IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Medellin v. Lucion,* 2025 BCSC 180

Date: 20250203
Docket: S2111074
Registry: Vancouver

Between:

Andres Barrios Medellin

Plaintiff

And

Liza Lucion, Canadian Global Immigration Consultant Services, and Canadian Global Immigration Consulting Inc.

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Class Proceedings Act- Application for Certification

Counsel for Plaintiff:	S. Quail A. Aziz J. Wahba
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Place and Dates of Hearing:	Vancouver, B.C. February 28, 29, 2024 March 1, 2024 June 27, 28, 2024
Additional Written Submissions from Defendants:	July 12, 2024
Additional Written Submissions from Plaintiff:	July 19, 2024

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Place and Date of Judgment:	Vancouver, B.C. February 3, 2025

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I. OVERVIEW

[1] This is an application for certification of a proposed class proceeding on behalf of aspiring migrants to Canada.

[2] Mr. Medellin alleges that he and the proposed class members paid Ms. Lucion and her companies significant fees to help them obtain work permits in Canada under a fictitious program promoted by the Defendants. The Plaintiff further alleges that Ms. Lucion never submitted any applications on their behalf. Consequently, they have lost thousands of dollars and valuable time in their immigration application process. Mr. Medellin's claim seeks to recover the fees and other alleged damages through a class action proceeding.

[3] The Defendants say that the Plaintiff's proposed class action cannot be certified as none of the requirements under s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], have been met.

II. TEST FOR CERTIFICATION

[4] Pursuant to s. 2 of the *CPA*, a resident of British Columbia who is a member of a class of persons may commence a court proceeding on behalf of the members of that class (the "Class Proceeding").

[5] Section 4(1) of the *CPA* requires the court to certify a class proceeding if each of the following requirements are met:

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

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

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[6] The Plaintiff bears the onus of satisfying each of these five certification requirements.

[7] Section 7 sets out the following issues that are not a bar to certification:

> **Certain matters not bar to certification**
>
> **7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[8] At a certification hearing, the court is not concerned with the merits of the action. Rather, the focus is on the form of the pleading and whether the action can properly proceed as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68, at paras. 16, 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ("*Microsoft*") at paras. 99–105.

[9] The first requirement under s. 4(1)(a) focuses on the claim as it is pled.

[10] The remaining four criteria under ss. 4(1)(b) to (e), require the Plaintiff to show "some basis in fact" that the criteria for certification are met: *Microsoft*, at paras. 99-100.

[11] The certification hearing judge should not assess the claim on its merits, nor should they weigh the evidence or try to resolve conflicting facts and evidence at this stage: *Hollick*, at para. 16; *Microsoft*, at para. 99.

[12] The question is whether there is some basis in fact to establish each of the individual requirements for certification, not whether there is some basis in fact for the claim itself: *Microsoft* at para. 100; *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228 at para. 39 ("*Lewis BCSC 2021*"), rev'd in part 2022 BCCA 145 ("*Lewis BCCA 2022*").

[13] In *Thorburn v. British Columbia*, 2012 BCSC 1585, aff'd 2013 BCCA 480 ("*Thorburn BCCA*"), the Court noted the important balancing act the certification judge exercises:

> [117] …The goal of the *CPA* is to be fair to both plaintiffs and defendants… "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."
>
> (see also *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353, at para. 22)

[14] In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 ("*Krishnan BCSC*"), aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 ("*Krishnan BCCA*"), Justice Branch noted that "the *CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behaviour modification": *Krishnan BCSC* at para. 42.

[15] I turn now to addressing each of the certification criteria.

III. DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

[16] Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. This is determined on the same test applicable on a motion to strike pleadings:[1] *Microsoft*, at para. 63.

[1] See Rule 9 5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, [*Rules*].

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[17] The court must ask whether, assuming that the facts pleaded are true, it is plain and obvious that each of the plaintiff's pleaded claims are bound to fail: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14 ("*Atlantic Lottery*"), citing *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at para. 17; *Microsoft* at para. 63. This question is determined solely on the basis of the pleadings.

[18] In *Sherry v. CIBC Mortgage Inc*, 2020 BCCA 139, the Court noted the following considerations the chambers judge should keep in mind at this first stage of the analysis:

> [24] When deciding whether pleadings disclose a cause of action, the judge should read them generously, err on the side of permitting novel but arguable claims to proceed and accommodate inadequacies in form to the extent reasonable by allowing for proposed amendments to cure deficient drafting. Nevertheless, for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: *Imperial Tobacco* at paras. 21–25; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44–46. In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. As Chief Justice McLachlin explained in *Imperial Tobacco*, the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: at para. 22.

[19] The "plain and obvious" threshold is a low but meaningful one. In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, Justice Dickson explained the important gate-keeping role of the chambers judge, as follows:

> [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, **certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced**. …[F]or an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice…
>
> [emphasis added]

[20] In determining whether the pleadings disclose causes of action, the Notice of Civil Claim is to be read as generously as possible and as it might

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reasonably be amended to accommodate inadequacies due solely to drafting deficiencies: *Sherry,* at para. 24.

[21] In applying this test, the facts that are pled must be assumed to be true. However, the court can consider if the facts are manifestly incapable of being proven or widely speculative: *Lewis v. WestJet Airlines Ltd.,* 2017 BCSC 2327, at para. 33 ("*Lewis BCSC 2017")*, aff'd 2019 BCCA 63 (*"Lewis BCCA 2019*"), leave to appeal to SCC ref'd, 38600 (18 July 2019).

[22] In *Lee v. Ocean Pacific Hotels Ltd*., 2022 BCSC 1608, at paras. 43-49 [*Lee 2022*], the Court summarized the law concerning a properly pled cause of action under s. 4(1)(a) of the *CPA*. Some of the important considerations noted, include:

a. to be certified, a claim must have a reasonable prospect of success, not a speculative one;

b. an effectively pleaded cause of action must include sufficient material facts pleaded to support each element of the cause of action;

c. speculation or "bald conclusory assertions" are not material facts;

d. the material facts giving rise to the claim, or that relate to the matters raised in the claim, must be concisely set out;

e. neither evidence nor argument is appropriate;

f. the *CPA* does not eliminate the necessity that the notice of civil claim properly plead the necessary material facts to support the causes of action; and

g. pleadings may be amended to fix drafting inadequacies or bring clarification to obscure issues, but amendments must be proposed with specificity, and an action should not be certified contingent on amendments that have to be presented or are unspecified.

[23] The primary concern for the court at this stage is the adequacy of the record, which will vary from case to case. Consequently, each case must be decided on its own facts: *Hollick* at para. 23; *Microsoft* at para. 104.

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A. Preliminary Issue

[24] A preliminary issue is raised by the parties regarding which version of the Third Further Amended Notice of Civil Claim ("3FANOCC") I should consider in this certification application.

[25] The Plaintiff submits that he should be permitted to rely on Exhibit E – the version of the 3FANOCC that was submitted to the Court at the conclusion of the certification hearing (the "Proposed Claim"). It is submitted that to do so would be in keeping with the general principle that pleadings should be read generously and that the court should err on the side of allowing proposed amendments to cure deficient drafting.

[26] The Defendants say that out of considerations of prejudice and fairness, the Court should require the Plaintiff to rely on the version of the 3FANOCC that was tendered at the start of the certification hearing, rather than the Proposed Claim.

[27] For clarity, the Plaintiff has tendered four formal unfiled versions of his 3FANOCC over the course of this proceeding, with various other amendments tendered during the hearing itself.

[28] The first version is dated June 12, 2023, and was included in the Application Record filed in support of a June 29, 2023, certification hearing date. That hearing was adjourned by the Court, partly because the Plaintiff wished to rely on a new class definition and make further changes to the 3FANOCC. I granted leave for the Plaintiff to provide a revised version of the proposed pleading.

[29] The second version of the 3FANOCC is dated July 31, 2023. This version was the subject of the parties' written submissions which were uploaded to the File Transfer Server ("FTS") prior to the start of the rescheduled certification hearing.

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[30] The certification hearing commenced on February 28, 2024, and was set for three days. Almost all of that time was taken up by Plaintiff's counsel. The parties' submissions at the hearing all focussed on this second version of the 3FANOCC, as well as additional amendments that were proposed to paragraphs 12 and 20 of the 3FANOCC. The certification hearing did not conclude on March 1, 2024, and additional days were secured for the end of June.

[31] When the parties returned for the continuation on June 27, 2024, the Defendants were still in the midst of their response submissions. Those concluded midday on June 27, 2024. In the course of the Plaintiff's reply submissions, Counsel for the Plaintiff produced yet another version of the 3FANOCC. The third formalized version of the 3FANOCC (i.e. the Proposed Claim) was produced on June 28, 2024, the last day of the certification hearing. In addition to the already referenced revisions to paragraphs 12 and 20 of the second version of the 3FANOCC, the Plaintiff also sought to modify paragraphs 9.a, 13, and 30, through the Proposed Claim.

[32] The Plaintiffs' Counsel asserted that this third version of the 3FANOCC was required to address concerns raised by the Defendants during the hearing. Not surprisingly, the Defendants objected to the Plaintiff being able to rely on this third version of the 3FANOCC, on the grounds of prejudice. The Proposed Claim was marked as Exhibit E. I asked the Plaintiff to upload a consolidated electronic version of Exhibit E to the FTS, and permitted the parties to make further submissions on whether I should grant the Plaintiff leave to rely on this third version of the 3FANOCC.

[33] The fourth version of the 3FANOCC was uploaded by the Plaintiff's Counsel on July 2, 2024. The document is labelled "2024-06-28 proposed TFANOCC as of end of cert hearing". Though it purports to be a consolidated copy of Exhibit E, this document does not match Exhibit E. Although it contains the amendments to paras. 9.a and 13, the uploaded document contains an older version of para. 30 rather than what was contained in the Proposed Claim. It is evident from the written submissions that Counsel relied on the amendments in

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the Proposed Claim, which was marked as Exhibit E (and not the fourth version that was uploaded), and it is this document that I will rely on for the following discussion about whether I should permit the Plaintiff to rely on the Proposed Claim for the purposes of this certification hearing.

[34] I conclude that the Plaintiff should be permitted to rely on the Proposed Claim for the purposes of certification.

[35] As noted by the Court in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* 2021 BCCA 85 ("*Revolution*") at para. 59, whether the plaintiff has been given opportunities to amend their claim is a consideration in the analysis of whether it is in the interests of justice to permit a plaintiff to amend their pleadings.

[36] However, while the Plaintiff has already amended the pleading many times, the Proposed Claim was provided during the hearing itself rather than on appeal, as occurred in *Revolution*. I also note that the Court of Appeal was not considering specific amendments in *Revolution*, as I am. Further, the amendments in this case go to "improving" the pleading so to speak, rather than fundamentally changing the nature of the claim. To that end, the Plaintiff submits that the second version of the 3FANOCC is capable of certification, but wishes to rely on the third version which is "aimed at improving clarity and specificity of the pleading".[2]

[37] I find that the interests of justice are better met if the Court permits the Plaintiff to rely on Exhibit E, rather than earlier versions of the 3FANOCC. Any prejudice to the Defendants has been addressed by providing them with an opportunity to make submissions on this further proposed pleading. Those submissions were received by the Court shortly after the conclusion of the oral submissions, and form part of the material that I am relying on in these Reasons.

[2] Plaintiff's Written Reply Submissions dated July 19, 2024, at para. 6.

