

**CITATION:** The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v.  
Sino-Forest Corporation v., 2015 ONSC 4004  
**DATE:** 2015-06-24

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde AP-Fonden, David Grant and Robert Wong, Plaintiffs

**AND:**

Sino-Forest Corporation, Ernst and Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited) Allen T.Y. Chan, W. Judson Martin, Kai Kat Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc, Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), Defendants

**BEFORE:** Regional Senior Justice G.B. Morawetz

**COUNSEL:** *Ken Rosenberg, Kirk Baert and A. Dimitri Lascaris*, for the Ad Hoc Committee of Purchasers of the Applicant Securities, including the Representative Plaintiffs in the Ontario Class Action

*Robert Staley, Derek J. Bell and Jonathan Bell*, for Sino-Forest Litigation Trust

*Derrick Tay*, for the Monitor

*Bryan McLeese*, for the US Plaintiffs

*Brandon Barnes*, for Mr. Kai Kit Poon

*Jason Beitchman*, for Allen T.Y. Chan

*David Bish, John Fabello and Rebecca Wise*, for the Dealers

*Robert Wong*, Self-Represented

*Kenneth Dekker*, for BDO Limited

**HEARD:** May 11, 2015

**ENDORSEMENT**

[1] Some roads lead to nowhere. Others are dead-end or circular. None of these can take you to your destination. In legal terms, no party obtains the desired outcome. That seems to be the case here.

[2] This motion is brought to approve a \$32.5 million settlement with Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd and Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC) (the “Dealers” and the “Dealers Settlement”), defendants in a class action concerning Sino-Forest Corporation (“Sino-Forest” or “SFC”).

[3] Counsel to the Ad Hoc Committee of Purchasers of the Applicants’ securities, including the Representative Plaintiffs in the Ontario Class Action (the “Class Action Plaintiffs”), submits that the settlement is the product of hard-fought and protracted negotiations which were conducted in the securities class actions and CCAA proceedings.

[4] Minutes of Settlement were entered into in late December 2014.

[5] The Dealers Settlement is to be implemented through Sino-Forest’s Plan of Compromise and Reorganization (the “Plan”), which has received court sanction in the Sino-Forest proceeding under the *Companies’ Creditors Arrangement Act*, RSC c, C-36, as Amended (the “CCAA”). The Plan requires that the Dealers Settlement be “acceptable” to the Litigation Trustee. The Litigation Trustee has not indicated that the Dealers Settlement is acceptable.

[6] The Class Action Plaintiffs request that the Court approve the settlement and the release without the consent of the Litigation Trustee. The Dealers support this position.

[7] The Litigation Trustee opposes the motion. The Litigation Trustee requests an order requiring the Dealers and Class Action Plaintiffs to comply with the consent requirements articulated in the Plan definition of Named Third Party Defendant Release prior to seeking approval of a third party release.

[8] The motion is also for an order:

(a) approving the proposed claims and distribution protocol setting out the process for the allocation and distribution of the net proceeds of the Settlement Funds; and

(b) appointing a Settlement Administrator.

[9] Argument on the return of the motion was limited to the threshold issue, namely, whether the Dealers Settlement could be approved over the objections of the Class Action Plaintiffs in relation to the consent requirements articulated in the definition of Named Third Party Defendant

Release. This threshold issue has to be determined before considering the merits of the Dealers Settlement. Accordingly, argument on the remaining issues was deferred.

[10] In order to analyze the positions of the Class Action Plaintiffs and the Litigation Trust, it is helpful to review a chronology of relevant events.

[11] At a creditors meeting held on December 3, 2012, an overwhelming majority of Sino-Forest's affected creditors approved the Plan.

[12] Pursuant to a Litigation Trust Agreement dated January 30, 2013 (the "Trust Agreement"), the Plan and the CCAA Plan Sanction Order, Mr. Cosimo Borrelli was appointed as the Litigation Trustee of the SFC Litigation Trust, the plaintiffs in this action. Under the Trust Agreement and the CCAA Plan Sanction Order, the Litigation Trust assets of SFC were transferred to the SFC Litigation Trust. The Litigation Trust Assets include the Litigation Trust Claims, the Litigation Funding Amount, and any other assets acquired by the SFC Litigation Trust on or after the effective date pursuant to the Trust Agreement or the CCAA Plan.

