

CANADA / JUDGMENT

Matthews v. La Capitale Civil Service Mutual

2020 BCSC 787

COURT

Supreme Court of British Columbia

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2020 BCSC 787 Matthews v. La Capitale Civil Service Mutual

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Matthews v. La Capitale Civil Service Mutual,

2020 BCSC 787

Date: 20200528

Docket: S1810216

Registry: Vancouver

Between:

Raymond Edward Matthews and Donald Dunlop

Plaintiffs

And

La Capitale Civil Service Mutual, La Capitale Financial Group Inc., La Capitale Civil Service Insurer Inc., La Capitale Financial Security Insurance Company, and 3602214 Canada Inc.

Defendants

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

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I. NATURE OF THE APPLICATIONS

- [1] The plaintiffs apply under s. 2(2) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] for an order certifying this action (the "Action") as a class proceeding and appointing them as the representative plaintiffs, as well as additional related relief (the "Certification Application"). The defendants oppose all aspects of the Certification Application.

II. FACTUAL CONTEXT OF THE CLAIM

- [2] The facts set out below are my findings based on the material presented at this hearing, which is limited to the preliminary procedural step of certification. They do not constitute final findings of fact based on the admissible evidence ultimately tendered by the parties at future hearings on substantive issues.
- [3] Penncorp Life Insurance Company ("Penncorp") was federally incorporated and provided life insurance and accident and sickness insurance in all Canadian provinces and territories. Its agents began officially doing business in July 1994 through Penncorp's offices across Canada. Before that time, Pennsylvania Life Insurance Company, a corporation based in the United States, conducted business in Canada through its Canadian branch, which opened in the late 1970s. In these reasons, I will refer to the Pennsylvania Life Insurance Company and

Penncorp collectively as "Penncorp" unless a distinction between the two entities is warranted in a particular context.

- [4] Prior to July 1, 2019, in addition to administrative staff, each Penncorp branch typically included the following personnel:
- a) insurance agents, who were independent contractors selling insurance products to customers;
 - b) sales managers, who oversaw teams of insurance agents;
 - c) regional directors, who were responsible for branch offices; and
 - d) "partners", who were people selected by the regional director to partner with the regional director to develop business and who participated in the regional directors' compensation.
- [5] The applicable compensation model prior to July 1, 2019 generally involved three categories or "buckets" of compensation:
- Bucket 1 - sales commissions, which were paid to agents who sold a policy and the sales managers who oversaw them, based on a particular formula;
 - Bucket 2 - profit and loss participation ("P & L Compensation"); and
 - Bucket 3 - a special percentage of P & L Compensation provided to 11 individuals (the "Founding Fathers") who had been the original directors for Canadian branch offices of Penncorp ("Founding Fathers Compensation").
- [6] These three buckets were not mutually exclusive and an individual could be entitled to multiple compensation buckets.
- [7] Although there have been various iterations of the contract governing the relationship between Penncorp and its agents (the "Sales Agent Agreements"), no modifications that are material to this application were brought to my attention at the hearing or described in the affidavits. The Sales Agent Agreements are standard form contracts with blank spaces in which the name of the agent, the company, and the date are filled into the template document.
- [8] Similarly, although there have been various iterations of the contract governing the relationship between Penncorp and its sales managers--referred to variously over the years as field trainers, field managers, district managers, and overwrite managers(the "Sales Managers Agreements"), no modifications that are material to this application were brought to my attention at the hearing or described in the affidavits. The Sales Manager Agreements are standard form contracts with blank spaces in which the name of the agent, the company, the date, and the region are filled into the template document.

- [9] P & L Compensation was tracked through the use of unique identifiers associated with the specific team of agents and managers in a given office ("Office Codes"). Although there have been various iterations of the contract governing the P & L Compensation between Penncorp and those entitled to P & L Compensation (the "P & L Compensation Agreements"), no modifications that are material to this application were brought to my attention at the hearing or described in the affidavits. The P & L Compensation Agreements are standard form contracts in which the name of the agent, the company, the region, the date, and the profit percentage are filled into blank spaces appearing in the template document and its compensation schedule.
- [10] Where the Sales Agent Agreements, Sales Manager Agreements, or P & L Compensation Agreements were modified over the years, modifications were made to the template agreement as a block.
- [11] The plaintiff, Raymond Edward Matthews, was an independent contractor who served as a sales agent and manager of various branches of Penncorp in British Columbia. Mr. Matthews agreed to provide insurance-related services in exchange for compensation, including commissions and percentages of profits of various offices in British Columbia, which were payable after retirement or the termination of his contractual relationship with Penncorp, upon the satisfaction of certain conditions (the "Matthews Compensation Agreement"). There are several hundred other individuals who have agreements similar to the Matthews Compensation Agreement. Mr. Matthews retired from working with Penncorp around May 1997.
- [12] The plaintiff, Donald Dunlop, was also an independent contractor who held various positions at Penncorp, including sales agent and manager of various branches of Penncorp in Alberta. Mr. Dunlop agreed to provide insurance-related services in exchange for compensation, including commissions and percentages of profits, which were payable after retirement or the termination of his contractual relationship with Penncorp (the "Dunlop Compensation Agreement"). Mr. Dunlop was also a Founding Father. The claim alleges the Dunlop Compensation Agreement included Founding Father Compensation equal to 5% of the profits of Penncorp generated through all Penncorp's offices in Alberta, payable to Mr. Dunlop in perpetuity during his lifetime. Mr. Dunlop retired from working with Penncorp around August 1999.
- [13] For ease of reference, Mr. Matthews and Mr. Dunlop are collectively referred to as "the plaintiffs" throughout the entirety of these reasons.
- [14] The defendant, 3602214 Canada Inc., is the parent company of Penncorp, owning 100% of its shares. Along with Penncorp, 3602214 Canada Inc. operates "in the individual life insurance industry in Canada" and the two companies "provide their client base with individual life and accident-health insurance products". The majority of the business of Penncorp has centred on the sale of personal disability insurance products, primarily accident insurance and accident and sickness and disability insurance (A&S), but life insurance policies and

annuities are also a components of the business ("Penncorp Products").

- [15] In November 2006, La Capitale (defined below) acquired 3602214 Canada Inc. The defendant, La Capitale Civil Service Insurer Inc. ("CCSI"), is the parent company of 3602214 Canada Inc., owning 70% of its issued and outstanding shares. CCSI offers its own collection of insurance products ("CAAP Products"), including term life, permanent life, critical illness, deferred life annuity, and decreasing term life insurance, as well as various joint life insurance products. Some time around November 2006 or 2007, CAAP Products were made available to Penncorp agents to sell.
- [16] CCSI is a fully owned subsidiary of the defendant, La Capitale Financial Group Inc. ("CFG"). The defendant, La Capitale Civil Service Mutual ("La Capitale" or "CCSM"), owns the controlling interest of CFG.
- [17] La Capitale's operations are carried out through its subsidiaries, including all of the co-defendants (collectively referred to, inclusive of La Capitale, as "La Capitale Group"[1]). La Capitale's consolidated financial statements include its accounts and those of its subsidiaries.
- [18] In 2014, Penncorp changed its name to La Capitale Financial Security Insurance Company ("CFS"), which is one of the defendants in this proceeding. Effective December 31, 2016, Penncorp, under its post-2014 name of CFS, was continued as a Québec company. For ease of reference, I will continue to refer to CFS as Penncorp.
- [19] After the plaintiffs retired, they each received payments pursuant to their respective compensation agreements. However, the plaintiffs allege they, and several hundred others similarly situated individuals whom the plaintiffs seek to represent (collectively the "Proposed Class Members"), have not received the full compensation owed to them due to one or more of the following acts of the defendants (the "Defendants' Actions"):
- calculating P & L Compensation using a formula that includes expenses of CAAP Products but not CAAP revenues;
 - "churning" Penncorp Products into CAAP Products;
 - providing incentives to their employees to swap Penncorp Products for CAAP Products; and
 - failing to keep an accounting of business conducted through the operations of Penncorp's offices and of funds to be held in trust by the defendants for the Proposed Class Members in order to meet ongoing obligations of the Retirement Compensation Agreements.
- [20] In the insurance industry, "churning" is the practice of cancelling an existing customer policy and replacing it with a new and different policy, resulting in an additional commission for the policy that is swapped in.
- [21] I will now turn to the preliminary issue of whether the plaintiffs may further amend their claim.

III. THE PLAINTIFFS' APPLICATION TO FURTHER AMEND THEIR CLAIM

[22] As a preliminary matter, the plaintiffs apply under R. 6-1 of the Supreme Court Civil Rules [Rules] for leave to further amend their originating pleading (the "Amendment Application"). The plaintiffs filed their original notice of civil claim on September 20, 2018. As of right, they filed an amended notice of civil claim on May 22, 2019. In their Amendment Application, the plaintiffs attached a draft of their proposed further amended notice of civil claim. Based on that draft, the defendants did not oppose the Amendment Application. However, over the course of the hearing, the plaintiffs changed the amendments they sought (the "Alternative Proposed Second Amended Notice of Civil Claim"). At the conclusion of that hearing, I permitted the defendants to provide written submissions setting out their position with respect to the plaintiffs' Alternative Proposed Second Amended Notice of Civil Claim. With the exception of one paragraph (para. 82(b)), the defendants continue to be unopposed to the plaintiffs' Amendment Application. For ease of reference, I will refer to the plaintiffs' Alternative Proposed Second Amended Notice of Civil Claim as the "NOCC". As the crux of the defendants' objection to the Amendment Application overlaps with whether the claim discloses a cause of action for breach of contract, I will address the Amendment Application within that stage of the certification analysis.

