



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Thorne v. College of the North Atlantic*, 2025 NLSC 186

Date: December 24, 2025

Docket: 202401G3474

BETWEEN:

DEBORAH THORNE

FIRST PLAINTIFF

AND:

ALAN LUYT

SECOND PLAINTIFF

AND:

**COLLEGE OF THE NORTH
ATLANTIC**

DEFENDANT

Before: Justice Peter A. O'Flaherty

Place of Hearing:

St. John's, Newfoundland and Labrador

Dates of Hearing:

February 24, 25, 26 and 27, 2025

Appearances:

James D. Hughes, KC and
Philip C.W. Whalen

Appearing on behalf of the Plaintiffs

J. David B. Eaton, KC and
Anna M. Wadden

Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Thorne v. College of the North Atlantic*, 2014 NLTD(G) 94; *Thorne v. College of the North Atlantic*, 2015 NLTD(G) 38; *Thorne v. College of the North Atlantic*, 2015 NLTD(G) 63; *College of the North Atlantic v. Thorne*, 2015 NLCA 47; *Thorne v. College of the North Atlantic*, 2016 NLTD(G) 165; *Thorne v. College of the North Atlantic*, 2018 NLCA 33; *Thorne v. College of the North Atlantic*, 2021 NLSC 74; *Thorne v. College of the North Atlantic*, 2022 NLCA 31; *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87; *Wise v. Abbott Laboratories, Limited*, 2016 ONSC 7275; *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Young v. Noble*, 2016 NLCA 58; *Marco Ltd. v. Newfoundland Processing Ltd.* (1995), 130 Nfld. & P.E.I.R. 317, 405 A.P.R. 317 (Nfld. S.C.(T.D.)); *Nova Fish Farms Inc. v. Cold Ocean Salmon Inc.*, 2025 NLCA 28; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12; *Seadane International Inc. v. Morgan International Marketing Co.* (1999), 180 Nfld. & P.E.I.R. 97, 548 A.P.R. 97 (Nfld. C.A.); *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912; *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311; *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410; *Holt v. Telford*, (1987) 78 N.R. 321 (SCC); *Capital Crane Limited v International Union of Operating Engineers, Local 904*, 2024 NLCA 42; *Garland v. Consumers' Gas Co.*, 1 S.C.R. 629

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Judgment Interest Act*, R.S.N.L. 1990, c. J-2

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

TEXTS CONSIDERED: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Markham: LexisNexis, 2020)

REASONS FOR JUDGMENT

O'FLAHERTY, J.:

INTRODUCTION

[1] The First and Second Plaintiffs bring this class action proceeding under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (the “*Act*”) against their former employer, the College of the North Atlantic (CNA).

[2] This class action seeks redress for breach of the employment contracts between individual members of the class and CNA. The Class members say that their contracts entitled them to the full amount of a cost-of-living allowance (COLA) for the period of September 1, 2008, and November 22, 2011, which they did not receive.

[3] On August 19, 2014, the Court certified the common issue for trial: Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008, and November 22, 2011?

[4] The class action has two stages. The first stage will decide the common issue, whether Class members have a general entitlement to the full amount of the COLA. If this question is answered in the affirmative, the second stage will decide whether CNA failed to pay the individual Class members the full amount of the COLA and how much individual Class members are entitled to receive in damages.

[5] The Plaintiffs now apply under Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, for a summary trial to determine the common issue for trial and two further issues.

OVERVIEW

[6] CNA is a publicly funded post-secondary education and training college in Newfoundland and Labrador.

[7] In September 2002, CNA opened a campus of the College in Doha, Qatar (CNA-Q) where the Plaintiffs were employed as instructors under contracts they entered with CNA in 2005 and 2006 respectively.

[8] CNA operated CNA-Q under an agreement between the Board of Governors of CNA and the State of Qatar (Qatar). The agreement, which was made effective September 30, 2001, was entitled the *Comprehensive Agreement to Establish a Campus of the College of the North Atlantic in Qatar* (Comprehensive Agreement)ⁱ.

[9] The Comprehensive Agreement required that CNA provide the educational and administrative services required for a fully operational campus in Doha, and that Qatar compensate CNA in accordance with the agreement and provide appropriate facilities for instruction at the campus during the term of the agreement.

[10] Because unions were illegal in Qatar, CNA sent each employee an individual written letter of appointment, outlining an offer of employment for a defined term, the position, and the compensation for the position offered.

[11] It is common ground that if an offer of employment was accepted in writing, then an individual contract of employment was formed between CNA and the employee. The contracts were generally for 1-year, 2-year, or 3-year terms.

[12] After the term of a first contract, some employees were offered and accepted continuing employment at the campus. In such cases, the employee was sent a

written letter of appointment, usually before the existing term ended, outlining an offer for a further term, the position, and the compensation for the position.

[13] The First Plaintiff, Ms. Thorne, is a resident of Newfoundland and Labrador. She worked at CNA-Q as an Instructor, English as a Foreign Language, under four employment contracts for a total continuous employment period of seven and a half years, from November 13, 2005, until July 31, 2013.

[14] The Second Plaintiff, Mr. Luyt, is a resident of British Columbia. He worked at CNA-Q as an Instructor, Industrial Trades (Mechanical), under two employment contracts for a total continuous employment period of five years, from early January 2007 until December 31, 2011.

[15] Beginning in 2005, all contracts for CNA-Q employees incorporated the terms and conditions of a document entitled *Terms and Conditions of Employment for Employees of College of the North Atlantic – Qatar* (Terms and Conditions).

[16] CNA prepared the 2005 Terms and Conditions and all revisions to the initial version. Article 5 of the Terms and Conditions governed the rights and obligations of the employee and CNA relating to compensation.

[17] Articles 5.1 and 5.2 provided:

5.1 The total annual compensation for an employee shall not exceed the sum total stated in that employee's Offer of Employment Letterⁱⁱ.

5.2 Incremental increases to an employee's total annual compensation, if any, shall be made pursuant to and in accordance with any incremental increase specifically provided to CNA by the State of Qatar for the sole purpose of providing said increase. Said increases, if any, shall take effect on September 1 of the calendar year in which said increase is provided to CNA.

[18] The Plaintiffs claim that Qatar approved a cost-of-living allowance of 12.25% of base salary for all CNA-Q employees, effective on September 1, 2008 (COLA).

[19] Relying on what they say is the clear and unambiguous meaning of Article 5.2 of the Terms and Conditions, the Plaintiffs claim that they were entitled to receive the full COLA increase of 12.25% of base salary, effective on September 1, 2008.

[20] The Plaintiffs further claim that from September 1, 2008, to November 22, 2011, CNA did not pay them the full COLA increase of 12.25% of base salary, and CNA did not pay the full COLA increase to other Class members who also had employment contracts that contained Article 5.2 of the Terms and Conditions.

[21] In 2014, this class action was certified. The Class was defined as follows:

Instructors and instructional support staff who were employed by the College of the North Atlantic in Qatar between September 1, 2008 and November 22, 2011, who currently reside in the Province of Newfoundland and Labrador.

[22] The common issue to be tried was certified by the judge in the same decision:

Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011?

[23] In 2015, Mr. Luyt was appointed the representative plaintiff of a sub-class of non-resident instructors and instructional support staff.

[24] CNA denies the Plaintiffs' claim for entitlement to the full amount of the COLA. In its factum, CNA raised three arguments on the common issue for trial.

[25] First, CNA argued it had no contractual obligation under Article 5 to make any incremental increases to the total annual compensation in the Class members' letters of appointment and Class members therefore had no entitlement to receive any part of the COLA increase. I will call this the "no entitlement" argument.

[26] CNA's "no entitlement" argument is that Article 5.1 is a "substantive" clause which provides that an employee is entitled to be paid the total annual compensation set out in the letter of appointment. Article 5.2, when read together with 5.1, deals only with "procedural aspects" of any incremental increases, if CNA decides, at its sole option, to provide an incremental increase during the term of the contract.

[27] If the "no entitlement" argument fails, CNA argued in the alternative that the entitlement of Instructors under Article 5.2 to an incremental increase is limited to "new money" incremental increases provided to CNA by Qatar after a Class member entered into an employment contract. I will call this the "new money" argument.

[28] If accepted, CNA's "new money" argument would mean that only Class members with an existing employment contract when the COLA increase was approved were entitled to receive the COLA increase, and their entitlement to the COLA increase was limited to the term of their existing employment contract.

[29] Third, and if Article 5.2 entitled any Class members to the COLA increase, CNA argued that the end of service compensation (ESC) payments it made to Class members in 2012 were received in satisfaction of CNA's obligation to pay the full amount of the COLA. I will call this argument the "satisfaction" defence.

[30] CNA also raises a defence of equitable set-off based on its mistaken payment to Class members of compensation in excess of what it was entitled to be compensated for by Qatar in accordance with the Comprehensive Agreement.

[31] Relying on unjust enrichment principles, CNA claims an equitable set-off for any excess amounts it paid to Class members against any COLA amounts the Class members may be entitled to. I will call this the “equitable set-off defence.”

[32] On October 22, 2024, the Plaintiffs applied for summary trial under Rule 17A, to answer the common issue question certified by the Court.

[33] If the common issue is answered in the affirmative, the Plaintiffs ask the Court to answer two further questions: 1. Does CNA have an equitable set-off defence?; and 2. Are the Instructors entitled to an award of judgment interest?

[34] On the discretionary issue of whether these three questions should be decided by a summary trial, for the reasons below I would grant the Order for summary trial on the common issue for trial and on both additional questions.

[35] In deciding the common issue for trial, and addressing the arguments raised by CNA, the central question I must decide is the accurate meaning of Article 5.2 of the Terms and Conditions, leading to a determination of its legal effect in 2008, when Qatar approved the COLA increase for all CNA-Q employees.

[36] I find the accurate meaning of Article 5.2 is that if any additional increase was specifically provided to CNA by Qatar for the sole purpose of providing an employee with an increase to the employee’s total annual compensation, then CNA had an obligation to increase the employee’s total annual compensation in accordance with the additional increase provided to CNA, effective September 1 of the year in which the additional increase was provided to CNA by Qatar.

[37] That is the common sense and practical meaning of the language of Article 5.2 read objectively in the internal context of the language of the entire employment contract and in the external context of the relevant surrounding circumstances.

[38] I find that the legal effect of Article 5.2 is that CNA had a contractual obligation to make the COLA increase for all Instructors on November 25, 2008, when Qatar ratified the COLA increase, and not on June 15, 2008, when the Joint Operating Board approved the COLA increase.

[39] I would reject the “no entitlement, “new money” and “satisfaction” arguments raised by CNA. I would also dismiss the equitable set-off defence raised by CNA.

[40] I find that the full amount of the COLA increase provided to CNA by Qatar on November 25, 2008, was 12.25% of each of the Instructors’ actual base salaries up to the maximum base salary amount of CAD \$73,395.

[41] As a result, I answer the common issue for trial as follows: The members of the Class were entitled by their contracts of employment to receive the full amount of the COLA increase for the period of September 1, 2008, and November 22, 2011.

[42] I further find that if any Class member was not paid the full amount of the COLA for the period of September 1, 2008, and November 22, 2011, the Class member is entitled to judgment interest on unpaid COLA amounts under the provisions of the *Judgment Interest Act*, R.S.N.L. 1990, c. J-2.

[43] Whether an individual Class member received the full amount of the COLA during the period of September 1, 2008, and November 22, 2011, and the amount of damages that an individual Class member may be entitled to must be determined individually in the next stage of the class action.

[44] My reasons follow below.

THE CLASS ACTION

[45] The class action was certified in 2014. Ms. Thorne was appointed as the representative plaintiff of a class of persons resident in the province: *Thorne v. College of the North Atlantic*, 2014 NLTD(G) 94 (Certification Decision).

[46] The common issue for trial is: Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011?: Certification Decision, paragraph 42.

[47] The judge's reasons for the certification of the common issue for trial are set out at paragraphs 37-40 of the Certification Decision. I will repeat them here:

[37] The College also claims that point number 3 (whether her contract of employment and those of other class members entitled her to the COLA) is not a common issue for certification. In the main, the College says, "... each employment contract was individual and individual circumstances applied to the compensation that each individual received."

[38] I disagree. The question whether Ms. Thorne and other class members are entitled to the COLA defines these proceedings. The College and Qatar added Annex X, entitled "Direct Labour Costs", to their Comprehensive Agreement in June 2008; b. Applied to all CNA Qatar employees; c. Not to be included in the salary base (e.g. no management fees on COLA); d. Not included in capped amount (Re. Annex I); e. Amount of the COLA is 12.5% of base salary."

[39] Each employee's contract of employment with the College incorporated the "Terms and Conditions of Employment for Employees of College of the North Atlantic – Qatar." The letter of offer the College sent to Ms. Thorne referred specifically to the "JUN08" iteration of the "Terms and Conditions". It provided in Article 5 for "Compensation, Benefits and Other Entitlements," of which paragraphs 5.1 and 5.2 will be, to varying degrees, relevant to this case. Ms. Thorne claims that the College breached her contract of employment when it did not pay her the full COLA between September 1, 2008 and November 22, 2011.

[40] If, as it appears, all contracts of employment were the same, both as to the method of calculating compensation and the terms and conditions of employment, an employee's entitlement to COLA because of those contracts, or not, is common

to all. It may be, as the College contends, that the College dealt with its individual employees differently; but that goes to the individual damages to which they might be entitled (if any) and not to overall entitlement to the COLA. So answering the question of general entitlement to the COLA will advance the litigation (and it must) so that individual claims can be considered, if that is necessary.

[48] The judge explained that the question of whether CNA failed to provide the Plaintiff and other Class members with the full amount of the COLA, and if so how much she and the other class members were entitled to receive, were not common issues. He found that these questions would only be relevant if the common issue is answered in the affirmative and they must be resolved individually.

[49] This class action therefore has two stages. The first stage will decide the issue of general entitlement to the full amount of the COLA as a common issue for trial. If the common issue question of general entitlement to the full amount of the COLA is answered in the affirmative, the second stage will decide whether CNA failed to pay the Class members the full amount of the COLA and how much the Class members were entitled to receive in damages.

[50] In 2015, a sub-class was applied for, and Mr. Luyt was appointed as the representative plaintiff of a class of persons resident in Canada, outside the province: *Thorne v. College of the North Atlantic*, 2015 NLTD(G) 38 (Sub-Class Decision).

[51] CNA filed a Defence and Counterclaim in February 2015. In the Counterclaim CNA claimed that, insofar as any Instructors were paid any amounts in excess of CNA's recoverable direct labour costs under the Comprehensive Agreement, CNA was entitled to counterclaim for those amounts against the Instructors.

[52] The Plaintiffs applied to strike out the Counterclaim. In 2015, the judge struck out the Counterclaim because it disclosed no reasonable cause of action and was irretrievably defective: *Thorne v. College of the North Atlantic*, 2015 NLTD(G) 63 (Striking-Out Decision).

[53] CNA appealed the Certification Decision and Striking-Out Decision. The Certification Decision was upheld by the Court of Appeal: *College of the North Atlantic v. Thorne*, 2015 NLCA 47, at paragraph 43 (First Court of Appeal Decision).

[54] In upholding the Certification Decision, the Court of Appeal addressed the CNA submission that the class definition may be overly broad because some of the Class members had received full payment of the COLA. In addressing this submission, the Court of Appeal confirmed the two-stage class action process outlined by the judge in the Certification Decision.

[55] The Class definition was not amended. The Class therefore includes all resident and non-resident instructors and instructional support staff employed by the College of the North Atlantic in Qatar between September 1, 2008, and November 22, 2011. I will refer to Class members in these reasons as “Instructors.”

[56] The Striking-Out Decision was set aside by the Court of Appeal on the basis that the judge had erred by considering the evidence in striking out the Counterclaim. CNA was directed, if it wished to pursue a counterclaim, to apply for certification of the Counterclaim: First Court of Appeal Decision, at paragraphs 52 and 54.

[57] CNA applied for certification of the Counterclaim. In 2016, the Counterclaim was certified as a common issue to be determined at the common issue trial: *Thorne v. College of the North Atlantic*, 2016 NLTD(G) 165 (Counterclaim Decision).

