COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361

Date: 20171020
Docket: CA43613

Between:

Eric Finkel

Respondent
(Plaintiff)

And

Coast Capital Savings Credit Union

Appellant
(Defendant)

Before: The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated March 31, 2016 (*Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561, Vancouver Docket S136407).

Counsel for the Appellant: B.W. Dixon, R.B. Dawkins

Counsel for the Respondent: D.G.A. Jones, R. Mogerman

Place and Date of Hearing: Vancouver, British Columbia, February 7, 2017

Place and Date of Judgment: Vancouver, British Columbia, October 20, 2017

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Summary:

Coast Capital Savings Credit Union appeals from certification of the underlying action as a class proceeding on the basis that the pleadings do not disclose a cause of action, nor does the evidence support a finding that the claims raise common issues or that a class proceeding is the preferable procedure. Held: appeal dismissed. The pleadings disclose the essential elements of a claim for breach of contract; the absence of jurisprudence on the issue of whether reliance is necessary for a claim under s. 171 of the BPCPA means declining to strike that claim at the certification stage was appropriate. The judge's conclusion that it is not plain and obvious that these claims are bound to fail should not be disturbed. There was also some basis in the evidence, particularly the terms of the standard form account agreement, for the finding that the claims raise common issues and the judge did not misdirect himself on the preferability criterion. Read as a whole, his reasons make it clear that the judge applied the correct test and undertook the necessary analysis regarding preferability.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] Coast Capital Savings Credit Union appeals from the order of Justice Masuhara certifying Eric Finkel's action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The action concerns alleged undisclosed surcharges that Coast Capital imposed on members who withdrew foreign currency from their personal accounts through automated teller machines ("ATMs") outside Canada. According to Mr. Finkel, Coast Capital was authorized to use only the standard daily exchange rate established for the Plus or Cirrus networks for such conversions, but, for several years, also imposed an additional surcharge in breach of its contractual obligations. He asserts further that Coast Capital engaged in a deceptive act or practice, contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], "in the supply, solicitation, offer, advertisement and promotion of … ATM Foreign Exchange Services". In consequence, he seeks a range of relief, including restitution, compensatory and punitive damages, interest and costs.

[2] Coast Capital denies any wrongdoing and challenges Mr. Finkel's interpretation of its contractual provision on the conversion rate applicable to foreign currency withdrawals from ATMs outside Canada. On appeal, it contends that the judge erred in granting certification because, properly assessed, the pleadings do not disclose a cause of action for breach of contract or breach of the *BPCPA*, nor does the evidence support a finding that the claims raise common issues or that a class proceeding is the preferable procedure.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] Mr. Finkel is a resident of British Columbia. Since 2006, he has been a member of Coast Capital, a credit union that provides banking, lending and investment services to its members. Like many other members, he has a Coast Capital personal chequing account and a linked debit card. Among other things, the debit card allows him to withdraw cash at ATMs around the world connected to the Plus or Cirrus interbank electronic networks. Its use is subject to a standard form account agreement with Coast Capital (the "Account Agreement").

[5] The Account Agreement entitles Coast Capital to charge its members service fees for various transactions, including foreign currency withdrawals from ATMs outside Canada. The service fees are listed in a document entitled "Personal Service Fees" and published by Coast Capital on its website. On January 1, 2013, this document provided that, depending on the service package, Coast Capital would charge a flat fee per foreign ATM withdrawal, but made no mention of a percentage surcharge or third party fees on foreign currency conversions. The conversion rate used for such transactions is addressed in section 37 of the Account Agreement:

> If the [debit card] is used in connection with a Transaction in a foreign currency, the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the Transaction is conducted.

[6] The Account Agreement does not define "electronic network".

[7] The Plus System and the Cirrus System are international electronic networks. Operated by Visa International and MasterCard Incorporated, respectively, they link ATMs around the world with financial institutions such as Coast Capital. Visa and MasterCard fix standard daily exchange rates for foreign currencies that apply to ATM withdrawals made on the Plus and Cirrus networks.

[8] Coast Capital does not have a direct relationship to Plus or Cirrus, but it gains access through a third-party intermediary, Moneris Solutions Corporation. In 2010, Coast Capital and Moneris entered into an agreement regarding access to various electronic payment networks, including Plus and Cirrus.

[9] The Account Agreement includes terms that authorize Coast Capital to act upon a member's instructions with respect to his or her account. Among other things, it provides that a member must "indemnify Coast Capital" for "costs" or "liabilities" incurred by Coast Capital "in connection with the administration or operation of" the account, or as a result of acting upon "electronic instructions" from the member. It also provides that a member must give notice to Coast Capital within 30 days of an account statement or transaction posting of any errors, irregularities or omissions in the statement or posting, failing which the member will have no claim against Coast Capital.

[10] On September 1, 2015, Coast Capital amended the Personal Service Fees document published on its website. The amended document provides for a fee of $5.00 plus 2 per cent per foreign ATM withdrawal and states "[a]dditional fees may be charged by third parties as part of the transaction amount". A notice to Coast Capital members to similar effect was published the same day.

[11] Mr. Finkel withdrew funds from his account from ATMs outside Canada prior to the September 1, 2015 publication of the amended Personal Service Fees document. On January 1, 2013, he withdrew U.S. dollars from an ATM in Cambodia on two occasions, and, on June 30, 2015, he withdrew U.S. dollars from an ATM in New York City. On all three occasions, his Coast Capital account was debited a sum in Canadian dollars that exceeded the prevailing Plus or Cirrus standard daily exchange rate fixed for U.S. dollars. He sought an explanation for the difference from Coast Capital, but was unsatisfied with its response.

[12] Mr. Finkel commenced this proceeding on August 28, 2013 and applied thereafter to have it certified as a class action.

The *Class Proceedings Act*

Certification as a class action

[13] A class action is a procedural tool that allows an individual class member to prosecute a suit on behalf of other class members. The procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 13, 27. Behaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public; judicial

economy, by avoiding unnecessary duplication in fact-finding and legal analysis: *Hollick* at para. 15. Access to justice is facilitated by providing class members with a fair, economical process to resolve their claims and, if the claims are established, with a just, effective remedy: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 24.

[14] Section 4(1) of the *Class Proceedings Act* sets out the statutory requirements for certification as a class action. When they are met, the proceeding must be certified:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. As Justice Rothstein stated in *Pro-Sys Consultants Ltd. v. Microsoft Corp.* 2013 SCC 57 at para. 104, for an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at para. 51.

Adequacy of pleadings

[16] The first s. 4(1) requirement is pleadings that disclose a cause of action. This requirement is assessed on the same standard of proof that applies to a motion to strike-out pleadings, as described in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. In other words, the question for determination under s. 4(1)(a) is whether, assuming the pleaded facts are true, it is plain and obvious that the action cannot succeed: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20.

[17] In deciding whether pleadings disclose a cause of action, the judge should read them generously, with a view to accommodating inadequacies in form attributable to deficient drafting. Where such inadequacies exist, the plaintiff should propose amendments to cure them or, to the extent reasonable, the certification application should be adjourned to allow such a proposal to be made: *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44-46. Even if the plaintiff's argument is novel and may require an expansion of the law as it currently stands, this is not necessarily fatal: *Sherry* at para. 53. On the contrary, the absence of jurisprudence fully settling an issue may be good reason to exercise restraint in striking a claim at the pleadings stage: *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, aff'd 2012 ONSC 463 at paras. 61, 74. To satisfy the s. 4(1)(a) requirement, the plaintiff need only satisfy the judge that the action is not bound to fail.

