LITIGATION - CANADA

Secondary market securities class action dismissed based on evidence

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Introduction

In *Coffin v Atlantic Power Corp*(1) the Ontario Superior Court of Justice recently considered two motions, namely:

- for leave under Section 138.8 of the Ontario Securities Act(2) to commence an action for secondary market misrepresentation; and
- for certification to proceed as a class action under Subsection 5(1) of the Class Proceedings Act (1992).(3)

Based on his review of the extensive evidence filed by the defendants, Justice Belobaba dismissed both motions and found that there was no actionable misrepresentation.(4) In doing so, he confirmed the close analytical relationship between requests for leave under the Ontario Securities Act and motions for class action certification under the Class Proceedings Act.

Facts

During a November 2012 earnings call, the chief executive officer (CEO) of Atlantic Power Corporation, referring to a previously issued company press release, announced that Atlantic was "confident" that it could maintain its dividend at current levels.(5) Four months later, after slashing its dividend by 65%, the price of Atlantic's shares and debentures dropped significantly.(6)

The plaintiffs – each of whom had purchased Atlantic's shares just weeks before the 65% dividend cut – commenced proceedings in Ontario alleging that Atlantic, its CEO and chief financial officer were liable under Sections 138.3(1) and 138.3(2) of the Ontario Securities Act for having made negligent and misleading secondary market disclosures. In particular, the plaintiffs alleged that the statements and various other disclosures made by Atlantic – which, significantly, contained language warning that future dividends were not guaranteed(7) – amounted to a misrepresentation of Atlantic's ability to maintain its dividend.(8)

Motion for leave under Ontario Securities Act

To grant leave to proceed under Section 138.8 of the Ontario Securities Act, the court must be satisfied that the plaintiff's action is brought in good faith and has a reasonable possibility of succeeding at trial.(9)

In assessing whether there was a reasonable possibility of succeeding at trial, the Ontario Superior Court of Justice applied the Supreme Court's framework in *Theratechnologies*,(10) highlighting that the leave threshold is intended to provide a robust screening mechanism for proposed securities

class actions.(11) It applied the test for leave endorsed by the Court of Appeal in *Green v Canadian Imperial Bank of Commerce*,(12) which it stated was consistent with the principles articulated in *Theratechnologies v 12185 Canada inc*:(13)

> "*whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success.*"

In applying this test the court noted that the defendants, having filed 10 bankers boxes of documents (including fact affidavits, expert reports, cross-examination transcripts and other supportive material), had "made a conscientious decision to do battle from the outset".(14) It highlighted that the alleged misrepresentations and the plaintiffs' expert report would generally "persuade the court that there is at least a reasonable possibility that the plaintiff will succeed at trial".(15) However, after reviewing the extensive materials filed by the defendants, the court concluded that no evidence established that any of the defendants had believed that Atlantic would be unable to sustain its dividend level.(16) Rather, the parties agreed that Atlantic had sufficient cash flow to maintain its dividend level and did not dispute that dividend payments were "business judgment calls" rather than "formulaic calculations".(17) The court ultimately rejected the plaintiffs' submission that the defendants should have known that the dividend level was unsustainable and held that there was no misrepresentation on which the plaintiffs might reasonably succeed at trial.(18) As such, leave under Section 138.8 of the Ontario Securities Act was denied.

Motion to certify under Class Proceedings Act

After dismissing the plaintiffs' motion for leave to proceed with statutory claims under the Ontario Securities Act, the court confirmed that the plaintiffs could still seek certification of their remaining common law and statutory shareholder and debenture-holder claims.(19) However, in order for these claims to be certified as a class action, the court must be satisfied, pursuant to Clause 5(1)(d) of the Class Proceedings Act, that a class action is the preferable procedure for the resolution of the common issues raised by the plaintiffs.

Before proceeding with its analysis, the court observed that no securities class action had ever been certified after leave under the Ontario Securities Act had been denied, as the statutory causes of action are "tailor-made" for class proceedings.(20) Having been denied leave under the Ontario Securities Act, the plaintiffs had to show that each shareholder and debenture holder that purchased Atlantic's securities on the secondary market individually relied on the alleged negligent misrepresentation.(21) However, the plaintiffs failed to do so.

Following the Court of Appeal in *Musicians' Pension Fund of Canada v Kinross Gold Corp*,(22) the court noted that the denial of leave under the Ontario Securities Act is a relevant factor in the Clause 5(1)(d) preferability analysis.(23) It concluded that the common law claims asserted by the plaintiffs rested on the same evidentiary foundation as the Ontario Securities Act claims, which had already been dismissed as part of the plaintiffs' motion for leave.(24) In concluding that a class action was not the preferable procedure for the plaintiffs' shareholder misrepresentation claims, the court noted that "encumbering the parties and the courts with a complex class action that is destined to fail promotes neither judicial economy nor access to justice".(25)

For the debenture-holder claims, the court noted that neither of the plaintiffs, who were shareholders only, were proper representative plaintiffs of the proposed class.(26) Should the debenture holders wish to proceed with a class action, the court reserved its right to hear their certification motion.(27)

Comment

This decision underscores that, using the framework established by the Supreme Court in *Theratechnologies*, securities class actions will often be won or lost at the certification/leave stage. The defendants' strategy – to marshal extensive volumes of evidence early on in support of their position that the plaintiffs could not succeed at trial – proved successful in this case.

For further information on this topic please contact Matthew Fleming or Thomas Wilson at Dentons

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Endnotes

(1) 2015 ONSC 3686.

(2) Securities Act, RSO 1990, c s5.

(3) SO 1992, c 6.

(4) *Coffin, supra* at paras 153-154.

(5) *Ibid,* at paras 2 and 11.

(6) *Ibid,* at para 2.

(7) *Ibid,* at paras 27-28.

(8) *Ibid,* at para 10.

(9) *Ibid,* at para 16. As noted paragraph 17 of the decision, whether or not the action was brought in good faith was not at issue on the plaintiff's motion.

(10) *Theratechnologies inc v 12185 Canada inc*, 2015 SCC 18.

(11) *Coffin, supra* at paras 18-19.

(12) 2014 ONCA 90.

(13) *Coffin, supra* at para 20.

(14) *Ibid,* at paras 23-24.

(15) *Ibid,* at para 22.

(16) *Ibid,* at para 77.

(17) *Ibid,* at para 30.

(18) *Ibid,* at paras 111-122.

(19) *Ibid,* at paras 129-130.

(20) *Ibid,* at para 131.

(21) *Ibid,* at para 132.

(22) 2014 ONCA 901.

(23) *Coffin, supra* at para 140.

(24) *Ibid,* at para 145.

(25) *Ibid.*

(26) *Ibid,* at para 147.

(27) *Ibid,* at paras 150-151.