Citation: Dugal v. Manulife Financial Corporation, 2014 ONSC 1347
Divisional Court File No. 516/13
Date: 20140303

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

2014 ONSC 1347 (CanLII)

B E T W E E N:	)	
	)	
MARK DUGAL, AARON MURPHY, HARLEN BOMBERRY, JOHN O'MALLEY, GAETAN SIGUOIN, ARMAND CHARBONNEAU, PAUL MITCHELL, STEVEN MOFFATT, JOHN VASCONCELOS and DAVID THOMPSTONE, AS TRUSTEES OF THE IRONWORKERS ONTARIO PENSION FUND and LEONARD SCHWARTZ	)	*A. Dimitri Lascaris, Daniel E.H. Bach, Michael Wright, Amanda Darrach* for the Respondents/Plaintiffs
Respondents/Plaintiffs	)	
- and -	)	
MANULIFE FINANCIAL CORPORATION, DOMINIC D'ALESSANDRO and PETER RUBENOVITCH	)	*Patricia D.S. Jackson, Andrew Gray, Laura Redekop* for Manulife *Linda Fuerst* for Dominic D'Alessandro, *Eric S. Block, Daniel Dawalibi* for Peter Rubenovitch
Appellants/Defendants	)	
	)	HEARD: December 2, 2013

M.A. SANDERSON J.

REASONS FOR DECISION

Introduction

[1] This is a motion by Manulife Financial Corporation ("Manulife") and the individual Defendants Dominic D'Alessandro and Peter Rubenovitch for leave to appeal the decision of Belobaba J. ("the Motion Judge") (1) granting leave to the Plaintiffs to pursue claims under Part XXIII.1 of the *Securities Act*, R.S.O.1990, c. S5, and (2) certifying this action as a class proceeding.

Background

[2] In this securities class action, the Plaintiffs have alleged that during the class period (April 1, 2004 to February 12, 2009) the Defendant Manulife misrepresented its equity market risk arising from its segregated fund/guaranteed products when it consistently advised class members it had "effective, rigorous, disciplined and prudent" risk management systems, policies and practices.

[3] It was uncontroverted that sellers of guaranteed products typically use hedging techniques to offset their potential liabilities and/or reinsure to reduce their risks. In this case, Manulife decided to largely abandon hedging and reinsurance of its guaranteed products during the class period. The Plaintiffs allege that while it was entitled to make that decision, Manulife was obliged to fairly, fully and timely disclose the attendant risks. Manulife did not do so until February 12, 2009, when it released its 2008 year-end financial results.

[4] The Motion Judge held the Plaintiffs had met the test for granting leave under Part XXIII.1 of the *Securities Act*. They had raised serious arguable questions on: (1) whether the market knew about the extent of Manulife's market risk exposure (para. 48); (2) whether Manulife was required to disclose the impacts of a 10% or 20% market decline or to use a GAAP approved measure (para. 59); (3) whether the market meltdown of 2008 was unforeseeable and unprecedented (para. 63). He held that they had a reasonable possibility of succeeding at trial on each question.

[5] He also held the Action should be certified. The pleadings disclosed causes of action in negligence (para. 80), negligent misrepresentation (para. 83) and unjust enrichment (para. 87). The common issues [with modifications] were common to the class and their resolution would move the litigation forward (para. 95).

Test for Leave to Appeal

[6] The Rules of Civil Procedure provide:

> Leave to appeal shall not be granted unless:
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> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
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> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. *Rules of Civil Procedure*, Rule 62.02(4)

[7] The test is conjunctive:

> (a) Before considering whether it is desirable that leave to appeal be granted, this Court must find that there are conflicting decisions on the matters involved in the proposed appeal. A conflicting decision is one where "the principles on which the discretion was exercised

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> differ from the principles upon which the same sort of discretion was exercised in the case before the court": *Lynch v Segal*, [2005] OJ no 1275 (Ont Sup Ct);
>
> (b) before considering whether the proposed appeal involves matters of such importance that. . . leave to appeal should be granted, this Court must conclude that there appears to be good reason to doubt the correctness of the order in question: *Abdula v Canadian Solar*, 2013 ONSC 5993.

