Solicitor General 26/10/16

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IN THE SUPREME COURT OF TONGA **CV 68 of 2014**
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **RICHARD RAY MANCEAU**

First Plaintiff

AND: **SAPAFA LIMITED**

Second Plaintiff

AND: **ENDANGERED ENCOUNTERS LIMITED**

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: **Mrs. D Stephenson for the plaintiffs**
Miss. L Tonga for defendant

Date of Hearing: **3, 4, 5, 9 and 12 August 2016**
Date of Ruling: **24 October 2016**

RULING

Nature of the case and observations

[1] This case concerns a 10 metre aluminium catamaran called Proteus. The plaintiffs allege that they built the Proteus and that in September 2007 it was sold to the defendant, Endangered Encounters Limited (EEL), for USD$287,500 but

rec'd 25/10/16

that the price was not paid. They seek payment of the price.

[2] A matter of some significance is that alternative claims, including a claim in restitution, were abandoned.

[3] EEL argues it acquired Proteus from the second plaintiff and that the agreement was that it was to reimburse the second plaintiff for the build cost only (the build cost) and has done so.

[4] EEL also argues that the second plaintiff cannot enforce payment of any sum that may be owed to it as EEL's acquisition of Proteus was a major transaction for which no special resolution of the shareholders was obtained (section 128 of the Companies Act 1995 (the Act)).

[5] On the face of it this is a straightforward civil dispute to enforce payment of a debt. However, my curt description of the case conceals a complex milieu. At the outset I feel I must make some observations.

[6] This action is in truth a property dispute following the breakdown of the marriage between the first named plaintiff, Mr. Manceau, and his former wife Mrs. Brenda Cox. They had incorporated and managed the businesses of Sapafa Limited (Sapafa) and EEL at Vava'u. The boundary between personal and business affairs was blurred and they disagreed about many business matters and maintained

only poor records. Today they still keep grievances over business and personal matters. To a greater or lesser degree the grievances are inter-related. The focus of this action on just one transaction lends an air of artificiality to the whole proceeding.

[7] Mr. Manceau and Mrs. Cox do not impress as having keen business acumen. The positions they adopted were often illogical, implausible and, importantly, at odds with their companies' financial statements which in my view are misleading and cannot be relied upon. Neither party called the accountant to provide explanations of the financial statements.

[8] It has been a feature of this case that throughout its progress the plaintiffs have added and removed both parties and causes of action. They have shifted both the legal and factual basis of their claim; most recently after the close of the evidence. As a result of the latest ground shift, which involved the wholesale adoption by the plaintiffs of the kernel of the defendant's case, the pleadings and much of the evidence were rendered redundant. As it has transpired the parties have agreed upon the specific issues that they consider require resolution. The issues fall within a small compass and it is on those issues alone that I have been asked to provide a ruling.

[9] On a related point, the first named plaintiff, Mr. Manceau, gave evidence in chief and whilst being cross examined that

the Proteus was owned by Sapafa before being sold to EEL. It is therefore only Sapafa that can sue for recover of the price of the boat. Mr. Manceau's claim is dismissed for that reason.

[10] Finally, I wish to note that Mr. Manceau and Mrs. Cox ought to have resolved their disputes upon the division of their matrimonial assets but did not do so. They entered into a settlement of their matrimonial assets that was approved by a San Diego Court. It was entirely inadequate and did not reflect the complexity of their affairs or the unresolved issues between them. I have little hope that this ruling, focused as it is on just one issue, will provide any sort of resolution for them.

The facts

[11] Sapafa was incorporated on 21 September 2005. At the time of the sale of Proteus Mr. Manceau and Mrs. Cox were directors of Sapafa. Mr. Manceau held 81,400 of the 100,000 shares. Mr. Manceau remains a director and the majority shareholder in Sapafa.

[12] The other company with which we are concerned is EEL. EEL was incorporated on 26 September 2007. Upon its incorporation Mr. Manceau was the sole director and owned 65,000 of the 100,000 shares. Mrs. Cox owned 20,000 shares and the balance were owned by a family member. The position has changed since the parties separated. Mrs.

Cox is now a director and holds the majority of shares in EEL.

[13] Without wishing to state the obvious, it should be noted from what I have just said that at the time of the sale of Proteus, Mr. Manceau owned the majority of the shares in both Sapafa and EEL and was also a director of both companies.

