to sign the standard form contracts, which Overseas both provided to Mac's and conveyed to prospective temporary foreign workers on its behalf. Moreover, despite having signed standard form contracts, Mac's apparently did not consider itself bound to a particular employee unless and until they commenced the job.

[119] In reaching my view, I bear in mind the judge's repeated references to the fact that hiring a temporary foreign worker involved a “myriad of obligations” and multiple steps, many of which Mac's retained Overseas to perform in the hiring process. As stated above, I interpret the judge's references to “recruitment” as a shorthand description of the process undertaken by or on behalf of an employer in hiring workers under the TFWP. I find support for this interpretation in dictionary definitions of “recruit”, “recruitment” and “hire”. For example: “recruit” is defined in the Merriam-Webster Online Dictionary as “to secure the services of: ENGAGE, HIRE” and its synonyms include “hire” and “employ”; “recruitment” is defined in the Cambridge Online Dictionary as “the process of employing new people to work for a company or organization”; and “hire” is defined in the Cambridge Online Dictionary as “to employ someone or pay someone to do a particular job”.

[120] That said, I agree with my colleague that the Services Canada forms and attestations did not empower Overseas to bind Mac's contractually by its actions. However, the judge did not find that they did. Nor did she find that Mac's assumption of responsibility for the actions of any person recruiting foreign workers on its behalf in the forms created an actual agency. Rather, she inferred from the content of the forms that Mac's and Overseas had agreed that Mac's would be responsible for

Overseas' actions as Mac's' authorized agent to recruit foreign workers: in other words, to bind Mac's to those workers by its actions. In my view, that was a proper use of the forms, and the factual inference drawn by the judge in this regard was reasonable and available on the evidence.

[121] As to apparent authority, I am satisfied that the judge was entitled to find that "Mac's communicated apparent authority of Overseas to the class members by allowing Overseas to control all aspects of the hiring process so far as the class members could see": at para. 150. This approach to apparent authority aligns with that endorsed in *Thiessen* by focusing on the perspective of the vulnerable prospective workers in the TFWP context and the extent to which Mac's openly delegated most hiring steps to Overseas. It is also consistent with the suggestion in *Keddie* that, while imposing vicarious liability on a company for misconduct committed by a representative who acts as an independent "middleman" in business activity would be unwarranted, it may be justified where, as here, the representative has a fixed relationship with and duties to the company in question.

[122] I agree with my colleague that because a third party's reliance on represented authority to its prejudice must be proven, the timing of a principal's representation matters in apparent authority cases. However, I do not agree that this foundational requirement necessarily defeated the class members' claim of apparent authority in this case.

[123] As noted, the judge found that Overseas organized and operated the relevant job fairs for Mac's, and thus that their close association was made apparent to prospective temporary foreign workers from the outset. Whether or not the jobs fairs were held exclusively for Mac's as the prospective employer, in my view, the judge was entitled to draw that inference based on the evidence as a whole. In any event, the judge clearly accepted that by the time class members actually paid the second installment of the impugned fees to Overseas, Mac's had represented to them by its conduct that it had authorized Overseas to control the process of hiring temporary foreign workers. Although she did not expressly infer that class members relied on that representation when they made those payments, a finding to that effect is

implicit in her brief reasons. While some judges might not have reached the same conclusion given the pre-existing fee agreement, in my view it was not an error for the judge to do so.

Conclusion

[124] I would allow the appeal with respect to common issue A3 and answer the question of whether the subclass members in question were required to mitigate their losses in the affirmative. With respect to common issue D3, I would find the judge did not err in concluding that Overseas was Mac's agent when it breached its fiduciary duty.

“The Honourable Justice Dickson”

APPENDIX A

APPOINTMENT OF REPRESENTATIVE

To Human Resources and Skills Development Canada (HRSDC)/Service Canada
FOR THE PURPOSE OF A TEMPORARY FOREIGN WORKER APPLICATION (Labour Market Opinion).

I, Geoff Higuchi residing at _____
(name of employer)

c/o Mac's Convenience Store Inc.

#1013 - 7445 132nd Street, Surrey, BC V5W 1J8
_____ (full address)

Telephone Number: (604) 590-5352 Fax Number: (604) 590-3569

heroby appoint Kuldeep Kumar Bansal
_____ (name of representative and business name)

of Overseas Career & Consulting Services Ltd.

#204-12830 80th Avenue, Surrey, BC V3W 3A8
_____ (full address)

Telephone Number: (604) 572-7786 Fax Number: (604) 572-6767

as my representative to act on my behalf in order to obtain from HRSDC/Service Canada a labour market opinion relating to _____
(name of individual to whom employment has been offered)

I, hereby, agree to ratify and confirm all that my representative shall do or cause to be done by virtue of this appointment.