[18] Nevertheless, the *Hunt* test will not be met in all cases. Difficult questions of law may arise on the pleadings and, insofar as reasonably possible, they should be addressed directly at the certification stage. This approach benefits the parties and the justice system by ensuring that only claims with a realistic prospect of success proceed and, therefore, that time and resources are only expended on moving such claims forward. As Justice Newbury observed in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64: "… scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context".

Evidentiary basis for certification

[19] If the pleadings disclose a cause of action, the plaintiff must go on to demonstrate some basis in fact for each remaining s. 4(1) requirement. This involves the presentation of

evidence, as contemplated by s. 5(1) of the *Class Proceedings Act*: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25. However, the focus of the inquiry is procedural; it concerns the appropriate form of the action, not its merits. The question is whether there is some basis in fact which establishes, to the requisite degree, an identifiable class, common issues, procedural preferability and a suitable representative plaintiff: *Microsoft* at paras. 99-100.

[20] In *Microsoft*, the defendant argued that the plaintiff must lead evidence to show the case meets the certification requirements on a balance of probabilities, but the court rejected this proposition. In doing so, Justice Rothstein noted the "some basis in fact" standard does not require the court to weigh and resolve conflicting facts and evidence. That is a task for which the court is ill-equipped at the certification stage. He also emphasized that each inquiry is case-specific and declined to offer an abstract definition of the "some basis in fact" standard because such a definition would be of limited utility. He emphasized further that certification does not predict trial success, the complexities of establishing the case are not assessed extensively, and the action may be decertified if and when the s. 4(1) requirements are no longer met: at paras. 102-105.

Identifiable class

[21] As in this case, the identifiable class requirement is often, though not always, straightforward. In *Jiang v. Peoples Trust Company*, 2017 BCCA 119, Chief Justice Bauman outlined the governing principles:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - 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.

Common issues

[22] In contrast, the common issues requirement is often controversial. This may be so, at least in part, because resolution of common issues is the heart of a class proceeding. The commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient. The critical factors in determining whether an issue is common are: (i) its resolution will avoid duplicative fact-finding or legal analysis; (ii) it is a substantial ingredient of each class member's claim and must be resolved to resolve the claim; and (iii) success for one class member on the issue will mean success for all: *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at paras. 35-38.

[23] In *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26, Justice Willcock referred with approval to the analytical approach to common issues outlined in detail in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42:

> [85] Mr. Justice Strathy, as he then was, described an appropriate analysis of the common issues question in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, a product claim brought against manufacturers. He provided a helpful description of the jurisprudence prior to the Supreme Court of Canada's recent restatement of the evidentiary requirements for certification:
>
> > [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:
> >
> > A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
> >
> > B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
> >
> > C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
> >
> > D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

> E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.
>
> F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605,, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.
>
> G: With regard to the common issues, "success for one 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." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.
>
> H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.
>
> J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

[Emphasis added in original.]

Preferable procedure

[24] The preferable procedure requirement is animated by the goals of class proceedings: behaviour modification, judicial economy and access to justice. It is governed by s. 4(2) of the *Class Proceedings Act*:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (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.

[25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).

[26] In *AIC*, Justice Cromwell explained the analytical approach to the preferability issue from the access to justice perspective. In doing so, he noted that the preferable procedure requirement has interconnected substantive and procedural aspects. The substantive aspect is concerned with whether class members will receive a just and effective remedy if their claims are established; the procedural with whether they will have access to a fair process, bearing in mind the existence of economic and other possible barriers. As Chief Justice

Strathy stated in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, *AIC* requires the court to consider the barriers to access to justice; the potential of a class action to address those barriers; and the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare: *AIC* at paras. 4, 24, 27, 37-38; *Fantl* at para. 27.

Representative plaintiff

[27] The final requirement is a suitable representative plaintiff. As s. 4(1)(e) of the *Class Proceedings Act* provides, the proposed representative plaintiff must show that he or she is able to represent the class fairly and adequately, has a workable plan for advancing the proceeding and will represent the interests of the class vigorously and without any conflict of interest on the common issues.

The Pleadings

[28] As is common in class proceedings, the pleadings in this case have gone through several iterations. In ruling on the certification application Justice Masuhara considered the most recent version, which is the second amended notice of civil claim. In it, Mr. Finkel seeks certification of the action on behalf of Coast Capital members who reside in British Columbia and used their debit cards to make a foreign currency withdrawal through an ATM on the Plus or Cirrus system outside Canada from August 28, 2007 to September 1, 2015, which is the defined class period. He asserts three causes of action against Coast Capital: breach of contract; breach of the *BPCPA*; and breach of the *Competition Act*, R.S.C. 1985, c. C-34.

[29] Under the heading "Factual Background to Claim", Mr. Finkel pleads that, during the class period, Coast Capital enabled class members to withdraw foreign currency at ATMs connected to Plus or Cirrus outside Canada using their debit cards. Governed by the Account Agreement and defined as "ATM Foreign Exchange Services", the transactions were, he pleads, subject to "Network Exchange Rates":

> 7. The terms of the Class members' account agreements with Coast Capital are set out in Coast Capital's standard form Personal Account and Services Agreement (the "Account Agreement"). The Account Agreement states that for ATM Foreign Exchange Services "the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the [t]ransaction is conducted". Visa International and MasterCard Incorporated each establish exchange

> rates between the Canadian dollar and various foreign currencies which apply to ATM withdrawals made on the Plus System or the Cirrus System, respectively (the "Network Exchange Rates"). It is a term of the Account Agreement that Coast Capital will use the Network Exchange Rates to convert funds belonging to the Class into foreign currency when providing ATM Foreign Exchange Services.
>
> [Underlining omitted.]

[30] Mr. Finkel pleads further that Coast Capital charged class members a surcharge on top of the Network Exchange Rates during the class period. He asserts that this surcharge, defined as the "Forex Surcharge", was not disclosed in the Account Agreement or the ATM withdrawal statements and was charged in breach of contract. He also asserts that Coast Capital engaged in deceptive acts or practices in connection with the ATM Foreign Exchange Services:

> 11. Coast Capital engaged in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services, including the following:
>
> a) Coast Capital represented that it charged only the Network Exchange Rates for ATM Foreign Exchange Services;
>
> b) Coast Capital failed to disclose the material fact that it charged the Forex Surcharge on ATM Foreign Exchange Services; and
>
> c) Coast Capital represented that it speaks to its members "in a clear, straightforward manner".
>
> 12. The representations and omissions set out in paragraph 11 had the capability, tendency or effect of deceiving or misleading the Class.
>
> 13. Coast Capital gained because of the consumer transactions in which it made the deceptive and misleading representations and omissions set out in paragraph 11 above.
>
> 14. The plaintiff, and the other members of the Class, relied on Coast Capital's deceptive representations and omissions described in paragraph 11 above and suffered loss because of such acts of practices.
>
> 15. Coast Capital acquired the Forex Surcharge due to its deceptive representations and omissions described in paragraph [11] above.
>
> 16. The plaintiff and the other members of the Class were the source of the Forex Surcharge acquired by Coast Capital.
>
> …
>
> 21. Each use of the ATM Foreign Exchange Services by the members of the Class was for primarily personal, family, or household uses and as such was a "consumer transaction" within the meaning of s. 1 of the *BPCPA*.
>
> [Underlining omitted.]

