

IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

CV 37 of 2016

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14/12/16

**BETWEEN: 'AISAKE 'ETIMONI TU'ONO**

**Applicant**

**AND: GOVERNMENT OF TONGA**

**Respondent**

**BEFORE THE LORD CHIEF JUSTICE PAULSEN**

**Counsel: Mr. W.C. Edwards Snr SC for the applicant**

✓ **Mr. J. Lutui for the respondent**

**Date of Hearing: 17 November 2016**

**Date of Ruling: 13 December 2016**

**RULING**

**The nature of the application**

[1] This is an application by the liquidator of Moapa Enterprises Limited (In liquidation) (Moapa) seeking directions under section

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293(a) of the Companies Act 1995. The underlying contest is whether the liquidator or the Crown (as the Ministry of Revenue and Customs) is entitled to a sum of more than TOP\$50,000 held in an account of Moapa with Bank of South Pacific (Tonga) Limited (BSP).

[2] The Ministry argues that from the date of service of a notice under section 15(3) of the Revenue Services Administration Act (the Act) upon BSP it had a charge over the money in the BSP account for payment of Moapa's tax debt and was a secured creditor of Moapa (section 257(2) Companies Act). The liquidator argues that upon liquidation the assets of Moapa, including the amount held in the BSP account, came under his custody and control and that the Ministry may only prove in the liquidation of Moapa for the tax debt as an unsecured creditor (section 257(1)(a) and (c) Companies Act).

[3] This case was argued within a very small compass. I have been asked to determine, based on the arguments presented, whether:

- (a) a notice issued by the Ministry under section 15(3) of the Act to BSP in respect of income and consumption tax due by Moapa is a valid notice; and
- (b) as a consequence of service of the said notice, the Ministry is a secured creditor in the liquidation of Moapa.

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**The facts**

- [4] The evidence was given in an affidavit of the liquidator and an affidavit of Mr. Michael O'Shannassy, a former employee of the Ministry. Both affidavits were brief and neither deponent was subject to cross examination. The facts as presented to me are not in dispute in any material respect.
- [5] On 6 May 2016, the applicant was appointed liquidator of Moapa by order of the Supreme Court.
- [6] More than a year earlier, on 15 April 2015 the Ministry issued consumption tax assessments to Moapa for the periods September 2007 to August 2011 and income tax assessments for the 2012-2013 and 2013-2014 income years. The amount owing (not including penalties) was TOP\$2,359,827.99.
- [7] On the same day, the Ministry issued notices to Westpac Bank of Tonga, ANZ Bank Tonga and Luna'eva Enterprises under section 15(3) of the Act. I will set out the section again later in this ruling but, for the benefit of the reader who is not familiar with it, section 15(3) reads:

Where this section applies, the Chief Commissioner of Revenue may, by notice in writing, require any person who owes money to the taxpayer to pay the amount specified in the notice to the Chief Commissioner of Revenue. The amount to be specified in a notice under this subsection shall not exceed the amount of tax that has not been paid or the

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amount that the Chief Commissioner of Revenue believes will not be paid by the due date.

[8] The notice issued to Westpac Bank of Tonga was as follows:

**Re: NOTICE TO PAY THE CHIEF COMMISSIONER PAYMENT DUE**

(Sections 15, 16 & 17 of the Revenue Services Administration Act no.28/2002)

Pursuant to section 15 of the Revenue Services Administration Act no. 28/2002 we hereby give notice in writing that Moapa Enterprises Limited trading as J M Stores is a taxpayer in the Kingdom of Tonga and owes tax that it has not paid by the due date.

Accordingly, we require you to hold any deposits (including international transfers) made to the bank accounts held by this company or in the name of or a combination of the names including individual accounts in the name of Mr. Rudra and/or Mrs. Pratita Prasad, up to the amount of \$2,359,827.99TOP from 4pm on 15<sup>th</sup> April 2015 until 30<sup>th</sup> June 2015.

The amounts retained should be paid to the Chief Executive Officer no later than 30<sup>th</sup> June 2015 at the Ministry of Revenue and Customs, Queen Salote Ex-Students Centre, Railway Road, telephone 23-444.

You are obliged under the law (section 17 of the *Revenue Services Administration Act* No.28/2002) to provide Moapa Enterprises Limited and/or Mr. Rudra and/or Mrs. Pratita Prasad with written

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notice of the payment(s) made to the Ministry of Revenue and Customs.