[58] The Counterclaim Decision was set aside on appeal in 2018. The Court of Appeal decided that the application to certify the Counterclaim did not comply with the *Act*; the Counterclaim did not disclose a cause of action against the Class members; there was no common issue identified; and Ms. Thorne was not a suitable representative Defendant by Counterclaim: *Thorne v. College of the North Atlantic*, 2018 NLCA 33 (Second Court of Appeal Decision).

[59] The Plaintiffs filed a Second Amended Statement of Claim in 2020. CNA applied to amend its Defence to add the defence of equitable set-off. In 2021, the application by CNA to amend its Defence was allowed: *Thorne v. College of the North Atlantic*, 2021 NLSC 74 (Amended Defence Decision).

[60] The Amended Defence Decision was upheld by the Court of Appeal: *Thorne v. College of the North Atlantic*, 2022 NLCA 31 (Third Court of Appeal Decision).

[61] On October 22, 2024, the Plaintiffs applied for Summary Trial under Rule 17A to answer the common issue for trial certified by the Court in the Certification Decision, and the two additional questions outlined therein.

[62] The Rule 17A summary trial application was heard on February 24-27, 2025, and I reserved my ruling until now.

THE EVIDENCE

[63] The Plaintiffs' Rule 17A summary trial application was supported by the following affidavits from two fact witnesses:

- i) Affidavit of Deborah Thorne, September 12, 2024, with fifteen exhibits attached. Ms. Thorne was cross-examined on the contents;
- ii) Second Affidavit of Deborah Thorne, November 21, 2024, attaching the financial statements of the Defendant for the fiscal years 2007-2014 showing the accrual of the ESG. Ms. Thorne was not cross-examined on the contents;
- iii) Responding Affidavit of Deborah Thorne, February 8, 2024, with three exhibits attached. Ms. Thorne was cross-examined on the contents; and
- iv) Affidavit of Alan Luyt, November 12, 2024, with six exhibits attached. Mr. Luyt was cross-examined on the contents.

[64] The Defendant opposed the Plaintiffs' Rule 17A summary trial application with the following affidavits from three fact witnesses:

- i) Affidavit of Bruce Hollett, January 22, 2025, with eight exhibits attached. Mr. Hollett was cross-examined on the contents;
- ii) Affidavit of John Hutchings, January 22, 2025, with fifteen exhibits attached. Mr. Hutchings was cross-examined on the contents; and,
- iii) Affidavit of Annette Morey, January 22, 2025, with seven exhibits attached. Ms. Morey was cross-examined on the contents.

[65] The evidence on the summary trial application consisted of the five deponents' evidence with attached exhibits. There were numerous documents filed in the exhibits covering a time frame from 2001-2013.

[66] The fact witnesses were cross-examined with leave of the Court. All evidence of the witnesses has been considered. I will outline some of the key evidence of each of the witnesses next. I will also refer to parts of their evidence in the factual background section that incorporates the documents submitted which follows below.

The Fact Witnesses

Deborah Thorne

[67] Ms. Thorne stated that she was hired by CNA to work as an Instructor on CNA's campus in Doha, Qatar in 2005. Her first contract of employment with CNA was for a three-year term and provided her an annual salary of CAD \$85,210.00.

[68] On March 27, 2008, during her first contract, Ms. Thorne was informed by CNA that all Instructors would be receiving raises to bring their salary in line with

CNA employees in Newfoundland and Labrador. She understood at the time that the raise was also an effort to provide employees at CNA-Q with competitive salaries.

[69] Ms. Thorne stated that she was informed by CNA that the increase would be 12.47% and she would be paid a 6% End of Service Gratuity, paid at the end of her total employment with CNA-Q, and a salary increase of 6.47%.

[70] On June 1, 2008, Ms. Thorne received a letter confirming the amendment of her contract to allow for the increase in her salary retroactive to September 2, 2007. She was informed that her total annual salary had increased to CAD \$93,351.00 and all other aspects of her contract remained the same.

[71] Ms. Thorne stated that she was not provided by CNA with any breakdown of her annual salary until 2012 after she requested that CNA provide a breakdown. She was not aware that the components of her annual salary were made up of a Newfoundland Base, Newfoundland Premium, and Non-Resident Allowance, or that CNA was calculating a Management Fee Base (MFB) amount.

[72] Ms. Thorne further confirmed that when she was employed in Qatar she had no personal knowledge of the Comprehensive Agreement, its budget approval process, or the existence of salary caps in an agreement between CNA and Qatar.

[73] Ms. Thorne stated that she is now aware that on June 1, 2008, CNA increased an element of her compensation called her Newfoundland Premium from 10% of her base salary to 18.25% of her Newfoundland Base salary, and increased another element called her Non-Resident Allowance from CAD \$9,860.00 to CAD \$12,000.

[74] Ms. Thorne entered a second contract of employment which she accepted on September 9, 2008. The second contract was for a two-year term and provided an annual salary of CAD \$96,122.00, plus any incremental increase provided to CNA by Qatar which the Terms and Conditions to her contract allowed her to receive.

[75] Ms. Thorne stated that she was advised by an email from Dr. Hal Jorch of CNA on November 25, 2008, that CNA had secured a 12.25% Cost-of-Living Allowance (COLA) from Qatar for their employees and that the COLA increase was ratified by Qatar on November 25, 2008, to come into effect on September 1, 2008.

[76] Ms. Thorne was informed that Instructors who received an increase in 2008 would not receive the COLA increase because it was based on the same COLA.

[77] Ms. Thorne did not receive the COLA in 2008. She received the amount of \$96,122.00 in each year of her second contract, as confirmed by Kevin Deveau of CNA in a letter dated November 16, 2012, which did not include the COLA increase.

[78] Ms. Thorne stated that her employment contract with CNA legally obligated CNA to pay her the full amount of the COLA from September 1, 2008, which CNA did not pay as required. She denied she was ever overpaid and stated she was only paid the monies owed to her by virtue of her contracts, except the full COLA amount.

[79] Ms. Thorne's third employment contract commenced on August 17, 2010. During the third contract, Ms. Thorne stated that she was paid part of the COLA, 6.25%, while 6% was held back to cover CNA's liability under its End of Service Compensation program.

[80] Ms. Thorne stated that in 2010 she became aware that CNA had mismanaged its contract with Qatar and had contracted to pay its employees more than CNA could contractually collect under its contract with Qatar. As a result, CNA overbilled Qatar and violated the contract, resulting in CNA being forced to repay millions of dollars.

[81] Ms. Thorne stated that the Office of the Comptroller General investigated the issue and its auditors produced a report which reviewed the overbilling. The report also included the auditors' review of CNA's inappropriate handling of the COLA monies which CNA received from Qatar but had failed to fully pay its employees.

[82] Ms. Thorne stated that on October 10, 2010, the Minister of Education, Mr. Darrin King, and the then President of CNA, Mr. Bruce Hollett, made a public announcement about the overbilling issue. They confirmed that the CNA employees were not overpaid, they had legal employment contracts entitling them to the amounts they were paid, and CNA had no legal or moral right to seek repayment.

[83] Ms. Thorne stated she was aware of the assurances and representations of Mr. Hollett and Mr. King and they solidified her belief that repayment of any amounts CNA had contracted to pay her would be unfair, inequitable and not appropriate.

[84] Ms. Thorne later received a memo on December 5, 2011, advising her that the End of Service Compensation program was discontinued, and she would be provided with a lump sum payment in January 2012 made up of the 6% accrued as an amount for End of Service Compensation up to November 2011.

[85] In cross-examination, Ms. Thorne stated that she was paid the 6% holdback by CNA as an End of Service Compensation benefit, and not as a payment of COLA.

Alan Luyt

[86] Mr. Luyt is a resident of West Vancouver, British Columbia. He stated he was employed by CNA to work as an Instructor on CNA's campus in Doha, Qatar from 2006 to 2012 in the capacity of an Instructor Trades (Mechanical).

[87] Mr. Luyt was hired by an appointment letter dated November 1, 2006. He commenced work on his first contract with CNA in early January 2007 with an end date of December 31, 2009, with total annual compensation of CAD \$71,781.00.

[88] During his first contract, Mr. Luyt stated that he was provided with an increase to his salary. He understood this was to bring his salary in line with his counterparts at CNA in Newfoundland and Labrador and CNA's need to provide its employees in Qatar with competitive salaries.

[89] On June 1, 2008, Mr. Luyt received a letter confirming the amendment of his contract to allow for an increase of his salary retroactive to September 2, 2007. He was informed that her total annual salary had increased to CAD \$83,491.00 and all other aspects of his contract remained the same.

[90] Mr. Luyt stated that on June 2, 2009, he was advised of his second contract with a start date of January 1, 2010, and an end date of December 31, 2011. The second contract provided for annual compensation of CAD \$83,491.00 plus a per diem allowance of CAD \$60.00 per day to an annual maximum of CAD \$15,000.00.

[91] Mr. Luyt stated he did not receive the 12.25% COLA which was provided to CNA by Qatar for the benefit of their employees and which was ratified on November 25, 2008, and was to commence September 1, 2008.

[92] Mr. Luyt stated that the terms and conditions of his contracts were provided to him and they included Articles 5.1 and 5.2 which he understood required CNA to pass along any incremental increase they received from the State of Qatar to him.

[93] Mr. Luyt stated that despite the express terms of his contract, and despite the approval of Schedule A to Annex X of the Comprehensive Agreement confirming the approval of a COLA of 12.25% of his base salary which became effective on September 1, 2008, CNA failed to provide the COLA increase to him.

[94] In cross-examination, Mr. Luyt stated that he was never paid more than the total annual compensation amounts in his letters of appointment. He confirmed that CNA paid him \$14,175.91 for an ESC payment on January 31, 2012, but stated the money was paid to him as an ESC program payment.

[95] Mr. Luyt agreed that under his employment contract he was not entitled to an ESG under Qatari law but confirmed that he had never claimed an ESG in Qatar.

Bruce Hollett

[96] Mr. Bruce Hollett was appointed Deputy Minister of Education and was responsible for post-secondary education commencing in February 2001.

[97] Mr. Hollett stated that he later served three terms as President of CNA:

1. From October 2005 to December 2006, when he also the Deputy Minister of Education;
2. From June 2010 to July 2011; and
3. From July 26, 2018, to May 31, 2020.

[98] Mr. Hollett provided his overview of the Comprehensive Agreement, including the responsibilities of CNA and Qatar thereunder, the requirement for individual contracts for CNA-Q employees, and the governance model under the Comprehensive Agreement for approving changes to employee compensation.

[99] Mr. Hollett stated that as CNA-Q grew it began to occupy excessive resources at CNA, and that in 2005 in his first term as President he established a Vice-President of CNA for the Qatar Project and a separate Qatar Project Office.

[100] Mr. Hollett signed four Annexes that amended or added to the Comprehensive Agreement while he was a member of the Joint Oversight Board (JOB).

[101] Mr. Hollett described Annex I as providing “additional budget room” that could be used to compensate employees. Mr. Hollett stated that Annex I allowed the compensation paid by CNA in Qatar to be competitive with what CNA was paying in Newfoundland and Labrador.

[102] Mr. Hollett’s Affidavit stated that other amendments to the Comprehensive Agreement, as reflected in the Annexes, that related to compensation were specified in the text of the Annex to be changes to the Budget, and the schedules provided guidance or limitations to what the text of the Annex permitted.

[103] Mr. Hollett stated that Annex X was an example of such an Annex and stated it provided a revised salary structure to be incorporated into the Ten-Year Budget, “and nothing more.” He described the schedule to Annex X as providing guidance and limitations as to the applicability of the “budget increases” set out in Annex X.

[104] Mr. Hollett stated that his understanding was that CNA-Q employees were entitled to be paid the total annual compensation amount set out in their individual employment agreement, plus any additional amount that CNA may provide.

[105] Mr. Hollett’s Affidavit stated he never understood they were entitled to receive the amount that Qatar had agreed to reimburse CNA in the Budget. His understanding of this class action is that some employees who were already paid more than the “Budget Cap” are now claiming additional increases in the amount by which the Budget increased in 2008 with the addition of the COLA line item.

[106] Mr. Hollett addressed the public statements he made at a press conference on October 12, 2010, where he stated in the context of the overbilling issue that CNA had no moral or legal right to seek repayment of the overpayment amounts from the staff members because they had employment contracts for what they received.

[107] Mr. Hollett suggested in his cross-examination that if he had known about this class action claim he would not have made the public statements in this manner.

John Hutchings

[108] Mr. Hutchings was employed by CNA from April 2008 to July 2015 as Vice President of Corporate Services. He was not involved with and had no first-hand knowledge the day-to-day activities of the Qatar Project before early 2010. In 2010 he became responsible to oversee the internal investigation by CNA of the overbilling of Qatar under the Comprehensive Agreement.

[109] Mr. Hutchings stated that after Dr. Hal Jorch completed his term as President of CNA-Q in 2009, the computer program he had maintained containing the compensation calculations for all CNA-Q employees crashed and all the compensation calculations had to be “recreated” using other sources of information.

[110] During the process of preparing upcoming contract renewals for August 2010, it was discovered that CNA had paid some employees more than was permitted under the “operational Budgets provided to CNA.” Ultimately, it was determined that CNA had billed Qatar CAD \$5.5 million more than was permitted under the Budget.

[111] Mr. Hutchings reviewed a large number of documents to become familiar with the history before 2010 including the amounts CNA paid to employees, how their compensation was calculated over time, and whether CNA had paid employees more than the budget limits and therefore overbilled Qatar.

[112] Briefing notes were prepared by CNA in 2010ⁱⁱⁱ showing how CNA had calculated the total annual compensation figures for Canadian hires who were resident in Canada for income tax purposes (CRA resident) and for those who elected to become non-resident for Canadian income tax purposes (CRA non-resident).

[113] Mr. Hutchings stated that CNA’s method of calculation of the Management Fee Base (MFB), which was used by CNA to calculate the base salary for employees, the management fee, and other mark-ups, that were charged to Qatar under the Comprehensive Agreement, was complicated and it changed over time^{iv}.

[114] Generally, to derive the total annual compensation figure in an appointment letter for a CRA resident Instructor, CNA would calculate a MFB salary amount that was made up of the sum of the Newfoundland Base Salary, based on the 2002 NL Pay Scales, a Newfoundland Premium, and a Per Diem Allowance.

[115] Generally, for a CRA non-resident, CNA would calculate a MFB amount that was made up of the sum of the Newfoundland Base Salary, based on the 2002 NL Pay Scales, a Newfoundland Premium, and a Non-Resident Allowance. By 2005, the Non-Resident Allowance was added to offset the per diem for CRA residents.

[116] According to the briefing notes attached to Mr. Hutchings' Affidavit, in 2005, a new employee compensation model was discussed and ultimately agreed upon by CNA and Qatar, and the new compensation package for employees was accepted by the Joint Oversight Board on July 3, 2005, and later approved by the State of Qatar.

[117] Mr. Hutchings testified that the ESC program was developed by Dr. Kevin Baker, who was the Vice-President of CNA who was directly responsible for the Qatar Project. The President of CNA-Q, Dr. Hal Jorch, reported to Kevin Baker^v.

[118] Mr. Hutchings testified that the 6% accruals were recorded on the financial statements of CNA while court cases in which employees had successfully sued CNA for an ESG were under appeal. The financial statements for the period ending March 31, 2009, show an accrual of \$3,928,955 for ESC^{vi}.

[119] In an email dated May 28, 2010, to the auditors appointed by the Office of the Comptroller General Mr. Hutchings explained his understanding of the rationale for the ESC program and why CNA split the amount budgeted for COLA into two parts:

To mitigate the risk of continuing court challenges and losses, the College moved to split the amount budgeted for COLA into two parts. 6.25% increase in pay and 6% provision for end of service compensation. Qatar law exempts an employer from paying end of service gratuity if it provides a greater benefit to employees at the end of their service. End of service gratuity in Qatar is equal to 3 weeks pay of

5.769% of salary whereas our end of service compensation is a greater benefit of 6%. [Emphasis added]

[120] In cross-examination, Mr. Hutchings agreed that under the ESC program CNA took part of the money for the 12.25% of base salary COLA increase ratified by Qatar on November 25, 2008, and re-assigned it to CNA's potential liability for ESG as shown in the financial statement accruals.

