Date: 20121119
Docket: CI 05-01-43350
(Winnipeg Centre)
Indexed as: Manitoba Securities Commission v. Crocus Investment Fund
Cited as: 2012 MBQB 282

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

	)	Dave G. Hill and
	)	Karen R. Wittman
APPLICATION under section 27 of ***The Securities Act***, C.C.S.M., c. S50 and ***Queen's Bench Rule*** 14.05(2)(b)	)	for Deloitte Touche Inc., Receiver and Manager for Crocus Investment Fund
	)	
	)	Kenneth A. Filkow, Q.C. and
	)	Diane M. Stasiuk
THE MANITOBA SECURITIES COMMISSION,	)	for Charles Curtis, Peter Olfert,
	)	Diane Beresford, Waldron
applicant,	)	(Wally) Fox-Decent, Lea
	)	Baturin, Albert Beal, Sylvia
	)	Farley, Hugh Eliasson,
- and -	)	John Clarkson and
	)	Robert Hilliard
	)	
CROCUS INVESTMENT FUND,	)	Ted E. Bock
	)	for Robert Ziegler
respondent.	)	
	)	Jeffrey A. Baigrie
	)	for Ron Waugh
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	October 19, 2012

McCAWLEY, J.

[1] Certain former Officers and Directors (the "Directors") of the Crocus Investment Fund ("Crocus") bring an application pursuant to s. 27 of ***The Securities Act***, C.C.S.M., c. S50, and ***Queen's Bench Rule*** 14.05(2)(b) in which they seek indemnification for legal expenses and costs incurred by them in responding to a motion by the Receiver and Manager of Crocus, Deloitte & Touche Inc. (the "Receiver"), for court approval of a second distribution of funds to Crocus shareholders. They also ask to be indemnified for legal expenses and costs incurred with respect to the motion before the court.

[2] Alternatively, the Directors seek an order requiring the Receiver to pay their legal expenses and costs in responding to the Receiver's motion for approval of a second distribution to Crocus shareholders plus costs of the within motion payable on a solicitor and client basis.

[3] The Directors include Peter Olfert, Charles E. Curtis, Waldron (Wally) Fox-Decent, Lea Baturin, Albert R. Beal, Diane Beresford, Sylvia Farley, Robert Hilliard, Hugh Eliasson, and John Clarkson (the "Olfert group"). They are joined by Ron Waugh and Robert Ziegler who have filed identical notices of motion and adopt the arguments advanced by the Olfert group.

[4] It is the Receiver's position that the Directors are not entitled to indemnification or reimbursement for legal fees and expenses incurred in relation to the Receiver's motion. It is the position of the Directors that they are so entitled.

BACKGROUND FACTS

[5] On June 28, 2005, this court made an order appointing Deloitte & Touche Inc. as Receiver and Manager of the Crocus Investment Fund. The order came about as a result of proceedings brought by the Manitoba Securities Commission ("MSC") against certain Directors of Crocus.

[6] Shortly thereafter, Bernard W. Bellan, a Class A shareholder of Crocus, commenced a claim in his own capacity and in his capacity as a representative plaintiff for a settlement class (the "class action"), against the Directors and other party defendants. In addition, a related action was also filed by Mr. Bellan and Robert Nelson against the Government of Manitoba (the "Government class action").

[7] As the Receiver embarked upon its work, it was agreed that the Receiver would file various reports with the court updating the court on the status of the receivership. It was also agreed that, if and when the Receiver required court approval or advice and direction, it would bring the appropriate motion and provide notice to all interested parties, including the Directors. This has been the practice over the past seven and a half years.

[8] From time to time, the Receiver did seek the advice and direction of the court on various matters relating to the receivership. One of these occasions arose from Receiver's Report No. 3. In that report, among other things, the Receiver sought court approval not to pay the ongoing legal expenses of the Directors relating to an investigation by the Officer of the Auditor General, the

investigation and proceedings taken by the MSC, and legal expenses incurred with respect to the proposed class action until completion of those proceedings or until further order of the court.

[9] In reasons for judgment dated January 30, 2006 (2006 MBQB 19, 200 Man.R. (2d) 89), I authorized and directed that the Receiver pay all reasonably incurred legal expenses of the Directors on an ongoing basis and any unfavourable judgments arising from the above-mentioned proceedings subject to certain rights of reimbursement. An order to this effect was taken out on May 31, 2006, and in August of the same year, Bernard W. Bellan, as intervener, filed an appeal. In the same month, on August 17, 2006, the Directors were granted leave to intervene as added parties in ***Bellan v. The Crocus Investment Fund et al.***, Court of Queen's Bench File No. CI 05-01-42765.