~~This notice remains in force until revoked or amended in writing by the Minister of Revenue & Customs.~~

- [9] I understand that Mr. Rudra Prasad and Mrs. Pratita Prasad, who are referred to in the notice (and in subsequent notices), were shareholders and directors of Moapa. No objection was received by the Ministry to this notice.
- [10] On 30 June 2015, further notices were issued to Westpac Bank of Tonga, ANZ Bank and Luna'eva extending the deadline for payment from 30 June 2015 to 31 December 2015. Again there was no objection to the notices.
- [11] Westpac Bank of Tonga was taken over by BSP and on 16 July 2015 a notice under section 15 of the Act was issued to BSP. That notice read as follows:

**Re: NOTICE TO PAY THE MINISTER OF REVENUE & CUSTOMS  
PAYMENT DUE**

(Sections 15, 16 & 17 of the Revenue Services Administration Act no.28/2002)

Pursuant to section 15 of the Revenue Services Administration Act No.28/2002 we hereby give notice in writing that Moapa Enterprises Limited trading as J M Stores is a taxpayer in the Kingdom of Tonga and owes tax that it has not paid by the due date.

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Accordingly, we require you to hold any deposits (including international transfers) made to the bank accounts held by this company or in the name of or a combination of the names including individual accounts in the name of Mr. Rudra and/or Mrs. Pratita Prasad, up to the amount of \$2,359,827.99TOP from 12pm on 18<sup>th</sup> July 2015 until 31<sup>st</sup> December 2015.

The amounts retained should be paid to the Chief Executive Officer no later than 31<sup>st</sup> December 2015 at the Ministry of Revenue and Customs, Queen Salote Ex-Students Centre, Railway Road, telephone 23-444.

You are obliged under the law (section 17 of the *Revenue Services Administration Act No. 28/2002*) to provide Moapa Enterprises Limited and/or Mr. Rudra and/or Mrs. Pratita Prasad with written notice of the payment(s) made to the Ministry of Revenue and Customs.

This notice remains in force until revoked or amended in writing by the Chief Executive Officer.

[12] On 29 September 2015, the Ministry emailed the Senior Relationships Manager of BSP with a request for the current balances of accounts held by Moapa (along with Mr. Rudra Prasad and Mrs. Pratita Prasad). The Ministry was advised that Moapa had two bank accounts, nos. 2000061800 and 2000841623. As at 16 July 2015 the amounts held in the accounts for the credit of Moapa were TOP\$2,714.73 and TOP\$116,225.99 respectively.

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[13] On 30 September 2015, the Ministry served a further notice upon BSP which purported to bring forward the date for payment from 31 December 2015 to 5 October 2015. It read as follows:

**Re: NOTICE OF PAY THE MINISTER OF REVENUE & CUSTOMS  
PAYMENT DUE**

(Sections 15, 16 & 17 of the Revenue Services Administration Act no.28/2002)

Pursuant to our Notice to pay to the Minister of Revenue & Customs dated 15<sup>th</sup> July 2015 we hereby amend the notice and request that the total amounts retained in the accounts of Mr. Rudra Prasad account number 2001183314 and Moapa Enterprises Account – A/C No. 2000841623 be paid to the Chief Executive Officer no later than 5<sup>th</sup> October 2015 at the Ministry of Revenue and Customs, Queen Salote Ex-Students Centre, Railway Road, telephone 23-444.

You are obliged under the law (section 17 of the *Revenue Services Administration Act* No.28/2002) to provide Moapa Enterprises Limited and/or Mr. Rudra Prasad with written notice of the payment(s) made to the Ministry of Revenue and Customs.

The original Notice dated 15<sup>th</sup> July 2015 remains in force, reduced by the amount of the payment when paid to the Chief Executive Officer, until revoked or amended in writing by the Chief Executive Officer.

[14] It will be observed that this notice referred to an earlier notice of 15 July 2015 when in fact the earlier notice was dated 16 July 2015. It will also be observed that whilst the notice of 16 July

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2015 required BSP to retain and pay to the Ministry funds in the accounts of Moapa as well as Mr. Rudra Prasad and Mrs. Pratita Prasad, the notice of 30 September 2015 only referred to BSP and Mr. Rudra Prasad. This latter matter was not relied upon by the liquidator and not explored in the evidence or Counsel's submissions.

