

BETWEEN:

LORD LUANI

Judgment Creditor

-and-

LORD NUKU

Judgment Debtor

MINISTRY OF FINANCE AND REVENUE

Employer

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Judgment creditor's application for attachment of earnings

## RULING

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Before: LORD CHIEF JUSTICE WHITTEN  
Counsel: Mr S. Fonua for the Judgment Creditor  
Mr W. Edwards SC for the Judgment Debtor  
Date of hearings: 17 July 2020, 28 August 2020, 11 September 2020  
Date of ruling: 21 September 2020

### The application

1. On 5 May 2017, in proceeding LA 29 of 2015, Scott J gave judgment in favour of Lord Luani against Lord Nuku, Yanjian Group Co and Yanjian Tonga Limited, jointly and severally, for damages for trespass to land in the sum of TOP \$5,556,000.
2. The Defendants appealed.
3. On 6 September 2017, in *Nuku v Luani* [2017] TOCA 5, the Court of Appeal upheld the appeal by, and set aside the judgment against, Yanjian Tonga Limited. The Court also allowed the appeal by Lord Nuku and Yanjian Group Co, in part, by reducing the damages award to TOP\$3,380,335 with costs and interest at the rate of 10% per annum from that date until satisfied.
4. Yanjian Group Co has since been wound up.

5. This is an enforcement application by Lord Luani in respect of the judgment debt for an attachment of Lord Nuku's earnings as a member of the Legislative Assembly.
6. As will be seen below, the application originated as one for a garnishee order pursuant to Order 32 of the *Supreme Court Rules 2007*. For the reasons discussed further below, the application was effectively converted to one for attachment of earnings pursuant to s.5(2)(b) of the *Supreme Court Act*. While that provision refers to such an application being made in accordance with the rules of the Supreme Court, those Rules do not in fact provide any in respect of applications for attachment of earnings.
7. Accordingly, as this ruling appears to be the first of its kind in the Kingdom, it is intended, apart from determining Lord Luani's application, to provide guidance for future applications of this kind.

#### **Procedural background**

8. On 20 March 2019, Lord Luani filed an ex parte application for a garnishee order. That application was rejected for reasons which are not presently relevant and on 2 April 2019, Lord Luani filed an amended application for a garnishee order naming the Minister of Finance as the Garnishee.
9. On 10 May 2019, Paulsen LCJ granted an order nisi requiring the Garnishee to show cause why Lord Nuku's Parliamentary salary should not be garnisheed. The hearing for an order absolute was listed to be heard on 31 May 2019.
10. On 31 May 2019, Mr Fonua raised concern as to whether clause 73 of the Constitution precluded an order of the Court against Lord Nuku being made while the Legislative Assembly was sitting. Paulsen LCJ also raised concern about whether Lord Nuku's salary could be garnisheed. The matter was adjourned to 4 June for further submissions and consideration of those issues.
11. On 4 June 2019, there was no appearance by Lord Nuku or for the Minister of Finance. Mr Fonua submitted that the court could make an order for the attachment of Lord Nuku's salary under s.5(2)(b) of the *Supreme Court Act*. As Paulsen LCJ was soon to retire from office, the matter was adjourned to be

dealt with by the new Chief Justice. However, Paulsen LCJ's minute included that the Ministry of Finance was to note that the order nisi "binds salary otherwise payable to the judgment debtor pending further Order of the court" and that if the Ministry was "in any doubt about its legal obligation to retain those payments it should seek legal advice". As a result of that order, the Ministry of Finance and Revenue, which is responsible for payment of Lord Nuku's Parliamentary salary, has withheld his salary since 5 May 2019.

12. The matter was then adjourned a number of times.
13. On 5 December, the day before the matter was listed for further hearing, Mr Edwards SC commenced to appear for Lord Nuku. He filed a notice of opposition to the application on the grounds that Lord Nuku's salary could not be the subject of a garnishee order. As a result, on 6 December 2019, the matter was further adjourned to January 2020.
14. On 9 December 2019, Mr Fonua filed a memorandum requesting a court direction for Lord Nuku to file an affidavit of assets and liabilities, including his income as a recently promoted member of the Cabinet. Lord Nuku was directed to file any notice of opposition to Mr Fonua's request by 16 December 2019.
15. On 31 January 2020, I heard argument on whether Lord Nuku's salary could be the subject of a garnishee application. Mr Edward submitted that salaries could not be the subject of a garnishee order pursuant to Order 32 of the Supreme Court Rules. I expressed the view preliminary (discussed in further detail below) that Mr Edwards was correct and that the appropriate application one for attachment of earnings.
16. Mr Edwards also filed a late associated application concerning Yanjian Tonga Ltd. As both counsel wished to consider these issues and their clients' respective positions further before the applications were progressed, the matter was again adjourned to April 2020.
17. On 27 March 2020, Mr Fonua filed an application to treat the garnishee application as an "irregularity". On 7 April 2020, Mr Fonua requested that the matter be brought on sooner because:

*"This case has been adjourned from May 2019 because of the contravention of clause 73 of the Constitution. This clause prevents issuing of judgment against a member of the Legislative Assembly while it is sitting. The Legislative Assembly closed on 26 March and it is likely to reopen again on 14 May. Any judgment issued against a member of the Legislative Assembly will have to be made within this time...."*