[10] On appeal, the January 30, 2006 reasons for judgment were unanimously upheld by the Manitoba Court of Appeal (2007 MBCA 36, 214 Man.R. (2d) 44). Accordingly, the Receiver paid the past legal expenses incurred by the Directors in regard to those proceedings. Not insignificantly, the payments made included compensation for costs incurred by the Directors in responding to the various reports filed by the Receiver and positions taken, for the period July 2005 to November 2006 inclusive.

[11] The class action and the Government class action were ultimately settled as reflected in a settlement agreement dated May 29, 2008, which was later amended on April 21, 2009.

[12] At that time, a corrollary agreement (the "Release") was entered into between the Directors and the Receiver with respect to the indemnity entitlements of the Directors. Pursuant to that agreement, the sum of $250,000 was paid by the Receiver to the law firm of D'Arcy and Deacon LLP. It was to be used as a legal indemnity fund to cover legal fees and costs incurred by the Directors in respect to the MSC proceedings. It included an undertaking by the Receiver not to pursue any claims for reimbursement of any indemnification payment already paid to the Directors for legal costs incurred subject to their being a surplus.

[13] In addition, the Receiver agreed to maintain a $3 million dollar holdback to indemnify the Directors from potential indemnity claims which might arise after the first distribution to shareholders, to be available on or after January 1, 2011, unless the Receiver received notice of any independent claims known to the Directors which might lead to indemnity claims as set out in paragraphs iv.(a) and (b). Although no notice of any independent claims was received, it is interesting to note that the kind of indemnity claims contemplated included, among other things, any legal costs associated with pursuing such indemnity claims with respect to the MSC proceedings.

[14] "Independent claims" are defined in the Release as follows:

> .... Independent Claims are those claims, demands or actions which have not been brought within the context or subject matter of the Class Actions but which may hereafter be brought by a Non-Settling Defendant (as that term is defined in the Amending Agreement) or a non-party against Crocus, the Receiver, a Director or an Officer for any matter arising out of or relating to

> the business, operations and affairs of Crocus including in regard to the Receiver's administration of the receivership of Crocus or in regard to any actions, claims or demands based upon, arising out of or in any manner relating to, any alleged conduct of a Director or an Officer in his or her capacity as a former director or officer of Crocus.

[15] The Release provided that the Directors:

> .... HEREBY RELEASE AND FOREVER DISCHARGE Crocus, the Receiver and Crocus Capital Inc. (the "Releasees") from any and all direct proceedings, actions, causes of action, claims and demands, for damages, loss or injury, howsoever arising, which they may have had or, now or in the future, may have against the Releasees arising out of the business, operation and affairs of Crocus, both before and after the receivership of Crocus to the date of the Amending Agreement.

[16] Importantly, the Release contained a provision that, notwithstanding the terms of the Release given and set out above, the Release did not apply to the following:

> .....
>
> (i) any indemnity claims of a Director as to any judgments, fines, monetary penalties or settlement amounts which may result from the Manitoba Securities Commission proceedings, <u>including any legal costs incurred or to be incurred by a Director in pursuing such indemnity claims;</u>
>
> (ii) the right of the Directors and Officers to bring claims over or cross claims against Crocus and the Receiver in the context of Independent Claims as aforesaid;
>
> (iii) any indemnity claims of a Director or an Officer as to any amounts, judgments, fines or settlements, including legal costs, arising from any Independent Claims as aforesaid;
>
> (iv) the right of the Directors and Officers to receive distributions as shareholders from funds realized by the Receiver other than from the Class Action and Government Class Action; and
>
> (v) the Directors' entitlement to the $250,000.00 indemnity legal fund and to retain same to the extent that such funds are required by

> one or more of them, except in the case of a declared surplus, if any.
>
> [emphasis added]

[17] A first distribution to Crocus shareholders was approved by the court in September 2009. In June 2011, the Receiver brought a motion for advice, direction and court approval for a second distribution of funds to the shareholders. At that time, the Receiver took the position that the deadline for maintaining a $3 million dollar holdback had expired on January 1, 2011, and that those funds should be included in the second distribution. The Directors opposed the motion saying that the Receiver was still obligated to maintain the $3 million dollar holdback. It was recognized by all concerned that at that time the potential exposure of the Directors very much depended on the outcome of the MSC proceedings which had not been resolved.

