

CANADA / JUDGMENT

Lee v. Ocean Pacific Hotels Ltd.

2022 BCSC 1608

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1608 Lee v. Ocean Pacific Hotels Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lee v. Ocean Pacific Hotels Ltd.,

2022 BCSC 1608

Date: 20220913

Docket: S213604

Registry: Vancouver

Between:

Tonia Lee, Melissa Kramer, and Jerome Bansagon

Plaintiffs

And

Ocean Pacific Hotels Ltd.

Defendant

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Blake

Reasons for Judgment

Counsel for the Plaintiffs:

S. Quail

Counsel for the Defendant:

I.G. Nathanson, QC

J.K. Lockhart

Place and Date of Hearing:

Vancouver, B.C.

April 20-21, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 13, 2022

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I. INTRODUCTION

- [1] This is an application brought for certification by the proposed representative plaintiffs, Tonia Lee, Melissa Kramer and Jerome Bansagon, who shall be referred to as the plaintiffs. They all worked for the defendant owner of the Pan Pacific Hotel, Ocean Pacific Hotels, Ltd. ("Ocean Pacific"), in July 2020. As a result of the significant impact of the COVID-19 pandemic on the hospitality industry, Ocean Pacific offered casual employment agreements to most of its regular hourly employees (the "Casual Agreement"). A term of the Casual Agreement was that employees continued to be eligible for extended health benefits from Manulife Financial, notwithstanding that casual employees were not normally eligible for those benefits, subject to and in accordance with the terms and conditions of the applicable plans and policies, and the continued approval of Manulife Financial.
- [2] Ocean Pacific offered the Casual Agreement to 156 employees, and ultimately 93 employees accepted the terms of the Casual Agreement. For the majority of the employees who signed the Casual Agreements their extended health benefits were cancelled on January 2, 2021.
- [3] In this proposed class proceeding, the plaintiffs seek to represent a class of current and former Ocean Pacific employees who signed the Casual Agreements and in doing so agreed to convert from regular to casual status in July or August 2020, in exchange for terms that included the continuation of extended health benefits (and whose benefits were thereafter terminated). The plaintiffs say that Ocean Pacific breached the Casual Agreement, breached its obligation to perform the Casual Agreement honestly and in good faith, and misrepresented its commitment to maintain the extended health benefits for those who signed the Casual Agreement. They say they are entitled to damages for these alleged legal wrongs, as well as punitive damages.
- [4] The plaintiffs seek an order that the class proceeding be certified with Ms. Lee and Ms. Kramer as representative plaintiffs of the proposed class, and Mr. Bansagon as a representative plaintiff of the proposed subclass.
- [5] Although not sought in their notice of application, at the hearing of the application the plaintiffs sought leave to amend their notice of civil claim originally filed April 9, 2021 (the "NOCC") in the form set out as attached to the draft order, as the proposed amended notice of civil claim (the " Proposed ANOCC").
- [6] The plaintiffs' position is that, subject to further verbally proposed amendments to the Proposed ANOCC made in their reply argument set out below, they have satisfied s. 4(1) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] and that the certification order must be granted.
- [7] Ocean Pacific's position is that the NOCC and the Proposed ANOCC fail to plead the necessary material facts to support the alleged causes of action, fail to set out properly pled causes of action, and are rife with hypotheticals, inferences and argument. Their position is that the NOCC is seriously flawed, and the Proposed ANOCC does not rectify these flaws. For

that reason Ocean Pacific objects to leave being granted to the plaintiffs to file the Proposed ANOCC. Further, Ocean Pacific points to what they say are two judicial admissions made in the NOCC, which the plaintiffs purport to withdraw from the Proposed ANOCC without the leave of this Court.

- [8] In reply, the plaintiffs said they would no longer withdraw those two judicial admissions from the Proposed ANOCC. Further, they acknowledged there were deficiencies, and proposed the deficiencies identified by Ocean Pacific could be cured by numerous additional amendments to the Proposed ANOCC, some of which plaintiffs' counsel said were obvious and identified verbally, others which plaintiffs' counsel said I could identify and set out in these reasons for judgment. The plaintiffs' position was that it was appropriate that I order the NOCC to be amended as set out in these reasons for judgment.
- [9] In response to that suggestion, Ocean Pacific argued that the plaintiff was proposing a wholesale redrafting of the NOCC, in what was a clear acknowledgment of the deficiencies of the proposed claim, and that the proposed verbal amendments were inappropriate to consider. Ocean Pacific says that the certification application should be dismissed, and invites me to go further and conclude that on the basis of the submissions at the application, the certification application would have been rejected in any event.
- [10] Upon careful consideration of the NOCC and the Proposed ANOCC, I am satisfied that both fail to plead the necessary material facts to support the causes of action advanced and therefore fail to properly plead those causes of action, and so cannot satisfy the requirements of s. 4(1)(a) of the CPA. I also accept that the proposed verbal amendments suggested by the plaintiffs in reply are too uncertain and ambiguous to consider on this certification application, and so to consider those further potential amendments is inappropriate at this time.
- [11] While the pleadings are defective, I find they may be curable, and that it is appropriate that the plaintiffs have an opportunity to amend their pleadings to produce a potentially viable claim. Upon balancing all of the interests at stake, I am satisfied it is appropriate to exercise my discretion and grant leave to the plaintiff to apply to amend their pleadings. Accordingly, the application for certification is dismissed with leave granted to the plaintiffs to reapply to amend their NOCC and certification application in accordance with these reasons.

