Date: 20090122
Docket: CI 05-01-43350
Indexed as: Manitoba (Securities Commission) v.
Crocus Investment Fund
2009 MBQB 13
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

THE MANITOBA SECURITIES COMMISSION,	)	Robert A. Dewar, Q.C.,
	)	Dave G. Hill and
applicant,	)	Karen R. Wittman
	)	for Deloitte Touche Inc.,
- and -	)	Receiver and Manager for
	)	Crocus Investment Fund
	)	
	)	Christopher P. Besko
CROCUS INVESTMENT FUND,	)	for The Manitoba Securities
	)	Commission
respondent.	)	
	)	J. R. Norman Boudreau,
	)	Douglas J. Lennox
	)	and Jay C. Prober
	)	for Bernard Bellan et al
	)	
	)	Kenneth A. Filkow, Q.C. and
	)	Diane M. Stasiuk
	)	for Charles Curtis, Peter
	)	Olfert, Diane Beresford,
	)	Waldron (Wally) Fox-
	)	Decent, Lea Baturin, Albert
	)	Beal, Ron Waugh, Sylvia
	)	Farley, Robert Ziegler, Hugh
	)	Eliasson, John Clarkson
	)	and Robert Hilliard
	)	
	)	David I. Marr
	)	for PricewaterhouseCoopers LLP

	) Kenneth McEwan) for David Friesen)) Jason D. Kendall) for James Umlah)) Nicole M. Watson) and David M. Wright) for Wellington West Capital Inc.)
Application under s. 27 of ***The Securities Act***, C.C.S.M. c. S50 and Court of Queen's Bench Rule 14.05(2)(b)	) JUDGMENT DELIVERED:) January 22, 2009)

McCAWLEY J.

[1] Deloitte & Touche Inc., as Receiver and Manager of Crocus Investment Fund, brings a motion seeking the court's approval of a form of bar order barring any claimant that does not file its claim with the Receiver by a claims bar date from forever asserting any claim or interest against "Crocus, the Receiver, or any person who served as an Officer or Director of Crocus, or any funds recovered by the Receiver, and such claim shall be forever distinguished and all such Claimants shall be deemed to have fully and finally released their Claims."

[2] Under the terms of the proposed order "claimant" is defined in paragraph 3(b) as:

> "*Claimant*" means any Person who has a Claim (as hereafter defined) or a successor in interest to such Claims, or a trustee, receiver, interim receiver, receiver and manager, liquidator or other person acting on behalf of such persons, but does not include shareholders, defendants in Manitoba Court of Queen's Bench suit number CI 05-01-42765 insofar as they have claims for indemnity against Crocus or any of the officers or directors named in said action, and The Manitoba Securities Commission;

[3] In paragraph 3(c) "claim" is defined as:

> "*Claim*" means an amount of any kind or nature, whether unliquidated, contingent, or otherwise, owing by Crocus Investment Fund ("Crocus") or by any person who has served as an Officer or Director of Crocus to the person making the claim, which claim arises from the operation or receivership of Crocus including the actions of its Directors and Officers in the operations of Crocus, but does not include claims by shareholders;

[4] What has prompted this motion is the inability of the parties to settle Court of Queen's Bench suit number CI 05-01-42765, a proposed class action proceeding which has yet to be certified. These parties appeared before my colleague, Hanssen J., seeking approval of a proposed settlement agreement last spring. Paragraph 3.2.1 of the settlement agreement barred "any and all claims for contribution, indemnification, subrogation or otherwise against the Settling Defendants by any Non-Settling Defendants or by any other person or party, against the Settling Defendants and every other person who has served as a director or officer of Crocus Investment Fund at any time, in respect of the subject matter of the Class Actions or any other matter arising out of the business, operations and affairs of the Crocus Investment Fund."

[5] The application was opposed by Wellington West Capital Inc., a Non-Settling Defendant, which argued, among other things, that the proposed bar order was too broad. Hanssen J. agreed and refused to grant the order requested, citing Winkler J. (as he then was) in ***Ontario New Home Warranty Program v. Chevron Chemical Company*** (1999), 46 O.R. (3d) 130 (S.C.J.) at para. 50:

> "[T]here is no jurisdiction conferred by the Class Proceedings Act to supplant or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants."

[Also see ***Gariepy v. Shell Oil Company***, 2002 CanLii 12911 (Ont. S.C.) at paras. 50, 51 and 57; ***Amoco v. Propak***, 2001 ABCA 110, [2001] A.J. No. 600 (QL) at para. 44 and ***Wright v. Via Rail Canada Inc.***, 2000 ABQB 8, at para. 10.]

[6] Further negotiations ensued involving counsel for the Receiver and counsel for the Officers and Directors without success. The court was advised that an impasse had been reached in that the Receiver and the Officers and Directors are all requiring full releases from the other in order to settle but which none are prepared to give.

[7] The court was assured that the risk of any unknown claims (now apparently referred to as "direct" claims) is minimal at best, raising the question as stated by the Receiver in its brief "as to who should take the risk of the existence of the additional claims – Crocus or the former Officers and Directors."

[8] It appears the answer the parties have come up with is to eliminate any risk by court order.

[9] The justification for the request is found in the Receiver's brief, that the Receiver "needs to know the extent of the claims against the company before there is a distribution to shareholders." In its submission counsel for the Receiver added that the proposed procedure would "give comfort to the shareholders" so that when they got their money they would know "the creditors are not being harmed." Although this theme was echoed by the other parties present, it would be naïve to think that their purpose is entirely altruistic.

[10] It was conceded that the request is an unusual one since the creditors in a receivership are usually paid before the shareholders. It was also acknowledged that here the court is being asked to go one step further because the bar order is being sought against persons with claims against the Officers and Directors arising out of the operation of Crocus in addition to an order barring claims simply arising against Crocus.

[11] Curiously, no mention was made by any of the parties about the apparently gratuitous inclusion of the Receiver which would also benefit from the proposed order. When questioned by the court it was withdrawn.

[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.

[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.

[14] It is also worth noting certain comments made by the Alberta Court of Appeal in ***Blue Range Resource Corp., Re***, *supra*. In that case the court had to decide whether late and late amended claims should be allowed beyond the time limit in a claims bar order made under the ***CCAA***. Stressing the need to balance ensuring all legitimate creditors come forward on a timely basis against integrity and respect for the court process and its orders, the court went on to say that "a claims bar and its schedule should not purport to "forever bar" a claim without a saving provision" (para. 10) and suggested a procedure for the supervising judge to follow whereby such claims could be considered. In the present case any late claims would be forever barred so that a distribution would be made without concern as to who might come forward later.

[15] The effect of the order being sought would be to impose by court order a new statute of limitations on potential but yet unknown claimants who do not come forward by a specified date. In my view, it would be an improper exercise of the court's discretion to eliminate a risk that neither Crocus nor the shareholders are prepared to assume in order to pave the way for a settlement and distribution.

[16] 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. If it is felt that the risk of unknown claimants at this stage is such that it cannot responsibly make a distribution to the shareholders, by allowing a reserve for unknown claims or otherwise, then be that as it may. Similarly, if the Officers and Directors are likewise disinclined to assume risk of the unknown, then it would appear a distribution is premature. All have available or are able to secure sound advice from counsel. In my view there is no principled basis on which the court should intervene to eliminate a risk that should be borne elsewhere.

[17] The motion is dismissed.

N.J. McCarthy J.