

Federal Court



Cour fédérale

Date: 20101028

Docket: T-407-07

Citation: 2010 FC 1039

Ottawa, Ontario, this 28th day of October 2010

Present: The Honourable Mr. Justice Pinard

BETWEEN:

NOVEL COMMODITIES S.A.

Applicant

and

REPUBLIC OF GUINEA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by Crew Gold Corporation for an order pursuant to Rules 398 and 462 of the *Federal Courts Rules*, SOR/98-106, (the “Rules”) staying or varying the Final Charging Order in favour of the applicant, Novel Commodities S.A., (“Novel”) rendered in this matter on August 30, 2010.

[2] By an order made on April 4, 2007, the respondent Republic of Guinea (“Guinea”) was ordered to pay to the applicant Novel (i) the amount of \$462,427.04 with interest of 4.5% from

13 April 2004 to 4 April 2007 and interest of 5% from 4 April 2007 to the date of payment; (ii) the amount of \$1,471,572.09 with interest of 4.5% from 17 June 2004 to 4 April 2007 and interest of 5% from 4 April 2007 to the date of payment; (iii) the amount of \$110,716.49 with interest of 4.5% from 17 June 2004 to 4 April 2007 and interest of 5% from 4 April 2007 to the date of payment; and (iv) the amount of \$10,384.97 with interest of 5% from 4 April 2007 to the date of payment.

[3] Guinea owns shares in a corporation duly constituted in accordance with the laws of Yukon called Crew Gold Corporation (“Crew”), which carries on business as a mining company. Its shares are traded on the Oslo and Toronto stock exchanges under the symbol “CRU”.

[4] The following relevant facts, as stated in the written representations contained in the motion record of Novel, are undisputed or are well-established by the evidence:

On September 12, 2007, the Registry of this Court issued a writ of seizure and sale in execution of the Enforcement Order against the shares (the “writ”).

On or about October 15, 2007, the writ was served upon the registered office of Crew. As Crew did not have possession of the actual share certificates evidencing Guinea’s shareholding, the sheriff’s office could not execute the writ.

Crew did not seek to intervene to contest the execution of the writ upon the shares at that time. In fact, there was no reaction whatsoever from Crew to the service of the writ.

On November 14, 2007, Novel applied for a garnishment order against Credit Suisse, as Novel had reasonable grounds to believe, at the time, that Credit Suisse was holding the shares as a nominee for Guinea.

The garnishment order was served upon Crew on or about November 26, 2007.

Crew failed to react to the garnishment order against Credit Suisse and did not come forward to state that Credit Suisse did not, in fact, hold shares as a nominee for Guinea (as Novel was ultimately advised by Credit Suisse).

Once again, service of execution proceedings in respect of the Enforcement Order elicited no response whatsoever from Crew.

On November 19, 2007, Novel applied for an Interim Charging Order to secure payment of the amount due to it, together with any interest thereon, which application was granted by this Court by virtue of an order dated November 20, 2007 (the "Interim Order").

On or about November 28, 2007, the Interim Order was served upon Crew, Guinea, Pacific Corporate Trust Company and Clearing and Depository Services Inc.

None of these parties reacted or responded in any way to the Interim Order and none of them came forward before this Court to show cause why the Interim Order should not be made absolute.

In fact, on February 22, 2008, Crew's counsel advised Novel that pursuant to a transaction that took place in June 2006, Crew had issued 7,836,908 common shares to Guinea, and that the shares were publicly traded.

On March 5, 2008, Novel gave notice to Crew of its Motion for a Final Charging Order and Other Incidental Relief (the "motion for a final order").

On or about April 21, 2008, Crew filed a Motion for Leave to Intervene in Novel's motion for a final order (the "motion for leave to intervene").

In the affidavit of Rory James Taylor filed in support of Crew's motion for leave to intervene, Crew did not allege that Guinea was not the owner of the shares, but on the contrary confirmed several times that Guinea was the owner of same. No condition or qualification as to that ownership was ever alleged.

At paragraph 7 of his affidavit, Mr. Taylor confirms that Crew acquired Guinea's 15% stake in the company Société minière de Dinguirawe ("SMD") in exchange for a cash payment to Guinea and the issuance of Crew shares.

The transaction is detailed in the press release issued by Crew on July 3, 2006, filed as Exhibit C to the affidavit of Brandon Wiener in support of Novel's motion for an Interim Order whereby Crew confirmed that it was "pleased to announce that an Agreement has been signed between Crew and government of Guinea whereby Crew will acquire the government of Guinea's 15% stake in SMD for a total consideration of U.S. \$30 million, consisting of \$15 million U.S.D. cash, and \$15 million U.S.D. worth of Crew Gold Shares. Crew welcome the Republic of Guinea as a major shareholder of Crew."