II. FACTS RELEVANT TO THE CERTIFICATION APPLICATION

- [12] The three proposed representative plaintiffs worked at Ocean Pacific as hourly employees until July 2020. Before the COVID-19 pandemic, Ocean Pacific employed approximately 254 hourly employees at the Pan Pacific Hotel.
- [13] In July 2020 Ocean Pacific provided identical letters to 156 of its hourly employees, offering them the opportunity to convert from regular status to casual status and to pay them a one time payment of \$250 upon receipt of a signed Casual Agreement. The letter stipulated that the hourly employees would relinquish the hours and termination pay rights associated with

their regular status, and in return Ocean Pacific promised to continue their extended health benefit coverage, subject to the terms and conditions of Manulife Financial (their extended health benefit carrier).

[14] Each of the Casual Agreements were identical in form, stated that Ocean Pacific did not have the same volume of work to offer its employees as it had before, and proposed a new agreement on the following terms:

- a) the employee would perform any duties reasonably assigned to them;
- b) their rate of pay and vacation entitlement would remain the same;
- c) Ocean Pacific would no longer have any obligation to provide the employee with shifts, and the employee would have no obligation to accept shifts offered;
- d) Ocean Pacific would continue the employees' benefits coverage, notwithstanding that casual employees are normally not eligible for benefits, subject to the terms and conditions and continued approval of the benefits carrier;
- e) Ocean Pacific would pay the employee \$250;
- f) employment as a casual employee may be terminated by providing only the minimum entitlement (if any) required by applicable employment standards legislation; and
- g) Ocean Pacific would consider qualified casual employees prior to other candidates for future positions if business resumed.

[15] Subparagraph (d) is the critical clause in the Casual Agreement, and is found in clause 4 of the Casual Agreement:

- 4. Notwithstanding that casual employees are not normally eligible for benefits, the Hotel is pleased to offer you continued eligibility for benefits coverage, subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of our carrier.

[Emphasis added.]

[16] Of the 156 full time employees who were offered the Casual Agreement, 93 accepted.

[17] The terms and conditions of the Manulife plan for extended health benefits requires that in order for a regular hourly employee to be eligible for benefits, they must be working more than 20 hours a week. As a result of the reduction in work available because of the COVID-19 pandemic, most of Ocean Pacific's regular hourly workers could no longer meet the hours requirement to obtain extended benefits from Manulife. Under the terms of their contract with Manulife, Ocean Pacific was able to extend coverage for 120 days during a temporary or indefinite layoff (the "120 day Grace Period"). Ocean Pacific says that by relying on the 120 day Grace Period, they were able to provide benefit coverage for their regular hourly employees who were no longer able to work after March 2020 as a result of the pandemic.

- [18] However, in July 2020, that 120 day Grace Period was expiring for the majority of Ocean Pacific's employees. The COVID-19 pandemic continued, and Ocean Pacific did not have sufficient work for most of its regular hourly employees.
- [19] Throughout the month of July 2020, Ocean Pacific communicated with employees about the Casual Agreement. While many employees received initial information during group meetings held between July 7 and 10, 2020, some were advised during individual meetings with Eytal Dattel, the Director, Human Capital and Development, at Ocean Pacific. Each of the meetings included a question and answer session that was driven by the questions of the employees attending at that meeting. For those employees who attended in person, it appears they were given a letter at the meeting, that set out the proposed terms of the Casual Agreement.
- [20] Mr. Dattel answered individual questions by way of email, phone and through additional meetings, and sent three email communications to the employees: on July 15, 2020, on July 20, 2020 and on July 22, 2020.
- [21] On July 15, 2020 Mr. Dattel addressed a recent posting by Local 40, and confirmed:
- No associate is being forced to sign anything. The offers referred to are purely voluntary, as is clear from the language in the offers, and extend certain benefits to associates who choose to accept casual status. The Hotel will continue to respect the associate's date of hire, seniority in current designation, rate of pay and benefits status for those who sign such offers.
- Associates are encouraged in the offers to consider them carefully, obtain advice if they wish, and consider whether the offers are appropriate to their individual circumstances.
- [22] On July 20, 2020 Mr. Dattel again addressed a recent posting from Local 40 and wrote:
- We wish to be clear: no associate has been forced to sign anything or will be forced to sign anything. The Pan Pacific Vancouver has extended a number of offers to associates intended to continue employment during this extraordinary time when COVID-19 has caused a severe reduction in business. These offers include continued benefits for all associates beyond the period when such benefits would normally be provided by the Hotel.
- The Pan Pacific Vancouver will continue to respect the associate's date of hire, seniority in current designation, rate of pay and benefits status for those who sign such offers.
- The Pan Pacific Vancouver will be returning existing associates to their original status as and when available, in priority over any external applicants.
- [23] Finally, on July 22, 2020, Mr. Dattel again wrote, to address some questions regarding the Casual Agreements, and of importance to the proposed class action wrote:
4. For associates who sign, what are the exact terms (eligibility and coverage) of their benefit plan?

