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Docket: CI 05-01-43350
(Winnipeg Centre)
Indexed as: Manitoba Securities Commission
v. Crocus Investment Fund
Cited as: 2006 MBQB 192

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
	)	Sandra A. Zinchuk
THE MANITOBA SECURITIES COMMISSION,	)	for Gerry Hogue and
	)	Nancy Hogue
Applicant,	)	
	)	Dave Hill and Karen Wittman
- and -	)	for Deloitte & Touche Inc.
	)	as Receiver and Manager of
CROCUS INVESTMENT FUND,	)	Crocus Investment Fund
	)	
Respondent.	)	Judgment delivered:
	)	August 31, 2006

McCAWLEY, J.

INTRODUCTION

[1] Gerry and Nancy Hogue seek leave of this court to continue an action commenced by them against Crocus Investment Fund on September 2, 2005 in the District Court, Denver County, Colorado. That action was started without first obtaining leave as required by a receiving order of this court dated June 28, 2005. The Hogues therefore ask that leave be granted *nunc pro tunc*, or retroactively.

[2] The motion is opposed by Deloitte & Touche in its capacity as Receiver and Manager of Crocus.

[3] On September 2, 2005 the Hogues issued a complaint against Crocus and COH Holdings (US) Inc. in Colorado claiming in excess of $32M in damages. Paragraph 1 of the complaint describes the nature of the action as involving fraud, breach of contract and interference with business opportunities.

[4] The plaintiffs claim they were promised certain compensation and benefits while they were employed by COH. They allege that Crocus, as the majority owner of COH, acting through its officers and agents on behalf of COH, induced them away from other opportunities to work for COH. They also allege that Crocus and COH failed to disclose the true value of Crocus' investment portfolio at the time or that Crocus was under investigation for possible wrongdoing. When Crocus subsequently withdrew its investment in COH, the plaintiffs say they were prevented from realizing the compensation and benefits they were promised and hence initiated their claim.

[5] In response to the filing of the action, the Receiver brought a motion in Colorado to dismiss the complaint against Crocus on the grounds that the Hogues had failed to obtain leave as required by the receiving order. The matter came before The Honorable Joseph E. Meyer, III on January 26, 2006 who, in reasons dated February 28, 2006, deferred his ruling on the motion to dismiss, in the interests of international comity, until the plaintiffs' motion for leave to continue the Colorado action could be heard and determined by this court.

BACKGROUND

[6] In or around August 1997 Crocus, a Manitoba venture capital investment fund, made an equity investment in OpTx Corporation, a Manitoba based health care information service provider. At the time, Gerry Hogue was the President and CEO of OpTx, a position he continued to hold until May 2003. Ten months later, in or around June 1998, OpTx was re-incorporated as a Delaware corporation authorized to do business in Colorado where the plaintiffs had recently taken up residence.

[7] In September 1998, just over a year after making its investment and after the re-incorporation, Crocus issued a valuation report on OpTx. It indicated that, in addition to its financial objective of achieving a return in excess of 20%, Crocus' non-financial objectives were to support development of the health care information services industry in Manitoba and to create high technology jobs here. The report also disclosed that despite the re-incorporation of OpTx as a U.S. company and its relocation to Colorado, 65 of the 95 employees of OpTx were to remain in the Winnipeg office.

[8] Approximately six years later, on March 26, 2004, OpTx sold substantially all of its assets to Varian Medical Systems Inc. following which OpTx was re-named COH Holdings (US) Inc. This is seen in by a Certificate of Amendment dated April 2, 2004. According to the affidavit of Gerry Hogue filed in these proceedings, COH was to continue as a Delaware corporation developing medical software for non-cancer markets.

[9] At the time of the sale to Varian, Crocus and certain other shareholders elected not to redeem their shares but instead to re-invest their funds in COH. This can be found in a settlement agreement dated June 30, 2004 approved by resolution of the directors of COH. In the result, Crocus became a majority shareholder of COH owning 65% of the preferred and common shares.

[10] According to the affidavit of Mr. Hogue, James Umlah, who was CEO of Crocus, began recruiting him to become President and CEO of COH once the OpTx sale was finalized. Beginning in January 2004 those efforts culminated in an employment agreement dated July 26, 2004 between Gerry Hogue and COH whereby Mr. Hogue was hired as CEO of the new company. The affidavit of Nancy Hogue states that she, too, was recruited by Umlah to become the Comptroller of COH although no written agreement was entered into and few details were given. Both plaintiffs say that it was as a result of representations made to them by Umlah that they were induced to leave their employment and that the promises made to them never materialized.

