

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 6275
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121106

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: MORAWETZ J.

COUNSEL: Robert Staley and Derek Bell, for Sino-Forest Corporation

Peter Griffin and Shara Roy, for Ernst & Young Inc.

Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Derrick Tay and Jennifer Stam, for the Monitor, FTI Consulting Canada Inc.

David Bish, John Fabello and Stephanie Lafrance, for the Underwriters

Edward A. Sellers, for the Board of Directors of Sino-Forest Corporation

Kenneth Rosenberg, Dimitri Lascaris and Massimo Starnino, for the Ad Hoc Committee of Purchasers of the Applicant's Securities

Kenneth Dekker, for BDO Limited

John Pirie and David Gadsden, for the Poyry (Beijing)

James Grout, for the Ontario Securities Commission

Simon Bieber and Aaron Pleet, for David Horsley

Emily Cole and Joseph Marin, for Allen Chan

HEARD: OCTOBER 28, 2012

ENDORSEMENT

[1] This motion was brought by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action (the "Class Action Plaintiffs") for an order limiting the scope of the stay of proceedings (the "Stay") imposed by the Initial Order dated March 30, 2012 and extended from time to time (the "Initial Order"), such that the Stay should not apply to Ernst & Young LLP, BDO Limited, the underwriters, and former directors Messrs. Allen T. Y. Chan, David Horsley and Kai Kit Poon, with respect to the following motions or petitions (the "Class Action Motions"):

- (a) a motion certifying the action styled *Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation et al (Toronto)*, Court File No. CV-11-431153-00CP (the "Ontario Class Action") as a class proceeding under the *Class Proceedings Act, 1992* S.O. 1992, C. 6 ("CPA") (the "Ontario Certification Motion");
- (b) a petition for authorization to commence a class proceeding (the "Quebec Class Action" and, together with the Ontario Class Action, the "Class Actions") under the *Quebec Code of Civil Procedure*, R.S.Q. C. c-25;
- (c) a motion for leave to proceed with statutory secondary market claims in the Ontario Class Action pursuant to s. 138.3 of the *Securities Act*, R.S.O. 1990, C.S.5;
- (d) a motion for leave to proceed with the statutory secondary market claims in the Quebec Class Action pursuant to Article 225.4 of the *Securities Act*, R.S.Q. C.V-1-1, to be filed; and
- (e) a motion for leave to add CONDEX Wattco Inc. as a plaintiff in the Quebec Class Action and with Ilan Toledano as its representative, to be filed, and a motion to amend the pleading in the Quebec Class Action to plead the *Securities Act*, R.S.Q. C.V-1-1 and add BDO Limited as a party.

[2] The original motion sought wider relief. In its restructured form, the motion was not opposed by the Applicant.

[3] The relief was, however, opposed by Ernst & Young, BDO, the Underwriters and the three former directors.

[4] Broadly speaking, the Class Actions allege that Sino-Forest, certain of its officers and directors, its auditors and its underwriters made material misrepresentations regarding the operations and assets of Sino-Forest. The claims seeks \$9.18 billion in damages.

[5] Sino-Forest obtained protection from its creditors pursuant to the Initial Order on March 30, 2012. The Class Actions have been stayed since that time.

[6] A Sales Process was undertaken by the Applicant following the Initial Order but it failed to attract any significant interest.

[7] Following the unsuccessful Sales Process, the Applicant and the Monitor, in cooperation with the Ad Hoc Committee of Noteholders, engaged in developing a Plan of Arrangement (the "Plan").

[8] The Applicant intends to call a meeting of creditors to consider the Plan.

[9] During the development of the Plan, the Applicant brought a motion to determine the status of certain claims against it, including the claims of the shareholder plaintiffs in the Ontario Class Action and the claims of the third party defendants based on indemnities arising as a result of these shareholder claims.

[10] On July 27, 2012, I rendered a decision finding that, among other things, the shareholder claims and indemnity claims were "equity claims" as defined in section 2 of the CCAA (the "Equity Claims Decision").

