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**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

LA 29 OF 2015

BETWEEN: LORD LUANI

Judgment Creditor

AND: LORD NUKU

First Judgment Debtor

YANJIAN GROUP CO. LIMITED

Second Judgment Debtor

YANJIAN TONGA LIMITED

Applicant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. W C Edwards Snr SC for the applicant
Mrs. P Tupou for the second judgment debtor
Mr. S Fonua for the judgment creditor**

**Hearing: 29 September 2017.
Date of Ruling: 2 October 2017**

RULING

The issue

[1] The applicant is seeking an order cancelling a garnishee order absolute made on 13 July 2017 pursuant to which the sum of \$315,007.25 was drawn from its account with the Australia and New Zealand Banking Group Limited (ANZ) and paid to the judgment creditor. The money was received

Read explicit
date

by the judgment creditor in partial satisfaction of a judgment obtained by it against the applicant in the Land Court. The judgment was subsequently set aside by the Court of Appeal. The applicant argues that the judgment creditor should not retain money it is not entitled to. The judgment creditor opposes the application principally on the ground that the Land Court has no jurisdiction to cancel the garnishee order absolute.

The facts

- [2] The judgment creditor obtained judgment jointly and severally against the first judgment debtor, the second judgment debtor and the applicant (who I will refer to collectively as 'the defendants') on 5 May 2017 for \$5,556,000 plus interest.
- [3] The defendants appealed from the judgment of the Land Court on 16 June 2017.
- [4] Notwithstanding the appeal the judgment creditor took steps to enforce his judgment. On 29 June 2017 he applied for a garnishee order against money held to the credit of the applicant with the ANZ. On 13 July 2017 the order was made absolute and an amount of \$315,007.25 was paid on 14 July 2017 from the applicant's account by the ANZ to the judgment creditor.
- [5] The applicant applied for a stay of execution of the Land Court's judgment on 17 July 2017 but that was too late to prevent execution of the garnishee order absolute and the application was withdrawn on 28 July 2017.
- [6] The Court of Appeal heard the appeal from the judgment of the Land Court on 4 September 2017. On 6 September 2017 the judgment against the applicant was set aside.

- [7] On 13 September 2017 the applicant filed this application to cancel the garnishee order absolute and for the refund of the \$315,007.25.

The arguments

- [8] Mr. Edwards submitted that the judgment creditor's right to obtain the garnishee order absolute was predicated on the judgment of the Land Court which has been set aside. As there is no amount owing by the applicant to the judgment creditor the Court should cancel the garnishee order absolute and order the money refunded. He referred me to the commentary in the White Book at 49/4/6, *Moore v Peachey* (1882) L.T. 198 and *Marshall v James* [1905] 1 Ch. 432 as authorities that the Court has the power to make the orders sought.
- [9] Mr. Edwards also argued that at the time that the judgment creditor applied for the garnishee order he was aware that the defendants had appealed from the Land Court's judgment and was on notice that he would have to repay the money should the appeal be successful. He also submitted that the system of appeals would be undermined if a party in the position of the judgment creditor could retain money obtained through an execution process notwithstanding he was subsequently found not to be entitled to that money.
- [10] Mr. Edward rejected the judgment creditor's criticism that the applicant should have sought a stay of execution of the judgment earlier. He referred me to the affidavit of Yalu Gee in which he states that the applicant had not become aware of the application for the garnishee order until 26 July 2017. He also submitted, correctly in my view, that the granting of a stay is discretionary and might not have been granted even if applied for.

[11] For the judgment creditor Mr. Fonua argued that the Land Court has no jurisdiction to make the order sought. He relied upon decisions of the High Court of New Zealand in *Paramount Export Ltd v New Zealand Meat Board* (HC, Wellington, CIV 1996-485-0005, 11 August 2003) and *Rural Banking and Finance Company of New Zealand v The Proprietors of Maraetaha and Westpac Bank* (HC, Gisborne, CP 15/88, 29 August 1988).

[12] In addition Mr. Fonua relied upon O.32 Rule 6 Supreme Court Rules which states:

Any payment made by a garnishee in compliance with an order absolute under this Order shall be a valid discharge of the garnishee's liability to the judgment debtor to the extent of the amount paid, even if the garnishee order or the judgment or order on which it is founded is subsequently set aside or reversed.