18. On 15 April 2020, the Court made directions which effectively converted the application for a garnishee into an application pursuant to s.5(2)(b) of *Supreme Court Act* for attachment of Lord Nuku's earnings as a member of the Legislative Assembly. The order by Paulsen LCJ on 10 May 2019 requiring the garnishee to show cause against the garnishee was stayed pending further or other order of the court.
19. In the absence of any rules in the Supreme Court Rules 2007 for applications for attachment of earnings, in accordance with Order 2 rule 3 thereof, procedural directions were made for the further conduct of the application fashioned from the UK White Book provides a regime for attachments of earnings under order 27 of the County Court Rules. Part 89 of the current UK rules of civil procedure provide for a similar regime. Those rules commence by requiring an application for an attachment of earnings order to include a certificate of the amount of money remaining due under the judgment or order and that the whole or part of any instalment due remains unpaid. Once served, that is followed by a reply by the judgment debtor in a prescribed form to be completed within eight days of service of the application. The court may, at any stage of the proceedings, send a notice requesting the debtor's employer to provide the court with a statement of the debtor's earnings, anticipated earnings, and such other particulars as may be requested in the notice from the court. Finally, if the court receives the debtor's reply form, and has sufficient information to make an attachment of earnings order, the court may make such an order.
20. The information received in the debtor's reply is important to the court's ability to determine a fair and reasonable amount of a judgment debtor's wage or salary to be attached.

21. I was then reasonably satisfied that the information contained in the original application for a garnishee order was sufficiently consistent with that required under the UK Rules for an application for attachment of earnings.
22. The next step then was Lord Nuku's reply to enable the court to consider and determine the application. Directions were made, which were substantially consistent with the requirements under the UK rules, requiring Lord Nuku to file an affidavit providing full details, with supporting documentary exhibits, of his:
  - (a) personal details - full name, marital status, age and address;
  - (b) names and ages of financial dependents;
  - (c) employment – for each employer (including self-employment): name, address, position held, length of time employed;
  - (d) assets (including legal and any beneficial interests);
  - (e) liabilities (including amounts and frequency of repayments on any loans, debts or other arrears);
  - (f) income (specifying amounts from each and every source over the last three years);
  - (g) expenses (excluding any payments made by other members of his household out of their own income); and
  - (h) offer of payment per week/month (in the event the judgment debtor wishes to voluntarily make payments to the judgment creditor without the judgment debtor's employer being ordered to make deductions from his salary, in which case, any attachment of earnings order may be suspended).
23. The hearing of the application was then adjourned to 8 May 2020.
24. On 28 April 2020, Lord Nuku filed an affidavit in purported compliance with the above directions.
25. On 5 May 2020, he filed a supplementary affidavit.

26. By the next hearing on 8 May 2020, Mr Fonua still had further queries about the information (or lack of it) provided by Lord Nuku in his two affidavits. Directions were made requiring a further affidavit to be filed in response to those queries. Also on that day, Ms Makeleta Siliva, Deputy CEO of the Treasury Division of the Ministry of Finance and Revenue, appeared before the court and confirmed information in relation to Lord Nuku's Parliamentary income. She later had that information presented in writing, copies of which were provided to counsel and placed on the file.
27. On 5 June 2020, Lord Nuku filed a third affidavit in which he purported to respond to further queries raised by Mr Fonua in respect of the information provided.
28. I will turn to the contents of those affidavits further below. Suffice to say, however, at this point in the procedural chronology, that Lord Nuku's affidavit material was deficient and incomplete. The matter was listed for hearing on 17 July 2020.
29. On 12 June 2020, further directions were made requiring Lord Nuku to file a further and final affidavit in relation to matters listed in the directions of 15 April 2020 which he had not addressed, fully or at all. He did not do so.
30. By 17 July 2020, Lord Nuku had still not provided the documentary evidence as directed. However, shortly prior to that date, Mr Fonua served a notice requiring Lord Nuku to attend court for cross-examination.<sup>1</sup> Lord Nuku appeared and gave sworn evidence and was cross-examined by Mr Fonua (referred to further below).
31. At the conclusion of that evidence, directions were made requiring Lord Luani to file final submissions by 7 August 2020 and for Lord Nuku to file final submissions in response by 21 August 2020. The final hearing on the application was adjourned to 28 August 2020.
32. Lord Luani filed final submissions. Lord Nuku did not.

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<sup>1</sup> Provided for by Order 27 rule 7 of the Supreme Court Rules.

33. On 28 August 2020, neither Mr Edwards (who had appeared on another matter earlier that day) nor Lord Nuku appeared. Mr Fonua informed the Court that Mr Edwards had advised him outside court earlier that day that he was no longer acting for Lord Nuku. No application for leave to withdraw or change of practitioner had been filed.
34. In the circumstances, I extended the date for the filing of Lord Nuku's final submissions to 4 September 2020 and adjourned the final hearing to 11 September 2020.
35. Lord Nuku did not file any further submissions.
36. On 8 September 2020, Mr Edwards filed a notice stating that he wished to withdraw from acting for Lord Nuku on this application. Order 43 rule 2 of the *Supreme Court Rules* required Mr Edwards to seek leave to withdraw from acting. He did not do so.
37. On 11 September 2020, there was no appearance for or by Lord Nuku. I heard final submissions from Mr Fonua.

