Federal Court of Appeal Cour d'appel fédérale

Date: 20170915

Docket: A-119-16

Citation: 2017 FCA 188

CORAM: **WEBB J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

DELIZIA LIMITED

Appellant/Garnishor

and

SUNRIDGE GOLD CORP.

Respondent/Garnishee

and

STATE OF ERITREA

Judgment debtor

Heard at Ottawa, Ontario, on April 5, 2017.

Judgment delivered at Ottawa, Ontario, on September 15, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Delizia Limited (Delizia) has appealed from the Judgment of Justice Brown dated April 8, 2016 (2016 FC 392) and also from the Judgment rendered the same day in a case involving Nevsun Resources Ltd. (Nevsun) (2016 FC 393). Although the appeals (A-118-16 and A-119-

16) were not consolidated, there is a significant overlap in the relevant facts and the arguments that are germane to both appeals.

[2] The Federal Court allowed the appeals of Sunridge Gold Corp. (Sunridge) and Nevsun and set aside the provisional order of garnishment and the final order of garnishment that had been issued against each company. These garnishment orders related to the debt owing by the State of Eritrea (Eritrea) to Delizia.

[3] For the reasons that follow I would dismiss this appeal. Separate reasons will be issued for the appeal related to Nevsun.

I. Background

[4] Delizia sold military aircraft equipment to Eritrea in 2003 but did not receive full payment. Under the terms of the contract, Delizia commenced an arbitration proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce. Eritrea did not fully participate in the arbitration proceedings and an arbitral award of $2,175,775 (US) was issued in favour of Delizia on April 18, 2006. Including arbitral fees and interest, the amount increased to $4,062,428.70 as of July 17, 2013, the date of the Order of Justice Mactavish registering the arbitral award and rendering judgment for this amount (the Recognition Order). This was an *ex parte* proceeding. Eritrea was not served with the notice of the proceeding nor the Recognition Order.

[5] Following the issuance of the Recognition Order, Delizia brought an *ex parte* application for a Garnishee Order to Show Cause (a provisional order of garnishment) against Sunridge under Rule 449(1) of the *Federal Courts Rules*, SOR/98-106 (Rules). This Order was granted on July 31, 2013 (Docket number T-1157-13) and it provided that “any debts owing or accruing from [Sunridge] to [Eritrea] be attached to answer the Judgment” and it also ordered Sunridge to appear before the Federal Court to say why Sunridge should not pay the amount owing by Eritrea to Delizia.

[6] Sunridge is a Canadian company that is in the business of exploring for and developing mineral deposits. Since 2003, Sunridge has been involved in exploring and developing a copper-zinc-gold-silver project in Eritrea (the Asmara Mine). From 2003 until 2006 Sunridge and an Australian company carried on business in relation to the Asmara Mine under a joint venture arrangement. In 2006 Sunridge bought out the interest of the Australian company in the joint venture and continued its Asmara Mine activities through a branch office that it established in Eritrea.

[7] Under the laws of Eritrea (Proclamation No. 68-1995 – A Proclamation to Promote the Development of Mineral Resources), Eritrea has the right to acquire a 10% interest in any mining investment in Eritrea without any cost to Eritrea and also additional equity participation by agreement. The Federal Court judge found, and Delizia does not dispute, that on July 4, 2012 Eritrea exercised its option to acquire 40% of the shares of the company that was to be formed to develop the Asmara Mine.

[8] On or about June 27, 2014, Sunridge and Eritrea National Mining Corporation (ENAMCO), a corporation controlled by Eritrea, entered into a shareholders agreement that provided for the incorporation of a company (Asmara Mining Share Company (AMSC)) to continue with the exploration and development of the Asmara Mine property. This agreement reflected the option that Eritrea had exercised to acquire 40% of the shares of this company. AMSC was incorporated on October 1, 2014. The exploration licences and other assets related to the Asmara Mine were transferred to AMSC and 40% of its shares were issued to ENAMCO.

