Case Name:

Hemosol Corp. (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 Hemosol Corp. and Hemosol LP. on Schedule "A", (the Applicants)

[2007] O.J. No. 3885

37 C.B.R. (5th) 128

2007 CarswellOnt 6511

Court File No. 06-CL-6453

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: August 31, 2007.
Judgment: October 5, 2007.

(23 paras.)

Insolvency law -- Receivers, managers and monitors -- Compensation -- PricewaterhouseCoopers Corporate Finance moved for a determination of its entitlement to recovery of a Success fee for its services as investment adviser for marketing process undertaken by receiver -- Motion allowed -- PWC-CF did the work that was contemplated to be entitled for the Success Fee -- Receiver and PWC-CF had the reasonable expectation that they would be paid -- PWC-CF was entitled to US$325,000.

Motion by PricewaterhouseCoopers Corporate Finance for a determination of its entitlement to recovery of a Success Fee for its services as investment adviser for the marketing process undertaken by the Receiver of Hemosol Corp. and Hemosol LP -- In December 2005, PWC was appointed as Receiver of Hemosol pursuant to s. 47(1) of the Bankruptcy and Insolvency Act --

Order authorized the Receiver to conduct a marketing process for the Hemosol assets -- PWC-CF was eventually engaged to assist in the Marketing Process -- Engagement Letter indicated that the minimum Success Fee payable was US$400,000 -- Catalyst's position was that upon an interpretation of the agreement relied upon and upon a proper appreciation of the substance of the transaction which the applicant alleged gave rise to the payment of the "success fee", no such fee was payable -- HELD: Motion allowed -- Marketing Process was pursuant to court direction, which included the involvement of PWC-CF as investment advisor -- Engagement Letter was entered into with knowledge and support of all parties that it would be a binding and enforceable contract -- PWC-CF did the work that was contemplated to be entitled for the Success Fee -- Receiver and PWC-CF had the reasonable expectation that they would be paid -- Fact that term of the transaction involved assumption of debt rather than sale of assets did not defeat reasonable expectations -- Reasonable expectations included payment of the Success Fee out of the Receiver's administration charge -- In the event of insufficient cash, the Receiver was to recover US$325,000 from Catalyst, which in turn was to be paid to PWC-CF.

Counsel:

Peter H. Griffin, Monique J. Jilesen, for PricewaterhouseCoopers Corporate Finance Inc.

David C. Moore for the Catalyst Capital Group Inc. which manages funds on behalf of Catalyst Fund Limited Partnership II.

Alan B. Merskey for PriceWaterhouseCoopers Inc. in its capacity as interim receiver and receiver of the assets, undertakings and properties of Hemosol Corp. and Hemosol LP.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- The motion of PricewaterhouseCoopers Corporate Finance Inc. ("PWC-CF") seeks determination of its entitlement to recovery of a Success Fee for its services as investment adviser for the marketing process undertaken by the Receiver of Hemosol Corp. and Hemosol LP (together, "Hemosol.")

2 On December 5, 2005, PricewaterhouseCoopers Inc. ("PWC") was appointed as Receiver of Hemosol pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*. The Order authorized the Receiver to conduct a Marketing Process for the Hemosol assets.

3 After consultation with and approval from major creditors, PWC-CF was engaged to assist in the Marketing Process.

4 The engagement letter between PWC-CF and the Receiver is dated December 13, 2005 (the

"Engagement Letter"). It provides that:

> (a) PWC-CF is engaged with the Receiver's marketing efforts with respect to Hemosol's Plasma, HbOC and 304 technology and operations;
>
> (b) As compensation for the services to be performed, the Receiver shall pay to PWC-CF:
>
> > (i) a monthly retainer of US$15,000 to a maximum of US$75,000, to be applied against success fee payable;
> >
> > (ii) expenses; and
> >
> > (iii) a "success fees based on the Consideration paid by a third party on completion of a Transaction or series of Transactions. Such fees shall be payable in connection with a Transaction ... if the Transaction is with a party who signed a Confidentiality Agreement with respect to the company's Plasma, HbOC or 304 technology and operations ... The total value of such success fees will be payable in cash upon the closing of any Transaction ..."

5 The minimum Success Fee payable under the Engagement Letter is US$400,000.

6 Transaction is defined in the Engagement Letter as:

> ... any transaction or series of related transactions whether through acquisition, merger, consolidation, tender offer, corporate partnering agreement or other similar transaction which results, directly or indirectly, in the sale by the Company of all or a material interest in the Plasma and/or or HbOC and/or 304 technology and operation (including, but not limited to, contracts, products, licensing rights, joint venture or partnership interest, trademarks, patents and royalty streams) of the Company ...

7 Catalyst's position is that upon an interpretation of the agreement relied upon and upon a proper appreciation of the substance of the transaction which the Applicant's allege give rise to the payment of the "success fee", no such fee is payable.