[8] Where leave to appeal from a decision granting the certification of a Class Proceeding is sought, absent matters of general principle or errors of law, leave against certification should not be given: *Mignacca v. Merck Frosst Canada Ltd.* (2008), 66 CPC (6th) 214 at para. 25, (Ont Sup Ct); *Sauer v. Canada (Attorney General)* (2009), 246 OAC 256 at para. 74, (Ont. Div. Ct.) Leave is granted from a decision as a whole, not "specific aspects of the Reasons": *Silver v Imax Corp.*, 2011 ONSC 1035 at para. 5.

[9] Counsel for Manulife submitted on behalf of all the Defendants that there is good reason to doubt the correctness of the decision, there are conflicting decisions on the matters involved in the proposed appeal, and the appeal involves matters of such importance that leave should be granted. Counsel for the Plaintiffs submitted the threshold requirements for granting leave have not been met here.

Leave Under Part XXIII.1 of the *Securities Act*

[10] In *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, Feldman J.A. for the Ontario Court of Appeal recently clarified the test to be applied in granting leave under Part XXIII.1 of the *Securities Act* at paras 90-91 as follows:

> [90] The motion judge stated that he agreed with van Rensburg J. (in *Silver v. IMAX*) and Tausenfreund J. (in *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 (CanLII), 2011 ONSC 25, 3 C.P.C. (7th) 261) that the leave requirement is "a relatively low threshold". Perell J. in *Zaniewicz v. Zungai Haixi Corp*, 2012 ONSC 6061 (CanLII), 2012 ONSC 6061, at para. 37, described it as a "preliminary low-level merits based leave test". I agree with these descriptive characterizations. However, beyond that, it is not necessary, in my view, to try to further qualify the test. As discussed above, it has been effectively described by McLachlin C.J. in relation to the *Hunt v. Carey* test for determining if a claim should be struck as disclosing no cause of action, when deciding whether a class action can be certified.
>
> [91] In the securities class action context, there is also a significant procedural advantage to having the same test apply to the leave motion as to the certification motion. If the leave motion is heard before the certification motion and leave is denied, the claim is at an end. But if leave is granted, it will be unnecessary to reconsider the issue on the certification motion. Because the test is the same, and the evidentiary basis is the highest it can be for the plaintiff on the certification motion, once leave is granted on the record filed, the claim will also meet the cause of action criterion under s. 5(1)(a) of the *CPA*.

[11] In this case, decided before the decision in *Green* was released by the Ontario Court of Appeal, the Motion Judge wrote at 2013 ONSC 4083 (Can L11) at paras 36, 37, 38 and 41:

> [36] The dispute here is whether the second hurdle has been cleared—that is, whether the plaintiffs have established a reasonable possibility of success at trial. Much of this dispute is centered on the meaning of the phrase "reasonable possibility of success." Is this simply a screening mechanism to

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> keep out "strike suits" that are plainly unmeritorious and have no chance of success? Or, is this a preliminary merits test that should have more bite?
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> [37] Everyone agrees that a "reasonable possibility" is more than a mere possibility and less than a probability. If the weather forecast says that the chance of rain tomorrow is no more than 1%, would you conclude that there is a reasonable possibility that it will rain tomorrow? Probably not. What if the chance of rain is 20%? Most people, I would think, would describe this as a reasonable possibility of rain. How about 10%? Or 5%? Does a one in twenty chance amount to a reasonable possibility?
>
> [38] Judges convey meaning with words, not percentages. But what is the best way to convey the meaning of "reasonable possibility of success at trial?" There are two schools of thought. Most class action judges, at least in Ontario, seem to be satisfied with a "relatively low threshold" — all the plaintiff has to show is "something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial. Of course, the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.
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> [41] Although I would very much prefer to treat the s. 138.8 hurdle as more than just a speed bump, I fear, given a recent Supreme Court decision, that the battle may be lost. In any event, in this case, I would have come to the same conclusion under both the relaxed Ontario approach and the more demanding B.C. / OLRC approach. As I explain below, the plaintiffs have easily cleared the "more than a chance" hurdle. They have also, in my view, cleared the higher OLRC hurdle on each of the four issues in dispute by showing not just a triable issue but a seriously arguable claim that has a reasonable possibility of success.
> [Footnotes omitted.]