Current Benefits, which are subject to the rules, regulations and policies of the Provider will remain the same. Currently we do not anticipate any changes to our existing policies. Specific questions should be directed to the Human Capital & Development department.

[Emphasis added.]

[24] At an as of yet unspecified date, Ocean Pacific sought and obtained an extension to the 120 day Grace Period from Manulife, which extension expired for most employees on January 2, 2021.

III. THE ACTION

[25] In the NOCC and the Proposed ANOCC, the plaintiffs advance causes of action in breach of the duty of honest and good faith performance regarding material terms of the Casual Agreement, breach of contract, negligent and fraudulent misrepresentation, and punitive damages

A. Notice of Civil Claim

[26] What underlies the cause of action advanced by the plaintiffs is the allegation that Ocean Pacific promised them that in signing the Casual Agreement, their extended health benefits would be extended "indefinitely".

[27] The plaintiffs referred throughout the NOCC to Ocean Pacific representing it would provide extended health benefits indefinitely (see paras. 3, 37, 43 and 45). Paragraph 3 of the NOCC reads as follows:

3. The defendant induced the plaintiffs and other employees to agree to convert from regular to casual status, giving up various entitlements in so doing, on the basis that it would continue to provide them extended health benefits indefinitely subject to approval by the benefits provider. The plaintiffs and other employees agreed to these terms. The defendant did not continue extended health benefits as it had promised to do.

[Emphasis added.]

[28] However, with respect to the alleged misrepresentation, the plaintiffs did not set out a specific representation, nor a contractual promise, they allege was made by Ocean Pacific. Rather, the NOCC, under the heading "Continued representations regarding benefits", set out the following:

- a) a representation made by email on July 15, 2020 and on July 20, 2020 that "if an employee signed the Casual Agreement, the defendant would continue to respect that employee's date of hire, seniority in current designation, rate of pay, and benefits status" (paras. 15 and 16 NOCC);

- b) a representation made by email on July 20, 2020 that "the Casual Agreement included the offer of continued benefits beyond the period when benefits would normally be provided (i.e. while employees were not actively working" (para. 16 NOCC); and
- c) a representation made by email on July 22, 2020 that the "benefits would remain the same and that [Ocean Pacific] did not anticipate changes" (para. 17 NOCC).

[29] The plaintiffs set out in Part 3: Legal Basis the following:

The arrangements between the defendant and Manulife

- 26. The defendant represented to Class members that the main benefit of accepting the Casual Agreements would be continuation of their extended health benefits. In the text of the Casual Agreements, the defendant said that benefits would continue subject to the continued approval of the carrier, Manulife. In other written communications about the Casual Agreements, the defendant reiterated that benefits would continue, and that it did not anticipate any changes to the existing policies.
- 27. The defendant did not warn Class members that benefits would only continue until early 2021, for a period of 5-7 months.
- 28. There are three plausible explanations why the defendant did not warn Class members that they were giving up their regular employee status for benefit continuation that would only extend 5- 7 months:
 - a. the defendant did not bother to check with Manulife to find out how long Manulife would be able to continue to cover employees under the Casual Agreement, so it did not know that benefits would only continue for 5-7 months;
 - b. the defendant did check with Manulife and Manulife gave the defendant information about how long it expected to continue this coverage, and the defendant did not give this information to Class members; or
 - c. the defendant did check with Manulife and Manulife told the defendant it could continue this coverage as long as the defendant continued to pay and remit premiums, but the defendant unilaterally terminated benefits anyway in 2021.
- 29. Each of the three plausible explanations described above involves wrongful conduct by the defendant against the Class.
- 30. The first explanation involves negligent misrepresentation.
- 31. The second explanation involves fraudulent misrepresentation and a breach of the duty of honest performance regarding material terms of the contract.

32. The third explanation involves breach of the contractual promise to continue benefit coverage subject to approval of the carrier, fraudulent misrepresentation, and breach of the duty of honest performance.
33. The plaintiffs plead each in the alternative.
- [30] The plaintiffs then set out the legal basis for their alleged claims of breach of the duty of honest and good faith performance regarding material terms of the Casual Agreement, breach of contract, negligent and fraudulent misrepresentation and punitive damages.
- [31] In their response to civil claim, Ocean Pacific plead the following in Part 3:
19. In answer to the whole of the Notice of Civil Claim, the Defendant denies that it breached any legal obligations to the Plaintiffs and denies that it made any material representations to the Plaintiffs regarding the continuation of their benefits. It did not breach any duty of honest and good faith.
20. In these circumstances and having regard to the terms of the Casual Agreements, the Plaintiffs had no reasonable expectation that they would receive any benefits under the terms of the Manulife policy other than in accordance with the terms of the Manulife policy.
21. In the alternative, and in any event, the Plaintiffs did not suffer any loss or damage.