IV. THE TEST FOR CERTIFICATION

[23] Section 4(1) of the CPA establishes the test for certification. On application, the court must certify a proceeding as a class proceeding if 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.

[24] In considering whether the pleadings disclose a cause of action, the pled facts are assumed to be true and disclose a cause of action unless it is "plain and obvious" no claim exists: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63; *Hollick v. Toronto*

(City), 2001 SCC 68 at para. 25. Pleadings are to be construed liberally with allowances made for deficiencies in drafting: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 16-17; *Andriuk v. Merrill Lynch Canada Inc.*, 2013 ABQB 422 at para. 68, *aff'd* 2014 ABCA 177. A pleading will disclose a cause of action where the facts pled could arguably or possibly entitle the plaintiff to a legal remedy: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 55; *Healey v. Lakeridge Health Corporation*, 2006 CanLII 36247 (ON SC) at para. 27.

- [25] If pleadings disclose a cause of action, the plaintiff must demonstrate, through the presentation of evidence, "some basis in fact" for the remaining s. 4(1) requirements: *Finkel* at para. 19; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 27; *Pro-Sys* at para. 99. The threshold is not an onerous one: *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 21, leave to appeal to SCC *ref'd* 2016 CarswellBC 1005 [Miller CA]. The proposed representative plaintiffs must come forward with evidence sufficient to support certification and give the opposing party an opportunity to respond with evidence of its own: *Hollick* at para. 22. Conversely, to defeat certification, a defendant must show there is "no basis in fact" or that the pleadings disclose no reasonable cause of action: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 4 and 20; *Hollick* at para. 25; *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 at para. 45, *aff'd* Miller CA, leave to appeal to SCC *ref'd* 2016 CarswellBC 1005 [Miller SC].
- [26] A certification application focuses on the form of the proceeding, not its underlying merit. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick* at para. 16; *Finkel* at para. 19.
- [27] Although the merits of the claim are not the focus of the inquiry at the certification stage, the court is nonetheless required to perform a gatekeeping function to ensure only claims in the common interest of class members are advanced: *Finkel* at para. 15. The court's gatekeeping role is not discharged if it does nothing more than undertake a cursory examination or symbolic scrutiny of the proposed class proceeding: *Finkel* at para. 15; *Pro-Sys* at para. 103. The objects of the CPA are not furthered where a proceeding fails when heard on its merits because the test for certification was not met: *Jastram Properties Ltd. v. Tan*, 2019 BCSC 475 at para. 22; *Finkel* at para. 15.
- [28] The court must not refuse to certify a class proceeding merely because of one or more of the following: the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues; the relief claimed relates to separate contracts involving different class members; different remedies are sought for different class members; the number of class members or the identity of each class member is not known; or the class includes a subclass whose members have claims that raise common issues not shared by all class members: CPA, s. 7.

- [29] Courts must not take an overly restrictive approach in interpreting the CPA, but rather should approach the legislation in a manner that gives full effect to the benefits of class proceedings, including judicial economy, improved access to justice, and behaviour modification: Hollick at para. 15.
- [30] The defendants argue the plaintiffs have cast the burden on them to establish there is "no basis in fact" for the certification requirements governed by that standard. However, I do not read the plaintiffs' submissions as advancing that argument. The plaintiffs accept their burden to adduce evidence showing there is "some basis in fact" to meet the certification requirements, other than the requirement that the pleadings disclose a cause of action. However, they also argue that where the defendants seek to put forward evidence to resist certification, the evidence must establish there is no basis in fact for at least one of the certification requirements. That second proposition is consistent with case authority from this Court and others: Miller SC at para. 45; Parker v. Pfizer Canada Inc., 2012 ONSC 1652 at para. 21.
- [31] While the defendants argue Tippet v. Canada, 2019 FC 869 at para. 50 confirms the court can engage in a limited weighing of the evidence on the certification application, a court must only assess the evidence to the extent necessary to determine whether the plaintiff has satisfied the "some basis in fact" threshold: Miller CA at para. 22.

V. DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

- [32] The plaintiffs argue they have sufficiently pled five[2] causes of action:

- breach of contract (NOCC at paras. 110-115)[3];
- breach of trust (NOCC at paras. 103-109);
- unjust enrichment (NOCC at paras. 121a-121d);
- fraudulent misrepresentation (NOCC at paras. 116-118); and
- negligence (NOCC at paras. 119-121).

- [33] With the exception of negligence, which the defendants concede is adequately pled, the defendants argue the NOCC fails to disclose the causes of action relied on by the plaintiffs and the appropriate response to the deficiencies is to strike those aspects of the claim: Tucci v. Peoples Trust Company, 2017 BCSC 1525 at para. 257.
- [34] In addition to the specific deficiencies particular to each cause of action, with respect to all of the causes of action the defendants argue the NOCC fails to adequately particularize the alleged wrongs of each defendant and has instead impermissibly grouped them together.

A. Breach of Contract

1. Elements of the Cause of Action

[35] To prove a claim in contract, a plaintiff must show the existence of a contract and its wrongful breach: *Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd.*, 2010 BCSC 46 at para. 16. In *Nanra v. NRI Legal Services*, 2017 ONSC 4503 at para. 19, Justice Barnes referred to Perell, Morden, *The Law of Civil Procedure in Ontario*, 2nd ed. at 531, to describe the essential elements for a pleading of breach of contract:

A proper pleading of breach of contract requires sufficient particulars to identify:

- (i) The nature of the contract,
- (ii) The parties to the contract, the facts supporting privity of the contracts between the plaintiff and the defendant,
- (iii) The relevant terms of the contract,
- (iv) Which term was breached,
- (v) The conduct given [sic] rise to the breach, and
- (vi) The damages the [sic] flow from that breach.

2. Positions of the Parties

[36] The plaintiffs acknowledge the heart of this action lies in their claim for breach of contract. They submit they have pled all the necessary elements for such a claim. They argue this case is analogous to the cases of *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285 (S.C.J.), and *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.), both of which involved class proceedings related to post-retirement benefits.

[37] The defendants argue the NOCC is deficient because the terms of the contract have not been pled and this deficiency is amplified where the contractual terms being relied on are implied terms: *Nadonly v. Peel (Region)*, 2009 CarswellOnt 5901 (S.C.J.) at paras. 69-72; *Macleod v. Viacom Entertainment Canada Inc.*, 2003 CarswellOnt 305 (S.C.J.) at para. 24; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at paras. 274, 279-291, aff'd 2012 ONCA 867, leave to appeal to SCC ref'd 2013 CarswellOnt 6050. It is this same concern that underpins the defendants' objection to the Amendment Application.

3. Analysis and Conclusion

[38] In *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para. 37, Justice G.P. Weatherill summarized the legal principles that apply to applications to amend pleadings under R. 6-1 of the Rules:

- (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17.

- (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.
 - (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.* 2008 BCSC 719.
 - (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
 - (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.*, 2006 BCSC 1567.
- [39] In summary, an application to amend pleadings should be allowed unless the amendment fails to disclose a cause of action or a party resisting the amendment proves actual prejudice.
- a) Have the defendants established prejudice?

[40] Paragraph 82(b) of the NOCC states:

It was an implied term of the Class Retirement Compensation Agreements that the defendants would not engage in conduct designed to, or which had the effect of, prematurely extinguishing the entitlement of Class Members to renewal commissions through, inter alia, the churning of policies from PennCorp Products into La Capitale Products.

[41] The defendants object to the phrase "inter alia" in para. 82(b) of the NOCC because they argue it leaves the door open to for the plaintiffs to argue the defendants owed further unspecified obligations. However, the same argument could be raised every time a pleading describes wrongful conduct using language that is inclusive and not exhaustive. The defendants have not established prejudice would flow from granting the Amendment Application to include the phrase "inter alia" in para. 82(b).

- b) Does the pleading disclose a claim for breach of contract?

[42] The NOCC describes agreements in the nature of contracts for services. The parties to these service contracts were the Proposed Class Members and PennCorp. The NOCC alleges the acquisition of PennCorp's Canadian operations by the defendants required the defendants to assume at a minimum all of PennCorp's Canadian operation's debts, obligations, and liabilities, which included the contractual obligations owed by PennCorp to the Proposed Class Members. The NOCC also alleges each of the defendants were aware of the existence of the compensation agreements and either (a) participated in the Defendants' Actions or (b) were wilfully blind or reckless to the fact that other defendants were engaging in the Defendants' Actions and either authorized those defendants to participate in the Defendants' Actions or were wilfully blind to their doing so.