[13] Mr. Fonua argues that the 'impact' of O.32 Rule 6 is that the judgment of the Court of Appeal does not affect the payment of funds made under the garnishee order absolute and the applicant is 'barred from trying to cancel the Order Absolute on the grounds that the judgment against it is set aside'. Mr. Fonua submitted, 'This is the whole purpose of Order 32 Rule 6'

[14] In seeming contradiction of that submission, Mr. Fonua also argues that the applicant should have sought an order cancelling the garnishee order absolute from the Court of Appeal and having not done so its only course is to bring an action for the return of the money. He said that any such action would be defended and the judgment creditor will ask the Court to 'lift the corporate veil' and treat the applicant and the second judgment debtor as one and the same company.

Discussion

[15] I can see nothing to recommend the stance taken by the judgment creditor which if correct would result in a substantial injustice.

[16] This Court has the power to set aside the garnishee order absolute. The existence of such power is reflected in the words of O.32 Rule 6 which states 'even if the garnishee order.....is subsequently set aside or reversed'.

[17] The existence of the power is referred to in *Halsbury's Laws of England* Vol 17 'Execution' at para 461 which records:

Where ...a judgment or order has been reversed after execution on it has taken place restitution will be made to the successful party. The order setting aside the execution or reversing the judgment or order should provide for this ...If it does not so provide, another order may be made ...commanding the judgment creditor to restore the property ..'

[18] The Court's inherent power to set aside a garnishee order absolute to avoid injustice was also recognised in *Marshall v James* (supra) where Joyce J said at pg 433:

On the authority of *Moore v Peachy* and on general principles I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. In my opinion there is no particular sanctity about a garnishee order, although it may have been made absolute and is so termed. I think the ordermust be set aside.

[19] O.32 Rule 6 does not assist the judgment creditor. The object of the rule is explained in the White Book at 49/8/1 and is to discharge the garnishee from his liability to his own creditor if he is forced to make payment or suffers execution in compliance with or pursuant to a garnishee order absolute. It is

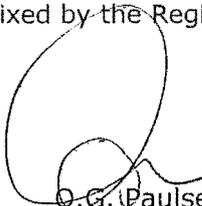
certainly not the purpose of the rule to bar an innocent party from recovering money taken from him under legal compulsion to which the judgment creditor has no entitlement.

- [20] The judgment creditor was aware of the appeal and must also be taken to have been aware that if the appeal was successful he would be required to repay the money taken in execution. It is no answer for him to now say that he is in no position to repay the money particularly as there is no explanation for how that can be so.
- [21] I do not accept Mr. Fonua's argument that the applicant should be required to issue ordinary proceedings as the judgment creditor will seek to lift the corporate veil treating the applicant and the second judgment debtor as one and the same legal entity. That would heap further injustice upon the applicant. Furthermore, if the judgment creditor wished to pursue that claim it could and should have been made in the Land Court. In my view it would be an abuse of process to raise it in subsequent proceedings between the same parties (*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581).
- [22] I have also considered the New Zealand authorities that Mr. Fonua referred me to but neither case is on point.
- [23] The final issue concerns the payment of interest. The applicant seeks interest at 10% from 13 July 2017 being the date of issue of the garnishee order absolute. The power to make such an award arises under O.30 Rule 2 and is appropriate in a case such as this to do justice between the parties (*Rodger v The Comptoir D'escompte De Paris* (1971) LR 3 PC 465). Such interest should be payable from 14 July 2017 being the date the \$315,007.25 was paid to the judgment creditor.

Result

- [24] I make an order cancelling the garnishee order absolute issued by this Court in this action on 13 July 2017.
- [25] The judgment creditor is ordered to pay to the applicant the sum of \$315,007.25 obtained in pursuance of the said garnishee order absolute. Interest will accrue upon the said sum at the rate of 10% pa from 14 July 2017 to the date of payment.
- [26] The applicant is entitled to its costs which are to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 2 October 2017


Q.G. Paulsen
LORD CHIEF JUSTICE

