CITATION: Simmonds v. Armtec Infrastructure Inc., 2014 ONSC 3587
COURT FILE NO.: CV-11-16465
DATE: 20140613

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Bruce Simmonds, Robert Grant and Gordon Moore Plaintiffs	Jay Strosberg, for the Plaintiffs
– and –	
Armtec Infrastructure Inc., Charles M. Phillips, James R. Newell, Michael S. Skea, Donald W. Cameron, Scotia Capital Inc., TD Securities Inc. and BMO Nesbitt Burns Inc. Defendants	Scott Kugler, for the Defendants Armtec Infrastructure Inc., Charles M. Phillips, James R. Newell, Michael S. Skea and Donald W. Cameron R. Paul Steep and Lisa M. Constantine, for the Defendants Scotia Capital Inc., TD Securities Inc. and BMO Nesbitt Burns Inc.
	HEARD: May 27, 2014

Proceedings under the *Class Proceedings Act*, 1992

PATTERSON J.:

[1] On February 19, 2014, the parties executed a settlement agreement without admission of liability by the defendants. On March 25, 2014, I ordered that the approval hearing be held on May 27, 2014, regarding certification of the action as a class proceeding, the approval of the settlement agreement and the fee agreement.

Background

[2] The defendant Armtec Infrastructure Inc. ("Armtec") is a publicly-traded company whose securities trade on the TSX under the symbol ARF. They manufacture and engineer various types of structures including a variety of infrastructure application products.

[3] On March 10, 2011, Armtec provided a press release which spoke of challenges resulting from the recession but that the challenges were behind them and that they intended to pay an annualized dividend of $1.60 per share on a quarterly basis.

[4] On March 24, 2011, Armtec announced that they had entered into an agreement with a syndication of underwriters who agreed to purchase 3.1 million common shares at a price of $16.20 per share, an aggregate being $50,220,000 with an over-allotment option of purchase of an additional 465,000 common shares at the offering price. A subsequent press release indicated that the company believed that they were in a stronger operating position and this would enable it to maintain its current level of dividends.

[5] On March 31, 2011, Armtec in its 2010 Annual Report indicated that with its revised capital structure management did not anticipate any issues with sustaining the proposed dividend. The officers and directors on the previous day signed the preliminary prospectus certifying that the material facts in the prospectus were true.

[6] Armtec on April 13, 2011, announced that the issued shares including the option shares were bought and the 3,565,000 common shares at $16.20 per common share raised a gross proceeds of $57,753,000.

[7] Less than three months later on June 8, 2011, Armtec revealed it suffered a net loss in the first quarter of 2011 and that it was suspending its payment of dividends pending further notice. On the following day the price of the Armtec shares declined approximately 59% from its closing price on June 8 of $10.50 to $4.35 at closing on June 9, 2011.

[8] The representative plaintiffs Grant and Moore purchased the Armtec shares from the secondary market and they allege a common law claim of negligent misrepresentation against the defendants.

[9] The representative plaintiff Simmonds purchased the Armtec shares pursuant to the prospectus and he alleges a statutory claim pursuant to s. 130 of the *Securities Act,* R.S.O. 1990, c. 5.5.

[10] Notice of action was issued in June of 2011, with a statement of claim issued in July with subsequent amendments.

[11] Two other actions were commenced, one in Quebec and the other in London, Ontario by Siskinds LLP, acting on behalf of the representative plaintiff Keith Locking. After a carriage motion and subsequent appeals the action issued by Sutts, Strosberg LLP was successful.

[12] In September 2013, a mediation session was held with Mr. Joel Wiesenfeld which resulted in a settlement in principle which was finalized on February 19, 2014 after five months of negotiation.

[13] The Quebec action is scheduled to be heard on June 19, 2014.

Certification under *CPA*

[14] I am satisfied that the five part tests for certification are met.

[15] The pleadings disclose a cause of action as I am satisfied the allegations as pleaded disclose a cause of action.

[16] The plaintiffs seek certification based on an allegation of common law negligent misrepresentation for the secondary market class and for breach of s. 130 of the *OSA* for the primary market class. The court has previously certified these types of actions in other security class action cases (see: *Poole v. PetroMagdalena Energy Corp.*, 2013 ONSC 4171 (S.C.J.), at para. 19 and *Elliot v. NovaGold Resources Inc.*, 2010 ONSC 2683 (S.C.J.), at para. 19). This action is similarly certified.

[17] I am satisfied that the requirement of s. 5(1)(b) has been met in that there is an identifiable class of two or more persons who would be represented by the representative plaintiff.