- [15] The evidence of Mr. O'Shannassy was that on 1 October 2015 Counsel for Mr. Rudra Prasad, Mr. William Edwards, wrote to the Ministry threatening an injunction if the Ministry sought to garnishee funds from Mr. Prasad's bank account. That letter was not put into evidence but the Court is aware of litigation between Mr. Rudra Prasad/Mrs. Pratita Prasad and the Minister of Revenue and Customs which concerned the validity of notices issued by the Ministry under sections 15 and 29 of the Act.
- [16] On 2 October 2015, BSP made payment from Moapa's account no 2000841623 to the Ministry of TOP\$65,097.06. The payment was made pursuant to a guarantee provided by BSP on behalf of Moapa in respect of customs matters. No challenge was made by the liquidator to the payment nor has the liquidator laid claim to the payment. There then remained a balance in Moapa's account of TOP\$51,091.43. That balance remains, subject only to deductions of account maintenance fees by BSP.
- [17] Due to Mr. Prasad's threat of imminent legal proceedings the Ministry did not require BSP to pay the balances in Moapa's accounts until the litigation was resolved. Proceedings were



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issued by the Prasad's which included a challenge to the validity of section 15 notices issued by the Ministry to BSP. Those proceedings were determined by the Court of Appeal in a judgment of 14 September 2016 (AC 7 of 2016).

[18] On 7 June 2016, following his appointment as liquidator of Moapa, the applicant wrote to BSP asking it to close the accounts of Moapa and requesting payment of the account balances. On 10 June 2016 the applicant was sent an email by the Ministry advising him that BSP had forwarded it his letter. The Ministry required the applicant to serve notice of his appointment within fourteen days as was required by section 18 of the Act. The email also advised the applicant that the Ministry had issued garnishee notices to BSP regarding the amounts in Moapa's accounts. The applicant responded to the Ministry on 14 June 2016 with a copy of the Court order appointing him liquidator of Moapa.

[19] On 16 June 2016, the applicant received a letter from the Ministry dated 15 June 2016 stating that the amount due by Moapa for income tax and consumption tax totaled TOP\$11,629,577.13, which sum consisted overwhelmingly of penalties. On 6 July 2016, Edwards Law on behalf of the liquidator wrote to the Ministry advising that in the liquidator's view the amounts in the bank accounts of Moapa should be paid to the liquidator. Relevantly the letter stated:

Priority payments will be made by the liquidator in accordance with Schedule 6 of the Companies Act 1995.

At this stage, the Ministry's claim for payment will probably rank higher than no. 5 after determination of the priority of the various claims against the company.

The funds with the Bank should be released to the liquidator to enable the liquidator to act in the best interests of its creditors.

[20] On 7 July 2016, the Ministry replied to the letter from Edwards Law and advised that the Ministry had a charge over the money in the accounts of Moapa with BSP. For its part, BSP indicated through its lawyers, Stephenson Associates, that BSP would like to be served with a Court Order as to who it should pay, the liquidator or the Ministry.

[21] The Ministry's position was explained to the liquidator in a detailed letter from Mr. O'Shannassy to Edwards Law dated 26 July 2016. The letter referred to Australian case law and asserted that the Ministry was a secured creditor with a charge over the money in the bank account of Moapa and that its claim took priority over other creditors in the liquidation. The liquidator did not accept the Ministry's view and these proceedings are the result.

**The statutory provisions**

[22] It would be helpful if I set out the relevant statutory provisions relevant to the arguments that the parties presented.

*The Revenue Services Administration Act 2002*

[23] Section 14(1) of the Act provides that tax is a debt due to the Crown which may be recovered by the Chief Commissioner of Revenue in the name of the Crown.

[24] Section 7 of the Act deals with the effect of defects in taxation decisions, documents issued in respect of taxation decisions or any document made under the revenue law. It provides that defects or a want of form shall not generally invalidate a document or decision. It provides:

**7 Defect does not affect validity**

The validity of a taxation decision or a notice of a taxation decision or any other document purporting to be made, or executed under any revenue law shall not be —

- (a) quashed or deemed to be void or voidable for want of form; or
- (b) affected by reason of any mistake, defect, or omission therein, if it is, in substance and effect, in conformity with the revenue law under which it has been made, issued, or executed and the person assessed, or intended to be assessed or affected by the decision or document, is designated in it according to common understanding..