[31] In addition to claims for breach of contract and breach of the *BPCPA*, a claim for misleading advertising contrary to the *Competition Act* is pleaded in the second amended notice of civil claim. However, that proposed cause of action was not certified, it is not at issue on the appeal, and, as a result, those pleadings need not be summarized or reproduced here.

[32] Mr. Finkel seeks various remedies, including restitution and damages pursuant to ss. 171 and 172 of the *BPCPA*; damages for breach of contract; punitive damages; and interest. Under the heading "Legal Basis", as noted, he pleads that Coast Capital breached the *BPCPA* by its representations and omissions regarding the Forex Surcharge charged on ATM Foreign Exchange Services and that it breached the Account Agreement by charging the Forex Surcharge on top of the Network Exchange Rates.

[33] Coast Capital filed a response to an earlier iteration of the second amended notice of civil claim. In the response, it opposes the grant of all of the relief that Mr. Finkel seeks. In addition to pleading its own version of the material facts, Coast Capital pleads several defences. Some are based on provisions in the Account Agreement and others on statutory limitation periods.

The Certification Hearing

[34] The certification hearing was conducted over the course of several days before Justice Masuhara. It was based on an extensive record which included affidavit evidence filed by both parties.

[35] In his affidavit, Mr. Finkel described the three transactions in which he withdrew funds from his account from ATMs outside Canada and was debited more than the prevailing Plus or Cirrus standard daily exchange rate fixed for U.S. dollars. For the two withdrawals from an ATM in Cambodia, he deposed, the difference was 2.3 per cent. For the withdrawal from an ATM in New York City, it was 1.8 per cent. Exhibits to Mr. Finkel's affidavit included a Coast Capital standard form personal account services agreement and his email correspondence with Coast Capital representatives regarding the foreign exchange rates he expected should apply and the higher charges debited from his account. In one of those emails, Coast Capital's representative wrote:

> If the Card is used in connection with a Transaction in a foreign currency, the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the Transaction is conducted. If you are using a Cirrus network ATM I would suggest being in contact with them to get their rates of exchange …

[36] The September 1, 2015 amended Personal Services Fees document and notice were exhibited to another affidavit filed on Mr. Finkel's behalf.

[37] Coast Capital filed the affidavit of its senior vice-president of operations, Nancy McNeill. Ms. McNeill deposed that Mr. Finkel's key factual assertions in the pleadings are inaccurate and denied that Coast Capital imposes or receives a foreign exchange surcharge, as he alleges or at all. She went on to describe the international payment network and its operation in foreign ATM transactions, stating that several networks may well be engaged in a single transaction:

> In the Canadian payments sector we commonly refer to the electronic networks used to communicate the transaction request as "The Rail". Like a railway, the lines of secure communication for processing payment requests are interconnected, have interchanges, and ultimately can direct the traffic to any financial institution that subscribes to a local interchange point for their institution. The number of electronic networks engaged and required for processing a transaction is indeterminate until the cardholder selects a specific access terminal that connects into The Rail. This is so because there are more electronic networks engaged when transactions are initiated on networks outside of the credit union networks used in Canada and even more when transactions are initiated at an ATM outside of Canada.
>
> When Coast customers use an ATM that does not belong to Coast Capital, there is always at least one third party electronic network service provider forming The Rail engaged in the transaction and, depending on where in the world the transaction took place, there could well be more than three third party electronic network service providers engaged.

[38] Ms. McNeill deposed further that the pricing, surcharges if any, and value of percentage-based fees charged by electronic network service providers on The Rail for foreign ATM transactions are outside of Coast Capital's control and knowledge. Her description of the conversion process involved is summarized in Coast Capital's factum:

> When a Member engages in a foreign currency transaction at a Foreign ATM, the foreign currency amount sought by the customer at the foreign ATM will be converted by one or more participants on The Rail until it is received by the electronic network provider in Canada and ultimately by Coast Capital. Coast Capital does not set any exchange rates or perform any foreign conversion calculation. Coast Capital simply receives an instruction to debit the Member's account, already converted into a specified amount in Canadian dollars. The Account Agreement confirms, as referred to above, that the Third Parties involved in the particular

> transaction set the rules and perform the conversion. Coast Capital does not receive any portion of the converted amount paid by the Member to settle the foreign exchange transaction. Coast Capital simply makes a "pay" or "no pay" decision, based on the account status, and then processes the debit instruction accordingly, making payment on behalf of the Member as instructed.

[39] Both parties made extensive oral and written submissions for or against certification. In general terms, Mr. Finkel contended that he met all s. 4(1) requirements and the certification application should be granted as proposed. In doing so, a central feature of his position was that, as pleaded, the term "electronic network" in the Account Agreement means Plus or Cirrus. Accordingly, "fixed according to the rules of the electronic network" means that Coast Capital was only authorized to charge the standard daily exchange rates for foreign currency withdrawals fixed for the Plus or Cirrus networks, but, in breach of contract, it also charged the Forex Surcharge. In response, Coast Capital argued that "electronic network" refers to the more complicated network of payment processing service providers described by Ms. McNeill and the "rules of the electronic network" contemplate charges in excess of the Plus and Cirrus exchange rates.

[40] The parties also divided on other matters, including the common issues and preferable procedure requirements. According to Coast Capital, neither requirement was met. As to preferable procedure, Coast Capital argued that there was little to no commonality in the proposed issues and individual issues would inevitably predominate. It also argued that certification holds no real advantages in terms of judicial economy and access to justice, particularly as there are alternative available remedies for class members such as direct contact or a *BPCPA* action brought by the Director.

The Chambers Judge's Reasons for Judgment

[41] At the outset, Justice Masuhara identified the meaning of "electronic network" in the Account Agreement as a key point of contention. After summarising the parties' positions and the factual background, he reproduced the relevant provisions of the *Class Proceedings Act*, the *BPCPA* and the *Competition Act*. Next, he reviewed the principles that apply on a certification application, including the onus on a party seeking certification and the court's role as gatekeeper. Turning to their application, he considered the requirements of s. 4(1) with respect to each cause of action pleaded in the second amended notice of claim.

[42] The judge stated that he was to assume the pleaded facts are true when deciding the first s. 4(1) requirement, namely, whether the second amended notice of claim discloses a cause of action. He also stated the question for determination was whether, on those facts, it is plain and obvious that the claim discloses no reasonable cause of action. To answer the question, he set out the pleadings with respect to Mr. Finkel's asserted causes of action and analysed their adequacy. As to the alleged breach of contract, he stated:

> [45] … the plaintiff has pleaded the existence of a contract, that the Agreement contains a term that Coast Capital will use the Cirrus or Plus exchange rates (which the plaintiff calls the "Network Exchange Rates"), and that in breach of this term Coast Capital charged a surcharge (the "Forex Surcharge") in addition to those rates. Assuming the facts as pleaded are true, I cannot conclude that it is plain and obvious that the plaintiff's claim will fail. Accordingly, the pleadings disclose a cause of action in breach of contract.

[43] The judge dealt next with Mr. Finkel's assertion that Coast Capital engaged in deceptive acts or practices contrary to ss. 4 and 5 of the *BPCPA*. He was satisfied that Coast Capital, the class members, and the transactions fell within the *BPCPA* definitions of "supplier", "consumer", and "consumer transaction" and found the pleading that Coast Capital committed a deceptive act or practice was adequate. He also considered the pleadings under ss. 171 (damage or loss) and 172 (restoration order) of the *BPCPA*, finding that they, too, were sufficient.