[12] The Motion Judge made it clear at paras. 41 and 69 that even if he had been applying the more onerous OLRC standard, the Plaintiffs would have met the test.

[13] Counsel for Manulife submitted the Motion Judge erred in holding that the test under the Securities Act had been met:

(a) the Plaintiffs had not raised arguable issues that had a reasonable possibility of success given the evidence that the market knew the nature and extent of Manulife's equity risk and its management of that risk prior to the February 12, 2009 "corrective" disclosure; the information the Plaintiffs alleged should have been disclosed was in fact disclosed;

(b) the "corrective" disclosure made on February 12, 2009 was not corrective but was the timely release of the financial results;

(c) his findings were based on inadmissible newspaper hearsay and argumentative and speculative opinions from unqualified experts;

(d) his assessment was based in part on the significant misapprehension that Manulife's equity market sensitivity was an "existential threat to Manulife's business";

(e) leave to pursue claims under the Securities Act should not have been granted *nunc pro tunc*.

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(a) The Market Knew - General Observations

[14] Counsel for Manulife is now in effect challenging the Motion Judge's factual conclusions, taking the position that they were unwarranted. She submitted that the Motion Judge erred in concluding that what the market knew was a seriously arguable question "given the competing evidence."

[15] I note that the Motion Judge was careful to point out that his conclusions were preliminary but necessary for the resolution of the leave and Certification issues. Whether or not the allegations against Manulife would ultimately prevail were matters to be decided at trial.

[16] Counsel for Manulife submitted the Motion Judge disregarded evidence that Manulife had disclosed and the market knew that Manulife had not reinsured its Guaranteed Products after 2004, had not hedged its Guaranteed Product exposure for most of the Class Period, had only commenced doing so at the end of 2007, and then, only on new business, and as a result was more sensitive to equity market declines than its peers. It was well-understood by the market that one of the consequences of the Guaranteed Products business was that there was a risk that a decrease in the value of equity markets would increase Manulife's potential obligations to the holders of the Guaranteed Products, with a corresponding negative impact on Manulife's shareholders. The market knew that sensitivity increased as the market declined.

[17] Counsel for Manulife submitted, for example, that the body of analyst and rating reports in the record supported the conclusion that the market knew about the extent of Manulife's equity market risk over the entire Class Period. The Motion Judge misapprehended the evidence in failing to conclude that at all material times the market knew the nature and extent of Manulife's equity market risk. The market knew that quantification of its Guaranteed Product liability in any quarter was sensitive to the CTE level that it used and that it varied between 60 and 80. The market knew before February 12, 2009 everything that should have been disclosed. In its press release on February 12, 2009, it simply disclosed its financial results at the earliest possible time.

[18] The Court relied on reports from three experts: Professor Jarrell (Jarrell), a financial economist and a professor of Economics and Finance at the University of Rochester, with a Ph.D. in Business Economics and an MBA, each from the University of Chicago. He served as the chief economist for the U.S. Securities and Exchange Commission; Paul Winokur (Winokur), an actuary; and Robert Chambers (Chambers), a chartered accountant, chartered business valuator and a Fellow of the Institute of Chartered Accountants of Ontario, formerly a partner of KPMG LLP, where he headed the financial institutions, forensic accounting and risk strategy practices in Canada, and KPMG's forensic accounting practices internationally. He has also worked extensively with securities regulators.

[19] Counsel for Manulife submitted the Plaintiffs' experts, Chambers and Jarrell, made a number of assertions about the alleged non-disclosure of Manulife's equity sensitivity, use of reinsurance and hedging, and variability in impact of CTE reserves that the Motion Judge

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accepted that were beyond their expertise, and were squarely contradicted by the analyst and rating agency reports in the record.

[20] Counsel for the Defendants submitted the Motion Judge should have disregarded the Chambers Report completely. He erred in noting that "[t]he defendants disparaged Mr. Chambers' expertise but filed no evidence in response to his or to the other two experts' reports." He should have held the opinion evidence inadmissible. Lack of response to an unqualified opinion did not make it admissible.

[21] Counsel for the Plaintiffs submitted the Defendants did not file affidavits disputing the content of these reports. Until this motion for leave to appeal, they did not object to Jarrell's qualifications or take issue with the content of his report. They brought no motions to strike his expert evidence. While they disparaged Chambers' qualifications and report, they took no steps to have him disqualified or his affidavit struck.

