Federal Court of Appeal | Cour d'appel fédérale

Date: 20170915

Docket: A-118-16

Citation: 2017 FCA 187

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

BETWEEN:

DELIZIA LIMITED

Appellant/Garnishor

and

NEVSUN RESOURCES LTD.

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 393) and also from the Judgment rendered the same day in a case involving Sunridge Gold Corp. (Sunridge) (2016 FC 392). 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 Nevsun Resources Ltd. (Nevsun) and Sunridge 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 Sunridge.

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 Nevsun, a Canadian corporation. This Order was granted on July 31, 2013 (Docket number T-1157-13) and it provided that “any debts owing or accruing from [Nevsun] to [Eritrea] be attached to answer

the Judgment" and it also ordered Nevsun to appear before the Federal Court to say why Nevsun should not pay the amount owing by Eritrea to Delizia.

[6] Nevsun, through its subsidiaries, operates a gold, silver and base metal mine in Eritrea. Under the laws of Eritrea, the Eritrean National Mining Corporation (ENAMCO) was entitled to acquire an interest in the mine in Eritrea. As a result, ENAMCO acquired a 40% interest in Bisha Mining Share Company (BMSC), the owner and operator of the mine. A wholly owned, indirect subsidiary of Nevsun holds the other 60% interest in BMSC. As the owner and operator of the mine, BMSC would be liable for any amounts payable to Eritrea in relation to the mine.

[7] A final order of garnishment dated January 9, 2015 (2015 FC 33) was issued by the Prothonotary against Nevsun to, *inter alia*, "attach all debts owing and accruing from Nevsun or its subsidiary BMSC to the State of Eritrea, including governmental bodies". By making Nevsun liable for amounts owing by its subsidiary, the Prothonotary was piercing or lifting the corporate veil.

[8] On appeal from this final order of garnishment to the Federal Court, Nevsun raised a number of issues. However, since only two of these issues were pursued in this appeal, the focus will be on these two issues. In particular, Nevsun argued that the corporate veil should not be pierced. If the corporate veil is not pierced, there is no debt owing from Nevsun to Eritrea and therefore no debt to garnish. Nevsun also raised the issue of whether failing to serve Eritrea in the manner as provided in the *State Immunity Act*, R.S.C., 1985, c. S-18, resulted in the provisional order of garnishment and the final order of garnishment being nullities.

[9] The Federal Court judge determined that the decision of the Prothonotary was to be reviewed *de novo* because the order was vital to the final issue of the case. In conducting this review, the Federal Court judge determined that there was no basis for piercing the corporate veil and therefore he allowed the appeal from the decision of the Prothonotary. Because he found that the corporate veil should not be pierced the Federal Court judge noted that there was no need to consider the *State Immunity Act* in this case. 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

[10] 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 the corporate veil should not be pierced?

III. Standard of Review

[11] 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).

IV. Analysis

A. *De Novo Hearing*

[12] 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.