## **Evidence**

### *First affidavit*

38. By affidavit sworn 29 April 2020, Lord Nuku deposed to the following:
  - (a) He is 67 years of age, married with six children all of whom are over 21 years of age, two are married and one is a single mother. All six 'children' are unemployed and continue to live with him and Lady Nuku.
  - (b) He has seven grandchildren who are financially dependent on him.
  - (c) His declared income is:
    - (i) Ministerial salary as a member of Cabinet - \$84,000 p.a.;
    - (ii) Noble's allowance - \$18,173 p.a.;
    - (iii) Receipts from leases within his estate in Kolonga - \$3,501.40 p.a.;

- (d) His son (not identified) helps with growing food and maintaining the house.
- (e) His expenses are:
  - (i) Living expenses for himself and his family - \$1,200 per week (which equates to \$62,400 p.a.);
  - (ii) Noble's expenses including annual obligations to His Majesty, organisation of village affairs, contributions to Kolonga development activities and village activities such as funerals, weddings 'among others' - \$25,000 p.a..
- (f) Assets:
  - (i) His house on his town allotment is worth approximately \$250,000.
  - (ii) A 1995 Mistubishi van which is broken down and not in use.
  - (iii) He does not hold any bonds, stocks, shares or interests in any company or business in Tonga or overseas.
- (g) Liabilities:
  - (i) Loan from the BSP Bank. According to an exhibited letter from the bank dated 28 April 2020, marked 'without prejudice', the outstanding loan balance for account no. 2000431425 as at that date was \$424,992.16. The letter also explained that on 5 September 2013, the bank foreclosed and demanded immediate payment of the then balance owing of \$484,871.16 with interest continuing to accrue at 9.15% p.a, and that the bank continued to receive payments through Lord Nuku's salary account but which has had "little effect" on the loan balance. Lord Nuku did not exhibit a copy of a bank statement for that loan account nor did he depose to the quantum or frequency of payments towards the loan balance being deducted from his salary or whether any other enforcement action has been taken or threatened by the bank.



39. Behind the letter from the bank, Lord Nuku exhibited a bank statement for his Plus saver account no. 2000513925 with the BSP from 11 January 2017 to 17 April 2020. It revealed the following:
- (a) an opening balance of \$3,866.04;
  - (b) no reference to any deposits of his Parliamentary salary even before the order of 4 June 2019;
  - (c) the only significant deposits being from 'Island Trucking' of \$513 per fortnight;
  - (d) debit transfers in 2017 for 'Recovery' of \$5,000 and \$2,900;
  - (e) loan payments in 2018 to account no. 9993499 of \$2,700, \$2,124, \$1,504, \$1,024, and another in 2019 to 'Recovery Bad Debts 9994399'<sup>2</sup> in the sum of \$3,000;
  - (f) various payments during 2019 and 2020 to 'Loan pymt to Hon Nuku' or 'Hon Nuku' of \$1,026, \$1,104, \$7,223, \$3,081, \$513 (x 2), \$510;
  - (g) various payments during 2019 and 2020 to 'Arrears' of \$513, being the same amount and transferred either the same day or within days of the deposits from Island Trucking;
  - (h) a final payment to 'Arrears' of \$1,022; and
  - (i) a closing balance of \$0.13.
40. Lord Nuku concluded by offering to pay \$576 per week towards the judgment debt, or \$30,000 per annum. He noted that Lord Luani is in the process of enforcing the judgment debt against Yianjian Group Co which he described as "a substantial Chinese company who made money out of the quarry". In *Warner v ANZ Banking Group Ltd* [2019] TOSC 42, Paulsen LCJ described Yianjian Group Co Limited as an overseas company (which was never registered in Tonga) that traded in Tonga until around 2012/2013. On 23 March 2018, Dianne Warner was appointed liquidator of Yanjian Group Co.

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<sup>2</sup> Not 9993499 named elsewhere in the statement.

41. Lord Nuku also deposed that he had “suffered badly as a result of a transaction which resulted in a loss”. No details of that transaction or loss were provided.

*Second affidavit*

42. By a supplementary affidavit sworn on 4 May 2020, Lord Nuku sought to correct an asserted mistake in paragraph 13 of his first affidavit by changing his offer to pay \$576 from per week to per fortnight, which would total approximately \$15,000 per annum.

*Letter from Ministry of Finance 8 May 2020*

43. As noted above, Ms Makeleta Siliva, Deputy CEO of the Treasury Division of the Ministry of Finance and Revenue, provided a letter to the court dated 8 May 2020. In it, she confirmed that Lord Nuku’s salary entitlements had been withheld since 5 May 2019. She also confirmed the amounts of his entitlements as:

- (a) net salary (i.e. after tax and retirement contributions) as a member of Cabinet (since 9 October 2019) of \$2,120 per fortnight;
- (b) housing allowance (not taxed) of \$1,000 per month;<sup>3</sup> and
- (c) noble’s allowance (after tax) of \$667.54 per fortnight.

*Third affidavit*

44. On 5 June 2020, Lord Nuku filed a third affidavit in which he deposed, relevantly and in summary, that:

- (a) He had a business account in the name of ‘Island Trucking’. That business is no longer operating, and he stated that he had no financial interest in it. His ‘noble salary’ was paid from the Palace Office into that account. It is not clear whether Lord Nuku meant his Parliamentary salary, housing allowance, Noble’s allowance, or any combination of the three. Apart from his single Plus Saver account, no other bank statements for the Island Trucking account or any other were disclosed.

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<sup>3</sup> Although one column referred to it as “Gross per fortnight”.