[22] In any event, the Motion Judge was entitled to conclude the experts had the requisite expertise.

[23] I accept the submission of Counsel for the Plaintiffs that the Motion Judge had before him Jarrell's report including his opinion on what the market knew. To challenge that evidence, the Defendants should have tendered competing expert evidence. They did not do so. *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57 at para. 119. In *CV Technologies*, Lax J held that by refusing to tender affidavits, the Defendants are "probably foregoing the right to assert the statutory defences." *Ainslie v. CV Technologies Inc.* (2008), 93 OR (3d) 200 at para. 24, (Ont. Sup. Ct.); see also *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 at para. 42. "If no objection is made to the admissibility of evidence in a civil trial, an objection on appeal will usually be unsuccessful." *Marshall v. Watson Wyatt & Co* (2002), 57 OR (3d) 813 at para. 15 (Ont CA).

[24] Counsel for the Defendants submitted that from early in the Class Period, Manulife disclosed its lack of hedging. In its annual MD&A for 2004, 2005, 2006 and 2007, it disclosed the size of the Guaranteed Products business, the manner in which risk was measured, and the impact on shareholders' economic value of a 10% decline in equity markets. During analyst conference calls, it discussed risk management. In its 2007 Annual Report, containing the MD&A and financial statements, Manulife included detailed risk management disclosure and disclosure regarding the Guaranteed Products.

[25] The Plaintiffs alleged that Manulife was required to make full timely disclosure of the extent of its risks/ exposure arising from its lack of hedging and reinsuring, and exposure to severe equity market and interest rate declines. Manulife had that information during the Class Period and did not disclose it. It now, even at a time of less risk, discloses that information.

[26] Counsel for Manulife submitted it did increase its disclosures about the effect of external events on its business as market conditions changed over the course of 2008, including during analyst conference calls that took place following the release of its quarterly

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results. By the end of Q3 2008 Manulife had disclosed and the market knew the impact of the 30% market decline to date on shareholders' economic value, net income, and capital, as well as the impact of a further 10% market decline on shareholders' economic value and net income, and the impact of a further 10% to 25% market decline on capital.

[27] There was evidence that although Manulife disclosed the impact of "shareholders' economic value" of a 10% reduction in equity markets, the magnitude of its exposure to market corrections greater than 10% could not be extrapolated from its exposure to a 10% correction.

[28] Moreover, the "shareholders economic value" Manulife used was an internally invented and non GAAP financial measure entailing assumptions and net present value calculations that were not transparent and masked the potential effect of equity market declines on Manulife's net income. It was poorly understood by investors. After the Class Period, Manulife cautioned that "shareholders' economic value" "should not be considered in isolation or as a substitute for any other financial information prepared in accordance with GAAP." Manulife began to disclose the estimated impact of equity market and interest rate fluctuations on the well-understood GAAP measure of net income. These post-Class Period disclosures allegedly revealed that the effects of equity market and interest rate declines on net income were substantially larger than their effects on "shareholders' economic value."

[29] Prior to the release of its 2008 year-end results on February 12, 2009, in its press release of December 2, 2008 Manulife mentioned it was raising $2.125 billion in common equity to bolster its capital position in the face of "the unprecedented decline in worldwide equity markets which for the 11 months ended November 30, 2008 are down 33% in Canada, 39% in the U.S. and by an average of 45% in Asia." It provided an estimate of fiscal 2008 earnings, noting that based on the then current state of global equity markets, net income for the year was estimated to be $900 million, including an estimated loss of $1.5 billion for Q4 2008. It also disclosed that its reserves for variable annuity guarantees that had been $526 million at December 31, 2007 were estimated to be $5 billion.

[30] Counsel for Manulife submitted there was no significant market reaction to this announcement.

