CITATION: Crystallex International Corporation (Re), 2018 ONSC 2443
COURT FILE NO.: CV-11-9532-00CL
DATE: 20180522

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

BEFORE: HAINEY J.

COUNSEL: *James Doris*, for the Applicant, Crystallex International Corporation

David Byers and *Lesley Mercer*, for the Monitor

Timothy Pinos, Ryan Jacobs and *Shayne Kukulowicz*, for the DIP Lender

Aubrey G. Kauffman, for Robert Fung and Marc Oppenheimer

Clifton Prophet and *Delna Contractor,* for the Ad Hoc Committee of Shareholders

Chris Armstrong, for the Ad Hoc Committee of Noteholders

HEARD: March 28, 2018

ENDORSEMENT

Overview

[1] This is a motion by the Ad Hoc Committee of Shareholders of Crystallex International Corporation ("Ad Hoc Committee") for the following relief:

a) An order lifting the stay of proceedings to allow the Ad Hoc Committee to commence and continue the claims below with respect to alleged oppression of the shareholders of Crystallex International Corporation ("Crystallex") and a breach of the criminal interest rate provisions in the *Criminal Code of Canada*;

b) An order varying the following orders of Newbould J. (collectively "Final Orders") to the extent necessary to permit the claims to be commenced and continued:

(i) Order dated June 5, 2013 approving the terms of the Second Credit Agreement Amendment dated June 5, 2013;

(ii) Order dated April 14, 2014 approving the terms of the Third Credit Agreement Amendment dated April 16, 2014;

(iii) Order dated December 18, 2014 approving the terms of the Fourth Credit Agreement Amendment dated March 12, 2015; and,

(iv) Order dated December 18, 2014 approving the Net Arbitration Proceeds Transfer Agreement among the Applicant, the DIP Lender, Robert Fung and Marc Oppenheimer dated Mach 12, 2015.

[2] The grounds for the motion are as follows:

Leave Motion

a) On June 5, 2013, Newbould J. directed that no party is to bring a motion in these proceedings without leave of the court after consultation with the Monitor;

b) On June 7, 2016, Newbould J. further directed that any party seeking to bring a motion in this proceeding is to provide draft motion material to counsel for the Applicant and request arrangements be made to appear at a chambers appointment to address the scheduling and hearing of the motion (the "Motion Protocol");

c) The Ad Hoc Committee has provided its draft motion material to counsel for the Applicant and has requested a scheduling attendance, in compliance with the Motion Protocol;

d) Crystallex's shareholders have an economic interest in the Applicant in view of the US$1.202 billion arbitration award ("Arbitration Proceeds") made in favour of Crystallex against the Bolivarian Republic of Venezuela ("Venezuela");

e) I approved a contract of Transaction and Settlement dated November 15, 2017 between the Applicant and Venezuela described by the Monitor in paragraph 27 of its Twenty-Second Report as providing "significant value to the Applicant over time beyond the quantum of asserted creditor claims against the Applicant";

f) As particularized in the Ad Hoc Committee's draft statement of claim, Crystallex's shareholders' interests have been diluted such that they currently represent a very small percentage of the Net Arbitration Proceeds ("NAP"), which are the Applicant's only remaining asset;

g) The dilution of Crystallex's shareholders' interests has been caused by DIP credit agreements that confer ever-increasing percentages of NAP on the DIP Lender. These arrangements were approved by the court without any effective notice to Crystallex's shareholders and in circumstances in which the Applicant, is directors and the DIP

Lender acted in a manner that was oppressive, unfairly prejudicial to and in unfair disregard of the interests of Crystallex's shareholders;

h) Unless leave to bring this motion is granted to allow the claims set out in the Ad Hoc Committee's statement of claim to proceed, Crystallex's shareholders will have no opportunity to be heard in relation to the severe dilution of their interests and they will lose very significant value and be denied access to justice;