B. Proposed Amended Notice of Civil Claim

- [32] The plaintiffs Proposed ANOCC abandons the "three explanations approach"; and rather advances claims for breach of the duty of honest and good faith performance regarding material terms of the Casual Agreement, breach of contract, and punitive damages on behalf of the class, and a claim for negligent and fraudulent misrepresentation on behalf of a proposed subclass who signed the Casual Agreement after receiving Mr. Dattel's July 22, 2020 email.
- [33] The Proposed ANOCC claim sets out in Part 3 a new legal analysis:

The arrangements between the defendant and Manulife

26. The defendant represented to Class members that the main benefit of accepting the Casual Agreement would be continuation of their extended health benefits. In the text of the Casual Agreements, the defendant said that benefits would continue subject to the continued approval of the carrier, Manulife. In other written communications about the Casual Agreements, the defendant reiterated that benefits would continue, and that it did not anticipate any changes to the existing policies.

27. The defendant did not warn Class members that benefits would only continue until early 2021, for a period of 5 - 7 months. Before the defendant offered the Casual Agreements to the Class members, it arranged with Manulife that Manulife would extend the grace period (which was set to expire in or around July 2020). The plaintiffs do not know what Manulife told the defendants about how long this extension would last. Ultimately, the extension lasted until January 2, 2021.
28. There are three plausible explanations why the defendant did not warn Class members that they were giving up their regular employee status for benefit continuation that would only extent 5 - 7 months. If the defendant knew, in July 2020, that the extension from Manulife would only last until January 2, 2021, it had an obligation to tell that to the Class members. Class members were entitled to know that they were signing away their regular employee status (and associated entitlements including termination pay) in exchange for benefit continuation that would end on January 2, 2021 if they were not working at least 20 hours per week.
 - a. the defendant did not bother to check with Manulife to find out how long Manulife would be able to continue to cover employees under the Casual Agreement, so it did not know that benefits would only continue for 5 - 7 months;
 - b. the defendant did check with Manulife and Manulife gave the defendant information about how long it expected to continue this coverage, and the defendant did not give this information to Class members; or
 - c. the defendant did check with Manulife and Manulife told the defendant it could continue this coverage as long as the defendant continued to pay and remit premiums, but the defendant unilaterally terminated benefits anyway in 2021.
29. Each of the three plausible explanations described above involves wrongful conduct by the defendant against the Class. If the defendant had this information and withheld it from the Class members, then it breached its duty of good faith performance of its contractual obligations toward the Class members. It also fraudulently misrepresented to Subclass members on July 22, 2020, when it told them: The first explanation involves negligent misrepresentation that "current benefits will remain the same" and "currently we do not anticipate any changes to our existing policies".
30. Alternatively, if the extension that Manulife agreed to in or before July 2020 was open-ended, and the defendant learned after the Casual Agreements had been offered and accepted that the extension would end on January 2, 2021, then the July 22, 2020 email contains negligent misrepresentations. Even if the defendant did not specifically know, as of July 22, 2020, that the end-date of the grace period would be January 2, 2021, the defendant did know that it had merely secured an extended grace period, not any firm commitment to maintain benefits. The defendant was negligent to make these statements in the July 22, 2020 email without making reasonable efforts to ensure that the information was accurate.

31. The second explanation involves fraudulent misrepresentation and a breach of the duty of honest performance regarding material terms of the contract. Class members who had already signed the Casual Agreement before July 22, 2020 were not affected by this misrepresentation, but those who signed after were and they form the Subclass for this part of the claim.
32. The third explanation involves breach of the contractual promise to continue benefit coverage subject to approval of the carrier, fraudulent misrepresentation, and breach of the duty of honest performance. The defendant also breached the Casual agreements by failing to make any attempt to arrange continued coverage of benefits for employees working less than 20 hours per week beyond the January 2, 2021 end-date. This failure is either a direct breach of contract, or in the alternative a breach of the defendant's duty of good faith in the performance of the contract. This claim applies to the entire Class.
33. The plaintiffs plead each in the alternative.
- [34] The plaintiffs then set out the legal basis for their alleged claims of negligent misrepresentation, fraudulent misrepresentation, breach of the duty of honest and good faith performance, breach of contract and punitive damages, with some further proposed amendments.
- [35] Ocean Pacific says that the Proposed ANOCC continues to fail to plead the material facts necessary to support the alleged causes of action. By way of some examples only, Ocean Pacific points to the following deficiencies in the Proposed ANOCC:
- a) the plaintiffs allege that Ocean Pacific induced the plaintiffs to sign the Casual Agreements on the basis that they would continue to provide extended health benefits "indefinitely", subject to approval by the benefits provider (para. 3 Proposed ANOCC), but they fail to plead a material fact as to when or how Ocean Pacific stated that the extended health benefits would be provided "indefinitely";
 - b) similarly, the plaintiffs fail to plead any material facts that would support an implied term of the Casual Agreements that the extended health benefits were to be extended "indefinitely";
 - c) the plaintiffs imply there was an obligation on the part of Ocean Pacific to make all reasonable efforts to ensure that Manulife continued the extended health benefits for those employees who signed the Casual Agreements for as long as possible, but there are no material facts pled that:
 - i. such an obligation was an implied term of the Casual Agreement; nor
 - ii. that Ocean Pacific had such an obligation;
 - d) the plaintiffs allege they should be "inferred" to have relied on their extended health benefits continuing "indefinitely", but plead no material facts to support a finding of inferred reliance;