- (b) \$500 per fortnight was paid from the Island Trucking account for his loan repayments to account no. 2000431425.
  - (c) The 'balance of \$513' was then deposited in his Plus Saver account no. 2000513925.
  - (d) Details of his Noble's expenses were set out in Appendix A to his reply verified by affidavit. On the face of that document, those expenses totalled \$30,250 per annum comprising:
    - (i) King obligations for annual King's birthday, Lady Nuku's monthly meetings and Sunday lunches - \$14,000;
    - (ii) Village affairs and farmers' financial assistance - \$3,000;
    - (iii) Village development - \$6,000; and
    - (iv) Cultural activities including funerals, weddings and birthday - \$7,250.
  - (e) Details of his living expenses were set out in Appendix B. They totalled \$5,100 per month (or \$61,200 per annum), comprising:
    - (i) Electricity - \$500;
    - (ii) Water - \$250;
    - (iii) Telephone - \$250;
    - (iv) Gas - \$400;
    - (v) Meals - \$2,000;
    - (vi) Fuel - \$1,000;
    - (vii) Sanitary supplies - \$400;
    - (viii) School expenses - \$300.
45. Despite directions requiring his to do so, Lord Nuku did not produce any documents to evidence any of his claimed expenses.

*Cross examination on 17 July 2020*

46. On 17 July 2020, Lord Nuku appeared before the court (with Mr V. Latu, lawyer, of Mr Edwards's office) and gave the following evidence under oath:
- (a) He said he had not seen Mr Fonua's memorandum filed 19 June 2020 containing queries arising from the earlier affidavits. Mr Fonua confirmed that the memorandum had been served on Mr Edwards' office on 19 June 2020, when it was filed. Mr Latu did not refute that but said that he been trying, unsuccessfully, to contact Lord Nuku, who had been unavailable due to his Parliamentary commitments. Mr Latu said that he had been working with Lord Nuku's daughter (who was also in court) on the matter and that she had discussed Mr Fonua's memorandum with Lord Nuku in order to provide answers.
  - (b) He confirmed the heads of his noble's expenses set out in Appendix A to his last affidavit but then disputed the accuracy of the amounts as presented therein. The table contained two monetary columns, one headed "Monthly" and the other headed "Yearly". The amounts in the yearly column aligned with the heading for each category of expense, thereby producing the total of \$30,250. However, under each collective heading, the individual types of expenses had amounts set out in the monthly column. At first glance, the table gave the expected appearance that the yearly amounts for each heading were the annual subtotals of the individual expenses under each heading. On closer analysis, that was not correct. The tally of the monthly expenses appearing in the yearly column were in fact the subtotals of the monthly expenses. During the course of trying to clarify that confusion, Mr Latu and Lord Nuku's daughter confirmed that, for instance, the Kings obligation expenses did in fact total \$14,000 per annum. However, Lord Nuku contradicted them and was adamant that \$14,000 for that head of expense was "too low".
  - (c) He also confirmed that he was directly involved in recording his financial affairs and that he himself had prepared Appendix A. At one point, he said

that while there were mistakes in the figures shown in the yearly column, the amounts in the monthly column were accurate.

- (d) It transpired that that was also inaccurate. After further questioning on each of the heads of expenditure, it became apparent that the yearly amount claimed for "Village Affairs" of \$3,000 was in fact a miscalculation of the monthly amount of single entry of \$500 for "village farmer's financial assistance" which, of course, should have been shown as \$6,000 per year. The next head – "Village Development" – also \$500 per month, had been correctly tallied in the yearly column at \$6,000.
- (e) The net effect of Lord Nuku's evidence was to abandon reliance on the figures in the yearly column in Appendix A and to only use the monthly amounts which he confirmed as being accurate. That recalculation brought Lord Nuku's claimed noble's expenses to **\$267,000** per annum.
- (f) However, Lord Nuku added that most of those monthly expenses were "not cash but value of goods". When asked about the value of such goods, he used funeral expenses as an example to explain that goods came from villagers who, in the traditional way, brought him pigs and mats to express their gratitude. In answer to a question from the bench, Lord Nuku said, again using funerals to illustrate this point, that 80% of the expenses were in the form of goods such as "mats weaved by his wife and the rest of his family" and that the "family of deceased gave pig and tapa".
- (g) When cross-examined about his claimed living expenses as set out in Appendix B, Lord Nuku confirmed the amounts claimed. However, when asked why he had not produced any invoices, receipts or other documents to evidence the amounts claimed, he said 'it was an oversight, but it can be done'.
- (h) In relation to his dependents, Lord Nuku said that their numbers changed from time to time, and that at that time, he had four children and three grandchildren living with him. He said the rest were 'stuck' overseas due to the coronavirus induced border closures. Later in his evidence, he said he had two children in Tonga at that time, three were overseas and one

travelled 'forward and back'. His expenses were greater when he had children overseas.

- (i) In answer to questions raised at paragraph 8 of Mr Fonua's memorandum, Lord Nuku:
  - (i) denied that a man by the name of Lupeti Vi owed him money;
  - (ii) said he had no knowledge of whether another man, Kalaleti Pese, was being prosecuted; and
  - (iii) recognized items of plant and heavy machinery depicted in photographs annexed to the memorandum but denied owning any of them or knowing who did.
- (j) In relation to paragraph 9 of Mr Fonua's memorandum, in which he asserted that between 2008 and 2012, Lord Nuku was paid \$1.6 million by Yanjian (which entity was not specified), Lord Nuku first said that he could not confirm that because it was the subject of disputes being resolved by the courts. He later said that even though he gave evidence in the primary proceedings resulting in the judgment debt here about the amounts he received from the quarrying arrangements on Lord Luani's land, he could not recall the evidence he gave at that trial but estimated it was "\$1 million plus".
- (k) Of that amount, Lord Nuku said that it was all spent on the quarrying work and that the "only thing left is debts to bank to pay". When asked for further details about how that money was spent, Lord Nuku said that the Kolonga land in question had been leased to his son, and that the money was otherwise spent on hiring machines, paying employees and repaying loans to banks.
- (l) When asked about the ownership of the quarrying business into which the \$1 million plus went, Lord Nuku denied having any interest in it. Later, when asked why then he had expended the money on that business, he said it was because "it was his; he ran it" through a company called "Poha Estate". He added that there was "not much profit" from that business. He

could not recall when he commenced that business other than it was in the 1990s and that it ceased operating sometime between 2006 and 2008. When he was challenged about that in light of the fact he admitted receiving over \$1 million from Yianjian Group between 2008 and 2012, Lord Nuku said that he was “not prepared for these questions” and that he would have to “go over his notes”. He then stated, however, that the money was not invested in any company and that most of it was used to “pay loans, family functions, that was it.”