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[38] In summary, the Plaintiff may rely on the Proposed Claim (i.e. the document marked as Exhibit E) for the purposes of this certification hearing.

B. The Claim

[39] The following is a summary of the key allegations made in the Proposed Claim.

[40] Mr. Medellin is a citizen of Mexico who was interested in obtaining a Canadian work permit through an immigration program advertised by Ms. Lucion.

[41] At the time, Ms. Lucion was a Regulated Canadian Immigration Consultant ("RCIC") and a licensee with the College of Immigration and Citizenship Consultants (the "College"), pursuant to the *College of Immigration and Citizenship Consultants Act*, S.C. 2019, c. 29, s. 292 [“*Immigration Consultants Act*”].

[42] During the class period, Ms. Lucion conducted business under two entities: (1) Canadian Global Immigration Consultant Services ("CGI Services"), which was registered in her name as a sole proprietorship; and (2) Canadian Global Immigration Consulting Inc. ("CGI Inc."), which was incorporated in BC with Ms. Lucion as its sole director. Both these companies are collectively referred to in these Reasons as “CGI”.

[43] Starting in January 2021, the Defendants started offering services related to a new, non-existent Canadian government immigration program related to the Covid-19 pandemic (the “Program”).

[44] The Program ostensibly included an active public policy announced by the federal government that would entitle class members to an open work permit (“OWP”). An OWP was desirable because it authorized the permit holder to work anywhere in Canada, for any employer, and in any occupation.

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[45] Class members were told that the Program provided a pathway to immigration, through a two-year OWP for foreign workers; clemency for migrants without status in Canada; and an avenue for permanent residence.

[46] The Program was advertised and promoted by Ms. Lucion through group information sessions held for migrant workers between approximately February 2021 and April 2021 (the "Information Sessions"). Various representations were made orally during those sessions, regarding the Program. These included the terms of the program, who could benefit from it and in what way, the manner in which an application could be made under the Program, and how much it would cost to use the Defendants' services.

[47] Mr. Medellin and other class members retained Ms. Lucion to make an application on their behalf for work permits via the Program. They did this by entering into written retainer agreements which were identical in form and substance (the "Retainer Agreements"). The Retainer Agreements all contained a term stipulating that the Defendants would assist Class members to apply for an OWP "under Active Public Policy announced by IRCC" (the "Contracted Policy").

[48] Each of the class members paid substantial fees for this service. Mr. Medellin himself paid Ms. Lucion $3,540. Subsequently, he and others learned that the Program was fraudulent and that they had no genuine application in progress to obtain, renew, or extend their status in Canada.

[49] In fact, there were only three public policies announced by the department of Immigration, Refugees and Citizenship Canada ("IRCC") that were active during the relevant period: one for post-graduation work permit holders; one for temporary resident applicants who were applying for permanent residence; and one for Hong Kong passport holders. None of the class members fall into any of these categories.

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[50] As a result of the Defendants' deception, Mr. Medellin and the class members became vulnerable to deportation, resulting in many having to leave Canada.

[51] On behalf of the class members, Mr. Medellin seeks damages (including aggravated and punitive) against all the Defendants on a joint and several basis, for:

(a) breach of contract, and more specifically, breach of duty of good faith and honest performance of the terms of contracts;

(b) breach of fiduciary duty; and

(c) unjust enrichment.

[52] I turn to the first ground on which the Claim is advanced.

C. Breach of Duty of Honest Performance

[53] The Defendants' objections to the viability of the claim for breach of the duty of honest performance relate to the manner in which it is pled. They submit that the claim cannot stand because: (1) the Plaintiff is not seeking to also certify breach of contract; and (2) the Plaintiff is only relying on the written retainers to ground his claim, which is insufficient.

[54] In order to understand these objections, it is helpful to review the legal framework that governs the duty of honest performance.

1. Legal Framework

[55] The duty of honest performance relates to honesty in the performance of contracts. This common law duty was first recognized in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 93, as follows:

> It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

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(the "Duty of Honest Performance")

[56] To establish a claim in breach of the Duty of Honest Performance, the plaintiff must plead material facts establishing that the defendant knowingly misled the class members about a matter directly linked to the performance of the contract: *Bhasin*, at para. 73.

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[57] The plaintiff must also plead material facts establishing that she relied on the defendants' misrepresentations: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 ("*Callow*"), at para. 130.

[58] In *Callow*, Justice Brown wrote concurring reasons where he described the Duty of Honest Performance as broadly comparable to misrepresentation with one key distinction: unlike fraudulent misrepresentation, the Duty of Honest Performance applies to representations made *after* contract formation:

> [131] The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth affirming here that the same settled principles apply to the duty of honest performance. **The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation** (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows that those representations sufficient to ground a claim for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.
>
> [Emphasis added]

[59] The elements required for fraudulent misrepresentation are well established. To succeed in such a claim, the plaintiff must prove that:

> a) A representation was made;
>
> b) The representation was false in fact;
>
> c) The party making the representation knew it was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
>
> d) The party making the false representation intended the other party to act on the representation; and

e) The other party was induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

(0116064 B.C. Ltd. v. Alio Gold Inc., 2023 BCSC 1310 at para. 95, citing *Carom v. Bre X Minerals Ltd.,* [1999] OJ No. 1662 (QL) at para. 71, 1999 CanLII 14794 (O.N.D.C.); *Wang v. Shao,* 2018 BCSC 377 at para. 196)

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[60] Bearing in mind the guidance from *Bhasin* and *Callow*, I conclude that the plaintiff must establish the following to succeed in a claim for breach of the Duty of Honest Performance:

(a) the defendant made a false representation;

(b) the false representation was made knowingly or recklessly;

(c) the false representation was about matters directly linked to the performance of the contract;

(d) the false representation was made after contract formation;

(e) the defendant intended for the plaintiff to would act on the false representation; and

(f) the plaintiff relied upon the false representation and was induced into conduct as a result.

[61] Determining whether a person has engaged in misleading or dishonest conduct is a highly fact specific exercise. Such conduct may include half-truths, omissions, or silence (such as in failing to correct a misapprehension caused by the misleading conduct): *Lee v. Ocean Pacific Hotels Ltd.,* 2023 BCSC 1650 at para. 82 [*Lee 2023*], citing *Callow* at paras. 90-91.

[62] The parties were unable to locate any decisions that addressed whether a claim for breach of the Duty of Honest Performance is viable in the context of contracts for immigration services. However, the Defendants agree that, in light of *Bhasin* and the requirement that pleadings be read generously “to permit novel but arguable claims”, it is possible that this doctrine could also be expanded into the immigration services context.

[63] I turn then to the pleadings.

2. The Pleadings

[64] The claim for breach of the Duty of Honest Performance is articulated in the following way in the Proposed Claim.

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[65] The Plaintiff alleges that the Defendants entered into contracts whereby, in exchange for thousands of dollars, they promised to assist the class members in applying for OWPs pursuant to the Contracted Policy, which did not exist. These allegations are set out in the following paragraphs of the Proposed Claim:[3]

> *Overview*
>
> 1. …She falsely advised migrants that the Government of Canada had created a broad and generous new immigration pathway and that, under this new program, they could obtain Canadian open work permits and a pathway to permanent residence for migrants to Canada. Dozens of victims paid Lucion and her company fees of roughly five thousand dollars or more in exchange for these services. Lucion never took any steps to seek status for these individuals under this pathway as it did not exist.
>
> …
>
> 9. a. There were three public policies announced by IRCC that were active during the relevant period: one for [post-graduation work permit] holders, one for TR to PR applicants, and one for Hong Kong passport holders.
>
> …
>
> *The defendants' scheme*
>
> 13. Beginning in January 2021, Lucion and Canadian Global began offering services related to a new, non-existent, Government of Canada immigration program related to the COVID-19 pandemic, referred to hereafter as the "Program". Lucion and Canadian Global concluded contracts with Class members, charging them thousands of dollars to apply for this non-existent Program on their behalf. Lucion, and Canadian Global, knew that there did not exist any other active public policy that Class members were eligible for and knew that migrants were being charged fees for and made promises of immigration services that would not and could not be performed.

---

[3] To avoid confusion, the relevant passages from the Proposed Claim are re-produced "fresh", such that markings that highlight the amendments have been removed.

14. Lucion told migrants that the Program included a pathway to immigration involving a two-year open work permit for foreign workers, clemency for migrants without status in Canada, and a pathway to permanent residence.

…

17. The defendants promoted the program to people who did not have permanent status in Canada or did not have status at all. Their prospective victims were people with limited integration into Canadian society and limited understanding of Canadian immigration programs, who were eager for opportunities to work and remain permanently in Canada.

18. Lucion's agents approached people in the migrant community in Vancouver to advise them about this new (non-existent) Program, promising them the opportunity to obtain open work permits and permanent resident status. They added interested individuals to a WhatsApp group and invited them to attend a meeting to learn more about the Program.

19. Lucion met with groups of 8-10 prospective clients at information sessions. Information sessions were held on a regular basis each week or more frequently beginning in approximately February 2021 and continuing until approximately April 2021. At these information sessions, Lucion told prospective clients the same things about the Program at each session:

   a. workers could obtain two-year open work permits through the Program, meaning they would be entitled to work for any employer in any occupation, in any location in Canada;

   b. workers would be entitled to bring their families to Canada through the Program;

   c. workers who did not have status in Canada at the time of their application would be able to have their status restored and to obtain open work permits;

   d. the application process was a formality: barring a criminal record or illness, the application would be likely approved;

   e. while the application was in progress, people who lost status in Canada or whose work permits expired could remain in Canada and continue to work;

   f. this work permit was a potential pathway to permanent residence; and

   g. the defendants' fees would be upwards of five thousand dollars, with additional fees to process the applications of family members.

20. Class members entered into contracts with Lucion and Canadian Global agreeing that Lucion and Canadian Global would process their applications to the Program in exchange for significant fees. These contracts were identical in form and substance. These contracts

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> stated that the Defendants would assist Class members to apply for open work permit "under Active Public Policy announced by IRCC".
>
> …
>
> **PART 3: LEGAL BASIS**
>
> …
>
> *Breach of contract*
>
> 30. Further, Lucion and Canadian Global breached their duty to perform the terms of the contracts honestly and in good faith. Lucion and Canadian Global acted dishonestly by misleading the class members about the existence of an active public policy announced by IRCC that would entitle class members to an open work permit and their ability to perform the contract.
>
> 31. Class members lost money in the form of payment to Lucion and Canadian Global for services they did not perform.
>
> 32. They also relied on Lucion's representations that they were eligible to remain in Canada and to continue working, in some circumstances after their immigration status expired, and did not need to pursue legal status independently. Lucion and Canadian Global's dishonesty caused the Class members to lose their opportunity to apply for genuine immigration status in Canada, rendering them vulnerable to deportation and loss of access to public services, among other risks.

[66] I turn to consider the issues raised by the Defendants.

3. Must the Plaintiff Also Seek to Certify Breach of Contract?

[67] The first issue relates to whether the Court can certify a cause of action for breach of the Duty of Honest Performance without also certifying a separate cause of action in breach of contract. The Defendants have not provided me with any jurisprudence that supports their perspective.

[68] The parties agree that at common law, there is no independent cause of action for breach of duty of good faith. However, it does not follow that the Plaintiff must separately seek certification of a distinct cause of action in breach of contract.

[69] The Supreme Court of Canada has been clear that a breach of the Duty of Honest Performance constitutes a breach of contract: see *Bhasin* at para 108; *Callow,* at para 40.