- [43] Terms of the contract are set out in the NOCC including, as a result of the reply submissions of the plaintiff, the implied terms upon which the plaintiffs rely. The NOCC sets out that it is the compensation provisions of the agreements that were breached by conduct defined as the Defendants' Actions. The NOCC also pleads that the plaintiff suffered damages as a result of the Defendants' Actions.
- [44] Nonetheless, the defendants argue the manner in which the implied contractual term is described in para. 82(b) is objectionable. They submit that in order to determine whether a term should be implied into a contract, the court must know how a plaintiff is defining that term: *Fairview Doughnut* at paras. 447-467. I agree. However, the comments in *Fairview Doughnut* were made in the context a summary judgement application, where once the court had determined the matter was suitable for summary judgement it was obliged to make the final determination on the substantive issue. On a certification application, it is not the role of the court to determine whether or not the contractual term should be implied.
- [45] Similarly, the defendants argue that for the court to determine whether there is some basis in fact that the proposed common issues concerning breach of contract are indeed common, the alleged implied term must be defined with precision: *Macleod* at para. 14. However, as observed by Justice Cullity at para. 5 of *Macleod*, the material facts which must be pled to establish a cause of action should not be confused with the evidence upon which findings of those facts may later be established. The circumstances that give rise to an implied term are matters of evidence. Certification is a preliminary procedural step in the litigation that occurs before the discovery process. Further, the common issues proposed by the plaintiffs do not depend on or require a commonality of every term of every contract across every proposed class member.
- [46] The defendants also submit the plaintiffs' proposed use of the terms "designed to" or having a particular "effect", rather than describing the actual conduct, results in a vague and uncertain pleading. They argue they are entitled to know the nature or full extent of the implied obligation being alleged: *Penney v. Bell Canada*, 2010 ONSC 2801 at para. 101.
- [47] As can be observed at paras. 62 and 97 of *Penney*, the circumstances in that case are distinguishable from those in the present application. In *Penney, and Beaucage v. Grand & Toy Ltd.*, 2001 CanLII 28391 (ON SC), which the court in *Penney* referred to and relied on, no implied terms were pled. That is not the case here. Further, *Beaucage* involved a motion to strike the pleading for disclosing no cause of action. Although the court found the pleading disclosed no cause of action for breach of contract because it failed to articulate the specific express, implied, written, or oral terms of the contract to a standard that would enable the defendants to know the case they were to meet, Justice C. Campbell granted leave to the plaintiffs to amend the pleading to particularize the alleged breaches. The defendants' objection amounts to a concern about the potential prejudice that might arise if the details surrounding the implied term are not particularized. Any such risk of prejudice can be ameliorated by a request for, and a response providing, particulars as part of the ongoing

litigation process.

- [48] I find the defendants have not established prejudice would flow from granting the Amendment Application, including para. 82(b) as proposed.
- [49] I find the NOCC discloses a claim for breach of contract. The plaintiffs' Amendment Application is granted.

B. Breach of Trust

1. Elements of the Cause of Action

- [50] A trust arrangement requires certainty of intention, certainty of subject-matter, and certainty of object: *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at para. 35. A trustee must hold the trust property in such a way that the object of the trust obtains the benefit of the trust property. In doing so, equity imposes certain obligations on the trustee, including the duty to account and the duty to act honestly and with a level of skill and prudence which would be expected of the reasonable person of business administering his or her own affairs: *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8 at paras. 17 and 18. A claim for breach of trust must particularize the alleged breach: Rules, R. 3-7(18).

2. Positions of the Parties

- [51] The NOCC pleads that the Proposed Class Members intended that the defendants would hold the trust property on certain terms and, alternatively, there was an express or implied declaration of trust by the defendants that the trust property would be held in trust for the benefit of the Proposed Class Members as the object of the trust relationship. The plaintiffs argue the defendants with whom each of the Proposed Class Members had a direct contractual relationship had fiduciary obligations under the trust. Further, relying on *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 at 809-818, the plaintiffs argue the NOCC sufficiently alleges the other defendants are constructive trustees because they either (a) knowingly received the trust property and assisted other defendants to receive the trust property and engage in the Defendants' Actions, or (b) took it upon themselves to act as trustees by administering funds that were impressed with the trust and either did not hold the trust property in trust or knowingly participated in the Defendants' Actions, thereby rendering them liable for the breach of trust.
- [52] The defendants argue the plaintiffs did not plead the material facts necessary to support a trust relationship between the Proposed Class Members and the defendants. They also argue the plaintiffs failed to plead facts underlying what they describe as conclusions of law set out in paras. 103(d) and (e) of the NOCC.

3. Analysis and Conclusion

- [53] The NOCC pleads the trust property is funds collected, maintained, and held to meet the obligations benefiting the Proposed Class Members under the compensation agreements between PennCorp and the Proposed Class Members. I find the pleadings sufficiently describe the object of the trust and the trust property to fulfil these certainty requirements for the purposes of this stage of the litigation process.
- [54] The NOCC alleges the defendants, as trustees, failed to properly account for the trust property, take adequate steps to ensure its protection and preservation, or act honestly and in good faith. I find the pleadings sufficiently particularize the alleged breach of trust for the purposes of this stage of the litigation process.
- [55] With respect to certainty of intention to create a trust, the defendants acknowledge the NOCC pleads such an intention but argue it is framed as a conclusion of law and with an inadequate factual foundation for a pleading. However, while the interpretation of a trust raises questions of fact and law, intention to create a trust is a question of fact: *Norman Estate* at para. 17.
- [56] Further, although the defendants argue there is nothing in the NOCC that takes the circumstances beyond the realm of the contractual relationship, that does not defeat the pleading of breach of trust; concurrent liability can be pled: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 30; *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228 at paras. 38-41.
- [57] Finally, although the defendants submit the pled facts demonstrate the contracting parties contemplated the co-mingling of funds by the defendants, and that an intention to create a trust cannot be established where funds are co-mingled, no authority for that proposition was provided and eventually the defendants resiled from that position. Similarly, while the defendants argued an intention to create a trust must be expressly articulated where the parties are contractually bound, no authority for that proposition was cited to me and that is not my understanding of the law.
- [58] The NOCC is distinguishable from the pleading considered by Fisher J., as she then was, in *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, *aff'd* 2015 BCCA 252, leave to appeal to SCC *ref'd* 2016 CarswellBC 707 [Marshall SC]. In *Marshall SC*, the only basis for including two of the defendants was an allegation of an ownership interest in a third defendant: para. 66. In this case, based on *M & L Travel Ltd.*, it is at least arguable the defendants who did not contract with the Proposed Class Members nonetheless owe duties to the Proposed Class Members based on a constructive trust that arose because, as set out in the NOCC, they either (a) knowingly received the trust property and assisted other defendants to receive the trust property and engage in the Defendants' Actions, or (b) took it upon themselves to act as trustees by administering funds that were impressed with the trust and either did not hold the trust property in trust or knowingly participated in the Defendants' Actions, thereby rendering them liable for the breach of trust.

[59] I find the NOCC sufficiently sets out in intention to create a trust relationship between the defendants and the Proposed Class Members for the purposes of this stage of the litigation process. However, while the NOCC makes reference to an express or implied declaration of trust, the plaintiffs acknowledge in their written submissions (at para. 69) "the agreements do not speak explicitly in terms of a trust relationship". Based on the NOCC as presented, only an implied trust relationship has been pled as a foundation for a breach of trust cause of action.[4]

[60] Accordingly, I find the NOCC discloses the cause of action of breach of trust.

C. Unjust Enrichment

1. Elements of the Cause of Action

[61] To establish unjust enrichment, the plaintiffs must establish three elements:

- a) enrichment to the defendants;
- b) a corresponding deprivation of the plaintiffs; and
- c) the absence of any juristic reason for the enrichment.

See: *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 at para. 100, *aff'd* 2015 BCCA 260, leave to appeal to SCC *ref'd* 2016 CarswellBC 332 [*Ileman SC*].

2. Positions of the Parties

[62] The plaintiffs acknowledge that where their claim is asserted in relation to the agreements, they must first invalidate the contracts at least to the extent they provide for the defendants' enrichment: *Ileman SC* at para. 111. However, the plaintiffs point out that the doctrine of unjust enrichment involves a large measure of remedial flexibility and is an equitable remedy which involves discretion and questions of fairness: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para. 13. The plaintiffs argue that the existence of a contract cannot, by itself, establish a juristic reason for an enrichment: *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at para. 27; *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260, leave to appeal to SCC *ref'd* 2016 CarswellBC 332 [*Ileman CA*].

[63] The defendants do not argue that unjust enrichment has not been adequately pled, but rather argue the claim is bound to fail because the contracts, which the plaintiffs submit are valid and which they seek to enforce, provide a juristic reason for any enrichment of the defendants, which was not the case in *Pro-Sys* at para. 88 or *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 at para. 74, two authorities relied on by the plaintiffs.

3. Analysis and Conclusion

[64] I agree that if the contracts are interpreted as providing the defendants with an entitlement to the money they have received, it would mean there is a juristic reason for any enrichment they have obtained and the plaintiffs' claim for unjust enrichment would fail. However, at

this stage of the proceeding, it is impossible to determine whether the contracts provide the defendants with that entitlement. It could be that there are valid agreements between the parties but that some terms involving the mechanisms for determining the compensation payable to the plaintiffs are uncertain. In such circumstances, while the agreements would be valid, there could arguably still be a basis for the plaintiffs to claim they have been deprived and that the defendants have been correspondingly enriched without any juristic reason for the enrichment.