[44] In finding the s. 171 pleading was sufficient, the judge held that Mr. Finkel was not required to plead reliance as an element of the claim for causation purposes, although he attempted to do so. This was important because, he found, the pleading of reliance amounted to a bare legal conclusion unsupported by material facts and, therefore, was deficient. However, he also found the unauthorized overcharge that Mr. Finkel pleaded properly linked the *BPCPA* breach causally to his loss (the Forex Surcharges) and thus that reliance need not be pleaded to disclose a cause of action. In his view, this was true despite the fact that, in some cases, reliance is required for a s. 171 *BPCPA* claim:

> [52] With respect to causation, s. 171 requires the plaintiff show that he or she suffered damage or loss "due to" a contravention of the legislation. This language clearly imports a causation requirement into this section.
>
> [53] Whether the pleadings are sufficient with respect to causation turns on whether reliance is a necessary element of the s. 171 claim in the circumstances of this case. In my opinion, it is not.

> [54] It is true that some prior decisions of this Court have held that reliance is required for a claim under s. 171: see e.g. *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172 at para. 34, rev'd in part (but not on this point) 2006 BCCA 235; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 197, aff'd 2015 BCCA 252, leave to appeal to S.C.C. refused 2016 CanLII 13743.
>
> [55] However, in my view whether reliance is required depends on the nature of the alleged contravention of the legislation. Where the alleged contravention involves a wrongful overcharge contrary to a term of a contract, the fact of the unauthorized overcharge causally links the breach to the plaintiff's loss. In these circumstances, the plaintiff need not show (and therefore need not plead) reliance.
>
> [56] In this case, the plaintiff alleges that Coast Capital committed a deceptive act or practice by representing, in a term of its contract with the plaintiff, that it would only charge Cirrus' and Plus' exchange rates for foreign currency transactions. He further alleges that, in breach of that term, Coast Capital charged a surcharge in addition to those rates. This is sufficient to link Coast Capital's alleged breach with the plaintiff's loss. The plaintiff need not plead reliance.

[45] The final cause of action the judge considered was the alleged breach of s. 52 of the *Competition Act*. He concluded that, as pleaded, it was deficient. In addition to two surmountable deficiencies, he identified a more serious problem with respect to causation:

> [70] What is more problematic is that the plaintiff has not pleaded that he suffered loss or damage as a result of the misrepresentations made to the public. While s. 52(1.1) removes the requirement of proving reliance in order to establish a contravention of s. 52(1), the cause of action created by s. 36 requires the plaintiff to show that he or she suffered damages "as a result" of the defendant's violation: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 91, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 125, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 107.
>
> [71] Unlike the *BPCPA* claim, then, the *Competition Act* claim does require that the plaintiff show reliance on the alleged misrepresentation. The link required by s. 36 is only present if the misrepresentation "caused [the plaintiff] to do something - i.e., that he relied on it to his detriment": *Singer* at para. 108.

[46] Satisfied that the pleadings disclose causes of action in breach of contract and breach of the *BPCPA*, the judge turned to the remaining s. 4(1) requirements. He accepted Mr. Finkel's proposed class definition and created a subclass limited to individuals acting for purposes that are primarily personal, family or household for the *BPCPA* claim. In doing so, he stated:

> [79] I accept that there could be some "non-consumer" personal account holders, though they are likely a very small minority, given that the Agreement contained a term that a personal account cannot be used for business purposes and also set out sanctions for breach of this term. While these non-consumers do not have a *BPCPA* claim, they do have a breach of contract claim. A class definition that excluded them

> entirely would be under-inclusive; it would not "bind the persons who ought to be bound": *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 at para. 34, quoting Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 93.
>
> [80] Instead, a subclass should be created for the *BPCPA* claim. The subclass will be limited to individuals acting for purposes that are primarily personal, family or household. The question of whether an account holder is acting for these purposes can be determined objectively, and is best dealt with at an individual issues trial or at the claims administration process. …

[47] Next, the judge considered the common issues requirement. He summarized the critical factors for determining whether an issue is common, citing *Thorburn* and noting there must be a rational connection between the class and the common issues, each must be a triable legal or factual issue, and their determination must move the litigation forward. Then, he outlined the long list of common issues proposed by Mr. Finkel, concluding that some, but not all, were suitable for certification. Paragraph 6 of his certification order provides:

> 6. The following questions are certified as common issues:
>
> *Business Practices and Consumer Protection Act*
>
> (a) Were withdrawals of foreign currency at ATMs connected to the Plus System or the Cirrus System located outside Canada ("ATM Foreign Exchange Services") "consumer transactions" as defined in the *BPCPA*?
>
> (b) With respect to the ATM Foreign Exchange Services, is Coast Capital a "supplier" as defined in the *BPCPA*?
>
> (c) Are the Subclass Members "consumers" as defined in the *BPCPA*?
>
> (d) Did Coast Capital engage in deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the ATM Foreign Exchange Services contrary to the *BPCPA*, as alleged in the amended notice of civil claim?
>
> (e) Did the representations and omissions have the capability, tendency or effect of deceiving or misleading the Subclass and therefore constitute deceptive acts or practices under s. 4 of the *BPCPA*?
>
> (f) If the Court finds that Coast Capital has engaged in deceptive acts or practices contrary to the *BPCPA*, should a declaration be granted that these acts or practices in engaged in by the Defendants in respect of consumer transactions contravene the *BPCPA*?
>
> (g) If the Court finds that Coast Capital has engaged in deceptive acts or practices contrary to the *BPCPA*, should an injunction be granted restraining Coast Capital from engaging or attempting to engage in those deceptive acts or practices?
>
> (h) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast Capital be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms or conditions?
>
> (i) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast Capital restore all Forex Surcharges that the

> Subclass paid? "Forex Surcharges" are amounts Coast Capital charged in addition to the Cirrus or Plus exchange rates.
>
> (j) If the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should a monetary award be made in favour of the Subclass and, if so, in what amount?
>
> *Breach of Contract*
>
> (k) Is the Coast Capital Personal Account and Services Agreement ("Account Agreement") a contract between Coast Capital and the members of the Class and the Subclass?
>
> (l) If so, is it a term of the Account Agreement that Coast Capital will use Visa International and MasterCard Incorporated established exchange rates between the Canadian dollar and various foreign currencies, which apply to ATM withdrawals made on the Plus System or the Cirrus System, respectively ("Network Exchange Rates"), to convert funds belonging to the Class and the Subclass into foreign currency when providing ATM Foreign Exchange Services?
>
> (m) Did Coast Capital breach the Account Agreement?
>
> (n) If so, is Coast Capital liable to Class Members and Subclass Members for breach of contract and, if so, in what amount?
>
> *Punitive Damages*
>
> (o) Do the acts and omission of Coast Capital warrant an award of punitive damages?
>
> (p) If the acts and omissions of Coast Capital warrant an award of punitive damages, should an award of punitive damages be made against Coast Capital and, if so, in what amount?
>
> *Interest*
>
> (q) What is the liability, if any, of Coast Capital for court order interest?
>
> 7. The issues in sub-paragraphs 6(p) and 6(q) will be determined after liability and the amount of compensatory damages payable by the defendant, if any, have been determined by the Court.

[48] One of the proposed common issues the judge declined to certify was "Are the solicitations and promotions of the ATM Foreign Exchange Services to the Class 'consumer transactions' as defined in the *BPCPA*?". He explained:

> [87] With respect to [the above-noted proposed common issue], the plaintiff has not pleaded any material facts to support his allegation that Coast Capital solicited or promoted the Foreign Exchange Services, nor has he established any basis in fact from which I can conclude that this is an issue at all, much less a common issue. This issue is not certified.

