COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Good Guys Recycling Inc. v. 676083 B.C. Ltd.,*
2023 BCCA 128

Date: 20230323
Docket: CA47904

Between:

Good Guys Recycling Inc.
(formerly known as Revolution Resource Recovery Inc.)

Appellant
(Defendant)

And

676083 B.C. Ltd.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Bauman
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated October 22, 2021 (*676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCSC 2072, Vancouver Docket S172912).

Counsel for the Appellant:	A.D.R. Delmonico J. Maryniuk
Counsel for the Respondent:	J.D. Winstanley J.E. Fung
Place and Date of Hearing:	Vancouver, British Columbia October 4, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 23, 2023

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Justice Griffin

Summary:

The appellant defendant appeals the decision of a chambers judge certifying an action as a class proceeding arising out of the appellant's contracts for its recycling services. The respondent plaintiff brought a number of claims pertaining to two classes: the "surcharge class", and the "restraint of trade class". In 2019, the chambers judge refused to certify the action, but allowed the plaintiff to re-apply for certification in its restraint of trade claim on terms. The plaintiff appealed and the defendant cross-appealed. In 2021, this Court dismissed the defendant's cross-appeal and allowed the plaintiff's appeal in part, granting leave to the plaintiff to re-apply for certification of the breach of contract claim for the surcharge class. In 2021, the plaintiff re-applied for certification of both claims, and the judge certified the action. On this appeal, the appellant says the certification judge erred:

(1) in finding the breach of contract claim disclosed a reasonable claim for expectation damages and the claim for expectation damages raised common issues for the surcharge class; (2) in finding the restraint of trade claim raised common issues; (3) in finding that a class proceeding is the preferable procedure for resolution of the breach of contract issues; and (4) by appointing the respondent as the representative plaintiff for the restraint of trade class.

Held: Appeal dismissed. The judge did not err in finding that the respondent plaintiff's latest pleading disclosed a valid cause of action for breach of contract and this Court did not limit the breach of contract claim to one of nominal damages alone. In addition, the respondent met the appropriate evidentiary basis to show that the claim for expectation damages raised common issues. It was not open to the appellant defendant to challenge on this appeal this Court's previous conclusion that the restraint of trade claim raised appropriate common issues.

The judge did not err in concluding that a class proceeding would be the preferable procedure. The appellant has not established errors in principle and this Court will not reweigh the evidence and factors assessed by the judge. Finally, the judge did not err in finding that it was necessary to appoint the respondent to represent the restraint of trade class in order to avoid substantial injustice.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This is the second time this class proceeding has been before this Court on appeal from an order made following a certification application under section 4 of the *Class Proceedings Act*, RSBC 1996, c 50 [*CPA*]. Previously, the appellant (defendant), Good Guys Recycling Inc., was known as Revolution Resource Recovery Inc. In these reasons, I shall refer to it as "Good Guys/Revolution" or "the appellant". I shall refer to the respondent (plaintiff), 676083 B.C. Ltd., as "676".

[2] The facts and background are fully canvassed in the previous decisions: the first certification decision, indexed as *676083 B.C. Ltd. v Revolution Resource Recovery Inc*., 2019 BCSC 2007 ("*676 SC #1*"); the first appeal, indexed as *676083 B.C. Ltd. v Revolution Resource Recovery Inc*., 2021 BCCA 85 ("*676 CA*"); and the second certification decision, from which this appeal is taken. That decision is indexed as *676083 B.C. Ltd. v Revolution Resource Recovery Inc*., 2021 BCSC 2072 ("*676 SC #2*").

[3] For present purposes, it is sufficient to note that 676 is a former customer of the appellant, which provides waste disposal and recycling services to commercial customers. In its proposed class action, 676 advanced a number of causes of action covering two discrete claims pertaining to two classes: the "surcharge class", and the "restraint of trade class".

[4] First, 676 alleged on behalf of the surcharge class that, since April 2015, Good Guys/Revolution routinely overcharged its customers by billing surcharges said to represent municipal fines, levies, and other charges, without actually incurring those surcharges and without authority under its form of agreement. 676 alleged that instead of passing on the charges as incurred, which the contracts permitted, Good Guys/Revolution billed an arbitrary 18% surcharge that was untethered to what actual costs, if any, Good Guys/Revolution incurred. 676 sought damages for breach of contract and unjust enrichment in that regard.

[5] Second, 676 alleged on behalf of the restraint of trade class that Good Guys/Revolution routinely relied on certain clauses in its form of agreement to make it difficult for its customers to avoid an automatic renewal of the term, or otherwise to terminate their agreements and change service-providers. 676 sought to have those clauses declared void and unenforceable as unconscionable and in restraint of trade.

[6] In *676 SC#1*, the certification judge refused to certify the action. In essence, he found that the surcharge class's proposed claim in unjust enrichment, as it was pleaded, did not disclose a viable cause of action (at paras 42–43), and concluded that the proposed breach of contract claim did not raise common issues (at para 91).

[7] With respect to the restraint of trade class, the judge concluded that all of the elements of the certification test had been met except for the requirement that 676 show that it is a suitable representative plaintiff for that class (at para 185). The problem identified was that 676 was no longer a current customer of the appellant (at para 169).

[8] In these circumstances, the judge granted 676 or its replacement leave to re-apply for certification of the claim in restraint of trade, provided that the application be brought by a different representative plaintiff who was a current customer of Good Guys/Revolution, or 676 demonstrate that its appointment is necessary to avoid a substantial injustice (at para 190).

[9] 676 appealed and Good Guys/Revolution cross-appealed. In *676 CA*, this Court dismissed the cross-appeal and allowed the appeal in part.

[10] The appeal concerned the surcharge claim. This Court agreed with the certification judge that 676's claim in unjust enrichment did not disclose a cause of action, and concluded that 676 should not be permitted to amend its pleadings further in that regard, or to re-apply for certification of that claim (at para 61). This Court held, however, that 676 should be permitted to re-apply for certification of the breach of contract claim subject to certain amendments and conditions (at para 152). Those included:

- restating the description of the surcharge class (at para 86) to read:

  > All persons [resident in British Columbia] who had contracts with [Good Guys/Revolution] … from April 1, 2015 to the present … and who were charged a Government Surcharge/Material Ban of 18%.

- reformulating the following three questions as suitable breach of contract common issues (at paras 141 and 153–159):

  1) Did Revolution breach the terms of the customer service agreements by charging a Government Surcharge/Material Ban in the amount of 18%?
  2) If the answer to common issue (1) is yes, is Revolution liable to the Class Members for breach of contract and, if so, in what amount?
  3) Can the damages sought by the plaintiff and other members of the Surcharge Class be calculated on an aggregate basis for the Class as provided by the [*CPA*]?

[11] The cross-appeal concerned the restraint of trade claim. This Court upheld the certification judge's finding that the pleadings disclosed a cause of action and that the test for certification was met except for the suitable representative requirement (at paras 181–185). In this Court's view, the certification judge did not err in granting 676 or a replacement representative plaintiff leave to re-apply to certify the restraint of trade claim (at paras 186–187).

