

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ocean Pacific Hotels Ltd. v. Lee*,
2025 BCCA 57

Date: 20250228
Docket: CA49394

Between:

Ocean Pacific Hotels Ltd.

Appellant
(Defendant)

And

Tonia Lee, Melissa Kramer, and Jerome Bansagon

Respondents
(Plaintiffs)

Corrected Judgment: The text of the judgment was corrected at paragraph 65 on
March 7, 2025.

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated
September 19, 2023 (*Lee v. Ocean Pacific Hotels Ltd.*, 2023 BCSC 1650,
Vancouver Docket S213604).

Counsel for the Appellant:

I.G. Nathanson, K.C.
J.K. Lockhart
A. McMahon

Counsel for the Respondents:

S.A. Quail
J. Wahba

Place and Date of Hearing:

Vancouver, British Columbia
October 18, 2024

Place and Date of Judgment:

Vancouver, British Columbia
February 28, 2025

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Chief Justice Marchand
The Honourable Justice Iyer

Summary:

The respondents, former employees of the appellant, commenced a class action against the appellant following their dismissal from employment. The respondents advanced several claims including that the appellant breached the duty of honest performance by intentionally and dishonestly withholding information about health benefits coverage under casual employment contracts, while those contracts were being negotiated. At a certification hearing, the chambers judge certified three common issues relating to the appellant's alleged breach of the duty of honest performance. On appeal, the appellant argues the chambers judge erred in law by certifying these issues because the duty of honest performance does not extend to pre-contractual dishonesty.

Held: Appeal allowed in part. The chambers judge erred in law by certifying the three impugned issues. The contractual duty of honest performance does not extend to dishonest conduct that takes place during pre-contractual negotiations, where the dishonesty was intended to influence the other party to enter into the contract. As a result, the respondents' claim as set out in their pleadings was bound to fail and did not meet the standard for certification under s. 4(1)(a) of the Class Proceedings Act. However, the respondents are granted leave to amend their pleadings to allege a breach of the duty of honest performance in relation to pre-existing employment contracts rather than the casual employment agreements.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] The appellant, Ocean Pacific Hotels Ltd. ("Ocean Pacific"), appeals from an order certifying several common issues under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA]. The respondents are former employees of Ocean Pacific who, in the summer of 2020, signed offers of casual employment which replaced their existing contracts of regular employment. The respondents advanced claims asserting various causes of action arising from Ocean Pacific's alleged wrongful conduct that occurred during the negotiations of the casual employment agreements. The chambers judge certified common issues in relation to claims for breach of contract, including breach of the duty of honest performance, as well as a claim for punitive damages.

[2] Ocean Pacific appeals only from the certification of three common issues concerning its alleged breach of the duty of honest performance. It submits that alleged dishonesty during contract negotiations, prior to the formation of a contract,

cannot be directly linked to the performance of that contract as required by *Bhasin v. Hyrnew*, 2014 SCC 71 and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [*Callow*]. Based on this principle, Ocean Pacific says the pre-contractual dishonesty the respondents allege cannot support a claim for breach of the duty of honest performance, and the judge therefore erred in law by certifying the respondents' claim.

[3] For the reasons below, I find the judge erred in certifying the claim for breach of the duty of honest performance. The claim as currently pleaded alleges Ocean Pacific was dishonest during the negotiation of casual employment agreements, which in turn induced the respondents to enter into those agreements. As the duty of honest performance does not extend to this type of dishonest conduct during pre-contractual negotiations, this claim is bound to fail and does not meet the standard under s. 4(1)(a) of the *CPA*.

[4] The respondents also seek the opportunity to amend their pleadings to allege a breach of the duty of honest performance in relation to their existing employment contracts, rather than the casual employment agreements. I would order that the respondents have leave to amend their pleadings and would refer the matter back to the chambers judge to give such directions and make such orders as she deems appropriate in considering proposed amendments in accordance with these reasons.

Background

[5] Ocean Pacific operates the Pan Pacific Hotel in Vancouver. Like all hospitality enterprises, its hotel operations were seriously impacted by the COVID-19 pandemic. As a result, it was unable to offer regular shifts to many of its employees. In the summer of 2020, it offered 156 hourly employees the option to sign agreements to change their status from regular to casual employment. Under these agreements, Ocean Pacific would not be obligated to provide shifts to these employees, nor would the employees have an obligation to accept shifts offered to them. In addition, the employees would no longer have a right to severance pay if their employment was terminated. However, employees would continue to receive

extended benefits coverage “subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of [Ocean Pacific’s] carrier”, Manulife. Ultimately, 93 employees accepted these terms and entered into an identical form of agreement in July or August 2020 (the “Casual Agreement” or, collectively, the “Casual Agreements”). On January 2, 2021, the extended benefits coverage terminated for most of the employees who signed the Casual Agreements.

[6] The respondents on this appeal—employees who signed the Casual Agreement—commenced a class action against Ocean Pacific. They alleged, among other things, that Ocean Pacific misled them about the continuation of benefits coverage under the Casual Agreements prior to entering into those agreements.

[7] The application for certification was first heard by the chambers judge in April 2022. In reasons indexed at 2022 BCSC 1608, the judge declined to certify the class action because the notice of civil claim and proposed amendments failed to plead the material facts necessary to support the causes of action alleged. The judge afforded the respondents the opportunity to reapply with further amendments.

Certification decision

[8] At the subsequent certification application, the respondents proposed another amended notice of civil claim (the “ANOCC”). In reasons indexed at 2023 BCSC 1650 (“Reasons”), the chambers judge noted the ANOCC advanced a new theory of the case: “that there was an implied term in the Casual Agreement that Ocean Pacific would take reasonable steps to obtain the insurer’s continued approval to provide extended health benefits to Class members”: Reasons at para. 36. To support this theory, the ANOCC alleged new material facts and an amended legal basis for the plea of breach of the duty of honest performance: Reasons at paras. 37–41, 89.

[9] The judge then set out the legal principles applicable to the certification of a class proceeding. She noted s. 4(1)(a) of the *CPA* requires that proposed causes of action be properly pleaded and there must be some prospect of success at trial. She explained the adequacy of a pleading is to be measured by the same test as an application to strike pleadings under Rule 9-5(1) of the *Supreme Court Civil Rules*: whether it is plain and obvious that the claim cannot succeed. Referring to *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139, the judge observed that this threshold is low. The court must read pleadings generously, assume the facts pleaded are true, and permit novel but arguable claims to proceed.