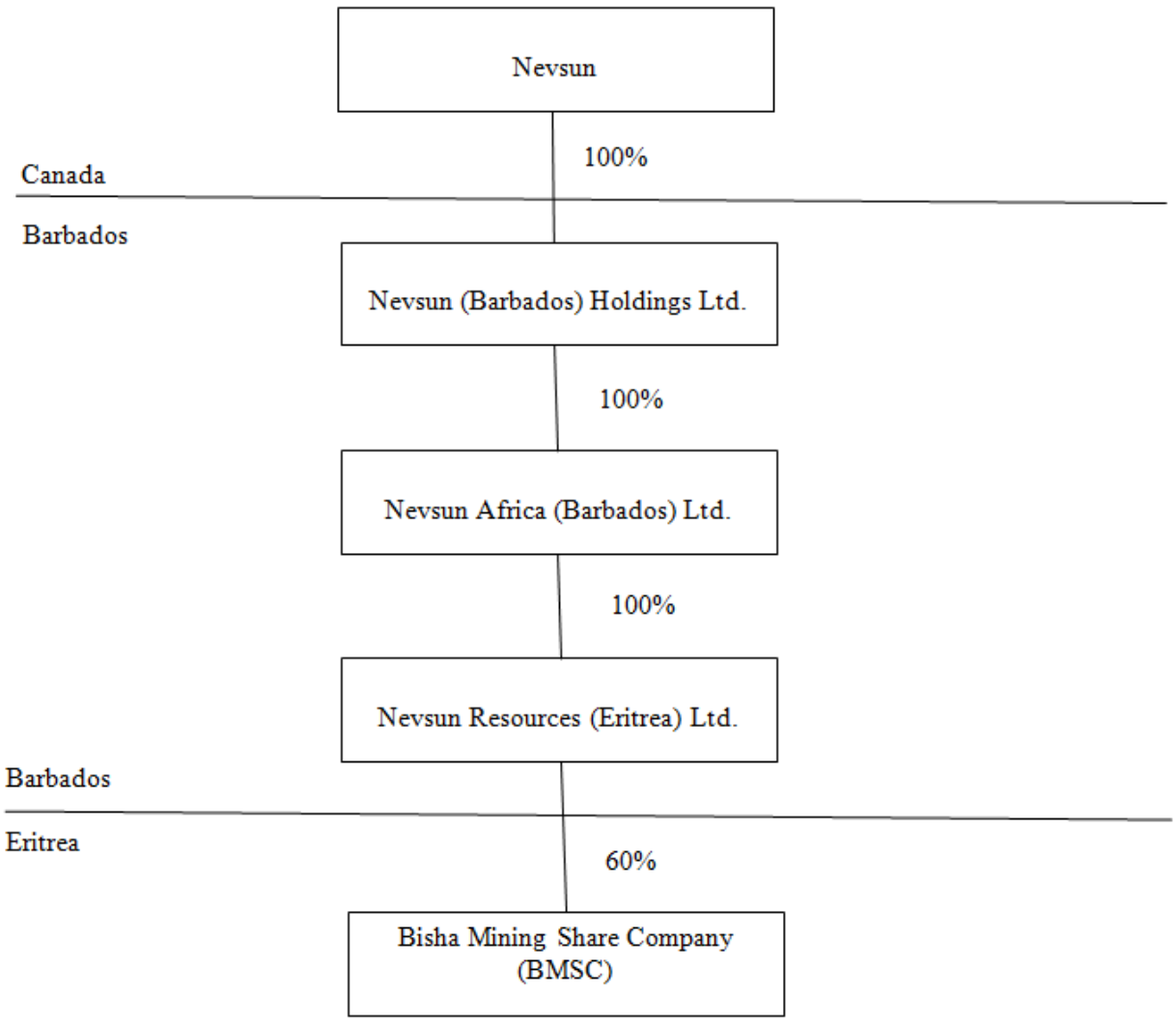
[13] In conducting the *de novo* hearing, the Federal Court judge was making his own determination with respect to questions of law. This would be the same as applying the correctness standard of review for such questions. As a result, with respect to questions of law, no error was committed.

[14] With respect to questions of fact, most of the facts are not in dispute. The only finding of fact that Delizia challenges in its memorandum of fact and law is the alleged finding by the Federal Court judge that BMSC was validly incorporated as a separate company under the laws of Eritrea.

[15] The Prothonotary, in paragraph 11 of his decision, noted that:

> [11] Furthermore, there appears to be little contradiction between the parties in holding that the following organizational chart establishes, on paper only, according to Delizia, the corporate structure of the group to which Nevsun and BMSC belong and the percentage in terms of the interest of Nevsun, or of its subsidiaries according to Nevsun's approach, in the various entities:

[16] The corporate structure that was illustrated in the Prothonotary's reasons is as follows:



(The corporate structure)

[17] In paragraph 14 of his reasons, the Prothonotary observed that:

> [14] The Court would like to add that even if the previous paragraph refers to "shares", the evidence in the record does not establish that BMSC is actually a corporation because Delizia was denied concrete proof of that status during the cross-examination of Mr. Davis.