[12] In the wake of *676 CA*, 676 re-applied for certification of both claims, leading to *676 SC #2*. In that decision, the certification judge found that all requirements for certification had been met and granted the order certifying both claims. In the submission of the appellant, how this Court's decision ought to have been applied in that second certification application is central to the appeal.

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

2. THE JUDGMENT BELOW: 676 SC #2

[14] After reviewing the procedural history outlined above, the certification judge referred to the steps taken by 676 to fulfil the conditions for certification set out in his previous order and in this Court, and summarized the position taken by Good Guys/Revolution:

> [13] First, 676 has amended its pleading to align with those orders. It has deleted the causes of action that the Court of Appeal and I found to be unsustainable. It has also reformulated the claim in contract so that it now pleads the specific allegation identified by the Court of Appeal as giving rise to the common issues specified.
>
> [14] Second, the application now before the Court seeks to have the action certified for both classes, with the Surcharge Class now defined in the manner ordered by the Court of Appeal. 676 seeks to proceed on behalf of the Surcharge Class with the three common issues that the Court of Appeal held to be suitable for that class.
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> [15] Finally, 676 argues that it has solved the problems that precluded it from being appointed as the representative plaintiff at the first certification application. It says that, assuming the Surcharge Class is certified, it can, as a member of that class, properly serve as the representative plaintiff for both classes. Alternatively, it claims to have adduced evidence satisfying the test under s. 2(4) of the *CPA* by demonstrating that appointing a representative outside the Restraint of Trade Class is necessary to avoid a substantial injustice to that class. It has also prepared a more robust litigation plan.
>
> [16] 676 also seeks, in the further alternative, to have a different representative appointed for the Restraint of Trade Class should that prove to be necessary. For reasons that I will explain later, however, I directed this application to proceed, at least in the first instance, with 676 as the only proposed representative plaintiff.
>
> [17] Revolution argues that 676 has, on this second application, failed to satisfy many elements of the certification test, as follows:

a) with respect to the contract claim, all elements are in dispute, other than the existence of an identifiable class as required by ss. 4(1)(b); and

b) with respect to the restraint of trade claim, the only element in dispute is the suitability of 676 to serve as representative plaintiff for that class under ss. 4(1)(e).

[15] The judge then referred to the test for certification set out in section 4(1) of the *CPA*:

> 4 (1) …the court must certify a proceeding as a class proceeding on an application under section 2 … 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.

[16] With respect to the breach of contract claim, the elements in issue were paragraphs (a) (whether the pleadings disclosed a cause of action), (c) (whether the claims raised common issues, and (d) (whether a class proceeding would be the preferable procedure). These remain in issue on this appeal. The last element, (e), concerning an appropriate representative plaintiff, was an issue for both the surcharge class and the restraint of trade class, but remains an issue on this appeal only in relation to the restraint of trade class.

[17] Next, the judge set out 676's amended pleading concerning its breach of contract claim:

> [19] 676 pleads the reformulated claim in contract in the following paragraphs of the proposed 5th Amended Notice of Civil Claim ("ANOCC"):
>
> Part 1 (Statement of Facts)
>
> 11. Revolution provides waste management and recycling disposal services to its clients in the GVRD. The terms of Class members' contracts with Revolution are set out in Revolution's customer service agreements, which include Revolution's written standard form "General Conditions". The General Conditions include a term that Revolution may charge its customers surcharges, fines, or levies where those costs were incurred by Revolution in the course of providing services to the customer.
>
> 12. Beginning in April, 2015, and continuing throughout the Class Period, Revolution charged the Surcharge Class a Government Surcharge/Material Ban in the amount of 18% of the Surcharge Class Member's invoice (excluding the charges for "Processing Fee", "Fuel and Environmental" and GST).
>
> 13. The Government Surcharge/Material Ban was charged at a uniform, fixed rate of 18% and bears no relation to the surcharges, fines, or levies incurred by Revolution in relation to the Organics Disposal Ban, the Tipping Fee Bylaws, or other any other surcharges, fines or levies incurred by Revolution in the course of providing services to the Surcharge Class Members.
>
> Part 2 (Relief Sought)
>
> 19. The plaintiff claims against Revolution as follows:
> …
>
> (b) damages for breach of contract in the form of expectation damages, and in the alternative, nominal damages …
>
> Part 3 (Legal Basis)

21. Revolution breached the customer service agreements by charging the Government Surcharge/Material Ban at a uniform, fixed, and arbitrary rate of 18%, which bears no relation to any corresponding fines, levies, or surcharges incurred by Revolution in the course of providing services to the Surcharge Class Members. The customer service agreements do not authorize Revolution to charge the Surcharge Class Members a fine, surcharge or levy at a fixed rate of 18% of each Surcharge Class Member's invoice.

22. In particular, the Government Surcharge/Material Ban is not authorized by any of the "General Conditions", including the "Fines" clause, which would require Revolution to establish, prior to charging a fine, levy or surcharge, that the fine, levy or surcharge was actually incurred by Revolution in the course of providing services to the customer. No such analysis was conducted by Revolution in relation to the Government Surcharge/Material Ban, which it charged to all Surcharge Class Members at an arbitrary and uniform rate of 18%.

23. Revolution is liable to the Surcharge Class Members for damages for breach of contract in the total amount of the Government Surcharge/Material Ban paid by the Surcharge Class Members minus any portion of the Government Surcharge/Material Ban actually incurred by Revolution in the course of providing services to the Surcharge Class Members.

[18] The judge rejected Good Guys/Revolution's assertion that this pleading failed to disclose a valid cause of action for damages in contract:

> [24] I am satisfied that 676 has pleaded a viable claim for expectation damages measured as the difference between the 18% charged and what the class members, in each case, should have paid had Revolution complied with its obligations under the contract. The loss for which 676 seeks to be compensated is the difference between those two figures, which is alleged to have been caused by the breach that is pleaded. But for Revolution's wrongful imposition of the surcharge at that arbitrary rate, it is alleged, the class members would not have suffered such a loss.
>
> [25] If, in any particular case, it turns out that the class member suffered no such loss, or 676 is unable to show that it did, then nominal damages may indeed be the only remedy available. At this early stage, however, it is impossible to predict how many class members, if any, will ultimately find themselves in that position. In any event, none of that is relevant in assessing the viability of the claim as pleaded.
>
> [26] Revolution also argues that the reformulated contract claim is deficient for failure to plead essential facts, including which terms of the contract are alleged to have been breached, and whether those terms were express or implied.
>
> [27] I find no fault with 676's pleading on that ground either. It is sufficient that 676 pleads that Revolution had no right under the CSAs to impose the Government Surcharge/Material Ban as it did. It is for Revolution, in its response, to identify the contractual source of its authority to do so.
>
> [28] In summary, I am satisfied that 676's latest pleading discloses a valid cause of action in damages, including expectation damages, for breach of contract.