Lift Stay re Oppression Claim

i) The Ad Hoc Committee seeks to issue and proceed with a claim which alleges, among other things, that the granting of compensation to the DIP Lender in the form of percentage interests in the NAP that are very substantial, was oppressive, in unfair disregard of, and unfairly prejudicial to the interests of Crystallex's shareholders (the "Oppression Claim");

Lift Stay re Breach of Criminal Interest Rate

j) The Oppression Claim further alleges that the compensation provided to the DIP Lender is in breach of the *Criminal Code of Canada.*

Issue

[3] The Ad Hoc Committee represents the interests of over 218 shareholders ("Complaining Shareholders") who together hold almost 30% of the common shares of Crystallex. According to the Ad Hoc Committee the fundamental question raised by this proposed motion is whether it is in the interests of justice for the court to vary the Final Orders.

[4] I have concluded that the answer to this fundamental question is "no" for the following reasons.

Analysis

[5] The Final Orders made over the last five years approving amendments to the DIP credit agreements were all declared to be fair, reasonable and appropriate by Newbould J. The DIP Lender relied upon these orders to advance and permit Crystallex to access over $75 million to pursue its claim against Venezuela. Its claim resulted in an arbitration award of approximately US$1.3 billion. This would not have occurred without the substantial financial support from the DIP Lender.

[6] The Complaining Shareholders have been aware of this CCAA proceeding since early 2012. They were aware of the Monitor's website where information concerning the motions to amend the DIP credit agreements and the Final Orders was readily available. They took no steps to participate in this proceeding or to challenge any of the orders sought by the DIP Lender to amend the DIP credit agreements despite having notice and many opportunities to do so.

[7] The Complaining Shareholders now seek to overturn the Final Orders long after the applicable appeal periods have expired to the serious detriment of the DIP Lender who relied upon the orders in advancing a significant amount of financing so that Crystallex could pursue is claim against Venezuela.

[8] In my view, in light of this background, the Final Orders, which were made following full hearings in court, and were issued and entered long ago, are a complete bar to the Ad Hoc Committee's proposed claim.

[9] Further, I have concluded that there is no basis in law to vary the Final Orders as the Ad Hoc Committee seeks to do. The Supreme Court of Canada made it clear in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 115 and 116 that, "... subject to an appeal, parties are secure in the reliance on the finality of superior court decisions" and "only in strictly limited circumstances can a court revisit an order or judgment..."

[10] The only "limited circumstances" available for varying a final, issued and entered order are the following:

a) The court's inherent jurisdiction to correct slips or errors in expression;

b) Rule 59.06(2) of the *Rules of Civil Procedure* (the "Rules"); and

c) Rule 37.14 of the Rules.

Inherent Jurisdiction

[11] The power of a court to vary an order after it has been issued and entered is limited to making the order conform to the judgment pronounced or intended to be pronounced. The Complaining Shareholders are not seeking to correct a slip or an error in the expression of a judgment. Rather, they are seeking to overturn key provisions of the Final Orders. The applicable jurisprudence is clear that this court does not have the inherent jurisdiction to review or vary these Final Orders in the manner requested by the Ad Hoc Committee.

[12] The fairness and reasonableness of the terms of the transactions contemplated by the original DIP credit agreement as amended by the Final Orders was determined at the time the orders were approved by the court. This was before the DIP Lender and Crystallex relied and acted upon those court approvals. A complaint that a shareholding interest that arguably had no value upon the CCAA filing in 2011 may be worth more now, following six years of DIP Lender support and effort by Crystallex to create value for stakeholders, is not evidence of an injustice to the Complaining Shareholders that warrants overturning the Final Orders.

[13] For these reasons, I am not prepared to vary the orders on the basis of my inherent jurisdiction.

Rule 59.06(2)

[14] There are no allegations that, if proved, would permit me to amend or vary the Final Orders pursuant to the limited exceptional circumstances under Rule 59.06(2) of the Rules.