Crew explicitly recognized Guinea's ownership of the shares throughout the motion for leave to intervene and argued only that the cancellation of Guinea's shares and reissuance of those shares in favour of Novel would "violate Crew's obligations towards the Republic of Guinea as a shareholder", as alleged at paragraph 12 of Mr. Taylor's affidavit in support of Crew's motion for leave to intervene.

In the same vein, Crew does not, in its motion to vary and stay the Final Charging Order, establish that it is the rightful owner of the shares, only that ownership remains "a live issue before the French Courts".

On July 14, 2010, Crew abruptly abandoned its motion for leave to intervene in the present matter.

On July 23, 2010, Crew's solicitors wrote a letter to the Administrator of the Federal Court in which they: a) confirmed that Crew no longer intended to seek leave to intervene in the present matter, and b) advised the Court that they were fully aware of all proceedings in France. These are the very same proceedings now invoked by Crew (in paragraphs 8 to 19 of their Written Representations), as to why the Final Charging Order should be varied or stayed.

On August 30, 2010, Mr. Justice Michel Beaudry granted the motion for a final order and issued a Final Charging Order in favour of Novel.

On September 7, 2010, Novel's solicitors wrote to Crew's solicitors requesting Crew's cooperation in the enforcement of the Final Charging Order.

On September 17, 2010, Crew's solicitors responded to Novel's request by advising Novel that Crew would not surrender the shares in which Novel now holds a legal interest.

On or about September 22, 2010, Crew filed a motion to vary seeking to: a) stay the Final Charging Order until such time as the courts of the Republic of France have finally ruled on the ownership of the shares; and b) vary the Final Charging Order by striking out paragraphs 4, 5 and 6.

[5] Crew is neither a party nor an intervener in the present proceedings. I have, therefore, serious doubts as to its right to bring this motion pursuant to Rules 398 and 462 of the Rules.

[6] In any event, I am of the view that the Final Charging Order ought not be stayed nor varied, for the following reasons.

[7] It appears that Mr. Justice Beaudry, at the time of the hearing of the motion for a final order, was fully aware and was advised by Novel's counsel of the pending proceedings in France concerning the ownership of the shares and still saw fit to issue the Final Charging Order.

[8] The abandonment by Crew of its motion for leave to intervene remains without any valid explanations. When Crew advised the Court that it no longer had any interest in continuing to seek leave to intervene, it is clear that Crew had full knowledge of the pending proceedings in France, including, *inter alia*, the order staying the enforcement of the judgment of the *Tribunal de grande instance de Nanterre* as well as the upcoming decision of the *Cour d'appel de Versailles*, expected to be delivered by the end of this year. In fact, since the abandonment of the motion for leave to

intervene, there has been no change whatsoever in the facts or in the circumstances surrounding the present litigation.

[9] The Final Charging Order, which is final and enforceable, should not be varied on the basis of Crew's failure to intervene in a timely manner.

[10] Furthermore, considering that the Final Charging Order has already declared the shares to be those of Guinea and considering that Crew has failed to bring any evidence attempting to show that a French Court decision with respect to the ownership of the shares will have precedence over the Final Charging Order, I find that Crew, in the context of all the above circumstances, has failed to demonstrate that there is a serious issue to be tried justifying the requested remedies.

[11] Crew has also failed to demonstrate that it will suffer any non-speculative harm by complying with the Final Charging Order. On the contrary, it appears that varying or staying the Final Charging Order would cause serious harm to Novel which would not be entitled to alienate the shares at its sole discretion. Given the nature of the charged property and the volatility of the market, it is imperative that Novel be allowed to exercise control over the shares at its discretion, as per the terms of the Final Charging Order.

[12] Finally, I agree with the applicant Novel that the balance of convenience is in its favour given (i) the inability of Novel to execute a valid, final and enforceable order from this Court declaring the shares to be those of Guinea (and thus properly seizable), (ii) the volatility of the

shares as set out in the affidavit of Hugo Babos-Marchand, and (iii) the inability of Novel to sell the shares at its discretion.

[13] For all the above reasons, Crew's motion is dismissed, with costs.

ORDER

The motion by Crew Gold Corporation for an order pursuant to Rules 398 and 462 of the *Federal Courts Rules*, SOR/98-106, staying or varying the Final Charging Order in favour of the applicant, Novel Commodities S.A., rendered in this matter on August 30, 2010, is dismissed, with costs.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-407-07

STYLE OF CAUSE: NOVEL COMMODITIES S.A. v. REPUBLIC OF GUINEA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 18, 2010

**REASONS FOR ORDER
AND ORDER:** Pinard J.

DATED: October 28, 2010

APPEARANCES:

Me Kristian Brabander FOR THE MOVING PARTY (Crew Gold Corporation)

Me Sandra Mastrogiuseppe FOR THE APPLICANT (Novel Commodities S.A.)

SOLICITORS OF RECORD:

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