[19] With respect to the common issues, which this Court had framed, the judge declined to accept the position of Good Guys/Revolution that the proposed common issues had to be reformulated further so that the available remedy was restricted to nominal damages alone:

> [33] I disagree. In [*676 CA*], the Court of Appeal identified a possible path to liability and an award of damages on these pleadings that may not require 676 to broach the individual issues that I was concerned with. The viability of that path depends on the outcome of the common issues trial. For the reasons set out in paras. 153-158 of the Certification Appeal Reasons, moreover, I cannot assume that that outcome will foreclose 676 from obtaining, through the common issues trial, a class-wide finding of liability or even quantification of damages, including expectation damages, which may be held to be calculable as aggregate damages.
>
> [34] The Court of Appeal has since reiterated that the availability of aggregate damages is a suitable common issue on the facts of this case: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, at paras. 133-139.
>
> [35] It follows that 676 has satisfied this element of the certification test for both classes.

[20] Turning to the question of preferability in relation to the breach of contract claim, the certification judge observed that although he had already found that a class proceeding was the preferable procedure for the

resolution of the restraint of trade claim, neither he nor this Court had considered "whether the same is true for the contract claim, even in its previous iteration, let alone the current one" (at para 36).

[21] The judge rejected the arguments of Good Guys/Revolution that, first, too many individual issues would remain outstanding following the conclusion of the common issues trial, without 676 making adequate provision in its litigation plan for resolving them, and, second, the Civil Resolution Tribunal ("CRT") offered a preferable procedure for resolving the claims in issue.

[22] On the question of whether individual issues would overwhelm common issues, the judge was of the view that it was not yet clear to what extent this might be so, and that in any event, resolution of the common issues would advance the litigation significantly (at para 56).

[23] As to the preferability of the CRT, the judge agreed with 676 that adjudicating the surcharge claim within the rubric of the class action would be fairer and comparatively more efficient than leaving individual claims to be prosecuted by class members on their own before the CRT (at para 59). Given that a class proceeding had already been found to be the preferable procedure for resolving the restraint of trade claim, and the overlap in membership in the two proposed classes, the judge was of the view that it would be more efficient to litigate them both together, and that the goals of access to justice, judicial economy, and behaviour modification all suggested that a class action would be the preferable procedure for resolving the contract claim (at paras 61–62).

[24] Finally, the certification judge turned to the last element, the suitability of 676 as a representative plaintiff. The principal issue concerned the restraint of trade class. This Court had ruled that the judge did not err in rejecting 676 as it was no longer a member of the class, and was also right to grant 676 or a replacement plaintiff leave to re-apply. On its reapplication, 676 took the position that its appointment as a non-member was necessary to avoid the risk of a "substantial injustice to the class", thus complying with section 2(4) of the *CPA*. After considering 676's evidence, the judge agreed. The judge concluded that 676 could properly serve as a representative plaintiff for both classes (at para 86).

[25] Having found all elements of the certification test satisfied, the judge granted the order for certification on the terms sought by 676 (at para 87).

3. ON APPEAL

3.1 Issues and standard of review

[26] Before us, the appellant submits that the certification judge erred in finding that 676 had met the requirements of section 4(1) of the *CPA* in the following four ways:

1) by finding that the breach of contract claim disclosed a reasonable claim for expectation damages (section 4(1)(a)), and that the claim for expectation damages raised common issues for the surcharge class (section 4(1)(c));

2) by finding that the restraint of trade claim raised common issues (section 4(1)(c));

3) by finding that a class proceeding was a preferable procedure for resolution of the breach of contract issues (section 4(1)(d)); and

4) by appointing 676 as the representative plaintiff for the restraint of trade class, and finding a risk of a "substantial injustice to the class" (section 4(1)(e)).

[27] This Court discussed the applicable standard of review in *Kirk v Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 at paras 39–42:

> [39] The standard of review applicable to an appeal from the certification of a class action depends on the nature of the issue under review.
>
> [40] A deferential standard of review applies to the judge's exercise of discretion. While section 4(1) of the *CPA* provides that the judge must certify the proceeding as a class action if the criteria are satisfied, the judge has some discretion in applying those criteria. Unless the chambers judge erred in principle or was clearly wrong in his or her exercise of discretion, this Court will not re-weigh the evidence and substitute its own conclusion for that of the judge: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 49, leave to appeal granted [2017] S.C.C.A. No. 408 [appeals dismissed 2019 SCC 42].
>
> [41] Questions concerning the application of a statutory provision to a set of facts are questions of mixed fact and law. They are subject to substantial deference absent an extricable error of law which is reviewable on a standard of correctness: *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 108.
>
> [42] The standard of review applicable to the question of whether the pleadings disclose a cause of action has been described differently in different cases. In *Godfrey* at para. 54, Savage J.A. explained that appellate intervention is justified in the face of an error of law or principle:
>
> > [54] The law concerning the standard of review to be applied to a chambers judge's decision under s. 4(1)(a) was recently summarized in *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240. In *Sherry*, the Court observed that recent decisions have suggested that "an appellate court must defer to a conclusion reached under s. 4(1)(a) of the *Class Proceedings Act* in the absence of an error of law or principle, or the failure of the judge below to consider or weigh all relevant factors". (Para. 54.) The Court further noted another line of case law providing that the question of whether a pleading discloses a cause of action is a question of law, thus subject to the standard of correctness. (Para. 55.) The Court stated that these two lines of authority may be reconciled on the basis that the exercise of discretion may raise an extricable question of law and that, in any event, "both standards contemplate appellate intervention where an error of law or principle is found". (Para. 55.)

3.2 Expectation damages

3.2.1 Overview

[28] Notwithstanding this Court's decision in *676 CA*, delineating three suitable common issues for the breach of contract claim, the appellant submits that the expectation damages claimed in 676's 5th amended notice of civil claim ("ANOCC") cannot be assessed on a class-wide basis. It follows, the appellant argues, that the claim for expectation damages fails to meet the requirements of both sections 4(1)(a) (which requires that the pleadings disclose a cause of action) and 4(1)(c) (which requires that the claims of the class members raise common issues, whether or not they predominate over issues affecting only individual members). I turn first to the cause of action requirement.

3.2.2 Cause of action

[29] The appellant accepts that 676 has a viable claim for nominal damages for breach of contract, but maintains that the breach of contract claim as reformulated by this Court in *676 CA* is one for which only nominal damages are available. In the appellant's submission, expectation damages cannot be assessed except on an individual basis. Relying on *Atlantic Lottery Corporation Inc v Babstock*, 2020 SCC 19, the appellant maintains that if, as it submits, the remedy of expectation damages is not available on a class-wide basis, then no viable claim for breach of contract exists.

[30] In considering this argument, it is important to remember that the requirements in question look at two different things. Section 4(1)(a) asks whether the pleadings disclose a cause of action. It does not speak of common issues. That the claims raise common issues is what section 4(1)(c) requires. As I see it, the appellant's argument properly relates to the requirements of common issues and preferability, not to whether the pleadings disclose a cause of action.