[14] Mr. Manceau and Mrs. Cox moved to Vava'u from the United States in 2005. They were then married. Upon their arrival they incorporated Sapafa. Sapafa ran bed and breakfast accommodation (known as Pangai Villa), made wholesale liquor sales and conducted whale watching tours. Mrs. Cox said the money to move to Tonga and to purchase a boat and other items came from the sale of her house, business and other property in the United States. I did not understand Mr. Manceau to dispute this.

[15] In late 2006 the couple made a decision to focus on whale watching charters and sell Sapafa's bed and breakfast operation. They applied to incorporate EEL with the intention that they would purchase a new boat to be owned by EEL. EEL would conduct up-market whale watching charters. They thought that was an untapped niche market. However, it was too expensive to buy a boat and they decided that as Mr. Manceau had the necessary skills they would build the boat themselves with a kitset from New Zealand. That is what they did. The boat was Proteus.

[16] Sapafa applied for and was granted a development licence which gave it an exemption from customs duty on the importation of materials to build Proteus. The build was financed by a bank loan of USD$90,000 to Sapafa by Westpac Bank, money that a friend from America had paid in the expectation that he would get shares in EEL and from advances made by Mr. Manceau's father once the bank loan was exhausted (although the advances were not fully spent on Proteus).

[17] The evidence was that in June 2007 Mr. Manceau's father advanced sums of USD$79,977.14 and USD$83,995.11 (document 7.1 of the defendant's documents) which were deposited into Sapafa's account, and USD$51,745.15 was spent at the same time to buy Kamo outboards for the Proteus. There is a dispute as to the extent to which Mrs. Cox was aware and approved of a later advance from Mr. Manceau's father but that is not presently material.

[18] Sapafa had a licence to conduct whale watch charters which was renewable annually. Its licence for the 2007 year was issued in the name of "Endangered Encounters Ltd Also known as Sa Pa Fa Ltd". The licence authorised the use of only two vessels, namely Islandia (the boat Sapafa had been using) and Proteus (which was not then fully built).

[19] Proteus was not completed until August 2007. The whale watching season was underway. Mr. Manceau and Mrs. Cox decided that Sapafa would complete the season using

Proteus. They disagree as to how the income from these charters was to be treated and I shall return to this later in the ruling.

[20] There was some evidence about attempts to insure the Proteus and whether it was insured in the name of Sapafa or EEL. It is not clear to me whether the boat was insured at this time and the evidence was of little assistance to me.

[21] In October 2007 Mrs. Cox returned to the United States as her father was ill. Mr. Manceau joined her in late November when Mrs. Cox's father passed away. Mr. Manceau said that it was while in the United States that the couple decided to document what EEL owed Sapafa for the Proteus and for another smaller boat that they intended to build. This boat was to be called Tachyon.

[22] Mr. Manceau said that they agreed that Sapafa was to be paid USD$287,500 by EEL which was to be treated as an advance to EEL. Interest was to be paid and the principal sum was due for payment on 1 May 2015, mirroring the terms of the advances Mr. Manceau had obtained from his father. According to Mr. Manceau this was documented in a promissory note which he prepared and Mrs. Cox approved. He said that he signed the promissory note on 3 March 2008 for himself and in his capacity as a director of EEL. Mr. Manceau strongly denied that he would ever have agreed to sell Proteus for anything less than its fair market value (which in 2008 he put at TOP$550,000).

[23] Mrs. Cox does not accept any of this. She says that it was agreed that Sapafa was to be reimbursed Proteus's build cost only. She also denies any knowledge of the promissory note. She says that the first time she saw the promissory note was in August 2014 when Mr. Manceau presented it to her along with an offer to buy her shares in EEL.

[24] Mr. Manceau returned to Vava'u in March 2008 but Mrs. Cox stayed in the United States for a time. Mr. Manceau had to deal urgently with the late lodgment of Sapafa's tax returns. The Commissioner of Revenue had sent a letter dated 16 January 2008 threatening Sapafa with prosecution for its failure to file tax returns for the 2006 and 2007 financial years. Mr. Manceau consulted an accountant, Helena Tuiono, to prepare the tax returns.