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[70] In *Callow*, the plaintiff did not advance a direct breach of contract claim, only a claim in breach of the Duty of Honest Performance of the contract. The Court found that while the defendant had complied with its contractual obligation to give the plaintiff 10 days' notice of termination of the contract, it had nonetheless breached its duty to perform the contract honestly by creating and then failing to correct the plaintiff's misapprehension that the contract would be continued or renewed.

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[71] That is similar to the manner in which the claim is pled here.

[72] While the Plaintiff is not seeking certification of a claim for breach of contract, it is evident that the Breach of Duty of Honest Performance in this case is grounded in the contractual relationship between the parties. This is evidenced by the heading preceding paras. 30-31 in the Proposed Claim, which specifically refers to an allegation of breach of contract. Further, the relief requested in the Proposed Claim is a declaration that the Defendants "*breached their contracts* with the Class members, by…breaching their duty of good faith and honest performance of the terms of the contracts"[4] [emphasis added].

[73] In my view, this pleading is sufficient to address the first concern raised by the Defendants.

4. Is the Plaintiff's Reliance on the Written Retainers Sufficient?

[74] I turn now to the Defendants' second argument, that the claim for breach of the Duty of Honest Performance cannot succeed because the Plaintiff is only relying on the written retainers to ground his claim.

[75] As I indicated earlier, the Plaintiff must establish the following to support a claim for the breach of Duty of Honest Performance:

1. the defendant made a false representation;

[4] Proposed Claim, at para. 26.b.i.2.

2. the false representation was made knowingly or recklessly;

3. the false representation was about matters directly linked to the performance of the contract;

4. the false representation was made after contract formation;

5. the defendant intended the plaintiff would act on the false representation; and

6. the plaintiff relied upon the false representation and was induced into conduct as a result.

[76] The Defendants' argument relates to the first element above.

[77] The Plaintiff's claim is based on its assertion that the Defendants allegedly advertised and promoted the Program to Class members, even though it did not exist: Proposed Claim, paras. 1, 4, 17. The Program is defined at para. 13 as being a "new, non-existent, Government of Canada immigration program related to the COVID-19 pandemic".

[78] Details of the Program, and the alleged misrepresentations made to the putative class members about the Program, are set out at paragraph 19 of the Proposed Claim (the "Misrepresentations"); some aspects of these allegations are repeated at paragraphs 1, 14, 18, 20, 30, and 32.

[79] The Proposed Claim asserts that the Misrepresentations were made by the Defendants (or their agents) through: (1) oral representations made at the Information Sessions; (2) other oral representations made at an unspecified time and place, in the course of their dealings with the class members; and (3) the text of the Retainer Agreements. For clarity, although the Proposed Claim uses the words "advertised" and "promoted", the Plaintiff does not assert that the misrepresentations were conveyed through written promotional or marketing materials.

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[80] The manner in which the allegations are framed suggests very strongly that the Plaintiff is relying on all three of the above sources of alleged misrepresentations to ground his claim. However, Plaintiff's Counsel has disavowed any intention to rely on oral representations.

[81] Counsel confirmed at the hearing that the Plaintiff is <u>not</u> relying on any oral representations made by the Defendants, whether during the Information Sessions or otherwise. Rather, the Plaintiff <u>only</u> relies on the representations made in the Retainer Agreements to establish that the Defendants made false representations to the putative class members.

[82] This position of the Plaintiff effectively removes from consideration paragraphs 1, 14, 18, and 19, as these are all based on oral representations. It also impacts the ability to rely on the first half of paragraph 32.

[83] While paragraph 32 does not refer specifically to oral representations, it is clear that this is precisely what is intended. The first sentence could not possibly refer to the Retainer Agreement. There is nothing in the Retainer Agreements that says that the Class members "were eligible to remain in Canada and to continue working, in some circumstances after their immigration status expired, and did not need to pursue legal status independently". The only way that the Plaintiff could establish this is by reference to oral representations made to individual class members. As such, this part of the pleading cannot be relied on to support the claim advanced on the basis of the Retainer Agreement.

[84] I do not have the same concern about the second half of paragraph 32. Giving a broad and generous interpretation to the remaining part of paragraph 32, it is possible that this second sentence could apply to the alleged misrepresentations in the Retainer Agreements.

[85] Stripped of the oral misrepresentations, and focussing solely on the Retainer Agreements, the allegations that remain in the Proposed Claim can be summarized as follows:

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(a) The Defendants entered into Retainer Agreements with the Class members to apply on their behalf to the Program, a new, non-existent, Government of Canada immigration program related to the COVID-19 pandemic: at para. 13.

(b) The Class members entered into identical Retainer Agreements with the Defendants to process their applications to the Program in exchange for significant fees. These contracts stated that the Defendants would assist Class members to apply for an OWP under the Contracted Policy, which was described as an "Active Public Policy announced by IRCC": at para. 20.

(c) At the time, there were three public policies announced by IRCC that were active (the "Existing Policies"): at para. 9.a.

(d) The proposed class excludes all persons who would qualify under the Existing Policies: at para. 9. Consequently, though it has not been pled, it can reasonably be inferred that none of the Class members qualified under the Existing Policies.

(e) The Defendants charged thousands of dollars for this service, knowing that the Program did not exist and that the Class members were being charged fees for and made promises of immigration services that would not and could not be performed: at para. 13.

(f) The Class members paid the Defendants fees of roughly five thousand dollars or more in exchange for filing immigration applications on their behalf. The services paid for were not performed. The Defendants never took any steps to seek status for the class members under the Contracted Policy, which did not exist: at para. 1.

(g) The Defendants breached their duties to perform the terms of the contracts honestly and in good faith. They acted dishonestly by misleading the Class members about the existence of the Contracted Policy, which

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they purported would entitle class members to an OWP, and also about the Defendants ability to perform the contract: at para. 30.

(h) The Defendants' dishonesty caused the Class members to lose their opportunity to apply for genuine immigration status in Canada, rendering them vulnerable to deportation and loss of access to public services, among other risks: at para. 32.

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[86] I pause here to note that whereas paragraph 9 (which defines the proposed class) refers to written retainer agreements, the term "retainer agreement" is actually not defined or used elsewhere in the Proposed Claim. At paragraphs 20 and 30, the pleading refers to "contracts" that were entered into between the parties. The word "contract" is also not defined. However, when paragraphs 9, 20 and 30 are read together, these lead me to conclude that the contract referred to at paragraphs 20 and 30, is the retainer agreement referenced in paragraph 9.

[87] I turn to the Defendants' opposition to this aspect of the claim.

[88] The Defendants say that the pleading is flawed as there is nothing in the Proposed Claim that connects the "Program" referred to at paragraph 13, with the Contracted Policy referenced at paragraph 20. I disagree. Paragraph 13 refers specifically to the putative Class members and Defendants entering into contracts "to apply for this non-existent Program on their behalf". Paragraph 20 provides details of the Contracted Policy. Bearing in mind that the pleadings are to be read generously and broadly, I am satisfied that the pleadings provide a sufficient nexus between the Program and the Contracted Policy.

[89] The second concern raised relates to the language of the Retainer Agreements that the Plaintiff relies on at para. 20. The Defendants say that this language is simply too vague and ambiguous to discern what alleged misrepresentations the Defendants made to the Class members. I do not agree. The bar to pass this first stage of the certification test is very low. When the

language of the Retainer Agreements is read with the other allegations in the Proposed Claim, the alleged misrepresentations are sufficiently evident.

[90] The Plaintiff submits that the Defendants acted dishonestly by misleading the class members about the possibility that they could obtain OWPs, pursuant to an active public policy that simply did not exist.

[91] In more specific terms, the Plaintiff asserts that the Defendant's alleged misrepresentations were that (a) there was an active public policy announced by the IRCC that could provide the Class members with an OWP; and (b) that the Class members could potentially qualify for open work permits under this public policy. The Plaintiff submits that these representations were false because the active public policy referenced in the Retainer Agreements simply did not exist.

[92] The Proposed Claim alleges that: (a) the putative class members sought assistance from the Defendants for obtaining OWPs; (b) they entered into Retainer Agreements which contain a preamble clause that the Defendants would assist Class members (and sometimes their families) to apply for an OWP under the Contracted Policy; (c) at the time, only three active public policies existed, each of which were narrow and discrete; and (d) none of the Class members were eligible for any of the existing active public policies.

[93] When the above are read together, it is possible that the Plaintiff may be able to establish the existence of the alleged misrepresentations without relying on any oral representations. There does not appear to be any dispute that the Defendants provided the Retainer Agreements to the Class members for their signatures. By including the impugned clause in the Retainer Agreements, it can be inferred that the Defendants were asserting that the Contracted Policy could provide the Class members with an OWP. By entering into the Retainer Agreements, it can also be inferred that the Defendants were representing to the Class members that they could potentially qualify for OWPs under this public policy. In addition, the Godinho Affidavit #1 which was filed by the Defendants, confirms the allegation made at paragraph 9.a of the Proposed Claim about the

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existence of only three active public policies at the time. To this is added the fact that the Class is comprised of only those persons that did not qualify for those existing public policies.

[94] I recognize that the pleading for the breach of the Duty of Honest Performance leaves much to be desire. Nevertheless, I am satisfied that the alleged misrepresentations are discernable (though barely so) through the Proposed Claim and the reliance on the Retainer Agreements.

[95] I also agree with the Plaintiff that to the extent that the wording of the Contracted Policy is vague, the Plaintiff might be able to rely on the principle of *contra proferentem* to resolve any ambiguities in favour the Class members. This principle allows the plaintiff to benefit from ambiguity in a term that the defendant drafted: *Seidel v. TELUS Communications Inc.,* 2011 SCC 15 at para 47.

[96] I turn now to the remaining components of the test to establish breach of the Duty of Honest Performance.

[97] Paragraph 13 satisfies the second requirement that Defendants knew the representation was false when it was made.

[98] The third element requires that the false representation be about matters directly linked to the performance of the contract. That is satisfied by paragraphs 1, 13, 20, and 30 of the Proposed Claim.

[99] An important issue arises in relation to the fourth element. The fourth element requires that the false representation be made *after* contract formation. Mr. Medellin does not assert any representations that were made *after* contract formation. Rather, the pleading relies solely on the representations that were made *at the time of* the contract formation, and which are contained in the Retainer Agreement. Despite this, and the fact that the Defendants rely on *Callow*, they have not suggested that the pleading should fail because it does not meet this requirement. Considering the Court's role in ensuring that only

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pleadings that meet the requirements of the *CPA* are certified, I have addressed this concern below.

[100] In *Lee 2023*, the defendants argued that the Duty of Honest Performance only applies to the performance of the contract and not the negotiation or terms of the contract: at para. 83.

[101] Justice Blake did not accept this argument as a bar to certification. She found that the plaintiffs had an “ongoing contractual relationship” with the defendants: *Lee 2023*, at para. 84. She further found that the plaintiffs’ claim that the defendant “intentionally and dishonestly withheld important information” within this relationship was not bound to fail: *Lee 2023*, at para. 84. The Court also held that the “novel” nature of the claim was not a bar to certification under s. 4(1)(a) of the *CPA*: *Lee 2023*, at para. 85.

[102] I come to a similar conclusion in this case. Dishonestly withholding important information in the course of an ongoing contractual relationship could establish a breach of the Duty of Honest Performance. In this case, there is some suggestion that the harm was caused by misrepresentations that induced the Class members to enter into the contracts, and that the Class members also suffered harm because they did not pursue other avenues of immigration while relying on (and paying) the Defendants to perform services which the Defendants knew they could never provide. It is possible that the Plaintiff could establish that the Defendants withheld important information during their ongoing contractual relationship because they never told class members that the Program did not exist. While novel, such a pathway does exist.