[31] Here, the cause of action pleaded is breach of contract. Whether the appellant breached the terms of its contracts with its customers is the subject of the first common issue reformulated by this Court in *676 CA* (see para 10 above). As this Court observed at para 142, the common issue as reformulated raises the question of liability, which, in a claim of breach of contract, does not require proof of loss. Accordingly, as this Court went on to say at para 143, most of the appellant's concerns about the variability of its relations with its clients address questions of damages and not liability. The cause of action, then, is not, as the appellant suggests (and as the judge stated at para 24), a claim for expectation damages. It is a breach of contract claim.

[32] In my view, *Atlantic Lottery Corp*. is of little assistance in the present context. There, the plaintiffs' breach of contract claim did not assert any claim for nominal damages, but limited the claim to the non-compensatory remedies of disgorgement and punitive damages. Justice Brown, for the majority in a 5–4 decision, concluded that the claim had no reasonable prospect of success because, on the pleadings, neither remedy was available in law.

[33] In this case, 676 has pleaded a claim for nominal damages in the alternative, and it cannot be said on the basis of its pleadings that expectation damages are not available in law. The real question is whether the claim for expectation damages can be assessed as a common issue. Consequently, I can see no error in the judge's conclusion at para 28, that 676's latest pleading discloses a valid cause of action for breach of contract.

[34] Nor do I read this Court's decision in *676 CA* as limiting the breach of contract claim to a claim for nominal damages, although that could be the ultimate result. The reference in para 142 to nominal damages was in the context of noting that a breach of contract claim does not require proof of loss to complete the cause of action. What this Court did was grant leave to 676 to seek certification of the reformulated breach of contract common issues which included as issue #2 whether Revolution is liable to the class members for breach of contract and, if so, in what amount? The question of how damages ultimately would be assessed would be determined at the common issues trial.

3.2.3 Common issue

[35] Here, the appellant argues that in order to be suited to class-wide adjudication, the proposed common issue must be further reformulated so that the available remedy is restricted to nominal damages alone. This follows, the appellant submits, because 676 cannot obtain expectation damages without proving a separate breach of each contract. That the 18% surcharge may have been arbitrarily imposed throughout the class does not necessarily mean that an expectation loss has occurred in every case. The result might have been a loss for some, but no loss for others. Individual analysis would be required. Accordingly, the appellant asserts, what is missing is a class-wide causal link between the breach contemplated in common issue #1 and a claim for expectation damages.

[36] These concerns mirror those the appellant raised in *676 CA*: that 676 cannot circumvent individual inquiries in its intended damage assessment if expectation damages form part of it.

[37] The appellant argues that the essential question of whether the arbitrary rate of 18% was too high or too low will not be resolved by this or any other common issue, so that the common issues trial cannot yield a factual finding that any class member has or will suffer any loss, a prerequisite to class-wide entitlement to compensatory expectation damages.

[38] I disagree. Common issue #1 asks whether Good Guys/Revolution breached the terms of its agreements by charging a Government Surcharge/Material Ban in the amount of 18%. Common issue #2 asks whether, if the answer is yes, Good Guys/Revolution is liable for breach of contract and, if so, in what amount. The ANOCC pleads in para 23 the proposed basis for determining the amount in the event of such liability for breach of contract:

> …the total amount of the Government Surcharge/Material Ban paid by the Surcharge Class members minus any portion of the Government Surcharge/Material Ban actually incurred by Revolution in the course of providing services to the Surcharge Class Members.

[39] The certification judge found this to be a viable claim for expectation damages. If liability is found in accordance with common question #1 and the first part of common question #2, which can be assessed class-wide for the reasons discussed at some length in *676 CA*, then the aggregate damages provisions in section 29 of the *CPA* become available, at least potentially—see the discussion in *LaSante v Kirk*, 2023 BCCA 28 at paras 88–94.

[40] The appellant argues, however, that common issue #2, which includes an assessment of loss, ought not to be certified because 676 provided no "basis in fact" for a viable methodology to determine class-wide expectation damages. It submits that the basis proposed in para 23 of the ANOCC does not provide a valid "basis in fact" showing how expectation damages could possibly be determined or even approximated on a common basis for the surcharge class. In *676 SC #2*, this argument was raised in the context of the preferability analysis, where the judge said this:

> [53] Although, as Revolution argues, the allocation of aggregate damages to the class members in this case may likewise present "methodological difficulties" of a similar kind, they are unlikely to rise to the same level. If liability is established in this case, it may be possible to calculate, or at least approximate, the total value of the overpayments made by the class as a whole. Thereafter, it may also be possible to allocate damages among groups of class members according to criteria grounded in the evidence to be adduced, such as the total amount of fees that they paid over the relevant period, the duration of the particular contracts they had, the physical locations of the businesses involved and the nature of the waste that they generated.
>
> [54] In any event, many of Revolution's arguments about the need to address individual issues going to liability and damages are answered by s. 7 of the *CPA*, which states as follows:
>
> > Certain matters not bar to certification
> >
> > 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
> >
> > (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
> >
> > (b) the relief claimed relates to separate contracts involving different class members;
> >
> > (c) different remedies are sought for different class members;
> >
> > (d) the number of class members or the identity of each class member is not known;
> >
> > (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[41] I am unable to accept the appellant's argument in this regard. The Supreme Court of Canada discussed the methodology requirement in the much more causally-complex case of *Pro-Sys Consultants Ltd. v Microsoft*

Corporation, 2013 SCC 57 [*Microsoft*]:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.
>
> [Emphasis added.]

[42] This Court discussed the requirement further in *Miller v Merck Frosst Canada Ltd.*, 2015 BCCA 353. Mr. Justice Savage, for the Court, said this:

> [32] That said, the *Microsoft* decision suggests that plaintiffs are required, at the certification stage, to establish some type of method for testing the common issues.
>
> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in [*Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177], not every case will require expert evidence (para. 11).

[43] Additional guidance was provided by the Supreme Court in *Pioneer Corp. v Godfrey*, 2019 SCC 42, where Justice Brown observed at para 119 that methodology that is sufficient for the purposes of certifying loss as a common issue need not be sufficient for the purpose of establishing the defendant's liability to all class members. That will depend on the findings of the common issues trial judge.

[44] As the certification judge noted at para 33 of *676 SC #2*, this Court "identified a possible path to liability and an award of damages on these pleadings that may not require 676 to broach the individual issues. …The viability of that path depends on the outcome of the common issues trial."

[45] This Court did indeed consider essentially the same argument in *676 CA*, and I see no error in the certification judge's conclusion. Though stated in the cause of action context, the judge's remarks apply equally in this context:

> [24] I am satisfied that 676 has pleaded a viable claim for expectation damages measured as the difference between the 18% charged and what the class members, in each case, should have paid had Revolution complied with its obligations under the contract. The loss for which 676 seeks to be compensated is the difference between those two figures, which is alleged to have been caused by the breach that is pleaded. But for Revolution's wrongful imposition of the surcharge at that arbitrary rate, it is alleged, the class members would not have suffered such a loss.
>
> [25] If, in any particular case, it turns out that the class member suffered no such loss, or 676 is unable to show that it did, then nominal damages may indeed be the only remedy available. At this early stage, however, it is impossible to predict how many class members, if any, will ultimately find themselves in that position. …
>
> [Emphasis added.]