[25] He wrote a letter to Helena Tuiono dated 30 April 2008. It dealt with the division of assets between Sapafa and EEL. Attached to the letter was a schedule of assets under the headings 'Pangai Villa Assets/Sapafa Ltd' and 'Endangered Encounters Assets'. EEL's assets included Proteus at a value of TOP$454,545.45, a jet boat Ika Pepe at a value of TOP$20,833.33 and an inflatable dingy with outboard at a value of TOP$5,577.65. The letter was silent both as to the fact of any sale of Proteus to EEL or as to what (if anything) EEL was to pay for Proteus except to the limited extent that it states the Westpac Bank loan was to be transferred to EEL. Relevantly the letter read:

> I have attached a list of assets and have classified and valued them. They are listed by business activity or company for clarity...
>
> Starting in early 2007 we began construction of a new boat for our whale watching business "Endangered Encounters Charters" and again that money came predominantly from me and again for expediency it went through the Sapafa accounts. That boat is part of Endangered Encounters Limited a company I formed last year. There is also a loan through Westpac Bank for about 50K USD that was used to complete the construction of the boat and that loan is also in the name of Sapafa. This loan needs to be transferred to Endangered Encounters for this years taxes
>
> Next we are getting ready to import materials and engines for the construction of a new boat that we plan to have ready for the 2009 season. This boat will be part of the Endangered Encounters Ltd as well and again that capital is coming from me.

[26] In May 2008 Sapafa entered into an agreement to sell its bed and breakfast operation. The agreement was dated 21 May 2008. A deposit was paid and the sale was completed in September 2008.

[27] Mrs. Cox returned to Vava'u in June 2008. She worked with Helena Tuiono to prepare EEL's financial statements and tax return. Mr. Manceau said that he was not involved in the preparation of EEL's financial statements or tax returns.

This is not correct, at least to the extent that he directed that the Westpac Bank loan be transferred to Endangered Encounters 'for this years taxes'. It is also the case that the asset values in his letter of 30 April 2008 were adopted in EEL's financial statements.

[28] Around August 2008 Mr. Manceau and Mrs. Cox separated (they have since divorced) and Mr. Manceau returned to the United States after completion of the sale of Pangai Villa. He returned to Vava'u in December 2008 before going back to live in the United States in January 2009. There was at this time a further dispute between the parties as to the disbursement of the proceeds of sale of Pangai Villa which resulted in Mr. Manceau freezing bank accounts. It is not relevant to the issues here. For her part, since the separation Mrs. Cox has remained living in Vava'u operating EEL.

[29] In paragraph 85 of her brief of evidence Mrs. Cox calculated what she considers EEL owes Sapafa to reimburse Proteus's build cost. She relied upon spreadsheet figures of the build cost prepared by Sapafa's accountant. She applied credits that she considered were due to EEL. The result was that EEL owed Sapafa just USD$660.54. I set out her table below, which I have modified but not in any material respect.

COST/CREDIT SUMMARY

Boat Cost	$104,521.56 USD

Paid from EEL USD Account #2000678322	($37,208.66 USD)	
Paid from Brenda Cox USD Account #2000706990	($5,307.82 USD)	
USD Balance	($42,516.48 USD)	$62,005.08 USD
Deposits to Washington Mutual Account USA	($53,475.00 USD)	
USD Balance		$8,530.08 USD
Additional cost to build Proteus incurred by EEL as per financial accounts of SaPaFa, Ltd 2007	$30,584.43 TOP	
Income received by SaPaFa, Ltd through Endangered Encounters Ltd Charters 2007	($48,336.62 TOP)	
TOP credit to EEL	($17,752.19 TOP)	($7,869.54 USD)
Outstanding debt to SaPaFa Ltd		**$660.54 USD**

[30] This paragraph of Mrs. Cox's evidence has become the field of battle upon which the parties now engage. I will shortly explain how that has come about.

[31] EEL did not pay Sapafa USD$287,500, or any other amount for that matter, on 1 May 2015. On 31 July 2015 a demand for payment was made but nothing was paid. These proceedings are the result.