[121] The intention of CNA, according to Mr. Hutchings, was to use the 6% it held back under the ESC program to pay the Qatari law ESG to CNA-Q employees "if we lost" the appeal. Mr. Hutchings went on to testify that CNA did not "lose" the appeal, so the ESC was paid out in COLA. As we shall see however, the undisputed evidence as to what happened and when it happened does not support his assertion.

[122] Mr. Hutchings stated that when the November 25, 2008, email was sent to all Canadian Hires the 12.25% COLA increase provided by Qatar was understood by CNA to be applicable only to employees whose compensation complied with the amounts permitted under the approved Annual Plans and Budgets^{vii}.

[123] Mr. Hutchings stated in cross-examination that CNA's "logic" was that, in the COLA increase, Qatar was only providing the COLA increase for the CNA-Q employees who were in compliance with the salary cap.

[124] Mr. Hutchings also stated that CNA-Q employees who were already receiving more than the Budget provided were "not entitled to the 12.25% increase."

[125] I find all Mr. Hutchings' evidence about the implementation of the COLA increase reflects his *post facto* understanding of CNA's position in the time frame of its implementation after November 25, 2008. It was acknowledged that he was not directly involved with any of the relevant events or CNA decisions in 2008.

Annette Morey

[126] Annette Morey is employed by CNA as the Vice President Finance and Administration and has worked at CNA for the past 27 years. Her role in the class action was to search CNA employment records and to compile information about payments to the employees at CNA-Q to respond to the claim by the Class members.

[127] Ms. Morey stated that the number of former employees falling within the Class definition is 607. Of the CNA-Q employees who were employed on September 1, 2008, she stated that only four employees had contracts that commenced before 2006, and the remainder had contracts that commenced in 2006, 2007, or 2008.

[128] Ms. Morey confirmed that the Board of Governors of CNA formally approved the 12.47% increase for the Instructors on April 29, 2008, retroactive to September 1, 2007. She also confirmed that, for Instructors, CNA began to accumulate 6% of the 12.47% increase for ESC immediately.

[129] In cross-examination, Ms. Morey confirmed that the 12.47% increase amount referred to in the March 27, 2008, email to Canadian Hires reflected the actual percentage change from the 2002 NL Faculty Scales to the 2007 NL Faculty Scales.

[130] Ms. Morey confirmed the 2008 retroactive salary increase provided to Ms. Thorne was in fact 8.25%, not 12.47% or 6.47%, and was calculated by increasing the Newfoundland Premium from 10% to 18.25% of the Newfoundland Base.

[131] Ms. Morey stated that in June 2008 the Joint Oversight Board approved a COLA Budget increase and that on November 25, 2008, the State of Qatar ratified this budget increase at which time the Comprehensive Agreement was amended.

[132] Ms. Morey agreed that the retroactive increase for the Instructors approved on April 29, 2008, was not the same increase provided by Qatar for the COLA increase because the COLA increase had not been considered by the Joint Oversight Board or approved by Qatar when the April 29, 2008, increase was approved by CNA.

[133] According to Ms. Morey, the addition of a line item to the Budget permitted CNA to increase compensation for employees by up to 12.25% of the MFB portion of their compensation, and the budget increase became effective September 1, 2008.

[134] Ms. Morey stated that as with the retroactive increase provided to faculty in April 2008, CNA accumulated approximately one half (i.e. 6%) of the approved 12.25% increase for each employee to be paid out upon termination of their employment or when a final decision was made on the ESG.

[135] The 6% accumulation was intended by CNA to be based on the actual MFB for each employee, or the maximum approved MFB if the employee was being paid more than maximum approved MFB, but Ms. Morey confirmed that for 47 Class members the 6% was calculated on an MFB above the maximum approved amount.

[136] Despite her characterization of the COLA increase as a “budget increase”, Ms. Morey confirmed in her Affidavit that CNA had billed Qatar for the 6% of the COLA “budget increase” as End of Service Compensation beginning on February 17, 2009, including the retroactive amount, and continued to bill Qatar for 6% End of Service Compensation until December 5, 2011.

[137] Ms. Morey also confirmed that when CNA calculated the amount it was required to repay to Qatar for overbillings in 2010, it was able to include the 6.25% of the COLA “budget increase” in the maximum permitted calculation. The effect of this was that the 6.25% was attributed to the compensation paid to each employee who had never received the COLA and CNA used the 6.25% to reduce its repayment.

[138] Ms. Morey stated that of the 607 Class members, 327 were at some point paid compensation amounts in excess of the maximum that Qatar had agreed to reimburse to CNA for those employees, and Ms. Thorne was one of those employees.

Deborah Thorne (Responding)

[139] Ms. Thorne's Responding Affidavit dated February 14, 2025, attached a further memo sent out by CNA dated July 25, 2013, which confirmed that the End of Service Compensation payment made to her and others in January 2012, was made in full and final satisfaction of CNA's obligation under the End of Service Compensation Program. It did not refer to satisfying any obligation to pay COLA.

[140] Ms. Thorne also addressed the characterization of her claim by Mr. Hollett in his Affidavit as her claiming an "entitlement to the amount Qatar had agreed to reimburse CNA as set out in the budget as part of the (Comprehensive Agreement).

[141] Ms. Thorne described it as a misrepresentation of her claim stating that the entitlement claimed to the COLA arises from her contract with CNA which compels CNA to pay her any salary increases that it requested and received from the State of Qatar to take effect on September 1 of the year in which the increase was provided.

[142] Ms. Thorne denied that she was now making a claim for what was "in the budget" that was agreed between CNA and Qatar and confirmed that her claim was relying on Article 5.2 of her contract, stating that clause meant to her that any increase provided to the employer by Qatar, for her, has to be passed on to her.

The Additional Factual Background

[143] Neither party objected, subject to cross-examination of the deponents, to the documents tendered being considered as evidence of the truth of the factual statements within the documents. I will refer next to some of the relevant documents.

The 2001 Comprehensive Agreement

[144] The Comprehensive Agreement was a contract for services between CNA and Qatar. CNA agreed as Contractor to provide all educational and administrative services required to operate the campus at CNA-Q^{viii}. Qatar agreed to compensate CNA for its services in accordance with the agreement^{ix} and provide the facilities.

[145] In order to perform the services required CNA was responsible to hire, recruit, employ and manage all CNA-Q personnel^x. All staff and managers employed at CNA-Q were specifically required to be CNA employees^{xi}.

[146] The Comprehensive Agreement was a cost-plus contract. Qatar agreed to compensate CNA for its services by reimbursing it for the direct labour costs it incurred in employing the faculty and staff and paying CNA a management fee of 10% of the base salary of all CNA-Q employees^{xii}. Qatar further agreed to pay CNA a mark-up of 25% of the base salary of all employees for fringe benefits^{xiii}.

[147] The term of the Comprehensive Agreement included a start-up period and a 10-year operational period from September 1, 2002, to August 31, 2012.

[148] The operating costs for the start-up period and the operational period were outlined in a Start-Up Budget and a Ten-Year Budget, attached as appendices to the

Comprehensive Agreement. These budgets reflected estimates of the operating costs of the campus during the term of the Comprehensive Agreement^{xiv}.

[149] The Comprehensive Agreement provided for an annual budget approval process. The Annual Plan and Budget for each year of operation required Joint Oversight Board approval and Qatar Authority final approval.^{xv} The CNA-Q fiscal year was the 12-month period starting on September 1 and ending on August 31.

[150] CNA-Q employees were required to be compensated in accordance with the remuneration rates in the Start-up Budget or an approved Annual Plan and Budget^{xvi}. It was agreed that the rates may be amended by mutual agreement to reflect changes in the market rates of compensation for personnel recruited to work at CNA-Q^{xvii}.

[151] The maximum base salary for Instructors in the Start-Up Budget and Ten-Year Budget was USD \$46,500^{xviii}. The maximum base salary for Instructors was converted in 2005 by Annex I of the Comprehensive Agreement from USD to CAD \$73,935^{xix}. That amount never changed in any subsequent Annual Plan and Budget.

[152] The initial employee compensation package approved in the Start-Up Budget included an uplift paid to employees called an Overseas Premium (OSP) of 25% of base salary. The initial employee compensation package also included amounts for international travel, relocation and school fees for children of the employees.

[153] The initial approved employee compensation package was formally revised twice. On both occasions the Comprehensive Agreement was amended by adding annexes called Annex I and Annex X. The details of the Annexes are set out below.

The Individual Contracts of Employment

[154] Because unions were illegal in Qatar, Instructors who were appointed by CNA to a position at CNA-Q entered into individual employment contracts with CNA.

[155] The letters of appointment were prepared by CNA and sent to each individual Instructor offering employment at CNA-Q for a defined term, identifying the position offered, and the compensation for the position.

[156] The total annual compensation figure in each letter of appointment was calculated internally by CNA. The elements making up the figure were not referred to in the Comprehensive Agreement or in the Annexes to that agreement. The evidence showed that these terms were all internal to and used exclusively by CNA.

[157] The make-up of the total annual compensation figure in the letters of appointment, including the elements and amounts that made up the figure, were not disclosed to the Instructors in the appointment letters^{xx}.

The 2005 Terms and Conditions of Employment

[158] By November 30, 2005, the date when Ms. Thorne was first appointed as an Instructor, all letters of offer of employment to Instructors stated that any acceptance of an offer of employment was also an acceptance of the Terms and Conditions of Employment document and the Leave and Other Benefits document.

[159] Ms. Thorne's letter of appointment referred to the 2005 Terms and Conditions document. The evidence showed that the 2005 Terms and Conditions or a revision was attached to each of the Plaintiffs' letters of appointment, or within the letter, the Plaintiff was informed that the document was available on the CNA-Qatar website.

[160] The evidence showed that there were revised versions of the Terms and Conditions document prepared by CNA in 2006, 2007, 2008, 2010 and 2011.

[161] CNA acknowledged that all versions of the Terms and Conditions contained the same or similar provisions to Articles 5.1 and 5.2.

[162] There was no evidence that the 2005 Terms and Conditions were negotiated between the Instructors and CNA. I am satisfied that the Terms and Conditions were prepared by CNA and provided to Instructors on a “take it or leave it” basis.

[163] On the evidence, I find that the 2005 Terms and Conditions document was created by CNA in 2005 prior to Ms. Thorne’s appointment letter of November 30, 2005, which refers to the 2005 Terms and Conditions document.

Annex I – Direct Labour Costs July 3, 2005

[164] On July 3, 2005, CNA and Qatar amended the Comprehensive Agreement to add Annex I – Direct Labour Costs. Annex I provided that the revised employee salary structure attached as Schedule A to the Annex shall be incorporated into and form part of Appendix 4, the Ten-Year Budget of the Comprehensive Agreement^{xxi}.

[165] Schedule A to Annex I of the Comprehensive Agreement was titled “Human Resources Compensation Package.” The elements of the revised structure were listed under a sub-heading “COT Compensation Package as approved 03-July-05.”

[166] The revised employee salary structure in Schedule A included the conversion of salaries for all employees employed at CNA-Q on or before July 3, 2005, from US dollars to Canadian dollars, at a USD \$1.00 to CAD \$1.59 exchange rate.

[167] The revised employee salary structure in Schedule A also added a Special Allowance for all CNA-Q employees paying Canadian income taxes. The Special Allowance was calculated at a fixed amount of 10% of base salary for existing hires and 10-15% of base salary for new hires based on qualifications and experience^{xxii}.

[168] Schedule A introduced a salary cap of CAD \$85,000 for faculty and CAD \$60,000 for support staff who were paying Canadian income taxes (made up of base salary plus special allowance)^{xxiii}. The salary cap was not applied to existing faculty and support staff. I will call the CAD \$85,000 cap the “New Instructors’ Salary Cap.”

[169] As referenced above, the maximum base salary for Instructors of USD \$46,500 was converted at the one-time CAD \$1.59 exchange rate to CAD \$73,935. I will describe the CAD \$73,935 maximum base salary amount as the “Instructors’ Maximum Base Salary” to avoid confusion with the New Instructors’ Salary Cap.

[170] Schedule A also confirmed that the existing Comprehensive Agreement structure of a salary base, a 25% Overseas Premium (OSP) uplift, a 25% fringe benefits mark-up, and a 10% management fee (all calculated on salary base) was to remain otherwise unchanged under the revised employee salary structure.

The Plaintiffs’ First Contracts of Employment

[171] By a letter of November 30, 2005, Ms. Thorne was appointed as an Instructor, English as a Foreign Language, from November 13, 2005, until August 2008.

[172] The total annual compensation for the position was \$CAD 79,915. Ms. Thorne was informed she would also receive a per diem allowance of \$CAD 50 per day for each day she was present in Qatar to a maximum for 300 days (\$15,000).

[173] The letter states that the 2005 Terms and Conditions of Employment document is attached. Ms. Thorne formally accepted the offer on April 6, 2006^{xxiv}.

[174] In March 2007, Ms. Thorne elected CRA non-resident status. By a letter of March 13, 2007, CNA offered to amend her current Terms and Conditions of Employment and Leave and Other Benefits documents, including her compensation package, and the total annual compensation for her position was amended effective March 21, 2007, to \$85,210^{xxv}.

[175] By a letter of November 1, 2006, Mr. Luyt was appointed as an Instructor, Industrial Trades (Mechanical), from early January 2007 until December 31, 2009.

[176] The total annual compensation for the position was \$CAD 71,781. Mr. Luyt was informed he would also receive a per diem allowance of \$CAD 50 per day for each day he was present in Qatar to a maximum for 300 days (\$15,000).

[177] The letter attached the May 17, 2006, version of the Terms and Conditions of Employment. Mr. Luyt formally accepted the offer on November 16, 2006^{xxvi}.

[178] In 2006, CNA amended the Leave and Other Benefits document under Part III “State of Qatar Provided Benefits” to provide that employees were not entitled to any end of service gratuity as anticipated in or prescribed by Qatari law^{xxvii}.

The Plaintiffs’ Contracts of Employment (Continuing)

[179] On June 7, 2008, Ms. Thorne received an offer of employment (continuing) letter for the same position starting on August 17, 2008, which provided as follows:

Offer To: Ms. Debbie Thorne.
Position Code: 0516064

Position: Instructor-EFL
 Supervisor: Dean Language Studies & Academics
 Annual Leave (days): 54
 Terms & Conditions Document: JUN08 Terms and Conditions
 Leave & Other Benefits Document: JUN08 Leave & Other Benefits
 Both available at www.cna-qatar.com/contract-documents
 Payroll Start Date: August 17, 2008
 Contract End Date: July 31, 2010
 Classification: AG6 S8
Taxation Status: Non-Resident of Canada – CNA Payroll
 Total Annual Salary: \$CAD 96,122

[180] The letter stated that Ms. Thorne would continue to be an employee of College of the North Atlantic (Newfoundland and Labrador) but working at College of the North Atlantic – Qatar which is generally subject to the laws of the State of Qatar and the terms of the Comprehensive Agreement between the State of Qatar and College of the North Atlantic.

[181] The JUN2008 Terms and Conditions of Employment document was attached. Ms. Thorne accepted the offer on September 9, 2008.

[182] After the COLA was approved and Ms. Thorne was informed by CNA she had already received the COLA increase (see below), she requested a breakdown of her total annual salary of \$96,122 for the period August 17, 2008, to July 31, 2010.

[183] In 2012, CNA informed Ms. Thorne that her total annual salary had been made up as follows^{xxviii}:

NL Base - \$54,882 (Classification AG 6 Step 8)
 NL Premium – 18.25% - \$10,016
 Non-Resident “Per Diem” Allowance - \$12,000
 MFB - \$76,898 (over Faculty maximum MFB of \$73,935)
 Special Allowance – 0% (not entitled as a Non-Resident)
 Overseas Premium – 25% - \$19,224 (over Faculty maximum OSP of \$18,484)
 Compensation as Stated in Contract Letter - \$96,122
 Compensation actually paid - \$96,122

[184] On April 16, 2010, Ms. Thorne received an offer of employment (continuing) letter for the same position starting on August 1, 2010, and ending on July 31, 2012. The April 12, 2010, Terms and Conditions of Employment document was attached.