- [65] In short, in this case, it is not possible at this stage of the proceedings to make the determination which the court was apparently able to make in *Ileman SC* at para. 111 that the impugned enrichment of the defendants was stipulated in the contracts.
- [66] As noted by Justice Jackson writing for the Saskatchewan Court of Appeal in *Microcell*, the existence of a contract does not necessarily constitute a juristic reason for an enrichment:
- [26] That the existence of a contract between the parties authorizing the impugned enrichment can provide a satisfactory juristic reason justifying the enrichment, and thus negate a cause of action based on unjust enrichment, is clear. This is inherent in the very notion of an enforceable bargain and is, in any case, confirmed in a number of cases in addition to *Garland*. See, for example, *Peter Kiewit Sons' Co. of Canada v. Eakins Construction Limited*, 1960 CanLII 37 (SCC), [1960] S.C.R. 361; *Rathwell v. Rathwell*, 1978 CanLII 3 (SCC), [1978] 2 S.C.R. 436 at 455-56; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55, [2007] 3 S.C.R. 679 at paras. 30-34; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575. [Emphasis in original.]
- [27] However, for the contract to provide a juristic reason for the enrichment, the clause doing so must in fact justify the defendant's enrichment at the expense of the plaintiff, and the clause must be valid and enforceable. Thus, it is open to the Respondents to argue either that the clauses authorizing the collection of the "system access fees", properly interpreted, do not justify the Appellants' retention of these sums for their own use, or enrichment, or, alternatively, if they do, that they are not valid or enforceable.
- [67] I find the NOCC discloses a cause of action for unjust enrichment.

D. Fraudulent Misrepresentation

1. Elements of the Cause of Action

- [68] To establish a claim of fraudulent misrepresentation, the plaintiffs must establish four[5] elements:
- a) a false representation by the defendants;
 - b) some level of knowledge of the falsehood of the representation on the part of the defendants (whether through knowledge or recklessness);
 - c) the false representation caused the plaintiffs to act; and

- d) the plaintiffs' actions resulted in a loss.

See *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21; *Fehr v. Sun Life Assurance Co. of Canada*, 2015 ONSC 6931 at para. 274, rev'd in part 2018 ONCA 718, leave to appeal to SCC ref'd 2019 CarswellOnt 6811 [Fehr SC].

2. Positions of the Parties

- [69] The plaintiffs submit that each of the elements for a fraudulent misrepresentation have been addressed in the NOCC and that the Defendants' Actions, taken together, amount to fraud.
- [70] The defendants submit the NOCC with respect to fraudulent misrepresentation is deficient in two respects: first, the NOCC does not articulate a specific false representation by the defendants (*Fehr v. Sun Life Assurance Co. of Canada*, 2018 ONCA 718 at paras. 47-48, leave to appeal to SCC ref'd 2019 CarswellOnt 6811 [Fehr CA]; Rules, R. 3-7(18)), and second, the NOCC does not allege the plaintiffs' reliance on any false representation caused the plaintiffs to act. The defendants submit that either of these deficiencies is fatal to the cause of action of fraudulent misrepresentation.
- [71] The defendants argue that even if the compensation reports were properly pled as an alleged false representation, the NOCC does not allege the plaintiffs relied on those representations. In addition, the defendants argue para. 118(a) of the NOCC amounts to an allegation of acquiescence by the plaintiffs, and that acquiescence cannot constitute an act of reliance, although they cited no authority for that proposition. The defendants concede that reliance is sufficiently pled with respect to putative class members being induced to sign agreements releasing the defendants from liability, but submit that allegation could only apply to four class members, which again raises issues with respect to commonality.
- [72] Finally, the defendants argue that even if the compensation reports were properly pled there would nonetheless be a deficiency associated with relying on those reports because they would vary from person to person.

3. Analysis and Conclusion

- [73] Although the defendants argue the plaintiffs' submissions at the hearing evidence a theory of liability based on the defendants making false statements through the publication and distribution of both corporate annual reports and compensation reports but that no such allegations appear in the NOCC, my analysis must be based on the NOCC as presented. The NOCC alleges the defendants made two types of false statements to the plaintiffs--that they were not engaging in the Defendants' Actions, and that compensation payments were being made pursuant to the relevant compensation agreements.
- [74] According to the NOCC, after Mr. Dunlop retired, Penncorp asserted to him (which I interpret as meaning represented to him) that it was making payments to him in accordance with his compensation agreement (para. 54), but beginning in November 2006 it was not

(paras. 48 and 81). The NOCC is silent with respect to any further particulars of the representations. The NOCC alleges that representation was false. There is no allegation in the NOCC that such a representation was made to Mr. Matthews, much less that the representation was false.

[75] Rule 3-7(18) of the Rules states:

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[76] However, the Rules also state particulars only need to be pleaded to the extent they are known at the date of pleading, in which case further particulars may be required later: R. 3-7(20).

[77] I turn to the defendants' second argument. The defendants argue there is no express plea of reliance in the NOCC. However, in my view, the phrase "as a result of relying on the defendants false statements" sufficiently communicates a pleading of reliance by the plaintiffs on the alleged false representations of the defendants. I, therefore, reject that argument as a basis for finding the plaintiffs have not properly pled fraudulent misrepresentation.

[78] I find the NOCC adequately pleads fraudulent misrepresentation at this stage of the proceedings. Further particulars may be required as the facts become known to a greater degree later in the process.

E. Negligence

1. Elements of the Cause of Action

[79] To establish negligence, the plaintiffs must establish three things:

- a) a duty of care is owed to the plaintiffs;
- b) there has been a breach of that duty; and
- c) damage has resulted from that breach.

See: Lewis N. Klar, *Remedies in Tort* (Toronto: Carswell, 2019) at 333.

2. Positions of the Parties

[80] As noted earlier in these reasons, the defendants do not dispute the plaintiffs have adequately pled negligence.

3. Analysis and Conclusion

[81] The NOCC pleads facts that describe relationships that could support the existence of a duty of care owed by the defendants to the Proposed Class Members, as well as a breach of that duty through participation in the Defendants' Actions, and consequent damage. I find the NOCC discloses negligence.

VI. IS THERE IS AN IDENTIFIABLE CLASS OF 2 OR MORE PERSONS?

A. Applicable Legal Principles

[82] For a proceeding to be certified as a class proceeding, there must be some evidence of an identifiable class of two or more persons: CPA, s. 4(1)(b). Chief Justice Bauman summarized the principles governing the identifiable class requirement in Jiang at para. 82:

- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
- the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
- the class definition must bear a rational relationship to the common issues -- it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
- the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[83] The plaintiffs must establish there is some basis in fact to believe there are two or more potential claimants within the class as defined, but it is not necessary to show more than one person within the class is motivated to bring the class proceeding: Harrison v. Afexa Life Sciences Inc., 2018 BCCA 165 at para. 32, leave to appeal to SCC ref'd 2019 CarswellBC 250; Keatley Surveying Ltd. v. Teranet Inc., 2015 ONCA 248 at para. 72. However, a lack of interest by class members in pursuing an action may be an important factor for the court when considering whether class proceedings is the preferable procedure under s. 4(1)(d) of the CPA: Harrison at para. 32. The inclusion of individuals who may ultimately not have an individual claim against the defendants is not a bar to certification: Boulanger v. Johnson & Johnson Corporation, 2007 CanLII 735 (ON SC) at para. 22; Heward v. Eli Lilly & Company, 2007 CanLII 2651 (ON SC) at paras. 67-69.

B. Positions of the Parties

[84] Initially, the plaintiffs proposed the following class definition:

[A]ll persons or entities, wherever resident, who are, or were, a party to any agreement with the Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, or their subsidiaries or acquirers which granted or entitled them to ongoing compensation from either the sale of Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, or their subsidiaries or acquirers' products or from the business operations and activities of the Defendants' offices.

- [85] The plaintiffs submit the proposed class definition meets all requirements and that the evidence put forward establishes there is some basis in fact to find the proposed criteria are sufficiently objective. The plaintiffs argue the evidence of the defendants demonstrates the class is identifiable and points out that one category of potential plaintiffs (the Founding Fathers) is a small group of 11 members who are even identified by name in the evidence filed by the defendants.
- [86] The defendants argue the class definition proposed by the plaintiffs is overbroad and, as a result, the plaintiffs have failed to establish a rational relationship between the class definition and the common issues: Harrison at paras. 33-44. The defendants advance several reasons for their position. First, the class definition is not time-limited (although the defendants' conduct complained of begins in November 2006) which precludes an effective opt-out right: Trottier c. Canadian Malartic Mine, 2018 QCCS 4777 at para. 27.[6] Related to this point, the defendants argue the plaintiffs have not established there is some evidence there are any class members presently working for any of the defendants. The defendants say any certified class should be defined as being limited to November 2006 and thereafter.
- [87] During reply, the plaintiffs proposed an amended class definition and now seek an order defining the class as those individuals or entities who were party to agreements with any of the defendants for the period between November 30, 2006 and ending at the date of certification. That change in the proposed class definition ameliorates the defendants' concern that the proposed class definition was overly broad because it covered an indefinite period of time.
- [88] Second, the defendants say the proposed class definition is overbroad because it does not distinguish between the various roles held by putative class members which, they argue, in turn determines the scope of the legal obligations the defendants would owe and the contractual terms of their compensation. The defendants argue the court should decline certification rather than redrafting a new class definition for the plaintiffs: Kenney v. Canada (Attorney General), 2016 FC 367 at para. 31.

C. Analysis and Conclusion

- [89] I find there is some basis in fact that are two or more persons who fall within the following class definition proposed by the plaintiffs:

All individuals or entities, wherever resident, who were, between November 30, 2006 and the date of certification of this action as a class proceeding, party to any agreement with the Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, or their subsidiaries or acquirers which grants or entitles them to ongoing compensation from the Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, their subsidiaries, their acquirers or from the business operations and activities of the Defendants.

[90] The class as defined uses objective criteria that do not depend on the merits of the claim and is rationally connected to the common issues, as I set them out later in these reasons. I disagree with the defendants' position that the class is overbroad.