The plaintiffs' change of position

[32] After the evidence had been heard, Counsel presented and spoke to their written submissions on 9 August 2016. For the plaintiffs Mrs. Stephenson asserted that the parties had entered into a contract for the sale of Proteus but now argued that the agreed price was not USD$287,500 but TOP$454,545.45 being the value, the plaintiffs submitted, at which the Proteus had been entered into the financial accounts of EEL (page 76 of the plaintiffs' bundle of documents). Mrs. Stephenson submitted that it was simply not credible that EEL had agreed to purchase Proteus for what she described as the costs of materials. The promissory note was now said to be 'flawed' but nevertheless should be regarded as an indicator of what Mr. Manceau had intended as the price to be paid by EEL for Proteus. It was accepted that credits were due to EEL for payments it made to the Westpac Bank loan with the result that the debt was now said to be TOP$297,347.75.

[33] Then in further submissions filed on 12 August 2016 the plaintiffs made another change of position. The plaintiffs no longer argued that the agreed price for the Proteus was TOP$454,545.45 (or even USD$287,500) but now conceded that the agreed price was (subject to one qualification) as set out in paragraph 85 of Mrs. Cox's evidence. The position the plaintiffs now advanced was stated in Mrs. Stephenson's submissions as follows:

> The contract as it is pleaded by the Plaintiffs in paragraph 10 of the claim was for the sale of Proteus to the Defendant in an amount of USD$287,500 in September 2007.
>
> Based on the evidence provided to the Court the Plaintiffs now concede that the figure agreed between the parties was USD$104,521.56 plus the figure of USD$30,584.43 (mistakenly referred to in TOP) as set out in paragraph 85 of Mrs. Cox's brief of evidence. The total amount agreed was therefore USD$135,105.99....
>
> Furthermore, the contract was performed by the giving over of possession of Proteus to the Defendant. The Plaintiffs accept that the following payments were made by the Defendant on account of Proteus:
>
> USD$37,208.66 paid by EEL
> USD$ 5,307.82 paid by Mrs. Cox
> TOTAL: USD$42,516.48

> When this total is deducted from the agreed contract amount of USD$135,105.99, the resulting debt owed is USD$92,589.71

[34] I called Counsel into Chambers. I was frankly concerned that the plaintiffs had departed so significantly from their pleadings. I wanted to know if EEL considered itself prejudiced by that and if so whether it objected to me determining the case on the basis the plaintiffs now advanced. Miss. Tonga advised me that EEL did not wish to hold the plaintiffs to their pleadings, preferring to have a ruling on the amount (if anything) owing to the second plaintiff. There was a discussion of the issues that the parties wished the Court to determine which I recorded in a minute. Counsel subsequently confirmed that those issues are as follows:

1 Was there an agreement for the defendant to acquire Proteus from the second plaintiff at the actual cost of its construction?

2 If so, what was the cost of construction?

3 What (if any) payments/credits are due to the defendant against the cost of construction?

4 What (if any) balance is owing by the defendant to the second plaintiff under the agreement?

5 Is the agreement unenforceable against the defendant as being a major transaction entered into in breach of section 128 Companies Act 1995?

[35] I now turn to consider these issues.

The cost of construction

[36] I do not need to spend a great deal of time on the first two issues. EEL's position is that it was obliged to reimburse Sapafa the build cost of Proteus (see for instance paragraphs 21, 36 and 50 of Miss. Tonga's submissions) and the plaintiffs now accept that was the agreement. In her answers to questions from the Court Mrs. Cox said:

> Witness ...we discussed that Sapafa would be reimbursed for the building of Proteus because we could not build it under Endangered Encounters because it was not incorporated yet.
>
> Court So when did you agree that?
>
> Witness When Endangered Encounters account was opened up and some money went into Sapafa account and some money was sent back to Washington account and reimburse of – after the sale of Pangai villa.

Court — So just to be clear, are you saying that you recall a discussion with Mr. Manceau about that or are you assuming?

Witness — No that was a discussion with all the shareholders who wanted to make sure that the building of Proteus was being reimbursed back to Sapafa's account.

[37] There is disagreement as to the quantum of the build cost in one respect. Mrs. Cox's evidence is that the build cost was the sum of the figures described in her table as 'Boat cost' of USD$104,521.56 and "Additional cost incurred by EEL as per financial accounts of Sapafa Ltd, 2007' of TOP$30,584.43 (documents 7.1 and 7.2 of EEL's documents). Helena Tuiono's spreadsheets, from which these figures were taken, were included in EEL's bundle of documents without objection. The point of difference between the parties is as to the figure of $30,584.43, which the plaintiffs say is an amount in United States dollars not Tongan pa'anga. As the spreadsheets record transactions in Sapafa's United States dollar loan account the plaintiffs are correct.