[9] A final order of garnishment dated January 9, 2015 (2015 FC 34) was issued by the Prothonotary against Sunridge. In issuing this order, the Prothonotary found that certain licence exploration fees were debts owing by Sunridge to Eritrea. The Prothonotary also found that the issuance of shares by AMSC to ENAMCO was effectively a sale of shares by Sunridge to Eritrea and should not have occurred based on the provisional order of garnishment. Sunridge was ordered to pay the sum of $4,371,618 (to be perfected). The order also provided that "all debts owing and accruing from Sunridge to the State of Eritrea, including ENAMCO" were attached in favour of Delizia.

[10] On appeal from the final order of garnishment to the Federal Court, the Federal Court judge conducted a *de novo* review of the decision of the Prothonotary because the order was vital to the final issue of the case. In conducting this review he found that the licence exploration fees were exempt from seizure as a result of the provisions of subsection 12(1) of the *State Immunity Act*, R.S.C., 1985, c. S-18. Delizia has not challenged this finding in this appeal.

[11] The Federal Court judge also concluded that he could only attach the issuance of shares by AMSC if he could pierce the corporate veil. Since he concluded that he could not pierce the corporate veil, the Federal Court judge concluded that there were no debts owing or accruing by Sunridge to Eritrea that could be garnished under the Rules and he set aside the provisional order of garnishment and the final order of garnishment.

[12] The Federal Court judge noted that since he had found that there were no debts owing or accruing from Sunridge to Eritrea that could be garnished under the Rules, he did not need to consider whether failing to serve Eritrea in the manner as provided in the *State Immunity Act* would result in the provisional order of garnishment and the final order of garnishment being nullities. However, since the application of this *Act* was fully argued before him, he addressed this issue and concluded that since Eritrea was not served with the originating document leading to the Recognition Order, the provisional order of garnishment and the final order of garnishment were nullities.

II. Issues

[13] The issues in this case are:

a) Did the Federal Court err by conducting a de novo hearing?

b) Did the Federal Court err in finding that there were no debts owing or accruing by Sunridge to Eritrea that could be garnished under the Rules?

III. Standard of Review

[14] The standard of review for any finding of fact is palpable and overriding error and for any question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) [*Housen*].

IV. Analysis

A. *De Novo Hearing*

[15] The first question to be addressed is whether a *de novo* hearing should have been held. The Federal Court decision was issued on April 8, 2016. On August 31, 2016, this Court released its decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331. In that decision, this Court concluded that the standards of review as set out in *Housen* will apply to appeals from discretionary decisions of Prothonotaries.

[16] In conducting the *de novo* hearing, the Federal Court judge was making his own determination with respect to questions of law. This would be the same as applying the correctness standard of review for such questions. As a result, with respect to questions of law, no error was committed.