[25] Sections 15, 16 and 17 provide the Chief Commissioner of Revenue with special powers to recover tax. Section 15 provides as follows:

**15 Recovery of tax**

- (1) For the purposes of sections 15, 16 and 17, "payer" means a person who owes or may subsequently owe money to the taxpayer, or who holds or may subsequently hold money for, or on account of, the taxpayer or who holds money on account of some other person for payment to the taxpayer, or who has authority from some other person to pay money to the taxpayer, and includes the Crown.
- (2) This section shall apply where a taxpayer is liable to pay an amount of tax and —
  - (a) the tax has not been paid by the taxpayer by the due date for payment; or
  - (b) the Chief Commissioner of Revenue has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for payment.
- (3) Where this section applies, the Chief Commissioner of Revenue may, by notice in writing, require any person who owes money to the taxpayer to pay the amount specified in the notice to the Chief Commissioner of Revenue. The amount to be specified in a notice under this subsection shall not exceed the amount of tax that has not been paid or the amount that the Chief Commissioner of Revenue believes will not be paid by the due date.
- (4) Subject to subsection (5), a payer shall pay the amount specified in a notice under subsection (3) by the date specified

in the notice. The date for payment specified in the notice shall not be a date before the date that the amount owed to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.

(5) A payer shall not pay an amount under this section in excess of the amount owed to the taxpayer.

(6) A copy of the notice served on the payer shall be served on the taxpayer.

[26] Section 16 allows the Chief Commissioner to vary or revoke or amend a notice under section 15. Relevantly it provides in section 16(1):

**16 Variation of recovery notice**

(1) The Chief Commissioner of Revenue shall, by notice in writing to the payer, revoke or amend a notice served under section 15 where the taxpayer has paid the whole or part of the tax due or has made an arrangement satisfactory to the Chief Commissioner of Revenue for payment of the tax.

[27] Section 17 deals with the manner of compliance with a section 15 notice. It provides that a payment made in compliance with a notice will be treated as having been paid under the authority of the taxpayer and constitute a discharge of the liability of the payer to the tax payer. Section 17 reads:

**17 Compliance with notice**

- (1) A payer who has paid an amount in compliance with a notice served under section 15 —
  - (a) shall give the taxpayer written notice of the payment that has been made;
  - (b) shall be treated as having paid such amount under the authority of the taxpayer; and
  - (c) the receipt of the Chief Commissioner of Revenue shall constitute a good and sufficient discharge of the liability of the payer to the taxpayer.
- (2) The Chief Commissioner of Revenue shall apply any amount paid by a payer under this section to the tax owing by the taxpayer.
- (3) A payer who, without reasonable explanation, fails to comply with a notice under this section shall be personally liable for the amount specified in the notice, which may be recovered by the Chief Commissioner of Revenue.

[28] Section 18 of the Act deals with the obligations of a liquidator to the Chief Commissioner and reads as follows:

**18 Liquidators**

- (1) A person shall give the Chief Commissioner of Revenue notice in writing within 14 days of his appointment as liquidator.

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- (2) The Chief Commissioner of Revenue shall notify the liquidator, in writing, of the amount of any tax that is or will become payable by the taxpayer or deceased whose assets are in the possession or control of the liquidator and such notice shall be served on the liquidator within 2 months of the Chief Commissioner of Revenue being served with a notice under subsection (1).
- (3) A liquidator shall not, without leave of the Chief Commissioner of Revenue, part with any asset held as liquidator until the liquidator has been served with a notice under subsection (2).
- (4) Subject to subsection (5), a liquidator shall set aside out of the proceeds of sale of any asset of the taxpayer or deceased the amount notified by the Chief Commissioner of Revenue under subsection (2) and shall be personally liable to the extent of the amount set aside for the tax due by the person who owned the asset.
- (5) Nothing in subsection (4) shall prevent the liquidator from paying any debt that has priority over the tax referred to in that subsection.
- (6) Subject to subsection (5), where the proceeds of sale of any asset are less than the amount notified by the Chief Commissioner of Revenue under this section, the liquidator shall set aside the entire proceeds of sale to meet the amount notified under this section.

- (7) Where two or more persons are liquidators in respect of a taxpayer or deceased, the obligations and liabilities under this section shall apply jointly and severally to the liquidators but may be discharged by any of them.