[185] The total annual compensation for the position was \$CDN 97,040. Ms. Thorne was also informed she would receive an annual transportation allowance of QR 6000. Ms. Thorne accepted the offer on April 30, 2010^{xxix}.

[186] In 2012, after a request, CNA informed Ms. Thorne her total annual salary of \$97,040 from August 1, 2010, to July 31, 2012, had been made up as follows:

- NL Base - \$54,882 (Classification AG 6 Step 8)
- NL Premium – 18.25% - \$10,016
- Per Diem Allowance - \$12,000
- MFB - \$73,935 (maximum)
- Special Allowance – 0% (not entitled as a Non-Resident)
- Overseas Premium – 25% - \$18,484 (Faculty maximum of \$18,484)
- COLA+ 6.25% = \$4,621
- Compensation as Stated in Contract Letter - \$97,040
- Compensation actually paid - \$97,040

[187] On April 27, 2012, Ms. Thorne received an offer of employment (continuing) letter for the same position starting August 1, 2012, and ending July 31, 2013. The April 2011 Terms, Conditions and Benefits of Employment were attached.

[188] The total annual compensation for the position was \$CDN 101,476. Ms. Thorne was also told she would receive an annual transportation allowance of QR 6000. Ms. Thorne accepted the offer on May 10, 2012^{xxx}.

[189] Ms. Thorne's annual compensation of \$101,476 included the COLA amount of \$9,057 calculated at 12.25% of the Instructors' Base Salary Cap of \$73,935^{xxxi}.

[190] On June 2, 2009, Mr. Luyt received an offer of employment (continuing) letter for the same position as follows:

Offer To: Mr. Alan Leslie Luyt
Position Code: 0517036
Position: Instructor-Indus. Maech.
Supervisor: Associate Dean Trades
Annual Leave (days): 54
Terms & Conditions Document: JUN08 Terms and Conditions
Leave & Other Benefits Document: JUN08 Leave & Other Benefits
available at www.cna-qatar.com/contract-documents
Contract Start Date: January 01, 2010
Contract End Date: December 31, 2011
Classification: AG6 S8
Taxation Status: Resident of Canada for Tax Purposes
Payroll Annual Salary: \$CAD 83,491 (\$CAD 76,195 pensionable)
Per Diem: \$CAD 60 per day in Qatar to an annual maximum of \$CAD 15,000

[191] The letter stated that Mr. Luyt would continue to be an employee of College of the North Atlantic (Newfoundland and Labrador) but working at College of the North Atlantic – Qatar which is generally subject to the laws of the State of Qatar and the terms of the Comprehensive Agreement between the State of Qatar and College of the North Atlantic.

[192] The letter informed Mr. Luyt that the JUN2008 Terms and Conditions of Employment document is on the CNA-Q website. Mr. Luyt formally accepted the offer of employment (continuing) on June 8, 2009^{xxxii}.

The 2008 End of Service Compensation Program

[193] In 2005, the State of Qatar had enacted a law to provide for an End of Service Gratuity (ESG). The ESG was equal to three weeks' pay for every year of service (approximately 5.77%) for all employees of private sector employers who did not provide an equivalent end-of-service severance benefit or pension benefit^{xxxiii}.

[194] After the law was enacted, some CNA-Q employees made claims against CNA in Qatari courts for non-payment of ESG. By 2008, CNA had been successfully sued by three CNA-Q employees in Qatari courts for non-payment of the Qatari law ESG at the end of their employment.

[195] Facing a potential liability to pay all CNA-Q employees an ESG at the end of their total employment, CNA decided to address its financial liability for payment of the ESG by establishing an end of service (ESC) compensation program^{xxxiv}.

[196] The ESC program is first referenced in an email of March 28, 2008, from Kevin Baker to all Canadian Hires. Dr. Baker informed the Instructors who were eligible to receive the 12.47% 2008 Retroactive Base Salary Increase (see section below), they would receive a 6.47% increase and 6% would be withheld for the ESC program and paid out at the end of their total employment at CNA-Q^{xxxv}.

[197] The ESC program is referred to again in an email of November 25, 2008, from Dr. Hal Jorch to all Canadian Hires.

[198] Dr. Jorch informed the CNA-Q employees who CNA deemed were eligible to receive the 12.25% COLA amount (see section below), that they would receive an increase a 6.25% increase of their salary base, retroactive to September 1, 2008, and that the remaining increase of 6% of their salary base would be held back by CNA to cover the risk to CNA of an End of Service Gratuity liability^{xxxvi}.

[199] The 6% accruals were recorded on the financial statements of CNA for the ESC program. The financial statements for the period ending March 31, 2009, show an accrual of \$3,928,955 for ESC^{xxxvii}.

[200] By a decision of the State of Qatar Court of Cassation, Civil Department, on December 25, 2012, the Qatari courts ruled that CNA-Q employees were not entitled to the ESG^{xxxviii}. By November 2011, as outlined below, CNA had already decided

to terminate the ESC program and decided to pay out the withheld 6% of COLA amount to the CNA-Q employees as an ESC benefit, and not as a COLA payment.

The 2008 Retroactive Salary Increase

[201] On March 27, 2008, Dr. Jorch, forwarded an email from Kevin Baker to the Canadian Hires at CNA-Q, informing them that all faculty would be placed on the 2007 NL Faculty Scales for purposes of calculating their NL Base Salary^{xxxix}. I will call this the “2008 Retroactive Salary Increase.”

[202] The email advised that this would result in an approximate 12.47% “across-the-board salary increase” for all those faculty who do not exceed the total maximum compensation for CNA-Q employees of \$106,000 annually, with the increase paid out in a 6% ESG and a 6.47% salary increase retroactive to September 2, 2007^{xl}.

[203] On June 1, 2008, CNA wrote to Ms. Thorne informing her that she would be receiving increases in her compensation commencing in the next payroll along with any retroactive amounts to 02-Sep-07 (first working day of the 2007-2008 budget year), with all other aspects of her contract to remain the same^{xli}.

[204] The June 1, 2008, correspondence to Ms. Thorne provided this summary:

Employee Name: Ms. Debbie Thorne.
Taxation Status: Non-Resident of Canada – CNA Payroll
Contract End Date: (on or about): August 31, 2008
Position: Instructor-EFL
Position Code: 0516064
Classification: AG6 S7
Previous Annual Salary: \$CAD 85,210
New Annual Salary: \$CAD 93,351
Non-Resident Adjustment included in Previous Annual Salary: \$CAD 12,325
Non-Resident Adjustment included in New Annual Salary: \$CAD 15,000

[205] On June 1, 2008, CNA wrote to Mr. Luyt stating that he would be receiving increases in his compensation commencing in the next payroll along with any retroactive amounts to 02-Sep-07 (first working day of the 2007-2008 budget year), with all other aspects of his contract to remain the same^{xliii}.

[206] The June 1, 2008, correspondence to Mr. Luyt provided this summary:

Employee Name: Mr. Alan Leslie Luyt
Taxation Status: Resident of Canada for Tax Purposes
Contract End Date: (on or about): December 31, 2009
Position: Instructor-Indus. Mech.
Position Code: 0517036
Classification: C3 LA+C S7/11
Previous Annual Salary: \$CAD 71,781
New Annual Salary: \$CAD 83,491
Plus Per Diem Allowance: \$CAD 60 per day in Qatar to an annual maximum of \$CAD 15,000

Annex X – Direct Labour Costs November 25, 2008 – The COLA

[207] On June 15, 2008, CNA brought a motion before the JOB that it approve a further revised approved salary structure for CNA-Q employees. The revision was approved by the JOB on that date and was ratified by Qatar on November 25, 2008.

[208] On November 25, 2008, Qatar formally approved the revised employee salary structure motion approved by the JOB on June 15, 2008^{xliiii}, and it was incorporated into the Comprehensive Agreement by Annex X - Direct Labour Costs^{xliv}.

[209] Annex X provided that the revised employee salary structure (attached as Schedule A) shall be incorporated into and form part of Appendix 4, the Ten-Year Budget of the Comprehensive Agreement.

[210] Schedule A to Annex X of the Comprehensive Agreement was entitled “Human Resources Compensation Package” followed by a sub-heading “Employee Compensation Package Revisions As approved by the Joint Oversight Board on 19-June-08.”

[211] Schedule A included the following description of a Cost-of-Living Allowance:

1. Cost-of-Living Allowance (COLA)
 - a. Effective September 1, 2008
 - b. Applied to all CNA-Qatar employees
 - c. Not to be included in the salary base (e.g. no management fees on COLA)
 - d. Not included in capped amount (Re: Annex I)
 - e. Amount of the COLA is 12.25% of base salary.

[212] By its express terms, I find the COLA was a revenue neutral “all employee” addition to the existing employee salary structure that was not included in the salary base (e.g. no management fees on COLA) or in the New Instructors Salary Cap.

[213] In his November 25, 2008, email sent to the “Canadian Hires” at CNA-Q, Dr. Jorch informed the Support Staff, Professional Staff and Management Staff at CNA-Q that the Qatar Authority has ratified a previous decision by the Joint Oversight Board of CNA-Q “for an increase to your salary”^{xlv}.

[214] Dr. Jorch stated “this allows (CNA) to extend the increases offered to Instructors last spring to all employees at CNA-Q.” The increase would be calculated as 6.25% of Qatar salary base, retroactive to September 1, 2008, with 6.00% “held back to cover the risk to CNA of an End of Service Gratuity liability.”

[215] The employees of CNA in the Instructor category were informed that they had “already received the COLA increase in the spring, based on the same Cost-of-Living Increases [COLA] in NL that were the basis of this new scheme.”

The Overbilling of Qatar Issue in 2010

[216] In early 2010, after its CNA-Q employee compensation database crashed, CNA determined that it had paid some Instructors who were hired after July 3, 2005, more than the Instructors’ Maximum Base Salary of CAD \$73,935^{xlvi}.

[217] CNA determined that the overbilling of Qatar resulted because in calculating total annual compensation figures CNA-Q had conflated the New Instructors’ Salary Cap of CAD \$85,000 with the Instructors’ Maximum Base Salary of CAD \$73,795.

[218] As a result, CNA paid some Instructors including Ms. Thorne a base salary more than CAD \$73,795.

[219] CNA also determined that it had overbilled Qatar for management fees, benefit amounts and COLA amounts, which were calculated, respectively, at 10%, 25% and 12.25% mark-ups of the incorrect Instructors base salaries^{xlvi}.

[220] In two reports prepared by the Office of the Comptroller General dated June 10, 2010, the auditors ultimately accepted CNA’s calculation of its overbilling of Qatar for salaries, benefits, management fees and COLA for the period September 1, 2005, to March 31, 2010, of \$5.5 million^{xlvi}.

[221] The Comptroller General found however that from the early years of operation CNA had overbilled Qatar because it understood the Comprehensive Agreement allowed it to pay some Instructors above the budgeted amount of USD \$46,500, and

some less, provided the average for all Instructors was less than USD \$46,500 and the total salaries remained within the line items as outlined in the budget^{xlix}.

[222] It also appeared that when the 2008 Retroactive Increase was approved by CNA it believed, again based on its interpretation of the Comprehensive Agreement, that there was available room in the Annual Plan and Budget for funding the 2008 Retroactive Increase^l.

[223] The Office of the Comptroller General made five findings in the summary of its Report dated June 10, 2010. The findings were accepted by CNA.

[224] The first finding was as follows:

Employees appear to have been paid in accordance with contracts they signed in good faith with CNA. It is not an issue of employees being “overpaid”; rather the issue is that the salary offers in the employment contracts were in excess of amounts that Qatar agreed to reimburse as per the CA (Comprehensive Agreement). They were therefore “overbilled”^{li}.

The Public Announcement by the CNA President and Minister in 2010

[225] On October 12, 2010, the Hon. Darin King, Minister of Education, released the findings of the review of overbilling of Qatar by CNA at a press conference. Mr. Bruce Hollett, who was then the acting President of CNA, addressed the overbilling issue and CNA’s official response to the recommendations in the report^{lii}.

[226] Mr. Hollett explained that the overbilling of Qatar occurred because of CNA’s incorrect interpretation of the Comprehensive Agreement. He stated that a number of CNA-Q employees had employment contracts that unknowingly paid them more than the amounts that were reimbursable under the Comprehensive Agreement, resulting in an overbilling by CNA of the salary amounts and the management fees.

[227] Mr. Hollett then stated the following publicly:

As for the employees affected, they were not overpaid, they all had legal employment contracts which specified a salary amount which is what they were paid. The College has no legal or moral right to seek repayment from these staff. All contract renewals for these staff however are at amounts that are reimbursable under the Comprehensive Agreement.

[228] In his evidence Mr. Hollett clarified that if he had known in October 2010 that the Plaintiffs would commence this class action then he may not have made the public statements in the same manner he did.

The Discontinuance of the ESC Program in 2011

[229] Mr. Hutchings testified there were discussions between CNA and government officials about the accumulation of 6.00% of the COLA amounts billed to Qatar for an ESC program. According to Mr. Hutchings, the interpretation of CNA was that withholding the 6.00% was permitted under the Comprehensive Agreement.

[230] In his email dated May 28, 2010 to an auditor appointed by the Office of the Comptroller General, Mr. Hutchings also explained his understanding of CNA's interpretation of the Comprehensive Agreement which supported its conclusion that it was justified in withholding 6% of the COLA from the CNA-Q employees:

We have a different interpretation of the comprehensive articles you refer to below. Our position which is supported by the comprehensive agreement is that salary amounts are budgets. We cannot pay out more than that amount. We can, however contract with employees to pay out less than is in the budget and that is what we have done. Employees will get all 12.25% of the COLA budgeted. The only question is when. [Emphasis added]

[231] According to the Comptroller General, withholding 6.00% was not permitted because under the Comprehensive Agreement and Annexes the COLA was intended to be paid to employees bi-weekly to pay day-to-day cost-of-living expenses^{liii}.

[232] CNA did not inform Qatar of the decision to withhold the 6.00% of COLA or its rationale for that decision until July 5, 2010, after it was determined it had been overbilling Qatar and after the overbilling review and audits were completed^{liv}.

[233] Ms. Morey confirmed that on November 22, 2011, a decision was ultimately made by CNA to discontinue the ESC program. As of and from that date no further amounts of 6% of base salary were accumulated by CNA under the ESC program.

[234] On December 11, 2011, the President of CNA informed the Canadian Hires that it had decided to “discontinue the 6% end of service compensation program and instead apply it to your bi-weekly pay”^{liv}. This was more than one year before the decision of the Qatar Court of Cassation which confirmed the position that CNA-Q employees were not entitled to the ESG under Qatari law.

The Payment to Instructors of the 6% ESC Amounts in 2012-2013

[235] In January 2012, CNA paid the 6.00% portion that had been withheld for the ESC program effective September 1, 2008, in a lump sum payment, with interest.

[236] The Plaintiffs confirmed that they received the withheld amounts of 6.00%. Both Plaintiffs testified however that when the 6% amount was received it was specifically paid to them by CNA in an ESC benefit and not in a COLA payment.

[237] In 2013 another ESC payment was made to some of the Instructors who had 6.0% withheld from the 2008 Retroactive Base Salary Increase for the ESC program.

[238] A memo was sent by CNA to all Canadian Hires on July 25, 2013^{lvi} informing them the End of Service Compensation issue was finally resolved, and the Board of Governors had completed its review. In the memo CNA confirmed the basis upon which the withheld funds were paid to the CNA-Q employees, including Instructors:

I am pleased to inform you the CNA Board of Governors has finished its review and has approved the release of the End of Service Compensation funds owing to these employees. This payment, together with the ESC payment made in January 2012, represents full and final satisfaction of CNA's obligations to employees under the ESC program. [Emphasis added]

THE ISSUES

[239] The first issue is whether the Plaintiffs' application for the determination of three issues by the summary trial procedure under Rule 17A should be granted.