This appointment shall remain in full force and effect only for the processing of this application, unless due notice in writing of its revocation has been given to HRSDC/Service Canada.

(signature of employer) Geoff Higuchi
(print name of employer)

2012-07-11
(date) (YYYY-MM-DD)

(signature of witness) Cynthia Hirak
(print name of witness)

Personal Information is administered in accordance with the Privacy Act. It will be retained in Personal Information Bank HRDC PPU 440. Individuals have the right to access their personal information. For instructions, please consult the government publication Info Source found in Service Canada Centres and available at the following address: infosource.gc.ca.

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DECLARATION OF EMPLOYER #1	
<p>I am an unincorporated employer, sole proprietor or partnership. <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If you answered "YES" to the above:</p> <p>I understand that some provinces and territories operate, pursuant to agreements with the federal Department of Citizenship and Immigration, provincial nominee programs. I hereby consent to HRSDC providing the personal information contained in this request for a Labour Market Opinion to the provincial/territorial government(s) of the province(s) or territory(ies) where I carry on business to be used by the province(s) or territory(ies) for the administration of their Provincial Nominee Programs. <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
<p>Check each box to declare that you comply (or will comply) with the statements below:</p> <p><input checked="" type="checkbox"/> I will provide the foreign worker(s) I hire with the wages, working conditions and employment in an occupation that are substantially the same as those described in the positive Labour Market Opinion letter and annex.</p> <p><input checked="" type="checkbox"/> I will immediately inform Service Canada of any subsequent changes related to the foreign workers' terms and conditions of employment, as described in the positive Labour Market Opinion letter and annex.</p> <p><input checked="" type="checkbox"/> I am compliant with, and agree to continue to abide by the relevant federal/provincial/territorial laws that regulate employment in the occupation specified and, if applicable, the terms and conditions of any collective agreement in place. I recognize that any terms and conditions of the attached offer of employment are considered null and void if they are less favourable to the foreign worker than the standards stipulated in the relevant Labour Standards Act.</p> <p><input checked="" type="checkbox"/> I am compliant with, and agree to continue to abide by federal/provincial/territorial legislation related to the foreign worker's recruitment applicable in the jurisdiction where the job is located. I declare that all recruitment done or that will be done on my behalf by a third-party, was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting foreign workers on my behalf.</p> <p><input checked="" type="checkbox"/> There is no ongoing or pending labour dispute at my business, and I will inform Service Canada in the case that one should develop.</p>	
SIGNATURE OF EMPLOYER #1	
<p>For applications relating to an arranged employment offer under the Federal Skilled Worker Program, please complete the following:</p> <p>I, <u>Geoff Higuchi</u> (name of employer) commit to hire the foreign national(s) covered by this application on a permanent basis as per the job offer described above upon issuance of permanent resident visa(s).</p> <p>I have read and I understand the Personal Information Collection Statement found at the beginning of this application. I declare that the information provided in this application is true and accurate.</p>	
<p> Signature of Employer #1</p>	<p>Geoff Higuchi Printed Name of Employer #1</p>
<p>Senior Recruitment & Training Manager Title of Employer #1</p>	<p>2013-06-28 Date (YYYY-MM-DD)</p>
SIGNATURE OF THIRD-PARTY REPRESENTATIVE	
<p>I certify that the information provided in this application is true and accurate to the best of my knowledge.</p>	
<p> Signature of Third-Party Representative</p>	<p>Kuldeep Kumar Bansal Printed Name of Third-Party Representative</p>
<p>Director Title of Third-Party Representative</p>	<p>2013-06-28 Date (YYYY-MM-DD)</p>
INFORMATION FOR EMPLOYERS	
<p>For applications relating to a temporary job offer with no intention to support an application for permanent residency: Employers must complete, sign, send the completed application and attached required documents to the Service Canada Centre responsible for processing applications for labour market opinions. The list of appropriate centres is available on HRSDC's website at: http://hrsd.gc.ca/enq/workplaceskills/foreign_workers/lis/trcc.shtml</p> <p>For applications relating to an arranged employment offer under the Federal Skilled Worker Program: Employers must complete, sign, send the completed application and attached required documents to: Service Canada Centre Temporary Foreign Worker Program Centre of Specialization 1 Agar Place, PO Box 7000 Saint John, NB E2L 4V4 Fax: 1-866-585-7524 (toll free)</p>	

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