- e) similarly the plaintiffs fail to plead they actually relied on their extended health benefits continuing "indefinitely";
 - f) the plaintiffs allege that Ocean Pacific engaged in "dishonest conduct" (para. 24 Proposed ANOCC) but fail to plead material facts setting out the alleged "dishonest conduct";
 - g) the plaintiffs allege that Ocean Pacific lied or knowingly mislead the plaintiffs about matters directly linked to the Casual Agreement, but fail to plead the material facts to support a conclusion that Ocean Pacific either lied or knowingly mislead the plaintiffs; and
 - h) the plaintiffs specifically state in Part 3, para. 27, that they "do not know what Manulife told the defendants about how long this extension would last" and fail to plead that Ocean Pacific knew that Manulife would not extend coverage of the extended health benefits past the beginning of January 2021.
- [36] Counsel for Ocean Pacific says the NOCC and the Proposed ANOCC fail to plead the necessary material facts to support the alleged legal causes of action. Counsel also notes that the material facts as pleaded - whether found in Part 1 or Part 3 of the pleading - are phrased as hypotheticals, not material facts with potential alternative legal interpretations. He characterized the submissions made on the certification application as ambiguous and creating a wholly unique situation.
- [37] Plaintiffs' counsel stressed that this class action is at an early stage, and that many of the material facts are still not known to the plaintiffs, but rather, only known to Mr. Dattel and others employed by Ocean Pacific. In reply, plaintiffs' counsel acknowledged that Ocean Pacific had identified significant deficiencies in the Proposed ANOCC that could be cured by further amendments. Counsel verbally set out a number of "obvious amendments", which included:
- a) removing the "hypotheticals" (paras. 28 to 30 and 39, 43, 49 and 51 of Part 3 of the Proposed ANOCC);
 - b) moving those paragraphs from Part 3 to Part 1 of the pleading;
 - c) moving paragraphs 32 and 51 from Part 3 to Part 1 of the pleading; and
 - d) clearly setting out paras. 28 and 30 as being the material facts underlying the claim Ocean Pacific engaged in dishonest conduct.
- [38] Further, plaintiffs' counsel agreed to have the purported judicial admission set out in paragraph 18(b) and 45 of the NOCC (and withdrawn in the Proposed ANOCC), "stand". These were only the "obvious" amendments that plaintiffs' counsel identified in verbal reply.
- [39] The plaintiffs say I should certify the class action, and grant leave to file the Proposed ANOCC, amended as I set out to be appropriate in these reasons for judgment.

[40] Ocean Pacific takes the position that the amendments proposed verbally amount to a "wholesale redrafting of the entire pleading" in an acknowledgment of the significant deficiencies underlying the claim (as set out in both the NOCC and the Proposed ANOCC). They say I should dismiss the certification application on this basis, and invite me to conclude that on the basis of the submissions at the application, the certification application would have been rejected in any event.

IV. certification application

A. General Principles

[41] Section 4(1) of the CPA lists the requirements to be met for certification of a class proceeding:

4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

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

[42] If all of the requirements in s. 4 are met, the court must certify the action. Certification of an action as a class proceeding is not a comment on the merits of the claim, but rather a determination of the most appropriate procedure to resolve the claim: *Jastram Properties Ltd. v. HSBC Bank Canada*, 2021 BCSC 2204 at para. 13; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [Pro-Sys]. Certification criteria is evaluated generously, with the aim of furthering the principal goals of class actions, being judicial economy, access to justice and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109.

B. Section 4(1)(a): Do the Pleadings Disclose a Cause of Action

- [43] The plaintiffs acknowledge s. 4(1)(a) of the CPA requires both that the proposed causes of action are properly pleaded, and that there is some prospect that they might succeed at trial.
- [44] The legal adequacy of a claim in a proposed class action is determined using the same test as applied on an application under Supreme Court Civil Rule 9-5(1) to strike a pleading for failure to disclose a reasonable cause of action: whether, assuming the facts pleaded to be true, it is plain and obvious that the claim cannot succeed: *Pro-Sys* at para. 63. This is a low threshold; pleadings are to be read generously: *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 24; *Webster v. Robbins Parking Service Ltd.*, 2016 BCSC 1863 at para. 32. Specifically, the Court of Appeal in *Sherry* set out the test as:
- [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 (B.C.C.A.) 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.
- [45] However, assertions that are manifestly incapable of proof need not be assumed to be true: *Young v. Borzoni et al*, 2007 BCCA 16 at para. 30. To be certified, a claim must have a reasonable prospect of success, not a speculative one: *Sherry* at para. 24
- [46] An effectively pleaded cause of action must include sufficient material facts pleaded to support each element of the cause of action: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54; *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at para. 39 [Basyal]; *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 25. Speculation or "bald conclusory assertions" are not material facts: *Kindylides v. Does*, 2020 BCCA 330 at para. 35. The material facts giving rise to the claim, or that relate to the matters raised in the claim, must be concisely set out. Neither evidence nor argument is appropriate: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 44 [Mercantile Office]. The CPA, and in particular s. 4(1)(a), does not eliminate the necessity that the notice of civil claim properly plead the necessary material facts to support the causes of action. This obligation was eloquently explained by Chief Justice McLachlin, as she then was, in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [Imperial Tobacco], in the context of a motion to strike, in the following manner:

[22] It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[Emphasis added.]

[47] Our Court of Appeal recently addressed this critical issue of sufficient material facts being plead in a notice of civil claim in *Mercantile Office* and noted:

[21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

[22] Pleadings also give effect to the underlying policy objectives of the Rules, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22-23. They enable the parties and the court "to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182 at para.55, citing *D.B. Casson & I.H. Dennis*, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75-76.

[23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15-22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para.30; *Weaver v. Corcoran*, 2017 BCCA 160 at para.63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: *Frederick M. Irvine*, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006 (loose-leaf updated 2021) at 3-6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras.17-18, *aff'd* 2016 BCCA 52.

[48] It is not appropriate to consider the possibility that, as the case progresses, new evidence may be revealed: *Imperial Tobacco* at para. 23. Rather, the exercise is whether taking the facts pleaded as true, the notice of civil claim discloses a cause of action.

[49] Pleadings may reasonably be amended to fix drafting inadequacies or bring clarification to obscure issues: *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44; *Sherry* at para. 24. The court should "read the statement of claim as generously as possible and, within reason, allow amendments to accommodate drafting deficiencies": *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650 (reversed on other grounds 2012 BCCA 310). The court should be generous in allowing amendments, however, fairness and access to justice are also

important considerations, including to defendants: Sandhu at para. 44. Amendments must be proposed with specificity, and an action should not be certified contingent on amendments that have yet to be presented or are unspecified: Escobar v. Ocean Pacific Ltd., 2021 BCSC 2414 at para. 14 [Escobar]; Sandhu at para. 118.

V. analysis

A. Do the Pleadings Disclose a Cause of Action?

- [50] The pleadings in this proposed class action are clearly in a state of flux. Presumably as a result of this certification process, the plaintiffs proposed an amended notice of civil claim. I am not satisfied that the pleadings as set out in the Proposed ANOCC properly set out the material facts necessary to support the alleged causes of action. For that reason, I do not grant the plaintiffs leave to file the Proposed ANOCC.
- [51] Further, for the reasons already set out, the proposed potential further amendments verbalized as possible by plaintiffs' counsel in reply were not set out with the necessary specificity and clarity to consider the certification application on the basis that specific amendments to the NOCC made in the future would allow for certification at this time. To consider such amendments would not be appropriate.
- [52] In paragraph 3 of the NOCC, the plaintiffs allege Ocean Pacific "induced the plaintiffs and other employees to agree to convert from regular to casual status, giving up various entitlement in so doing, on the basis that it would continue to provide them extended health benefits indefinitely subject to approval by the benefits provider". This theme that Ocean Pacific had promised the benefits would continue "indefinitely" is maintained throughout the Legal Basis in both the NOCC and the Proposed ANOCC.
- [53] However, there is nothing in the Casual Agreement, nor in any of the communications plead, that says the extended health benefits would continue "indefinitely". Without the plaintiffs pleading the material facts upon which they rely to advance their claim that Ocean Pacific advised the plaintiffs their extended health benefits would continue indefinitely (either directly or by implication), the potential success of their claim is doubtful.
- [54] For the reasons set out above I would dismiss the certification application on the basis that the plaintiffs have failed to satisfy s. 4(1)(a) of the CPA. Given the proposed verbal amendments pleadings were ambiguous, I have not considered them at this time. Accordingly, I will not consider at this time whether the plaintiffs have satisfied the balance of s. 4(1) of the CPA. However, I will briefly review each of the four proposed legal claims, to set out the current deficiencies of most significant concern.

1. Breach of Contract

[55] The plaintiffs wish to pursue a claim that Ocean Pacific had an obligation to ensure that the employees who signed the Casual Agreement received extended health benefits "indefinitely"; and that Ocean Pacific had a contractual obligation pursuant to the terms of the Casual Agreement to take all reasonable steps to obtain the continued approval of Manulife to provide extended health benefits "indefinitely".

[56] The Casual Agreement provided:

4. Notwithstanding that casual employees are not normally eligible for benefits, the Hotel is pleased to offer you continued eligibility for benefits coverage, subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of our carrier.

