COURT OF APPEAL FOR ONTARIO

CITATION: Entes Industrial Plants Construction & Erection Contracting Co. Inc. v. Centerra Gold Inc., 2023 ONCA 294
DATE: 20230428
DOCKET: COA-22-CV-0016

Roberts, Favreau and Copeland JJ.A.

In the Matter of an application under section 192 of the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, as amended

And in the Matter of Rule 14.05(2) of the *Rules of Civil Procedure*

And in the Matter of a proposed arrangement of Centerra Gold Inc.

BETWEEN

Entes Industrial Plants Construction & Erection Contracting Co. Inc.

Creditor
(Appellant)

and

The Kyrgyz Republic

Debtor

and

Centerra Gold Inc.

Garnishee
(Respondent)

Ryder Gilliland and Corey Groper, for the appellant

Alexander D. Rose, Eliot N. Kolers, and Zev Smith, for the respondent

Heard: April 13, 2023

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated July 28, 2022, with reasons reported at 2022 ONSC 4720.

REASONS FOR DECISION

[1] The appellant appeals from the dismissal of its garnishment motion, which was heard at the same time as the application brought by Centerra Gold Inc. ("Centerra") for approval of its plan of arrangement. The appellant is a substantial creditor of the Kyrgyz Republic ("the Republic"). It seeks to garnish a $50 million intercompany payment, made by Centerra, to its subsidiary, Kumtor Gold Company CJSC ("KGC"), pursuant to the court-approved plan of arrangement under s. 192 of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*").

[2] Centerra is a Canadian-based mining company. Prior to the implementation of the plan of arrangement, it owned 100% of the shares of KGC, whose major asset is the Kumtor gold mine, located in the Republic. Kyrgyzaltyn JSC ("KZN"), a company wholly owned by the Republic, was Centerra's largest shareholder; it owned 26.1% of Centerra's shares and had two representatives on Centerra's Board.

[3] Centerra's relationship with the Republic became increasingly acrimonious. The Republic attempted to gain control of the Kumtor gold mine, instigating

numerous civil and criminal proceedings against Centerra, as well as its employees and directors, and appointing an external manager over the gold mine. After lengthy negotiations within an international arbitration proceeding, Centerra, KZN, and the Republic entered into a Global Arrangement Agreement ("GAA"), by which Centerra would sever all ties with the Kumtor gold mine, KZN, KGC, and the Republic and extricate itself from billions of dollars of claims. Centerra brought an application for approval of a plan of arrangement under s. 192 of the *CBCA* in order to obtain approval of the GAA.

[4] The application judge heard Centerra's application for approval of the plan of arrangement at the same time as the appellant's garnishment motion. On July 28, 2022, she approved the plan of arrangement and dismissed the appellant's motion. She expressly rejected the appellant's suggestion that the plan of arrangement was done secretly or for the purpose of preventing the appellant from collecting on its judgment against the Republic. The appellant did not appeal the order approving the plan of arrangement, nor did it seek a stay of its implementation.

[5] As a result, at 12:01 a.m., on July 29, 2022, the plan of arrangement was implemented. Among other terms, at the same time as Centerra transferred $50 million as an intercompany payment to KGC and its shares of KGC to KZN, KZN returned its shares in Centerra for cancellation. Centerra also received a global release, including of billions of dollars worth of claims against Centerra, its

employees, and its directors that were before the Republic's courts, as well as of any claim by any person in relation to the $50 million payment to KGC.

[6] The appellant does not appeal the order approving the plan of arrangement. As a result, it is bound by the findings that the application judge made with respect to the plan of arrangement, which were also made in the context of the garnishment motion.

[7] Centerra maintains that the appellant's appeal is effectively moot because the $50 million payment that the appellant seeks to garnish has already been paid, and all claims against that payment have been released, pursuant to a final court order. However, the appellant submits that, in dismissing its garnishment motion, the application judge made several extricable reversible errors that are independent from her findings and decision on the plan of arrangement application. The appellant concedes that it would have to demonstrate that the application judge made each of the alleged errors in order to succeed on the appeal.