[11] The third party defendants have since obtained leave to appeal the Equity Claims Decision to the Court of Appeal for Ontario, which appeal I understand is scheduled to be heard in mid-November 2012.

[12] The parties to the Ontario Class Action have entered into a tolling agreement in respect of the limitation period in Part XXIII.1 of the *Securities Act (Ontario)*, which suspends the operation of those limitation periods until February 28, 2013.

[13] I can well understand the basis of the motion. The Class Action Plaintiffs want the Class Actions to move forward. I have no doubt that, failing resolution, the Class Actions will have to proceed. The only issue is when should the Class Actions proceed.

[14] However, at this point in time, the auditors and the underwriters are active participants in the upcoming appeal of the Equity Claims Decision. It is conceivable that the decision of the Court of Appeal for Ontario will have an impact on the auditors and underwriters with respect to the upcoming meeting of creditors to consider the Plan and any potential motion to sanction the Plan.

[15] It seems to me that the auditors and underwriters, in the short term, should focus their attention on the appeal and the upcoming meeting. It could very well be that, within a short period of time, the situation affecting the auditors and the underwriters will be clarified such that these groups will be in a position to focus their attention on the Class Actions.

[16] As I stated in *Timminco Limited (Re)* 2012 ONSC 215 at [17]: Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but these factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance, there may not be sound reasons for lifting the stay). See *Canvest Global Communication (Re)*, [2011] O.J. No. 1590 (S.C.J.).

[17] In the circumstances of this case, I see little prejudice to the Class Action Plaintiffs if the stay were to be maintained for a short period of time which could result in clarity being brought to the proceedings. Although there is a concern that memories of key witnesses will fade with

the passage of time, I have not been persuaded that maintaining the stay for a short period of time will be detrimental to the Class Action Plaintiffs on that account.

[18] On the issue of the limitation period, clearly this is an issue that has to be kept in mind, but maintaining the stay for a short period of time would not appear to negatively impact the Class Action Plaintiffs.

[19] On the other hand, the concerns raised by counsel on behalf of the auditors and the underwriters have persuaded me that, the balance of convenience favours these parties, and at this time, they need to focus on issues arising out of the appeal of the Equity Claims Decision as well to focus on the Plan itself.

[20] Accordingly, it seems to me that, having taken into account the relative prejudice to the parties and the balance of convenience, it is reasonable and appropriate to maintain the stay at this time, on the basis that the issue can and should be re-evaluated shortly after the scheduled meeting of creditors to consider the Plan, but in any event, no later than December 10, 2012.

[21] Further, although the appeal of the Equity Claims Decision and the upcoming meeting of creditors and possible sanction hearing does not have any direct impact on the three former directors, I am of the view that it is appropriate to also maintain the stay with respect to these individuals so that the Class Actions can ultimately proceed in a more organized fashion.

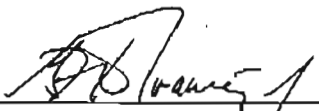
[22] On a secondary issue, the Class Action Plaintiffs requested, if necessary, leave to amend the pleading in the Quebec Class Action to plead the Securities Act, R.S.Q. C.V.-1-1 to add BDO Limited as a party.

[23] This relief was opposed by the auditors on the basis that the Quebec Class Action plaintiffs ignored the Stay as they were never given leave to seek to add parties to any class proceedings – especially without notice.

[24] The Quebec Class Action plaintiffs countered with the submission that there was no intent to violate the Stay, but rather, there was a degree of confusion arising as a result of different procedures in the Quebec proceedings.

[25] In keeping with the direction of the main aspect of this endorsement, it is my view that this secondary issue can be considered at the time that the main issue is being revisited in early December. However, the parties should be mindful of the comments I made at [13] above, to the effect that failing resolution, the Class Actions will have to proceed. The only issue is when.

[26] In the result, the motion is dismissed, without prejudice to the right of the Class Action Plaintiffs to renew their request in accordance with the terms of this endorsement.


MORAWETZ J.

Date: November 6, 2012