[49] In the absence of evidence or submissions, another common issue the judge declined to certify related to aggregate damages. He noted that, in consequence, unless an aggregate damages award is found to be appropriate, assessing damages will require individual claims.

[50] The judge went on to address the preferable procedure requirement:

> [111] The preferability analysis is governed and informed by s. 4(2) of the *CPA* and the three goals of class proceedings: access to justice, judicial economy and behaviour modification. The *CPA* sets the preferability test in relation to the resolution of the common issues and not the entirety of the class members' claims. A practical cost benefit approach is to be adopted with consideration of the impact of a class proceeding on class members, the defendant and the court.

[51] After reminding himself of the "some basis in fact" standard, the judge summarized Coast Capital's arguments that class proceedings would not be preferable. He was not persuaded:

> [118] In terms of Coast Capital's point that an issue can be resolved directly between the member and Coast Capital, the communications between Mr. Finkel and Coast Capital set out at the beginning of these Reasons do not support that proposition.
>
> [119] In any event, the breach of contract and *BPCPA* claims can be determined without reference to the circumstances of any individual member. The common issues can be answered based on the conduct and circumstances of Coast Capital alone. The standard form contract and a fee schedule common to all class members is at the heart of the common issues.
>
> [120] With respect to the breach of contract and *BPCPA* claim, a class proceeding would be fair, efficient, and manageable. Access to justice strongly favours a class proceeding, as it is unlikely that many plaintiffs would be able to bring individual claims given the small value of their losses. The common issues predominate over individual issues, and individual inquiries can be dealt with effectively should the applicant succeed at the common issues trial.
>
> [121] The small value of the claims means that few if any class members have a valid interest in individually prosecuting separate actions. The claims here have not been the subject of any other proceeding.
>
> [122] To conclude, a class proceeding is the preferable procedure for the resolution of the *BPCPA* and breach of contract claims.

[52] Finally, the judge accepted that Mr. Finkel is an appropriate representative plaintiff and otherwise met the requirements of s. 4(1)(e) of the *Class Proceedings Act*. In the result, he certified the action as a class proceeding in the terms described.

On Appeal

[53] As it did below, Coast Capital contends that Mr. Finkel's claim is based on a fundamental misapprehension of the complexity of the international payment system. In fact, it says, it did not charge an undisclosed foreign exchange rate surcharge, which allegation is central to the claim and Justice Masuhara's decision to certify. It goes on to say that, as

Ms. McNeill explained, in fact, third party electronic network service providers engage in the transactions and, in doing so, set the rules and perform the conversion in a manner unknown to Coast Capital and from which it does not benefit. However, it says, the judge failed to appreciate this reality, which failure led him to commit several significant errors in certifying the proceeding as a class action.

[54] More specifically, according to Coast Capital, the judge erred in finding that:

i. the pleadings disclose a cause of action, because a) the implied term and representation regarding the Forex Surcharge pleaded is inconsistent with an also pleaded express term of the Account Agreement such that the truth of the pleaded facts should not have been assumed and b) there is no proper pleading of reliance for purposes of s. 171 of the *BPCPA*;

ii. the claims raise common issues, because a) no basis in fact was shown for the existence of a common contractual term, a common representation or the imposition of surcharge, b) the nature of the transactions cannot be determined on a class-wide basis and c) the pleaded defences were not taken into account;

iii. a class proceeding is the preferable procedure, because the necessary inquiry was not undertaken.

Discussion

Standard of Review

[55] The standard of review that applies to a chambers judge's conclusions reached under s. 4(1) of the *Class Proceedings Act* depends on the nature of the issue for appellate consideration. If the impugned element of the certification order is discretionary it will be reviewed with considerable deference, bearing in mind the need for judicial flexibility in the fair and efficient resolution of class proceedings: *Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22 at para. 25, leave to appeal ref'd [1998] S.C.C.A. No. 13. Questions of fact and mixed fact and law also attract the deferential standard: *Charlton* at para. 108 citing *Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177. However, to the extent the certification order rests on a question of law, it will be reviewed on a standard of correctness: *Jiang* at para. 37.

[56] As noted, s. 4(1) of the *Class Proceedings Act* provides that an action must be certified if all of the listed requirements are met. Accordingly, a decision on whether to certify a class proceeding is not a matter of discretion. Nevertheless, the chambers judge has a measure of discretion in assessing the statutory requirements, which requirements set the boundaries for its exercise. Absent an extricable error of law, unless the judge erred in principle or was clearly wrong this Court will not interfere with his or her exercise of judicial discretion: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 28, leave to appeal ref'd, [2010] S.C.C.A. No. 32.

[57] It follows that Coast Capital must establish Justice Masuhara erred in law or principle in assessing the cause of action requirements for the breach of contract or breach of the *BPCPA* claims to succeed on the first appeal issue. To succeed on the second and third, it must establish that he made an extricable error of law, erred in principle or was clearly wrong.

The *BPCPA*

[58] The *BPCPA* is consumer protection legislation. Enacted by the provincial government in 2004 to replace and harmonize predecessor consumer protection statutes, it provides a comprehensive and exhaustive code for the regulation of consumer transactions and affairs. Its legislative objectives are consumer protection, consistency and fairness for all participants in the consumer marketplace and, to this end, its provisions establish, administer and enforce statutory rights and obligations in a wide range of circumstances. In addition to other remedies, the *BPCPA* provides consumers with recourse to court proceedings for recovery of damages or loss they suffer due to contraventions of its terms: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at paras. 57, 63.

[59] For present purposes, the relevant provisions of the *BPCPA* are the definitions of a "consumer" and a "consumer transaction", as well as portions of ss. 4, 5,171 and 172:

> 1 (1) in this Act:
>
> "consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction …
>
> "consumer transaction" means

(a) A supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or

(b) A solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a) …

…

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

…

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

…

171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

(a) supplier,

…

172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

(a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;

(b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

…

> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
>
> …

[60] As consumer legislation, the *BPCPA* seeks to protect consumers who are vulnerable as a result of the imbalance in bargaining power between those who purchase goods and services and those who sell or manufacture them: *Koubi* at para. 57. Sections 171 and 172 create statutory causes of action for consumers to recover pecuniary loss caused by deceptive acts and practices that are committed by suppliers. The focus of s. 171 is on private actions for loss or damage. The focus of s. 172 is on public interest remedies such as injunctive relief: *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260 at para. 51.

The *Competition Act*

[61] The *Competition Act* is federal legislation. Its primary purpose is to maintain and encourage competition in Canada: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 2, 195, 199. Among others, a subsidiary purpose is to provide consumers with competitive prices and product choices: s. 1.1. Although, as noted, Justice Masuhara did not certify Mr. Finkel's *Competition Act* claim, portions of ss. 52(1) and 36(1) are relevant to an issue raised on this appeal:

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Do the Pleadings Disclose a Cause of Action in Breach of Contract and in Breach of the *BPCPA*?

Breach of contract

[62] Coast Capital contends that two inconsistent terms of the Account Agreement are pleaded in the second amended notice of claim, both in paragraph 7. The first is an express term; the second, it says, is an implied term unsupported by material facts. It says further that, in these unusual circumstances, Justice Masuhara should not have assumed the truth of the pleaded facts in determining the s. 4(1)(a) cause of action requirement. However, in error, he did so. According to Coast Capital, this error led him to conclude, incorrectly, that the pleadings disclose a cause of action in breach of contract that is not bound to fail.