[18] The process for the hearing of the motion required a number of court appearances as various procedural matters were sorted out. While this was taking place, the court became aware of ongoing settlement negotiations between the Olfert group and MSC and that, as the hearing date approached, a settlement appeared imminent. A settlement was ultimately achieved and approved by an independent MSC panel on October 14, 2011, after the hearing, but before judgment was rendered. No determinations or findings were made that any of the Directors had acted improperly or dishonestly and no monetary payments were imposed on them.

[19] On December 12, 2011, I issued reasons for judgment (2011 MBQB 305) approving the Receiver's motion for a second distribution on condition that a reduced holdback of $1 million dollars be maintained by the Receiver for the Directors whose matters with the MSC had not yet been heard or resolved. The Directors had taken the position in October that a reduced holdback was acceptable.

[20] Following my decision, counsel for the Olfert group and Messrs. Waugh and Ziegler rendered their accounts for payment of legal expenses and costs incurred by the Directors for appearances and attendances relating to the Receiver's motion for a second distribution and in order to make submissions as to the obligation of the Receiver to maintain a holdback. It is these accounts which the Receiver is not prepared to recognize taking the position that the Directors are not entitled to any further indemnification.

DECISION AND ANALYSIS

[21] In advancing their claim for indemnification, the Directors rely on Crocus By-Law 1.7, which provides as follows:

> 1.7 Indemnity of Officers and Directors: Each Officer and each Director of the Fund and each former Officer and each former Director of the Fund and each person who acts and/or has acted at the Fund's request as a Director or Officer of a body corporate of which the Fund is or was a Shareholder or creditor and her or his heirs and legal representatives shall be indemnified against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by her or him in respect of any civil, criminal or administrative action or proceeding to which she or he is made a party by reason of being or having been a Director or Officer of the Fund, if

(a) she or he acted honestly and in good faith with a view to the best interests of the Fund; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, she or he had reasonable grounds for believing that her or his conduct was lawful.

[22] The Directors say that the legal expenses incurred by them in respect to the Receiver's motion and positions taken by the Receiver fall within a "civil" and/or "administrative action or proceeding."

[23] The Receiver advances three arguments in support of its position that the by-law does not apply.

[24] First, the Receiver says that By-law 1.7 does not apply because the Directors were never made a party to the proceedings as required. In response, the Directors say that, although not technically made a party to all proceedings, they were formally made a party to the class action proceedings by order of the court and have been accorded standing throughout all other proceedings, including being served by the Receiver, because of their obvious interest in them.

[25] It was at the request of the court that, as noted earlier, it was agreed at the outset of the receivership that the Directors would be provided with notice of all proceedings. This has been the practice since 2005.

[26] Furthermore, the Directors have attended all motions in which they have had an interest, and have filed briefs and taken positions. At no time has their standing been questioned by the Receiver or anyone else. As well, pursuant to

this court's judgment and indemnity order, they have received payment for legal expenses and costs incurred by them for the period beginning July 2005 to the end of November 2006, in regard to a number of proceedings, including those related to responding to various reports and positions taken by the Receiver since June 2007.

[27] As I have observed on numerous occasions, this is a unique receivership in that Crocus remains an ongoing operation and continues to work for the benefit of the shareholders. To now suggest that the Directors are not entitled to indemnification on the grounds that they are technically not a party rings hollow and flies in the face of the accepted practice based on principles of fairness and common sense over the past seven and a half years. Furthermore, it ignores the provisions of the indemnity order dated January 30, 2006, which provides that:

> 1. ... the Receiver is authorized and directed to pay all reasonably incurred past and future legal expenses of former officers and directors on an on-going basis, and any resulting unfavourable judgments arising from the investigation of the Office of the Auditor General, proceedings taken by the Manitoba Securities Commission, the proposed class action proceeding in Court of Queen's Bench Suit No. CI 05-01-42765 and related to issues affecting the former directors arising from actions or positions taken by the Receiver of Crocus, unless it can be demonstrated that such former officers and directors do not meet the qualifying criteria set out in s. 119(1) of *The Corporations Act*, Crocus by-law 1.7, or any individual agreements.
>
> [emphasis added]

[28] The Receiver also argues that, for policy reasons, the Directors should not be entitled to further indemnification. It is submitted that they continue to owe

a duty to Crocus and its shareholders to act in the best interests of the corporation and the shareholders which duty includes an obligation to limit claims for legal fees to those necessarily and reasonably incurred. It is the position of the Receiver that the Directors should "refrain from spending Crocus money when there is no need to do so."