[240] Flowing from my decision on the summary trial application, I am asked to decide these three issues:

1. Were the Instructors entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008, and November 22, 2011?
2. Has the Defendant established a defence of equitable set-off?
3. Are the Instructors entitled to judgment interest?

ANALYSIS

1. Should the Plaintiffs' Application for a Summary Trial be Granted?

[241] The summary trial procedure is available in this Court on an application under Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

[242] Rule 17A contains the following relevant provisions:

17A.01(1) A plaintiff or defendant may, after defence has been filed and at any time prior to the proceeding being placed on a trial list, apply to the Court with supporting affidavit material or other evidence for summary trial seeking judgment on or dismissal of all or part of the claim in the statement of claim, as the case may be.

17A.03(2) Where the Court decides that there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, upon an issue or generally, unless

- (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or
- (b) it would be unjust to decide the issues on the application.

[243] The Supreme Court of Canada has directed trial courts to use the summary trial procedure similar to the one found in Rule 17A in appropriate cases to provide litigants with proportionate, timely, and affordable access to justice: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at paras. 28 and 32.

[244] Summary trial applications have become an important and widely used means of improving access to justice. There is no reason in principle that the summary trial procedure in Rule 17A cannot be used in a class action common issue trial: *Wise v. Abbott Laboratories, Limited*, 2016 ONSC 7275.

[245] The law under Rule 17A has developed a screening device grounded in the inherent power of the Court to control its own process to ensure that unmeritorious motions for summary trial do not waste time and resources and cause unnecessary expense. This is known as the threshold inquiry: *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, at paragraphs 40-41.

[246] The threshold inquiry on an application under Rule 17A was described as a preliminary determination by a judge of “whether the applicant has provided some evidentiary basis for the assertions made and whether the nature of the case is such that it is potentially capable of being dealt with in the attenuated manner contemplated by a summary trial”: *Young v. Noble*, 2016 NLCA 58, at para. 27.

[247] The second aspect of the threshold inquiry in *Young* was later clarified by the Court of Appeal to be a requirement that the judge decide whether there is any reason evident at that stage that it would be inappropriate to deal with some or all of the issues by summary trial: *Brook Construction*, at paragraphs 34-37.

[248] Once it is determined that the threshold inquiry is satisfied, Rule 17A.03 provides the jurisdictional test for granting judgment on a summary trial application. Rule 17A.03(1) provides that where there is no genuine issue for trial on a claim or defence the Court “shall grant summary judgment accordingly.”

[249] In *Brook Construction*, the Court of Appeal defined a genuine issue as one that is “not spurious” and “relates to a material fact or point of law that is necessary to be decided to resolve the ultimate controversy between the parties.”

[250] Rule 17A.03(2) goes on to provide that even where there is a genuine issue with respect to a claim or defence, a judge *may* nevertheless grant judgment in favor of any party, unless the judge cannot find the facts necessary to decide the questions of fact or law, or it would be unjust to decide the issues on the application.

[251] Given the endorsement in *Hryniak* of the use of a summary trial, the Court of Appeal has held the burden of persuasion rests on the opposing party to show that a summary trial is an inappropriate process: *Brook Construction*, at paragraph 41.

[252] Whether the summary trial procedure should be used to decide a genuine issue for trial turns largely on whether a judge can find the facts necessary to decide the questions of fact or law on the existing record. In *Marco*, this issue was termed by Green, J., as whether the evidentiary record was “sufficient for adjudication”: *Marco Ltd. v. Newfoundland Processing Ltd.* (1995), 130 Nfld. & P.E.I.R. 317, 405 A.P.R. 317 (Nfld. S.C.(T.D.)) (*Marco No. 2*), at para. 76.13.

[253] A judge must also consider whether it would be “unjust” to use the procedure. The list of factors that may be considered in determining whether it would be “unjust” to proceed by summary trial is not closed. The factors may include whether there is other material evidence available that might materially affect the result, and a variety of other case-specific considerations including the complexity of the matter and the amount at stake: *Marco No.2*, at paragraph 76.15.

[254] Ultimately, the decision whether to grant or refuse an application for summary trial is a discretionary one: *Marco No. 2*, at para. 76.14

The Positions of the Parties

[255] CNA submitted the preliminary threshold has not been crossed and it opposed the summary trial application because the issues as framed by the Plaintiffs lack clarity and conciseness. CNA accepts however that the “no entitlement” question as framed by CNA is a genuine issue appropriate for determination by a summary trial.

[256] The Plaintiffs submit that the three issues as framed are appropriate for determination by summary trial. They point to the existence of a documentary record that establishes the material background facts and argue that a summary trial is proportionate, timely, and appropriate given the protracted proceedings to date.

Discussion

[257] On the threshold inquiry under Rule 17A, I am satisfied that the preliminary threshold in favor of proceeding by summary trial has been crossed by the Plaintiffs.

[258] The Affidavits of the Plaintiffs comply with Rule 17A by putting forward an evidentiary basis for the claim that they are contractually entitled to receive the full amount of the COLA for the period of September 1, 2008, and November 22, 2011.

[259] The Plaintiffs assert they were employed by CNA at CNA-Q as Instructors, and that by the terms of Article 5.2 of their written contracts CNA promised to pay them any incremental increase specifically provided to CNA by Qatar for the sole purpose of providing such an increase to an employee's total annual compensation.

[260] The Plaintiffs further assert that CNA was specifically provided with such an incremental increase by Qatar to take effect September 1, 2008, the COLA, which CNA did not fully pay to them in full, thereby breaching their employment contracts.

[261] As to the defence of equitable set-off, the Plaintiffs assert that they were not overpaid because all amounts of compensation received by them from CNA were paid in accordance with the specific terms of their signed contracts of employment.

[262] In terms of the nature of the case this is a class action proceeding for breach of contracts of employment. The common issue is were Instructors entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011.

[263] The law of contractual interpretation is well-settled. In general terms, what I must determine is what did the parties to the employment contracts mutually and objectively intend by Article 5.2 when they entered the contracts.

[264] I must make this determination by reference to the words used in Article 5.2, read in the context of the contract as a whole. In addition, the contract as a whole, and Article 5.2 in particular, must be examined in the context of the factual matrix that gave rise to the contract and in which the parties intended it to operate.

[265] I am satisfied at the threshold stage that the extensive evidence in the record is sufficient to allow a full understanding of the factual matrix in which the contract, and Article 5.2, arose and in which the parties intended it to operate. There is no concern regarding record-adequacy apparent on the extensive record before me.

[266] There were very few conflicts in the evidence tendered by the parties aside from different interpretations of the Comprehensive Agreement and the contracts of employment offered by the witnesses and some commentary on their legal effect.

[267] I do not agree with CNA's submission that the issues as stated by the Plaintiffs lack clarity and conciseness.

[268] I further do not agree with CNA's submission that on the summary trial I should restrict myself to deciding CNA's "no entitlement" argument and defer deciding CNA's "new money" and "satisfaction" arguments to a further hearing.

[269] I will explain why I have reached these two conclusions.

[270] In its factum at sub-paragraph 52(3), CNA unpacks the common issue for trial into a detailed series of cascading sub-questions, beginning with whether Article 5 of the Terms and Conditions provides "some entitlement" to Class members which CNA suggests should be addressed through its "no entitlement" argument.

[271] CNA submits that answering the common issue requires that I then decide what the entitlement is, i.e. whether it is the full amount of the COLA of 12.25% of

the total annual compensation figure in the letter of appointment, or 12.25% of the Instructors' actual base salaries up to a maximum base salary amount.

[272] I must then decide whether the entitlement is limited to additional “new money” provided by Qatar after entering a contract.

[273] Finally, CNA argues that if any entitlement is defined, I must decide when the entitlement was triggered and if the entitlement was “satisfied” by CNA.

[274] I note CNA is not arguing that the sub-questions form part of the second stage of this class action in which what must be decided are the question of breach and the question of remedy. I agree and I see no difficulty in addressing all of CNA's sub-questions together as part of the general entitlement common issue for trial.

[275] Furthermore, the judge who certified the common issue for trial was aware of each of CNA's arguments when he framed the common issue for trial in broad terms as whether the Instructors were entitled by their contracts of employment to receive the full amount of the COLA for the relevant period.

[276] In so framing the common issue, the judge must be presumed to have taken all CNA's arguments into account. I am satisfied that he did and that he saw each of the sub-questions as part of the common issue for trial as it was framed.

[277] Determining the common issue for trial turns on what the parties to the contracts of employment mutually and objectively intended by Article 5.2 when they entered the employment contracts, leading to a determination of its legal effect.

[278] In my view, CNA's “no entitlement” and “new money” arguments pose two alternative interpretations of what the parties reasonably intended by Article 5.2.

[279] While it may be more “complex” for a contracting party like CNA to argue two conflicting interpretations of the same provision of an employment contract it has entered, CNA has the right to raise alternative arguments such as these on a trial. I can see no reason in principle why this should be any different on a summary trial.

[280] The “satisfaction” argument is framed by CNA as a defence which pleads that if there is any obligation to pay the full amount of the COLA, CNA should be released on the facts because of the ESC payments it made to Instructors in 2012.

[281] The evidence in the record filed before me is sufficient to allow me to address whether on the facts a satisfaction of CNA’s obligation under Article 5.2 to provide the COLA, if there is one, resulted from the ESC payments in January 2012.

[282] I can also determine on the existing record the question of what constituted the full amount of the COLA increase provided to CNA by Qatar.

[283] Overall, I am satisfied that no unfairness arises in deciding these sub-questions in a summary trial rather than in a conventional trial.

[284] I also reject the related argument that it may be necessary to provide different types and volumes of evidence to supplement the existing record to address CNA’s “new money” and “satisfaction” arguments depending on when the entitlement was “triggered” and whether it was satisfied for some, or all, Class members.

[285] No explanation was provided of the evidence that was absent or could be required if the “no entitlement” question was decided in favor of the Plaintiffs. If CNA felt there was additional admissible evidence that was relevant to its other arguments on the common issue for trial then it should have led the evidence.

[286] The burden of persuasion on this summary trial application is on CNA to place all the evidence before the Court that it requires to oppose the application, or to demonstrate there is an actual absence of relevant evidence that would cause an injustice to CNA or render it inappropriate in proceeding to decide one or more of the questions by the summary trial procedure. I find that CNA has not done either.

[287] I find that CNA has not met its burden of persuasion to show it would be inappropriate to use the summary trial procedure to decide the common issue for trial and the two additional questions.

[288] The next question for determination is whether the common issue for trial and the two additional issues constitute genuine issues for trial under Rule 17A.03.

[289] CNA has filed evidence and argument to show that the Instructors had no contractual entitlement to the COLA under Article 5.2, or if there was a contractual entitlement, then under Article 5.2 the contractual entitlement is limited to “new” increases provided to CNA by Qatar after entering the contract so only Instructors employed when the COLA increase was provided would receive it.

[290] CNA has filed further evidence and argument to show what it claims constitutes the full amount of the COLA increase, and to show that if any Instructors were not paid the full amount of the COLA, then by making the ESC payments CNA satisfied its contractual obligation to pay the full amount of the COLA.

[291] The evidence and argument filed by CNA satisfies me that the common issue certified for trial constitutes a genuine issue for trial. Through its filings, I am satisfied CNA has demonstrated that the common issue for trial is not spurious. Its resolution will clearly determine part of the controversy between the parties.

[292] Under Rule 17A.03(2) I am satisfied that I can decide the common issue for trial fairly based on the extensive record because the relevant facts and documents

are before the court, there are no difficult issues of credibility to resolve, and the law regarding the interpretation of the contracts of employment is well established.

[293] As to the two remaining questions, CNA has not objected to their determination on the common issues trial or submitted that they are not appropriate for determination by summary trial.

[294] CNA has filed evidence from Ms. Morey and argument to show that it mistakenly paid some Instructors, including Ms. Thorne, amounts in excess of the amounts recoverable by CNA under the Comprehensive Agreement. CNA argues on the basis of equitable set-off and the application of unjust enrichment principles that those Instructors should account for the excess amounts in their claim for the COLA.

[295] The factual basis of the defence of equitable set-off has been a live issue from the outset of this class action and the governing legal principles of equitable set-off and unjust enrichment are well known.

[296] The evidence and argument filed by CNA on this issue satisfies me that the defence of equitable set-off therefore constitutes a genuine issue for trial.

[297] The entitlement of the Instructors to judgment interest is a narrow question that largely turns on whether delay including systemic delays in concluding the class action should be considered in awarding judgment interest. I find it is a genuine issue and one that can be readily resolved on the record and arguments before the court.

[298] I am satisfied that the extensive record before me is sufficient to allow me to find the facts and apply the law to resolve all three genuine issues. I find that the use of a summary trial is proportionate, timely, and more affordable in this case.

[299] I must also consider the factors from *Marco No. 2* to determine whether it would be unjust to proceed by summary trial. A factor that weighs in favor of proceeding by summary trial is the protracted course of the proceedings and the fact that the Instructors have waited 13 years to find out if they are entitled to the COLA.

[300] A factor that arguably points away from using the summary trial procedure is the amount involved in this class action which is potentially significant. This factor must be weighed in the mix with the complexity of the matter and its urgency. Weighing all the factors, I find it would not be unjust to proceed by summary trial.

[301] I therefore grant the Plaintiffs' application for summary trial.

2. The Common Issue for Trial

The Applicable Law

[302] Contractual interpretation is an exercise in giving effect to the intention of the parties by giving proper meaning to the words selected by the parties to govern their relationship, understood within the context in which those words are used: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Markham: LexisNexis, 2020), at 2.1.1.

[303] The context includes both the internal context of the language of the entire contract and the external context of the surrounding circumstances which gave rise to the contract. The main purpose of the interpretive exercise is to ascribe an accurate meaning to the parties' expressed intentions within this overall context: *Canadian Contractual Interpretation Law*, at 2.1.1.

[304] An objective approach is applied to the words of a contract and the context. The interpretive exercise therefore determines what a reasonable person would

objectively have understood from the words of the document read as a whole and in the factual matrix: *Canadian Contractual Interpretation Law*, 4th Ed., at 2.1.5.

[305] The interpretive exercise requires the trial judge to read the contract as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Nova Fish Farms Inc. v. Cold Ocean Salmon Inc.*, 2025 NLCA 28, at paragraph 17, citing from *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paragraph 47.

[306] The language of specific provisions of the contract must be interpreted in the context of the language of the entire agreement as a whole. This is a cardinal rule in contractual interpretation: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, at paragraph 9.

[307] In recognizing the role of the surrounding circumstances, in *Sattva* the court's role in interpreting a contract was described as "an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract": *Sattva*, at paragraph 50.

[308] The rationale of considering the surrounding circumstances which gave rise to the contract was discussed by Green, C.J. in *Seadane International Inc. v. Morgan International Marketing Co.* (1999), 180 Nfld. & P.E.I.R. 97, 548 A.P.R. 97 (Nfld. C.A.), at paragraph 26:

... A contract will rarely be able to be interpreted in the abstract, divorced from the evidentiary milieu within which it was created. Words take their meanings from their context. Thus, evidence of the factual matrix surrounding the making of the agreement and of the genesis and aim of the transaction will be relevant to a proper interpretation, in addition to the actual words used (Atlific), so as to enable the court to apply it to the facts which the parties were negotiating about.

[309] *Sattva* recognized that contractual interpretation is an inherently fact-specific exercise that requires a practical, common-sense approach no longer dominated by the application of technical rules of construction: *Sattva*, paragraphs 47-49.

[310] The modern approach to the interpretive exercise is described as a search for the practical, common-sense meaning of the contractual language consistent with the overall context: *Canadian Contractual Interpretation Law*, 4th Ed., at 2.1.1.

[311] *Sattva* set out important limits on the use of evidence of the surrounding circumstances. Such evidence must never be allowed to overwhelm the words of the agreement, and the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract: *Sattva*, at para. 57.

[312] In terms of the evidence that can be considered part of the “surrounding circumstances” Rothstein, J. stated it is limited to objective evidence of the background facts that were known or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva*, at para. 58.