VII. DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES?

A. Applicable Legal Principles

[91] In order for a proceeding to be certified as a class proceeding, there to be some evidence that claims of class members raise common issues: CPA, s. 4(1)(c). The plaintiff need only establish a minimum factual basis for the existence of common issues, namely that there is "some basis in fact": Pardy et al. v. Bayer Inc., 2004 NLSCTD 72 at para. 114.

[92] The term "common issues" is defined in s. 1 of the CPA:

"common issues" means

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[93] The requirement that there be some basis in fact that there are common issues only requires a plaintiff to establish there is a triable factual or legal issue that, once determined, will advance or terminate the litigation; is not necessary for the common issues to be determinative of liability: Service v. University of Victoria, 2019 BCCA 474 at para. 59 [Service CA]; Finkel at para. 22. In Pro-Sys at para. 108, Justice Rothstein, writing for the Court, summarized the principles applicable to the common issues analysis:

[108] In Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] 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 not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. 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.
- [94] The latter principle was the subject of further comment in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45-46, where the Court noted that for a question to be common, success for one member of the class does not necessarily have to lead to success for all members, but it must serve to advance the resolution of every class member's claim. However, success for one member must not result in failure for another member.
- [95] The plaintiff bears the onus of providing an evidentiary basis to establish "some basis in fact" that common issues exist: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 79. A question can constitute a common issue even where the answer to the question could be nuanced to reflect individual claims: *Rumley v. British Columbia*, 2001 SCC 69 at para. 32.
- [96] At the outset I will address the concern raised by the defendants that the common issues posed by the plaintiffs, which cover a range of causes of action, stem from a shotgun pleading which should not be condoned by the court.
- [97] By the plaintiffs' own admission at the outset of the hearing, this case is about the plaintiffs' allegations that the defendants are not honouring the compensation agreements between the parties. However, concurrent liability in contract and tort exists: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. Justice Le Dain, writing for a unanimous Court in *Central Trust*, noted at 159-160:

The question whether there can be concurrent liability [sic] in contract and in tort for negligence in the performance of professional services has been the subject of conflicting judicial opinion and a great deal of academic commentary which has been overwhelmingly in favour of the recognition of concurrent liability in such a case. Important legal consequences have turned on the differences in the rules applicable to contractual and tortious liability. The three most important areas in which these differences have been reflected in the decisions on the question of concurrent liability are limitation of actions, measure of damages and apportionment [sic] of liability. It has been the important difference of result, particularly in the three areas referred to, that has given the question of concurrent liability its policy focus and interest in the abundant judicial and academic opinion on the subject.

[Emphasis added.]

[98] To Justice Le Dain's list of practical differences, I would add the nature of the remedy available for various causes of action.

[99] The plaintiffs are entitled to pursue multiple causes of action if they choose to do so.

B. Positions of the Parties

[100] In general, the plaintiffs argue that there is some basis in fact to find the issues they propose are common issues of fact or law arising from the common facts, even though the answer to the questions may differ among the class members depending on their individual circumstances. They argue that the common issues trial judge will not need to consider the circumstances of each class member individually in order to be able to determine the questions they propose as common issues. They further submit that while the three groupings of class members could result in separate classes at some point in litigation, the allegations with respect to the Defendants' Actions are consistent across those subgroups making them ideally suited to be determined as common issues.

[101] In general, the defendants argue that this case is made up individual claims for unpaid amounts under different contracts entered into in varying circumstances over an extended period of time by individuals working at different branch offices that adopted different philosophies for their business operations including the incurring of expenses. The defendants argue that the litigation of this case will ultimately break down into individual proceedings, making it the antithesis of a case with common issues: *Fulawka* at para. 81, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42. The defendants argue that the replacement of Penncorp policies with La Capitale policies, one of the alleged Defendants' Actions, requires individual assessment. They submit that this case is distinguishable from *Fulawka* and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, where certification was ordered, because there is no common statutory provision that serves as the common point of connection and in both of those cases the defendants maintained a corporate policy on overtime.

[102] I will outline the parties' specific positions in my analysis of the proposed common issue questions below.

C. Analysis and Conclusion

1. Generalized Questions

[103] At Part 1, paragraphs 6(a), (b), and (c) of their notice of application filed May 22, 2019 (the "notice of application"), the plaintiffs proposed the following common issues related to preliminary fact-finding:

6. An order stating the common issues to be:

(a) Were the Defendants a party to Class Retirement Compensation Agreements or similar agreements therein with Class members?

(b) If the answer to (a) is yes, did the Defendants owe an ongoing duty to inform the Class of any acts or omissions which would affect the Class Retirement Compensation Agreements or similar agreements?

(c) Did the Defendants engage in any of the Defendants' Actions?

[104] The plaintiffs argue that significant judicial economy will flow from a determination of questions which address the Defendants' Actions from a systemic and operational perspective.

[105] The defendants do not contest the first two of these are common issues. With respect to the third question involving the Defendants' Actions, the defendants argue that it is not a common issue because it will require the individual assessment and determination focused on each class member. The defendants also rely on the evidence of Neil Brown, Assistant Vice President Of Finance of CFS, which in part sets out that CFS actions involving expense attribution vary by region.

[106] I disagree with the defendants that the third question is not a common question. Although the defendants endeavoured to distinguish *Fresco* and *Fulakwa* on the basis that they involved a common statutory requirement absent in this case, both of those cases involved allegations that the defendants breached their statutory and contractual duties to the class members. As is the case in this proceeding, in both *Fresco* and *Fulakwa*, the class included members holding held various positions and involved multiple contracts. Further, as is the case in this proceeding, at their heart the allegations in *Fresco* and *Fulawka* involved allegations of systemic deficiencies in the defendants' compensation systems. The proposed common questions ask whether the defendants undertook certain actions at all. If the answer to that question is yes, at the second stage there will be consideration of whether those actions were undertaken in relation to any particular member of the class.

[107] I find there is some evidence that all three of the generalized questions constitute common issues across the class.

2. Breach of Contract

[108] At Part 1, paragraph 6(d)(iii) of the notice of application, the plaintiffs proposed the following common issues related to the claim for breach of contract:

(iii) breach of contract:

(1) Did the Defendants, or any of them, have Class Retirement Compensation Agreements with members of the Class?

(2) If the answer to question (d)(iii)(1) is yes, did the Defendants' Actions constitute a breach of the Class Retirement Compensation Agreement(s)?

(3) If the answer to question (d)(iii)(2) is yes, are the Defendants liable to pay damages to the Class?

- [109] The plaintiffs submit "these questions are common to all class members although the answer to the question may differ depending on the nature of the relationship. In that regard, there are a small and finite set of categories into which class members fall, and the common issues trial judge will not need to consider the circumstances of each class member individually in order to make these findings" (the "Boilerplate Statement"). This Boilerplate Statement, which is repeated frequently in the plaintiffs' submissions, is completely devoid of any connection to the NOCC or factual matrix of this case and, therefore, provides no assistance to the court in undertaking its analysis.
- [110] The plaintiffs argue that while there have been differences between contracts with different class members at different times, the differences are not material to the issues that are key to the litigation, which relate to the implied terms. They submit that questions 6(a), (b) and (c) involve factual findings regarding a breach of classes of contracts that existed between various subgroups of the class.
- [111] The defendants repeat their objection to the plaintiffs' breach of contract claim, arguing the plaintiffs have failed to plead any material express or implied terms of the contract. The defendants argue this case is distinguishable from cases relied on by the plaintiffs which involved standard form contracts: *Fulawka* at paras. 89-90; *Fresco* at para. 103; *Lam v. University of British Columbia*, 2010 BCCA 325 at para. 55, leave to appeal to SCC ref'd 2011 CanLII 7738. The defendants argue that because the plaintiffs impugn agreements that potentially span 40 years with putative class members, this case is more aligned with cases where certification was denied:
- *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at paras. 7-8;
 - *Service v. University of Victoria*, 2018 BCSC 2027 at para. 157, rev'd 2019 BCCA 474;
 - *MacLean et al. v. Telus Corporation and Telus Communications Inc.*, 2006 BCSC 766 at paras. 26, 35, 42;
 - *Kaplan v. Casino Rama*, 2019 ONSC 2025 at para. 71;
 - *Koo and Gingras v. Canadian Airlines International Ltd.*, 2000 BCSC 281;
 - *Bennett v. Hydro One Inc.*, 2017 ONSC 7065 at paras. 86, 98, aff'd 2018 ONSC 7741;
 - *Loveless v. Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744 at paras. 68, 75.
- [112] The defendants also argue the plaintiffs have failed to address how the breach of contract issues will be different for the four class members who settled their claims for Founding Father Compensation: *McDougall v. Collinson et al.*, 2000 BCSC 398 at paras. 113-114.
- [113] The focus of the proposed common issues involving breach of contract is whether the defendants formed contracts of the nature described in the NOCC, whether they took actions defined in the NOCC as the Defendants' Actions and, if so, whether those Defendants' Actions breached the agreements as found. I disagree with the defendants that

these are not questions common across the class. While the need to determine whether the circumstances of each individual fall within the matrix determined by the common issues may arise at the subsequent stage, this does not remove the commonality of the questions proposed by the plaintiffs, or impede their determination. I do not view the proposed common questions as requiring individual assessment at the determination of the common issues stage.