[31] Counsel for the Plaintiffs submitted that was in part because in its December 2, 2008 press release Manulife had not disclosed that the CTE (conditional tail expectation) level it had used to calculate those losses [later disclosed to be 65] differed from the CTE it had employed in Q3 2008 [80], the highest it had ever employed. There was evidence before the Motion Judge that the market had not expected the CTE level used by Manulife in Q4 to have been so low. At least one major analyst had expected a CTE level at or around the Q3 high [80]. Manulife's stated reason for the high Q3 CTE level was high volatility in that quarter. In Q4/08, volatility was as high—or higher. [All other things being equal, the higher the CTE level, the greater the reserves required.]

[32] Counsel for Manulife submitted the Motion Judge relied on Jarrell's speculation that in December 2008, had it been otherwise, the market would have reacted to these results. Such speculation was beyond the expertise of Jarrell.

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[33] Counsel for Manulife submitted that the Motion Judge erred in failing to appreciate that the variability of CTE rates and its impact was known and understood by the market. As the CTE level varied every quarter throughout the Class Period, the Motion Judge had no basis on which to conclude that the market anticipated that Manulife would apply the same CTE level from one quarter to the next.

[34] Counsel for the Plaintiffs submitted that on February 12, 2008, Manulife finally revealed the extent of its exposure to the Guaranteed Products. It disclosed its earnings in 2008 were $517 million versus $4.3 billion in 2007. The loss as a result of the increased reserves for guaranteed products was $1.8 billion, up from the $1.5 billion estimate at December 2, 2008. Its reserves for the associated guarantees had increased to approximately $5.8 billion, up from the estimate at December 2, 2008 of $5 billion.

[35] Jarrell opined the report released on February 12 2009 was "news." Manulife revealed that it used a CTE of 65 – its lowest ever—and that it had increased reserves by $5.8 billion. [Had Manulife used CTE 80, as in Q3, it would have had to increase its reserves by an additional $2.2 billion, i.e. it would have increased reserves by $8 billion.] Jarrell opined that as a result of the revelation of the CTE levels that had been used in the fourth quarter of 2008, the stock price experienced a statistically significant decline.

[36] Counsel for Manulife submitted there was nothing new or corrective in the February 12, 2009 press release as to Manulife's sensitivity to equity market declines as a result of its risk management processes. All that was new was the actual financial impact of the turbulent financial events of Q4 2008.

[37] The Motion Judge considered the evidence before him. There was admissible evidence upon which the Motion Judge could reach the conclusions he did. He considered the Plaintiffs' evidence that some "analysts … were saying nothing about the company's unhedged exposure risks" and concluded that it did not follow that "the market" knew of Manulife's exposure. He was not required to equate dissemination of material information to selected market participants to dissemination of information in Manulife's core documents. It was open to the Motion Judge to reach the conclusions he did on what the market knew.

(b) The Corrective Disclosure was not Corrective

[38] Counsel for Manulife submitted there was no evidence that the decline after February 12, 2009 was anything more than the reaction by the market to the timely and accurate disclosure of Manulife's year-end 2008 results.

[39] I disagree. The Motion Judge was entitled to consider the "uncontroverted opinion evidence" of the plaintiffs' expert Jarrell that there was a statistically significant stock price decline on February 12, 2009 "directly attributable" to news (i) of the CTE level Manulife used to calculate reserves for the Guaranteed Products; and (ii) of Manulife's decisions not to hedge or reinsure the Guaranteed Products.

[40] In my view, it was open to the Motion Judge to reach the conclusion he did based on the evidence of Jarrell.

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[41] There is no good reason to doubt his conclusion that the Plaintiffs have raised a seriously arguable issue as to whether corrective information was disclosed on February 12, 2009 that caused the severe drop in the Manulife share price.

(c) Hearsay Evidence and Evidence from Unqualified Experts

[42] Counsel for Manulife submitted the Motion Judge erred in relying on a newspaper article that was inadmissible hearsay.

[43] In my view the Motion Judge did not rely much or at all on the investigative reports of the *National Post*. There was evidence to support his conclusions apart from them.

(d) Alleged Misapprehension Regarding "Existential Threat to Manulife's Business"

[44] Counsel for Manulife submitted that the Motion Judge misapprehended the evidence and erroneously concluded that the financial crisis was an existential threat to Manulife. He should have concluded that the market meltdown of 2008 was unforeseeable. He incorrectly concluded that a market correction of around 40% was not "surprising" or "unprecedented."