[10] Turning to the facts of the case, the plaintiffs characterized the “key dispute” between the parties as whether the pleadings disclosed an implied term in the Casual Agreement obliging Ocean Pacific to seek Manulife’s approval of continued extended health coverage. The judge found that the analysis of this question was relevant for all of the alleged causes of action: Reasons at para. 60. The judge held there was no express term in the Casual Agreement which required Ocean Pacific to seek Manulife’s approval of continued benefits coverage. However, she found that paragraph 18 of the ANOCC set out material facts capable of establishing an implied term to this effect. Specifically, she stated:

[72] I am satisfied that at this stage the plea of the [respondents], as set out in para. 50 of the Proposed ANOCC, that there is an implied term that Ocean Pacific was required to ask Manulife it would consider extending its coverage of extended health benefits to those employees covered by the Casual Agreement after January 2, 2021, is not bound to fail.

[11] The judge then considered the plea that Ocean Pacific breached its duty of good faith contractual performance. She observed that there is no such broad duty, but reasoned that the plea was in substance an allegation that Ocean Pacific had failed to exercise contractual discretion in good faith. The judge found that no material facts were pleaded in support of such a claim and as such it was bound to fail.

[12] The judge then turned to the alleged breach of the duty of honest performance. She noted the ANOCC alleged that Ocean Pacific “intentionally and dishonestly withheld the information that it had only arranged a temporary Grace Period [where benefits coverage would continue], and it did not intend to take reasonable steps to seek an extension”: Reasons at para. 81. The ANOCC further alleged that withholding that information meant the respondents were “left with an inaccurate impression of the value of the Casual Agreements” so they would be more likely to accept those agreements in order to obtain continued benefits coverage: Reasons at para. 81.

[13] Referring to *Bhasin* and *Callow*, the judge observed that to establish a claim for breach of the duty of honest performance, the pleadings must allege “the defendant lied, or knowingly misled the plaintiffs about a matter directly related to the performance of the contract”: Reasons at para. 82. She accepted the analysis of what constitutes dishonest or misleading conduct is highly fact-specific, and that such conduct could include half-truths, omissions, and even silence.

[14] The judge rejected Ocean Pacific’s argument the claim could not succeed because the duty of honest performance applies to the performance of a contract, not the negotiation of its terms, and because the pleadings did not identify a contractual obligation that was performed dishonestly: Reasons at para. 83. The judge reasoned:

[84] ...It is clear from the Proposed ANOCC that the plaintiffs’ claim is that the employment agreement and the Casual Agreement must be taken together collectively, and as such, they are [in] an existing employer-employee contractual relationship. They say within that existing contractual relationship, Ocean Pacific intentionally and dishonestly withheld important information from the plaintiffs about the value of what was on offer if they entered into the Casual Agreements, so that they would be more likely to accept the Casual Agreement.

[15] She concluded that the claim, while novel, was not bound to fail.

[16] The judge also considered the respondents' claim for fraudulent misrepresentation, which was based on an email from Ocean Pacific's Director of Human Capital and Development that stated: "[c]urrently we do not anticipate any changes to our existing policies": Reasons at para. 88. The respondents claimed this statement was false, as Ocean Pacific had only secured benefits for a grace period of a few months, and was aware that the employees would not receive continuing benefits beyond that period.

[17] However, the judge found the fraudulent misrepresentation claim was bound to fail for two reasons. First, the ANOCC alleged a representation as to a future event rather than a statement of fact. Second, the email statement made it clear Ocean Pacific was "unable to make any representation with respect to future entitlement": Reasons at para. 93. The respondents have not appealed from the order refusing to certify this claim.

[18] The judge certified the following common issues concerning the breach of contract claims at para. 161 of her Reasons:

Breach of the duty of honest performance

1. Did the defendant intentionally mislead the Class members about the limited continuation of their benefits?
2. If so, did that conduct amount to a breach of the defendant's duty of honest performance of its contractual obligations toward Class members?
3. If so, what remedies are the Class members entitled to?

Breach of contract

1. Did the defendant fail to take reasonable steps to seek the continued approval of the carrier for continued benefits coverage for Class members?
2. If so, did that conduct amount to a breach of an implied term in the contracts between the defendant and each Class member?
3. If so, what remedies are the Class members entitled to?

[19] For completeness, I note that the judge also certified three common issues concerning the claim for punitive damages.

Issues on appeal

[20] The primary issue on appeal is whether the judge erred in concluding the allegation that Ocean Pacific breached the duty of honest performance of the Casual Agreement discloses a reasonable cause of action.

[21] Since I have found the judge did so err, I must also address a second issue on appeal: whether the respondents' proposed amendments should be allowed.

Standard of review

[22] The question of whether pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* is a question of law. The standard of review on appeal is correctness and no deference is owed to the conclusion of the chambers judge: *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 28.

Parties' positions on appeal**Ocean Pacific**

[23] Ocean Pacific focuses its arguments on the requirement for a direct link between the dishonesty alleged and the performance of the contract. Referring to *Callow*, it submits that not every dishonest statement made in the context of a contractual relationship will give rise to a claim for breach of the duty of honest performance. A direct link between the dishonesty and the contract is required, which exists only when a party acts dishonestly in performing obligations or exercising rights under a contract.

[24] Ocean Pacific also argues *Bhasin* and *Callow* require that actionable dishonesty must relate to a contract in existence at the time of the dishonesty. It submits that allegations of dishonesty arising during the formation of a contract or in connection with a proposed future contract—including representations, misstatements, and omissions—are inadequate to support a claim for breach of the duty of honest performance.

[25] Turning to the certification decision, Ocean Pacific says the judge erred in concluding that the Casual Agreements entered into by the respondents could be the contractual foundation for a breach of the duty of honest performance when they were not yet in existence at the time of the alleged dishonesty. Further, it submits the chambers judge's finding that "the [existing] employment agreement and the Casual Agreement must be taken together collectively" was rejected in *Callow*: Reasons at para. 84.