[11] The evidence disclosed that shortly after Gerry Hogue took on his new position a meeting of the directors of COH was held by telephone on September 23, 2004. The directors at the time were Hogue, Umlah and Trevor Coates. A second meeting of directors was held on November 1, 2004 in Winnipeg. Present at that meeting in their capacity as directors were John Pelton, Laurie Goldberg, Trevor Coates, James Umlah and Gerry Hogue. All except for Gerry Hogue were residents of Winnipeg. Also at the meeting were

corporate counsel for Crocus and two Crocus representatives, all of whom also reside in Winnipeg. It should be noted that although the plaintiffs both remain Canadian citizens, they were at that time and remain full-time residents of Colorado. It also appears from the corporate minutes that Umlah was appointed as a Crocus representative to the COH Board, and became Acting President of the corporation.

[12] The plaintiffs say that at the time of their recruitment, and until May 2005, they were unaware of certain difficulties in which Crocus had become embroiled, including the resignation of several officers and directors in September 2004 and a $46M write-down of assets in April 2005. Following a report from the Auditor General for Manitoba released at the end of May 2005, John Pelton, who was then Chair of the COH Board, resigned. The following day, in his capacity as an officer of Crocus, Pelton demanded the redemption of the Crocus preferred shares. COH did not have enough cash to meet the demand and subsequently, on September 1, 2005 the plaintiffs resigned and commenced the Colorado action. On October 20, 2005, Deloitte & Touche, as Receiver for Crocus, obtained an order in Colorado appointing a Receiver to act on behalf of COH and, as already mentioned, a subsequent motion by Crocus to dismiss the Colorado action was heard and the decision deferred pending the within proceedings.

APPLICABLE LAW

[13] There was no disagreement between counsel as to the applicable law. Accordingly, I will review it only briefly with significant reliance on *Bennett on Receiverships* (2nd Ed., Toronto, Carswell).

[14] In Canada, it is common practice in situations where the court has appointed a Receiver to prohibit legal proceedings against the debtor and the Receiver unless leave of the court is first obtained. In addition to the inherent jurisdiction of the court to control its process, the authority to do so in this jurisdiction is found in s. 55 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280. The underlying concerns such a provision is designed to address are the complications posed by a multiplicity of proceedings and resulting difficulties the court would have in controlling any direct or derivative actions brought against the debtor and the Receiver. Accordingly, the approach generally taken by the courts in interpreting such a prohibition is to interpret the term broadly so as to preserve the integrity of the court's role as supervisor over the Receiver and the receivership, and to ensure the preservation and realization of a debtor's assets. This approach also recognizes the court's obligation to ensure the proper and orderly conduct of the receivership as well as to protect the estate from groundless or unjustified proceedings (*Bennett on Receiverships,* ***The Court of Queen's Bench Act***, s. 55, ***Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.***, [1995] O.J. No. 1482 and ***Ontario (Ontario Securities Commission) v. Gaudet***, [1988] O.J. No. 1349).

[15] The test for determining whether leave ought to be granted where an action has been commenced without court approval against a debtor who is the subject of a court appointed receivership, as is the case here, requires consideration of three factors:

(a) whether the claim raises a triable issue;

(b) whether the claim is frivolous or vexatious; and

(c) whether the granting of the order to continue the action will cause prejudice and whether it is in the interests of justice (***RoyNat Inc. v. Allan***, [1988] A.J. No. 606).

[16] It has also been held that, where the granting of leave will have a significant impact on the assets of a receivership, a court ought to exercise particular vigour in considering any request for leave (***Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.***, *supra*).

[17] It is conceded by counsel for the Receiver that the plaintiffs' claim raises a triable issue and is neither frivolous nor vexatious. Accordingly, the issue to be decided here is whether the granting of an order to continue the Colorado action will cause prejudice and whether it is in the interests of justice.

[18] Counsel for both parties acknowledged that, in the circumstances presented here, the issue is really one of competing *fora* and whether the plaintiffs should be permitted to maintain their Colorado action or be required to bring suit in Manitoba. This necessarily imports a consideration of the factors applicable in cases of *forum conveniens*. These were concisely set out in a

decision of this court in ***Torlen Supply & Services Inc. v. ConAgra Ltd./ConAgra Ltée.***, [1998] M.J. No. 342 at ¶6, as follows:

(a) the issues;
(b) what law is applicable;
(c) the location of the witnesses;
(d) the location of the evidence;
(e) the location of the parties;
(f) whether related or similar proceedings exist elsewhere;
(g) the relative costs and efficiencies of the competing fora;
(h) which forum would be more likely to secure the ends of justice for all parties; and
(i) any juridical advantage in any forum.