[38] On this basis I find that EEL was to reimburse Sapafa for the build cost of Proteus in an amount of USD$135,105.99 (being the sum of USD$104,521.56 and USD$30,584.43).

The payments/credits due to EEL against the build cost

[39] The plaintiffs accept that EEL is entitled to credits of USD$37,208.66 and USD$5,307.82 representing payments by EEL and Mrs. Cox to the Westpac Bank loan account. This is the sum of USD$42,516.46.

[40] Referring to Mrs. Cox's table, the amounts that are in dispute are:

[40.1] USD$53,475 described as 'Deposits to Washington Mutual account USA'

[40.2] TOP$48,336.62 described as 'Income received by Sapafa Ltd through Endangered Encounters, Ltd charters 2007'

[41] In relation to the amount in [40.1], Mr. Manceau and Mrs. Cox had a joint bank account with Washington Mutual. Mrs. Cox's evidence was that proceeds of whale watch charters totalling USD$53,475 were deposited into the Washington Mutual account to 'cover the cost of the engines' purchased for Proteus (paragraph 61 of her evidence and documents 5.1-5.4 of EEL's bundle of documents). Mr. Manceau denies this and I accept his denial.

[42] Mrs. Cox's evidence was scant. I can find nothing in the documents to support her contention that the deposits were reimbursement for the cost of the motors. It is the case

that Kamo outboard motors were purchased for Proteus on 14 June 2007 for USD$51,745.15 but the money used to purchase them did not come from the Washington Mutual bank account. On or about 12 June 2007 Mr. Manceau's father had advanced $79,977.14 which was deposited into Sapafa's bank account. That money was used to purchase the Kamo outboards. There was no payment (at least in respect of the purchase of the outboard motors) from the Washington Mutual account for which reimbursement needed to be made.

[43] Furthermore, the deposits to the Washington Mutual account were made over an extended period from 16 November 2007 to 5 October 2008 (documents 5.1-5.3 of the defendant's bundle) and did not equate with the cost of the Kamo outboards. This suggests to me that the deposits were for other purposes. I find that EEL is not entitled to this credit.

[44] In relation to the credit sought by EEL in [40.2], Mr. Manceau and Mrs. Cox agreed that Proteus was built intending that it would be an asset of EEL. They also agree that when it was built EEL had not been incorporated and that Sapafa operated the boat during the 2007 whale watch season. Where they disagree is how the income earned by Sapafa is to be treated. Mrs. Cox said that the income was to reimburse Sapafa for the build cost of Proteus. Mr. Manceau denies this and says that the income belonged to Sapafa. Counsel in their submissions had little to say about this issue.

[45] It is proper at this juncture that I should note that I am not greatly assisted in resolving this issue by making a general assessment of the relative credibility of Mr. Manceau and Mrs. Cox. I found neither to be more credible than the other. Both harbour animosity which guides their interpretation of events. While the changes in the plaintiffs' position does nothing to enhance Mr. Manceau's credibility I am mindful that in litigation such decisions are made upon advice and for tactical reasons and it cannot be assumed from that alone that his evidence was untruthful. Mrs. Cox's evidence was often implausible and in some respects clearly incorrect. I got the distinct impression that much of the evidence of both Mr. Manceau and Mrs. Cox reflected their expectations as to what should have happened rather than what did happen.

[46] I am satisfied on the evidence before me to the appropriate civil standard that there was no agreement that income earned by Sapafa would be set off against Proteus's build costs.

[47] Mrs. Cox's evidence is stated with a high degree of generality. It contains none of the detail I would expect as to the time and circumstances under which this issue was discussed, its implications and the reasons for the decision made.

[48] I can see no logical reason why Sapafa would incur all the risk and costs (wages, fuel etc.) of whale watching charters only to have the income benefit EEL. In my view, such an

arrangement would defeat the parties' primary intention that Sapafa would be reimbursed by EEL for the build cost of Proteus.