[103] Having said that, the pleadings are not framed in this way. I am mindful that this particular deficiency in the pleadings was not raised by the Defendants. As such, it would be unfair to bar the claim on this basis alone, particularly if an amendment can address the concern. Though it is unclear whether the Plaintiff will be able to propose an amendment to address this concern which does not entail oral representations, he should be permitted to try to do so.

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[104] The fifth requirement to establish the breach of the Duty of Honest Performance, is an allegation that the Defendant intended for the Plaintiff to act on the false representation. That requirement is met through a generous reading of paragraph 13.

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[105] The sixth and final requirement is that the Plaintiff plead detrimental reliance on the false representations. Only half of this requirement is met – the allegation of detriment. The only pleading of reliance is contained in the first sentence of paragraph 32, which does not assist as it relates to the Class members' reliance on oral representations.

[106] Indeed, in his Affidavit #2, Mr. Medellin only refers to his reliance on oral representations made in the form of an "explanation of the program" and "advice" from Ms. Lucion:

> 9. I relied on Ms. Lucion's explanation of the program which I have outlined in this affidavit and my previous affidavit to retain the services of Ms. Lucion for assistance in applying for an unrestricted open work permit. I also relied on Ms. Lucion's advice that I was allowed to remain in Canada while I awaited the processing of my application.

[107] Bearing in mind that the second sentence of paragraph 32 asserts that the dishonesty caused the Class members harm, it is possible that the pleading that the class members entered into contracts and paid for certain services, and then suffered harm, could mean that they relied on the representation in the Retainer Agreement that the Defendants would assist Class members to apply for an OWP under the Contracted Policy. However, not only has that not been plead, but there is no pleading that the class members even read the Retainer Agreements, let alone relied on any representations made in them, particularly the representation in relation to the Contracted Policy. Without such a pleading, the claim for breach of the Duty of Honest Performance is bound to fail.

[108] To that end, the Plaintiff's reference to the affidavit material to support his position does not assist. As noted earlier, the question of whether the pleadings disclose a cause of action is determined *solely* on the basis of the pleadings.

Those pleadings as drafted are insufficient to support a claim for breach of the Duty of Honest Performance.

5. Should Further Amendments be Permitted?

[109] I have already determined that it would be appropriate to permit amendments to the Proposed Claim to plead that the alleged false representations were made after contract formation. Those amendments were not sought by the Defendants, but I consider them necessary to ensure that the claim is properly plead.

[110] I turn to considering whether it would be appropriate to permit the Plaintiff an opportunity to amend the pleading to plead reliance on the alleged misrepresentation.

[111] In *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414, Justice Matthews succinctly summarized the considerations when determining whether amendments should be granted in the context of class proceedings:

> [13] It is not unusual for class proceeding plaintiffs to propose amendments to defective, but curable, pleadings when they come under scrutiny at a certification application. The Court of Appeal has described the appropriate approach to such amendments as "generous": *Sandhu v. HSBC Finance Mortgages Inc.,* 2016 BCCA 301 at para. 44.
>
> [14] However, the amendments must be proposed with specificity. If the pleadings are inadequate, it is incorrect to certify contingent on the pleadings being amended without proposed amended pleadings: *Sandhu* at paras. 44 and 118, citing *Jer v. Royal Bank of Canada*, 2014 BCCA 116 at para. 108; *Brown v. Canada (Attorney General)*, 2013 ONCA 18 at paras. 45-46.
>
> [15] Amendments should be allowed as necessary to achieve the objectives of class proceedings, namely access to justice, judicial economy and behaviour modification. However, the court exercises this discretion judicially including taking into account any prejudice to the defendant, the stage of the case and the opportunities the plaintiff has had to produce a viable claim: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 59, citing *Sandhu* at para. 44; *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 92.

[112] I take guidance from the authorities that this Court should approach the question generously, and with the view to ensuring that the objectives of the

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CPA are met. Those objectives, particularly regarding access to justice for vulnerable persons, may be best met by permitting amendments to address the noted deficiencies.

[113] However, the value of such an amendment in the context of the *CPA*, is questionable. The Plaintiff has not provided any path that indicates how he could re-word the pleading in order to frame the allegation of a breach of the Duty of Honest Performance to properly plead reliance. Since the Plaintiff is relying solely on the text of the Retainer Agreements, such a pleading would have to assert, amongst other things, that each Class member had read the relevant portion of the Retainer Agreement before signing it, and understood what was expressed by the words that refer to the Contracted Policy. It is difficult to see how this can be proven without resorting to the evidence of each individual Class member. The challenge this poses will be discussed further under the common issues analysis.

[114] I conclude that permitting the Plaintiff to amend the Proposed Claim further to plead reliance, would not further the objectives of the *CPA*. It would result in further costs and delay of this proceeding, and ultimately be a fruitless endeavour, as any such pleading would necessarily involve individual inquiries that weigh against certification as a class proceeding.

6. Conclusion

[115] In summary, the claim with respect to breach of Duty of Honest Performance cannot be certified because the Proposed Claim fails to: (a) plead that the allegedly false representations were made after contract formation; and (b) plead reliance.

[116] While the Plaintiff could amend the pleading to address the first concern, the second deficiency regarding failure to plead reliance, still remains. Without such an amendment, the pleading for breach of Duty of Honest Performance is bound to fail.

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D. Breach of Fiduciary Duty

[117] The Defendants assert that the Plaintiff has not properly pled breach of fiduciary duty as the Proposed Claim fails to plead the material facts in support of a fiduciary relationship.

1. Legal Framework

[118] In relationships or circumstances in which one party has the power to affect the interests of another, fiduciary duties may arise to protect the more vulnerable party: *Sharp v Royal Mutual Funds Inc.*, 2020 BCSC 1781, at para. 40, aff'd 2021 BCCA 307, citing *Galambos v. Perez*, 2009 SCC 48. These fiduciary duties are breached when the party that owes a duty acts in their own interest, above the interests of the other party: *Hodgkinson v Simms*, [1994] 3 S.C.R. 377.

[119] Fiduciary duties arise in two ways: in established *per se* categories of relationships or on an *ad hoc* basis, where the duty arises as a matter of fact in particular circumstances: *Sharp*, at paras. 41-42. Not all relationships of power-dependency will give rise to fiduciary duties: *Galambos*, at para. 74.

[120] *Per se* relationships include the relationship between a trustee and a beneficiary, or a relationship between an agent and a principal: *Sharp*, at para. 41.

[121] An *ad hoc* fiduciary duty, on the other hand, is only established where the claimant shows vulnerability that arises from the relationship: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 ("*Elder Advocates*"), at para. 36.

[122] This vulnerability is characterized by three general characteristics, as set out in *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 and adopted in *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, 1989 CanLII 34:

> (1) The fiduciary has scope for the exercise of some discretion or power.

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> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> *Elder Advocates*, at para. 27.

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[123] In addition to vulnerability arising from the relationship, the party seeking to establish the existence of an *ad hoc* fiduciary relationship must show:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
>
> (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
>
> (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> *Elder* Advocates, at para. 36.

[124] This court has previously recognized that the relationship between immigration consultants and their clients may give rise to an *ad hoc* fiduciary duty: *Baysal v. Mac's Convenience Stores Inc*., 2018 BCCA 235 at para. 77.

[125] Three of the defendants in *Baysal* were British Columbia corporations, run by a brother and sister who were registered Canadian immigration consultants. The plaintiffs were citizens of foreign countries who alleged that they contracted with the defendant companies and paid fees on the understanding that they would be "guaranteed" a job in Canada. When they arrived in Canada, they found the jobs did not exist: *Baysal*, at paras. 5, 7-8, 22. On appeal of the decision to certify the plaintiff's class action, the Court found that the pleadings sufficiently disclosed a cause of action in breach of fiduciary duty against the immigration corporations, though "barely so": *Baysal*, at para. 77.

[126] While *Baysal* may provide guidance, it is important to note that *ad hoc* fiduciary relationships must be established on a case-by-case basis: *Elder Advocates* at para. 33.

2. The Pleadings

[127] The Proposed Claim alleges the following facts to establish a reliance-based relationship between the Proposed class members and the Plaintiff:

(a) Ms. Lucion was at all material times a Registered Canadian Immigration Consultant (RCIC): at paras. 10,12.

(b) She was subject to various professional conduct standards including the duty of good faith, a duty of competence, a duty to be honest, a duty to maintain quality standards and other obligations and duties: at para. 11.

(c) The Class members trusted Lucion as a regulated, licensed professional in Canada: at para. 2.

[128] I pause here to note that not all of what is pled at paragraph 12 can be relied on in the ensuing analysis. This paragraph contains the following allegations about representations by Ms. Lucion that she was a lawyer and notary public:

> 12. Lucion was at all material~~s~~ times an RCIC and was subject to these professional obligations. Lucion represented herself to the Class members as a lawyer and notary public, in addition to an RCIC. She is not a member of Law Society of B.C. nor the B.C. Notaries Association. The Defendants were under an undertaking to act in the best interests of the Class members.
>
> [emphasis added]

[129] Since there is nothing in the Retainer Agreements that suggests that Ms. Lucion made such representations, the only way that the Plaintiff can prove this allegation is through oral representations. As no oral representations are relied on by the Plaintiff, this aspect of the Proposed claim cannot form the basis for breach of any fiduciary duty.

[130] The Proposed Claim goes on to specify the alleged breach of the fiduciary duty, as follows:

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> 35. Lucion and Canadian Global owed Class members a fiduciary duty arising from Lucion's status as an RCIC.
>
> 36. Lucion and Canadian Global breached this duty by acting in their own interests, contrary to the interests of their clients, the Class members.
>
> 37. Lucion and Canadian Global deceived Class members about the services they would or could provide them within their fiduciary role.
>
> 38. Class members relied on Lucion and Canadian Global to make immigration applications that they did not make, and for which they charged and obtained significant fees from the Class members.
>
> 39. The Class members lost money and opportunities to seek status in Canada through legitimate means as a result of this breach. They also suffered mental distress from the experience of having been deceived by a professional, whom they trusted, and potentially losing their immigration status in Canada.

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[131] I turn then to the concerns raised by the Defendants.

3. Analysis

[132] The Defendants say that the pleadings fall short of the requirement in *Basyal* for an *ad hoc* fiduciary relationship, because: (a) it does not specify the legal interests of the Class members that were affected by the alleged fiduciary relationship; and (b) it does not specifically state that they were under an undertaking to act with loyalty or in the Class members' best interests.

[133] While I agree with the Defendants that these elements are required, I disagree that they are missing.

[134] As to the first criticism, the vulnerability of the members of the proposed class is evident, as is the legal interest "that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control": *Elder Advocates*, at para. 36. The Plaintiff has asserted that the defendants offered and contracted to provide services that would secure status and authorization to work in Canada. The right to remain and work in Canada is clearly a legal right that stands to be affected.

[135] The second concern was addressed by the amendment made by the Plaintiff during the hearing. Paragraph 12 of the Proposed Pleading was

amended by adding the following sentence at the end: “The Defendants were under an undertaking to act in the best interests of the Class members.” Further, the Defendants’ concern is misplaced. In *Baysal*, the Court was not concerned with the absence of words making a bare assertion that the alleged fiduciary was on an undertaking to act in the best interests of the Class members. If that was the case, then the Plaintiff’s amendment to paragraph 12 would be sufficient.