[114] The plaintiffs at Part 1, paragraph 6(d)(ii) of their notice of application also proposed three common questions related to breach of the duty of good faith:

(ii) breach of the duty of good faith:

- (1) Did the Defendants (or any of them) owe to the members of the Class a duty of good faith, whether by virtue of a contract or otherwise?
- (2) If the answer to question (d)(ii)(1) is yes, did the Defendants' Actions constitute a breach of the duty of good faith?
- (3) If the answer to question (d)(ii)(2) is yes, are the Defendants liable to pay damages to the Class?

[115] As noted in my assessment of that cause of action earlier in these reasons, the analysis with respect to that allegation is better suited to the breach of contract analysis in the circumstances of this case. I fail to see how the three questions involving breach of duty of good faith proposed by the plaintiffs would advance the litigation dealt with separately and outside the breach of contract analysis. As those questions do not seem to provide any utility I find they are not questions to be dealt with at the common issues stage.

3. Breach of Trust

[116] At Part 1, paragraph 6(d)(i) of the notice of application, the plaintiffs proposed the following common issues related to the claim for breach of trust:

(i) breach of trust:

- (1) Were the Defendants (or any of them) in a trust relationship with members of the Class, with a corresponding obligation to act in accordance with their trust obligations toward the trustees (i.e. members of the Class)?
- (2) If the answer to question (d)(i)(1) is yes, did the Defendants (or any of them) fail to conduct themselves in accordance with their trust duties?
- (3) If the answer to question (d)(i)(2) is yes, have any losses been incurred by the members of the Class and if so, are the Defendants liable to pay damages to the Class for those damages?
- (4) If the answer to question (d)(i)(2) is yes, have the Defendants accrued any gains, whether realized or not, by virtue of the impugned conduct?

[117] The plaintiffs repeat the Boilerplate Statement.

[118] In response, the defendants reiterate their position that there is no factual foundation in the NOCC arising out of the contractual relationship between CFS and the Potential Class Members for an intention to create a trust, and that determining whether a trust relationship exists will require an assessment of each individual class members circumstances and their particular interactions with the defendants.

[119] As said above, I have already found that the pleading discloses a clause of action of breach of trust. The focus of the proposed common issues involving breach of trust is on the nature of the relationship between the defendants and members of the class, or potentially subclasses. I do not view the questions as requiring individual assessment at the determination of the common issues stage.

4. Unjust Enrichment

[120] At Part 1, paragraphs 6(g), (h), (i), and (j), the plaintiffs proposed the following common issues related to the claim for unjust enrichment:

- (g) Did the Defendants enrich themselves through the receipt of the Owed Payments?
- (h) Did the Defendants enrich themselves through their acts and omissions, including the Defendants' Actions?
- (i) If the answer to any of questions (g) or (h) is yes, did the Class, or any subclass thereof, suffer a corresponding deprivation?
- (j) If the answer to question (i) is yes, is there any juristic reason justifying retention by the Defendants of the Owed Payments?

[121] The plaintiffs repeat the Boilerplate Statement.

[122] The defendants repeat their position that the contracts between the class members and the defendants are a complete answer to any claim based on unjust enrichment. They further argue claims of unjust enrichment require the careful consideration of the circumstances of each class member and therefore are unsuitable for determination as common questions: *Webster v. Robbins Parking Service Ltd.*, 2016 BCSC 1863 at para. 188.

[123] In my view, while it is true that in order to find unjust enrichment the court will need to carefully consider the circumstances of each class member, that question arises in the final determination of liability: *Service CA*. The need to consider the individual circumstances of the class members does not, in and of itself, defeat the matter proceeding as a class action. The common issues proposed with respect to unjust enrichment are aimed at the actions of the defendants and the general consequences of them. I do not view the proposed common questions as requiring individual assessment at the determination of the common issues stage.

[124] I find there is some evidence that the proposed common questions once determined will advance or terminate the litigation.

5. Fraudulent Misrepresentation

[125] At Part 1, paragraph 6(d)(iv) of the notice of application, the plaintiffs proposed the following common issues related to the claim for fraudulent misrepresentation:

(iv) fraudulent misrepresentation:

- (1) By virtue of Defendants' Actions (a) - (k), did the Defendants or any of them misrepresent the inputs (including but not limited to La Capitale Profits, Penncorp Product Expenses, and Penncorp Product Revenues) from which the Class Penncorp Business Payments were derived?
- (2) If the answer to question (d)(iv)(1) is yes, did members of the Class, by virtue of their Class Retirement Compensation Agreements or otherwise, reasonably rely on that misrepresentation?
- (3) If the answer to question (d)(iv)(3) is yes, were these misrepresentations made knowingly, or without belief in their truth, or recklessly as to their truth?
- (4) If the answer to questions (d)(iv)(2) and (d)(iv)(3) are yes, was that reliance detrimental to the members of the Class? If so, are the Defendants liable to pay damages to the Class accordingly?

[126] The plaintiffs repeat the Boilerplate Statement.

[127] The plaintiffs acknowledge certification of actions alleging misrepresentation is uncommon because of a lack of commonality involving what representations were made; recourse to the individual claimant's circumstances is often required. Nonetheless, relying on *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232 at paras. 106-110, *aff'd* 2006 BCCA 96, the plaintiffs argue the court can presume that every individual class member received the same financial reporting which constitute the basis of the representations, namely, the distribution of monthly compensation reports and annual financial statements and reports. The plaintiffs rely on the pleading that the financial documents were circulated by the defendants with the full and complete expectation of the class would rely on them to determine their compensation entitlement.

[128] The defendants argue that this case is not one of the rare cases in which fraudulent misrepresentation can be certified: *Lee v. Transamerica Life Canada*, 2017 BCSC 843 at para. 27. They submit that the questions of whether misrepresentations were made, relied on, and resulted in loss require individualized assessments, which make them unsuitable as common questions:

· Fehr CA at paras. 57-60;

- Samos Investments Inc. v. Pattison, 2001 BCSC 1790 at paras. 128-131, 249, aff'd 2003 BCCA 87;
- Nelson v. Hoops L.P. et al., 2003 BCSC 277 at paras. 32-34, aff'd 2004 BCCA 174;
- Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.);
- Millgate Financial Corp. v. B.F. Realty Holdings Ltd. (1998), 28 C.P.C. (4th) 72 at para. 51 (Ont. Ct. J. (Gev. Div.)).

[129] The defendants again argue that the annual reports upon which the plaintiffs rely say nothing about the manner in which CFS agents, managers, and Founding Fathers are compensated. They deny that financial statements, earning reports, or other documentation were circulated to the class with the expectation that the class would rely on those documents to determine compensation entitlement under the Compensation Agreements.

[130] The defendants' latter point goes to the merits of the overall action, which is not the focus of a certification application. Again, I find there is some evidence that the determination of the proposed common questions, aimed as they are at the Defendants' Actions and the question of whether reliance on any representations they made was reasonable, will advance or terminate the litigation.

6. Negligence

[131] At Part 1, paragraph 6(d)(v) of the notice of application, the plaintiffs proposed the following common issues related to the claim for negligence:

(v) Negligence:

(1) By virtue of the relationship between the Defendants and the Class, did the Defendants or any of them owe a duty of care to the Class and if so, what was the nature of that duty? In particular, did the duty include:

(A) a duty to ensure that they and related parties (as pled at para. 119 of the Claim) did not engage in the Defendants' Actions; or

(B) a duty to investigate and report any action or omission that negatively impacted the contractual interests of the Class pursuant to the Class Retirement Compensation Agreements?

(2) If the answer to either questions (d)(v)(1)(A) or (d)(v)(1)(B) is yes, did the Defendants breach the applicable duty of care?

(3) If the answer to question (d)(v)(2) is yes, has the Class suffered any damages as a consequence?

(4) If the answer to question (d)(v)(3) is yes, are the Defendants liable to pay damages to the Class accordingly?

[132] The plaintiffs repeat the Boilerplate Statement.

[133] Once again, the defendants argue that under the rubric of a negligence cause of action, the proposed common issues involving the Defendants' Actions continue to be require individual consideration and determination.

[134] The focus of the proposed common issues involving negligence is the nature of the relationship between the defendants and the proposed class. I am satisfied that the nature of the relationship between the defendants and the Proposed Class Members are sufficiently common to satisfy me that whether a duty of care was owed by the defendants to members of the class is a common issue. The parties acknowledge the Proposed Class Members fall into, at most, three groupings. I am not satisfied that the distinction between those groupings will affect what appears to be a common duty of care analysis. Similarly, the issue of whether the Defendants' Actions breached any duty of care owed is common across the class. I find there is some evidence the determination of the proposed common questions will advance or terminate the litigation.

7. Joint and Several Liability

[135] At Part 1, paragraph 6(l) of the notice of application, the plaintiffs proposed the following question with respect to their joint and several liability claim against the defendants:

(l) Are the Defendants jointly and severally liable for damages?

[136] The plaintiffs argue the question of the defendants' joint and several liability is a pure question of law that is suitable for determination as a common issue.

[137] The defendants made no submissions with respect to whether the proposed question involving the defendants' joint and several liability was an issue common across the class.

[138] With respect to negligence, if two or more of the defendants are found at fault, their liability is joint and several by operation of law: Negligence Act, R.S.B.C. 1996, c. 333, s. 4. With respect to breach of contract, the question of the defendants' joint and several liability will be a function of the interpretation of the compensation agreements which I have found are suitable for determination as a common issue. Similarly, with respect to the causes of action of fraudulent misrepresentation, unjust enrichment, and breach of trust, as I have found those issues to be common issues, I am likewise of the view that the question of the defendants' joint and several liability for such causes of action if established are also common across the class.