[26] Ocean Pacific opposes the respondents' alternative position: that this Court should permit an amendment which would allege a breach of the duty of honest performance in relation to the existing employment contracts, rather than the Casual Agreement. It submits the ANOCC does not contain any claim for breach of contract or breach of the duty of honest performance of the existing employment agreements. It argues amendments should only be permitted to fine tune or bring clarification to pleadings, and to allow the proposed amendment here would entirely change the cause of action.

The respondents

[27] The respondents argue that *Callow* does not deal with the issue of the temporal limitations on the duty of honest performance; specifically, they say *Callow* does not address whether dishonesty must occur after the contract is entered into to engage the duty of honest performance. In the respondents' view, *Callow* stands for the proposition that dishonesty must be linked to the performance of a contract, but not for the proposition that the dishonesty must occur during the life of the contract.

[28] The respondents argue the decisions relied on by Ocean Pacific for the proposition that the duty of honest performance does not apply prior to contract formation are distinguishable. They submit the judge's finding that the existing employment agreements and the Casual Agreement must be considered collectively is correct and consistent with the observation in *Bhasin* that longer term, relational contracts that depend on an element of trust and cooperation call for a basic element of honesty in performance.

[29] The respondents also say the decision in *Basyal v. Mac's Convenience Stores Inc.*, 2021 BCSC 1002, which was not referred to by the chambers judge, should be accepted and followed. In *Basyal*, Justice Matthews rejected the defendant's contention that the duty of honest performance is explicitly limited to dishonest behaviour occurring after parties enter into a contract. She permitted a claim based on alleged pre-contractual dishonesty to proceed to a common issues trial.

[30] Finally, the respondents argue that if this Court concludes the judge erred in certifying the common issues as pleaded, they should be permitted to amend the ANOCC to allege Ocean Pacific's breach of the duty of honest performance occurred in relation to the existing employment contracts.

[31] The respondents say the material facts in support of that proposed amended claim are already set out in paragraphs 7, 9, 11, 17b, 18e, and 20 of the ANOCC. They submit a simple amendment to the legal basis of the ANOCC is all that is required to permit this claim to proceed to a common issues trial, and seek an order that the following amendment be allowed:

49. ~~The continuation of~~ value of the offer of continued benefits is a matter directly linked to the performance of the ~~contractual terms of the Casual Agreement~~ obligation in the pre-existing employment contracts to provide severance pay on termination of the contract without cause.

Analysis

Issue 1: Did the judge err in certifying common issues relating to the claim for breach of the duty of honest performance?

[32] The parties do not dispute the judge's statement of the applicable principles for determining the sufficiency of pleadings in this context. Whether the pleadings disclose a cause of action is assessed on the same "plain and obvious" standard as applications under Rule 9-5(1) of the *Supreme Court Civil Rules*. The fact a claim is novel should not prevent the issue from proceeding to trial: *Rorison* at para. 27. However, the novelty of a claim does not insulate it from scrutiny at the certification

stage of a proceeding. As Justice Brown stated for the majority in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19:

[19] ... [A] claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present “no legal justification for a protracted and expensive trial” (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19).

[Emphasis in original.]

[33] The respondents have had difficulty framing their pleadings to identify their claims in contract, hence the substantial amendments to date. In the ANOCC the respondents now make two key assertions of fact: 1) Ocean Pacific’s breach of the duty of honest performance occurred when the parties were negotiating the possible move from regular employment to casual employment, before the parties had entered into the Casual Agreement; and 2) Ocean Pacific made dishonest representations intended to influence the respondents to enter into the Casual Agreements.

[34] In response to Ocean Pacific’s arguments on appeal, the respondents have focused on the issue of temporality. Relying on statements in *Bhasin*, *Callow*, and *Baysal*, they submit it is possible for pre-contractual dishonesty to be directly linked to contract performance and to form the basis for a claim of breach of the duty of honest performance.

[35] The idea pre-contractual dishonesty can satisfy the required direct link with contractual performance as articulated in *Bhasin* and *Callow* seems counterintuitive. It is difficult to imagine how a duty to perform a contract honestly can arise before that contract comes into existence. However, the issue raised on this appeal can be answered without considering the temporal connection between dishonesty and contractual performance in isolation as the respondents ask us to do.

[36] The respondents’ allegations raise a more focused question: whether dishonest conduct in the course of pre-contractual negotiations which is intended to

induce the formation of a contract can form the basis for a claim for breach of the duty of honest performance. In my view, it cannot. I would allow the appeal on that basis.

[37] In arriving at this conclusion, I have considered the substance of the allegations in the ANOCC as well as the parameters of the duty of honest performance.

ANOCC allegations

[38] The statements of facts in Part 1 of the ANOCC relevant to the breach of the duty of honest performance include:

- Paragraphs 6–8: set out the terms of the Casual Agreements, including the offer of continued eligibility for benefits coverage (notwithstanding that casual employees would not normally be eligible for benefits).
- Paragraphs 15–17: outline statements made by Ocean Pacific to its employees about the Casual Agreement, including Ocean Pacific’s representation that the benefits “will remain the same” and that Ocean Pacific “[did] not anticipate any changes to [its] existing policies”.
- Paragraph 17a: alleges the above statements were false, as Ocean Pacific knew that Manulife had agreed only to a grace period and not to enduring benefits coverage.
- Paragraphs 17b and 17c: allege the reason Ocean Pacific did not share the information about the temporary grace period with employees was to mislead them about the value of the Casual Agreement, as Ocean Pacific “knew that the continuation of benefits was highly valuable to employees”. These paragraphs also state that Ocean Pacific “specifically emphasized the continuation of benefits” so the respondents would be more likely to enter into the

Casual Agreements and relieve Ocean Pacific of the obligation to pay the respondents severance pay.

- Paragraph 18f: states “[Ocean Pacific] knew or reasonably ought to have known that the information that the coverage was temporary, and the information that [Ocean Pacific] would not keep requesting extensions from Manulife to continue this coverage longer, would significantly change Class members’ evaluation of the trade-off they were being offered in the Casual Agreements. [Ocean Pacific] intentionally withheld this information from Class members so that they would be more likely to accept the Casual Agreements” (emphasis added).