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[136] Rather, the Court in *Baysal* was concerned with the absence of material facts that would support an undertaking given by the defendants to act in the best interest of the class members. The Defendants do not raise such a concern, nor is it supported by a plain reading of the Proposed Claim.

[137] In *Galambos* at para. 79, the Court explained that an undertaking necessary to ground a fiduciary relationship may be express or implied. It also explained that considerations of “professional norms, industry, or other common practices” were relevant considerations: at para. 79.

[138] In this case, the Plaintiff has pled that Ms. Lucion was an immigration consultant with certain professional conduct standards. I am satisfied that sufficient material facts have been asserted to support an inference of an undertaking.

4. Conclusion

[139] I conclude that the pleadings regarding a cause of action for breach of fiduciary duty are not bound to fail.

E. Unjust Enrichment

[140] The Defendants say that an insufficient factual basis is set out for this pleading to stand.

1. Legal Framework

[141] There are three elements that must be established for a claim of unjust enrichment to succeed: (a) an enrichment of or benefit to the defendant; (b) a

corresponding deprivation of the plaintiff; and (c) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*,[1980] 2 S.C.R. 834; *Microsoft* at para. 85.

[142] In my view, all three elements are satisfied in the Proposed Claim.

2. Analysis

[143] The essence of the pleading is found in the following passages:

> *Harms to Class members*
>
> 22. Class members paid Lucion and Canadian Global thousands of dollars for immigration services, based on the defendants' representation that Lucion and Canadian Global would make applications on behalf of Class members to the Program, which did not exist.
>
> …
>
> *Unjust enrichment*
>
> 56. Lucion and Canadian Global have been unjustly enriched by receiving fees paid by the Class members.
>
> 57. The Class members suffered the deprivation of the money paid in the form of fees to the defendants.
>
> 58. Because the fees Lucion and Canadian Global received from the Class members resulted from wrongful or unlawful acts, there is and can be no juridical reason justifying their retaining any part of it.
>
> 59. These wrongs render void or unenforceable any alleged reason for these defendants' enrichment, including contract, and thereby negate any juristic reason for why the defendants should have received or should retain the benefit of their wrongdoing.
>
> …

[144] Giving the pleading a broad and generous interpretation, I conclude that the elements for unjust enrichment are met through a combined reading of paras. 1, 9.a, 13, 22, 38, 56, and 57 of the Proposed Claim. The Plaintiff pleads that Class members paid the defendants thousands of dollars in exchange for assistance in applying for a Program that did not exist and making applications that were never made. The Defendants received the Class members' payment, and the Class members lost money in the form of payment of fees. The assertion that the program did not exist, and that the applications were never made, supports the lack of juristic reason for the enrichment.

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[145] I turn to the second concern raised by the Defendants, which is that the unjust enrichment claim must be pled in the alternative, because the pleading is inconsistent with a pleading of breach of the Duty of Honest Performance, which is premised on the existence of an existing valid contract which may be breached: see Rule 3-7(6) and (7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[146] The Plaintiff is prepared to make such an amendment, though he submits it is not necessary.

[147] In *Simsek v. United Airlines, Inc.*, 2015 BCSC 1453, aff'd 2017 BCCA 316, the court found the claim for unjust enrichment was bound to fail because there was a juristic reason (a valid contract) for the enrichment: *Simsek* at paras. 53-58.

[148] I come to a similar conclusion in this case. I agree with the Defendants that a valid and subsisting contract would be a juristic reason for the deprivation, and in the face of such a claim, the unjust enrichment claim must be pled in the alternative. In the circumstances, such an amendment should be permitted.

[149] Finally, I turn to the Defence Counsel's objection to the pleadings on the basis that paras. 58-59 are bald conclusory statements. In my view, this criticism is unfounded and represents a too narrow reading of the claim. A broad, generous reading incorporates the language in the facts that have been pled, which I find supports this claim.

[150] I turn to a final concern with the pleading, which the Defendants raise in relation to paragraph 60, which provides:

> 60. In the alternative, justice and good conscience require that the defendants Lucion and Canadian Global disgorge to the plaintiff and Class members an amount attributable to the value they received on account of the defendants' scheme.

[151] I agree with the Defendants that the legal basis for seeking disgorgement on the basis of "justice and good conscience" is unclear. To the extent the

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Plaintiff is relying on principles of "waiver of tort" where disgorgement was previously thought to be available without proof of damages based on "wrongful conduct", the Supreme Court of Canada has confirmed that waiver of tort is not an option: see *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 23.

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[152] I conclude that paragraph 60 of the Proposed Claim should be struck as it has no reasonable prospect of success.

3. Conclusion

[153] In summary, paragraph 60 of the Proposed Claim is struck.

[154] In regards to the remaining aspects of the claim for unjust enrichment, the Plaintiff is given leave to propose an amendment to plead unjust enrichment in the alternative.

F. Punitive Damages

[155] The Defendants also challenge the sufficiency of the pleadings to sustain a claim for punitive damages.

1. Legal Framework

[156] Punitive damages are aimed at retribution, deterrence, and denunciation, rather than compensation: *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 at para. 94.

[157] They are awarded only when there has been high-handed, malicious, arbitrary, or highly reprehensible conduct and must be assessed in proportion to the harm caused, degree of misconduct, plaintiff’s level of vulnerability, any advantage the defendant gained through their conduct: *Whiten* at para. 94.

[158] To succeed in a claim for punitive damages the facts must be pleaded with some particularity and rigour: *Whiten* at paras. 87 and 94.

2. Analysis

[159] In support of his claim for punitive damages, the Plaintiff pleads at paras. 61-62 that the defendants' conduct was high-handed, reckless, callous, willful, reprehensible, and "entirely without care" for the Class members' vulnerability in Canadian society, and that such behaviour should be deterred.

[160] The Defendants argue that the Plaintiff has not provided material facts to support his "conclusory" statement at para. 61, as summarized above. This argument cannot succeed. As summarized in the following paragraphs, the Plaintiff has pled material facts capable of supporting a cause of action and punitive damages earlier in the Proposed Claim, at Part 1: Statement of Facts.

[161] The Plaintiff pleads that the Defendants deceived vulnerable individuals, caused harm to the class members, and acted in a high-handed manner that should be deterred.

[162] Insofar as paragraph 17 of the Proposed Claim refers to oral representations when using the word "promoted" the pleading cannot support a claim for punitive damages. However, it is possible to conclude that by inference, paragraph 17 asserts that the Program was offered to members of the migrant community, who did not have permanent status or any status at all in Canada, and were eager for opportunities to work and remain permanently in Canada.

[163] At paragraphs 22-25, the Plaintiff pleads that the defendants caused harm to the class members. The class members paid thousands to dollars to the defendants. They lost opportunities to apply to immigrate via other pathways.

[164] Furthermore, the Plaintiff pleads at paragraph 24, "The defendants' deception made Class members vulnerable to deportation and many ended up having to leave the country." The consequences of this conduct led to significant stress and anxiety.

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[165] The Defendants also assert that the pleadings fail to disclose a cause of action to support the claim for punitive damages. This argument must also fail. The Plaintiff pleads three actionable wrongs: breach of the Duty of Honest Performance, breach of fiduciary duty, and unjust enrichment.

[166] The Plaintiff also seeks aggravated damages. The Defendants do not challenge this claim and I am satisfied that there is sufficient basis in the pleadings to sustain this claim as well.

3. Conclusion

[167] In short, the pleading for punitive damages and aggravated damages is not bound to fail.

G. Joint and Several Liability

[168] Joint liability will be found in three scenarios: vicarious liability, agency, and concerted action: *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370, at para. 18. Concerted Action may be made out when wrongdoers acted "in furtherance of a common design": *Valley Traffic Systems Inc.* at para. 18:

[169] Generally, the court is reluctant to pierce the corporate veil and hold shareholders or directors personally liable. However, it may impose personal liability when there is conduct akin to fraud: *Han v. Yan,* 2018 BCSC 1450, at paras 138-139.

[170] In *Han* at para. 139, the court found that piercing the corporate veil was warranted because the company was "a mere shell", the defendant shareholders acted at times in their personal capacities, and they benefitted personally from the transaction.

[171] The Plaintiff pleads that Ms. Lucion and CGI engaged in conduct akin to fraud by telling migrants that the Program existed, as well as by entering into contracts and charging the class members thousands of dollars while knowing that the Program did not, in fact, exist: at para. 13.

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[172] Furthermore, the Plaintiff pleads that Ms. Lucion was the sole proprietor, director, and/or officer of CGI at all material times: at para. 6.

[173] In the Legal Basis section of the Proposed Claim, the Plaintiff pleads that Ms. Lucion is jointly and severally liable for CGI's wrongful conduct because she was the sole director, officer, and/or proprietor, had complete control of CGI, directed CGI's activities, and knew or ought to have known that her conduct was unlawful.

[174] The Defendants argue that the claim is bound to fail because the pleadings do not provide material facts to support a finding of joint and several liability. This is the same argument the Defendants advanced against the Plaintiff's claim for punitive damages and it fails for the same reason. The foregoing summary confirms that the Plaintiff has plead material facts in Part 1: Statement of Facts which are sufficient to ground this claim.

[175] This aspect of the claim is not bound to fail.

IV. IS THERE AN IDENTIFIABLE CLASS?

[176] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons.

[177] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 ("*Dutton*"), the Court noted at para. 38 that to meet the identifiable class requirement of the certification test, "the class must be capable of a clear definition". The Court elaborated as follows:

> [38] … Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> [Citations omitted.]

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[178] The class definition is intended to assist in identifying those persons who have potential claims; defining the parameters of the lawsuit; and describing who is entitled to notice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

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[179] The Plaintiff seeks to represent a class comprising of:[5]

> all persons who, on or after June 1, 2020 until the opt-out date set by the Court, entered into a written retainer agreement with Canadian Global Immigration Consultant Services and/or Canadian Global Immigration Consulting Inc. and/or Liza Lucion (the "Defendants") in exchange for assistance in applying for an open work permit, and whose written retainer used the words "Active Public Policy announced by IRCC" when describing the services to be provided by the Defendants, excluding all persons:
>
> i. who held or formerly held a Post-Graduation Work Permit;
>
> ii. who received and email or letter from Immigration, Refugees and Citizenship Canada confirming that they successfully submitted a permanent resident application for a stream of the temporary resident to permanent resident pathway, or were the spouse or dependent child of this person;
>
> iii. who was a resident of Hong Kong, as defined under paragraphs R190(2)(d) and (e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.
>
> (the "Class)

[180] The Defendants do not dispute that the proposed class definition sets out an identifiable class of two or more persons. However, they say that the definition as it is currently worded requires some modification in order to more clearly define the proposed class.

[181] The Defendants have proposed various changes to the Plaintiff's Class definition. The Plaintiff has agreed to all of them. Most of these proposed changes have already been incorporated in the class definition set out above. However, some amendments are outstanding, such as: changing the class period from June 1, 2020, to January 1, 2021 to conform with the facts that are pleaded in the Proposed Claim; inserting the word "agreement" after "retainer" in the second sentence; and fixing a few typographical errors.

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[5] Proposed Claim, para. 9.

[182] I am satisfied that the amended class definition, as agreed to by the parties, clearly defines the persons that could have potential claims.

[183] The Plaintiff has filed affidavit evidence that identifies 53 putative class members who fit the defined class. Based on this affidavit evidence, I am satisfied that there is some basis in fact that there is an identifiable class of two or more people.