POSITION OF THE PARTIES

[19] It is the position of the plaintiffs that their claim has a substantial connection to Colorado, that a Colorado claim would not interfere with the Crocus receivership in Manitoba and it would impose an unnecessary and unfair financial burden on the plaintiffs to require them to pursue COH in Colorado and Crocus in Manitoba. Indeed, it was argued that such a requirement could potentially deny the plaintiffs their right to have their claim against Crocus heard and determined.

[20] It is the position of the Receiver that the plaintiffs' claim lacks a significant connection to Colorado to justify the continuation of the claim in that jurisdiction. The Receiver says that a consideration of the applicable factors viewed in light of the court's responsibility to preserve the integrity of its administration and supervision of the receivership process weighs in favour of Manitoba as the proper forum. This is particularly so where the remedy sought will have a significant impact on the receivership assets. Furthermore, it is argued that in

the interests of fairness and consistency in the consideration of all claims relating to the Crocus receivership, their adjudication should occur in one forum.

ARGUMENT AND ANALYSIS

[21] In support of their position that there is a substantial connection to Colorado so as to justify the continuation of their claim, the plaintiffs raise a number of arguments.

[22] First, the Hogues point out that their claim is against both COH and Crocus and arises from the same set of facts, involves the same witnesses and claims a common relief. Furthermore, COH is a Delaware corporation with its principle and only place of business in Colorado. The plaintiffs say Crocus chose to do business in Colorado in investing in COH, and was and remains the majority shareholder of COH. It is also argued that Crocus recruited the Hogues, who were Colorado residents at the time, to work for COH; the employment agreement between Gerry Hogue and COH was executed by Crocus' Chief Investment Officer, James Umlah; and the contract specifically provided that any dispute would be governed by the laws of the State of Colorado.

[23] Counsel for the plaintiffs also argue that all of the actions which form the basis for the Hogues' claim against Crocus took place in Colorado and that what is in dispute is a Colorado asset. In addition, counsel notes that Crocus has already attorned to the jurisdiction having become involved in the Colorado court process by virtue of applying for and obtaining the appointment of a Receiver for COH.

[24] There is no doubt that the plaintiffs' claims against Crocus and COH are intertwined. They arise from the same set of facts, involve essentially the same witnesses and seek common relief. It is also acknowledged that splitting the litigation, as was argued by plaintiffs' counsel, would result in some financial burden to the Hogues and raises the potential for inconsistent findings between two jurisdictions. It was also suggested that since Crocus will be involved in the COH lawsuit in any event, it would make financial sense to have the entire matter heard in Colorado.

[25] There is some merit to these arguments. However, as counsel for the Receiver pointed out, the majority of the witnesses, including the majority of the Board of COH, the directors of the Board of Crocus, and legal counsel for COH and Crocus are all residents of Manitoba. As well, all documents with respect to Crocus, including copies of agreements, minutes of meetings and other corporate documents are located in Winnipeg other than those specifically dealing with Crocus' investment in Colorado.

[26] Similarly, while COH is a Delaware corporation with its place of business in Colorado and the dispute involves a Colorado asset, the fact remains that should the plaintiffs be successful in obtaining judgment against Crocus, realistically the assets which would be used to satisfy such a judgment are Manitoba assets currently under the control of the Receiver in Manitoba.

[27] The evidence at this stage in support of the plaintiffs' allegation that Crocus recruited the Hogues for COH is unclear. It does show that James Umlah

was the CEO of Crocus and that the employment agreement ultimately entered into was between Gerry Hogue and COH, not Crocus. Whereas the employment agreement does stipulate that the applicable law and the forum for resolution of disputes is Colorado, as the Receiver properly pointed out, Crocus was not a party to that agreement and accordingly is not bound by it.

[28] It should also be observed that there is little evidence before this court with respect to how the agreement between Gerry Hogue and COH was arrived at. Nancy Hogue relies on a verbal contract and there was no evidence offered to support her assertion that all the recruitment activities took place in Colorado. Indeed, to the extent that the plaintiffs say that all of the actions which form the basis of their claim against Crocus took place in Colorado, after careful scrutiny there is little evidence in support of this beyond the mere assertion of it. This lack of evidence as to when conversations took place, where, how and between whom, is of concern and detracts from the argument of a Colorado connection beyond the specific provision in Gerry Hogue's contract to which I have already referred.