[39] The legal basis of the claim is stated at paragraphs 48 and 49 of the ANOCC. The ANOCC alleges it is a breach of the duty of honest performance when a party makes misleading statements while knowing such statements would cause the other party to draw an incorrect inference. It alleges “[t]he continuation of benefits is a matter directly linked to the performance of the contractual terms of the Casual Agreement” and that Ocean Pacific “intentionally and dishonestly withheld information [about the continuation of benefits] that it had an obligation to share”. Finally, the ANOCC states “[w]ithholding this information meant that Class members would be (and were) left with an inaccurate impression of the value of the Casual Agreements, so that they would be more likely to accept the trade-off of giving up their severance entitlements in exchange for continued benefit coverage.”

[40] In summary, the material facts in the ANOCC related to the duty of honest performance are:

- a) Ocean Pacific’s dishonest conduct consisted of false statements and a failure to provide complete information to employees about the health benefits they would receive under the Casual Agreement.

- b) The dishonest conduct took place during contract negotiations, before the parties entered into the Casual Agreements.
- c) The dishonest conduct was intentional and designed to mislead the respondents in order to influence them to enter into the Casual Agreements and give up their entitlement to severance pay.

[41] The respondents appear to assert that the outlined allegations in the ANOCC do not amount to a claim for breach of the duty of honest performance in negotiating the Casual Agreement. This appears to be an attempt to distinguish case law which concludes the duty of honest performance does not apply to pre-contractual negotiations, which I discuss further in the next section. However, I disagree with the respondents' position. The dishonest conduct alleged in the ANOCC is properly characterized as taking place during, and in furtherance of, negotiations of the Casual Agreements. The ANOCC is clear the alleged misrepresentations were made directly to the employees as inducements to contract.

The parameters of the duty of honest performance

Bhasin and Callow

[42] It is helpful to review the facts and findings in *Bhasin* and *Callow*, the two foundational cases on the scope of the duty of honest performance. In *Bhasin*, the Supreme Court of Canada (the "SCC") first recognized the duty of honest performance as one manifestation of the organizing principle of good faith contractual performance. Justice Cromwell, writing for the Court, held that this duty meant contracting parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": at para. 73.

[43] The contract at issue in *Bhasin* was a commercial dealership agreement between Mr. Bhasin and Canadian American Financial Corp. ("Can-Am"). The dishonesty occurred during the time the contract was in force, when Can-Am misled Mr. Bhasin about an upcoming merger which would impact the value of Mr. Bhasin's business, as well as about its exercise of a non-renewal clause in their contract. The

Court found Can-Am breached the duty of honest performance because their dishonesty “was directly and intimately connected to Can-Am’s performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision”: at para. 103.

[44] The contract at issue in *Callow* was a winter maintenance agreement between a group of condominium corporations and C.M. Callow Inc. (“Callow”). The dishonesty arose because the condominium corporations knowingly misled Callow into believing the contract would not be terminated. The SCC found that this amounted to exercising the termination clause dishonestly, breaching the duty of honest performance. Justice Kasirer, writing for the majority, disagreed with the Ontario Court of Appeal’s conclusion that “any dishonesty was about a renewal, which was in turn connected to pre-contractual negotiations to which the duty as stated in *Bhasin* does not apply”: at para. 37. Instead, he agreed with the trial judge’s finding that “the dishonesty in this case was related not to a future contract but to the termination of the winter maintenance agreement”: at para. 37.

[45] In coming to his conclusion on the facts of the case, Justice Kasirer re-iterated the holding in *Bhasin* that a breach of the duty of honest performance “must be directly linked to the performance of the contract”: *Callow* at para. 51. Then, drawing on the abuse of rights framework from Quebec civil law, he held that this “direct link exists when the party performs their obligation or exercises their right under the contract dishonestly”: at para. 67. He noted “[i]t is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance”: at para. 49. While Justice Kasirer’s reasons do not state that the duty of honest performance does not apply to pre-contractual negotiations, neither do they suggest that the Ontario Court of Appeal’s finding to that effect was incorrect.

[46] Justice Brown, authoring the concurring decision in *Callow*, agreed there was a breach of the duty of honest performance but disagreed with the majority’s reliance

on the Quebec doctrine of abuse of rights in formulating the test required for a “direct link” between contractual performance and dishonesty. Justice Brown would have relied on common law principles instead, as in his view “representations sufficient to ground a claim for misrepresentation are analogous to representations that will support a claim based on the duty of honest performance”, although the duty of honest performance “applies (unlike misrepresentation) to representations made *after* contract formation”: at para. 131 (emphasis in original).

[47] Justice Kasirer noted in *Callow*, “[t]his appeal makes plain a need for clarification on the question of when dishonesty is directly linked to the performance of a contract”: at para. 64. Unfortunately, the clarification in *Callow* has not removed all uncertainty about the parameters of the duty of honest performance. The requirement that dishonesty “must be directly linked to the performance of the contract”, when expressed in those terms, does not necessarily mean it must take place during the performance of the contract: *Callow* at para. 51. However, the fact such a direct link is present if a party performs their obligations or exercises their rights dishonestly certainly suggests that the required dishonesty must take place during the contract, when a party actually has obligations to perform and rights to exercise.

[48] Additionally, Justice Kasirer’s statement “[i]t is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract” suggests it is a prerequisite that actionable dishonesty take place during the lifetime of a contract: *Callow* at para. 49. However, this statement does not definitively rule out the possibility of pre-contractual dishonesty. Similarly, Justice Brown’s observation that the duty of honest performance “applies (unlike misrepresentation) to representations made *after* contract formation” suggests, but does not mandate, that representations sufficient to support a claim based on the duty of honest performance must take place during the term of the contract: at para. 131.

[49] In short, the argument can be made that the decisions in *Bhasin* and *Callow* leave open the possibility, however slight, that dishonesty prior to the formation of a contract may be sufficient to support a claim in breach of the duty of honest performance. This is the basis for the respondents' contention that while the claim may be novel, it is arguable and thus meets the test for a reasonable cause of action.

