Robert Dewar QC and Karen Wittman $8 Hill Dewar Vincent

Date: 20090522
Docket: CI 05-01-43350
Indexed as: Manitoba (Securities Commission) v. Crocus Investment Fund
Cited as: 2009 MBQB 139
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA (GENERAL DIVISION)

B E T W E E N:

THE MANITOBA SECURITIES COMMISSION, applicant,	)	Robert A. Dewar, Q.C. and Karen R. Wittman for Deloitte Touche Inc., Receiver and Manager for Crocus Investment Fund
- and -	)	
CROCUS INVESTMENT FUND, respondent,	)	
Application under s. 27 of ***The Securities Act***, C.C.S.M. c. S50 and Queen's Bench Rule 14.05(2)(b)	)	JUDGMENT DELIVERED: May 22, 2009

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MCCAWLEY J.

[1] Deloitte & Touche Inc., as Receiver and Manager of Crocus Investment Fund, brought a motion on May 11, 2009, for an Order:

(a) dispensing with service of the Notice of Motion and Motion Record on any other interested party other than those served;

(b) substantially approving a form of order attached as Appendix 1;

(c) requesting directions from the court as to the manner of service of an intended motion by the Receiver for an interim distribution to shareholders; and

(d) such further and other relief as the court deems just.

[2] In support of the motion the Receiver filed Receiver's Report No. 11 and an affidavit of service sworn May 11, 2009.

[3] On the basis of information provided by counsel for the Receiver it appeared that all interested parties received notice of the within motion such that further service was dispensed with.

[4] The proposed form of order for which court approval is sought contains a process by which the Receiver would notify potential claimants against Crocus (not including shareholders or creditors who have received an exemption notice) with any claim arising before or after the Receiver's appointment, that they have until 5:00 p.m. on Friday June 19, 2009 to file their claim. If they fail to file within the stated time they are forever barred from asserting any claim against Crocus, or the Receiver, without the consent of the Receiver or leave of the court. The proposed order sets out other details and the various forms to be used.

[5] The proposed order is similar to one the Receiver sought from the court in this matter several months ago which was denied (January 22, 2009 decision, 2009 MBQB 13). What prompted the earlier motion was the inability of the parties to a proposed class action by the shareholders against Crocus and others

to settle the action because none were prepared to assume the risk of unknown claims. The proposed solution at that time was to ask the court to eliminate any risk, by court order, so that the shareholders, who would otherwise have to wait until all creditors had been paid, could receive an interim cash distribution.

[6] The court was advised that what is different now is that the parties to the class action have reached a settlement. As well, the bar order sought is less broad and excludes any reference to the former officers and directors of Crocus although it does bar any claims against Crocus and the Receiver. Unlike before, and as already noted, the proposed order also provides for the filing of late claims.

[7] One difficulty is that, although a settlement has been reached in principle, it has not been "completed" in that the shareholders have been given until June 22, 2009 to opt out of any settlement, the documentation has not been finalized and the money has not been paid. Furthermore, should a number of shareholders decide to exercise their right to opt out, the settlement would fall apart. This raises the obvious question of why the motion is being brought at this time. When asked, counsel responded that the Receiver is anxious to get money into the hands of the shareholders and could wait no longer.

[8] No one wants to see the shareholders of Crocus wait unnecessarily for the distribution that will inevitably go to them. The question is, and has always been, how much and when can it appropriately be paid?

[9] Since the initial order appointing the Receiver in 2005, much progress has been made, but it has been slow and sometimes painful, and not devoid of frustration on the part of many. It has also generated significant publicity which, at this stage, may be of some assistance in that one can assume a large number of people in Manitoba have had some form of exposure to it. That being said, before any distribution to the shareholders can be made, it is acknowledged it is necessary for the Receiver to "shake the trees" (to use the words of counsel) to find out who may be out there with claims as creditors of Crocus.

[10] This is because, as stated many times, any entitlement the shareholders have to payment is subordinate to the rights of the creditors. Although no court order is necessary for the Receiver to take steps to find out what potential claims may be around, it is perhaps prudent of the Receiver to seek the court's approval of the process to be undertaken. However, it appears it is the claims bar order that is the driving force behind the Receiver's persistent efforts and which is problematic.