[8] To dispose of this appeal, it is necessary to address only one of the alleged errors put forward by the appellant. The appellant submits that the application judge erred in failing to find that the Republic is effectively the alter ego of KGC because of its *de facto* appropriation of KGC and its assets.

[9] We are not persuaded by these submissions and dismiss the appeal.

[10] Garnishment is a statutory, and not a common law, remedy; it is a broad, equitable, discretionary remedy: *Waxman v. Waxman* (2006), 216 O.A.C. 379, at para. 37. Rule 60.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that garnishment is available as follows: "A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons." Rule 60.08(16) allows the court, in response to a garnishment motion, to make any order it deems just: *20 Toronto Street Holdings Ltd. v. Coffee, Tea or Me Bakeries Inc.* (2001), 53 O.R. (3d) 360, at para. 5. The court's order is entitled to appellate deference, absent reversible error. We see no such error here.

[11] It is common ground that, unless the Republic can be characterized as the debtor to whom Centerra was obligated to make its payment, the appellant has no entitlement to garnish the $50 million intercompany payment made by Centerra to KGC.

[12] The application judge rejected the same arguments on this issue that the appellant asserts on appeal, for the reasons set out at para. 40 of her reasons:

> … [T]he intercompany payment is to be made to KGC, a subsidiary of Centerra. KGC will only become a subsidiary of KZN if the payment is made and the Arrangement is approved and completed. While the Republic has taken over the Kumtor mine, it cannot be said that Centerra exercises no further control over KGC. Centerra owned (prior to closing) 100% of KGC's shares. As such, I reject Entes' claims that the Republic has

> conducted a *de facto* expropriation of KGC from Centerra such that KGC no longer exists as a corporate entity.

[13] The appellant argues that the application judge failed to address the following criteria to determine *de facto* governmental appropriation, as set out in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227, and recently confirmed in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, 33 M.P.L.R. (6th) 1, at para. 4:

> … [A] constructive taking occurs where: (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue.

[14] Specifically, the appellant submits that the application judge failed to consider the Republic's beneficial, rather than legal, interest in the mine and that, through its actions, including the temporary management of the mine, the Republic had taken *de facto* control of KGC and deprived Centerra of all economic benefits of the gold mine.

[15] We disagree. The application judge's findings were open to her to make on the record. When her reasons from July 28 and August 17, 2022, are read in their entirety, they demonstrate that she was alive to the distinction between *de jure* and *de facto* control, as well as the extent of the Republic's intrusion into KGC's affairs. The evidence before the application judge does not support the appellant's

argument that Centerra had effectively lost all control over KGC and was deprived of all economic benefits flowing from the mine. This argument is belied by the proceedings instigated by Centerra and KGC, including: the Ch. 11 Bankruptcy proceedings in the United States that gave rise to a worldwide stay of all matters against KGC; Centerra's successful application before the Toronto Commercial Court for a permanent injunction enjoining the temporary manager, appointed by the Republic, from disclosing confidential information acquired in his capacity as a director of Centerra to the Republic or KZN, as well as from participating in any capacity, directly or indirectly, in the management or operations of KGC, and of the mine, so long as Centerra had any interest in the mine[1]; and Centerra's successful negotiation of the GAA as the culmination of the international arbitration proceedings that it initiated against the Republic and KZN. Moreover, although KGC paid fines and taxes to the Republic, there is no evidence that all of KGC's income from the gold mine flowed directly to the Republic. We also note that Centerra paid the $50 million intercompany payment that the appellant sought to garnish to KGC, a separate corporate entity from KZN and the Republic.

[16] As a result, we are not persuaded that the application judge made any reversible error. We see no basis to intervene.

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[1] Per the order, dated February 15, 2022, of Gilmore J., with reasons reported at 2022 ONSC 1040. To allow for the completion of the plan of arrangement, this injunction order was subsequently set aside by this court on consent: unreported, Court of Appeal File No. C70441, dated December 2, 2022.

Disposition

[17] Accordingly, we dismiss the appeal.

[18] Centerra is entitled to costs in the agreed upon amount of $40,000, inclusive of all applicable taxes and disbursements.

"L.B. Roberts J.A."
"L. Favreau J.A."
"J. Copeland J.A."