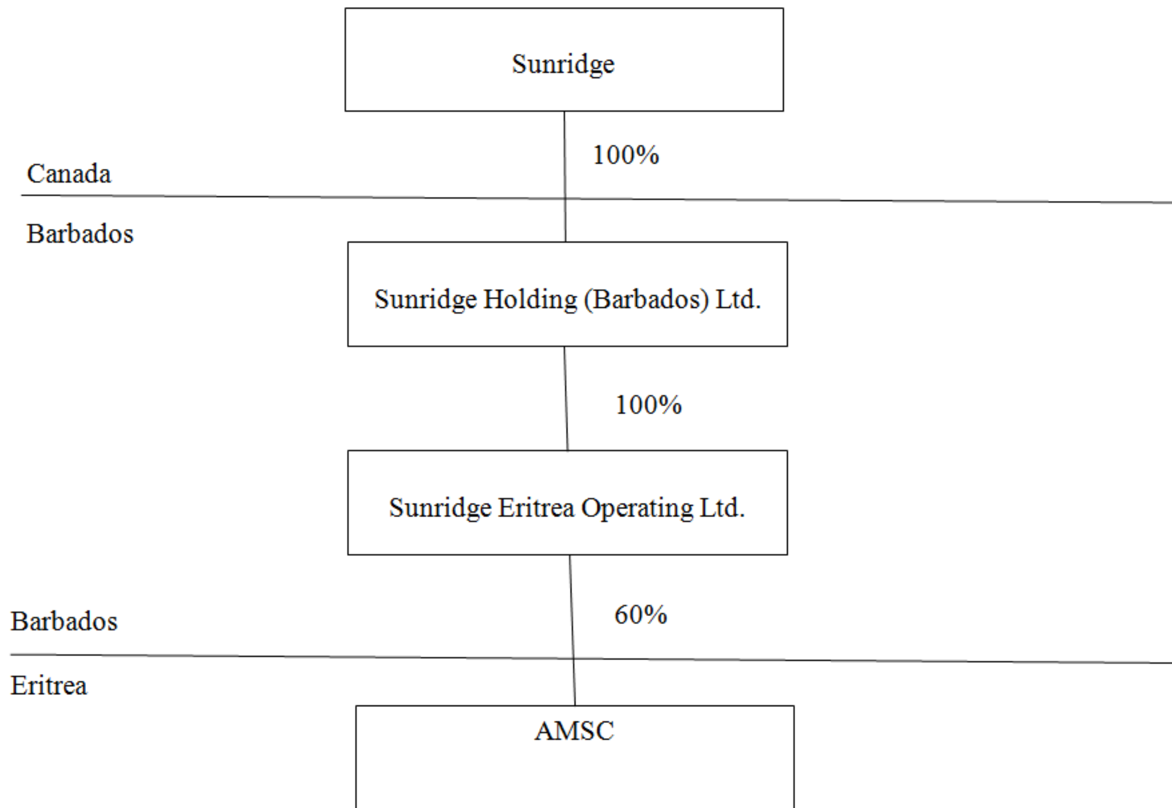
[17] With respect to questions of fact, the only finding of fact that Delizia disputes, is the finding by the Federal Court judge that the incorporation of AMSC and the issuance of shares by it were completed for legitimate business purposes. This finding was made in relation to the

question of whether the issue of shares by AMSC to ENAMCO was a transaction that violated the provisional order of garnishment. Since the Prothonotary found that this issue of shares was a transfer of shares from Sunridge to ENAMCO, he did not make any finding with respect to whether the incorporation of AMSC was done for legitimate business purposes. Since the Prothonotary did not make any finding in relation to this matter, it was open to the Federal Court judge to do so and, as a result, the conduct of the hearing *de novo*, in my view, did not adversely affect the result.

B. *Issuance of Shares*

[18] Delizia submits that there was no need to pierce the corporate veil to find that the issuance of shares by AMSC was in violation of the provisional order of garnishment. Delizia submits that this issuance of shares was effectively a transfer of shares by Sunridge to ENAMCO.

[19] The corporate chart for Sunridge and its subsidiaries was set out by the Federal Court judge in his reasons and Delizia does not dispute the accuracy of this chart. The corporate structure of Sunridge and its subsidiaries is as follows:



(The corporate structure)

[20] Neither party referred to anything in the record that would identify when either one of the Barbadian companies was incorporated. It is not clear whether the exploration licences and other assets were transferred by Sunridge or by Sunridge Eritrea Operating Ltd. to AMSC. In my view, it is not necessary to determine which particular company transferred assets to AMSC. Even if the issuance of shares by AMSC from treasury for consideration that is less than the fair market value of those shares could be a transfer of property from Sunridge to ENAMCO, that transfer (or the agreement to cause such transfer to occur) would not, in and of itself, create a debt owing or accruing from Sunridge to ENAMCO that could be attached under the provisional order of garnishment.