Basyal

[50] Understandably, the respondents place considerable reliance on the decision in *Basyal*, where Justice Matthews certified a claim for breach of the duty of honest performance based on pre-contractual dishonesty as a common issue under the *CPA*. Specifically, they refer to her conclusion that "any temporal limitations of the doctrine [of the duty of honest performance] are an open question best suited for determination at trial": *Basyal* at para. 57. While I find her decision useful as a framework to analyze the respondents' arguments in this appeal, I do not find her reasoning of assistance to the issues on appeal.

[51] At the outset, I note that Justice Matthews' decision in *Basyal* was influenced by two circumstances that have no application here. First, Justice Matthews determined an earlier order made by the Court of Appeal established that, for the purposes of s. 4(1)(a) of the *CPA*, the plaintiffs have pleaded a "cause of action in breach of the duty of honest performance": *Basyal* at para. 29. Because of that earlier order, she concluded she could not address the defendant's objection that the facts pleaded related to pre-contractual dishonesty, which fell outside the scope of the duty of honest performance. There is no such order in this case.

[52] Second, the pleadings in *Basyal* alleged the defendant's dishonesty occurred both before and after contract formation. Accordingly, the common issue proposed was "appropriate even if [the defendant's] submission on the temporal scope of the duty of honest performance is accepted": at para. 59. In light of these constraints, Justice Matthews emphasized she was not rendering a decision on the parameters

of that duty. Again, this can be distinguished from the current case, where the ANOCC does not allege dishonesty after the Casual Agreements were signed.

[53] Referring to Justice Brown's statement in *Callow* that the duty of honest performance "applies to representations made *after* contract formation", Justice Matthews reasoned the temporal limit he was referring to was in relation to representations that form the basis for a claim of fraudulent misrepresentation, not to the timing of dishonesty that forms the basis for a breach of the duty of honest performance: *Basyal* at para. 55. The respondents make the same submission here.

[54] In my view, the distinction addressed by Justice Brown in that paragraph is not the "temporal limits" of the two claims, but rather a concern about the "dividing line" between actively misleading conduct and permissible non-disclosure. He concluded the duty of honest performance is comparable to the doctrine of fraudulent misrepresentation so that the settled principles from the jurisprudence about the line between actionable and non-actionable conduct should apply to both doctrines. Accordingly, Justice Brown's statement that "[t]he duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to misrepresentations made *after* contract formation", is not an attempt to define the temporal application of the claims: *Callow* at para. 131. Further, to the extent it refers to the temporal limits, it does not suggest that dishonesty giving rise to a claim under the duty of honest performance can arise *prior* to the formation of a contract.

[55] In *Basyal*, Justice Matthews also distinguished *Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1, leave to appeal to SCC ref'd, [2017] S.C.C.A. No. 76, in which the Court stated:

[51] Firstly, the *Bhasin* principle relates to the performance of the contract. It does not relate to the negotiation or terms of the contract. It does not invite the court to examine the terms of the contract and decide if they are "honest", "capricious", or negotiated in "good faith", much less whether they are "fair and reasonable".

[Emphasis in original.]

Justice Matthews found the statement was *obiter* to the extent that it referred to the negotiation of terms of the contract. I would agree, because the case was not concerned with dishonesty at the time of negotiation. However, the observation the *Bhasin* principle does not apply to pre-contractual negotiations has also been made by other courts, as I discuss below.

The duty of honest performance in contractual negotiations

[56] In *Larizza v. Royal Bank of Canada*, 2018 ONCA 632, the appellant, who had been duped by her fraudulent husband, brought an action against her landlord in breach of contract. Relying on the duty of good faith recognized in *Bhasin*, she alleged her landlord's actions prior to the formation of the lease (performing a credit check on her without her consent and naming her as tenant based on her husband's representations) breached a general duty of good faith. The Court upheld a summary judgment in favour of the landlord, agreeing with the following analysis from the motion judge:

[14] ... However, the flaw in [the appellant's] argument is that the duty of good faith recognized by the Supreme Court in *Bhasin*... arises in the context of the performance of the contract, and not from the circumstances leading up to the formation of the contract. Moreover, the obligation of good faith in the performance of a contract is a requirement not to lie or mislead the other party in the performance of the contract.

[Emphasis added.]

[57] The respondents say this decision is distinguishable, asserting that the case was about the substance of the allegations of bad faith, not their timing. I would agree that the decision does not carry great precedential weight, as the appellant's claim in *Larizza* had little merit and the Court's statement of the law is not supported by analysis. However, I do not agree the Court's statement can be disregarded as *obiter*, or otherwise. The Court specifically approved of the motion judge's analysis which found that under *Bhasin*, a breach of the duty of good faith must arise in the context of performance of a contract and "not from the circumstances leading to the formation of a contract": *Larizza* at para. 14.

[58] In *Wonderville Child Centre Inc. v. Highwood Enterprises Ltd.*, 2018 BCSC 1759 [*Wonderville*], the parties entered into a commercial lease at a later date than was contemplated by an initial offer to lease. The tenant sought damages arising from the delay on a number of bases, including that the landlord had breached the duty of honest performance by taking advantage of the tenant's financial pressures to secure a lease on more favourable terms than originally offered. In rejecting the claim, Justice Horsman (as she then was) stated "the duty of good faith established in *Bhasin* relates to the performance of contractual obligations, not to the negotiation or the terms of the contract": at para. 72 (underline emphasis added, italic emphasis in original).

[59] The respondents argue the decision is distinguishable because the court's concern in *Wonderville* was that the claim was about the conduct of negotiating the contract, and not about any matter linked to performance of the contract. I would agree with the respondents' characterization of the concern in *Wonderville*, but disagree with the contention that it is distinguishable from the claim raised by the pleadings here. As previously mentioned, all of the allegations of dishonesty in the respondents' ANOCC concern representations relating to the negotiation of the Casual Agreements.

[60] In *The Power Limited Partnership v. OEFC*, 2016 ONSC 4415, the plaintiff advanced a variety of claims concerning a series of power purchase agreements the parties had entered into over many years. One claim alleged that the defendant, the successor to Ontario Hydro, had breached its duty of good faith and honest contractual performance by intentionally misleading the plaintiff about whether an additional approval was required for one such agreement. The Court dismissed this claim and granted the defendant's summary judgment motion, stating:

[71] In considering this claim, it is important to begin by identifying the contractual obligation that was allegedly performed dishonestly. However, in this case, the course of conduct relied upon by [the plaintiff] was the negotiation of a new contract, not the performance of an obligation under an existing contract. In essence, [the plaintiff] accuses [the defendant] of intentionally misleading it in the course of negotiating and signing the 1999

PPA. The duty of honesty under *Bhasin* does not apply to a negotiation. [The plaintiff] must tie this claim to a contractual obligation.