[139] The issue of joint and several liability of the defendants turn on questions of fact which are common to the class, such that the individuals as well as the company are responsible for the consequences: *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 (H.L.) at 476.

8. Remedies

[140] At Part 1, paragraphs 6(e), (f), (k), (m), (n), and (o) of the notice of application, the plaintiffs proposed the following additional common issues related to remedies:

- (e) If the answer to questions (d)(i)(3), (d)(iii)(3), (d)(iv)(4), or (d)(v)(4) are yes, what is the measure of damages and is it appropriate to assess those damages in the aggregate?
- (f) if the answer to question (d)(i)(4) is yes, is it appropriate to impose a constructive trust, require an accounting of profits, and order disgorgement of those profits to the Class?
- (k) Should the Defendants be required to disgorge the Owed Payments?
- (m) If an aggregate award of damages is deemed appropriate or disgorgement of revenues is ordered, what methodology is to be utilized after the conclusion of the common issues trial to determine the amount of the aggregate award or disgorgement?
- (n) Are the Defendants liable to pay punitive damages having regard to the nature of its conduct as asserted in the Claim? If so, in what amount and to whom?
- (o) Should the Defendants be ordered to pay interest?

[141] The plaintiffs submit the question of whether aggregate damages should be ordered is one that can and should be determined as a common issue. They argue whether there is some basis in fact to find the information needed to make such an assessment is in the hands of the defendants. They say they have established there is some basis in fact that, following a common issues trial, a methodology can be developed to determine the quantum and division of that aggregate award: *Pro-Sys* at para. 134; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at paras. 110-111. The plaintiffs argue the remedies sought are common amongst the class with individual quantification being deferred and addressed separately if and when liability is imposed: *Robinson v. Medtronic Inc.*, 2009 CanLII 56746 (ON SC) at paras. 162, 192-195.

[142] With respect to the issue of punitive damages, the plaintiffs concede *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 123 suggests quantification of punitive damages should be undertaken after the other heads of damage have been assessed, but argue this does not preclude certification of punitive damages as a common issue.

[143] Instead, the plaintiffs argue it means the common issues trial judge could postpone the determination of the appropriate quantum of punitive damages until after the individual compensatory damages are determined, and following the individual issues trials, determine, and if appropriate assess, the issue and quantum of punitive damages: *Chalmers (Litigation guardian of) v. AMO Canada Company*, 2010 BCCA 560; *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583 at paras. 79-80; *Pederson v. Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at paras. 79-82, 90, 92. The plaintiffs argue this is entirely appropriate because punitive damages are claimed based on allegations of systemic wrongdoing by the defendants against the class: *NOCC* at paras. 94-97; *Rumley* at para. 34; *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at paras. 43, 90, 92.

[144] With respect to a common issue involving aggregate damages, the defendants point out that the CPA only permits the court to make an order for an aggregate monetary award in certain situations:

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

- (a) monetary relief is claimed on behalf of some or all class members,
 - (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
 - (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
- (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
- (a) submissions that contest the merits or amount of an award under that subsection, and
 - (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[145] The defendants submit in this case there will be questions of fact or law that remain after the common issues trial before liability is established and, therefore, it will to be possible to consider whether aggregate damages can be ordered: Pro-Sys at paras. 131-132. The defendants also argue that the Supreme Court of Canada's decision in Pioneer Corp. at para. 113 makes it clear that even if aggregate damages are certified as a common issue, the trial judge nonetheless must consider whether it is appropriate to apply the aggregate damages provisions of the CPA after the common issues trial has been completed and that, in these circumstances, there is no utility to be gained from considering aggregate damages at the common issues trial stage.

[146] The defendants argue the proposed question involving constructive trust is not a common issue, however, they advance that argument based on their position that there is no basis for the imposition of a constructive trust in this case: Pro-Sys at paras. 91-92, referring to Kerr v. Baranow, 2011 SCC 10. The defendants acknowledge this argument is focused on the merits of the overall action.

[147] The defendants also argue the issue of punitive damages is not common to the class. They argue the plaintiffs have acknowledged this in their written submissions (referring to para. 164 of the plaintiff's argument). Again, the defendants argue the question of punitive damages is inherently individualistic. The defendants argue that the cases relied on by the plaintiffs are distinguishable on their facts. In Sherry Good, the conduct alleged to give rise to punitive damages stemmed from a single event affecting all of the class members: paras.

80-83. In Pederson, the conduct alleged to give rise to punitive damages was a systemic failure by government affecting the entire class: paras. 6 and 85-87. The defendants argue that the allegations in this case are the antithesis of the types of collective systemic wrongs alleged in Sherry Good and Pederson.

[148] Finally, the defendants argue that there is no need to deal with interest as a common issue because it is already within the court's jurisdiction: Court Order Interest Act, R.S.B.C. 1996, c. 79, s. 1(1).

[149] The questions proposed by the plaintiffs for common determination do not seek a calculation to be performed but rather focus on general entitlement. In particular, the questions posed by the plaintiffs focus on whether the nature of the relationship between the Proposed Class Members and the defendants was such that a duty of care was owed; what the content of that duty would be, again, given the nature of the relationship and context; whether the Defendants' Actions breached that duty; and whether, as a result of that breach, the Proposed Class Members suffered a loss. The plaintiffs are not proposing to calculate the loss suffered. As I understand it, they are asking the court to determine, as a common issue, whether there are any policy reasons that would negate the defendants' responsibility to pay damages for any loss caused by their actions which were in breach of the duty of care owed. The need to determine each member's particular damages subsequent to the determination of the common issues does not negate the commonality of the questions posed by the plaintiffs.

VIII. WOULD A CLASS PROCEEDING BE THE PREFERABLE PROCEDURE FOR THE FAIR AND EFFICIENT RESOLUTION OF THE COMMON ISSUES?

A. Applicable Legal Principles

[150] In order for a proceeding to be certified as a class proceeding, there must be some evidence that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues: CPA, s. 4(1)(d). As noted by Chief Justice McLachlin for the Court in Hollick:

[28] The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": Report of the Attorney General's Advisory Committee on Class Action Reform, [Toronto: The Committee, 1990], at p. 32.

[151] In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, s. 4(2) of the CPA requires the court to consider all relevant matters including:

- (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.

[152] The possibility of the need for individualized inquiries is also a relevant factor when considering whether other means of resolving the claims are less practical or less efficient: Jiang at para. 105.

[153] None of the statutory factors are prerequisites to certification or determinative of whether a class proceeding is the preferable procedure: Kirk v. Executive Flight Centre Fuel Services, 2017 BCSC 726 at para. 138, rev'd on other grounds 2019 BCCA 111, leave to appeal to SCC ref'd 2019 CarswellBC 3036.

[154] The preferability inquiry should be conducted through the lens of the three principal advantages of class actions--judicial economy, access to justice, and behaviour modification: Hollick at para. 27; Service CA at para. 64. In the context of this analysis, access to justice is concerned with claimants being afforded both a fair process for resolving their claims and a just and effective remedy for their claims if established: AIC Limited v. Fischer, 2013 SCC 69 at para. 24.

B. Positions of the Parties

[155] The plaintiffs argue determination of the common issues will resolve the core factual and legal questions surrounding the defendants' liability. They argue the bifurcation of class proceedings--with individual issues following the determination of the common issues--is the norm in class actions and should not be over emphasized: Metera v. Financial Planning Group, 2003 ABQB 326 at para. 69. The plaintiffs submit the number of potential class members--which they estimate to be in the hundreds--is not unworkable or unwieldy. The plaintiffs also argue that, for many of the potential class members (other than the Founding Fathers), including Mr. Matthews himself, the claim amounts are too small to warrant individual consideration. In the plaintiffs' view, a collective proceeding, which will be case managed by a single judge, enables the class to attract counsel that might otherwise be difficult for individual litigants and protects the class from any adverse cost award in relation to the common issues stage of the proceeding. These are all benefits that would accrue through certification of the action as a class proceeding.

- [156] The plaintiffs also submit that a class action would serve the objective of behaviour modification because the defendants argue they are entitled to act as they have and are continuing to undertake the same actions. If in fact the defendants' actions are improper, a class proceeding would be more effective in achieving behaviour modification. The plaintiffs also argue that because some of the class members continue to work with the defendants, a class action allows those class members to participate and yet be removed from direct involvement in the litigation at least at the common issues stage.
- [157] The defendants argue that the plaintiffs have failed to establish that common questions of fact or law predominate over individual questions in this litigation and argue the individual issues dominate, both with respect to liability and damages. According to the defendants, questions such as what the terms of an individual's contract were, what representations were made to them, and whether any of the alleged Defendants' Actions are made out are particular to each class member: *Fulawka* at para. 155; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 47 [*Dutton*].
- [158] The defendants also argue that a multi-plaintiff action would be a more practical and efficient means for determining the claims of the Founding Fathers (four of whom have signed releases for their claims). The defendants argue that the remaining class members, the individual agents (Bucket 1), would only have an interest in whether the improper churning occurred, but even then their claims would depend on an individualized analysis and determination of who sold which policies. The defendants argue that behaviour modification is not a significant factor in this case because the industry is heavily regulated and the alleged conduct of the defendants is prohibited by law in the jurisdictions in which CFS operates. The defendants say judicial economy will not be served because the common issues trial will quickly break down into an individualized assessment. Finally, the defendants say that several of the agreements in evidence reflect that there are mandatory arbitration clauses which will require the individuals to resolve their disputes through arbitration.