[15] The two limited exceptional circumstances under Rule 59.06(2) are: (i) fraud, or (ii) new facts that have arisen or have been discovered after the order was made.

[16] The Ad Hoc Committee's motion does not make any allegations of fraud or of new facts that would permit me to reopen and vary the Final Orders under this rule. Instead, the motion is an attempt to re-litigate the merits of the Final Orders based on arguments that could have been advanced when the Final Orders were sought and granted many years ago. No new facts have arisen, or are alleged to have arisen, since the Final Orders were made.

[17] I am, therefore, not prepared to vary the Final Orders on the basis of Rule 59.06(2).

Rule 37.14

[18] There is also no basis to amend or vary the Final Orders under Rule 37.14 of the Rules. Under this Rule, the court may only vary an order where "no notice or insufficient notice" has been provided to an affected party and where the party affected by the order moves forthwith to vary the order.

Notice Effected

[19] Service and notice in this CCAA proceeding were effected in compliance with the Initial Order and s. 23 of the CCAA. There is no requirement in the CCAA or the Initial Order to give any other specific notice to shareholders.

[20] It was open to any one of the Complaining Shareholders to file a notice of appearance and to be added to the Service List. In fact, counsel for two shareholders were added to the Service List and, therefore, received notice of all subsequent proceedings, and made submissions at hearings dealing with the Final Orders now under attack by the Ad Hoc Committee.

[21] The Complaining Shareholders did nothing to be added to the Service List. The motion material for the Final Orders was served upon everyone on the Service List. The Final Orders provide that no further service is required.

[22] Mr. Justin Fine, who testified on behalf of the Ad Hoc Committee, confirmed that the Complaining Shareholders were aware of the proceedings shortly after the granting of the Initial Order. They also had various discussions with representatives of Crystallex and the Monitor and they were aware of the Monitor's website.

[23] The Complaining Shareholders also knew or ought to have known about the Final Orders shortly after they were issued and entered. They were in a position to have known the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. Each of the Final Orders was posted on the Monitor's website after being issued and entered. The Final Orders approving the Second and Third Credit Agreement Amendments contained the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. The order approving the Fourth Credit Agreement Amendment contained a term allowing any creditor or shareholder to obtain a copy of the relevant terms from Crystallex, on such terms as Crystallex and the Monitor agreed, or on further order of the court.

[24] Accordingly, the Complaining Shareholders were in a position to obtain the necessary information to advance the allegations now asserted had they exercised modest due diligence in response to the Initial Order or following the dates on which any of the Final Orders were made.

[25] I am, therefore, satisfied that the Complaining Shareholders had sufficient notice concerning the Final Orders.

Failure to Move "Forthwith"

[26] The Complaining Shareholders did not move "forthwith", as required by Rule 37.14, despite the fact that they were aware, or could have been aware, of the Final Orders, prior to or at the time they were made, or at least shortly thereafter once posted on the Monitor's website.

[27] Serving this motion in December 2017, seeking to vary the Final Orders that were issued, entered and posted publicly between June 2013 and December 2014, was clearly not done "forthwith".

[28] I have concluded that the Complaining Shareholders' failure to move forthwith is also a bar to the variation of the Final Orders pursuant to Rule 37.14.

Legal Barriers to Variation

[29] I have also concluded that the following legal barriers prevent the variation of the Final Orders sought by the Ad Hoc Committee:

a) a court will not disturb a final order if parties have acted and relied upon it;

b) the Ad Hoc Committee's claims are barred by s. 142 of the *Courts of Justice Act*;

c) the Ad Hoc Committee's claims are statute-barred pursuant to the *Limitations Act*; and

d) the Ad Hoc Committee's claim based upon a criminal interest rate is bound to fail.