- (m) He denied any relationship with a quarrying business by the name of Island Dredging<sup>4</sup> or that any of the money received from Yianjian had been used in that business. When pressed about Island Dredging, Lord Nuku said that another of his sons owned it.
- (n) He confirmed that he did not have “any other money anywhere else” nor any income other than that stated. When asked about how he had been paying his noble’s and living expenses since the court order resulting in withholding his Parliamentary salary, Lord Nuku gave evidence, for the first time, that most of his money was coming from “working crops and farming animals” on his bush allotments and from relatives overseas.
- (o) In an endeavour to ascertain the quantum of that income or support, Lord Nuku said that money from his relatives was in the order of \$1,000 or \$2,000 on average, “but not monthly”. None of it was shown in the (one and only) bank statement he provided with his first affidavit.
- (p) He said that his crops and animals were not sold but used for his obligations. When asked how he had been paying for other expenses such as utilities and other groceries, Lord Nuku explained that “when someone took his livestock, they gave him money”. He did not regard that as selling his livestock. He estimated that for the last year he had received about \$20,000 from (not selling) about 30 cows.<sup>5</sup>

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<sup>4</sup> Referred to in paragraph 10 of Mr Fonua’s memorandum.

<sup>5</sup> From the transcript, although my notes recorded the evidence as \$30,000 for 20 cows.

- (q) He concluded his evidence by saying that apart from the above, he had no other sources of income.

47. Mr Latu declined an invitation for re-examination.

### **Submissions**

48. In addition to the observations above, Mr Fonua submitted that:

- (a) Lord Nuku bore the burden of proving his income and expenses;
- (b) his evidence was not reliable and the Court should not consider it;
- (c) the only reliable evidence was the letter from the Ministry of Finance in relation to Lord Nuku's Parliamentary salary and other allowances;
- (d) by reason of the lack of any documentary supporting evidence, Lord Nuku's asserted living expenses of \$1,200 per week should be disregarded;
- (e) in those circumstances, it is fair and reasonable to attach Lord Nuku's full Parliamentary net salary of \$2,120 per fortnight, leaving him his housing and noble's allowances to live on;
- (f) the whole of the withheld salary and allowances since May 2019, which as at 3 May 2020 stood at \$48,727, should be paid to Lord Luani; and
- (g) if the above is ordered, it is always open to Lord Nuku to apply for a variation to such orders if in the future he is able to demonstrate by proper evidence that such orders should be varied.

49. Mr Fonua was unable to identify any previous decisions in Tonga concerning an application of this kind.

### **Consideration**

#### *Attachment of earnings vs Garnishee*

50. As noted above, when this matter came before me, an issue arose as to whether salaries could be the subject of a garnishee application. Mr Edwards'



submitted, at the time, that Order 32 (garnishee proceedings) was not applicable to salaries. I expressed provisional agreement. I will now express more fulsome reasons for that view.

51. A garnishee order is directed to existing debts owed to a judgment debtor. Salary is not a debt "certainly payable, belonging to an enforcement debtor" when any garnishee order is served: *Universal Guarantee Pty Ltd v Derfink* [1958] VR 51.
52. For a debt to be the subject of a garnishee order, the judgment debtor must have "an immediate legal or equitable right to it": *Nicholson (otherwise McDonald) v McDonald* [1936] VLR 233.<sup>6</sup> A debt that is uncertain in amount or as to the time of payment is not attachable. In the absence of statutory authorization, future wages cannot be attached because they are not immediately payable.
53. Further, the 2001 UK White Book Service at SC 49.1.68 provides to the effect that a garnishee order cannot be made in respect of wages or salary due to an officer of the Crown.
54. I pause to note in passing that of the few published decisions in the Kingdom concerning applications for garnishee orders in respect of salaries, including where the garnishee is the Kingdom of Tonga, I record my respectful agreement with Paulsen LCJ in *Australia and New Zealand Banking Group Ltd v Lasike* [2017] TOSC 6 to effect that *Bank of Tonga v Fotofili* [1998] Tonga LR 69 was wrongly decided; and my reservations in respect of the correctness of the decision in *Australia and New Zealand Banking Group Ltd v Paunga* [2011] TOSC 4; CV 39 of 2010.
55. The more appropriate enforcement measure for the relief sought by Lord Luani was an order for attachment of earnings. Section 5(2)(b) of the *Supreme Court Act* empowers the court to "make garnishee orders and orders for the *attachment of earnings*, in accordance with rules of the Supreme Court". As noted, there are presently no rules within the Supreme Court Rules prescribing the procedure for the making and determination of applications for attachment

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<sup>6</sup> From "Australian Civil Procedure" 7th edition, by Bernard Cairns, Thompson Lawbook Co at page 573.

of earnings. In that event, pursuant to Order 2 rule 3, the rules of procedure under the former Rules of the Supreme Court (RSC) in England (the "White Book") shall continue to apply notwithstanding the substantial and ongoing replacement of those rules by the Civil Procedure Rules 1998 (CPR). Order 27 of the White Book expressly provides for applications for attachment of earnings. Rule 89 of the current UK CPR provides likewise.