[45] I note that at para. 62, where the Motion Judge mentioned the existential threat, he was stating the position of the Plaintiffs. At para. 63, he noted there was an evidentiary basis for the Plaintiffs' submission that the market meltdown and declines of 40% were not unforeseeable or unprecedented. There was evidence that a comparable market decline had occurred between August 2000 and September 2002, when the S&P/TSX Composite Index had fallen by 44%. There was also evidence that a lack of hedging combined with the significant growth in Manulife's book of Guaranteed Products exposed Manulife to enormous risk. In a recent BNN interview, Manulife's current CEO conceded that the lack of hedging, combined with the guarantees attached to the Guaranteed Products, "exposed the company to enormous risk" and that the risk associated with the Guaranteed Products should have been "constrained to tolerable levels," that hedging was "an important part" of keeping the risk "within tolerable levels."

[46] There is no good reason to doubt the correctness of the Motion Judge's conclusion that there was an evidentiary basis for the Plaintiffs' allegation that market declines of 2008 were not entirely unforeseeable and that the Plaintiffs had shown a reasonable possibility of success on this issue at trial.

(e) The *Nunc Pro Tunc* Issue

[47] Given the decision of the Court of Appeal in *Green* it is not necessary to consider the *nunc pro tunc* issue. The limitation has not expired with respect to the claims under the *Securities Act*.

Summary re Leave Under the *Securities Act*

[48] In summary, there is no good reason to doubt the correctness of the decision to grant leave under s. 138.8 of the *Securities Act*.

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Leave to Appeal the Certification Order

Failure to Consider the Interaction Of Part XXIII of the *Securities Act* and the Common Law

[49] Counsel for Manulife submitted that the Motion Judge erred in certifying the following common issue: "Can each Class Member's reliance be inferred from the fact of the Class Member having acquired Manulife's securities in an efficient market?" He erred in certifying the common law negligence and negligent misrepresentation claims. He ignored the underlying premise of Part XXIII.1 of the *Securities Act*, i.e., the unsuitability of common law misrepresentation claims for certification. She submitted that conclusion conflicts with *McKenna v. Gammon Gold Inc.* 2010 ONSC 1591 (CanLII), *Dobbie v. Arctic Glacier Income Fund* [2011] O.J. No 932, 2011 ONSC 25, and the many other cases referred to in those cases where the Courts have held that reliance-based claims are not suitable for certification.

[50] I do not accept this submission. I have noted that in some cases involving negligent misrepresentation, the Court has certified common issues, including inferred reliance, in a negligent misrepresentation claim.

[51] I note that in *McKenna* Strathy J wrote at paras. 135-138:

> [135] It has been generally accepted that the cause of action in negligent misrepresentation requires proof that the plaintiff relied on the misrepresentation. It is for this reason that courts have usually concluded that negligent misrepresentation claims give rise to such individual inquiries as to reliance that they are unsuitable for certification: *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No. 2786 (Gen. Div) at para. 30; *Abdool v. Anaheim Management Ltd. et al* 1995 CanLII 5597 (ON SCDC), (1995), 21 O.R. (3d) 453 (Div. Ct.) at para. 129; *Sherman v. Drabinsky* 1990 CanLII 6763 (ON SC), (1990), 74 O.R. (2d) 596 (H.C.J.), aff'd [1994] O.J. No. 4419 (C.A.); Moyes *v. Fortune Financial Corp.* 2002 CanLII 23608 (ON SC), (2002), 61 O.R. (3d) 770 (S.C.J.), aff'd 2003 CanLII 872 (ON SCDC), (2003), 67 O.R. (3d) 795 (Div. Ct.); *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350 (Gen. Div.) at para. 16; *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 31 C.P.C. (4th) 340, [1998] O.J, No. 5461 (Gen. Div.) at para. 27; *Williams v. Mutual Life Assurance Co. of Canada* 2003 CanLII 48334 (ON CA), (2003), 226 D.LR. (4th) 112 (Ont. C.A.) at para. 48; *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at para. 93; *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.); *McKay v. CDI Career Development Institutes Ltd.* (1999), 30 C.P.C. (4th) 101, [1999] B.C.J. No. 562 (S.C.) at paras. 39-42; *Olar v. Laurentian University* (2004), 6 C.P.C. (6th) 276, [2004] O.J. No. 3716 (Div. Ct.) at paras. 25-26; *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790 (CanLII), 2001 BCSC 1790, 22 B.L.R. (3d) 46 (S.C.) aff'd 2003 BCCA 87 (CanLII), 2003 BCCA 87, 30 B.L.R. (3d) 177 (C.A.); *Huras v. COM DEV Ltd.*, [1999] O.J. No. 2560, 36 C.P.C. (4th) 31 (S.C.J.) at para. 19.
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> [136] Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis: *Lacroix v. Canada Mortgage and Housing Corp.*, [2009] O.J. No. 316, 68 C.P.C. (6th) 111 (S.C.J.) at para. 97; *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41, [2006] O.J. No. 3748 (S.C.J.), at paras. 91 – 93; *Carom v. Bre-X Minerals Ltd.* 2000 CanLII 16886 (ON CA), (2000), 51 O.R. (3d) 236 (C.A.) at para. 57; *Serhan (Estate Trustee) v. Johnson & Johnson* 2004 CanLII 1533 (ON SC), (2004), 72 O.R. (3d) 296 (S.C.J.) at paras. 57-60.
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> [137] Exceptions may be made where there is a single representation made to all members of the class or there are a limited number of representations that have a common import: see, for example, *Hickey-Button v. Loyalist College of Applies Arts & Technology*, 2006 CanLII 20079 (ON CA), (2006), 211 O.A.C. 301, [2006] O.J. No. 2393. [Emphasis added.]