[63] As noted, paragraph 7 of the second amended notice of civil claim provides:

> 7. The terms of the Class members' account agreements with Coast Capital are set out in Coast Capital's standard form Personal Account and Services Agreement (the "Account Agreement"). The Account Agreement states that for ATM Foreign Exchange Services "the rate of conversion into Canadian currency will be fixed according to the rules of the electronic network through which the [t]ransaction is conducted". Visa International and MasterCard Incorporated each establish exchange rates between the Canadian dollar and various foreign currencies which apply to ATM withdrawals made on the Plus System or the Cirrus System, respectively (the "Network Exchange Rates"). It is a term of the Account Agreement that Coast Capital will use the Network Exchange Rates to convert funds belonging to the Class into foreign currency when providing ATM Foreign Exchange Services.

[64] Coast Capital points to the second and fourth sentences of paragraph 7, which, it submits, plead two separate contractual terms with two distinct and contradictory meanings. In its submission, the express term pleaded in the second sentence of paragraph 7 plainly means that it may accept whatever conversion rate is used in the direction to pay it receives through the interconnected electronic network. However, in contrast, the implied term pleaded in the fourth sentence means that it will perform the conversion itself using exchange rates established by Visa International and MasterCard Incorporated. Accordingly, in its submission, paragraph 7 contains internally inconsistent pleadings regarding the currency conversion rate that applies to ATM Foreign Exchange Services.

[65] Citing *Sandhu*, Coast Capital emphasizes the heightened importance of pleading the essentials of a cause of action in the context of a proposed class action. Where, as here, an implied contractual term is pleaded, the plea must be supported by the material facts from

which it is said to arise. In addition, Coast Capital argues that, as this Court held in *McLean v. Canadian Premier Life Insurance Company*, 2013 BCCA 264, no term will be implied in a contract if it is contrary to an express term, but the implied term Mr. Finkel pleads is contrary to the express term also pleaded. In these circumstances, it submits, it is plain and obvious that the breach of contract claim cannot succeed.

[66] I do not accept this submission. In my view, paragraph 7 manifestly pleads only an express term regarding the currency conversion rate applicable to ATM Foreign Exchange Services. The words of the express term are pleaded, by direct quotation, in the second sentence of paragraph 7. Mr. Finkel's interpretation of its meaning is pleaded in the fourth sentence of the same paragraph, which interpretation includes the "Network Exchange Rates". The phrase "Network Exchange Rates" is defined in the third sentence of paragraph 7 to mean exchange rates established for the Plus and Cirrus systems. There is no plea of a separate or inconsistent implied contractual term.

[67] As the judge recognised, whether, on a full contextual analysis, Mr. Finkel's interpretation of the meaning of the express term in the Account Agreement is correct is a key point for determination on the merits. Contrary to the necessary implication of Coast Capital's submission, its own interpretation is not the only possible meaning of that express term. Rather, Coast Capital's interpretation of the meaning of the express term is a different, alternative interpretation to that proposed by Mr. Finkel. However, for purposes of s. 4(1)(a), the judge was obliged to assume the truth of Mr. Finkel's interpretation. In my view, he did not err in making this assumption.

[68] To put it another way, the judge was correct not to delve into the merits of the claim when deciding whether the pleadings disclose a cause of action in breach of contract. The essential elements of a breach of contract claim are all pleaded and his conclusion that it is not plain and obvious the claim is bound to fail should not be disturbed.

Breach of the BPCPA

[69] Coast Capital also contends that Justice Masuhara erred in finding the pleadings disclose a cause of action in breach of the *BPCPA*. Its argument has two prongs. The first prong assumes that inconsistent express and implied terms are pleaded regarding the applicable currency conversion rate and, based on that assumption, asserts the related *BPCPA*

pleading of a deceptive representation is deficient. The second prong assumes that a plaintiff must always plead reliance to be entitled to damages under s. 171 of the *BPCPA*.

[70] For the reasons already given, I reject Coast Capital's contention that Mr. Finkel pleads inconsistent express and implied terms regarding the applicable currency conversion rate. The pleading it characterizes as an implied term is Mr. Finkel's interpretation of the express term's meaning, not a pleading of a separate alleged term. The related plea of a deceptive representation incorporates Mr. Finkel's presumptively true interpretation of the express term and, as such, has, in the language of the *BPCPA*, "the capability, tendency or effect of deceiving or misleading a consumer". It follows that there is no merit to the first prong of Coast Capital's argument that the second amended notice of civil claim does not disclose a cause of action in breach of the *BPCPA*.

[71] In my view, the second prong of Coast Capital's argument also lacks merit given the certification context in which it is advanced.

[72] According to Coast Capital, the judge's (correct) conclusion that s. 36 of the *Competition Act* requires reliance on an alleged misrepresentation to establish causation must also apply to s. 171 of the *BPCPA*. In other words, it says, reliance is a necessary element of the causes of action created under both statutes. It contends that this is so for at least three reasons. First, both sections use similar language in requiring proof of a causal connection between the statutory breach and the loss or damage suffered by the plaintiff. Second, both are directed at potentially misleading conduct in the marketplace. Third, both provide a civil remedy where a person has actually been misled.

[73] In support of its submission, Coast Capital emphasizes the similarity between the words used in s. 36 of the *Competition Act* and those used in s. 171 of the *BPCPA* with respect to causation. Pursuant to s. 36(1) of the *Competition Act*, if a person "… has suffered loss or damages *as a result of* (a) conduct that is contrary to any provision of Part VI …" that person may claim damages; and, pursuant to s. 171(1) of the *BPCPA*, if a person "has suffered damages or loss *due to* a contravention of this Act …" that person may claim damages. It also emphasizes the similarity between the conduct addressed by s. 52 of the *Competition Act* and that addressed by s. 5 of the *BPCPA*, noting that s. 52 prohibits false or

misleading promotional representations and s. 5 prohibits deceptive acts or practices, including representations which tend to mislead.

[74] Coast Capital goes on to emphasize that, as is clear from *Wakelam*, the causal connection between an alleged breach of s. 52 of the *Competition Act* and damages under s. 36 is detrimental reliance. It argues that, by parity of reasoning, the same must be true of the requisite causal connection between a breach of s. 5 of the *BPCPA* and damages under s. 171(1). By using what are essentially the same terms, it says, both statutes import the notion that a person changed his or her position based on the contravening conduct, and, in both cases, the loss must flow from the breach.

[75] Coast Capital also submits that the *BPCPA* is not intended to subsume the remedial aspects of the law of breach of contract. In support of this submission, it notes that the claim under s. 171 of the *BPCPA* is for committing a deceptive act or practice, not for breach of a contractual promise. Although concurrent causes of action in breach of contract and breach of the *BPCPA* may be available, their constituent elements are different, as, it argues, is the requisite causal link between the wrongful conduct and damages. While reliance is not necessary for a breach of contract claim or to obtain injunctive relief under s. 172 of the *BPCPA*, for a private interest plaintiff to recover a money judgment under s. 171, it says, he or she must show reliance on the statutory breach.

[76] Coast Capital cites this Court's decision in *Sandhu* in further support of its submissions. In *Sandhu*, the Court held that a cause of action for breach of s. 171 of the *BPCPA* was not disclosed because the causal link between the claimant's loss, via detrimental reliance, and the delict was not pleaded properly. In contrast, the breach of contract claim was allowed to stand because there was a proper plea that a fee was imposed in breach of an express term of the contract. According to Coast Capital on this prong of its argument, the same analysis would apply here.