*Procedure adopted*

56. As this appears to be first application for an attachment of earnings in the Kingdom, it is perhaps appropriate that I say something about them based on the practices elsewhere. As but one method of enforcing outstanding judgment debts, applications for attachment of earnings are relatively commonplace in other English law based jurisdictions, including obviously, the United Kingdom, Australia and New Zealand. In the United Kingdom, orders for attachment of earnings are provided for by the Attachment of Earnings Act 1971 which empowers the County Court to make such orders. The procedure for such applications is provided for by order 89 of the UK civil procedure rules. Similar procedures are followed in Australia. For example, see order 72 respectively of the Victorian magistrates Court and Supreme Court rules. In New Zealand, analogous provisions are to be found at sections 84F to M of the District Courts Act. Common key features of the procedures applied by those various jurisdictions include:

- (a) an order may be made to secure the payment of a judgment debt of not less than a prescribed amount;
- (b) an order must specify a normal deduction rate, expressed as a sum of money or percentage of earnings per week, month or other period which the court thinks reasonable for the debtor's earnings to be applied to meet his/her liability;
- (c) the specification of a 'protected earnings rate', below which, having regard to the debtors resources and needs (which include the needs of any person for whom he must, or recently made, provide) the court thinks reasonable that the earnings actually paid him should not be reduced. In

that regard, in Victoria, the rules provide that unless the court has received from the judgment debtor a completed statement of financial affairs (as prescribed by the Rules) or has examined the judgment debtor as to those matters, the court must not specify a protected earnings rate less than 80% of the debtor's net earnings.

*Lack of bankruptcy legislation in Tonga*

57. One of the hallmarks of cases in which applications for attachment of earnings are sought is that the proportion of the judgment debt to the amount of the debtor's earnings is such that the amount and duration of any order is likely to either satisfy or significantly reduce the judgment debt, including any interest and costs accruing thereon, within a reasonable period. While clearly a practical consideration in the exercise of the court's discretion, reduction of the debt is not necessarily a prerequisite for any order nor is it a mandatory or determinative factor. An application is open to a creditor seeking to recover at least some of the debt that had been adjudged to him: *Transport Accident Commission v Kunkel* [1998] VSCA 105.<sup>7</sup>
58. However, where the size of the debt is so large in comparison to a debtor's earnings, that there is no realistic prospect of the debt being satisfied or even significantly reduced within a reasonable period, in jurisdictions which have bankruptcy legislation, that is the more likely avenue available to judgment creditors. Despite reference in a myriad of current statutes to the concept of bankruptcy and undischarged bankrupts,<sup>8</sup> Tonga does not, in fact, have any bankruptcy legislation. It appears, however, that bankruptcy proceedings were once available in Tonga. For instance, in 1992, then Chief Justice Ward issued Practice Note No. 4 (Bankruptcy),<sup>9</sup> which provided, among other things, that in the absence of any Tongan Bankruptcy legislation, the provisions of general application in Part IX to XI of the English *Insolvency Act* 1986 and the

<sup>7</sup> *CompLare Cahill v Howe* [1986] VR 630, a case concerning an application for a judgment debt to be paid by instalments.

<sup>8</sup> Companies Act, Revenue Services Administration Act, Tonga Defence Services Pensions Regulations, Receivership Act, Commissioner for Public Relations Act, Pensions Act, Magistrates Court (Justice of the Piece) Regulations, Bills of Exchange Act, Money Laundering and Proceeds of Crime Act, Public Service Act, National Retirement Benefits Act, Tonga Act, Education Act, Financial Institutions Act, Foreign Investment Regulations, Communications Commission Act, Arms and Ammunition Act, Tonga Tourism Authority Act, Public Enterprises Act, Land Act, Shipping Act, Income Tax Act, Customs and Excise Act, Financial Institutions Act, Explosives Regulations, Anti-Corruption Commissioner Act, Education Act.

<sup>9</sup> [1992] TOLawRp 16 (22 September 1992).

*Insolvency Rules* 1986, read together with the Tongan *Civil Law Act*, applied to bankruptcy proceedings brought in the Supreme Court. Corporate insolvency was subsequently regulated by the Companies Act 1995.<sup>10</sup> The availability of the English insolvency statutes in cases of personal bankruptcy ended with amendments to the *Civil Law Act* in 2003 where the references therein to "any statute of general application" were deleted thus leaving sections 3 and 4 providing for the court to apply only the common law of England and the rules of equity in force in England where not otherwise provided for by any Act in force in the Kingdom and only so far as local circumstances render necessary.

59. During the course of this aspect of this proceeding, Mr Fonua raised the prospect of the appointment of a Receiver, pursuant to Order 33, as a means of equitable enforcement, as discussed in *Estate of Wong v Commercial Factors Ltd* [2011] TOCA 9. I confirm my expressed preliminary doubt about the appropriateness of receivers being appointed to the affairs of individuals where the primary aim of the application is to have a receiver take control of the salary or other income or earnings of those individuals. That is the province of an order for attachment of earnings. Often, a receiver will be appointed where, for instance, a security holder in respect of a loan seeks to protect the security where the borrower is in default by having a receiver appointed to take possession, control and/or management of the security asset (where for example it is a business). A receiver will also ordinarily be empowered to sell up any such assets and pay the proceeds into court with a view to having them applied to the reduction or extinguishment of a judgment debt. Examples of cases where receivers have been so appointed, in my view, include: *Bank of Tonga v Beaton* [2000] TOCA 8 and *Strauss v Warner* [2018] TOCA 21. To appoint receivers in the circumstances of, and for the purposes intended in, this case, is tantamount to the appointment of a trustee in bankruptcy for individuals, analogous to liquidators for corporations.
60. In those jurisdictions which have bankruptcy legislation, upon the making of a sequestration order, all the assets of the bankrupt vest in the trustee in bankruptcy. The trustee has control of the bankrupt's financial affairs (including