[46] There can be no doubt that 676 established some basis in fact for these propositions including "some evidence of the availability of the data to which the methodology is to be applied" (*Microsoft* at para 118).

[47] Moreover, the judge recognized that it would be open to the common issues trial judge to reach a number of different conclusions. This is consistent with *Pioneer Corp*. There, as noted, the Court observed at para 119 that the question of certifying loss as a common issue is quite different from the question of establishing the defendant's liability to all class members. As Brown J. put it:

> [120] It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that *all* class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that *no* purchasers suffered a loss…. Were that the case, the action would fail. Or, it might be that the trial judge finds that an *identifiable subset* of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.

[48] This Court stated in *676 CA* at para 158 that Brown J.'s guidance is "directly relevant in this case. The concerns raised by Revolution do not form a basis to oppose common issues (c) or (r)" [referred to as common issues #2 and #3 in these reasons].

[49] It is, of course, possible that, at the common issues trial, 676 will fail to show that all, most, or even some class members have suffered anything more than nominal damages, even if it establishes a class-wide breach of contract. But that is for another day. At this stage, it is worth remembering that a certification hearing is procedural and not the forum where the merits of the action are decided. The common issue criterion is not a high legal hurdle; the onus on the applicant is simply to provide a minimum evidentiary base that shows some basis in fact for each proposed common issue: *LaSante* at para 61. As the Supreme Court pointed out in *Microsoft*:

> [105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[50] I remain of the view this Court expressed in *676 CA*: the concerns raised by Good Guys/Revolution on this appeal do not form a basis to oppose common issue #2.

3.3 Restraint of trade

[51] As reviewed above, in *676 SC #1*, the certification judge found that all of the requirements for certification of the restraint of trade claim had been met, with the exception of the requirement under section 4(1)(e) that there be a suitable representative plaintiff. In doing so, the judge found proposed restraint of trade common issues (f) and (h) to be suitable common issues for the purposes of the requirement under section 4(1)(c). Question (f) asked whether the impugned clauses in the appellant's agreements "operate to create a restraint of trade". Question (h) asked whether, assuming a positive answer to question (f), the impugned clauses are contrary to the public interest.

[52] The appellant challenged the judge's finding on the suitability of the restraint of trade common issues in its cross-appeal. That cross-appeal was dismissed in *676 CA*. There, Mr. Justice Voith, for the Court, concluded:

> [181] I am satisfied, subject to the cautions I have expressed, that the chambers judge's conclusions in relation to the suitability of common issue (h) were correct. I would dismiss this aspect of Revolution's cross

appeal.

[53] Before us, the appellant nevertheless submits that question (h) ought not to have been certified as a common issue, effectively seeking to re-argue its cross-appeal in the hope that this Court will now overrule itself. It does so because, the appellant advises, when preparing for this appeal, it became aware of case law supporting its argument of which it was unaware at the time of the previous hearing.

[54] In the face of skepticism expressed by this Court at the oral hearing, the appellant chose not to argue the point—yet did not abandon it, relying on its factum.

[55] In any form, I find this submission astonishing and singularly devoid of merit. The appellant did not apply for a hearing before a division of five Justices of Appeal for the purpose of overruling the previous decision. The time to raise the arguments that it now seeks to rely on has long passed. The matter has been decided, and there is no mulligan. I would reject this ground of appeal.

3.4 Preferable procedure

3.4.1 Overview

[56] As discussed, one of the requirements a plaintiff must meet in order to obtain certification of a proceeding is that set out in section 4(1)(d) of the *CPA*: that a class proceeding "would be the preferable procedure for the fair and efficient resolution of the common issues".

[57] By section 4(2):

> (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.

[58] It will be recalled that the issue of preferability was considered in *676 SC #1* only in relation to the restraint of trade claim. Although the issue was argued in relation to the breach of contract claim and was the subject of evidence, the certification judge did not have to address it once he found that the breach of contract claim did not raise common issues.

[59] For the restraint of trade claims, the judge concluded at para 166 that a class action was the preferable procedure for their resolution and there was no realistic alternative. He did not certify the claim, however, because he found that 676 had not demonstrated that it was a suitable representative plaintiff. He granted leave to re-apply. Good Guys/Revolution's cross-appeal challenged the judge's conclusions concerning the suitability of the common issues in the restraint of trade claim and the identifiable class requirement. As noted, that cross-appeal was dismissed. Good Guys/Revolution did not challenge his finding that a class action was the preferable procedure for resolving the restraint of trade claim.

[60] Accordingly, the question of whether a class action was the preferable procedure for resolving the breach of contract claim was addressed for the first time in *676 SC #2,* where the appellant argued that a class action was not the preferable procedure for resolving the contract claim because (at para 39):

> a) too many individual issues will remain outstanding following the conclusion of the common issues trial and 676 has made inadequate provision for resolving them in its litigation plan; and
>
> b) the [CRT] offers a preferable procedure for resolving the claims in issue.

[61] As we have seen, the judge disagreed:

> [62] Having considered the factors set out in in s. 4(2) of the *CPA* in light of the goals of access to justice, judicial economy and behaviour modification, I am satisfied that a class action is the preferable procedure for resolving the contract claim.

[62] A certification judge's assessment of whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues is entitled to "special deference because it involves weighing and balancing a number of factors": *AIC v Fischer*, 2013 SCC 69 at para 65, citing *Pearson v Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 43, 2006 CanLII 913 (CA); *Lewis v WestJet Airlines Ltd*., 2022 BCCA 145 at para 46. This Court will not re-weigh the evidence and substitute its own conclusion for that of the judge. It will interfere only in the case of "errors in principle which are directly relevant to the conclusion reached": *Fischer* at para 65.

[63] Here, the appellant submits that it has identified four errors of principle in the certification judge's analysis under this requirement. These focus on the first factor listed under section 4(2): "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members".

[64] In view of these errors of principle, the appellant asserts, the judge's conclusion is owed no deference and should be reversed. These errors are as follows:

1) the judge failed to apply the "some basis in fact" standard;

2) the judge imposed a reverse evidentiary onus on the appellant;

3) the judge certified without sufficient evidence to determine the predominance factor; and

4) in failing to find that individual issues would predominate, the judge failed to consider or address arguments presented by the appellant.

[65] As the fourth alleged error makes clear, the gist of the appellant's argument is that the judge ought to have found that individual issues predominated over common issues. Because the judge did not come to that conclusion, finding instead that he could not yet say which predominated, the appellant says his weighing of the factors was incomplete and his determination must be set aside.