[184] I also find that the class is rationally connected to the common issues. This is addressed in more detail in the following section.

[185] Thus, subject to the Plaintiff making all of the amendments to the class definition that are set out at paragraphs 65 and 68 of the Defendants' Brief of Argument, I conclude that the Plaintiff has met this part of the certification test.

V. DOES THE CLAIM RAISE COMMON ISSUES?

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

[187] In *Pioneer Corp. v. Godfrey*, 2019 SCC 42 ("*Godfrey*") the Court reaffirmed the following principles which apply to a s. 4(1)(c) analysis:

> [104] In *Microsoft*, at para. 108, this Court reaffirmed the principles of "common issues" for the purpose of certification, as they were explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534:
>
> > In [*Dutton*] this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
> >
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
> >
> > (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims

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> must share a substantial common ingredient to justify [a class proceeding]. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.
>
> [105] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court clarified that the "common success" requirement in *Dutton* should be applied flexibly. "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean failure for another (para. 45). A question is considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

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[188] To the above principles set out in *Godfrey*, I add the following additional considerations which are referenced in the authorities:

(a) The central question is “whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis”: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 39.

(b) The common issue must advance the litigation towards a resolution, although it does not need to be determinative: *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223, at para. 30.

(c) An overly broad common issue runs the risk of not yielding answers that will advance the litigation in a meaningful way, which inevitably breaks down into individual proceedings*: Thorburn BCCA*, at para. 39.

(d) If resolution of an issue depends on individual findings of fact that must be made for each class member, it fails to meet s. 4(1)(c) as this does not avoid the duplication that the common issues criteria seeks: *Thorburn BCCA*, at para. 42.

(e) The answer to the common issue must be capable of extrapolation to each member of the class, and in the same manner: *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26, at para. 85.

(f) A class action should not be certified if there is a conflict of interest between the class members: *Dutton* at para. 40; *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 56, citing *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at para. 46.

(g) The onus is on the plaintiff to provide sufficient evidence to establish the existence of the common issues on a "some basis in fact" standard: *Microsoft*, at para. 99. The "some basis in fact" standard is much less stringent than the "balance of probabilities" test: *Hollick*, at paras.16–26.

(h) The plaintiff must provide some evidence showing that: (a) there is in fact a common issue; and (b) the issue can be answered in common across the class: *Krishnan BCSC*, at para. 115.

(i) The evidentiary standard at this stage is not onerous and does not involve weighing the evidence: *AIC Limited v. Fischer*, 2013 SCC 69, at paras 39-43; *Hollick*, at para. 21.

(j) The defendant can challenge the plaintiff's evidence and bears the "heavy evidentiary burden" to "show that there is no basis in the evidence for the facts asserted by the plaintiff": *Stanway v. Wyeth Canada Inc.,* 2011 BCSC 1057, at paras 8-9.

[189] In answer to the entire claim, the Defendants submit that none of the proposed common issues can be answered without reference to the individual findings of fact respecting each individual Class member. As such, the determination of the common issues is destined to become an individualized inquiry, particularly since the Plaintiff is relying solely on the text of the Retainer Agreements.

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[190] The Defendants submit that the Retainer Agreements cannot be interpreted without reference to the collateral oral representations, because the written agreements alone are too vague, ambiguous, and describe the relevant immigration policy too generally. In other words, it will be necessary to consult with each individual class member to determine what oral representations were made to them and whether they relied on these representations. If the success of the case relies on consultation with each individual class member, then these cannot be considered common issues.

[191] The Defendants further submit that this situation is not ameliorated by reliance on oral representations. Even if the Plaintiff relied upon both the Retainers and the representations made at the Information Sessions and in individual meetings, that would not avoid the need for individual inquires, since each individual class member would still need to be consulted regarding the oral representations. Consequently, the issues would cease to be common.

[192] With these arguments in mind, I will now consider each proposed common issue.

A. Common Issue 1

[193] The Plaintiff seeks to certify the following as Common Issue 1:

> 1. Breach of the Duty of Good Faith and Honest Performance
>   (a) Did Lucion and/or Canadian Global breach their duty to perform their contractual obligations honestly and in good faith by deceiving Class members about the existence of an immigration program that Lucion and/or Canadian Global would assist them in applying for?

[194] This common issue relates to a claim that I have found is insufficiently plead and cannot succeed. Since I have concluded that the Plaintiff has failed to plead a viable claim for beach of the Duty of Honest Performance, proposed Common Issue 1 cannot be certified.

[195] However, I set out the following analysis for the sake of completeness. This analysis is done on the hypothetical that the deficiencies in the claim for

breach of the Duty of Honest Performance which are highlighted at paragraphs 99-103, 105-107, and115-116 in these Reasons, were corrected by the Plaintiff.

[196] There is a general reluctance by the courts to certify contract-based common issues, unless they are based on a uniform contract. See for example, *Lam v. University of British Columbia*, 2010 BCCA 325, at paras. 55–58, leave to appeal to SCC ref'd, 33855 (17 February 2011), where the Court held that a claim that requires the court to consider individual representations or contractual terms is unlikely to be certified.

[197] The pleading asserts that the common experience across the Class is that they entered into the Retainer Agreements for assistance in applying for the Program, which did not exist.

[198] At para. 5 of the Plaintiff's Written Brief, Counsel writes:

> …the defendants promised migrants that, for a payment of approximately $5000, they could help them obtain open work permits through a program that simply did not exist. That promise is plain on the face of the retainer agreements the Class members entered into with the defendants, whether or not each particular Class member attended a group information session and regardless of what they were specifically told orally.

[199] Mr. Medellin's Retainer Agreement provides that:

> **WHEREAS** The Client has requested that the Company assist him/her in the preparation of an Application / legal documentation for Open Work Permit under Active Public Policy announced by IRCC.
>
> **AND WHEREAS** the Company, through Liza Lucion, Member of the Immigration Consultants of Canada Regulatory Council …, has agreed to perform such services; …
>
> ("Preamble to the Medellin Retainer")

[200] The Plaintiff argues that from the Preamble to the Medellin Retainer, and with no further context, the Court can answer Common Issue 1 for all class members and reach the conclusion that one or all of the Defendants breached their duty to perform their contractual obligations honestly and in good faith by deceiving Class members about the existence of an immigration program that they would assist them in applying for.

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[201] There are several problems with this assertion.

[202] I have already accepted that the following alleged misrepresentations are discernable based on the Retainer Agreements and other aspects of the Proposed Claim that are referred to at paragraph 91: that (a) the Contracted Policy existed and could provide the Class members with an OWP; and (b) that the Class members could potentially qualify for OWPs under this public policy.

[203] Even if the Plaintiff had leave to amend the pleading to plead reliance, I cannot see a pathway that would not require individual inquiries.

[204] In order to show that one or more of the proposed Class members were in fact deceived, the Plaintiff must prove reliance. To establish reliance, the Plaintiff will have to show that each individual class member read the Retainer Agreement, and came away with the common understanding of what was meant by the words "Open Work Permit under Active Public Policy announced by IRCC". I cannot see how that is possible without the evidence of each individual Class member.

[205] Indeed, Mr. Medellin's own affidavit mostly describes Ms. Lucion explaining the Program's features to him during two Information Sessions. He avers that he received information about the Program in the first session, and then signed the Retainer Agreement at the second one. Beyond these sessions, Mr. Medellin's second affidavit makes a reference to Ms. Lucion explaining the Program through "other communications": at para. 4. The affidavit does not detail the form or content of these other communications.

[206] The insurmountable challenge for the Plaintiff is that, on their face, the Retainer Agreements only refer to the Program or the Contracted Policy in broad terms. Even if the Plaintiff was successful in showing that the alleged misrepresentations had been made, to succeed in the claim, evidence of each Class member would be required as to: whether they read the Retainer Agreement before signing; whether they relied on any representations contained in the Retainer Agreement; whether any collateral representations were made

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about the performance of the Retainer Agreement, when they were made, and what they were.

[207] In *0930032 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd.*, 2015 BCCA 332 at para. 3, the Court noted the importance of the background, context, and knowledge of the genesis of the contract when interpreting the words.

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[208] To address this issue in a class proceeding, the Court needs to be satisfied that it can resolve the issue of whether the Retainer Agreements were deceptive or misleading without the Plaintiff (or any other Class member), providing any evidence as to the circumstances around the signing of the Retainer Agreement, including the Plaintiff's individual interactions with the Defendants or "their agents" as pled in the Proposed Claim.

[209] However, the Proposed Claim does nothing to assuage this concern, as is evident from the following paragraph, which states that Mr. Medellin retained Ms. Lucion to apply "for a work permit via the immigration program Ms. Lucion advertised":

> 4. The plaintiff, Andres Barrios Medellin, is a citizen of Mexico who currently resides in Vancouver, British Columbia. He retained Liza Lucion to make an application on his behalf for a work permit via the immigration program Lucion advertised, which did not exist.

[210] At paragraph 13 of his Affidavit #2, Mr. Medellin goes further and avers to Ms. Lucion "lying about the program and my eligibility for any unrestricted open work permit programs". This is not information that is contained in the Retainer Agreements.

[211] It is difficult to see how the Plaintiff can establish that he was deceived about the "existence of an immigration program" without reference to his own interactions with Ms. Lucion and his alleged experience at the Information Sessions. In this regard, the admission in the Godinho Affidavit #1 filed by the Defendants does not assist the Plaintiff. In her Affidavit #1, Ms. Godinho avers on behalf of the defendant that, during the relevant period, there were 25 pathways to obtaining an OWP. Of the total possible routes, however, only three

were created using the Minister of Immigration's power to create public policies granting foreign nationals permanent resident status or exempting them from criteria under the *Immigration and Refugee Protection Act*. While I accept that these are the only pathways that could fit the description in the Retainer Agreement of "Active Public Policy announced by IRCC", that does not eliminate the need for inquiry into the individual circumstances of each class member.

[212] To establish that the Defendants knowingly deceived him, the Plaintiff would have to show that the Defendants knew of his individual circumstances before he entered into the Retainer Agreement, and that those circumstances were such that he did not qualify for the Existing Policies. Once Mr. Medellin's individual circumstances become relevant, so do the circumstances of each of the other class members. This is fatal to certification of Issue 1 as a common issue.

[213] In *Marshall v. United Furniture Warehouse Limited Partnership*, 2015 BCCA 252, the Court upheld the chambers judge's decision to deny certification on the basis that the claim lacked commonality. The chambers judge found that, even though the plaintiffs claimed they only relied on written material, a resolution of the issue required consideration of the "mix" of oral representations made to the different consumers in the proposed class: *Marshall*, at paras. 20-21.

[214] This is analogous to the case before me. Even though the Plaintiff submits that he intends to rely only on the written Retainer Agreement, the claim cannot be resolved without consideration of oral representations made on an individual basis.