[77] In my view, the *Sandhu* analysis is not determinative. While it provides helpful guidance, there are significant points of difference between *Sandhu* and this case.

[78] The claim in this case concerns the collection of an undisclosed, unauthorized fee said to amount to a deceptive act or practice and related breach of contract. The claim in *Sandhu*

concerned the collection of a contractually-authorized fee said to be deceptively mischaracterized. The pleadings in *Sandhu* were deficient in many respects and it is unclear whether and, if so, how the alleged contractual breach was linked to the claim for damages under s. 171 of the *BPCPA*. Nor does it appear the Court was asked to consider whether, as a matter of statutory interpretation, reliance is always required to establish a causal link between a breach of the *BPCPA* and damages for purposes of s. 171, even if there may be other means of doing so such as a contractual breach or nondisclosure amounting to a deceptive act or practice.

[79] The broad interpretation of s. 171 of the *BPCPA* urged by Mr. Finkel and adopted by Justice Masuhara in this regard is novel. Accordingly, the question for determination, for purposes of certification, is whether s. 171 is capable of bearing the broad interpretation proposed. For the reasons that follow, I would answer in the affirmative and conclude, therefore, that it is not plain and obvious Mr. Finkel's claim under s. 171 of the *BPCPA* is bound to fail.

[80] In reaching this conclusion, I begin with first principles of statutory interpretation. Like all statutes, the *BCPCA* must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects: *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. This approach reflects the modern principle of statutory interpretation adopted by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2d ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[81] As noted, the objects of the *BPCPA* are consumer protection, consistency and fairness in the consumer marketplace. To protect vulnerable consumers, among other things, it creates statutory causes of action for them to recover pecuniary loss due to deceptive acts and practices committed in respect of consumer transactions, which may include deceptive representations in contracts. In *Seidel v. Telus Communications Inc.*, 2011 SCC 15, Justice Binnie affirmed that, as consumer protection legislation, the *BPCPA* should be interpreted generously, in favour of consumers. Accordingly, for present purposes, bearing in mind the

certification context, the most generous, consumer-oriented interpretation possible of s. 171 of the *BCPCA* and the causal link it requires between a breach of s. 5 and damages should be assumed.

[82] The objects of the *Competition Act* are similar to those of the *BPCPA* in some respects and distinguishable in others. Importantly, the causal link required between a breach of s. 52 of the *Competition Act* and damages for the cause of action created by s. 36 is well-settled by the jurisprudence. It relates, in part, to the nature of a s. 52 breach, namely, a false or misleading representation made to the public for purposes of promoting a product or business interest. For a private interest plaintiff to bring a claim under s. 36 of the *Competition Act* for a s. 52 breach, damages in the abstract are not sufficient; to establish causation, detrimental reliance is required. As stated in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 and cited with approval at para. 91 of *Wakelam*:

> … A consumer [of the product at issue] cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal ...
>
> … It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something – i.e. that he relied on it to his detriment.

[83] In my view, the causal link required between a breach of s. 5 of the *BPCPA* and damages for the cause of action created by s. 171 is not equally well-settled. Nor is it equally apparent that reliance will always be necessary for causation purposes given the differing nature of the statutory breach and the potential loss. As this Court noted in *Collette v. Great Pacific Management Co. Ltd*., 2004 BCCA 110 at para. 34 in the context of a tort claim, reliance may not be required to establish a causal link between a breach of duty and a loss in all misrepresentation cases. The reason for insistence on reliance is to prove causation. They are not independent requirements. Accordingly, if a breach of duty can be adequately linked to a loss by alternate means, individual reliance need not be shown.

[84] Without reliance, a misleading representation made to the public in breach of s. 52 of the *Competition Act* cannot be linked to a loss suffered by a particular individual. However, given the broad definition of a "consumer transaction" and a "deceptive act or practice", the same is not necessarily true of a breach of s. 5 of the *BPCPA* and an individual loss. Where,

as here, a s. 5 breach is allegedly committed in the context of a direct contractual relationship and involves a breach of a contractual term and related loss, in my view it is arguable that, as the judge held, the fact of the contractual breach sufficiently links the statutory breach to the loss for purposes of causation under s. 171 of the *BPCPA*. Interpreted thus, s. 171 would enable a consumer to recover the loss suffered within the comprehensive scheme of the *BPCPA*, which scheme expressly prohibits deceptive representations in contracts.

[85] I see no reason in policy or principle for the existence of a concurrent breach of contract claim to limit the remedial reach of s. 171 or otherwise delineate its causation requirement, as suggested by Coast Capital. While the focus of the two causes of action is different, so long as the constituent elements of each are present nothing more should be required. Nor do I consider decisions such as *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 175 or *Marshall* as necessarily inconsistent with the broad interpretation of s. 171 proposed by Mr. Finkel. The factual matrix and issues in *Knight* and *Marshall* were significantly different than those that arise in this case.

[86] *Knight* involved an allegation of deceptive marketing by a manufacturer of light cigarettes, which conduct was similar to that prohibited by s. 52 of the *Competition Act*. *Marshall* involved alleged misrepresentations in connection with a cashable voucher program. In *Knight*, the Court concluded that, while reliance on the deceptive marketing was required to establish causation, it need not necessarily be individual. In *Marshall*, the plaintiff conceded that reliance was required for the cause of action advanced. In neither case did the Court consider or foreclose the possibility that causation might be proven in another type of s. 171 case by other means.

[87] In sum, the absence of jurisprudence fully settling the statutory interpretation issue raised by the s. 171 claim and the plausible arguments advanced for its broad application in this factual context meant restraint in declining to strike the claim at the pleadings stage was appropriate. In my view, given the nature of the alleged statutory contravention and despite the lack of a proper reliance plea, as the judge concluded, it is not plain and obvious that the claim is bound to fail. I would not accede to this ground of appeal.

Did Justice Masuhara Err in Finding the Claims Raise Common Issues?

Was a basis in fact shown for the existence of a common contractual term, a common representation or the imposition of surcharge?

[88] Coast Capital submits that Justice Masuhara made palpable and overriding errors in finding any basis in fact for a common contractual term, a common representation or the imposition of a surcharge. Rather, it says, Mr. Finkel's evidence showed only his subjective belief as to the electronic networks involved in his foreign ATM transactions, no contextual facts in connection with the Account Agreement and no common surcharge applied by Coast Capital to foreign ATM transactions. In addition, Ms. McNeill's evidence showed that more than one network may be involved in a foreign ATM transaction and that Coast Capital simply receives a direction to pay an already converted sum in Canadian currency whenever a member initiates such a transaction.

[89] Given the foregoing, Coast Capital contends there was no basis in fact for the conclusion that Mr. Finkel's interpretation of the Account Agreement could apply to all foreign ATM transactions on a class-wide basis. The evidence does not show an express term in the Account Agreement such as that alleged in paragraph 7 of the second amended notice of civil claim, it says, nor does it show any commonly known factual matrix for purposes of contractual interpretation. Further, it says, there was no basis in fact of any common surcharge or the electronic network rules involved in Mr. Finkel's transactions or those of other members. Taking into account Ms. McNeill's evidence, Coast Capital submits that, as with the unsubstantiated allegation regarding solicitation and promotion of the Foreign Exchange Services, the judge should have found there was no real common issue in respect of an alleged common surcharge.