[29] In my view, the issue before the court as to the Directors' continuing entitlement to indemnification, which was raised by the Receiver's position not to pay the legal expenses and costs incurred by the Directors in opposing the Receiver's motion to distribute the $3 million dollar holdback as part of the second distribution, was a legitimate and unquestionably important one. To suggest that as a result of being former Directors they are somehow disentitled from advancing a legitimate legal argument, particularly in light of the complex issues before the court and obvious differences of interpretation of the applicable agreements, makes little sense. It also reinforces pre-existing doubts as to the Receiver's commitment to indemnify the Directors unless they are otherwise disentitled to receive indemnification. Contrary to the argument advanced by the Receiver, there are important public policy reasons that support the Directors' claim for indemnity which I have dealt with in an earlier judgment.

[30] The Receiver's main argument is that the Directors have each entered into an agreement (the "Release") whereby they have released Crocus from any further obligation to pay indemnification. This is in fact the crux of the issue before the court. What interpretation is to be placed on the Release?

[31] The Release addresses the purpose of the $3 million dollar holdback. It states ".... The $3M Holdback is intended to address potential indemnity claims of the nature set out in this paragraph which may arise after the Receiver effects the said distribution" referring to the first distribution. One of the kinds of indemnity claims included are those "which may result from the Manitoba Securities Commission proceedings, including any legal costs incurred in pursuing such indemnity claims."

[32] However, and again as noted earlier, the Release goes on to specifically except from its application the following:

> (i) any indemnity claims of a Director as to any judgments, fines, monetary penalties or settlement amounts which may result from the Manitoba Securities Commission proceedings, including any legal costs incurred or to be incurred by a Director in pursuing such indemnity claims;
>
> [emphasis added]

[33] There is no question that on a cursory reading of the Release its terms appear contradictory. However, to accept the argument that such claims for indemnification are excluded would render this exception meaningless. It is this provision on which the Olfert group relies to say that it was never intended that legal costs "incurred in pursuing such indemnity claims" would no longer be covered. That position is strengthened considerably by the position of Mr. Ziegler, against whom the MSC proceedings remain extant, which was the position of Mr. Waugh and the Olfert group when the issue first arose. At that

time, the total exposure of the Directors, as a result of the MSC proceedings, was unknown but was potentially considerable.

[34] It is also worth noting, as counsel for the Olfert group observed, that the logical extension of my order of December 12, 2011, was that, had the settlement not been concluded, a larger holdback would likely have been ordered, the implication being that I accepted the position of the Directors that the Receiver was obligated to maintain some kind of holdback. They are correct in that.

[35] The position of the Directors is also supported by the order of January 30, 2006, which clearly indicates that the Directors are entitled to be paid all reasonably incurred past and future legal expenses on an ongoing basis arising from or related to "issues affecting the former Directors arising from actions or position taken by the Receiver of Crocus."

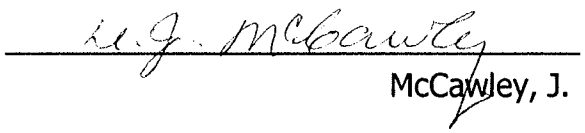
[36] Counsel for Mr. Waugh eloquently described the need of the Directors to "attend, defend and preserve" the holdback in the face of the Receiver's stated intention to release it. I agree with his statement that to suggest that steps taken to preserve indemnity rights are not included in the cost of pursuing those rights would render the provision futile and meaningless.

[37] For the foregoing reasons, I am satisfied that the Release does not apply to the Directors' request for indemnification and By-law 1.7 remains in effect.

[38] Accordingly, I find that the Directors of Crocus, as represented by the Olfert group and Messrs. Waugh and Ziegler, are entitled to an order of

indemnification for legal expenses and costs incurred by them in responding to the Receiver's motion seeking court approval for a second distribution to Crocus shareholders.

[39] I therefore order that Deloitte & Touche Inc., in its capacity as Receiver and Manager of the Crocus Investment Fund, indemnify the Directors for same and as well the legal expenses and costs incurred by them in advancing the within motion.



McCawley, J.