[13] The Litigation Trust Claims (as defined in the CCAA Plan) consist of any and all claims which have been or may be asserted by or on behalf of (a) SFC against any and all third parties; or (b) the Trustees (on behalf of the former Noteholders in SFC) against any and all persons in connection with the Notes issued by SFC, other than in either case "(i) any claim, right or cause of action against any Person that is released pursuant to Article 7 [of the Plan]; or (ii) any Excluded Litigation Trust Claim."

[14] Section 4.12(b) of the Plan reads:

All causes of action against the Underwriters by (i) SFC or (ii) the Trustees (on behalf of the Noteholders) shall be deemed to be Excluded Litigation Trust Claims that are fully, finally, irrevocably and forever compromised, released, discharged, canceled and barred on the Plan implementation date in accordance with Article 7 hereof, provided that, unless otherwise agreed by SFC and the initial consenting Noteholders prior to the Plan implementation date in accordance with section 4.12(a) hereof, any such Causes of Action for fraud or criminal conduct shall not constitute Excluded Litigation Trust Claims and shall be transferred to the Litigation Trust in accordance with section 6.4(o) hereof.

[15] Pursuant to section 4.12(b), the cause of action of the Litigation Trust as against the Dealers was deemed to be an Excluded Litigation Trust Claim and thus, does not form part of the Litigation Trust Claims. This fact is not in dispute.

[16] Subsequent to the sanction of the Plan, the Class Action Plaintiffs agreed to Minutes of Settlement to resolve the claims advanced against the Dealers in the Ontario Class Action in exchange for \$32,500,000. If the settlement is approved, the Class Action Plaintiffs seek to allocate 69.23% of the aggregate settlement funds available for distribution (after deducting Class Counsel fees and certain other amounts) to subordinated equity claim holders, with the remaining 30.769% being allocated to Noteholder claimants.

[17] As part of the proposed settlement, the Dealers also seek to obtain a CCAA Plan release.

[18] The CCAA Plan provides a mechanism by which “Named Third Party Defendants” in the class actions can take advantage of a prescribed settlement framework to obtain the benefit of a broad release of all claims under the terms of the Plan. Specifically, the Plan allows a “Named Third Party Defendant” to settle specified litigation in relation to Sino-Forest, and to obtain a “Named Third Party Defendant Release” (the “CCAA Release”) subject to certain conditions.

[19] The term “Named Third Party Defendant Release” is defined at section 1.1 of the CCAA Plan, which reads:

“Named Third Party Defendant Release” means a release of any applicable Named Third Party Defendant agreed to pursuant to a Named Third Party Settlement and approved pursuant to a Named Third Party Defendant Settlement Order, provided that such release must be acceptable to SFC (if on or prior to the Plan Implementation Date), the Monitor, the initial consenting Noteholders (if on or prior to the Plan Implementation Date) and the Litigation Trustee (if after the Plan Implementation Date), and provided further that such release shall not affect the plaintiffs in the Class Actions without the consent of counsel to the Ontario Class Action Plaintiffs.

[20] Mr. Borrelli, in his capacity as Litigation Trustee of the SFC Litigation Trust, submits that the overwhelming support for the CCAA Plan was the result of exhaustive negotiations between Sino-Forest, the Monitor, and various constituent groups. Mr. Borrelli also submits that the Plan was a heavily negotiated document in which both the Class Action Plaintiffs and the Dealers’ counsel were directly involved. The Plan was sanctioned on December 10, 2012, more than two years before the Minutes of Settlement were concluded.

[21] This was the situation at the time when the Minutes of Settlement were entered into: the Plan had been sanctioned; the action against the Dealers was an Excluded Trust Litigation Claim; and the Dealers and the Class Action Plaintiffs were aware of the procedure required to obtain a CCAA Release.

[22] The Litigation Trust complains that not only have the Dealers failed to obtain its consent and that of the Monitor, they have deliberately excluded the Litigation Trustee and the Monitor from all negotiations giving rise to the settlement for which they now seek court approval.

[23] The Litigation Trust further complains that the Dealers only advised that they had entered into a settlement agreement that purportedly “entitled” them to a CCAA Release after they had executed minutes of settlement with the Class Action Plaintiffs. They further complain that neither the Litigation Trustee nor the Monitor was consulted regarding terms for their consent to a CCAA Release.