[21] To illustrate, assume that a person (the first person) owns assets worth $1,000,000 and transfers these assets to a corporation for 100 common shares. Assume that the particular corporation issues (or previously had issued) another 100 common shares to a second person (the second person) for $1. Each shareholder would then hold shares with a fair market value of $500,000. Even though, based on the decision of this Court in *Her Majesty the Queen v. Kieboom*, [1992] 3 F.C. 488, 92 D.T.C. 6382, this could be considered to be a transfer of a portion of the equity interest of the first shareholder in the corporation to the second shareholder, this would not, in and of itself, mean that a debt was created or paid. It would simply mean that an interest in property was transferred at less than fair market value.

[22] It would be the same as if the first person had agreed with the second person to sell an asset for an amount less than the fair market value of that asset. Assume a person agrees to sell an asset with a fair market value of $1,000,000 to another person for $800,000. To the extent that the consideration is equal to the fair market value of the asset ($800,000 in this example) there is no debt for this amount owing or accruing from the vendor to the purchaser. The vendor simply has the obligation to convey the asset in question upon receiving the consideration from the purchaser. The only other amount in this example is the difference between the fair market value of the asset ($1,000,000) and the purchase price ($800,000). How could this create a debt of $200,000 owing by the vendor to the purchaser? Assume that these amounts represent the consideration and the fair market value when the agreement is reached but, prior to the closing, the fair market value of the asset decreases to $800,000, through no fault of the vendor. Even though there was a $200,000 difference when the agreement was reached, there is no basis upon

which the purchaser could recover this $200,000 from the vendor and, therefore, this $200,000 difference cannot be a debt.

[23] In order for the agreement to cause AMSC to issue shares, in this case, to be attached under Rule 449(1), the obligation to cause AMSC to issue the shares would have to be a debt for the purposes of this Rule. Garnishment proceedings are governed by Rules 449 to 457 and writs of execution (as defined in Rule 2) for property are governed by Rules 433 to 448. The provisional order of garnishment in this case was issued under Rule 449(1).

[24] Rule 449(1) provides that:

<table>
<tr><td>449 (1) Subject to rules 452 and 456, on the ex parte motion of a judgment creditor, the Court may order</td><td>449 (1) Sous réserve des règles 452 et 456, la Cour peut, sur requête ex parte du créancier judiciaire, ordonner :</td></tr>
<tr><td>(a) that</td><td>a) que toutes les créances suivantes du débiteur judiciaire dont un tiers lui est redevable soient saisies-arrêtées pour le paiement de la dette constatée par le jugement :</td></tr>
<tr><td>(i) a debt owing or accruing from a person in Canada to a judgment debtor, or</td><td>(i) les créances échues ou à échoir dont est redevable un tiers se trouvant au Canada,</td></tr>
<tr><td>(ii) a debt owing or accruing from a person outside Canada to a judgment debtor, where the debt is one for which the person might be sued in Canada by the judgment debtor,</td><td>(ii) les créances échues ou à échoir dont est redevable un tiers ne se trouvant pas au Canada et à l’égard desquelles le débiteur judiciaire pourrait intenter une poursuite au Canada;</td></tr>
<tr><td>be attached to answer the judgment debt; and</td><td></td></tr>
<tr><td>(b) that the person attend, at a specified time and place, to show cause why the person should not</td><td>b) que le tiers se présente, aux date, heure et lieu précisés, pour faire valoir les raisons pour lesquelles il</td></tr>
</table>

pay to the judgment creditor the debt or any lesser amount sufficient to satisfy the judgment.	ne devrait pas payer au créancier judiciaire la dette dont il est redevable au débiteur judiciaire ou la partie de celle-ci requise pour l'exécution du jugement.
(emphasis added)	(soulignement ajouté)

[25] In *Choken v. Lake St. Martin Indian Band*, 2004 FCA 248, [2005] 1 F.C.R. 69, this Court noted that:

> **20** It is fair to say that the words "a debt owing or accruing" mean, in the context of garnishment proceedings, a sum of money which is now payable or will become payable in the future by reason of an existing and certain obligation and which is or will become recoverable in an action.[…]

[26] The agreement to cause AMSC to issue shares to ENAMCO did not result in a sum of money that was payable by Sunridge to ENAMCO or Eritrea in the amount equal to the difference between the fair market value of these shares and the consideration to be paid by ENAMCO. Sunridge simply had the obligation to cause these shares to be issued by AMSC. This obligation arose as a result of the proclamation that gave Eritrea the right to a 10% interest at no cost to Eritrea and the exercise by Eritrea of its right to acquire an additional equity interest at the agreed upon price.

