Date: 20111212
Docket: CI 95-01-43350
(Winnipeg Centre)
Indexed as: Manitoba Securities Commission v. Crocus Investment Fund
Cited as: 2011 MBQB 305

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

APPLICATION under section 27 of ***The Securities Act***, C.C.S.M., c. S50 and Queen's Bench Rule 14.05(2)(b)	)	Dave G. Hill and Karen R. Wittman for Deloitte Touche Inc., Receiver and Manager for Crocus Investment Fund
THE MANITOBA SECURITIES COMMISSION, applicant,	)	Kenneth A. Filkow, Q.C. and Diane M. Stasiuk for Charles Curtis, Peter Olfert, Diane Beresford, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Sylvia Farley, Hugh Eliasson, John Clarkson and Robert Hilliard
- and -	)	
CROCUS INVESTMENT FUND, respondent.	)	✓Ted E. Bock for Robert Ziegler
	)	Jeffrey A. Baigrie for Ron Waugh
	)	JUDGMENT DELIVERED: December 12, 2011

McCAWLEY, J.

[1] On June 30, 2011, Deloitte & Touche Inc., as Receiver and Manager of the respondent, Crocus Investment Fund, brought a motion for an order:

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

(b) authorizing and directing the Receiver to make a second interim distribution of the proceeds of the within receivership amongst Class A and Class I shareholders in accordance with the following formula:

Individual shareholder's share	=	Distributable amount Total number of Class A and Class I shares	X	Number of shares held by a shareholder

(c) such further and other relief as this Honourable Court may deem just.

[2] As the matter was contested, it was put over to July 7, 2011, for counsel to make their submissions. One of the issues in contention was the amount of the second interim distribution and, more particularly, whether the Receiver was obligated to hold back $3 million dollars pursuant to a Release Agreement dated May 8, 2009. That agreement provided for a $3 million dollar holdback which was intended to address potential indemnity claims including, among others, indemnity claims of a director which may result from certain proceedings of the Manitoba Securities Commission ("MSC") against them.

[3] The Receiver argued that it was no longer obligated to maintain this holdback whereas counsel for the directors took the position that it was.

[4] The Release contemplated that the $3 million dollar holdback could be reduced through negotiation and agreement between the parties failing which

the Receiver would be at liberty to apply to the court. As it was apparent that little, if any, discussions had taken place among the parties and there was some uncertainty as to the basis on which the Receiver was advancing this position, the court directed that the parties meet over the summer months in an attempt to see if the matter could be resolved. Not only was no agreement reached, but it appeared that a meeting could not be arranged with all of the parties and the matter was set down for hearing on September 16, 2011. That date were adjourned by consent to October 17, 2011, when the parties once again came before the court.

[5] At that time, the court was advised that since filing Receiver's Report No. 13 in June 2011, more monies had become available for distribution. Rather than the $7.9 million dollars recommended previously, the Receiver indicated it was now recommending a distribution of $9 million dollars. Once again, the Receiver took the position that no holdback was necessary, but in the alternative argued that, if the court felt otherwise, any amount set should be nominal.

[6] The court was advised of another significant change which had occurred the previous day. A Settlement Agreement had been put forward for approval by the MSC as between it and eight former Crocus directors (Charles Curtis, Peter Olfert, Diane Beresford, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Sylvia Farley and Robert Hilliard). All agreed that if the MSC's approval was forthcoming it would have a significant impact on the matters before the court. Accordingly, after hearing further submissions, the matter was adjourned *sine*

die, it being anticipated that a decision from the MSC would be available within a couple of weeks.

[7] By letter dated October 25, 2011, counsel for the MSC wrote to advise that the Settlement Agreement had been approved and further, that the Order of the MSC giving effect to the Settlement Agreement did not contain any assessments of costs, administrative penalties or orders of compensation for financial loss against any of the settling directors.

[8] The court was further advised that the MSC proceedings remained outstanding against Robert Ziegler and Ron Waugh and that an initial organizational meeting was scheduled for November 2, 2011.

[9] Given that counsel had already had two opportunities to make submissions concerning the proposed second interim distribution and holdback, the court wrote to them asking for clarification of their respective positions by letter in light of the settlement. Responses were received from all counsel up to and including October 28, 2011. It should be noted that the court also had before it correspondence from five shareholders of Crocus.

[10] In its correspondence, the Receiver continued to maintain the position that the Directors were no longer entitled to the $3 million dollar holdback, but if the court decided to order a holdback, as it was agreed it could do, the amount should be significantly reduced. Counsel for the Receiver also argued that, as far as they were aware, Mr. Waugh has an indemnity through the provincial government which appointed him as a director of Crocus and, accordingly, there

was no need for Crocus to maintain a second indemnity on his behalf. In my view, this fact (if indeed it is one) has no bearing on the issue of the amount of a second interim distribution or the amount of holdback. Even if there is a double indemnity, there may be an issue in future as to which indemnity should be called upon first. That is not a concern at the present time.