[24] Upon learning of the settlement, counsel to the Litigation Trustee reminded counsel to the Dealers that the Class Action Plaintiffs had been put on notice on several occasions (dating back to 2013) that they could not offer a CCAA Release without the prior consent of the Litigation Trustee and the Monitor.

[25] Counsel to the Litigation Trustee takes the position that, as a result of its exclusion from all negotiations, the Litigation Trustee was unfairly denied any opportunity to seek consideration

from the beneficiaries of the SFC Litigation Trust (“SFC Non-Subordinated Creditors”). That includes non-monetary forms of consideration, such as the cooperation provisions obtained in the settlement with Mr. David Horsley or those obtained in favour of the Class Action Plaintiffs in the proposed settlement with the Dealers.

[26] It seems clear to me that the Dealers were aware, at all times, that the Plan required any third party release provided to the Dealers to be acceptable to the Litigation Trust and the Monitor.

[27] The Class Action Plaintiffs, recognizing that the action as against the Dealers was an Excluded Litigation Trust Claim, decided to forge ahead and conclude the Minutes of Settlement without addressing the issue of whether or not the CCAA Release would be acceptable to the Litigation Trust.

[28] In effect, the Class Action Plaintiffs now seek the court’s assistance to override the specific language of the Plan.

[29] The Class Action Plaintiffs submit that the Litigation Trust may not unreasonably withhold its acknowledgement of the CCAA Release as being “acceptable”. They rely on statements that have been made in a number of cases, notably *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (at paras. 14 and 19-21), to the effect that the CCAA is a flexible statute. They submit that flexibility permits the court to grant the CCAA Release notwithstanding the Litigation Trust’s refusal to confirm that it is “acceptable”. Counsel submits that the CCAA gives the court broad jurisdiction to make orders and “fill in the gaps in legislation” so as to give effect to the objects of the statute.

[30] Counsel further submits that the Court may “deem” that the Litigation Trustee has provided its acceptance, or to approve the CCAA Release in the absence of the Litigation Trustee’s consent. Counsel references *Playdium Entertainment Corp. (Re)* (2001) O.J. No. 4252 (Sup. Ct.) where the debtor Playdium sought an order permitting it to assign an asset. It required the consent of Famous Players, which consent, pursuant to a contract, could not be unreasonably withheld. Although Spence J. found that it was entirely reasonable for Famous Players to withhold its consent, he concluded that he had jurisdiction to approve the assignment.

[31] At paragraph 23 he stated:

If there were no CCAA order in place and Playdium wished to assign it to the proposed assignees, it would not be able to do so, in view of Famous Players’ withholding of its consent. The CCAA order affords a context in which the Court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by CCAA...

[32] In my view, the *Playdium* case can be distinguished in these circumstances. In *Playdium*, the transaction involved assignment to the assignee, a new entity, of the material contracts of the business of *Playdium*. These contracts provided that they could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. These contracts were entered into prior to the CCAA filing. Spence J. was of the view that the CCAA could be used in certain circumstances to override this consent right.

[33] In the case, the agreements came into effect after the CCAA filing. All parties acknowledge that the CCAA Plan was the product of extensive negotiations among Sino-Forest, the Monitor, and various constituent groups. As noted above, Mr. Borrelli stated that the Plan was a heavily negotiated document and both the Class Action Plaintiff and the Dealers counsel participated in its formation.

[34] In my view, this is an important distinction. In a post-filing CCAA environment, with each interested party carefully negotiating its position, the CCAA Plan and the subsequent Litigation Trust Agreement were drafted in a careful and comprehensive manner. Given that the Class Action Plaintiffs participated in the negotiation of the documents and the crafting of the defined terms referenced herein, there was never any doubt that the Class Action Plaintiffs were aware that the CCAA Release had to be acceptable to the Litigation Trust and the Monitor.

[35] In my view, the plain wording of the defined term "Named Third Party Defendant Release" leads to the inescapable conclusion that the Release must be in a form which is acceptable to the Litigation Trustee and the Monitor. The position of the Class Action Plaintiffs, which in effect, seeks to override this requirement, is flawed. In my view, it would not be appropriate, at this time, to override the consent rights of the Litigation Trustee and the Monitor.

[36] On the other side, the position of the Litigation Trust is also flawed. The Litigation Trust has no economic interest in this action. Indeed, the Class Action Plaintiffs characterize the Litigation Trust's opposition to the Dealers Settlement as a "stick-up". While the Litigation Trust takes the position that there are some ancillary issues involved that could possibly lead to a portion of the consideration being allocated to it, the action itself is an Excluded Litigation Trust Claim whose benefits should therefore accrue to the Class Action Plaintiffs.