[11] Because the settlement of the class action (which was recently certified by Hanssen J. for the purpose of settlement only) is not finalized, on that ground alone the order should be refused. But even if the settlement were finalized, there is no principled basis on which the order should be granted to facilitate an interim distribution. The situation is not akin to a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "***CCAA***") as was made clear in the January 22, 2009 decision:

> [12] The court was urged to exercise its inherent jurisdiction to grant the order sought. Reliance was placed on the broad discretion the court derives from its jurisdiction under s. 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. 280, to give effect to a receivership. It was also suggested that the court take guidance from bar orders granted with respect to officers and directors in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Although rare, these have been granted to allow a corporate reorganization to take place although there is no specific authority in that act [*Houlden & Morawetz Bankruptcy and Insolvency Analysis* N-17; *Blue Range Resource Corp., Re*, 2000 ABCA 285; and *ATB Financial v. Metcalfe Mansfield Alternative Investments II Corp.,* 2008 ONCA 587]. It was argued by counsel for the Receiver, with no contrary view being expressed, that the same liberal attitude should be adopted here to facilitate a distribution to the shareholders. Indeed, all present indicated their agreement in principle to the proposed order, subject to some small changes which need not concern us here.
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> [13] As is obvious, this is not a reorganization under the *CCAA*, but rather a court-appointed receivership. While in no way minimizing the interest of the shareholders in being paid, the circumstances here are not analogous to those in the cases cited thereby opening the door for a similar approach.

[12] Although the proposed order does answer some concerns raised then and by the Alberta Court of Appeal in ***Blue Range Resource Corp., Re***, 2000 ABCA 285, with respect to late claimants, it does not address the very basic question of why, in order to facilitate an interim distribution, the court should create a new limitation period eliminating a risk (that it is assured is minimal) which should more properly be provided for by way of a reserve for unknown claims.

[13] The issue was addressed in response to the Receiver's request to approve an interim distribution of $14M to shareholders three years ago. At the time the contingent liabilities of Crocus were unknown and the Receiver admitted it could not realistically place a value on them. The observations made then are equally applicable now (April 7, 2006 decision, 2006 MBQB 87):

> [15] In my reasons for decision of October 27, 2005, I noted certain general principles which bear repeating here. One is that creditors have priority over shareholders. Another is that whereas the goal is to maximize the realization available to shareholders, the general rule is that such realization does not occur until after the liabilities of a company are determined and paid. One can conceive of a situation where it might be appropriate to make a distribution after all liabilities have been determined but not yet paid (for example, where sufficient funds have been reserved for that purpose), but that is not the case here.

[14] At that time the Receiver accepted that it had a responsibility to evaluate contingent claims and consider whether Crocus had sufficient assets to cover its liabilities before making any distribution to the shareholders. Although not directly saying anything different now, it first wants a bar order to protect it and Crocus from possible future claims.

[15] Having abandoned the argument that the situation is analogous to proceedings under the ***CCAA*** and a bar order is therefore appropriate, it is now submitted that it is closer to a Receivership under the ***Bankruptcy and Insolvency Act***, R.S., 1985, c. B-3. Since a trustee in bankruptcy is afforded statutory protection against creditors' late claims, it was argued the Receiver should be granted similar protection by the court exercising its inherent jurisdiction and broad discretion in favour of a bar order. Counsel acknowledged that they were unable to find any authority for such an order.

[16] The reason may lie in the fact that the Receiver is protected at common law. It is trite law that if a Receiver has conducted itself reasonably and responsibly in the execution of its duties, no cause of action will lie against it unless it can be demonstrated that the Receiver has been grossly negligent or fraudulent. One can only assume this is well known to this Receiver. Why, then,

is it seeking court protection against the very conduct the court should not condone? As stated earlier, "The Receiver agreed to being appointed by the court to administer this receivership and is being compensated for its efforts. As an officer of the court bound to execute its responsibilities honestly and reasonably, it ought to be willing to be judged by that standard" (January 22, 2009 decision, at para. 16).

[17] The court has no objection in principle to the Receiver "shaking the trees" in the manner suggested once the settlement of the class action is "complete" or sufficiently finalized so that, in the exercise of the professional judgment of the Receiver on the advice of counsel, it would be reasonable to do so.

[18] This should include a process whereby late claims would be considered, either with the consent of the Receiver or with leave of the court, which process would be made known to all potential claimants. However, it should not include a bar order.

[19] It must be remembered that this is an interim distribution not a final one. While recognizing the need to include a time period within which a claim must be made, the Receiver can still consider what claims have been submitted and, on the basis of its knowledge and experience, determine when the time is appropriate to apply for court approval of an interim distribution. At that time the Receiver would be expected to provide the evidentiary justification for it. There may be a future time, when Crocus is ready to be put to bed, that the kind

of order now sought, would be appropriate as against Crocus. It is difficult to conceive of when it would ever be justified as against the Receiver.

[20] With respect to the request for direction for service when the time to make a distribution arrives, in addition to the service proposed by the Receiver in the draft "service order", I would suggest appropriate notice on the Crocus website as well as in newspapers in the major Manitoban centres at least three weeks prior to the proposed hearing. There may be other notifications that would make sense but this will depend on what claims are filed and what other information comes forward. That remains to be seen.

[21] The motion of the Receiver to substantially approve a form of order attached as Appendix 1 to its Notice of Motion is dismissed.

M. J. McCawley J.