[18] The proposed definition of the class in this matter is as follows:

a) "Class" and "Class Members" means the Prospectus Class and the Secondary Market Class;

b) "Prospectus Class" and "Prospectus Class Members" means all persons, other than Excluded Persons, who acquired securities of Armtec pursuant to the Prospectus and held some or all of those securities at the close of trading on the TSX on June 8, 2011; and

c) "Secondary Market Class" and "Secondary Market Class Members" means all persons, other than Excluded Persons, who acquired securities of Armtec during the Class Period on secondary markets and held some or all of those securities at the close of trading on the TSX on June 8, 2011.

[19] There is no dispute that the appropriate class are those who acquired the securities during the class period.

[20] I am satisfied that the provisions of s. 5(1)(c) have been met, namely that the claims of the class members raise common issues.

[21] The proposed common issues are as follows:

a) Did the defendants, or any of them, represent that Armtec had achieved or would achieve the level of earnings required in order to declare and pay dividends. If so, who made the representation, when, where and to whom?

b) Did Armtec or the individual defendants, or any of them, fail to disclose that because of margin compression and bad weather, Armtec had not achieved or would not achieve the level of earnings required in order to declare and pay dividends? If so, who failed to disclose that information, when, where, how and to whom?

c) Did Armtec's prospectus contain a misrepresentation?

1) as defined in the *OSA*; and

2) the analogous provisions in the *Securities Act*, RSA 2000, c S-4, s. 211.03; *Securities Act*, SNB 2004, c S-5, s. 161.2; *Securities Act*, CCSM c S50, s. 176; *Securities Act*, RSBC 1996, c 418, s. 140.3; *Securities Act*, 1988, SS 1988-89, c S-42.2, s. 136.11; *Securities Act*, RSNS 1989, c 418, s. 146C; *Securities Act*, RSNL 1990, c S-13, s. 38.3; *Securities Act*, RSPEI 1988, c S-3.1, s. 124; *Securities Act*, RSQ c V-1.1, ss. 225.8, 225.9, 225.10, and 225.11; *Securities Act*, SNWT 2008, c 10, s. 124; *Consolidation of Securities Act*, SNu 2008, c 12, s. 124 and *Securities Act*, SY 2007, c 16, s. 124.

[22] Section 1 of the *CPA* defines "common issues" as:

a) common but not necessarily identical issues of fact, or

b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[23] It has been provided in various cases that the common issues only need to advance the litigation and resolution through the class proceeding of the entire action, or even resolution of particular legal claims is not required. The requirement has been described as a low bar (see *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), at pp. 248-249, paras. 40-42 and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at p. 414, para. 52).

[24] The determination of common issues will determine liability for all class members with the only remaining issue being damages. As a result, determination of the common issues will eliminate the need for each class member to separately have these issues adjudicated (see: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, at pp. 199-204, paras. 27 and 34).

[25] Breach of a standard of care and whether the defendant has made a negligent misrepresentation has been recognized in securities class actions as common issues (see: *Elliott*, at para. 21).

[26] I am satisfied that s. 5(1)(d) has been met being the class proceeding being the preferable procedure for the resolution of the common issues. I am satisfied that the preferability requirements established in *Cloud*, at p. 420, para. 73, have been satisfied, namely that it is a fair, efficient and manageable method of advancing the claim and it is preferable to other reasonably available means of resolving the claims of the parties.

[27] Further this class proceeding is the preferable procedure because:

a) repetitive trials on the same issues will be avoided including the possibility of inconsistent verdicts;

b) all parties have an interest in whether or not a misrepresentation took place;

c) an experienced counsel team has been retained on a contingency basis;

d) the cost of prosecuting an individual action is prohibitive and beyond the financial capabilities of the vast majority of class members; and

e) any order or settlement will accrue to the benefit of the entire class.

[28] I am satisfied that the proposed representative plaintiffs would fairly and adequately represent the interests of the class under the provisions of s. 5(1)(e) of the *CPA*.

[29] I have reviewed the background and experience of the proposed representative plaintiffs and I am satisfied they have capably prosecuted this action, having retained competent counsel. The representative plaintiffs are knowledgeable in business affairs of corporations and investments. There is no conflict between the members of the class in relationship to the common interests.

[30] I am satisfied that a workable plan has been provided under s. 5(1)(e) of the *CPA*. The plan of allocation proposed sets out a process for notification, claims process, determination of eligibility, and a formula for determination of each class' compensation and the process for distribution.

[31] Therefore I am satisfied that all the tests outlined in s. 5 of the *CPA* have been satisfied and the class action is ordered to be certified as a class proceeding.

Approval of the Settlement

[32] I have reviewed the settlement proposed and I am satisfied that it is fair, reasonable and in the best interests of the class as a whole taking into account the claims and defences and any objections to settlement. I am satisfied that it is in a zone and range of reasonableness.