C. Analysis and Conclusion

- [159] The defendants have not filed an application to stay the proceedings under s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55. Accordingly, the questions of whether the arbitration clauses contained in template agreements filed by the defendants are applicable to any of the class members and, if applicable, whether they are void, inoperative, or incapable of being performed, were not squarely before me and were not argued on this application. At this stage, I cannot conclude arbitration of disputes involving the potential class members is required.

- [160] Class proceedings frequently involve claims encompassing multiple individual contracts: Service CA; Finkel; Fulawka; Fresco. The court must not refuse to certify a proceeding as a class proceeding merely because the relief claimed relates to separate contracts involving different class members: CPA, s. 7(b).
- [161] If it becomes apparent as litigation unfolds that the remaining individual issues render it difficult to treat all claims in a single class, the defined class can be modified through the further inclusion, exclusion, or subclass treatment of class members: CPA, s.12. The court must not refuse to certify a proceeding as a class proceeding merely because the class includes a subclass whose members have claims not shared by all class members: CPA, s. 7(e).
- [162] While the defendants proposed a multi-plaintiff action for the Founding Fathers, they did not suggest there was a court process other than individual claims as an alternative for the vast majority of the potential claim members. With the number of potential class members estimated to be in the hundreds, judicial economy would not be served by the need for each to pursue individual claims.
- [163] Further, as the plaintiffs point out, for many of the members of the class, the economies of scale may mean the costs of litigation will not warrant an individual bringing their own separate action. Their opportunity for access to justice for any wrong they have suffered would best be served by a class proceeding. Further, multiple individual actions in various jurisdictions would mean the potential for inconsistent determinations of fact and law is very real. With respect to alternatives to traditional litigation mechanisms, I find a class proceeding, where the entire class will receive notice, and have the benefit of and be bound by the determination of the common issues (unless they have opted out), is preferable to multiple individual actions or actions with multiple individual plaintiffs, which provide no guarantee the issues will not be relitigated at some other time or in some other forum: CPA, s. 26.
- [164] Based on the evidence before me, it does not appear there are any other proceedings relating to these alleged wrongs.
- [165] The common issues focus on the Defendants' Actions and will facilitate a universal consideration and determination of questions which, in my view, will go a considerable measure towards obtaining relief for the potential class members: Hoy v. Medtronic, Inc., 2003 BCCA 316 at para. 54. There is some evidence that the determination of the common issues will result in economies in the overall litigation of the class' individual claims. In my view, a class proceeding is the preferred procedure to determine the claims raised in this case.

IX. ARE THE PLAINTIFFS SUITABLE REPRESENTATIVE PLAINTIFFS?

A. Applicable Legal Principles

- [166] For a proceeding to be certified as a class proceeding, there must be some evidence there is a representative plaintiff who would fairly and adequately represent the interests of the class, has presented a workable litigation plan for advancing the action, and who is not prevented from serving as a representative plaintiff by reason of having a conflict of interest on the common issues: CPA, s. 4(1)(e).
- [167] The threshold for establishing suitability of a representative plaintiff is relatively low and a detailed examination of the plaintiff's competency and circumstances is neither necessary nor appropriate: *Peterson v. Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at para. 102. As observed by Chief Justice McLachlin for the Court in *Dutton*:
- [41] Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see *Branch*, [Ward K., *Class Actions in Canada* (Vancouver: Western Legal Publications, 1998)], at paras. 4.210-4.490; *Friedenthal*, [Jack H.], *Kane*, [Mary Kay] and *Miller*, [Arthur R., *Civil Procedure*, 2d ed. (St. Paul, Minn: West Publishing Co., 1993)], at pp. 729-32.

B. Positions of the Parties

- [168] The plaintiffs depose they are aware of the time demands serving as representative plaintiffs would place on them, and the time constraints of the litigation, and that they are willing, able, and suitable to serve as representative plaintiffs for the class, collaborating with each other and their legal counsel. Both plaintiffs are members of the proposed class, with Mr. Dunlop, as one of the Founding Fathers, being in all three compensation buckets. Insofar as subclasses may be required in the future, the plaintiffs submit that between the two of them, they would be able to divide representative duties based on Mr. Dunlop's membership in the Founding Fathers group.
- [169] The plaintiffs have submitted an initial litigation plan they submit is workable, acknowledging it may need some modification. They submit that they do not have a conflict of interest involving the common issues that would preclude them from serving as representative plaintiffs.

[170] In their written submissions, the defendants indicated an objection to the plaintiffs serving as representative plaintiffs because the litigation plan is not workable. However, at the hearing, the defendants acknowledged that while there are some deficiencies in the litigation plan, they are not sufficient to bar certification. Their candid view was that any problems with the litigation plan can be worked out if the case is certified.

C. Analysis and Conclusion

[171] Both plaintiffs have deposed their willingness to undertake the responsibilities of representative plaintiffs, their affidavits reflect they are aware of the nature of the litigation and what is involved in the litigation process, and the material filed demonstrates a capacity to instruct counsel: Dutton at para. 41.

[172] The defendants raised no specific concerns with respect to the plaintiffs serving as representative plaintiffs and I find there are none.

[173] With respect to the litigation plan, the defendants did not seek specific modifications to the litigation plan proposed by the plaintiffs. I agree with the defendants that any deficiencies with what the plaintiffs acknowledged was an "initial litigation plan" can be resolved, either by the parties or through the case management process, in order to ensure it is fair both to the plaintiffs and the defendants and does not abrogate substantive rights to which the parties are entitled: *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (S.C.J.) at para. 71.

[174] If it becomes apparent further on in the litigation that a subclass of the Founding Fathers is appropriate, I am satisfied Mr. Dunlop would be able to fairly and adequately represent the interests of that subclass.

[175] I find there is some evidence there is a representative plaintiff who would fairly and adequately represent the interests of the class. I find the plaintiffs have presented a workable litigation plan for advancing the action. I find that, based on the evidence before me, neither of the plaintiffs are prevented from serving as a representative plaintiff by reason of having a conflict of interest on the common issues.

X. CONCLUSION

[176] The plaintiffs' Amendment Application is granted.

[177] I find the plaintiffs have met the requirements for certification under s. 4 of the CPA and as such I must certify the action. The plaintiffs' Certification Application is granted.

[178] Section 8 of the CPA imposes certain requirements with respect to a certification order:

8 (1) A certification order must

- (a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,

- (b) appoint the representative plaintiff for the class,
- (c) state the nature of the claims asserted on behalf of the class,
- (d) state the relief sought by the class,
- (e) set out the common issues for the class,
- (f) state the manner in which and the time within which a class member may opt out of the proceeding, and
- (g) [Repealed 2018-16-7.]
- (h) include any other provisions the court considers appropriate.

[179] The class shall be described as follows:

All individuals or entities, wherever resident, who were, between November 30, 2006 and the date of certification of this action as a class proceeding, party to any agreement with the Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, or their subsidiaries or acquirers which grants or entitles them to ongoing compensation from the Pennsylvania Life Insurance Company, the Penncorp Life Insurance Company, their subsidiaries, their acquirers or from the business operations and activities of the Defendants.

[180] I appoint the plaintiffs, Mr. Matthews and Mr. Dunlop, to be the representative plaintiffs for the class.

[181] The claims asserted on behalf of the class are breach of trust, breach of contract, fraudulent misrepresentation, unjust enrichment, and negligence.

[182] The class seeks an accounting, and relief through a constructive trust and various forms of damages.

[183] The common issues are as set out in these reasons.

[184] The parties shall schedule a case management conference to take place within 90 days of the date of these reasons to speak to any required amendments to the litigation plan and the form, process, and logistics for providing notice to the class, as well as to the further advancement of this class proceeding.

[185] In accordance with s. 37(1) of the CPA, I make no award of costs for these applications.

"Jackson J."

[1] La Capitale has additional subsidiaries beyond its co-defendants.

- [2] In the NOCC the plaintiffs treat breach of duty of good faith as a standalone cause of action but at the hearing they modified that position, arguing instead that breach of duty of good faith may be subsumed within the breach of contract analysis: PA at para. 82. The plaintiffs' concession was a reasonable one: *D. v. The Catholic Children's Aid Society of Toronto*, 2019 ONSC 2042 at paras. 24-25; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at paras. 47-49.
- [3] The noted paragraphs are those that are specific to a particular cause of action. In addition, the plaintiffs rely on various general facts in the NOCC common to various causes of action that deal with the identification of the parties, the relationship between the parties, the wrongful actions the NOCC attributes to the defendants (referred to in the NOCC as the "Defendants' Actions" or the "Unlawful Conduct") and a general plea for various damages and an accounting.
- [4] The NOCC also seeks a constructive trust as a remedy.
- [5] In *Fehr SC*, Justice Perrell included a fifth element, namely an intent by the maker of the fraudulent representation to deceive the recipient (at para. 274). However, as noted by Justice Karakatsanis for the Court in *Bruno*, the motive of the statement maker is immaterial if fraud is proven. "It matters not that there was no intention to cheat or injure the person to whom the statement was made": *Derry v. Peek* (1889), 14 App. Cas. 337 at p. 374 (H.L.).
- [6] Although *Trottier* involved Quebec's Code de procédure civile, the court interpreted the Code as requiring a deadline so a member can effectively opt out of the class action, and that principle is equally applicable in British Columbia.

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