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> [138] In *Carom v. Bre-X Minerals Ltd.* 1998 CanLII 14705 (ON SC), (1998), 41 O.R. (3d) 780, [1998] O.J. No. 4496 (Gen. Div.), Winkler J., as he then was, referred to *Cognos* and *Hercules Management Ltd. v. Ernst & Young* as well as *Parna v. G. & S. Properties Ltd.*, above, in support of the need to prove reliance in negligent misrepresentation cases. He rejected the proposition that proof of reliance could be supplanted by a "fraud-on-the-market" theory, which has found favour in the United States, based on the proposition that in an efficient securities market the market price of the securities reflects the misrepresentations. He concluded, at para. 40:
>
> > The torts of fraudulent and negligent misrepresentation are neither novel nor undeveloped in Canada. Both have been canvassed by the Supreme Court of Canada and the pronouncements of that court on the elements of each must be considered to be settled law. In my view, the presumption of reliance created by the fraud on the market theory can have no application as a substitute for the requirement of *actual reliance* in either tort. In the context of the torts of fraudulent and negligent misrepresentation a presumption of the nature advocated for by the plaintiffs does not exist in Canadian common law. Indeed, to import such a presumption would amount to a redefinition of the torts themselves [emphasis added].

[52] In *Dobbie,* Tausendfreund J at para. 224 cited Strathy J's conclusions at paras. 136 and 137 of *McKenna,* and wrote at paras. 223 and 225:

> [223] It is generally accepted that a cause of action in negligent misrepresentation requires proof of reliance. For that reason, courts have concluded that negligent misrepresentation claims are unsuitable for certification: *McKenna v. Gammon Gold Inc., supra* at para. 135.
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> …
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> [225] Proof of reliance in a case of negligent misrepresentation can be made by inference, as opposed to direct evidence: *Mondor v. Fisherman,* [2001] O.J. No. 4620 and *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41. Two recent actions were certified in the face of claims of negligent misrepresentation: see *McCann v. CP Ships, supra* and *Silver v. Imax,* [2009] O.J. No. 5585.

[53] The Ontario Court of Appeal noted in *Green, supra,* that in *Cannon v Funds for Canada Foundation*, Strathy J. also certified common issues relating to reliance in a negligent misrepresentation claim on the basis that investors looked at only two documents. In these circumstances he certified as a common issue inferred group reliance.

[54] When in *Green*, Strathy J concluded that issues of individual reliance were not suitable for certification, the facts there differed greatly from the facts in *Cannon*. In *Green*, multiple misrepresentations were alleged over a lengthy time frame. There was no core misrepresentation.