[33] The factors taken into account in approving a settlement have been outlined in *Lefrancois v. Guidant Corporation*, 2014 ONSC 1956 (S.C.J.), at para. 11. There were risks in this litigation. The defendants deny liability which include the possibility that misrepresentation did not meet the threshold of materiality or that the misrepresentation

was not a "misrepresentation" as defined by the *OSA*. It is anticipated that the defendants would argue there was disclosure that it was possible a dividend could be suspended.

[34] There was concern that unexpected or other events could have contributed to the decrease in value of the shares other than misrepresentation and the concern about an adverse costs award if the plaintiff was not successful. If not settled this matter would have resulted in significant delay and costs to continue the litigation.

[35] There was the possibility that the claim was as high as $38 million but the unexpected or confounding events could significantly lower the potential recovery. In addition the liability cap under s. 138 of the *OSA* is $16.5 million.

[36] I am satisfied that the plaintiffs have provided me with sufficient evidence to make an objective and impartial independent assessment of the fairness of the settlement, having regard to all the circumstances. I acknowledge that discovery has not occurred but it is appropriate that settlements be reached at an early stage in the proceeding when there is sufficient evidence to do so.

[37] Armtec, as part of the settlement discussions produced over 12,000 documents which have been reviewed by class counsel. Class counsel has reviewed many other documents in the public domain filed by Armtec in accordance with its obligations under the securities legislation and regulations.

[38] Class counsel also had the benefit of an opinion of an economist and forensic accountant that the securities of Armtec were traded in an efficient market during the class period and therefore reasonable estimate of the value of the claim was possible.

[39] As a result class counsel were not guessing about the merits of the action or the value of the claim. I am further satisfied that they have exercised due diligence in their evaluation of risks which has resulted in the settlement and that it is recommended by plaintiffs' counsel.

The Settlement Terms and Conditions

[40] The settlement provides for the recovery of $12,915,516 with no right of reversion. The claims process will be web-based and a formula has been established in the plan of allocation as to class members' entitlement which is straightforward and clear.

[41] Further, a resolution process has been established to deal with issues of eligibility and amount allocated with the right for a member to apply to an independent referee to determine those issues.

[42] The settlement sets up a potential *cy prés* payment for all monies not distributed directly to class members subject to approval of the court.

[43] If not resolved this litigation could take as long as four years to resolve with various approvals required such as leave under Part 23.1 of the *OSA*.

[44] The parties had the assistance of a highly qualified mediator, Joel Wiesenfeld, and he recommends the proposed settlement.

[45] No class members have objected to the settlement with the proposed notice of settlement being provided to the class members pursuant to my order of March 25, 2014.

[46] Class counsel is a highly experienced firm in class action proceedings including securities cases. Class counsel believe the proposed settlement is fair and reasonable and in the best interests of the class members. This settlement has been negotiated by competent counsel at arm's length and as a result there is a "strong initial presumption of fairness" (*Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 (S.C.J.), at paras. 55-56).

[47] I accept the recommendation of class counsel of the appointment of Marsh Risk Consulting Canada as administrator and Gregory D. Wrigglesworth as the referee and recipient of the Opt-Out forms.

[48] Therefore I approve the settlement and the proposed notice as outlined in the material.

Class Counsel Fees

[49] The plaintiff and class counsel have agreed to a fee of 25% of the total recovery plus HST plus disbursements. The proposed fee will be allocated 94% to Sutts, Strosberg LLP and 6% to Siskinds, Demeules.

[50] An objection was raised as to a portion of class counsel's disbursements which was resolved by its withdrawal.

[51] Included in the disbursement request was the payment of a disbursement expense of $82,177.12 incurred by Siskinds LLP concerning two reports in the Locking carriage action. I accept the initial proposal that these funds be paid to Siskinds as part of the disbursement account.

[52] There was no objection to the proposed 25% contingency fee arrangement which were contained in the notices of the approval hearing.

[53] I am satisfied that the counsel fees and disbursements are fair and reasonable in the circumstances. I am satisfied that the fee arrangement is appropriate. I also note that class counsel did not apply to the class proceeding funds and saved the class the statutory 10% levy that otherwise would have been payable.

[54] I therefore:

1. approve the settlement of this class action in accordance with the terms of the settlement agreement;

2. appoint Marsh Risk Consulting Canada as administrator;

3. appoint Gregory D. Wrigglesworth of Kirwin Partners LLP as referee; and

4. include the right to make ancillary orders and directions as is necessary.

[55] As a separate order I approve and fix class counsel fees at $3,228,879 plus HST of $419,754 plus Sutts, Strosberg disbursements of $147,986.49 and Siskinds LLP disbursements of $82,177.12 for a total of $3,878,796.61.

Terrence L.J. Patterson
Justice

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Defendants

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REASONS FOR JUDGMENT

Patterson J.

Released: June 13, 2014