[66] For the reasons I develop below, I conclude that the appellant has established no errors in principle, but is in fact asking this Court to reweigh the evidence and the factors. It is not open to this Court to do so.

3.4.2 Errors in relation to the "some basis in fact" standard, onus of proof, and insufficient evidence

[67] The first three errors in principle alleged by the appellant intertwine, and I shall consider them together.

[68] The appellant asserts that the judge failed to determine whether 676 had made out the "some basis in fact" requirement, which it asserts is a "necessary inquiry", so that failure to consider it is an error in principle. In the appellant's submission, the judge did not analyse any of 676's evidence in considering preferability, but rather considered only new evidence put forward by Good Guys/Revolution, thereby reversing the onus of proof. The judge then concluded at para 56 that "it is not yet clear whether, or to what extent, the common issues predominate over the individual issues, or vice versa".

[69] In these circumstances, the appellant argues, the judge ought to have refused certification on the ground that 676 had not satisfied the onus on it, or at least ought to have adjourned the matter for further evidence.

[70] The appellant refers to *Kirk* at paras 99 and 132. Those excerpts from *Kirk* discuss the "some basis in fact" standard in the context of considering the common issues requirement (4(1)(c))—where the burden is on the applicant to show "some basis in fact" for each proposed common issue: see para 46 above. Nevertheless, the appellant is correct in asserting that the applicant must show "some basis in fact for each of the certification requirements…other than the requirement that the pleadings disclose a cause of action": *Hollick v Toronto (City),* 2001 SCC 68 at para 25. That demonstrates the low hurdle that the applicant is obliged to surmount, and, in my view, illustrates that the appellant's argument misapprehends the function of the "some basis in fact" standard.

[71] In a certification proceeding, there is no obligation on the applicant to prove anything in the sense of establishing a proposition on a balance of probabilities. That is for the common issues trial. When it comes to the requirements for certification, the applicant need only show that it is not "plain and obvious" that the pleadings disclose no cause of action, and that there is some basis in fact for the other requirements.

[72] In relation to section 4(1)(d), then, the obligation is to show some basis in fact for determining that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. That basis was in the extensive evidentiary record going back to the first application. In this context, the words "some basis in fact" do not constitute a magic formula that must be expressly applied by the judge to each finding. It is a standard specifically applicable to the quality of evidence, and in this case, the judge reviewed the evidence and the facts in detail in coming to his conclusion in relation to this requirement. The appellant did not argue before the judge that 676 failed to show some basis in fact on the preferability question. Rather, the appellant's argument focused on the totality of the evidence and what conclusions the judge should draw from it.

[73] As noted, in considering preferability, the judge must consider the matters set out in section 4(2). Those comprise factors to be weighed by the judge on the basis of the evidence, not a checklist of propositions to be proven. With respect to the predominance factor (section 4(2)(a)), for instance, the "some basis in fact" test will have already been applied in determining what questions of fact or law are common to the members of the class, and indeed a good portion of the judgments rendered in this matter review the relevant facts in considerable detail, culminating in the three breach of contract common issues reformulated by this Court. The judge will also consider evidence relevant to the existence of individual issues, such as the appellant adduced.

[74] What remained, then, was for the judge to weigh the evidence in assessing whether the common issues or the individual issues predominated. That is precisely what he did.

[75] In discussing that factor, the appellant submits, the judge focused solely on "Revolution's new evidence" instead of asking whether 676 had met the "some basis in fact" standard, and then certified despite concluding that it was not yet clear whether the common issues would predominate or not.

[76] I do not accept that the judge focused solely on "Revolution's new evidence". The judge's role, of course, was to consider and weigh all of the evidence. In that regard, he had before him the complete record from *676 SC #1*, as well as new evidence adduced by the appellant in *676 SC #2*.

[77] Parenthetically, I note that there is no merit whatsoever to the appellant's argument that, because preferability was not decided in *676 SC #1*, the record before the court on that application is irrelevant. The question of preferability was very much in issue on that application, and a good deal of relevant evidence was filed. That same record remained available to the judge at the second hearing.

[78] As quoted above, what the judge said in *676 SC #2* was this:

> [44] I am not persuaded that this new evidence, alone or in combination with the evidence previously adduced, demonstrates the predominance of individual issues pertaining to liability or damages.
>
> [Emphasis added.]

[79] In other words, the judge was pointing out that the evidence previously adduced did not demonstrate the predominance of individual issues, and Good Guys/Revolution's new evidence did not help. That is not reversing the onus. It is weighing the evidence.

[80] The appellant objects that the judge nevertheless failed to come to a conclusion about predominance, finding at para 56 that it was "not yet clear whether, or to what extent, the common issues predominate over the individual issues, or vice versa."

[81] The appellant says that, as a matter of law, the judge was obliged to determine whether individual issues did or did not predominate over common issues before weighing all of the factors to determine preferability. It argues that the judge's inability to resolve whether common or individual issues predominated meant that 676 failed the "some basis in fact" standard. Accordingly, the appellant submits the proper course would have been for the application for certification to be dismissed or adjourned to allow for better evidence to be adduced: *0790482 B.C. Ltd. v KBK No. 11 Ventures Ltd.,* 2021 BCSC 1761.

[82] I disagree for three reasons. First, the problem in *KBK No. 11* was much wider: the adjournment was not only to permit the plaintiff to tender further evidence regarding all of the requirements of section 4, but also to reformulate the proposed common issues. The judge's exercise of discretion in ordering an adjournment in that case establishes no principle of law.

[83] Second, the appellant's argument would elevate the "some basis in fact" standard into a "balance of probability" standard, which, as I remarked above, it most certainly is not. At no stage in the certification process is an applicant for certification obliged to prove facts on a balance of probabilities. As already stated more than once, the applicant need only adduce sufficient evidence to show "some basis in fact" for the proposition that the certification requirements are met.

[84] Third, the appellant has provided no authority for the proposition that the judge must determine whether individual issues do or do not predominate over common issues before weighing all of the factors to determine preferability. As this Court stated in *Lewis*:

> [45] … Section 4(2)(a), for example, in asking "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members," is not a binary enquiry. Instead, it requires some measured assessment.

[85] Once again: it is not required that each section 4(2) factor be established one way or another like a checklist. What is required is that they be considered and weighed. In this case, the judge found that on the current state of the litigation, taking into account all of the evidence, he was unable to conclude whether common issues or individual issues predominated. This was the result of a measured assessment. Whether one or the other or neither predominates does not answer the question of preferability. As Savage J., as he then was, put it in *Haghdust v British Columbia Lottery Corporation*, 2013 BCSC 16 at para 155, "the existence or predominance of individual issues is no bar to certification, but merely one factor to be considered among others".

[86] Where as here, the judge finds that he is unable to conclude which issues predominate at this stage, it is not due to a failure to meet the "some basis in fact" standard. Absent 676 establishing "some basis in fact", there would have been nothing for the judge to consider. Rather, it is the result of a full assessment of the evidence. As such, it becomes a matter the judge should weigh in his determination together with the other matters. It may weigh against a finding of preferability, or not. It may be appropriate to adjourn the matter, or not. That is in the judge's discretion. As Mr. Justice Smith of this Court observed in *Halvorson v British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para 23, certification is a "fluid, flexible procedural process".