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<sup>10</sup> Discussed in *Miller v Friendly Islands Fishing* [2002] Tonga LR 358.

their ability to travel out of the jurisdiction) for the duration of the bankruptcy (usually three years). During that time, a bankrupt is required to pay contributions to the trustee, calculated as a percentage of the bankrupt's salary or income after-tax and other allowances, towards the costs of the bankruptcy and satisfaction of creditors. Upon satisfactory completion of a period of bankruptcy, the discharged bankrupt is released from all debts provable during the bankruptcy.

61. It may be surmised that at least one of the reasons for Parliament's evident intention not to include bankruptcy legislation as a means of addressing personal insolvency, at least in the form adopted by other jurisdictions based on English law, is the likely conflict with Tongan land law and the traditional system of allotted and hereditary landholding throughout the Kingdom.
62. As a result, and as demonstrated by the instant case, a judgment debtor in respect of a large judgment debt may never be released from or free of the obligation and is likely to be subject to rolling and repeated applications for various methods of enforcement over a long period of time, perhaps even indefinitely.<sup>11</sup> The matter is compounded by the lack of any limitations period in respect of enforcement of judgments.<sup>12</sup>

*Limitations of attachments of earnings*

63. Here, post-judgment interest on the judgment debt alone, at the rate of 10% per annum,<sup>13</sup> is running at over \$300,000 per year. Mr Fonua indicated that the current level of indebtedness is just over \$4 million. Therefore, Lord Nuku's Parliamentary salary is insufficient to meet even the accruals of interest.
64. A further consideration is the duration of any order. The object of the application is Lord Nuku's salary as a member of the Legislative Assembly and a Cabinet Minister. Therefore, any order in respect of those earnings will operate only so long as Lord Nuku remains a member of Parliament.

<sup>11</sup> Subject to the requirements of Order 29 rule 1 for leave to enforce after six years from judgment.

<sup>12</sup> Compare s.5(4) of the Victorian *Limitations of Action Act* 1958 which precludes any action being brought upon any judgment after the expiration of fifteen years from the date on which the judgment became enforceable.

<sup>13</sup> Pursuant to Order 32 rule 2(2).

65. The next general election is scheduled to take place in November 2021. Clause 65 of the Constitution provides:

**65 Qualification of representatives**

Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer: ...

66. Accordingly, if by the time of nominations for the next general election, Lord Nuku has not paid or otherwise secured a release of the judgment debt, it is unlikely he will be eligible to stand for re-election. In that event, any order made on this application will cease to operate.

*Assessment of the evidence*

67. Notwithstanding those observations on the limited utility of the application, Mr Fonua confirmed his client's desire to proceed with it.
68. The purpose of the procedure adopted for the conduct of the application here, consistent with prescribed in other jurisdictions, was to ensure that the judgment debtor, Lord Nuku, was afforded a reasonable opportunity to present before the Court all relevant financial information to enable the court, in the exercise of its discretion, to determine what, if any, reasonable amount should be attached from his earnings having regard to his reasonably and necessarily incurred expenses to meet his legal, cultural and moral obligations.
69. Unfortunately, and for the reasons which follow, I am compelled to the view that the evidence presented by Lord Nuku was unsatisfactory and that he failed to engage bona fide in the process.
70. Lord Nuku's affidavit evidence was substantially deficient and incomplete. Despite a number of opportunities to do so, he did not comply with the court's

directions in that regard. His evidence in court contradicted and confused a good deal of his affidavit evidence in material respects. Other explanations had to be extracted through cross-examination. Even then, his answers were less than satisfactory. The lack of detail, transparency, consistency and documentary support for Lord Nuku's evidence leads, regrettably, to the conclusion that rather than co-operate with the process, he sought to obfuscate it in order to avoid responsibility for payment of the judgment debt. I am therefore not satisfied that his evidence as to his expenses and, from that, what must be his other sources of income, was credible or reliable.

71. If it be thought that Lord Nuku's offer to pay \$576 per week, later changed to \$576 per fortnight, was a genuine, albeit meagre, attempt at evincing responsibility for payment of at least some small part of the judgment debt, the genuineness of such offers was belied by his subsequent evidence in court as to his expenses.
72. On the available evidence, Lord Nuku's verifiable net income for the last year has been **\$3,286 per fortnight** (or \$85,436 per annum), calculated as:
  - (a) parliamentary salary - \$2,119;
  - (b) housing allowance - \$500;
  - (c) noble's allowance - \$667.
73. His lease revenues have since been made the subject of a charging order in favour of Lord Luani and are therefore not taken into account as part of his income for this exercise.
74. Apart from his admission of \$20,000 from livestock, it is not possible to precisely state the value of overseas support or other crops and mats used to meet some of his obligations.
75. Had his expenses as sworn to in his third affidavit of \$30,250 per year for noble's expenses and \$61,200 per year for living expenses plus his bank loan repayments amounting to \$13,000 per year, totalling \$104,450 per year, been accepted as accurate and reasonable, that would still have left a shortfall of

\$19,014. In that event and putting aside for one moment the fact that that would not have permitted him to pay the \$576 offered, either per week or even per fortnight, such lack of available surplus earnings would, in the ordinary case, most likely have led to the application being refused.