*The Companies Act*

- [29] For the purpose of the Companies Act a secured creditor is defined as:

**"secured creditor"**, in relation to a company, means a person entitled to a charge on or over property owned by that company;

- [30] A charge is defined as follows:

**"charge"** includes a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 322; but does not include a charge under a charging order issued by a court in favour of a judgment creditor;

- [31] Section 257 deals with the effect of the commencement of liquidation. Particularly relevant in the present context are sections 257(1)(a) and (c) and (2) which read as follows:

**257 Effect of commencement of liquidation**

- (1) With effect from the commencement of the liquidation of a company —



- (a) The liquidator has custody and control of the company's assets....
- (c) Unless the liquidator agrees or the Court orders otherwise, a person shall not —
  - (i) commence or continue legal proceedings against the company or in relation to its property; or
  - (ii) exercise or enforce or continue to exercise or enforce, a right or remedy over or against property of the company;
- (2) Subsection (1) does not affect the right of a secured creditor, subject to section 314, to take possession of, and realise or otherwise deal with property of the company over which that creditor has a charge.

[32] Section 314 deals with the rights of secured creditors in a liquidation including the right to realise property which is subject to their charge. The section relevantly provides as follows:

**314 Rights and duties of secured creditors**

- (1) A secured creditor may —
  - (a) realise property subject to a charge, if entitled to do so;

- (b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or
  - (c) surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.
- (2) A secured creditor may exercise the power referred to in paragraph (a) of subsection (1) whether or not the secured creditor has exercised the power referred to in paragraph (b) of that subsection.
- (3) A secured creditor who realises property subject to a charge —
  - (a) may, unless the liquidator has accepted a valuation and claim by the secured creditor under subsection (6), claim as an unsecured creditor for any balance due after deducting the net amount realised;
  - (b) shall account to the liquidator for any surplus remaining from the net amount realised after satisfaction of the debt including interest payable in respect of that debt up to the time of its satisfaction and after making any proper payments to the holder of any other charge over the property subject to the charge.....

**The arguments of the parties**

[33] Counsel presented written and oral submissions at the hearing and, in addition, I asked for further written submissions which were provided following the hearing and for which I am grateful.

[34] In his initial submissions Mr. Edwards argued that the relevant notice for present purposes was the one dated 16 July 2015. The later notice of 30 September 2015 was ineffective, he argued, as it purported to amend a notice of 15 July 2015 and not the notice upon which the Crown relied which is dated 16 July 2015.

[35] Whilst acknowledging that a notice under section 15 of the Act will create a charge over a debt owing to the taxpayer, Mr. Edwards argued that both the notice of 16 July 2015 and the consequent charge had expired on 31 December 2015. His submission was that the notice:

...expired on the 31<sup>st</sup> December 2015 and consequently the charge ceased as from that date...

and

Once the retention period has expired and the liquidation commences the property vests in the liquidator. The respondent becomes a creditor with the preferential ranking set out in the Sixth Schedule of the Companies Act.

[36] In his later written submissions Mr. Edwards resiled from his earlier concession that a section 15 notice will create a charge. He

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sought to distinguish Australian case law that suggested otherwise upon the basis that the language used in Australian taxation statutes was different from section 15.

- [37] Mr. Edwards repeated his earlier submissions that the notice that the court is concerned with is dated 16 July 2015 and that this had expired.
- [38] He also argued that the arrangement that the Ministry made to delay payment by BSP, pending the resolution of the Court proceedings brought by the Prasad's, could not be taken to have extended the date for payment under the 16 July 2015 notice (and thereby maintained the existence of any charge) beyond 31 December 2015 because the arrangement was not in writing and was not served upon Moapa.
- [39] For the Ministry, Mr. Lutui presented comprehensive written submissions analysing Australian case law. The Ministry submits in reliance upon this case law that a notice under section 15 creates a charge over money held for or on account of a taxpayer and that at the date of liquidation of Moapa the Ministry was a secured creditor.
- [40] The Ministry's argument continues that under section 257(2) of the Companies Act (and notwithstanding anything in section 257(1)) a secured creditor may take possession of, and realise or otherwise deal with the property of the company over which the secured creditor has a charge.

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[41] The Ministry also submits that a section 15 notice does not expire or lapse upon the date stipulated for payment nor can a notice be challenged for any want of form if it is in substance and effect in conformity with the revenue law (section 7 of the Act).