[87] After concluding that it was unclear whether or to what extent common issues predominated over individual issues, the judge went on say that he was "satisfied, however, that resolution of the common issues will at least be likely to advance the litigation significantly for the members of the Surcharge Class." I see no error in principle in this approach.

3.4.3 Failing to address arguments that individual issues predominated

[88] The appellant maintains that the judge failed to consider or address three arguments on which the appellant relied in contending that individual issues predominated over common issues.

[89] The three ignored arguments, the appellant says, were these:

1) the need to consider that the 18% surcharge rate was analysed individually for some customers;

2) the need to consider individual issues and evidence arising from the appellant's pleaded limitation defence and defences of waiver and estoppel; and

3) that resolution of the breach of contract issues would not provide a substantive remedy to the surcharge class.

[90] In the appellant's submission, the failure to consider these arguments "constitutes reversible legal error that led the judge to conclude improperly that a class action was preferable", a proposition for which the appellant cites *0843003 BC Ltd v Inspire Group Development Corporation*, 2022 BCCA 3:

> [26] In my view, the judge's failure to consider the appellant's argument constitutes a reversible error of law, just as a judge's failure to deal with a pleaded cause of action is an error of law: see, for example, *Genesis Fertility Inc. v. Yuzpe*, 2021 BCCA 420. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada gave an analogous example:
>
> > [39] . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

…

[91] It has, of course, long been accepted that judges are not required to address or answer in their reasons for judgment every point raised in argument: see, for instance, *R v M E-H*, 2015 BCCA 54 at para 68, *Coast Mountain Aviation Inc v M. Brooks Enterprises Ltd.*, 2014 BCCA 133 at para 74, and *Siemens v Howard*, 2018 BCCA 197 at para 21. Consequently, citing the excerpt from *Inspire Group Development* as support for the broad proposition urged by the appellant is unhelpful.

[92] It is correct to say, as this Court did in *Inspire Group Development*, that a judge's failure to consider a particular argument may constitute a reversible error of law, but that is where, as in that case, the argument is: (a) sound in terms of both the evidence and the law, and (b) material to the conclusion the judge reached: see *8640025 Canada Inc (Re)*, 2019 BCCA 473 at para 76.

[93] I am satisfied that, to the extent the arguments upon which the appellant relies were material, they were adequately addressed by the judge. What the judge said about the appellant's arguments was this:

> [42] I have already noted that the proposed common issues trial offers the potential to resolve many if not all of the disputed questions of liability and damages for the Surcharge Class. The extent to which that potential is likely to be realised is difficult to assess at this early stage of the litigation.
>
> [43] Revolution has adduced new evidence on this second application with a view to demonstrating the various kinds of individual issues that, Revolution says, will still need to be addressed before it can be found liable. That evidence speaks to whether:
>
> a) Revolution conducted individualised assessments justifying the imposition of the Government Surcharge/Material Ban at 18%; and
>
> b) class members can be said to have agreed or acquiesced individually to the imposition of the Government Surcharge/Material Ban at that rate.
>
> [44] I am not persuaded that this new evidence, alone or in combination with the evidence previously adduced, demonstrates the predominance of individual issues pertaining to liability or damages.
>
> [45] The fact that Revolution may have conducted "waste audits" for some customers with a view to determining whether and to what extent to depart from the standard 18% charge may, but need not necessarily, give rise to individual issues. The degree to which any individual issues will predominate depends on the nature of the evidence to be adduced. The evidence pertaining to the waste audits may also be helpful in resolving the common issues, insofar as it illustrates the kind of analysis that 676 says should have been done for everyone but in most cases was not. The results of those audits may also assist, if liability is ultimately established, in quantifying the damages payable.
>
> [46] The complications that may arise because some class members agreed or acquiesced to various other written or oral terms were addressed at the first certification application. At para. 153 of [*676 SC #1*], I rejected a similar argument in the context of the preferability analysis relating to the restraint of trade claim, stating as follows:
>
> > [153] What will be left to be resolved following the conclusion of the common issues trial for the proposed Restraint of Trade Class, if 676 is successful, are any individual issues that may arise from the various handwritten and oral terms that delete or materially modify one or more of the impugned clauses. Many of those variations appear to fall into their own smaller categories, such as those that delete one or more of the impugned clauses, those that set shorter terms, those that allow for early termination by the customer, or those that stipulate that there is to be no automatic renewal. Some of those categories may be capable of being considered as subclasses within the rubric of the common issues trial itself. On the other hand, there may be many CSA's that will still require individual attention, depending on the outcome of the common issues trial. The complications that can be foreseen in that regard do not appear to be insurmountable, however. It does not appear that the individual issues would overwhelm the litigation, even at that stage.
>
> [47] Similarly, in [*676 CA*], the Court of Appeal concluded, in relation to the reformulated contract claim, that differences in the forms of agreement used "can likely be addressed through the creation of one or more subclasses" (at para. 145). The same reasoning can be applied to differentiate the treatment of those class members who may have agreed or acquiesced to pay the Government Surcharge/Material Ban at a rate of 18%, insofar as Revolution is able to establish that that occurred.

[48] This case is therefore distinguishable in various ways from *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 and *Winter v. British Columbia*, 2017 BCSC 871, which Revolution cites for the proposition that individualized defences "should not be brushed aside merely to fit the action into the mould of a class proceeding" (*Winter* at para. 31).

[49] *Gary Jackson* involved a joint venture to develop a commercial property. The plaintiff was one of only 15 or 16 investors in the project. Justice Hinkson, as he then was, refused to certify the action on behalf of a class comprised of those investors, for failure to meet the "preferable procedure" element of the certification test. In particular, he concluded that the defences raised (including "knowledge and consent, acquiescence, ratification and/or estoppel") made it likely that "evidence from and with respect to the various proposed class members" would have to be heard before the question of liability could be resolved (at para. 67). As a result, he concluded, the individual issues would "predominate the litigation if it is certified as a class proceeding, thus offering no real advantage in terms of judicial economy" (at para. 68). Furthermore, the fact that there were only 15 or 16 other class members meant that it would be equally efficient simply to join the other investors as co-plaintiffs without the need to certify the action under the *CPA* (at para. 69).

[50] *Winter* involved a claim brought on behalf of a number of employees of a college concerning their entitlement to severance pay on termination. Justice Kent refused to certify the action, for failure to state any properly-framed common issues (at para. 29). He went on, in *obiter*, to cite extensively from *Gary Jackson* in the context of the preferability analysis, concluding as follows:

> [34] The same may be true in the present case if three or four other individuals who signed the other versions of employment contract were joined as co-plaintiffs in this action or issued their own individual proceedings which were then tried together with this case. If the outcomes were favourable to the plaintiffs, resolution of similarly situated claims by others might readily follow.