[Emphasis added.]

[61] The respondents attempt to distinguish the decision in *OEFC* on the following basis:

The court in this passage, and in this ruling in general, did not say that the alleged dishonesty cannot have occurred during the period of negotiation. Rather, the ruling is that the allegation of dishonesty cannot be about the conduct of the negotiation.

[62] I do not disagree with the respondents' characterization of the court's finding in *OEFC*. The issue of temporality—that the dishonest behaviour occurred prior to contracting—was incidental to its finding that there could be no breach of the duty of honest performance. However, as with *Wonderville*, I do not accept there is any distinction between the circumstances of the present case and those in *OEFC*. The claim in *OEFC* failed because it was based on conducting a negotiation dishonestly. In my view, that is not distinguishable from the material allegation here: Ocean Pacific's dishonest conduct occurred when the parties were involved in contract negotiations and was intended to mislead the respondents into accepting the terms of the Casual Agreements.

[63] I note other decisions have also accepted that the duty of honest performance recognized in *Bhasin* does not apply to pre-contractual negotiations. For instance, the New Brunswick Court of Appeal has stated “the law does not recognize a pre-contractual duty to bargain in good faith”: *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44 at para. 35; *Algo Enterprises Ltd. v. Repap New Brunswick Inc.*, 2016 NBCA 35 at para. 13. Similarly, in *Okanagan Equestrian Society v. North Okanagan (Regional District)*, 2018 BCSC 800 [*Okanagan*], the court referred to *Bhasin* and *OEFC* and observed that a duty to negotiate in good faith is incompatible with the adversarial nature of negotiations between parties. The Court concluded “the duty to act in good faith referred to in *Bhasin*...does not apply to contract negotiations, as distinct from performance of one's obligations under an existing contract”: *Okanagan* at para. 248.

[64] I appreciate the SCC has not conclusively rejected the existence of a duty of good faith which could apply to pre-contractual negotiations. Recently, in *Rovi Guides, Inc. v. Videotron Ltd.*, 2024 FCA 125 at para. 119 [Rovi], the Court observed that while a duty of good faith applicable to pre-contractual negotiations appears to arise under the *Civil Code of Québec*, “the issue has not been firmly settled in the common law”. It noted that in *Martel Building Ltd. v. Canada*, 2000 SCC 60, the SCC specifically left the question of whether such a duty of good faith exists for another time.

[65] Despite the fact the SCC has not explicitly found there is no manifestation of good faith which could apply to pre-contractual negotiations, there is still a developing consensus, with which I agree, that a claim for breach of the duty of honest performance cannot be based on dishonest conduct connected to contract negotiations. It is my view that in recognizing the contractual duty of honest performance in *Bhasin*, the Court did not intend to establish a contractual duty to negotiate in good faith.

[66] I am also of the view there is no need to expand the contractual duty of honest performance to apply to dishonest conduct during pre-contractual negotiations which is intended to induce a party to enter into a contract. The law concerning the torts of negligent and fraudulent misrepresentation is well-developed and provides an adequate remedy in this situation. In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 1993 CanLII 146, the SCC found that statements made by an employer to a prospective employee in the course of an interview, which ultimately led to a contract of employment, could amount to negligent misrepresentation. There is no doubt a claim in fraudulent misrepresentation can also be made in appropriate circumstances during the negotiation of a contract, including a contract of employment. Both torts are based on a contracting party being wrongfully misled by statements made leading to the formation of a contract.

[67] The adequacy of these remedies is evidenced by the fact the respondents could have advanced a claim in fraudulent misrepresentation based on the same

material facts pled in the ANOCC in support of the claim for breach of the duty of honest performance. However, no such claim based on these allegations was made in the ANOCC. The judge considered but declined to certify common issues arising from the respondents' claim in fraudulent misrepresentation, a decision the respondents have not cross appealed. However, that fraudulent misrepresentation claim was based only on statements contained in one email sent on July 22, 2020, rather than all the material facts relied on for the duty of honest performance claim.

The importance of the employment relationship

[68] The respondents also argue the principle of good faith may be invoked in these circumstances where the alleged dishonesty occurs in the context of an employment relationship. In *Bhasin*, the SCC stated “the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange”: at para. 69. The respondents submit the parties' long-term employment relationship was based on mutual cooperation and trust, and therefore this is an appropriate case to apply the duty of honest performance.

[69] I accept the SCC has recognized the unique context of employment contracts, and the vulnerability of employees within those contracts. For example, in *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55 at para. 36, the SCC noted “the unique nature of a contract of employment derives largely from the fact that the employee is legally subordinate to the employer's power of direction and control”. In addition, it has long been recognized that employers owe a duty of good faith in relation to termination of employment contracts: *Bhasin* at para. 73, referencing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 1997 CanLII 332 at para. 98 and *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 58.

[70] However, I do not see how the fact the parties are in an employment relationship should lead to a conclusion that the duty of honest performance of the Casual Agreements was breached during the contract negotiations. As I have already indicated, the allegation as pleaded contains no direct link to an existing

contract and, in this case, there is no reason to recognize what would be an artificial “direct link” to a future contract under negotiation. At the time of the alleged dishonesty the parties were already in a contractual relationship and if the respondents can prove a breach, it should, in principle, be connected with their existing contract.

[71] For the same reason, I am of the view the judge’s contention that “the [existing] employment agreement and the Casual Agreement must be taken together collectively” is not an accurate statement or extension of any principle established in *Bhasin* or *Callow*. Reasons at para. 84. As I have indicated, a claim for the breach of the duty of honest performance must be directly linked to the performance of a particular contract. The Court in *Callow* had the opportunity to suggest that the direct link to performance could be found by “taking together” a future contract—the renewal—and the existing contract, but did not do so. In my view, it would create confusion and difficulty in application to permit the duty of honest performance to be applied to the combination of a present and future contract.