[215] I reject the Plaintiff's argument that, since the Class definition precludes individuals who were eligible for an existing program, all individuals in the class necessarily contracted for a program that did not exist. While this is possible, that conclusion cannot be reached solely based on the language of the Retainer Agreements alone, particularly in light of Clauses 1.1 and 1.2 of the Retainer

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Agreement. The Retainer Agreement itself contemplates that the Defendants would advise the clients about the applicable statute and procedures, and make individual inquiries to ascertain how to make the application more successful. Clauses 1.1 and 1.2 of Mr. Medellin's Retainer Agreement are substantively similar to the other Retainer Agreements tendered into evidence. That clause provides:

> **…**
>
> **IT IS HEREBY AGREED:**
>
> **1. CONSULTANTS RESPONSIBILITIES AND COMMITMENT**
>
> In consideration of the fees paid and the matter stated in the preamble, the Consultant agrees to provide the following services to the Client:
>
> 1.1 To advise the Client on Canadian Immigration Act & Regulations and procedures;
>
> 1.2 To conduct an assessment on the Client's background and qualifications and to advise the Client of options that offers the best chance of a successful application;
>
> …

[216] This inevitably leads to an individual inquiry into what the Defendants knew about the circumstances of each Class member before, during and after they entered into the Retainer Agreement, in order to establish that the Defendants breached a Duty of Honest Performance.

[217] In addition, the Retainer Agreements are not in fact identical. Although a standard form contract appears to have been generally used for the Retainers that are in evidence, it appears to have been modified for some of the Class members. For example, Mr. Dominguez's Retainer Agreement refers to "+ family":

> **WHEREAS** The Client has requested that the Company assist him/her in the preparation of an Application / legal documentation for Open Work Permit + family under Active Public Policy announced by IRCC;
>
> **AND WHEREAS** the Company, through Liza Lucion, Member of the Immigration Consultants of Canada Regulatory Council …, has agreed to perform such services; …
>
> ("Preamble to the Dominguez Retainer")

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[218] The implications of this could be significant. In her Affidavit #1, Ms. Lucion avers that she was guided by the personal circumstances of each applicant, such that she determined that some of her clients qualified for an employer-specific work permit and their spouse qualified for an unrestricted OWP (OWP Pathway #9), whereas, other OWP Clients qualified for a study permit while their spouse qualified for an OWP (OWP Pathway #10). Consequently, even minor differences in the Retainer Agreements could have implications that require a detailed inquiry into the personal circumstances of each Class member.

[219] Finally, I note that the Retainer Agreements do not contain an entire agreement clause. Instead, s. 10 of the Retainer Agreements specifically provides for changes to the Retainer Agreement “upon mutual agreement”. This further erodes any possibility that the Court could conclude, on the face of the Retainer Agreements alone, that there was a misrepresentation about the "existence of an immigration program" as framed in Issue 1.

[220] In conclusion, even if the pleadings were not deficient, I find that Common Issue 1 cannot be certified as it cannot be answered in common across the Class.

B. Common Issue 2

[221] The Plaintiff seeks to certify the following as Common Issue 2:

> 2. Breach of Fiduciary Duty
>
> (a) Did Lucion and Canadian Global owe a fiduciary duty to the Class members, arising from Lucion’s status as a Regulated Immigration Consultant?
>
> (b) Did Lucion and Canadian Global act in their own interests, contrary to the interests of the Class member, by:
>
> (i) deceiving the Class members about the existence of an open work permit program they could apply to; and
>
> (ii) charging the Class members fees to provide services to apply for this program, which services they could not and did not perform?
>
> (c) If so, did the defendants’ breach of their fiduciary duty cause the Class members loss in the form of the fees they paid to the defendants for these services?

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[222] The Defendants concede that issue 2(a) is a common issue as it can be answered on a common basis. However, they submit that the remaining issues are dependent on individual findings of fact. I agree.

[223] Like the proposed Common Issue 1, a determination under Common Issue 2(b)(i) on whether the Defendants acted in their own interests by "deceiving" the Class Members would require an investigation into representations made to the individual members of the class. It is not possible to ascertain if the Defendants deceived class members on the face of the words "Open Work Permit under Active Public Policy announced by IRCC" alone. Nor is it possible, as stated at paragraph 204 of these Reasons, to establish that the Defendants knew the individual circumstances of each class member and knowingly deceived them.

[224] The success of issues 2(b)(ii) and 2(c) relies on a finding under 2(b)(i). If there was no deceit, then the class members cannot show that Lucion breached any fiduciary duty she may have owed them.

[225] In short, common issues 2(b) and 2(c) all rely on individual inquiries. As such, they do not meet the requirement under this part of the certification test.

[226] I conclude that Common Issue 2(a) is certifiable, but Common Issue 2(b) and (c) do not meet the test for certification.

C. Common Issue 3

[227] The Plaintiff seeks to certify the following as Common Issue 3:

> 3. Unjust Enrichment
>
> (a) Were the fees received from Class members a result of wrongful or unlawful acts such that there can be no juridical reason justifying retaining any part of the fees?

[228] As noted earlier, the pleading for unjust enrichment is deficient. As such, Common Issue 3 cannot be certified. However, the amendment required is not

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onerous. As such, I will address this issue for the sake of completion, and on the hypothetical that the required amendment has been made.

[229] Common Issue 3 is built on the resolution of Common Issues 1 and 2. It relies upon a determination under proposed Common Issues 1 and 2 that the Defendants engaged in particular “wrongful or unlawful acts,” namely, a breach of the Duty of Honest Performance and/or a breach of fiduciary duty. I have already found that proposed Common Issues 1, 2(b) and 2(c) do not raise common issues. Consequently, Common Issue 3 must also fail.

[230] Without Common Issues 1 and 2 to specify which “wrongful or unlawful acts” are in question, Common Issue 3, as framed here, is overly-broad. It would not serve the interests of fairness or efficiency to certify it: *Cheetham v. Bank of Montreal*, 2023 BCSC 1319, at para. 207, citing *Rumley v. British Columbia*, 2001 SCC 69 at para. 29 at para. 29.

[231] In *Simsek*, the court refused to certify three proposed common issues, on the basis that they relied upon a fourth proposed issue that failed to meet the commonality requirement: *Simsek* at para. 97. The Court found that the common issues were “built” on one another, so that if one failed then the others must as well: *Simsek*, at para. 97.

[232] The same logic applies here. If proposed Common Issues 1, 2(b) and 2(c) cannot be answered in common, then proposed Common Issue 3 must also fail.

D. Common Issue 4

[233] The Plaintiff seeks to certify the following as Common Issue 4:

4. Punitive Damages

    (a) Was the defendant's conduct high-handed, malicious, arbitrary, or reprehensible such that punitive damages are warranted?

    (b) If so, and if the aggregate compensatory damages awarded to Class members does not achieve the objectives of retribution, deterrence, and denunciation in respect of such conduct, what is the appropriate quantum of punitive damages in this case?

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(c) If the answer to common issue 4(a) is yes, and for consideration once all other common issues have been decided, can an aggregate award pursuant to s. 29 of the *Class Proceedings Act* be made as regards punitive damages?

[234] I agree with the Defendants that neither Common Issues 4(a) or 4(b) can be certified as a common issue, which precludes certifying Common Issue 4 in its entirety.

[235] Like proposed Common Issue 3, Common Issues 4(a)(b), and (c) rely on the certification of the proposed common issues regarding breach of the Duty of Honest Performance, unjust enrichment, and/or breach of fiduciary duty.

[236] If the proposed issues dealing with unjust enrichment and/or breach of fiduciary duty do not raise a common issue and cannot be certified, then no finding of an independent actionable wrong will follow and proposed common issue 4 must fail. Punitive damages will only arise where the court has found an independent actionable wrong: *Whiten* at para. 82.

[237] In *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, rev'd on other grounds 2012 BCCA 310, the Court found that punitive damages were not appropriate because the defendants' conduct could not "be considered in isolation from the individual circumstances of particular claimants": *Koubi* at para. 153.

[238] However, the court did not rule out the possibility that there may be scenarios in which the court could determine entitlement to punitive damages as a common issue: *Koubi* at para. 157.

[239] In *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, the Court of Appeal upheld the chambers judge's decision to certify a "bifurcated approach" to punitive damages, whereby the issue of whether punitive damages were warranted would be heard at the common issues trial, while a determination on the amount of damages would be decided at a later date: *Sherry* at paras. 41 and 89.

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[240] I find that the circumstances here are analogous to *Koubi*, in that individual assessments would be necessary to determine whether punitive damages are warranted, as well as the amount of any damages that followed. A bifurcated approach, as adopted in *Sherry*, would not suit the proposed common issues before me.

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[241] I conclude that Common Issue 4 is not suitable for certification.

E. Common Issue 5

[242] The Plaintiff seeks to certify the following as Common Issue 5:

5. Joint and Several Liability and Vicarious Liability

   (a) Is Liza Lucion jointly and severally liable for the wrongful and unlawful acts of Canadian Global?

   i Did Canadian Global commit wrongful and unlawful acts at the direction and under the control of Lucion?

   ii Did Lucion know or ought she to have known that her conduct was contrary to law?

   iii Was Lucion the sole director and in complete control of Canadian Global such that it was not a truly independent entity?

   iv Did Lucion direct Canadian Global to collect payment from Class members for a fraudulent purpose?

   v Would allowing Lucion to avoid liability unjustly deprive the Class members of their rights?

   vi Should the corporate veil be pieced to allow the Class members to recover against Lucion for her misconduct?

[243] This proposed issue also relies on certification of the earlier common issues. Without a finding that CGI is liable for any of the proposed common issues regarding the duty of good faith and honest performance, breach of fiduciary duty, and/or unjust enrichment, there can be no finding that Ms. Lucion is jointly and severally liable.

[244] For the reasons outlined previously, I find that Common Issue 5 is not suitable for certification.

VI. IS A CLASS PROCEEDING THE PREFERABLE PROCEDURE?

[245] As noted above, only Common Issue 2(a) is capable of certification; none of the other common issues meet the requirements of s. 4(1)(c) *CPA*. The question then is whether a class proceeding is the preferable procedure for the fair and efficient resolution of this isolated common issue.

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[246] For a class proceeding to be considered the preferable procedure under s. 4(a)(d) of the *CPA,* the Plaintiff must show some basis in fact that a class proceeding: (1) would be a fair, efficient and manageable method of advancing the claim; (2) would be preferable to any other reasonably available means of resolving the claims of the class members; and (3) it will facilitate the goals of judicial economy, behaviour modification, and access to justice: see *Curtis v. Medcan Health Management Inc.,* 2021 ONSC 4584 at para. 34; *Hollick* at paras. 28, 32-34*.*

[247] Section 4(2) of the *CPA* requires the court to consider the following non-exhaustive list of factors to determine preferability:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[248] Considering the first factor under s. 4(2)(a), I find that Common Issue 2(a) does not predominate over individual questions. The opposite is true. It is clear the remaining issues which are not certifiable but which still need to be resolved, will significantly predominate over Common Issue 2(a). As such, a class proceeding in relation to Common Issue 2(a) is not a preferable procedure,

particularly when one considers judicial economy, access to justice, or even behaviour modification.

[249] As held by the court in *Tiemstra v. Insurance Corp. of British Columbia (1997),* 149 D.L.R. (4th) 419 (B.C.C.A.), 1997 CanLII 4049 at para. 17:

> A class action which will break down into substantial individual trials in any event does not promote judicial economy or improve access to justice, and is not the preferable procedure.

[250] A similar conclusion was reached in *Harrison v. Afexa Life Sciences Inc.,* 2018 BCCA 165, leave to appeal to SCC ref'd, 38196 (7 February 2019), where the Court of Appeal made the following observation:

> [62] I would observe that where different representations are made to different persons in different circumstances, a class proceeding will often not be appropriate because of the need for detailed individual assessments of circumstances (see, for example, *Marshall v. United Furniture Warehouse Limited Partnership*, 2015 BCCA 252 (B.C. C.A.); *Simsek v. United Airlines, Inc.*, 2017 BCCA 316 (B.C. C.A.)).
>
> [63] I am not persuaded by the plaintiff's suggestion that this case, if tried under the *Class Proceedings Act*, could proceed without inquiries into the individual circumstances under which class members purchased the defendants' product. Issues of causation and reliance would almost certainly have to be proven on an individual basis.