[51] In this case, on the other hand, it is not yet clear whether the Court will have to hear from any class members individually in addressing the defences that Revolution has raised. Moreover, the economies of scale are of an entirely different order in a case such as this, involving thousands of class members with an interest in resolving common issues that, it has already been established, will significantly advance the litigation on their behalf.

[52] Revolution also cites the recent decision of this Court in *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228, as an example of a case, said to be like this one, in which a certification application was refused solely for failure to meet the preferability element of the certification test. One of the main grounds for that result was held to be the lack of a coherent plan for allocating among the proposed class members any damages award that might be made. In *Lewis*, the plaintiff was seeking disgorgement of monies alleged to have been saved by the defendant employer in failing to put in place an adequate workplace harassment policy. At para. 114, Horsman J. enumerated a number of unresolved "methodological difficulties" that would have to be addressed in any such allocation, many of which were seen to be all but intractable.

[53] Although, as Revolution argues, the allocation of aggregate damages to the class members in this case may likewise present "methodological difficulties" of a similar kind, they are unlikely to rise to the same level. If liability is established in this case, it may be possible to calculate, or at least approximate, the total value of the overpayments made by the class as a whole. Thereafter, it may also be possible to allocate damages among groups of class members according to criteria grounded in the evidence to be adduced, such as the total amount of fees that they paid over the relevant period, the duration of the particular contracts they had, the physical locations of the businesses involved and the nature of the waste that they generated.

[54] In any event, many of Revolution's arguments about the need to address individual issues going to liability and damages are answered by s. 7 of the *CPA*, which states as follows:

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

[55] Thus, it has been held that "the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding": *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781; *Sherry v. CIBC Mortgage Inc.*, 2014 BCSC 1199.

[94] The matter of individual contractual issues and defences (arguments 1 and 2) was sufficiently addressed by the judge in paras 43–51 and 54; the question of remedy (argument 3), already explored above, was discussed further in paras 52–55.

[95] The appellant nevertheless argues that in this discussion, the judge failed to carry out a full analysis of, for instance, the impact of different clauses in the contract, saying instead that subclasses can deal with this. But this was not a trial. At this stage, the parties, including the appellant, could not even say how many customers were involved in any given variation. The point is that the judge took these matters into account, and appropriately considered the relevant factors, including economies of scale given the thousands of class members.

[96] I am satisfied that the appellant's arguments were addressed as thoroughly as they deserved given the stage of proceedings. I see no error in principle here.

3.4.4 Conclusion on preferability

[97] In finding that 676 had met the requirement of section 4(1)(d) that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the judge weighed and balanced the appropriate factors. The appellant has established no error in principle, and accordingly, the judge's conclusion is entitled to deference. I would not accede to this ground of appeal.

3.5 Suitable representative plaintiff (restraint of trade class)

[98] The appellant says that the judge erred in finding that 676 could represent the restraint of trade class as a non-member of that class.

[99] In the appellant's submission, 676 cannot properly be certified as the representative plaintiff because it is not a member of the restraint of trade class, given that it is no longer a current customer of Good Guys/Revolution. Accordingly, the appellant says, 676 does not meet the requirement of section 2(4) of the *CPA*:

> (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

[100] The question is whether 676 properly established that it was necessary to be appointed as representative plaintiff "in order to avoid a substantial injustice to the class".

[101] In *676 SC #1*, the certification judge agreed with the appellant's position:

> [176] … The legislation requires in ss. 2(4) that a certified class should be represented by one of its own members unless it is shown that appointing a representative plaintiff outside the class is necessary to avoid a substantial injustice to the class. The extent to which 676, although not a member of the class, may still be adequately committed to the cause, says virtually nothing about whether its appointment is necessary in that sense.
>
> [177] It may be that the risk that no one will advance the claim if 676 is denied the opportunity to do so, is itself a "substantial injustice to the class" that ought to be avoided. What is missing here, however, is evidence to justify the conclusion that appointing a non-member such as 676 is necessary to avoid that risk. That evidence would have to include, at a minimum, an explanation as to why appointing a class member to serve in that capacity is not feasible in this case [citation omitted].

[102] The judge granted leave to re-apply for certification of the restraint of trade claim if the application were brought by a different representative plaintiff. Alternatively, 676 could re-apply if its application were supported by

evidence showing that its appointment was necessary to avoid a substantial injustice to the class. This Court did not disturb these findings in *676 CA*.

[103] In *676 SC #2*, the certification judge concluded that 676 had established what was required. The judge observed that in its application materials served on July 15, 2021, 676 had put forward a then-current customer of the appellant, Strata VR1072 ("VR1072") as a substitute representative plaintiff that was a member of the restraint of trade class. VR1072 shared the complaint that was the subject of the restraint of trade claim because it had attempted to terminate its contract with the appellant, but the appellant had insisted that the agreement remained in effect.

[104] The judge described what then occurred:

> [70] On September 3, 2021, however, the same day that Revolution delivered its response to this application, it also retrieved its bins from VR1072's premises and took the position in that response that VR1072 could not be a suitable representative for the Restraint of Trade Class because, among other things, it was no longer a member of that class, having recently elected to terminate its CSA.

[105] The judge explained:

> [75] The restraint of trade claim is aimed at addressing the difficulties that current customers of Revolution are alleged to encounter when they attempt to terminate their CSAs. A class member will be unlikely to come forward with a complaint about the termination process until it has sought to terminate its CSA and has encountered such a difficulty. Revolution may respond, as it did with VR1072 (at least in the first instance), by resisting the attempt to terminate. If, however, the frustration borne of that experience moves the class member to come forward to represent the entire class in this proceeding, as VR1072 sought to do, Revolution can frustrate that attempt too by relenting and accepting the termination.
>
> [76] In these circumstances, I am satisfied that it is necessary to permit a former customer like 676, who claims to have encountered similar difficulties in terminating its CSA, to represent the Restraint of Trade Class in advancing the restraint of trade claim. To continue to insist that only current customers can do so gives rise to a "substantial injustice", inasmuch as it leaves Revolution in a position to disqualify any aspiring representative and thereby avoid a successful certification application.

[106] The appellant argues that there is nothing new about this evidence, as the certification judge was already well aware of evidence that customers had difficulty terminating their agreements with the appellant. But what the judge did not have before him until *676 SC #2* was the evidence of what the appellant did in relation to VR1072: initially refusing to accept VR1072's termination of their agreement; learning that VR1072 was proffered as a substitute representative plaintiff; then picking up its bins in purported acceptance of the termination on the same day that it presented the position that VR1072 could not serve in that capacity by reason of not being a current customer.

[107] In view of this conduct, I am of the view that it was open to the judge to conclude, as he did, that it was necessary to appoint a representative plaintiff who is not a member of the class in order to avoid substantial injustice. I would not accede to this ground of appeal.

4. DISPOSITION

[108] For these reasons I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

“The Honourable Justice Griffin”