**Discussion**

[42] I can deal quickly with the liquidator's submission that the section 15 notice of 30 September 2015 was ineffective because it referred to an earlier notice of 15 July 2015 and not 16 July 2015. There is nothing to suggest that BSP or Moapa was misled by what was clearly a typographical error. It is the sort of defect or mistake which section 7 of the Act is intended to respond to. It does not invalidate the notice.

[43] Furthermore, even if the notice was to be declared invalid on this ground it is immaterial to the outcome of this case because (and the applicant accepts) the notice of 16 July 2015 would remain in effect and the contest between the applicant and the Ministry, as to who is entitled to the money in the BSP account, remains to be determined.

[44] I cannot see any merit in the liquidator's second argument that if the section 15 notices issued to BSP created a charge, the charge expired or lapse on the stipulated date for payment.

[45] The problem with that argument is that it does not satisfactorily explain how (or indeed why) the fact that a recipient of a notice

under section 15 does not pay on due date deprives the Ministry of its rights under the notice. There is nothing in the Act to support that argument. The Act contemplates the discharge of the payer's obligation by payment or by revocation of the notice only. In my view also, the argument advanced is anomalous and is lacking in any commercial rationale. It would mean that a payer's defiance of his obligations under the law would defeat the rights of the Ministry and frustrate the purpose of Part V of the Act. That cannot possibly have been the intention of the Legislature.

- [46] This leaves the final issue, which the applicant only latterly relies upon, whether the service of a section 15 notice does create a charge over debts due by a debtor to the taxpayer so that the Ministry is a secured creditor for the purposes of the Companies Act.
- [47] On liquidation of a company, and unless the Court orders otherwise, no person may exercise or enforce or continue to enforce a right or remedy against the property of the company. However, this does not apply to a secured creditor who under section 257(2) of the Companies Act has the right to "take possession of, and realise or otherwise deal with property of the company over which that creditor has a charge."
- [48] The definition of 'charge' in the Companies Act 1995 is a very broad one and is not confined to a charge in the strict sense and will include a mortgage (*Sintel-Com Limited (In Liq) v Telecom New Zealand Limited* (High Court (NZ), CIV 2004-404-1677, 6

April 2006, Rodney Hansen J). That said, the definition of charge in the Companies Act is not greatly illuminating. The meaning of the term is however well established and means a proprietary interest by way of security for satisfaction of a debt without any transfer of title or possession to property.

- [49] I was referred to Lord Esher's statement in *Re Potts; Ex parte Taylor* [1893] 1 QB 648, 658 (referred to in *Deputy Commissioner of Taxation (NSW) v Donnelly* (1989) 89 ALR 232, 234 and also in *Stapleton v F.T.S O'Donnell, Griffin & Co (Q'Land) Limited* (1961) 108 CLR. 106, 113) as follows:

A charge is a well-known thing. If one man owes a debt to another, a creditor of the latter can, by bringing in the debtor, charge the debt in his hands so as to prevent him from paying it to his own creditor, and oblige him to pay it to the creditor who obtains the charge. Why is that a charge? Because it charges the debt in the hands of the man who has to pay it.

- [50] *Donnelly's* case (supra) concerned a medical practitioner (the taxpayer) who bulk billed the Health Insurance Commission (HIC) for attendances on patients who were seen at his clinic. The taxpayer was made bankrupt having committed an act of bankruptcy on 22 May 1987. Before that date, on 23 December 1986, the Commissioner of Taxation had served on HIC a notice under section 218 of the Income Tax Assessment Act 1936 requiring HIC to pay to the Commissioner 45 cents in the dollar of each payment due by HIC to the taxpayer. One of the issues that

arose was whether the section 218 notice had the effect of making the Commissioner a secured creditor of the taxpayer because it operated to charge the debt owed to the taxpayer obliging it to pay it to the Commissioner. It was held by a majority of the Federal Court that the notice did create a charge.

[51] Lockhart J said at pages 234 -235

Section 218 empowers the Commissioner, by giving notice in writing under the section to require the recipient to pay to the Commissioner moneys when they become payable to the taxpayer by the recipient. The section confers on the Commissioner the right to prevent the taxpayer from subsequently dealing with the moneys so as to prevent compliance with the notice by the recipient when the time for payment of the moneys by the recipient to the taxpayer arrives; the section also creates an offence for a recipient to refuse or fail to comply with the notice: s 218(2). Upon payment by the recipient to the Commissioner a valid discharge of the recipient's obligation to the taxpayer is given *pro tanto* with the amount of the payment: 218(4). The section operates as a statutory assignment of the money's payable by the recipient to the taxpayer in favour of the Commissioner in the nature of a charge over those moneys.