[55] In the case at bar, a core misrepresentation was alleged. The Motion Judge noted at para. 81 that the Plaintiffs are claiming negligent misrepresentation only against Manulife and only on the basis of the Representation defined as follows: the statement that Manulife had in place enterprise-wide risk management systems, policies and practices, that were comprehensive, effective, rigorous, disciplined and or prudent, and the substantially similar statements that are particularized in the Statement of Claim. He found the Representation

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could "stand alone as a single Representation that is judicially manageable in a class proceeding." He concluded the Representation was reasonably confined and judicially manageable. The common issues trial judge would not be required to deal with multiple representations over a multi-year timeframe.

[56] In *Green*, the Ontario Court of Appeal saw no basis to interfere with Strathy J's conclusion in that case that the reliance issues in that case should not be certified. However, the Court of Appeal did not clearly hold, for example, that *Cannon* had been wrongly decided. It did not make it clear that reliance issues should never be certified, even where a core misrepresentation has been alleged.

[57] Counsel for Manulife also submitted that permitting the Plaintiffs to assert common law misrepresentation claims as common issues would make the statutory regime "redundant."

[58] In *Green*, Strathy J. based his decision in part on the fact that the statutory remedy for secondary market misrepresentation under s. 138.3 of the *Securities Act* was enacted due to the difficulty in proving reliance based common law claims and the rejection in Ontario of the "fraud on the Market theory" He observed that to allow common law claims where the corporate and shareholder protections are not available would render the new remedy and leave process redundant. On that point the Ontario Court of Appeal in *Green* disagreed, and held that common law misrepresentation claims CAN be certified alongside statutory claims under the *Securities Act*, overruling Strathy J. on that point.

[59] Perell J. held in *Kinross* at para. 216 that if leave were granted under Part XXIII.1, the common law claims ought to be certified despite the need to prove reliance.

[60] Following the hearing of the leave and certification motions in this case, the Supreme Court issued a trilogy of decisions regarding class proceedings:

> The certification stage does not involve an assessment of the merit of the claim and is not intended to be a pronouncement on the viability or strength of the action"Although the claim might fail at trial, the action should proceed if there is an arguable case (or some basis in fact);

and

> Where the law is not settled on an issue, there is no impediment to certification on the basis of no cause of action. *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57
> The Supreme Court of Canada held that where matters are controversial and unsettled, they should be certified and proceed to a trial on the merits

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[61] The decision made by Belobaba J. on the certification motion is not a final adjudication of the merits. At trial, the Defendants may advance any defences available to them under the *Securities Act* or at common law.

Matters of General Importance

[62] Counsel for Manulife submitted that the proposed appeals raise issues of substantial importance not only to the parties, but to the practice generally, including whether the leave requirement of the *Securities Act* operates as a meaningful hurdle as a pre-condition to certification as intended by the Ontario Law Reform Commission. Since this issue has now been decided by the Court of Appeal, this is not an issue upon which appellate consideration is desirable.

[63] Counsel for Manulife submitted another matter of importance is whether the statutory regime operates to confer benefits on plaintiffs not available at common law without any of the burdens associated with the statutory regime. Again, this issue has now been decided by the Court of Appeal in *Green* and does not raise matters of importance that transcend the interests of the parties.

[64] "General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice. The issues here do not "transcend the interests of the parties." *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 97.

DISPOSITION

[65] The motion for leave to appeal is dismissed.

[66] Counsel may make written submissions on costs not exceeding five pages on or before March 20, 2014.

M.A. SANDERSON

Released: March 3, 2014

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Citation: Dugal v. Manulife Financial Corporation, 2014 ONSC 1347
Divisional Court File No. 516/13
Date: 20140303

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MARK DUGAL, AARON MURPHY, HARLEN BOMBERRY, JOHN O'MALLEY, GAETAN SIGUOIN, ARMAND CHARBONNEAU, PAUL MITCHELL, STEVEN MOFFATT, JOHN VASCONCELOS and DAVID THOMPSTONE, AS TRUSTEES OF THE IRONWORKERS ONTARIO PENSION FUND and LEONARD SCHWARTZ

Respondents/Plaintiffs

- and -

MANULIFE FINANCIAL CORPORATION, DOMINIC D'ALESSANDRO and PETER RUBENOVITCH

Appellants/Defendants

M.A. SANDERSON J.

Released: March 3, 2014