[Emphasis added]

[57] While the plaintiffs set out at paragraph 18(b) of the NOCC that "As of January 2, 2021, a condition came into effect that employees must work a minimum 20 hours per week to remain eligible for benefits coverage" they fail to plead any material fact that Ocean Pacific had obligations in addition to the contractual terms set out in the Casual Agreement, and specifically, that Ocean Pacific had obligations to ensure extended health benefits continued "indefinitely". Without such material facts, the plaintiffs have failed to set out the necessary material facts to adduce such a claim. To say it should be inferred is not sufficient. If the basis is an inference, they must plead the material facts which support the inference, and what the inference is. The issue of the clear condition in the Casual Agreement that continued eligibility was subject to the continued approval of the carrier providing the extend health benefits is also an issue for the plaintiffs to address in their pleading.

[58] This failure is not rectified by the plaintiffs' Proposed ANOCC, in which the plaintiffs set out in the Legal Basis that Ocean Pacific breached the Casual Agreements by "failing to make any attempt to arrange continued coverage of benefits for employees working less than 20 hours per week beyond the January 2, 2021 end-date" (para. 32 Proposed ANOCC). Nor is it rectified by the plaintiffs' proposed amendment that "It is implied in the contract [the Casual Agreement] that the defendant would take reasonable steps to obtain the continued approval of the carrier so that benefit coverage could continue, and the defendant took no steps at all to do so during the life of the contract" (para. 51 Proposed ANOCC).

[59] Pursuant to the terms of the Casual Agreement, the parties agreed that conditions may be imposed by Manulife in the future. The plaintiffs have not plead any material facts to support their allegation that Ocean Pacific agreed to ensure the extended health benefits continued indefinitely, and failed to do so.

2. Breach of the Duty of Good Faith and Honest Performance in Contractual Relations by Recklessly Misleading Class Members

[60] Initially, it appeared the plaintiffs intended to pursue a claim that Ocean Pacific had intentionally and/or recklessly mislead the employees about the duration of the continuation of their benefits. The NOCC did not set out any material facts to support a cause of action that Ocean Pacific was reckless, nor did it set out any legal basis for such a claim. Neither did the Proposed ANOCC set out either a material fact to support such a cause of action, nor any legal basis for a claim Ocean Pacific had intentionally and/or recklessly mislead the employees.

[61] Rather, the Proposed ANOCC set out in Part 3:

Breach of the duty of honest performance

48. Parties to contracts, including employment contracts, must not lie to or knowingly mislead each other about matters directly linked to the performance of the contract.
 49. The continuation of benefits is a matter directly linked to the performance of the contractual terms of the Casual Agreement. To the extent that the defendant lied or knowingly misled the Class members about the limited continuation of their benefits, it breached the duty it owed them of honest performance. If the defendant knew in July 2020, when it offered the Casual Agreements and sent emails about their terms, that Manulife would only extend the grace period to January 2, 2021, then by withholding this information about the contract the defendant breached its duty of good faith in the performance of the contract.
 50. Additionally, the defendant's duty of good faith in the performance of the contract obligated it to at the very least attempt to secure Manulife's agreement to continue the grace period beyond January 2, 2021. The defendant made no efforts in this regard at all, instead letting the grace period end and benefits terminate for the Class members.
- [62] However, the plaintiffs' written argument sets out arguments on "recklessness", notwithstanding there were no material facts plead that Ocean Pacific was reckless. To advance such a cause of action would require further amendments. In reply submissions, they appear to accept that recklessness cannot form the basis of a breach of the duty of honest performance.
- [63] I accept Ocean Pacific's argument that for a breach of the duty of honest performance a plaintiff must set out material facts that Ocean Pacific lied, or knowingly deceived, the plaintiffs: *Bhasin v. Hrynew*, 2014 SCC 71 at para. 73; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 54. Similarly, for a breach of the duty of good faith, the plaintiff must set out the material facts as to how Ocean Pacific intentionally lied, or intentionally deceived, the plaintiffs. The necessary material facts are not set out in the Proposed ANOCC.
3. Negligent and Fraudulent Misrepresentation

- [64] The plaintiffs wish to bring a cause of action that, for those class members that signed the Casual Agreements after receiving the July 22, 2020 email, Ocean Pacific made fraudulent and negligent misrepresentations. Ocean Pacific says that no cause of action is disclosed on any of the pleadings, as the pleadings fail to properly particularize the representation(s) upon which the claims are based.
- [65] In their written argument, the plaintiffs say their claim is adequately particularized in para. 6 of the NOCC, which sets out the terms of the Casual Agreements. The Casual Agreement does not provide that Ocean Pacific will maintain the extended health benefits indefinitely, but rather that "Current Benefits, which are subject to the rules, regulations and policies of the provider will remain the same".
- [66] The plaintiffs say the written representations set out in the Casual Agreement are the foundation of their misrepresentation claim. In the alternative, they seek leave to amend their pleading further, to include details about Mr. Dattel's oral representations which they say they rely upon for their misrepresentation claim.
- [67] In oral submissions, plaintiffs' counsel confirmed that the plaintiffs say that a July 22, 2020 email from an employee of Ocean Pacific is the actual misrepresentation they say is actionable. In that email, Mr. Dattel writes:

4 . For associates who sign, what are the exact terms (eligibility and coverage) of their benefit plan?