[313] Since *Sattva*, the Ontario Court of Appeal has clarified the rule regarding the admissibility of evidence of the parties’ post-contracting conduct and statements: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, at paragraph 56:

In summary, evidence of the parties’ subsequent conduct is admissible to assist in contractual interpretation only if a court concludes, after considering the contract’s written text and its factual matrix, that the contract is ambiguous. The court may then make retrospectant use of the evidence, giving it appropriate weight having regard to the extent to which its inherent dangers are mitigated in the circumstances of the case at hand, to infer the parties’ intentions at the time of the contract’s execution.

[314] *Nova Fish Farms* and *Sattva* both involved the interpretation of negotiated stand-alone commercial contracts. There is generally a different factual matrix

involved in the formation of a written employment contract. This is particularly so where the terms and conditions of the contract are largely dictated by the employer.

[315] Where appropriate, the trial judge may also consider the policy rationale underlying employment law principles in interpreting an employment contract, including the protection of vulnerable employees, always bearing in mind that the goal of the interpretive exercise remains giving effect to the intention of the parties.

[316] In *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311, a case involving the interpretation of an employment contract, at paragraph 15 the British Columbia Court of Appeal provided a helpful summary of the application of the governing principles of contractual interpretation to employment contracts:

The court should strive to give effect to what the parties reasonably intended to agree to when the contract was made. The starting point is the language of the contract, which should be given its plain and literal meaning, and be interpreted in the context of the entire agreement. Consideration may also be given to the factual matrix surrounding the creation of the contract. If the contractual language reveals two possible interpretations, the court should seek to resolve this ambiguity by searching for an interpretation that reflects the true intent and reasonable expectations of the parties when they entered the contract, and achieves a result consistent with commercial efficacy and good sense. Considerations of reasonableness and fairness inform this exercise. If these principles do not resolve the ambiguity, extrinsic evidence may be admissible to assist in ascertaining the parties' intent. As a last resort the principle of *contra proferentem* may be invoked to favour construction of the ambiguity against the party that drew the agreement. This principle may not be used, however, to create or magnify an ambiguity. As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers. Nevertheless, the construction of an employment contract remains an exercise in contractual interpretation, and the intentions of the parties will generally prevail, even if this detracts from employment law goals that are otherwise presumed to apply: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham, Ont.: LexisNexis, 2012) at 9-52, 66-70, 187-88.

The Positions of the Parties

[317] In their factum, the Plaintiffs rely on the clear and unambiguous language of Article 5.2 which they say can only mean that any incremental increase obtained by CNA from the State of Qatar for the provision of an increase to the compensation of their employees “shall” be passed on by CNA and that the increase “shall” take effect September 1 of the calendar year in which the said increase is provided to CNA.

[318] In oral argument, counsel for the Plaintiffs described the combined meaning of Articles 5.1 and 5.2 in layman’s terms as “you don’t get more than in your letter during the term” (Article 5.1) “unless there is an incremental increase” (Article 5.2).

[319] CNA raised a series of arguments. It first argued it had no obligation under Article 5 to make any incremental increases to the Instructors’ total annual compensation during the term of the contract, and the Instructors therefore had “no entitlement” to receive the full or any amount of the COLA under Article 5.2.

[320] Under its “no entitlement” argument, CNA argues Article 5.1 is a “substantive” term which makes it abundantly clear an employee will not be paid more than the total annual compensation amount set out in an offer of employment.

[321] Reading Article 5.2 and Article 5.1 together, CNA argued that Article 5.2 is a “procedural” term which does not contain any promise of future increases during the term of the contract and speaks only to the “procedural aspects” of any increases that are provided to the employee, at CNA’s sole option, if an incremental budget increase is provided to CNA by Qatar for that purpose.

[322] CNA submitted that meaning of Article 5.1 and Article 5.2 is clear and unambiguous, and the factual matrix supports its “no entitlement” interpretation.

[323] If I find that Article 5.2 does create any “substantive” right, CNA raises its alternative “new money” argument which is that the reference to “incremental” increases provided to CNA by Qatar means “new” budget increases provided to CNA after the date that a contract was entered into between CNA and an Instructor.

[324] CNA argues that money that is already available in the budget when a contract was entered into between CNA and an Instructor cannot be considered money specifically provided to CNA by Qatar for the sole purpose of providing an increase.

[325] Two consequences would flow from the “new money” interpretation of Article 5.2. First, only Instructors who were employed on the date the COLA was “triggered”, which CNA suggests is September 1, 2008, would have an entitlement under Article 5.2 to receive the COLA increase.

[326] Second, Article 5.2 limits the Instructors’ contractual entitlement to receive the “new” COLA increase to the time period from the date the COLA was triggered to the end of the existing employment contract.

[327] If its “no entitlement” argument is rejected, and whether or not the “new money” argument is accepted, CNA argues that if any Instructors were entitled to the full amount of the COLA under Article 5.2, then the ESC payments to Instructors in 2012 satisfied the obligation of CNA to pay the full amount of the COLA.

[328] The Plaintiffs submit that the facts clearly show that all ESC payments made to the Instructors in 2012 were expressly made in payment of a separate severance benefit, the ESC program benefit, and were not received by Instructors in satisfaction of CNA’s contractual obligation to pay the full amount of the COLA.

[329] CNA argued that the proper measure of entitlement, if I find there is one, is 12.25% of the Instructors’ actual base salaries up to a maximum base salary amount.

[330] The Plaintiffs argued that the proper measure of entitlement, if I find there is one, is 12.25% of the Management Fee Base as calculated by CNA.

The Accurate Meaning of Article 5.2

[331] In addressing the common issue for trial, my first task is to ascribe an accurate meaning to the parties' mutual and objective intention, as expressed in Article 5.2, by interpreting this provision in the internal context of the entire contract as a whole and by considering the entire contract and Article 5.2 in light of the external context in which it arose and was intended to operate.

[332] The words of Article 5.2 read:

Incremental increases to an employee's total annual compensation, if any, shall be made pursuant to and in accordance with any incremental increase specifically provided to CNA by the State of Qatar for the sole purpose of providing said increase. Said increases, if any, shall take effect on September 1 of the calendar year in which said increase is provided to CNA.

[333] The words of Article 5.2 must be given their ordinary and grammatical meaning and they must be read in the context of the entire agreement as a whole.

[334] In this case the internal context of the entire written contract of employment as a whole consists of an Instructor's appointment letter along with the common Terms and Conditions of Employment and the Leave and Other Benefits documents.

[335] The Plaintiffs' first appointment letters are generally indicative of the letters of appointment used for all Instructors. The relevant portions provided as follows:

On behalf of the Board of Governors of College of the North Atlantic, I am very pleased to confirm your appointment as (Instructor) at College of the North Atlantic

– Qatar in Doha, Qatar...Your anticipated start date is (start date) and shall conclude (end date).

The total annual compensation for the position is (\$CDN). You will also receive a per diem allowance of \$CDN 50 per day for each year that you are present in Qatar, to a maximum of three hundred (300) days. Paid leave and other benefits will be provided to you in accordance with the Leave and Other Benefits Package (attached).

Please confirm that you have read and understand this letter and the attached Leave and Other Benefits document and Terms and Conditions of Employment document, and that you agree to accept this appointment pursuant to the terms and conditions stated herein by signing in the designated space below. [Emphasis added]

[336] The underlined portion confirms the Terms and Conditions of Employment document was incorporated into the Instructors' written contracts of employment upon acceptance by the Instructor of an appointment by signing the letter.

[337] All the Articles in the Terms and Conditions form part of the internal context. Some are of assistance for the interpretation of Article 5.2, or for determining its legal effect, in particular parts of Articles 1, 2, 3, 5, 6, 8 and 10.

[338] Article 1 – Term:

1.1 The term of employment for each CNA-Qatar employee (“employee”) shall commence and expire on the dates specified in each employee’s Offer of Employment Letter, unless terminated earlier pursuant to and in accordance with this agreement.

[339] Article 2 – Employee Obligations:

2.1 Subject to the supervision and pursuant to the orders of the President of CNA – Qatar and his/her designate, (“the President”), employees shall perform such duties as are customarily performed by other employees holding similar positions at College of the North Atlantic and/or at other post-secondary institutions.

2.2 Without limiting the generality of the foregoing, employees shall perform such duties as may be assigned to him/her from time to time by the President.

[340] Article 3 – CNA Obligations:

3.1 CNA shall provide compensation to employees in accordance with the terms and conditions contained herein.

[341] Article 5 - Compensation, Benefits and other Entitlements:

5.1 The total annual compensation for an employee shall not exceed the sum total stated in that employee's Offer of Employment Letter.

5.2 Incremental increases to an employee's total annual compensation, if any, shall be made pursuant to and in accordance with any incremental increase specifically provided to CNA by the State of Qatar for the sole purpose of providing said increase. Said increases, if any, shall take effect on September 1 of the calendar year in which said increase is provided to CNA.

5.3 Total annual compensation shall be paid to employees in bi-weekly installments pursuant to the schedule established by CNA. Each bi-weekly installment shall be calculated by dividing the total annual compensation by twenty-six pay periods.

[342] Article 6 – Termination:

6.1 Except as provided for below, this agreement may only be terminated by mutual agreement of the affected employee and CNA.

6.2 In the event that CNA or the State of Qatar terminates the comprehensive agreement between CNA and the State of Qatar, this agreement shall terminate automatically.

[343] Article 8 – Force Majeure:

8.1 Neither CNA nor any employee, acting as reasonable and prudent parties, shall be in default in the performance of an obligation to the extent that the performance

of any obligation is prevented or delayed by a *force majeure* event. As used herein, the term “*force majeure event*” shall mean an event which is unforeseeable, insurmountable and which renders the invoking party unable, in whole or in part, to perform its obligations, but excludes any event arising out of the invoking party’s negligence. A *force majeure* event shall include, without limitation, the following:

- (c) non-payment of the contractor’s fees pursuant the (sic) comprehensive agreement between CNA and the State of Qatar

[344] Article 10 – General Provisions:

10.6 An employee’s Offer of Employment Letter embodies the entire agreement between CNA and that employee, as to the subject matter thereof, and the Parties shall not be bound by any statement, representation, promise, inducement or understanding of any kind or nature which has not been set forth therein.

10.7 No changes, amendments or modifications of the terms and conditions of the employee’s Offer of Employment Letter shall be valid unless reduced to writing and signed by the Parties. To the extent that any provision of the employee’s Offer of Employment letter may be affected by changed circumstances, the Parties agree to negotiate any corresponding amendment in good faith.

[345] I will address at this point the CNA submission that the employment contracts, consisting of the letter of offer of employment and the Terms and Conditions, made no reference to the Comprehensive Agreement^{lvii}. I find that the Terms and Conditions do refer to the Comprehensive Agreement, both directly and indirectly, in a manner I consider relevant in determining the accurate meaning of Article 5.2.

[346] Article 6.2 provides that an Instructor’s contract of employment shall automatically terminate “in the event that CNA or the State of Qatar terminates the comprehensive agreement between CNA and the State of Qatar.”

[347] Article 6.2 means that in the event of the termination of the Comprehensive Agreement, by either CNA or Qatar, CNA’s obligations to an employee under the contract including to pay an employee compensation for the remaining term of the contract will automatically end upon the action of either CNA or Qatar.

[348] Article 8.1(c) provides that non-payment by Qatar of the Contractor's fees pursuant to the Comprehensive Agreement is a *force majeure* event.

[349] Article 8.1(c) means that in the event of the non-payment by Qatar to CNA of the Contractor's fees under the Comprehensive Agreement, CNA has no liability for any breach of its obligation to pay an employee the total annual compensation while the *force majeure* event continues.

[350] In addition, Article 8 and Article 2.6 of the Terms and Conditions track the specific language of Articles 12.3 and 12.4 of the Comprehensive Agreement, and Articles 10.7 and 10.8 of the Terms and Conditions track the specific language of Article 12.11 of the Comprehensive Agreement.

[351] I will turn next to determine the relevant external context in which the contracts of employment arose and was intended to operate.

[352] The extensive record tendered by the parties can be divided into four parts:

- 1) background facts up to the time of the formation of the Plaintiffs' first contracts of employment;
- 2) the Plaintiffs' contracts of employment over the total period of their employment;
- 3) the 2008 conduct and statements of CNA relating to the 2008 Retroactive Increase, the COLA increase, and the ESC program; and,
- 4) the 2010-2013 conduct and statements of CNA, and statements of third parties, relating to CNA's overbilling of Qatar, the withholding of 6% of the COLA increase, and the payout of the withheld amounts by CNA.

[353] The parties also tendered CNA financial statements showing the ESC accruals, CNA accounting records relating to the billings by CNA to Qatar, and CNA records relating to the Plaintiffs' compensation over their total employment period.

[354] A preliminary issue I must determine is what parts of the evidence I should consider as part of the surrounding circumstances in the interpretive exercise.

[355] I was not provided with any authority or argument which suggested that determining the relevant surrounding circumstances for the purpose of the common issue for trial in this class action engages different legal considerations from those in an individual action in which a single employment contract is at issue.

[356] *Sattva* provides that the “surrounding circumstances” evidence that can be relied upon in the interpretive exercise should consist only of objective evidence of background facts that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva*, at paragraph 58.

[357] Evidence of post-contracting conduct or statements may be admissible to assist in contractual interpretation if I conclude, after considering the contract's written text and its factual matrix, that the contract is ambiguous. It still cannot include evidence of the parties' subjective intentions: *Shewchuk*, at paragraph 56.

[358] The governing legal principles provide that objective evidence of background facts up to the time of the formation of the Plaintiffs' employment contracts would be admissible as part of the external context of their contracts of employment, and objective evidence after the date of contracting may be admissible.

[359] The facts show that the Plaintiffs were offered employment on November 30, 2005, and November 1, 2006, and they commenced employment shortly thereafter. There was no negotiation of the terms and conditions of employment. I find their contracts arose on or about November 30, 2005, and November 1, 2006.

[360] I did not consider the dates of the Plaintiffs' contracts of continuing employment to be relevant in determining the formation dates of their contracts. The Plaintiffs were continuously employed as Instructors for the total period of their employment under their initial contracts and contracts of continuing employment.

[361] Leaving the issue of admissibility aside for a moment, determining the relevant surrounding circumstances is a question of fact, and the evidence of background facts must be examined from the standpoint of an objective bystander.

[362] The Terms and Conditions of Employment which the Plaintiffs worked under were created by CNA in 2005, before the Plaintiffs commenced employment, and the applicable provisions did not change during their employment. All Instructors entered contracts that included the same applicable provisions, including Article 5.2.

[363] Viewing the evidence objectively, I find that the most relevant and meaningful surrounding circumstances to consider in deepening my understanding of the mutual intention expressed in Article 5.2 is the objective evidence of background facts at the time the Terms and Conditions, including Article 5.2, were created in 2005.

[364] The 2005 background facts were or reasonably ought to have been within the knowledge of the parties when the Plaintiffs' contracts of employment were formed.

[365] Taking this approach is also consistent with the decision of the Court as confirmed by the Court of Appeal that the Terms and Conditions of Employment constitute common facts and circumstances arising under each individual Instructor's contract of employment. This is not a certification application *redux*.

[366] Applying *Shewchuk*, I find that the evidence of post-contracting conduct and statements of CNA in 2008 relating to the 2008 Retroactive Increase, the ESC program, and the COLA increase, is not admissible to interpret Article 5.2.

[367] I make this finding because, having considered the contract’s written text and its factual matrix, I conclude that the language of Article 5.2 is sufficiently clear and unambiguous when read in the relevant internal and external contexts that I do not need to have resort to the 2008 post-contracting conduct evidence as an aid to interpretation of the provision.

[368] Even if there was an ambiguity in the language of the contract, the evidence of post-contracting conduct and statements of CNA about the 2008 Retroactive Increase, the ESC Program, and the COLA increase would be inadmissible to assist me in the interpretation of Article 5.2, or irrelevant to the interpretive exercise.

[369] The post-contracting evidence about the COLA increase from November 25, 2008, onwards is inadmissible because it would constitute subjective intention evidence of one party that considers the potential risk to CNA posed by the Qatari ESG law. This factor was not in the contemplation of the parties when the contracts of employment and the Terms and Conditions including Article 5.2 were formed.