[37] Each side, in effect, has tried to stymie the other. The Class Action Plaintiffs negotiated the Minutes of Settlement without regard to whether or not the CCAA Release would be acceptable to the SFC Litigation Trustee. They want the court's assistance in rewriting the contract. The Litigation Trust, in turn, recognizes that it has no economic value in the Dealers Action, but wants to obtain indirect compensation in exchange for providing the formal declaration that the CCAA Release is in an acceptable form. The result is a classic stalemate.

[38] The Class Action Plaintiffs do not wish to concede any part of the settlement proceeds to the Litigation Trust. The Litigation Trust has to be satisfied that the CCAA Release is acceptable. The Dealers Settlement cannot be consummated without the CCAA Release.

[39] The Class Action Plaintiffs want to consummate the Dealers Settlement. They cannot do so with the cooperation of the Litigation Trust. The Litigation Trust wants concessions from the Class Action Plaintiffs, but acknowledges that it has no economic interest in the action itself. The parties are at an impasse.

[40] The situation is not unlike disputes over a generation ago which involved a receiver and a trustee in bankruptcy in relation to proceeds arising from the assignment of a leasehold interest of a bankrupt.

[41] Some of the issues were referenced by Henry J. in *Re Karelia Ltd.*, [1980] 31 OR (2<sup>nd</sup>) 153, [1980] O.J. 3842. In the regime in existence at that time, only a trustee in bankruptcy had

the statutory right to effect an assignment of an unexpired portion of a lease of a bankrupt tenant to a fit and proper assignee. In many circumstances, the leasehold interest, with the exception of the last day of the lease, had been pledged as security to a secured creditor. Thus, the situation that confronted both the receiver and a trustee was that the secured creditor would have the economic interest in the proceeds arising from the assignment of any unexpired portion of a lease, but the receiver had no ability to compel the landlord agree to the assignment.

[42] As a result, in the absence of landlord consent, an assignment could only take place if the receiver was able to reach an accommodation with the trustee. The reality was that the trustee, with no economic interest in the proceeds arising from the assignment of a leasehold interest, was in a position to extract some consideration from the secured creditor.

[43] These forced negotiations, or negotiations by necessity, between the trustee and the receiver resemble the situation now facing the Litigation Trustee (Trustee in Bankruptcy) and the Class Action Plaintiffs (the Secured Creditor or Receiver). Each side requires a degree of cooperation from the other.

[44] All parties should be mindful of the guidance recently provided by the Supreme Court of Canada in *Bhasin v. Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 494. At paragraph 63 the court held as follows:

The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[45] The CCAA Plan is, in effect, a contract. Both sides should attempt to resolve this issue in good faith.

[46] The CCAA Release must be acceptable to the Litigation Trust and the Monitor. The Class Action Plaintiffs have to recognize that reality. In return, the Litigation Trust must acknowledge that it has no economic interest in the action itself and that its consent to a CCAA Release should not be arbitrarily withheld. To date, the Monitor has not taken a position.

[47] The threshold issue is resolved in favour of the Litigation Trust. The CCAA Release must be acceptable to the Litigation Trustee and the Monitor.

[48] However, the Litigation Trustee, having no economic interest in the Dealer Action, must perform its contractual duties honestly and reasonably and not capriciously or arbitrarily. On the other hand, the Class Action Plaintiffs must recognize that the Litigation Trustee does have certain rights.

[49] While the parties may already have had some discussions to resolve their difference, it seems to me that they should attempt to resolve this issue in accordance with the principles set forth in *Bhasin, supra*. Accordingly, I direct the parties to negotiate with each other to resolve this issue and to return to court at a 9:30 hearing on Friday, July 24, 2015, to report their progress to me.

[50] If the matter is not resolved on or prior to that date, the Class Action Plaintiffs can renew their motion for the requested relief and a date will be set for argument on the issue of whether the parties have indeed been negotiating in good faith in accordance with the principles set forth in *Bhasin, supra*. If necessary, I will then determine whether the relief requested by the Class Action Plaintiffs can be granted over the objections of the Litigation Trustee.



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Regional Senior Justice G.B. Morawetz

**Date:** June 24, 2015