Current Benefits, which are subject to the rules, regulations and policies of the Provider will remain the same. Currently we do not anticipate any changes to our existing policies. Specific questions should be directed to the Human Capital & Development department.

This position is not made clear in either the NOCC or the Proposed ANOCC.

- [68] I am satisfied that the plaintiffs have failed to adequately specify the misrepresentations they say support their cause of action for fraudulent or negligent misrepresentation in either version of their pleading. Further, if they do wish to rely upon an alleged representation they argue is in para. 4 of the Casual Agreement, there is an issue as to whether that is a statement of fact capable of being a representation, or a statement of future intention: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 14. Finally, I note Justice Voith's comments from Mercantile Office, that a representation cannot be both negligent and fraudulent, and the difference between them is a dishonest state of mind: see para. 40. If a claim of fraudulent misrepresentation is alleged, then the presence of a dishonest state of mind is a material fact that must be expressly plead.
- [69] Finally, the plaintiffs fail to plead the material fact of the plaintiffs' actual reliance upon either the alleged negligent or fraudulent misrepresentations. While in the Legal Basis of the Proposed ANOCC the plaintiffs claim "members reasonably relied on the [negligent] misrepresentation" (para. 40) they do not plead any material facts to support this alleged reasonable reliance. While the plaintiffs argue that reliance may be inferred from all of the

circumstances, they likewise fail to clearly plead any material facts which would support a determination that reliance may be inferred from all of the circumstances: see CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman, [2001] O.J. No. 4620, 2001 CanLII 28388 (Ont. S.C.J.) at paras. 64-67.

[70] There are no material facts plead that would support a finding of either actual reliance or inferred reliance. I am satisfied that in the NOCC and the Proposed ANOCC, the plaintiffs have failed to sufficiently plead the material facts necessary to make out a claim for fraudulent or negligent misrepresentation.

4. Punitive Damages

[71] To succeed in a claim for punitive damages, the plaintiff must allege misconduct that is malicious, oppressive and high handed, such that it offends the court's sense of decency: see Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para. 196; Whiten v. Pilot Insurance Co., 2002 SCC 18 at para. 36. The facts must be pleaded with some particularity: Whiten at para. 87.

[72] The plaintiff, in the Proposed ANOCC, pleads in Part 3 that Ocean Pacific engaged in conduct that was "high-handed, reckless, callous, willful, reprehensible and entirely without care for Class members' precarious position in a sector hard-hit by COVID-19" (para. 52). This is a conclusory pleading in the legal basis, with no details of the material facts that would justify such a legal conclusion.

B. Conclusion

[73] I find that both the NOCC and the proposed ANOCC fail to plead the material facts necessary to support the elements of the causes of action, and so fail to disclose a cause of action as necessary for s. 4(1)(a) of the CPA.

[74] Further, I find that the proposed verbal amendments were vague, uncertain and ambiguous, and it is not appropriate to consider certifying this class action on the basis of those proposed further amendments.

[75] While in some cases certification can be granted, if an amendment would cure a defect in the pleadings, in my opinion that is not the correct approach here. In Escobar, Justice Matthews addressed the issue of defective pleadings as follows:

[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.
- [76] This action is still at a relatively early stage. It was commenced in April 2021, and the Proposed ANOCC was the first set of proposed amendments. The certification application is the first contested application, and is the first test of the pleadings.
- [77] While the pleadings as they stand and as they have been set out in the Proposed ANOCC are defective, I find they may be curable, and that it is appropriate that the plaintiff have an opportunity to amend their pleadings to produce a potentially viable claim: see *Basyal* at para. 80; *Spencer v. Transat A.T. Inc.*, 2022 BCSC 145 at para. 121.
- [78] While I accept Ocean Pacific's argument that the pleadings, particularly as modified verbally in reply, are too ambiguous to give me any choice other than to dismiss the certification application, I am not satisfied that it is appropriate that I conclude that I would have rejected the plaintiffs' certification application in any event. I have considered the potential prejudice to Ocean Pacific of granting the plaintiffs leave to apply to amend the pleadings further. As this proceeding remains at an early stage, I am satisfied that when I balance all of the interests at stake, it is appropriate to exercise my discretion and grant leave to the plaintiffs to apply to amend their pleadings.
- [79] For clarity, with respect to the two judicial admissions in paras. 18(b) and 45 of the NOCC, which the plaintiffs verbally agreed they would not delete on a future amendment, any future amendment seeking to have them withdrawn would have to be determined on an appropriate court application.
- [80] In these circumstances, based on the findings I have made, I will not address the balance of the factors to be considered on a certification application. Should the plaintiffs choose to proceed with their certification application, those factors are appropriately considered at that stage.

VI. Conclusion

[81] The application for certification is dismissed with leave granted to the plaintiffs to reapply to amend their NOCC and certification application in accordance with these reasons. The plaintiffs should file any application to amend within 90 days of these reasons.

"Blake, J."

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