[251] Even if Issue 2(a) was certified, I agree that following the common issue trial, the court would still need to assess on an individual basis:

(a) the contractual terms governing each class member's Retainer Agreement;

(b) the representations the Defendants made to each class member, and what each class member understood from these representations, and whether they reasonably relied upon them;

(c) whether the Defendants made immigration applications on behalf of each of the class members and the reasons any applications may have failed;

(d) whether a juridical reason, such as a valid contract, existed for the Defendants to retain the fees any of the individual class members paid;

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(e) whether each individual class member experienced a loss of opportunity or delay of opportunity, to immigrate via alternate immigration programs that were legitimate;

(f) whether each individual suffered stress or anxiety and whether that mental state was caused by the Defendants’ wrongs;

(g) the quantum of general damages, unjust enrichment, and if any punitive or aggravated damages, are payable; and

(h) whether the individual class members took steps to mitigate any loss of damages.

[252] The overwhelming number of issues that require individual inquiries leads me to conclude that certification of Common Issue 2(a) would advance the issues between the parties only marginally.

[253] While the *CPA* still permits certification where the individual issues may predominate over common issues, the goals of class proceedings - judicial economy, behaviour modification, and access to justice - must be met through certification. I conclude that in the circumstances of this case, they are not met, having regard to the vast number of individual issues that would still need to be addressed. For that reason alone, this matter is not suitable for certification.

[254] I turn to consider the other factors under s. 4(2) of the *CPA*. There is no evidence that a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions. Factor 4(2)(b) would mitigate in favour of a class proceeding being the preferable procedure.

[255] Factor 4(2)(c) considers whether the class proceeding would involve claims that are or have been the subject of any other proceedings.

[256] There currently exist two separate court proceedings that are related to these matters, though I find that they only have marginal relevance and on their

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own are not sufficient to support non-certification. First, an individual who is not a prospective class member has filed a notice of claim naming Ms. Lucion in a Small Claims Court proceeding. This claim arises from different facts than the proposed class action before me. Second, Ms. Lucion herself filed a notice of civil claim in the Supreme Court of British Columbia, naming three individual defendants. While Ms. Lucion's claim appears to arise from the same set of facts as the case before me, it too is insufficient to show a proliferation of other claims.

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[257] Section 4(2)(d) requires the court to consider whether other means of resolving the claim would be less practical or less efficient. The Plaintiff submits that a class proceeding is the best avenue for Class members to access justice, given that many of them are in vulnerable positions and do not have the ability to bring individual claims against the Defendant. I agree that this factor weighs towards certification. On the Plaintiff's evidence, there is some basis in fact that some individual members of the class would face barriers to bringing individual claims.

[258] However, even if I was to certify this action, there would be numerous issues that must be resolved on an individual basis. There is little value in certifying an issue that will only advance the case to such a limited extent.

[259] I also note that there are other options for seeking redress that do not involve the same time or monetary expenses as advancing a claim in the Supreme Court of British Columbia. However, the efficacy of these alternative courses of action is questionable.

[260] Because Ms. Lucion is a registered immigration consultant, the Class members could make complaints to the Discipline Committee of the College of Immigration and Citizen Consultants. Under the College's bylaws, the Discipline Committee has the power to revoke or suspend a licensee's licence, issue a reprimand, pay a monetary penalty and legal fees, or make any other order it considers necessary, where it is found that a licencee has committed an offence:

Immigration Consultants of Canada Regulatory Council, By-Law 2021-2 (17 November 2021), 28.9. In fact, Ms. Lucion has already been the subject of a complaint, albeit under different circumstances were different: *CICC v. Lucion*, 2023 CICC 22, at para. 11(a).

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[261] Importantly, the Discipline Committee has the power to order restitution to the complainant. It can also order fines and penalties which are similar to punitive damages and would address behaviour modification. While any fines would go to the College, rather than the complainants, this does not offend the purpose of punitive damages, which are aimed at retribution, deterrence, and denunciation, rather than compensation: *Whiten* at para. 94.

[262] The Discipline Committee may also order a licensee who has committed an offence to pay legal fees for the hearing and specify the amount, timing and manner of payment. This can compensate or offset costs for complainants.

[263] Having said that, I am mindful that there are significant limitations to the administrative tribunal process, and the tribunal cannot provide all the relief that would be available in the civil system: *AIC Limted v. Fischer*, 2013 SCC 69. In *AIC*, the Supreme Court of Canada found that the motion judge erred by accepting that he should not “second-guess the access to justice” provided in a regulatory proceeding the securities context. Rather, the judge was required to engage in a comparison of procedural and substantive dimensions of the processes and determine which was preferable under the applicable class proceedings statute: *AIC* at para. 62.

[264] I have considered how the process for bringing a complaint to the Disciplinary Committee and the substantive relief available compare to a class action suit in the Supreme Court. I am also mindful that the class members that would wish to make a complaint may still require legal assistance to navigate the complaint process. Even if the Discipline Committee went on to order the Defendants to pay legal fees, the complainant would be responsible for this up front cost. It is also not guaranteed that the Discipline Committee would find the

Defendants committed an offence or order payment of legal fees as a remedy. As such, I do not find the disciplinary proceedings a viable and effective option to address the concerns raised by the Class members. However, that in and of itself does not mean that the class proceeding should be certified.

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[265] In *Sharp* at paragraph 199, the Court noted that class proceedings should not be certified if they are unworkable due to individual evidence and fact-finding, even if other proceedings are not available or preferable.

[266] In my view, a conventional multi-plaintiff action offers a more practical and efficient proceeding than a class action. Proceeding by way of a conventional multi-plaintiff action would avoid "unleashing the full panoply of procedural requirements" for a class proceeding, such as notice requirements, the opting out process, restrictions on discovery rights, and other similar matters: *Ward-Price v. Mariners Haven Inc.*, 2002 CanLII 38058 (Ont. S.C.) at para. 39.

[267] In a multi-plaintiff action, a single round of discovery could advance the claim significantly, and be completed in less time and with less expense. Additionally, if the parties agree, then it may be possible to answer the question of whether Ms. Lucion owed a fiduciary duty to the proposed class members by way of a statement on a special case under Rule 9-3 or a proceeding on a point of law under Rule 9-4.

[268] I turn to the final factor under s. 4(2)(e). This also does not weigh in favour of certification. This factor requires the court to consider whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. Given the narrow issue that could be addressed by the class proceeding, I conclude that it would create greater difficulties than those likely experienced if the proposed class members sought redress through a conventional multi-plaintiff litigation or by filing a complaint with the Discipline Committee.

[269] In conclusion, while there are some factors that weigh in favour of a class proceeding being the preferable procedure, most of the factors weigh against it.

When the matter is considered as whole, and having regard to the very narrow issue that could conceivably be resolved through a class proceeding, I find that a class proceeding not the preferable procedure in this case.

VII. IS THERE AN ADEQUATE REPRESENTATIVE PLAINTIFF?

[270] Section 4(1)(e) requires that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[271] The proposed representative plaintiff need not be "typical" of the class but must be "adequate" in the sense that they are willing to vigorously prosecute the claim: *Dutton* at para. 41.

[272] An issue arises here due to the Plaintiff's residence. He currently resides outside of Canada. Pursuant to s. 2(1) of the *CPA*, a representative plaintiff must be a resident of British Columbia.

[273] However, counsel for the Defendant concedes (and I accept) that Mr. Medellin's residency would not be a bar to certification, as the court could conditionally certify a class proceeding and replace the Plaintiff with a resident of BC. This was the approach taken by the Court in *Jiang v. Peoples Trust Co*, 2018 BCSC 299. Justice Bowden found that it would be "severe" and "detrimental to the interests of the absent class members" to refuse certification solely on the basis that the plaintiff had not proven that they were a resident of British Columbia. He concluded that it was open to the court to conditionally certify a proceeding under s. 5(6) or s. 12 of the *CPA*, and then adjourn the proceedings to give the plaintiff time to provide further evidence regarding residency: *Jiang* at para. 40.

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[274] The case before me is distinguishable from *Jiang*, as Mr. Medellin's residency is not the "sole" basis on which to deny certification.

[275] I turn then to the Litigation Plan. Given my above findings, it is not necessary for me to consider it in depth. I have already concluded that the claim raises the need to address individual issues, making it unsuitable to proceed as a class proceeding. No litigation plan can resolve this.

VIII. CONCLUSION

[276] In the result, I find that this claim is not suitable to certification as a class proceeding.

[277] If the court refuses to certify a class proceeding, the *CPA* provides that it may nevertheless permit the proceeding to continue as between different parties, as follows:

> **Refusal to certify**
>
> 9 If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings; and
>
> (c) make any other order that it considers appropriate.

[278] In these Reasons, I identified three amendments that needed to be made to the Proposed Claim in order for the pleadings to disclose a viable cause of action for the breach of the Duty of Honest Performance and unjust enrichment.

[279] I have already determined that the Plaintiff should be given leave to make two of those amendments: (a) in the breach of the Duty of Honest Performance claim, amending the claim to plead that the false representations were made after contract formation; and (b) in the unjust enrichment claim, amending the pleading to plead unjust enrichment in the alternative.

[280] The third amendment is to the breach of the Duty of Honest Performance claim, in order to permit the plaintiff to plead reliance. The concerns that I raised

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earlier that prevented me from granting leave to make this amendment in a class action proceeding do not arise in the context of a regular civil action. In the circumstances, I find it appropriate to give the Plaintiff leave amend the pleading to plead reliance on the alleged misrepresentations.

[281] Further, I am mindful that many of the earlier amendments were made in an effort to have the matter certified. It is possible that given the outcome of this certification hearing, the Plaintiff may wish to amend the pleadings further so that he can proceed with this action as a conventional trial. To that end, he should be given an opportunity to propose further amendments that will permit him to advance his arguments fully.

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[282] Having said that, counsel must keep in mind that the opportunity to amend is not limitless. At some point, the Plaintiff will have to live with the pleadings as they have been drafted. There are only so many opportunities that the Plaintiff will be given to “get it right”.

IX. ORDER MADE

[283] I make the following order:

1. The Plaintiff’s application to have this matter certified as a class proceeding, is dismissed.

2. Pursuant to s. 9 of the *CPA* the Proposed Claim be amended as follows:

    (a) Paragraph 60 is struck from the Proposed Claim, as it presents an alternative argument that is bound to fail.

    (b) To address the concerns raised at paragraphs 99-103 and paragraph 115 of these Reasons regarding the claim for the breach of the Duty of Honest Performance, and to plead that the false representations were made after contract formation.

(c) To address the concerns raised at paragraphs 105-107 and paragraph 115 of these Reasons regarding the claim for the breach of the Duty of Honest Performance, and to plead reliance on the alleged misrepresentations.

(d) To address the concerns raised at paragraphs 145-148 and paragraph 154 of these Reasons regarding the claim for unjust enrichment, to plead unjust enrichment in the alternative.

3. Once the amendments at Paragraph 2 above are made, the proceeding may continue as one or more proceedings between different parties.

4. The Plaintiff has leave to apply to court to seek additional amendments to the Proposed Claim which may be necessitated by the dismissal of the Plaintiff’s application for certification.

“Shergill J.”

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