[27] In this case, Delizia does not dispute the finding that Eritrea exercised its option to acquire a 40% interest in the mining project before the provisional order of garnishment was issued. When the assets were transferred to AMSC and 40% of its shares were issued to ENAMCO, this was simply the fulfillment of the obligation that arose when Eritrea exercised its option. This did not represent a sum of money owing by Sunridge to Eritrea but rather an

obligation to complete the deal to provide Eritrea (or ENAMCO) its 40% interest in the Asmara Mine project. It was an obligation to cause an equity interest in the project to be acquired by Eritrea. As a result, the issuance of shares by AMSC was not a transaction that was subject to the provisional order of garnishment.

C. *Piercing the Corporate Veil*

[28] In my view, it is not necessary to determine whether the corporate veil should be pierced in relation to the issuance of shares of AMSC to ENAMCO. However, since the future operations related to the development and operation of the Asmara Mine will be carried on by AMSC, Sunridge will only have accruing debts if the corporate veils are pierced and the liabilities of AMSC are considered to be the liabilities of Sunridge.

[29] As noted above, prior to the issuance of the provisional order of garnishment, Eritrea had exercised its option to acquire a 40% interest in the Asmara Mine project. Sunridge and Eritrea had the right to take the necessary steps to fulfill their legitimate business obligations. Eritrea had the right to acquire a 40% interest in this project (and not a 40% interest in all of the assets of Sunridge). It would be a common commercial transaction to incorporate a separate company to operate a mine and to allow for different persons to acquire an equity interest. The incorporation of AMSC and the issuance of shares to ENAMCO was simply a means by which this was accomplished. There is nothing to suggest that the incorporation of AMSC to facilitate this was done for the purpose of allowing Eritrea to evade the payment of its debt to Delizia. This was simply a common commercial arrangement to form a company to operate a mine and allow another person to share in the equity.

[30] For the same reasons as provided in 2017 FCA 187, in my view, there is no basis to pierce the corporate veils of Sunridge Holding (Barbados) Ltd., Sunridge Eritrea Operating Ltd. and AMSC and find that the debts of AMSC will be the debts of Sunridge. Sunridge had the right, in this case, to arrange its affairs in a manner that suited its needs and its obligations to Eritrea.

V. Conclusion

[31] As a result, I agree with the Federal Court judge that there are no debts owing or accruing by Sunridge to Eritrea or ENAMCO that could be garnished under the Rules. As noted by the Federal Court judge, this finding that there are no such debts is sufficient to dispose of this matter. Since any comments on the application of the *State Immunity Act* in relation to the failure to serve Eritrea with notice of the proceedings would, therefore, be *obiter*, I would refrain from commenting on this issue.

[32] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

"I agree
D. G. Near J.A."

"I agree
J. Woods J.A."

<u>FEDERAL COURT OF APPEAL</u>

<u>NAMES OF COUNSEL AND SOLICITORS OF RECORD</u>

APPEAL FROM THE JUDGMENT OF THE FEDERAL COURT DATED APRIL 8, 2016 NO. T-1157-13 (2016 FC 392)

DOCKET:	A-119-16
STYLE OF CAUSE:	DELIZIA LIMITED v. SUNRIDGE GOLD CORP. AND STATE OF ERITREA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 5, 2017
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
DATED:	SEPTEMBER 15, 2017

<u>APPEARANCES</u>:

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