[49] To accept Mrs. Cox's evidence I would need to also accept that the parties were mindful of maintaining a separation of the affairs of Sapafa and EEL, which clearly was not the case. They were not sophisticated business people and in the circumstances that pertained at the time, when embarking on an exciting business venture with apparently no talk of separation, I would be very surprised if the issue even crossed their minds.

[50] Furthermore, there is no mention of any such agreement in any of the documents nor can I see anything in them which supports a reasonable inference of an agreement. Importantly, there is no mention of it in Mr. Manceau's letter to Mrs. Tuiono of 30 April 2008, as one would expect when the subject matter of the letter was the preparation of Sapafa's financial accounts and tax returns.

What is the balance to reimburse Sapafa for the Proteus

[51] It follows, based on these findings (and subject to the defence under section128 of the Act), that there is a sum of USD$95,589.51 owing by EEL to Sapafa as follows:

Build cost of Proteus	USD $135,105.99
Less paid by EEL	USD $37,208.66

Less paid by Mrs. Cox	USD $5,307.82.
TOTAL:	**USD $95,589.51**

Major transaction

[52] Under the heading 'Major Transactions' sections 128(1) and (2) of the Act provide:

> (1) A company shall not enter into a major transaction unless the transaction is —
> (a) approved by special resolution; or
> (b) contingent on approval by special resolution.
>
> (2) In this section:
> "assets" includes property of any kind, whether tangible or intangible; and
> "major transaction", in relation to a company, means:
>
> (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets of the value of which is more than half the value of the company's assets before the acquisition;
>
> (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the company's assets before the disposition; or
>
> (c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which

> is more than half the value of the company's assets for the transaction.

[53] It is accepted by Sapafa that the agreement that EEL would acquire Proteus was a major transaction for the purposes of section 128 because it 'constituted an agreement by EEL to acquire assets with a value of more than half of [*EEL's*] assets prior to the acquisition of Proteus' (paragraph 3 of the plaintiffs' further submissions). There is no dispute either that the acquisition of Proteus was not approved by a special resolution of the shareholders of EEL.

[54] EEL argues that as the agreement to acquire Proteus was not approved by a special resolution of its shareholders it was unlawful and Sapafa cannot enforce payment of the price. Sapafa rejects this defence.

[55] Sapafa argues that Mrs. Cox's evidence was that she agreed to the acquisition of Proteus by EEL and accordingly the necessary shareholder approval was obtained for the purposes of section 128.

[56] Next, Sapafa argues that a major transaction which is not approved by a special resolution of the shareholders is not to be regarded as *ultra vires* the company and unenforceable for that reason. I was referred to *Morrison's Company and Securities Law* (loose-leaf ed, LexisNexis) at [10.3] – [10.5] and *Kava v Australia and New Zealand Banking Group Ltd* [2009] Tonga LR 420, 441 where Shuster J held, *obiter dicta*, that a breach of section 128

could not have been intended to render transactions void *ab initio* as that would, in his view, effectively render section 183 of the Act (which deals with shareholder remedies) redundant.

[57] A further argument advanced by Sapafa is that it would be unduly harsh in the context of the 'relatively unsophisticated commercial environment' in Tonga to find that a breach of section 128 renders a transaction void.

[58] Before turning to consider Sapafa's submissions I set out some other relevant sections of the Act.

[59] Section 21(1) of the Act provides:

> No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right or the power to do the act or to transfer or to take a transfer of the property.

[60] Section 22(1) of the Act provides:

> A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights or interests from the company that –
>
> (a) this Act or the constitution of the company has not been complied with; ...

> Unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of the paragraphs (a) to (e), as the case may be.

[61] Turning now to Sapafa's position, Mrs. Stephenson argues that the necessary shareholder approval was obtained because Mrs. Cox agreed to the purchase of Proteus and together she and Mr. Manceau held more than 75% of EEL's shares. There is nothing in this point which, if accepted, would circumvent the clear requirements of section 128 of the Act. No meeting of shareholders of EEL was called and no special resolution was obtained authorising the acquisition of Proteus. The decision was not subsequently ratified by the shareholders either (section 186 of the Act).