Reliance on Final Orders

[30] CCAA jurisprudence is consistent that final orders that have been relied upon by parties to the CCAA proceeding will not be disturbed. In *DBCD Spadina Ltd. et al. v. Norma Walton et al.*, 2015 ONSC 870, at para. 16, Newbould J. held that a court should be loath to vary an order if persons relying on the order would be materially prejudiced. With respect to CCAA initial orders, Farley J. commented on comeback motions in *Muscletech Research and Development Inc., (Re),* 2006 ONSC 316 at para. 5 as follows:

> Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question.

[31] More recently, in *Target Canada Co. (Re)*, 2016 ONSC 316, Morawetz R.S.J. rejected a plan of arrangement that would conflict with a final order made in the CCAA proceeding, stating as follows at para. 81:

> The CCAA process is one of building of blocks. In this [sic] proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected... Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[32] In this case Crystallex and the DIP Lender have relied in good faith on the Final Orders. In particular, the DIP Lender has advanced and permitted Crystallex to use in excess of US$75 million in reliance on the Final Orders.

[33] In my view, to vary the Final Orders now would turn this entire CCAA proceeding into chaos, result in a default under the DIP credit agreement and the amendment agreements and undermine the commercial certainty and reliability of the DIP financing process in every future CCAA proceeding. I am not prepared to vary the Final Orders which have been relied upon by parties in good faith who have taken significant risks and expended substantial resources to maximize value. Particularly since throughout this proceeding the Complaining Shareholders chose to sit on the sidelines.

Claims Barred by the Courts of Justice Act

[34] Section 142 of the *Courts of Justice Act* provides that a person is not liable for any act done in good faith in accordance with a court order. There is no allegation of bad faith here. At all times, the DIP Lender acted in good faith in reliance upon the Final Orders. In my view, it cannot now be liable for oppression for having done so.

Claims Barred by the Limitations Act

[35] I have also concluded that the Ad Hoc Committee's claims for oppression and breach of s. 347 of the *Criminal Code* are statute-barred by the *Limitations Act*. A claimant is presumed to have known of the loss or damage on the day the act or omission on which the claim is based took place, unless the contrary is proved. To prove the contrary, the claimant must show that it was highly unlikely, if not impossible, with reasonable due diligence, to have obtained the necessary information within the limitation period. The Ad Hoc Committee has not demonstrated this.

[36] As described above, the Complaining Shareholders knew or ought to have known about the Final Orders at the time they were made and posted on the Monitor's website or shortly thereafter. They had ample opportunity to challenge or oppose these terms but instead, failed to act forthwith or with reasonable diligence within the limitation period.

Claims regarding criminal interest rate are bound to fail

[37] Section 347(1) of the *Criminal Code* provides that "every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receive a payment or partial payment of interest at a criminal rate" is guilty of an offence.

[38] In order for there to be an offence, the agreement or arrangement in question must, on its face, require payment of interest at a criminal rate. The DIP credit agreement does not require, and in fact expressly prohibits, the payment of interest at a criminal interest rate:

a) the parties to the DIP credit agreement specifically agreed to comply with enumerated and detailed procedures for the adjustment, if necessary, of interest payable under the DIP credit agreement in any given year to ensure that "no receipt by the [DIP] Lender of any payments to the [DIP] Lender hereunder would result in a breach of section 347 of the *Criminal Code (Canada)*"; and

b) the law is clear that where a payment that might be considered interest is not fixed, but is dependent upon future events (like the collection of the Arbitration Award) which may or may not cause it to exceed the criminal interest rate prohibition, the agreement is not contrary to s. 347(1) of the *Criminal Code*.

[39] Further, the claim for receipt of interest by the DIP Lender at a criminal interest rate is premature because no interest has yet been received. A claim based on the alleged receipt of interest at a criminal rate is a "wait-and-see" cause of action. It cannot accrue until interest has actually been paid and its timing and quantum are known so as to permit the calculation of the effective rate of interest.

Conclusion

[40] For all of these reasons the Ad Hoc Committee's motion is dismissed.

[41] If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me.

[42] I thank counsel for their helpful submissions.

HAINEY J.

Date: May 22, 2018