[370] The post-contracting evidence from the time frame March-June 2008 about the 2008 Retroactive Increase and CNA’s establishment of the ESC Program and withholding 6% of the increase does not relate to the application or interpretation of Article 5.2 and is therefore not relevant to the interpretive exercise.

[371] While I am satisfied the post-contracting evidence is not admissible for the purpose of determining the accurate meaning of Article 5.2 it may be considered relevant for the “satisfaction” argument and the validity of equitable set-off defence.

Discussion

[372] Returning to the task of determining the accurate meaning of Article 5.2, this provision is located within Article 5 which governs the rights and obligations of the parties with respect to employee compensation and benefits during the contract.

[373] Article 5.2 expressly refers to and deals with “increases” in employee compensation during the term of the contract, and in particular with “increases to an employee’s total annual compensation.” On its face, these “increases” form the subject matter of Article 5.2 of the Terms and Conditions.

[374] In my view, nothing in the ordinary and grammatical meaning of language in Article 5.2 expresses that the provision is intended to confer any type of “procedural” right upon an employee or deal with the “procedural aspects” of its subject matter.

[375] In terms of the ordinary and grammatical meaning of the words in Article 5.2, the provision expressly refers to and deals with “incremental” increases to an employee’s total annual compensation. In plain terms it deals with raises to an employees’ total annual compensation that are “incremental.”

[376] The word “incremental” is actually used in Article 5.2 twice, first to refer to “incremental increases” provided by CNA to an employee, and second to refer to “any incremental increase” specifically provided to CNA by Qatar for the sole purpose of providing said increase, i.e. increases provided by CNA to an employee.

[377] The parties did not submit any authority or argument to suggest that the phrase “incremental increase” is used as a legal term of art in this written employment contract. To determine the ordinary and grammatical meaning of an “incremental increase” I will therefore have recourse to the dictionary meaning.

[378] The word “incremental” is an adjective which means advancing or growing by increments. The word “increment” is a noun which means an addition or an amount gained: Shorter Oxford English Dictionary, Sixth edition, Vol. 1, page1358.

[379] The ordinary and grammatical meaning of an “incremental increase” therefore, is an additional increase that advances or grows a matter, structure or other thing by an addition or by an amount gained.

[380] CNA argues that “if any” means that incremental increases to the total annual compensation for an employee are possible but would be made at CNA’s sole option.

[381] I find that the proper approach to the interpretation of a specific provision in a written employment contract is to read the provision in question as a whole, in the context of the entire agreement, and not piecemeal.

[382] Reading Article 5.2 in this manner, I find that the provision expressly sets out what the parties to the contract have agreed to do, conditional upon the specific action of the State of Qatar, in providing CNA with any additional increase for the sole purpose of providing an additional increase to an employee’s total annual compensation.

[383] I find that the condition expressed in Article 5.2 is fulfilled if any additional increase is specifically provided to CNA by the State of Qatar for the sole purpose of providing said increase to an employee’s total annual compensation.

[384] Such provisions are not uncommon in the law of contract. Like any other express contractual term which is conditional upon the action of a third party, the rights and obligations of the parties under Article 5.2 are properly characterized as either “suspended” or “operative” depending on whether the action of the third party has in fact occurred and the condition is fulfilled.

[385] In their submissions, based on the external context evidence, the parties described the condition expressed in Article 5.2 as dealing with the provision of incremental “budget” increases, or incremental “funding” increases by Qatar.

[386] In my view, the words in the condition “any incremental increases specifically provided to CNA by the State of Qatar for the sole purpose of providing said increase” were intended to be read broadly and purposively and not in a limited way.

[387] I find that the condition expressed in Article 5.2 is intended to include, in accordance with the plain and literal meaning of the words, “any incremental increases” specifically provided to CNA by the State of Qatar as long as it was provided for the sole purpose of providing said increase.

[388] My interpretation of Article 5.2 is fully supported by the internal context of the entire agreement and by an examination of the most relevant factual matrix.

[389] The internal context of the contract of employment specifically tells the reader that CNA and Qatar are counterparties to the Comprehensive Agreement and that the employee is working for CNA in Qatar while that agreement is in force.

[390] The Terms and Conditions not only refer to the Comprehensive Agreement, but the language in specific provisions closely mirrors the language in provisions of the Comprehensive Agreement. I infer that these provisions of the Terms and Conditions were drafted with a view to aligning with the Comprehensive Agreement.

[391] As noted previously, Articles 6.2 and 8.1(c) of the Terms and Conditions provide for two other circumstances in which the parties’ rights and obligations with respect to employee compensation conditionally depend on the independent actions of the same third party, the State of Qatar, under the Comprehensive Agreement.

[392] My interpretation of Article 5.2 is also consistent with a proper interpretation of Article 5.1. I find that both terms should be read together in the context of the entire agreement to determine their respective meanings.

[393] I have explained my interpretation of Article 5.2 and why I find Article 5.2 is an express contractual term which is conditional upon the action of a third party.

[394] I find that the ordinary and grammatical meaning of Article 5.1 is that the total annual compensation for an employee shall not be greater than the total amount arrived at by counting the amounts stated in that employee's letter of offer of employment.

[395] In reading Articles 5.1 and 5.2 together, in the context of the entire agreement, the law directs that I must strive to give effect to both provisions rather than adopt a meaning that renders one provision ineffective: *BG Checo*, at para. 9.

[396] To give meaning to the parties' written agreement, and therefore to uphold their mutual and objective intention as expressed by the words of the agreement, which is the fundamental goal of contractual interpretation, trial judges are expressly directed to reject an interpretation that would render one of the terms of a written agreement ineffective: *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410.

[397] Applying these principles, and to render both terms effective, I find Article 5.1 may be interpreted as a general term that is intended to define total annual compensation for an employee during the term of the contract.

[398] Article 5.2 may be interpreted as a term that specifically qualifies Article 5.1 to the extent of any additional increases that shall be made by CNA to the total annual compensation for an employee if the condition in Article 5.2 is fulfilled.

[399] Adopting this approach allows both Article 5.1 and Article 5.2 to operate as effective provisions by taking the parties to have intended that the effect of Article 5.1 should not override the effect of Article 5.2 and render it an ineffective and meaningless provision.

[400] I turn next to an examination of the relevant and meaningful factual matrix.

[401] The Comprehensive Agreement was a contract for services. The purpose and aim of entering the Instructors' employment agreements for CNA, as the Contractor, was to enable it to perform its services under the Comprehensive Agreement.

[402] Under the Comprehensive Agreement, Qatar was obliged to provide compensation to CNA for incurring its direct labour costs. The Comprehensive Agreement contemplated that increases would be provided to CNA by Qatar for the purpose of providing increases in employee total annual compensation.

[403] In 2005, CNA was experiencing recruitment issues at CNA-Q and it was requesting Qatar to approve a new salary structure for employee compensation to provide additional increases.

[404] The Comprehensive Agreement required that an amendment be made to approve a new salary structure. On July 3, 2005, Qatar approved Annex I.

[405] Schedule A to Annex I of the Comprehensive Agreement specifically stated that it provided a new compensation package for employees. Schedule A is entitled "Human Resources Compensation Package" with a sub-heading "COT Compensation Package as approved 03-July-05."

[406] By its express terms, Annex I added a specific increase for Canadian residents (CNA-Q employees paying Canadian income taxes) called the Special Allowance

of 10% of base salary for existing hires and 10-15% of base salary for new hires based on qualifications and experience.

[407] Mr. Hollett characterized Annex I which he signed as providing a revised salary structure to be incorporated into the Ten-Year Budget, “and nothing more.” He described the schedule to Annex X, which he did not sign, as simply providing guidance and limitations as to the applicability of the “budget increases” in Annex X.

[408] Annex I does not refer to “budget increases” but I accept that Annex I, as an administrative matter, resulted in “Budget increases”, or new lines being added in the budget.

[409] I have reviewed all the Annexes. I find no objective support for Mr. Hollett’s evidence that the Annexes provided “budget increases” and nothing more, and the Schedules simply provided guidance and limitations as to the applicability of the “budget increases” in the Annexes.

[410] I conclude that Mr. Hollett’s evidence that the Annexes were “budget increases” only was not well anchored in the objective facts. I decline to give significant weight to his evidence on this point.

[411] Similarly, Mr. Hutchings’ evidence echoed the position advanced by CNA in its factum and materials that the Annexes were “budget increases” only even though he admitted he had no first-hand knowledge of any of the relevant events or decisions. I find his evidence is not entitled to significant weight on this point either.

[412] Viewing the background facts objectively, I find that when Qatar approved the revised employee salary structure in Annex I it provided CNA with an increase to the employees’ total annual compensation, the Special Allowance, which built onto the existing total annual compensation package for CRA resident employees.

[413] This relevant evidence of background facts, viewed from the standpoint of an objective observer, also supports my interpretation of Article 5.2.

[414] I therefore find the accurate meaning of Article 5.2 is that if any additional increase was specifically provided to CNA by Qatar for the sole purpose of providing an employee with an increase to the employee's total annual compensation, then CNA had an obligation to increase the employee's total annual compensation in accordance with the additional increase provided to CNA, effective September 1 of the year in which the additional increase was provided to CNA by Qatar.

[415] That is the common sense and practical meaning of the language of Article 5.2 read objectively in the internal context of the language of the entire employment contract and in the external context of the relevant surrounding circumstances.

The Legal Effect of Article 5.2

[416] I will next determine the legal effect of Article 5.2 when the COLA increase was approved by Qatar in 2008 by applying the accurate meaning of Article 5.2.

[417] I find that on June 15, 2008, when the Joint Operating Board approved the COLA increase, an incremental increase was not specifically provided to CNA by Qatar for the required purpose because the formal approval process was ongoing and no final approval had been given by Qatar.

[418] On November 25, 2008, when Qatar ratified the COLA increase, I find an incremental increase was specifically provided to CNA by Qatar for the sole purpose of providing an incremental increase to the Instructors' total annual compensation.

[419] The legal effect of Article 5.2 was that CNA then had an operative contractual obligation to make the COLA increase for all Instructors' total annual compensation

pursuant to and in accordance with the specific increase provided to CNA on November 25, 2008, effective September 1, 2008.

[420] Article 5.3 deals with the manner of performance of the CNA obligation:

5.3 Total annual compensation shall be paid to employees in bi-weekly installments pursuant to the schedule established by CNA. Each bi-weekly installment shall be calculated by dividing the total annual compensation by twenty-six pay periods.

[421] Article 5.3 provides that CNA had a contractual obligation to make the COLA increase for all Instructors' total annual compensation by payment of the COLA increase in bi-weekly installments as part of their total annual compensation.

The “No Entitlement” Interpretation of Article 5.2

[422] I reject CNA's “no entitlement” interpretation of Article 5.2. My conclusion is that CNA's “no entitlement” interpretation is contrary to the ordinary and grammatical meaning of the language of Article 5.2, and it ignores both the internal context of the entire agreement and the relevant factual matrix.

[423] Broadly speaking, I understand “substantive” law to be concerned with the creation and definition of rights which may be asserted. “Procedural” law on the other hand generally relates to the process or method by which rights that have been created and defined by substantive law may be pursued or enforced.

[424] The line between substantive and procedural rights has been considered in a variety of legal contexts and different consequences may result from the characterization of a right as substantive or procedural depending on the context.

[425] As it relates to Article 5.1, I understand that CNA is using the adjective “substantive” to describe the entitlement it says is created and defined in Article 5.1 which is the employee’s entitlement to receive from CNA total annual compensation to the maximum amount set out in the offer of employment letter.

[426] I accept that the written contract of employment, consisting of the letter of appointment, and the Terms and Conditions, including Article 5.1, confers upon an employee a “substantive” right to receive total annual compensation in the amount stated in the letter of appointment which may be asserted against CNA.

[427] But concluding that Article 5.1 deals with a “substantive” right to receive compensation does not mean that Article 5.2 is “procedural” or that CNA accurately describes the rights conferred upon an employee under Article 5.2 as “procedural.”

[428] In my view, CNA’s “no entitlement” argument more closely resembles an argument that Article 5.2 confers no “substantive” rights and its effect is only to limit and provide an effective date for any incremental increases in total annual compensation that are provided to employees solely at the option of CNA.

[429] I say this because CNA submits that Article 5.2 only deals with the “*procedural aspects*” of incremental increases to the total annual compensation of an employee if CNA, at its sole option, decides to pay the Instructors all or part of any incremental increase specifically provided to CNA by Qatar for the sole purpose of providing an incremental increase to an employee’s total annual compensation.

[430] If Article 5.2 only deals with “procedural aspects” of incremental increases that are intended to be made at CNA’s sole option, then Article 5.2 does not confer a “procedural” right upon an employee, at least not in the sense of conferring a right to pursue or enforce a substantive right of an employee under the contract.

[431] Turning back to the thrust of CNA’s “no entitlement” argument, I do not agree that the ordinary and grammatical meaning of the language in Article 5.1 makes it

“abundantly clear” that no increase can be expected by employees under any circumstances during the term of the employment contract.

[432] Simply put, Article 5.1 does not expressly refer to or deal with “increases” to total annual compensation and nor does the language of Article 5.1 expressly rule out the possibility of increases during the term of the employment contract. “Increases” are addressed in Article 5.2 as I have explained above.

[433] An examination of the internal context also supports my rejection of CNA’s “no entitlement” interpretation of Article 5.2.

[434] CNA’s submission is that giving “substantive” effect to Article 5.2 would of necessity contradict the “substantive” meaning of Article 5.1 and render it completely meaningless, re-write the contract to create an entitlement that does not exist, and would violate fundamental principles of contractual interpretation.

[435] I find this circular submission untenable. In my view, this submission ignores the legal principles which I have referred to above and must follow and it would require me to treat Article 5.2 as an ineffective and inoperative contractual provision.

[436] Finally, the relevant and meaningful surrounding circumstances do not support CNA’s “no entitlement” interpretation of Article 5.2.

[437] Viewing the facts objectively I am unable to find any support for CNA treating the COLA increase in Annex X as a budget increase that it could apply “optionally.”

[438] There was no evidence for example that beginning in 2005 the Special Allowance salary increase in Annex I was made at the “sole option” of CNA, or that it was applied to CRA resident employees “optionally” by CNA after July 3, 2005. Such evidence as there is points in the complete opposite direction.

[439] I find that reading Article 5.2 as a provision dealing with “procedural aspects” if CNA decided, at its sole option, to provide an employee with some or all of any additional budget increases specifically provided to CNA by Qatar for the sole purpose of providing additional increases to total annual compensation would be inconsistent with the relevant factual matrix outlined above.

The “New Money” Interpretation of Article 5.2

[440] In the alternative, CNA argued that the entitlement of Instructors under Article 5.2 to an incremental increase is limited to “new money” budget increases provided to CNA by Qatar after a Class member entered into an employment contract.

[441] I would dismiss the “new money” argument of CNA. Such an interpretation is not in accordance with the ordinary and grammatical meaning of the language in Article 5.2, as I have defined it above.

[442] CNA’s submission would require that the words “any incremental increase” specifically provided to CNA by Qatar be interpreted as “any new incremental increase” specifically provided after the date the employment contract was entered. This is not supported by a plain and literal reading of the text of Article 5.2.

[443] I have also explained that the ordinary and grammatical meaning of an “incremental increase” in Article 5.2 is an additional increase that advances or grows a matter, structure or other thing by an addition or by an amount gained.

[444] The “new money” interpretation would mean that Ms. Thorne was entitled under Article 5.2 to receive the full amount of the COLA increase from the effective date of the COLA increase, September 1, 2008, which fell during her second employment contract.

[445] According to the “new money” interpretation, she would continue to receive an “incremental increase” of the full amount of the COLA increase during her second employment contract, but from the date when she commenced her third employment contract, on August 17, 2010, she would have no further entitlement to the COLA because the COLA increase was not “new money”, it was “already in the Budget.”

[446] CNA makes this argument even though the facts show that during her third contract, Ms. Thorne was paid 6.25% of the COLA.

[447] Similarly, the “new money” interpretation would mean Mr. Luyt was entitled to the COLA increase during his first employment contract, from the effective date of the COLA increase, but from the date when he commenced his second employment contract on January 1, 2010, he had no further entitlement to the COLA.