[29] While in no way discounting the relevance of the foregoing factors, in my view the most important factors influencing the decision as to whether leave should be granted to the plaintiffs *nunc pro tunc* is which forum would be more likely to secure the ends of justice for all parties as well as whether there is any juridical advantage to be gained by one forum over another.

[30] Unfortunately for the Hogues, their employment with COH and their resulting claim against COH and Crocus have drawn them into a much bigger picture than they might otherwise expect, including the complicated landscape of the Crocus receivership and events that occurred well before and after the receiving order of June 28, 2005. The size of the Hogues' claim, if successful, would obviously have a significant impact on the Crocus receivership overall given that Crocus has limited assets and particularly in light of other claims. These include a yet to be certified class action against Crocus filed in Manitoba as well as the claims of numerous creditors and shareholders.

[31] The administration of these claims has been placed in the hands of a court appointed Receiver under the ongoing supervision of this court. As matters now stand, the Hogues' claim is the only claim that has been initiated in another jurisdiction. It was also conceded by plaintiffs' counsel that, in principle, multiple claims from other jurisdictions are to be avoided and that the duty of a court appointed Receiver, and indeed the court, is to protect the interests of all creditors.

[32] Although no procedure has yet been established for the submission of claims in the receivership, it goes without saying that a claims procedure which applies to all will be less prejudicial to other claimants than if the plaintiffs' claim were allowed to be determined in another jurisdiction. This is particularly so where, as here, potential liabilities exceed existing assets. Such a comment is in no way a reflection on whatever process might be available to the plaintiffs in

Colorado. Rather it is an observation that generally a process where all claimants are treated, and are seen to be treated, similarly under the same procedure in the same jurisdiction is to be preferred.

[33] Significantly, in the plaintiffs' brief it was stated that their liability action in Colorado will establish whether the Hogues are in fact creditors of Crocus, and if so to what extent, in accordance with the governing laws of the State of Colorado. While not necessarily determinative of the issue, I place considerable weight on this acknowledgement and its implications given the importance of having all claimants subject to the same jurisprudence as well as the same procedure. This is strengthened by the fact that the plaintiffs have asked to have their case tried in Colorado before a jury whereas all other matters will be determined by a judge sitting alone in Manitoba.

[34] To the extent that the plaintiffs argued they would suffer a financial burden if required to bring their action against Crocus in Manitoba, the Receiver argues conversely it would be more efficient and less costly overall to have the plaintiffs' claim proceed here. This position is consistent with the Receiver's overarching obligation to protect the assets of the estate and not incur unnecessary expenses.

[35] It was suggested by counsel for the plaintiffs that Crocus could potentially escape liability if the Colorado action were not allowed to proceed, although this point was never elaborated upon. In fact, the Hogues would be free to bring their action in this jurisdiction with leave of the court. Although counsel for the

Receiver was not prepared to say the Receiver would consent to such a motion, it was acknowledged that given the Receiver's position that the plaintiffs' claim raises a triable issue and is neither frivolous nor vexatious, the Receiver would be hard pressed to successfully oppose a motion for leave to sue in this jurisdiction.

[36] It perhaps also bears mention in passing that the uncontradicted evidence before this court is that the plaintiffs were aware that leave was required before any legal proceedings could be instituted. No explanation was offered as to why they apparently chose to ignore the provisions of the receiving order. I say no more on this point and I base my decision on other more cogent factors that have already been articulated.

[37] Taking all of the foregoing into account, and while recognizing there will be some inconvenience and additional costs associated with having to bring their action against Crocus in Manitoba, I am not persuaded that the plaintiffs would suffer undue prejudice if required to do so. Furthermore, I am satisfied that the overriding responsibility of the court to secure the ends of justice for all parties, to the extent possible, is best met if all claims against Crocus are dealt with in one jurisdiction. Consistency of approach, uniformity in the law and overall fairness as well as other logistical considerations already referred to, tip the scale in favour of this view.

[38] Accordingly, the motion for leave to continue the plaintiffs' action against Crocus Investment Fund in the District Court, Denver County, Colorado, is denied.

[39] Costs may be spoken to if the parties are unable to agree.

L.E.J. McCarthy J.