[52] To similar effect Hill J said at page 254:

A notice under s 128 is not itself a garnishee order although as Mason J in *Clyne's* case remarked it is certainly very similar to such an order. Particularly, in my view it confers upon the Commissioner not merely the negative right to prevent the taxpayer from



accepting payment of the debt or disposing of it, but positive rights, namely a right to give a valid receipt and discharge for the money (s 218 (4)): the payment being deemed by that section to have been made under the authority of the taxpayer and there is conferred upon the Commissioner the further right in the event of default or failure to comply with a s 218 notice to apply to the court for an order requiring the convicted person to pay the Commissioner an amount which the convicted person has refused or failed to pay. Thus the similarity between the s 218 notice and a garnishee order is indeed most striking and in my opinion it follows that for the purposes of the Bankruptcy Act there is created in the Commissioner by virtue of the service of the s 218 notice a charge so that the Commissioner becomes for the purposes of bankruptcy law a secured creditor.

[53] Mr. Lutui has referred me to other cases, which he submitted supported the Ministry's position (*Macquarie Health Corporation Limited v Federal Commissioner of Taxation* (1999) 169 ALR 16; *Government Insurance Office of New South Wales v Deputy Commissioner of Taxation* (1992) 106 ALR 715; *Bruton Holdings Pty Limited (In Liq) v Commissioner of Taxation* (2009) 258 ALR 612 and *Hansen Yuncken Pty Limited v Ian James Ericson trading as Flea's Concreting & Anor* [2012] QSC 51).

[54] Although Mr. Edwards is undoubtedly correct when he argues that the Australian taxation statutes, which were considered in the cases I have referred to, and section 15 of the Act are differently worded, he presented no submissions as to how the differences

are material in the present context. It appears quite plain that section 15, acting in conjunction with section 17 of the Act, operates in just the same way as section 218 of the Income Tax Assessment Act 1936 which was considered in *Donnelly* (supra).

[55] The service of a section 15 notice charges a debt in the hands of a 'payer' (in this case the BSP) because the payer is legally bound to pay the debt to the Ministry and not the taxpayer in full or partial satisfaction of the taxpayer's tax debt.

[56] As the Court of Appeal succinctly stated in the *Minister of Revenue and Customs v Prasad* (supra) at [8] in relation to section 15:

This section creates a mechanism whereby a third party can be obliged, by notice in writing, to pay an amount specified in the notice to the Minister and, in substance, to do so in partial or complete satisfaction of a tax debt of another person

[57] It follows that the section 15 notice of 16 July 2015 (as varied by the notice of 30 September 2015) issued to BSP created a statutory charge in favour of the Ministry on the debt owing by BSP to Moapa. The Ministry was therefore a secured creditor for the purposes of the Companies Act 1995 entitling it to payment in priority to the liquidator.

**The result**

[58] For the reasons given I make the following directions:

**IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY**

**CV 37 of 2016**

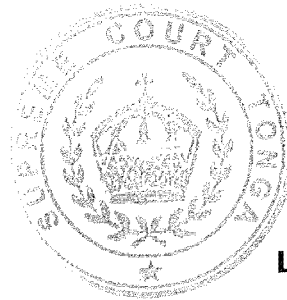
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(a) The notices issued by the Ministry to BSP under section 15 of the Act of 16 July 2015 and 30 September 2015 were validly issued.

(b) The said notices created a charge over the money held for or on account of Moapa with BSP and the Ministry is a secured creditor in the liquidation of Moapa for the purposes of the Companies Act.

[59] I reserve leave to either party to seek further consequential directions as may be required to give effect to this ruling.

[60] If the Ministry wishes to apply for costs it should do so within 21 days and the liquidator will have 14 days to reply.



A handwritten signature in black ink, consisting of a large, stylized 'O' followed by a series of loops and a horizontal line.

**O.G. Paulsen  
Lord Chief Justice**

**Nuku'alofa: 13 December 2016**

**N. 'Inafo  
12/12/2016.**