[18] In my view this is not a clear finding of fact by the Prothonotary that BMSC is not a corporation. It is simply a statement related to the evidence and, in my view, is a refusal by the Prothonotary to make any final determination on this point. In any event, the Prothonotary did examine the law in relation to piercing the corporate veil for BMSC and he described BMSC as a subsidiary of Nevsun in his Order. Therefore, he implicitly concluded that BMSC was duly incorporated. Since no factual finding was explicitly made by the Prothonotary that BMSC is not a corporation, it was open to the Federal Court judge to make his own determination of this fact.

[19] The record includes the affidavit of Clifford Davis, the President and Chief Executive Officer of Nevsun and the affidavit of Yehuda Tunik, a partner in the law firm of Tunik & Co. Law Offices in the city of Tel-Aviv, Israel. Yehuda Tunik was a "duly authorized representative" of Delizia and also "the attorney of record for [Delizia] in respect of the foreign judgment whose registration" was being sought in the Federal Court.

[20] In paragraph 7 of his affidavit Clifford Davis stated that:

> BMSC is a company incorporated under the laws of Eritrea in 2006.

[21] In the affidavit of Yehuda Tunik, paragraph 38 is as follows:

> As an example, Nevsun, a publicly traded British-Columbia corporation, has its principal operations in the Bisha Mine in Eritrea, held by the Eritrea registered corporation Bisha Mining Share Company (hereinafter "BMSC"), in which Nevsun has a 60% interest, as appears from page 6 of Nevsun's Interim Financial Statement for the quarter ended March 31, 2013, annexed hereto as Exhibit 14.
>
> (emphasis added)

[22] Since both the legal representative of Delizia and the President of Nevsun, in sworn statements, acknowledged that BMSC was a corporation, in my view the Federal Court judge did not commit any error in finding that BMSC is a corporation. Even if the statement of the Prothonotary referred to above could be construed as a finding of fact that BMSC was not a corporation, in my view, this would have been a palpable and overriding error. The only basis identified by the Prothonotary for this "finding" was the lack of evidence. However, the sworn statements of the President of Nevsun and the legal representative of Delizia would be evidence that BMSC was validly incorporated. There was no reference to any evidence to contradict these statements.

[23] As a result, in this case, since this was the only impugned finding of fact, the conduct of the hearing *de novo*, in my view, did not adversely affect the result.

B. *Piercing the Corporate Veil*

[24] Delizia submits that the Prothonotary did not err in piercing the corporate veil and finding that the debts of BMSC were the debts of Nevsun. In order to assess whether it is appropriate to

pierce the corporate veil, it is first necessary to determine the applicable test to be applied. This is a question of law, reviewable on the standard of correctness. By conducting the hearing *de novo* the Federal Court judge was essentially reviewing this question on the correctness standard.

[25] In my view, the Federal Court judge did not commit any error in his analysis of the law in relation to piercing the corporate veil. I would only add a few comments to his detailed and thorough analysis.

[26] As noted by the Federal Court judge, the Prothonotary stated in his reasons that:

> 28 In my view, it has been established that Nevsun's controlling interest in BMSC enables it to, in effect, have complete control over BMSC. In any event, nothing was adduced in evidence to rebut this perception.
>
> 29 The same is true for the finding that BMSC is being used by Nevsun as a conduit to avoid any liability here. Certainly, the corporate structure reflected by the chart produced in paragraph [11], *supra*, was not put in place to avoid this garnishment. However, it has not been ruled out in the mind of the Court that by keeping such a structure in place, and more specifically the presence of BMSC, Nevsun, like the State, sought to protect itself in the event of such a proceeding.

[27] I agree with the Federal Court judge that once the Prothonotary concluded that the corporate structure was not put in place to avoid the garnishment, this should have ended this part of the analysis. There may well be tax implications of undoing a corporate structure. Nevsun should not have an obligation to change its structure to benefit a third party.