[11] Insofar as Mr. Ziegler is concerned, the Receiver suggested that $187,500.00 would be an appropriate amount based on his proportionate share of the original $3 million dollar holdback.

[12] Counsel for Mr. Waugh and Mr. Ziegler both argued that, given the potential exposure to costs, penalties, settlements and judgments, including an administrative penalty of up to $100,000.00 under s. 148.1(1) of ***The Securities Act***, C.C.S.M., c. S50; a potential compensation order of up to $250,000.00 per claimant under s. 148.2(2); an order for payment of the costs of and incidental to the MSC proceedings under s. 154; a potential order of costs of an investigation under s. 28(1); legal costs incurred in resisting and/or defending any "Independent Claims" as defined in the Release; and the cost of any amounts, judgments, fines or settlements arising out of such independent claims, $500,000.00 should be held back on account of each of their clients for a total of $1 million dollars. It further was suggested this amount be held for a period to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

[13] As a result of the settlement with the MSC, it was clear that eight of the ten directors subject to those proceedings will not be required to make any financial payment in respect of them. Although there appears to be some confusion as into what category some legal fees may fall, there was agreement that the $3 million dollar holdback is no longer required.

[14] Counsel for the settling directors advised that they also represent two other former directors, John Clarkson and Hugh Eliasson, who were named defendants in the now settled class action. They were not named in the Statement of Allegations by the MSC. As with the others, they are entitled to claim indemnities from Crocus if an Independent Claim is advanced against them. Accordingly, it was submitted that $1,250,000.00 be held back for these 10 directors, again for a period to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

[15] In his letter to the court, counsel for the MSC indicated that, should the MSC be successful in the proceedings against Mr. Ziegler and Mr. Waugh, it will be seeking costs and administrative penalties, in addition to a removal of exemptions and other remedies that might be available.

[16] The letter further indicated that no claims for compensation for financial loss have been received to date. In counsel's view, it is unlikely that such claims will be pursued in light of the outcome of the class action lawsuit, and I agree that is likely the case.

[17] Counsel for the MSC went on to state that, in the event the proceedings against Mr. Ziegler and Mr. Waugh by the MSC are successful, the MSC will be taking a position concerning their claim for indemnity as against Crocus for any costs or administrative penalties in light of any findings made by the MSC panel hearing the matter.

[18] Although a considerable amount of time was spent on whether the Receiver's obligation to maintain the $3 million holdback ended as of December 31, 2010, in my view it is not necessary to decide the issue. A settlement has been reached with eight of the ten former directors of Crocus named in the MSC proceedings with no financial penalties imposed. Counsel for the remaining two directors have agreed to a reduction in the amount of the holdback subject to a suggested time limit; and all agree the court is free to make whatever order makes sense in all the circumstances in any event.

[19] It should also be observed that whatever interpretation might be placed on the terms of the Release, the former officers and directors of Crocus are entitled to bring any claim for indemnification to which they may be legally entitled. The validity of any such claims is a matter for another day.

[20] One of the unique characteristics of this receivership is that Crocus is not insolvent and continues to carry on business and realize substantial proceeds for its shareholders. Financial information before the court indicates that as of September 30, 2011 (the end of the third fiscal quarter), Crocus had $16.3 million dollars in investments and cash equivalents with accounts receivable of

$3.8 million dollars and a net carrying value of $9.8 million. Since its appointment in June 2005, some six and a half years ago, the Receiver has realized proceeds of $57.7 million dollars on investments with a book value of about $54.5 million dollars representing a recovery in excess of 100%. A further report will be out at the end of this year.

[21] Not insignificantly, between the Receiver's first court appearance at the end of June 2011 and its later appearance in October 2011, the amount which the Receiver was recommending be distributed increased from $7.9 million dollars to $9 million dollars, because of the financial viability of Crocus.

[22] The Receiver says that the amount of holdback suggested by counsel for the directors is unnecessary and that anyway, other money is available, if needed. In my experience, the Receiver has been conservative in its estimation as to what can be paid out, an approach that is appropriate in the circumstances given the difficulty of valuing a contingency. On the other hand, its initial argument, based on the wording of the Release and advanced prior to the settlement of the MSC proceedings, left many discomfited and raised a concern among the former directors about the Receiver's general approach to Crocus' indemnification obligations. When all is said and done, however, I am satisfied on the basis of the information before me that the Receiver is in a position to distribute $9 million dollars as it has requested approval to do without compromising the ability of Crocus to pay any legitimate claims for indemnification which may be brought in future.

[23] I therefore order that:

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

(b) the Receiver is authorized and directed to make a second interim distribution of $9 million dollars of the proceeds of the within receivership amongst Class A and Class I shareholders in accordance with the following formula:

Individual shareholder's share	=	Distributable amount Total number of Class A and Class I shares	X	Number of shares held by a shareholder

(c) $1 million dollars be set aside as a holdback, for any claim for indemnification as contemplated by the Release Agreement dated May 8, 2009, to expire one year and one day after the disposition of the MSC proceedings and any appeals therefrom.

M. J. McCawley

McCawley, J.