8 A potential plan was put forward under the *Companies' Creditors Arrangement Act* ("CCAA"), which contemplated the sale of Hemosol assets to a corporate entity known as "209."

9 As this Court is aware from the previous motions and proceedings herein, one of the key assets central to the sale transaction contemplated with 2092248 was Hemosol's license with ProMetic Biosciences Inc. ("ProMetic"). The scope of this license was the subject of hotly contested litigation involving ProMetic, the Receiver, and 2092248 during the summer of 2006.

10 In this context, at the end of October 2006, Catalyst purchased the secured indebtedness held by MDS. Consequently, it assumed all the rights and obligations associated with that secured indebtedness. Following this assignment, additional litigation ensued between MDS, 2092248, and Catalyst as to the effect of the Plan Sponsorship Agreement upon Catalyst's rights and obligations as the assignee of the MDS' debt.

11 Ultimately, Catalyst prevailed in the aforementioned litigation and as a result was free to assert its rights as Hemosol's senior secured creditor unencumbered by the obligations which 2092248 had claimed were binding on Catalyst as a result of the Plan Sponsorship Agreement.

12 There are still unresolved issues as between Catalyst and Prometic, which may result in further litigation.

13 In these circumstances, in late June 2007 an assignment by way of a Vesting Order of substantially all of Hemosol's assets to 2140304 was sanctioned by this Court. The assignment occurred because of Catalyst's position as the holder of Hemosol's senior secured debt. In substance, Catalyst stepped into MDS' shoes and exercised its rights in relation to the Hemosol property held as security for that debt.

14 Catalyst asserts that the "Success Fee" is not payable since the assets acquired by its subsidiary represented a purchase of MDS' debt position. Catalyst submits that it stands in MDS' shoes for the purpose of this motion and it is submitted that the Engagement Letter did <u>not</u> provide for a "success fee" as a result of a transaction based upon the exercise of existing rights under MDS' security. That is what Catalyst alleges has happened here.

15 Catalyst does accept that it signed a confidentiality agreement but posits that the Engagement Letter contemplates a transaction in which consideration is paid by a <u>third party</u> and that the purchase of pre-existing security held by MDS is not such a third party transaction.

16 In support of its position, Catalyst submits that in acquiring the MDS secured loan position, in addition to the rights thereunder it was subject to the obligations applicable to that security, which included the risks and undertaking of this litigation with "209."

17 In asserting its rights, Catalyst submits that it is simply realizing on security purchased and not engaged in a transaction as contemplated in the Engagement Letter, and in the circumstances should be entitled to do so.

18 Having read the factum of the parties and heard from counsel, I am satisfied that the resolution of this matter is really one of first impression.

19 I am not persuaded, despite the submissions of Mr. Merskey for PWC as Receiver, that the determination in this case could affect the willingness of advisers to participate in other like transactions. Parties are in a position to protect themselves by contract. In this case, I am satisfied

that Catalyst was at least aware of the Engagement Letter prior to its purchase of the assets and the fact of a Success Fee. I make no finding beyond that as to whether it was aware at an earlier time of all the terms or of the position that is now taken by PWC-CF. It was publicly available in the Receiver's Nineteenth Report.

20 It is accepted that PWC-CF expended significant professional time in the Marketing Process and was integral in the marketing and negotiations leading up to a proposed transaction with 209, which was superseded by Catalyst's purchase of the MDS security.

21 Having reviewed the documentation and the submissions, I have concluded that the Success Fee is payable. I reach this conclusion for the following reasons:

1. The Marketing Process was pursuant to Court Direction, which included the involvement of PWC-CF as investment advisor.
2. The Engagement Letter was entered into with the knowledge and support of MDS that it would be a binding and enforceable contract. The definition of "transaction" is a broad one.
3. Catalyst is properly regarded as a third party since it received information under a Confidentiality Agreement envisaged in the Marketing Process.
4. PWC-CF did the work that was contemplated to be entitled for the Success Fee.
5. The Vesting Order in effect represents a sale of the Hemosol assets to Catalyst and **closed** as contemplated.
6. Both the Receiver and PWC-CF had the reasonable expectation that they would be paid. The fact that the term of the transaction involved assumption of debt rather than sale of assets should not defeat those reasonable expectations.
7. The reasonable expectations include the payment of the Success Fee out of the Receiver's Administration Charge.
8. In the circumstances the Receiver should not be at risk for the Success Fee.

22 For the foregoing reasons, the Success Fee is therefore due and owing to PWC-CF by the Receiver. The Receiver should not be at risk for the Fee, yet the Fee is due and owing by the Receiver. In the circumstances of insufficient cash, the Receiver is to recover US$325,000.00 from Catalyst which in turn shall be paid to PWC-CF.

23 If it is necessary to deal with the any matters including costs arising from this conclusion, I may be spoken to.

[Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

---- End of Request ----
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