[28] In this case, the Prothonotary had to pierce several corporate veils. BMSC, as the company operating the mine, would be the person who is liable for any amounts owing to Eritrea in relation to the operation of the mine. In order for the debts of BMSC to be the debts of

Nevsun, each and every one of the corporate veils of Nevsun (Barbados) Holdings Ltd., Nevsun Africa (Barbados) Ltd. and Nevsun Resources (Eritrea) Ltd. would have to be pierced. There is no direct discussion of the piercing of these corporate veils but the separate existence of these corporations appears to have been disregarded by the Prothonotary based on the comments of the Supreme Court of Canada in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208 [*Kosmopoulos*].

[29] In paragraph 23 and 24 of his reasons, the Prothonotary stated that:

> **23** As no garnishment situation involved a lifting of the corporate veil in light of facts similar to the facts present here was cited to this Court, the Court is inclined to rely on the broad statement by the Supreme Court in *Kosmopoulos v Constitution Insurance Co.*, [1987] 1 SCR 2, where, on page 10, the Court stated the following in the passage below. Certainly, the lifting of the corporate veil comes into play as long as it is maintained that BMSC is a corporation under Canadian law:
>
> (a) "Lifting the Corporate Veil"
>
> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. [...]
>
> [Emphasis added by the Prothonotary]
>
> * * *
>
> a) «Faire abstraction de la personnalité morale»
>
> En règle générale, une société est une entité juridique distincte de ses actionnaires: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) Aucune règle uniforme n'a été appliquée à la question de savoir dans quelles circonstances un tribunal peut déroger à ce principe en «faisant abstraction de la personnalité morale» et en considérant la société comme un simple

> «mandataire» ou «instrument» de son actionnaire majoritaire ou de sa société mère. En mettant les choses au mieux, tout ce qu'on peut dire est que le principe des «entités distinctes» n'est pas appliqué lorsqu'il entraînerait un résultat [TRADUCTION] «trop nettement en conflit avec la justice, la commodité ou les intérêts du fisc»: L.C.B. Gower, *Modern Company Law* (4th ed. 1979), à la p. 112...
>
> [Soulignés du protonotaire]

> **24** Here, I believe that it is appropriate to accept that BMSC is only the mere agent or puppet of Nevsun and that to conclude to the contrary would yield a result for Delizia, which seeks to enforce the Judgment, that is too flagrantly opposed to justice.

[30] The only reasons cited by the Prothonotary for finding that it would be "too flagrantly opposed to justice" to respect the separate existence of the corporations are that:

a) BMSC is the mere agent or puppet of Nevsun; and

b) there is a judgment for an outstanding unpaid debt owing by Eritrea (a creditor of BMSC) to Delizia (a third party).

[31] The unpaid debt, in this case, is not a debt of any of the corporations whose veil was being lifted. If the corporate veil could be pierced for debts of creditors of a corporation then it could also be pierced for debts of that corporation. Lifting the corporate veil could then be done in any situation where a person owns all of the shares of a particular corporation (and hence the corporation could be viewed as the puppet of that person) and the corporation has an unpaid liability. Any individual who owns all of the shares of a company would then be personally liable for the debts of that corporation. In my view, this cannot be the correct result and I agree with the Federal Court judge that control alone cannot justify lifting the corporate veil to hold a shareholder liable for the debts of that corporation.

[32] I would also note that the Supreme Court of Canada in *Kosmopoulos*, at page 10, stated that:

> The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle.
>
> (emphasis added)

[33] The reference to the company being a mere agent or puppet is not a condition that would justify lifting a corporate veil but rather it is a consequence of lifting the corporate veil.

[34] As a result, I agree with the Federal Court judge that there is no basis to pierce the corporate veil in this case. As noted by the Federal Court judge, this finding that the corporate veil should not have been lifted is sufficient to dispose of this matter. Since any comments on the application of the *State Immunity Act* would, therefore, be *obiter*, I would refrain from commenting on this issue.

[35] 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."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM THE JUDGMENT OF THE FEDERAL COURT DATED APRIL 8, 2016 NO. T-1157-13 (2016 FC 393)

DOCKET:	A-118-16
STYLE OF CAUSE:	DELIZIA LIMITED v. NEVSUN RESOURCES LTD. 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

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