76. However, by his evidence in court, Lord Nuku's recalculated noble's expenses of some \$267,000 plus his claimed living expenses of \$61,200, totalled \$328,200<sup>14</sup> per annum or **\$12,623 per fortnight**.
77. Against his verified income, those claimed expenses produce a **shortfall of over \$9,000 per fortnight**.
78. The magnitude of that shortfall and the rather dramatic manner in which that evidence was adduced does not permit of mere acceptance on its face thus also resulting in dismissal of the application.
79. There was no suggestion by Lord Nuku that, over the last year during which his Parliamentary salary has been withheld, he had not been able to meet his various claimed expenses. When presented with the calculations of the extent of the shortfall, his only explanation, apart from some ad hoc receipts from overseas relatives was that about 80% of his expenses were met in the form of crops, livestock and mats. There was no reliable, independent or objective evidence to demonstrate that the above deficit was or could be made up the value of crops, livestock, mats or overseas support.
80. Moreover, it is inconceivable that any business operation involving cultivation of crops, raising livestock and weaving of mats to a value of over \$200,000 per year<sup>15</sup> would not have some financial books of account or other documentary evidence of the extent of that activity. Here, not a single such document was presented. His evidence in relation to other expenses which plainly required monetary payment (such as utilities, telephone, meals, fuel, school fees, etc.) was neither comprehensive nor convincing.

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<sup>14</sup> Total of monthly expenses in Appendix A is  $\$22,250 \times 12 = \$267,000$  plus living expenses in Appendix B of  $\$61,200 =$  a total of  $\$328,200$ .

<sup>15</sup>  $\$9,000$  per fortnight  $\times 26 = \$234,000$ .



81. That therefore leaves two other possible explanations: either the claimed expenses were grossly exaggerated or Lord Nuku has had other undisclosed sources of income with which to meet his expenses.
82. Lord Nuku had ample opportunity to review and revise the quantum of expenses to which he testified. He even countermanded his own lawyer and daughter who had been involved in the preparation of his documents filed in the application. He unhesitatingly assumed responsibility, not only for knowledge of his own financial affairs, but also for the preparation of his own affidavit material including Appendices A and B. I therefore must proceed on the basis that the quantum of his claimed expenses was accurately stated.
83. By deduction therefore, I conclude that it is more likely than not that Lord Nuku has or has had other significant sources of income which he has not disclosed or not fully disclosed in this proceeding. In that regard, I note that the entries in the one bank statement produced bear no resemblance to the levels of financial transactions about which Lord Nuku gave evidence. That observation alone reinforces the view that it is more likely than not that he holds, or has held, personally or beneficially, other accounts or has otherwise dealt in substantial cash amounts which have not been disclosed in this proceeding.
84. For those reasons, I am of the view that upon analysis of the available evidence, it is reasonable to infer that Lord Nuku's actual income is very likely to be substantially greater than just his Parliamentary salary, and housing and nobles allowances.

*Amount to be attached*

85. However, even with that finding, I do not consider it appropriate to order, as Mr Fonua submitted, that all of Lord Nuku's net salary be attached. Instead, I consider it reasonable and appropriate, in all the circumstances, to order that half of his net salary, being **\$1,060 per fortnight** (or \$27,560 per annum), be attached and paid to the judgment creditor as some amount towards reducing the growing judgment debt.

*Withheld amounts*

86. In relation to Lord Nuku's salary withheld by the Ministry, I do not consider those monies to be properly characterised as a debt due by the Ministry to Lord Nuku which might thereby be susceptible to an order equivalent to a garnishee order as Mr Fonua submitted.
87. Had the application originally been made for an order for attachment of earnings, rather than an erroneous application for a garnishee order in respect of salary, it is unlikely that any withholding or freezing order would have been necessary, and that instead, any amounts ordered to be attached would have commenced to be paid from that date.
88. I therefore consider it appropriate to treat those monies the same as his future salary from which half will be deducted in accordance with this ruling. It follows therefore that half of the withheld monies should be paid to Lord Luani and the balance released to Lord Nuku.

**Conclusion**

89. For the reasons stated above, the application for attachment of Lord Nuku's earnings as a member of Parliament is granted.
90. Pursuant to s.5(2)(b) of the *Supreme Court Act*, I order that **\$1,060 per fortnight** from Lord Nuku's salary as a member of Cabinet be attached and paid to Lord Luani.
91. The Ministry of Finance and Revenue is ordered to pay the said sum of \$1,060 per fortnight:
- (a) to Mr Fonua's ANZ bank trust account number 1819100; and
  - (b) for as long as Lord Nuku remains a member of the Legislative Assembly;  
or
  - (c) until the judgment debt is satisfied.
92. The protected earnings rate, below which this attachment order will be suspended, is specified at \$1,500 net per fortnight.

93. The order of this court made on 10 June 2019, by which the Ministry of Finance and Revenue has withheld Lord Nuku's salary, is lifted.
94. Half of all such monies withheld by the said Ministry is to also be paid to Lord Luani and the balance is to be released and paid to Lord Nuku.
95. A copy of the formal Order, which will be issued separately, is to be served on the Ministry of Finance and Revenue as the entity required by the Order to make the deductions from earnings paid by it to Lord Nuku.
96. Lord Nuku is to pay the costs of and incidental to this application, to be taxed in default of agreement.

NUKU'ALOFA  
21 September 2020



M.H. WHITTEN QC LCJ  
PRESIDENT