[62] As to the argument that a breach of section 128 does not render a major transaction void and unenforceable, the effect of sections 21 and 22 of the Act are as described in Farrar and Watson (eds) '*Company and Securities Law in New Zealand*' (2nd Ed, Thomson Reuters - Brookers Ltd, New Zealand, 2013) at [12.4] as follows:

> Failure to obtain a special resolution of the shareholders before entering into a major transaction will not normally make the transaction unenforceable by a third party unless the other party was aware, or ought to have been aware, of the irregularity by virtue of that party's position with, or relationship to, the company

[63] I note that this is the same position expressed in the extracts from *Morrison* to which Mrs. Stephenson referred me at [10.4] and [10.5] and which read:

> A transaction which is unauthorised, or which is against the Act or the company's constitution, is normally enforceable against the company unless the outsider was in a position of knowledge. Outsiders dealing with the company are therefore protected against almost all ultra vires acts.

and

> Section 17 of the Companies Act 1993 *[NZ]* is not limited to acts or transactions beyond the company's capacity. It also provides that a transaction will not be invalidated merely because the company had no power or right to enter into it. This means that, for example, entry by the company into a major transaction without the shareholders' consent will not be automatically invalid as far as the other party is concerned. However, as in the case of ultra vires transactions, such an action will be an unauthorised transaction by the directors, and outsiders will not be protected if they have knowledge of the lack of authority.

[64] It has been recognised that breach of the major transaction provision may render the enforcement of payment of a debt irrecoverable in circumstances where the party seeking payment was in a position of knowledge. This was the view of Ellis J in *Hansard v Hansard* [2013] NZHC 1692 Ellis J at [41] (which went on appeal in [2014] NZCA 433 but not on

this point). *Jacomb v Wikely* [2013] NZHC 707 was an action to enforce a guarantee where Kós J noted that he would have to accede to a defence that the guarantee was unenforceable for breach of section 129 (NZ) upon it being established that the loans in question were major transactions which had not been ratified by the shareholders.

[65] In so far as the *obiter* comment of Shuster J in *Kava* suggests that the only consequence of a breach of section 128 is to give rise to shareholders remedies, it is plainly incorrect.

[66] The final point advanced for Sapafa was that it would be unduly harsh in a Tongan context to find that the breach of section 128 rendered unenforceable EEL's obligation to pay for Proteus. It is the legislature's role to make the law and the Court's role to interpret it. When the law is clear the Court cannot choose to disregard it on the basis that it is ill-advised or harsh.

[67] More substantially, Mrs. Stephenson's submission contains within it the assumption that if Sapafa was prevented from recovering money in debt it had no other avenue open to it. As is noted in Mitchell, Mitchell and Watterson '*Goff and Jones: The Law of Unjust Enrichment*' (8th Ed, Sweet & Maxwell, London, 2011) at [24-30], there have been cases where the recipients of benefits transferred by companies under ultra vires contracts were ordered to make restitution (see also *Cabaret Holdings Ltd v Meeanee Sports and Rodeo*

Club Inc [1982] 1 NZLR 673, 674). In this case, Sapafa abandoned its cause of action in restitution at the commencement of the hearing. I cannot therefore concern myself with the possibility that had some other approach been taken Sapafa might (I certainly put it no higher than that) have obtained a different outcome.

[68] The final issue is whether, for the purposes of the proviso to section 22(1) of the Act, Sapafa ought to have had knowledge, by virtue of its relationship to EEL, that section 128 had not been complied with. There was no evidence that Sapafa (or Mr. Manceau) had actual knowledge of the breach of section 128.

[69] Mr. Manceau was both a director and majority shareholder of EEL and Sapafa at the time EEL acquired Proteus. There can be no doubt to my mind that he ought to have had knowledge of the breach of section 128 and that such knowledge must therefore be attributed to Sapafa by reason of its relationship to EEL. Mrs. Stephenson made no attempt to argue otherwise (*Story v Advance Bank Australia Ltd* (1993) 11 ACLC 69, 638-639 per Gleeson C J).

[70] For the reasons given I conclude that it is not possible for Sapafa to sue on an agreement for the sale of Proteus to EEL in the circumstances of this case and its claim must be dismissed.

Result

[71] The plaintiffs' claim is dismissed.

[72] The defendant is entitled to costs to be fixed by the Registrar if not agreed.

O.G. Paulsen

NUKU'ALOFA: 24 October 2016 **LORD CHIEF JUSTICE**