Conclusion

[72] In summary, I would conclude the duty of honest performance in contract does not extend to dishonesty that was intended to influence the other party to enter into the contract. If it were not so, the organizing principle of good faith established in *Bhasin* would expand remedies for breach of contract exponentially. It would permit claims for breach of the duty of honest performance to be brought whenever a contracting party alleged that the other party made false or misleading representations during the course of contract negotiations. Moreover, it would appear to permit such claims whether or not the defendant intended to induce the other party to enter into the agreement, as the SCC has held “the contractual duty of honest performance does not require that the defendant intended that his or her representation be relied on”: *Bhasin* at para. 88. Finally, it would result in an unnecessary and potentially confusing overlap between the remedies in tort and contract.

[73] As the claim in the ANOCC is based on an allegation of dishonesty which induced the respondents to enter into the Casual Agreements, it is plain and obvious it does not state a reasonable cause of action and the judge therefore erred in certifying the common issues relating to this claim. Having arrived at that conclusion, I need not decide the pure temporal question of whether there may be circumstances in which pre-contractual dishonesty, unrelated to misrepresentations in negotiations, can form the basis for a claim for breach of the duty of honest performance.

Issue 2: Should further amendments to the ANOCC be allowed?

[74] As the judge erred in certifying three common issues concerning the duty of honest performance of the Casual Agreement in the ANOCC as it currently stands, I must also consider the alternative remedy sought by the respondents: an amendment to the ANOCC which would allege a breach of the duty of honest performance in the context of the existing contracts of employment.

[75] At the outset, I would note that if the pleadings are amended to properly allege a breach of the duty of honest performance in relation to the existing employment contracts, the pleadings would fall squarely within the legal framework articulated in *Callow*. As Ocean Pacific acknowledges in its factum, *Callow* is illustrative of the point that “statements made during the negotiation of a future contract may also be directly linked to the performance of an existing contract, such that the duty of honest performance is engaged” (emphasis in original).

[76] In this case, the alleged dishonesty took place during the performance of existing contracts of employment while the Casual Agreements were being negotiated. The respondents’ amended framing of their claim would mean the alleged dishonesty is no longer pre-contractual. Rather than serving only as an inducement to enter into the Casual Agreements which did not yet exist, it attaches to Ocean Pacific’s contractual obligation to provide termination pay. Therefore, the fact the duty of honest performance does not extend to pre-contractual dishonest

conduct intended to induce a party to enter into a contract would no longer bar the respondents' amended claim.

Is the proposed amendment sufficient?

[77] A preliminary issue is whether the proposed amendment would, on its own, be sufficient to plead the essentials of the cause of action of breach of the duty of honest performance. In my view it is not sufficient, in large part because a breach of the duty of honest performance is not a distinct cause of action, but rather can ground a cause of action in breach of contract.

[78] Several cases have dealt with the issue of whether a breach of the duty of honest performance is a distinct cause of action, albeit somewhat indirectly. In *Bhasin*, the SCC explained the duty of honest performance is not an implied term, “but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance” that operates irrespective of the parties’ intentions: at para. 74. The SCC also observed that “[u]nlike promissory estoppel and estoppel by representation, the contractual duty of honest performance...is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action”: *Bhasin* at para. 88. This suggests the duty of honest performance, unlike estoppel, can be used to found an independent cause of action, but not necessarily that a breach of the duty is an independent cause of action.

[79] The result in *Bhasin* also indicates that a breach of the duty of honest performance can ground an independent cause of action—the cause of action of breach of contract—as the Court found that “Can-Am breached [their contract] when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause”: at para. 103. *Callow* interprets *Bhasin*’s holding in this way as well, stating that:

[50] ...Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated...

[Emphasis added.]

[80] The issue of whether the duty of honest performance is a distinct cause of action was relevant in *Basyal*, where Justice Matthews had to consider whether the claim for breach of that duty had been certified for the class proceeding by a prior order of this Court. Referring to *Bhasin* and *Callow*, she observed:

[30] In its order, the Court of Appeal referred to breach of the duty of honest performance as a cause of action. However, while indicating that the matter is not necessarily settled, the Supreme Court of Canada has described the breach of duty of honest performance as a doctrine of contract law, the violation of which is a breach of contract, not as a distinct cause of action.

[Authorities omitted.]

[81] Justice Matthews then reasoned that if the prior ruling of this Court “did not expand the doctrine to a freestanding cause of action”, then the Court’s order may have had the effect of certifying the pleaded claim in breach of a duty of honest performance: at para. 31. After examining the reasons of this Court, she concluded:

[41] Although the Court of Appeal did not analyze the claim of breach of duty of honest performance often or in detail, when it did refer to it, the Court of Appeal referenced as included in the breach of contract claim. I conclude that the certification of breach of contract includes the breach of duty of honest performance.

[Emphasis added.]

[82] I agree with Justice Matthews’ reading of the decisions in *Bhasin* and *Callow*. A breach of a contracting party’s duty of honest performance gives rise to a claim for breach of the contract with which the dishonesty is directly linked. It is not a distinct cause of action, but rather can ground a breach of contract claim if a party dishonestly performs their contractual obligations. This is also consistent with the Court’s observation that the remedy for breach of the duty of honest performance supports a claim for damages according to the contractual measure of damages rather than the tortious measure: *Bhasin* at para. 88; *Callow* at para. 113.

[83] Here, the ANOCC clearly alleges a claim for breach of contract arising from Ocean Pacific’s dishonest performance of its obligations arising under the Casual Agreements. However, it does not allege any breach of the existing

employment agreements. Neither does the respondents' sole proposed amendment, which I set out again for convenience:

49. The continuation of value of the offer of continued benefits is a matter directly linked to the performance of the contractual terms of the Casual Agreement obligation in the pre-existing employment contracts to provide severance pay on termination of the contract without cause.

[84] A breach of contract claim must plead facts to support two elements: 1) the existence of a contract; and 2) the breach of a term of that contract: *Atlantic Lottery* at para. 91. The ANOCC, even with the proposed amendment, does not explicitly allege the existence of pre-existing employment contracts between Ocean Pacific and the class members. It does contain allegations the class members were offered the Casual Agreements “[i]n exchange for giving up regular employee status and its attendant [*sic*] rights and privileges”, including “entitlement to severance pay”. These statements, along with the proposed amendment, imply that the class members had employment contracts with Ocean Pacific which included a term entitling them to severance pay. However, in a claim for breach of contract, the existence and terms of the contract should not have to be inferred from the pleadings. They should be explicitly stated.