[448] Accepting CNA’s “new money” interpretation would lead to the absurd result that every time a contract of continuing employment was entered by an Instructor all “new” salary increases that were provided either before or during the preceding term would be reversed. I reject this interpretation as a result-oriented interpretation unconnected to the mutual and objective intention of the parties.

[449] CNA’s submission also ignores the relevant factual matrix. I have already addressed the submission that the external context shows that “incremental increases” refers to “budget increases” and I will not revisit it here.

[450] The objective evidence of background facts satisfies me that revisions to the approved salary structure under the Comprehensive Agreement under Annex I were intended to remain in place for the operational period, not for the remainder of the term of each individual existing Instructor’s contract of employment.

[451] There was certainly no evidence that the Plaintiffs did not receive the Special Allowance during the time when they were CRA residents for tax purposes, even though they were not employed by CNA on the date when it was first approved.

The “Satisfaction” Defence

[452] Under the “satisfaction” argument, CNA argued that the ESC payments to Instructors in January 2012 satisfied its contractual obligation to pay the Instructors the full amount of the COLA increase between September 1, 2008, and November 22, 2011. For the following reasons, I would reject the “satisfaction” defence.

[453] A defence of satisfaction is ultimately a question of fact. To establish a good defence to the breach of contract claim established by the Instructors, CNA must prove on the civil standard of proof that it paid the Instructors an amount in discharge and satisfaction of its contractual obligation under Article 5.2 to pay the Instructors the full amount of the COLA for the relevant period.

[454] No evidence was provided to show that CNA paid the Instructors any amount in January 2012 in discharge and satisfaction of its obligation under Article 5.2 to pay the Instructors the full amount of the COLA for the relevant period.

[455] Instead, the evidence showed that when the payments relied upon by CNA were made to Instructors in January 2012 they were expressly made as “ESC” payments. The ESC program had been established by CNA in 2008 to protect CNA from financial liability under Qatari law by providing the Instructors with a severance benefit that was greater than the statutory ESG of 5.769% under Qatari law.

[456] The Instructors were advised by CNA in writing that the ESC program was discontinued and that the January 2012 payments represented “full and final satisfaction of CNA’s obligations to employees under the ESC program.”

[457] This evidence not only does not support a satisfaction defence it positively confirms that these payments were not made in satisfaction of the COLA obligation.

The Full Amount of the COLA

[458] The parties disagreed on what constituted the full amount of the COLA.

[459] The contractual entitlement to the full amount of the COLA arises from a contractual obligation to provide the Instructors with an incremental increase to an employee's total annual compensation, "made pursuant to and in accordance with any incremental increase specifically provided to CNA by the State of Qatar."

[460] The facts show that the incremental increase specifically provided to CNA by Qatar was a cost-of-living increase of 12.25% on their base salaries which was calculated on the base salary up to the Instructors' Base Salary Cap of CAD \$73,935.

[461] I therefore find that the full amount of the COLA increase provided to CNA by Qatar on November 25, 2008, was 12.25% of each of the Instructors' actual base salaries up to the maximum base salary amount of CAD \$73,395.

Conclusion on the Common Issue for Trial

[462] I answer the common issue for trial as follows: The members of the Class were entitled by their contracts of employment to receive the full amount of the COLA increase for the period of September 1, 2008, and November 22, 2011.

3. Does CNA have a defence of equitable set-off?

The Positions of the Parties

[463] According to CNA, a defence of equitable set-off only arises if I find that Article 5.2 created an entitlement for Instructors to receive the amount set out in the Annual Budget set by Qatar for the applicable period, and a particular Instructor has received more than that amount during at least some of that period.

[464] CNA submits that if the Instructors have been successful on the common issue for trial they were claiming an entitlement to a discrete line item amount in the Budget and it would be inconsistent to hold that an Instructor can claim entitlement to a discrete Budget amount but not be subject to the limits of the Budget amount.

[465] CNA claims that in making payments to the Instructors it did not interpret the Terms and Conditions to provide an entitlement to the full Budget amount and instead it based its payments to Instructors on the amount in the offer letters plus any other increase that CNA agreed to provide.

[466] If the Court determines that CNA was incorrect in its interpretation of the employment contract and Instructors were entitled to “the full Budget amount” rather than the amount in their offer letters, then CNA submits that it “mistakenly paid (Instructors) more than they were entitled to receive.”

[467] CNA argues that the monetary claim which underlies its defence of equitable set-off is based on this alleged mistaken payment and the doctrine of restitution which allows the payor of payments made by mistake to be reimbursed based on the principles of unjust enrichment.

[468] The Plaintiffs submit that the defence of equitable set-off must fail at the first hurdle, because all monies paid to the Plaintiffs was paid pursuant to their contracts and there has been no mistaken payment. As there is no reciprocal monetary claim to set-off against the claim for the full amount of the COLA there can be no set-off.

[469] If there is a reciprocal monetary claim to set-off, the Plaintiffs submit that a claim under the principles of unjust enrichment must fail because CNA has not established there has been an enrichment, a corresponding deprivation or the absence of any juristic reason for the enrichment.

The Applicable Law

[470] The parties agree that the governing legal principles of equitable set-off are set out in *Holt v. Telford*, (1987) 78 N.R. 321 (SCC), at paragraph 35:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.).

[471] The parties further agree that the law is now settled that claims for mistaken payment of money are addressed under the doctrine of restitution, on the principles of unjust enrichment: *Capital Crane Limited v International Union of Operating Engineers, Local 904*, 2024 NLCA 42, at paragraphs 26-28.

[472] In *Garland v. Consumers' Gas Co.*, 1 S.C.R. 629, the Supreme Court of Canada identified three elements required to succeed on a claim based on unjust enrichment: (1) enrichment of the defendant, (2) deprivation of CNA, and (3) an absence of juristic reason for the enrichment.

Discussion

[473] For the following reasons, I would dismiss the equitable set-off defence.

[474] I am unable to accept the characterization of the Plaintiffs' claim as a claim to entitlement to a full budget amount. I am prepared to accept, however, *arguendo*, and without deciding the matter that CNA has raised a monetary cross-claim that is capable of grounding a defence of set-off.

[475] In my view, the equitable set-off defence can and should be disposed of on the basis that CNA has failed to establish on the civil standard of proof that the Instructors were enriched, there was a corresponding deprivation of CNA, and the absence of a juristic reason for the enrichment.

[476] The undisputed facts show that the "mistaken payments" made by CNA in this case were all made because of internal errors and incorrect interpretations by CNA in the calculation of the individual Instructors' total annual compensation. CNA has admitted that it paid the Plaintiffs no more than the amounts which were agreed to be paid to them as total annual compensation in their contracts of employment.

[477] These conclusions are fully supported for all Instructors by the findings of the Comptroller General, which were publicly endorsed and accepted by Mr. Hollett on October 10, 2010.

[478] Mr. Hollett publicly confirmed that the overbilling of Qatar occurred because of CNA's incorrect interpretation of the Comprehensive Agreement, and the CNA employees who received excess amounts were all paid in accordance with contracts they signed in good faith and they were not "overpaid."

[479] The application of the principles of unjust enrichment to these admitted and uncontradicted facts does not support either a finding of an enrichment on the part of the Instructors or a corresponding deprivation to CNA.

[480] I find there was no mistaken payment in this case resulting in an enrichment on the part of the Instructors or a corresponding deprivation to CNA.

[481] Under the third element of the test in *Garland* CNA must also demonstrate no juristic reason from an established category exists to deny recovery. CNA has in my view failed to do so on two grounds.

[482] The contractual entitlement of the Instructors clearly falls within the definition of an established category of juristic reasons to deny recovery to CNA. The amounts paid to the Instructors were paid pursuant to and in accordance with the express terms of their written contracts of employment. No argument has been raised that these written contracts of employment were not binding and enforceable.

[483] The Instructors can rely upon the existence of a contractual entitlement as a juristic reason in not repaying the amounts. I find that the claim of unjust enrichment, in this case, is met by the contractual obligation owed to each Instructor to pay the amount in their letter of offer of employment.

[484] A second and separate juristic reason is that in equity the Instructors should not be required to repay any excess amounts were paid to the Instructors. CNA discovered the overpayments in 2010, and determined the reason, after which its President publicly waived CNA's right to claim recovery of any excess amounts paid from the Instructors in the presence of the Minister of Education^{lviii}.

[485] It would be unjust to allow CNA to resile from that express waiver.

[486] I would dismiss the equitable set-off defence.

4. Are Instructors entitled to judgment interest?

[487] By section 3 of the *Judgment Interest Act*, a person who obtains a money judgment has a right to interest on the judgment calculated in accordance with the *Act*.

[488] Where it is proven to the satisfaction of the court that it would be just to do so, a judge may refuse to award judgment interest or award a modified amount.

[489] CNA submits that the delays occasioned by the Plaintiffs, and systemic delays, constitute grounds to deny judgment interest on allowable components of the Instructors' individual claims.

[490] I have been shown no basis to conclude that the delays in bringing this class action to trial on the common issue for trial can be laid at the feet of the Plaintiffs. CNA decided, as was its right, to vigorously defend the class proceeding since 2013 and determining its own issues like the counterclaim have resulted in certain delays.

[491] It is true that there have been some systemic delays because a number of judges who were assigned to case manage this proceeding were reassigned or elevated to the Court of Appeal. This delay is of course not occasioned by either party and is simply a by-product of the protracted course of the class action.

[492] I am not satisfied that it would be just to deny the Instructors an award of judgment interest or to award a modified judgment interest amount.

[493] I would therefore order that if, upon individual calculation, it is determined that any Instructor was not paid all or part of the COLA for the period of September 1, 2008, and November 22, 2011, then the Instructor is entitled to judgment interest on unpaid COLA amounts in accordance with the *Judgment Interest Act*.

DISPOSITION

[494] I would allow the Rule 17A application for summary trial on the three issues.

[495] I answer the common issue for trial as follows: The members of the Class were entitled by their contracts of employment to receive the full amount of the COLA increase for the period of September 1, 2008, and November 22, 2011.

[496] I would dismiss the equitable set-off defence.

[497] I would order that if, upon calculation, it is determined that any Instructor was not paid all or part of the COLA increase for the period of September 1, 2008, and November 22, 2011, then the Instructor is entitled to judgment interest on unpaid COLA amounts in accordance with the *Judgment Interest Act*.

[498] There is no order as to costs.

[499] I would like to thank counsel for their written and oral submissions.

[500] Order accordingly.

PETER A. O'FLAHERTY
Justice

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- ⁱ Affidavit of Bruce Hollett, January 22, 2025, Tab 1.
- ⁱⁱ Affidavit of J. Annette Morey, January 23, 2025, Exhibit “3”: Article 5.1 in the version 05.17.06 of the Terms and Conditions reads “The total annual compensation for an employee shall not exceed the sum total stated in that employee’s confirmation of appointment letter”.
- ⁱⁱⁱ Affidavit of John Hutchings, January 22, 2025, paragraphs 23-24, Exhibits 7-10.
- ^{iv} Affidavit of John Hutchings, January 22, 2025, paragraphs 14-15.
- ^v Affidavit of John Hutchings, paragraph 11.
- ^{vi} Second Affidavit of Deborah Thorne, November 21, 2024.
- ^{vii} Affidavit of John Hutchings, January 22, 2025, paragraph 33.
- ^{viii} Comprehensive Agreement, Article 2.1, Services Provided by Contractor
- ^{ix} Comprehensive Agreement, Article 3.2, Compensation to Contractor
- ^x Comprehensive Agreement, Article 2.1.10.
- ^{xi} Comprehensive Agreement, Article 7.1 Contractor Personnel.
- ^{xii} Comprehensive Agreement, Article 4.2, Operational Period
- ^{xiii} Comprehensive Agreement, Appendix 4, Ten-Year Budget, Notes to Projected Costs Estimates, Faculty.
- ^{xiv} Comprehensive Agreement, Article 6.1, Start-Up and Ten-Year Budgets
- ^{xv} Comprehensive Agreement, Article 6, Annual Plans and Budgets.
- ^{xvi} Comprehensive Agreement, Article 7.1 Contractor Personnel.
- ^{xvii} Comprehensive Agreement, Article 7.1 Contractor Personnel.
- ^{xviii} Comprehensive Agreement, Appendix 4, Ten-Year Budget, page 2.
- ^{xix} Comprehensive Agreement, Annex I – Direct Labour Costs.
- ^{xx} Affidavit of Annette Morey, January 22, 2025, paragraph 22.
- ^{xxi} Comprehensive Agreement, Annex I – Direct Labour Costs.
- ^{xxii} Comprehensive Agreement, Schedule A, to Annex I, 2, page 135.
- ^{xxiii} Comprehensive Agreement, Schedule A to Annex I, 1. C, page 135.
- ^{xxiv} Affidavit of J. Annette Morey, paragraph 18, Exhibit 1, pages 2-4.
- ^{xxv} Affidavit of J. Annette Morey, paragraph 19.
- ^{xxvi} Affidavit of J. Anette Morey, paragraph 33.
- ^{xxvii} Affidavit of Annette Morey, January 22, 2025, Tab 3, page 50.
- ^{xxviii} Affidavit of Deborah Thorne, February 8, 2025, Exhibit B.
- ^{xxix} Affidavit of Anette Morey, Tab 1, pages 12-13.
- ^{xxx} Affidavit of Anette Morey, Tab 1, pages 14-15.
- ^{xxxi} Affidavit of Anette Morey, Tab 1, page 16.
- ^{xxxii} Affidavit of Anette Morey, Tab 3, pages 28-30.
- ^{xxxiii} Affidavit of Deborah Thorne, September 12, 2024, Schedule H, page 8.
- ^{xxxiv} Affidavit of Deborah Thorne, September 12, 2024, Schedule H, pages 8-10.
- ^{xxxv} Affidavit of Deborah Thorne, September 12, 2024, paragraphs 6-7, Schedule A, page 3.
- ^{xxxvi} Affidavit of Deborah Thorne, September 12, 2024, paragraph 18, Schedule F, page 1.
- ^{xxxvii} Second Affidavit of Deborah Thorne, November 21, 2024.
- ^{xxxviii} Affidavit of John Hutchings, paragraph 43.
- ^{xxxix} Affidavit of Deborah Thorne, paragraphs 6-7, and Schedule “A”, pages 1, 3.
- ^{xl} Affidavit of Deborah Thorne, paragraphs 6-7, and Schedule “A”.
- ^{xli} Affidavit of Deborah Thorne, paragraph 9, and Schedule “B”.
- ^{xlii} Affidavit of Alan Luyt, November 12, 2024, paragraph 5, and Schedule “B”.
- ^{xliii} Affidavit of Bruce Hollett, paragraph 28, Exhibit 7.
- ^{xliv} Comprehensive Agreement, Annex X – Direct Labour Costs.
- ^{xlv} Affidavit of Deborah Thorne, paragraphs 18-19, and Schedule “F”.
- ^{xlvi} Affidavit of John Hutchings, January 22, 2025, paragraphs 13-26.
- ^{xlvii} Affidavit of John Hutchings, January 22, 2025, paragraph 26.
- ^{xlviii} Affidavit of Deborah Thorne, Tab H, page 6.

^{xlix} Affidavit of Annette Morey, Exhibit H, pages 6-7.

^l Affidavit of John Hutchings, January 22, 2025, paragraph 29-30.

^{li} College of the North Atlantic – Review of Overbilling of Qatar Contract Employee Payroll Report, page 5.

^{lii} Affidavit of Deborah Thorne, paragraph 36, Schedule L.

^{liii} Affidavit of Deborah Thorne, September 12, 2024, paragraphs 31-32, Schedule H, page 10.

^{liv} Affidavit of Deborah Thorne, paragraph 48, and Schedule “M”.

^{lv} Affidavit of Deborah Thorne, paragraph 50, and Schedule “N”.

^{lvi} Responding Affidavit of Deborah Thorne, February 8, 2025, paragraph 3.

^{lvii} Brief of the Defendant, paragraph 85(9).

^{lviii} Affidavit of Deborah Thorne, February 8, 2025, Tab A.