[90] Coast Capital goes on to say that, in the absence of evidence of a surcharge, there was also no basis in fact for any common issue as to remedy under s. 172 of the *BPCPA*. This is so, it says, because a s. 172 restoration order requires the supplier to have acquired something due to a statutory contravention. However, the only evidence was that, acting on a direction to pay, Coast Capital paid out the amount of Canadian currency required by third parties to settle Mr. Finkel's foreign exchange transactions. In Coast Capital's submission, this unchallenged evidence refutes the unsupported assertion that Coast Capital imposed a surcharge.

[91] I am not persuaded by these submissions.

[92] The evidence established that there was a standard form account agreement and a standard fee schedule related to all class member account holders. As this Court held in *True Construction Ltd. v. Kamloops (City),* 2016 BCCA 173 at para. 34, "the factual matrix is of limited importance in the interpretation of standard form contracts". Given that the Account Agreement is a standard form contract, the absence of commonly known contextual facts is insignificant: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. Further, while I agree with Coast Capital that Mr. Finkel's subjective understanding of what the Account Agreement means is irrelevant, his proposed interpretation of the key term at issue, as an objective matter, is open on its language. In the circumstances, there was some basis in the evidence for the judge's finding of a common contractual term and his related finding of a common representation made to the *BPCPA* subclass.

[93] As to the purported lack of evidence of a common surcharge, Coast Capital's submissions concern the merits of the claim, not certification. The "surcharge" Mr. Finkel alleges is Coast Capital's collection of funds from member accounts for foreign currency ATM withdrawals in an amount that exceeds the exchange rates set by the Plus and Cirrus networks. This, he says, amounted to a breach of the Account Agreement and gives rise to a *BPCPA* claim even if Ms. McNeill's evidence concerning payment of third party charges from those funds is accepted as accurate.

[94] In my view, regardless of which other electronic networks might be involved in a transaction, who performs the conversion, whether Coast Capital retains or passes on the funds and the amount of each surcharge, the evidence demonstrated a factual basis for the existence of the impugned practice, however characterized. As discussed in *Microsoft,* at the certification stage the court is ill-equipped to weigh the evidence, assess the complexities of establishing the plaintiff's case or predict trial success. The judge did not err in declining to do so in connection with the alleged common surcharge issue.

Can the nature of the transactions be determined on a class-wide basis?

[95] Coast Capital submits that Justice Masuhara certified several questions related to the application of the *BPCPA* which cannot be determined without a finding on the purpose of each individual transaction. In particular, he certified as common questions: i) were the ATM

Foreign Exchange Services "consumer transactions" as defined in the *BPCPA*? ii) with respect to the ATM Foreign Exchange Services is Coast Capital a "supplier" as defined in the *BPCPA*? and iii) are the Class Members "consumers" as defined in the *BPCPA*?

[96] According to Coast Capital, the answers to these questions are beset with individuality. They are also inconsistent with the creation of a *BPCPA* sub-class, which recognized that individual determinations of whether a transaction was for personal or business purposes would be required. In its submission, it follows that certifying these questions as common issues was an error. This is so, it says, because there was no basis in fact for a class-wide determination of the *BPCPA* claims.

[97] I see no merit in this submission. As the judge noted, the Account Agreement contained a term to the effect that a personal account could be used only for personal, not business, purposes. This provided a basis in fact for a class-wide determination of the certified questions, even though individual issues might still remain. As the judge noted further, the question of whether a particular account holder acted "for purposes that are primarily personal, family or household", and thus participated in a consumer transaction, can be determined objectively. To the extent necessary, it can also be appropriately addressed following the common issues trial.

Should the pleaded defences have been taken into account?

[98] In addition to various liability issues, Justice Masuhara certified some common issues related to remedies: i) if the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should Coast Capital restore all Forex Surcharges that the Subclass paid? ii) if the Court finds that Coast Capital engaged in deceptive acts or practices contrary to the *BPCPA*, should a monetary award be made in favour of the Class and, if so, in what amount?; and iii) if so, is Coast Capital liable to Class Members for breach of contract and, if so, in what amount? In Coast Capital's submission, he erred in doing so without considering its pleaded defences, such as alleged failure to comply with notice requirements or statutory limitation periods.

[99] According to Coast Capital, the relevant limitation period for each class member is an individual issue, which strongly militated against certification of remedies-related questions as common issues. In addition, just as there was no basis in fact to certify entitlement to

aggregate damages as a common issue, it says, there was no basis in fact to certify any remedial issue. In particular, it says, there could be no class-wide determination of the amount of any remedy for any of the pleaded causes of action. In these circumstances, it contends, the judge erred in certifying the remedies-related questions as common issues.

[100] Again, in my view, Coast Capital's submissions go to the merits, not certification. Like the question of individual consumer transactions, the limitation questions can be appropriately addressed following the common issues trial. In addition, and in any event, the limitation period defences are not decisive of the litigation given that the claims span several years of transactions which fall outside any possibly applicable limitation period. As Justice Bauman (as he then was) stated in *Pausche v. British Columbia Hydro & Power Authority*, 2000 BCSC 1556; aff'd 2002 BCCA 62:

> [38] If the limitations issue is not by itself decisive in the context of certification in a particular case, it follows that it is a matter that can properly be considered later on an individual basis, after the disposition of the common issues.

[101] As to Coast Capital's assertion that because the judge declined to certify aggregate damages as a common issue there was no basis in fact to certify any of the remedial issues, I am unpersuaded. His approach to aggregate damages was consistent with Justice Rothstein's statement in *Microsoft* at para. 134 to the effect that the ultimate decision as to whether aggregate damages should be available should be left to the common issues judge. It was also adopted in the absence of evidence or submissions in respect of the issue. In my view, his conclusion that there is a common issue as to the class members' entitlement to damages, being the sum of the Forex Surcharges, is unassailable.

Did Justice Masuhara err in finding that a class proceeding is the preferable procedure?

[102] Finally, Coast Capital contends that Justice Masuhara misdirected himself in para. 111 of his reasons in stating "… [t]he CPA sets the preferability test in relation to the resolution of the common issues and not the entirety of the class members' claims." In its submission, this was an incorrect interpretation of the *Class Proceedings Act* which failed to recognize the need to consider the claims as a whole and conduct a cost-benefit analysis, an analysis that he failed to undertake. It submits further that his purported failure in this regard

amounted to an extricable error of law which displaces any deference otherwise due to his analysis on the preferable procedure requirement.

[103] According to Coast Capital, given the number and nature of the individual issues, a class proceeding is simply not the preferable procedure. This is so, in part, it says, because certification of any common issues would only begin the litigation. It would also create undue complexities and would not achieve any sort of meaningful access to justice or judicial economy. In these circumstances, Coast Capital submits that, as in *Tiemstra v. Insurance Corporation of British Columbia* (1997), 38 B.C.L.R. (3d) 377 (C.A.), certification is plainly not worth the trouble and expense.

[104] I do not accept Coast Capital's submissions. In my view, the judge did not misdirect himself on the preferability criterion. On the contrary, read as a whole, it is clear from his reasons, including the entirety of para. 111, that he applied the correct test and undertook the necessary analysis on the preferable procedure requirement, as outlined in *AIC*. In doing so, he made no extricable error of law as alleged or otherwise. Nor did he err in principle or reach a decision that was clearly wrong. It follows that his conclusion that a class action is the preferable procedure is entitled to deference.

Conclusion

[105] I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Groberman"