[85] More problematically, there is nothing in the ANOCC nor the proposed amendment which sets out how the existing employment contracts were breached by Ocean Pacific's alleged dishonesty. Put simply, a claim for breach of contract must clearly allege that a contract was breached.

[86] In my view, for the ANOCC to properly plead a breach of the duty of honest performance, it must be amended to clearly allege the existence and material terms of the employment contracts between Ocean Pacific and the class members, as well as a breach of those contracts due to Ocean Pacific's alleged dishonesty. In other words, the respondents' claim for breach of the duty of honest performance must be pleaded as a breach of contract claim.

[87] I also note that paragraph 25(b)(iii) of the ANOCC seeks the following declaration:

that [Ocean Pacific] breached its duty of honest performance of its obligations in the Casual Agreement when it intentionally withheld important information about the value of the Casual Agreement from the Class...

[Emphasis added.]

This paragraph would also need to be amended to seek a declaration that the existing employment contracts were breached because of Ocean Pacific's dishonest performance, rather than the Casual Agreements.

Should the necessary amendments be allowed?

[88] With the amendments necessary to properly bring a claim for breach of the duty of honest performance of the existing employment contracts in mind, I now turn to the question of whether the respondents should be afforded the opportunity to make such amendments.

[89] In *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301, this Court set out the approach for analyzing whether amendments to pleadings should be allowed:

[44] ...Authorities tend to be generous in making available the possibility of amendments to fine tune the pleadings and to bring clarification to obscure issues, e.g., *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 87, 106, 140, 197. Nonetheless, in British Columbia—a cost beneficial jurisdiction to plaintiffs—fairness and access to justice considerations, including to defendants, reinforce the proposition that the essentials of a cause of action must be pleaded else the pleadings may be found to be fatally lacking. The court will consider in this mix the length of time the plaintiff has had to “get it right”.

[90] Some considerations militate against allowing the respondents to make the necessary amendments. First, as previously outlined, the ANOCC as it stands does not plead the essentials of a cause of action in breach of the existing employment contracts, which is necessary to properly plead a breach of the duty of honest performance. This is a significant deficiency, not a purely technical one, especially since changing the cause of action from breach of the Casual Agreements to breach of the existing employment contracts has the potential to change the commonality analysis. The chambers judge certified the duty of honest performance claim in part

on the basis there was “evidence of an identical contract”: Reasons at para. 140. There is no such evidence that all class members’ pre-existing employment contracts were identical.

[91] In addition, this is not the first proposed amendment to the pleadings. As Ocean Pacific points out, the respondents proposed amendments at both applications for certification, as well as before this Court. The respondents’ notice of civil claim was filed in April of 2021, which means they have had over three years to “get it right”.

[92] On the other hand, this is not a case where the necessary amendments are broad and unspecific: *Sandhu* at para. 118. As set out above, it is clear what specific amendments the respondents would need to make to properly plead their claim.

[93] In *Sandhu*, this Court also found, given the many attempts to plead the case and the time elapsed (three statements of claim filed in eight years), that it could infer the respondents were unable to plead any material facts in support of the causes of action at issue: at para. 46; see also *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 59–60. I would not make such an inference here. While the respondents have proposed several rounds of amendments since the initial claim was filed in 2021, they have not yet filed an amended notice of civil claim. More fundamentally, the deficiencies in the pleadings arise out of a failure to properly frame a breach of the duty of honest performance as a breach of the existing contracts of employment. Most of the material facts grounding that breach—namely, the alleged dishonest representations about the continuing benefits coverage under the Casual Agreements—are already clearly set out in the ANOCC.

[94] In addition, while it is true the deficiencies in the pleadings are substantive, this Court has permitted significant amendments to class action pleadings if it is in the interests of justice to do so. For instance, in *Basyal v. Mac’s Convenience Stores Inc.*, 2018 BCCA 235 [*Basyal CA*], this Court permitted amendments to pleadings which were deficient in non-technical ways even though they went “to the crux of

most of the causes of action advanced, and [would] necessitate a thorough ‘re-think’ of the case”: at para. 78. Similarly, in *Workers’ Compensation Board v. Sort*, 2022 BCCA 318, this Court permitted plaintiffs of a class action to make “[s]ignificant and substantive amendments” to the pleadings before referring the matter back to the certification judge: at para. 190.

[95] Finally, while procedural fairness to defendants is an important consideration under the *CPA*, Ocean Pacific is unable to point us to any specific prejudice it would suffer if the respondents are granted the opportunity to amend their pleadings. In addition, I must keep in mind that another key purpose of the *CPA* is “making access to justice possible for vulnerable people” such as the respondents: *Basyal CA* at para. 58.

[96] In my view, the appropriate remedy in light of the above considerations is to permit the respondents to amend their pleadings to rectify the deficiencies identified above. In light of the fact the amendments may change the analysis under s. 4(1) of the *CPA*, including the question of whether breach of the duty is a common issue, it is appropriate to remit the matter back to the chambers judge to make the orders she deems appropriate. This includes an order permitting the respondents to apply for another certification hearing on the claim for breach of the duty of honest performance of the existing employment contracts. Such an order will allow Ocean Pacific to respond to the amended pleadings on this issue, as well as give the court the opportunity to address whether the amended cause of action meets all the certification criteria in s. 4(1) of the *CPA*.

Disposition

[97] I would allow the appeal to the extent of setting aside the judge’s order certifying three common issues in relation to the breach of the duty of honest performance.

[98] However, I would not order that the respondents’ claim for breach of the duty of honest performance be struck. Instead, I would grant the respondents leave to amend their pleadings to address the deficiencies noted in these reasons.

[99] Finally, I would refer the matter back to the chambers judge to give such directions or make those orders she deems appropriate, including but not limited to the filing of a renewed certification application and application response, such that a third certification hearing may take place for the issue of breach of the duty of honest performance of the existing employment contracts.

[100] In accordance with s. 37 of the *CPA*, I would make no order of costs to either party.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Justice Iyer”