IN THE SUPREME COURT OF TONGA CV 51 of 2016
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: SIONE MOEHAU

First Plaintiff

EPIC INTERNATIONAL Limited

Second Plaintiff

AND: KINGDOM OF TONGA

First Defendant

REGISTRAR OF COMPANIES

Second Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. W. C Edwards Snr SC for the plaintiffs
Mr. 'A. Kefu SC for the defendants
Mrs. D Stephenson for Tonga Asset Managers and Associates Limited

Date of Hearing: 28 March 2017
Date of Ruling: 26 April 2017

RULING

The application

[1] The plaintiffs seek an order restoring Tonga Investments Limited to the register. The application is necessary so that

the plaintiffs may pursue court proceedings against Tonga Investments Limited (TIL).

[2] The application has been opposed by the defendants and by Tonga Assets Managers and Associates Limited (TAMA), a company with an interest in the subject matter of the plaintiffs' proposed court proceedings.

The factual background

[3] TIL was a registered company and wholly owned by the Government of Tonga.

[4] In 2007 TIL proposed to dispose of assets including leases of land. It put the leases up for public tender and on around 20 June 2007 the first plaintiff (Mr. Moehau) lodged a bid for three leases. His tender was accepted. Mr. Moehau nominated the second plaintiff (Epic) to complete the purchase of the leases.

[5] One of the leases was registered lease number 2934 (the lease). On 8 October 2007 TIL and Epic entered into a written agreement for the transfer of the lease. The agreement recorded that the transfer price was TOP$725,000. Epic paid a 10 percent deposit of TOP$72,500. A further 30 per cent of the transfer price amounting to TOP$217,500 was paid on 24 August 2007. The balance of TOP$435,000 was payable within 14 days of Epic being advised in writing that the lease transfer documentation had been completed by the Lands Department and that the transaction has been approved by Cabinet.

[6] Also of relevance is clause 5.4 of the agreement (incorrectly numbered as clause 5.3) that provided:

> In the case the Purchaser is in default for any payment of the transfer price or for the fulfilment of any other condition of the sale, all funds paid or offset to the date of the default will be forfeited. In this case the Seller has the right to enforce this Agreement without further announcement.

[7] The documents before the Court indicate that on 30 November 2007 TIL gave notice to Epic that the lease transfer documentation in respect of all three leases was complete and calling for settlement in terms of the agreement. However on 6 December 2007 TIL wrote to Epic and Mr. Moehau stating the Ministry of Lands and Survey was still processing the transfer of the leases and that Epic should disregard TIL's letter of 30 November 2007 until further notice.

[8] For reasons that are not clear Cabinet did not approve the transfer of the lease (2934) until 8 February 2013.

[9] On 18 February 2013 TIL gave Mr. Moehau notice that the lease transfer documentation had been completed and that Cabinet approval had been obtained to the transfer of the lease. Epic was given 14 days to pay the balance of the transfer price or Epic would forfeit its deposit.

[10] On 25 February 2013 TIL again wrote to Mr. Moehau reminding him that Epic had seven days (i.e. by 4 March) to pay the balance of TOP$435,000 on the transfer of the lease and again

stating that failure to pay would result in Epic forfeiting its deposit.

[11] On 12 March 2013 Mr. Moehau wrote to TIL acknowledging receipt of the letter of 18 February 2013 and explaining that after TIL's lengthy delay a decision had been made to utilise its funds on other projects. He proposed that the parties enter into an instalment plan to pay the outstanding balance.

[12] In a late affidavit Mrs. Christine 'Uta'atu, the former chief executive and a director of TIL, did not refer to the letter of 12 March 2013 but says that at a meeting on 15 March 2013 Mr. Moehau requested an extension to pay the balance until 2014. She said this was put to TIL's board on 11 April 2013 but the board refused the request and approved the forfeiture of 'the deposits' and decided to re-tender the lease. It is not clear whether the board's decisions were communicated to Epic or Mr. Moehau.

[13] In the event TIL did not re-tender the lease. Mrs. 'Uta'atu states in her affidavit that on 5 June 2013 the board resolved to transfer the lease to TAMA which is another company owned by the Government of Tonga. Cabinet approved the transfer on 1 July 2013.

[14] On 28 June 2013 Mrs. 'Uta'atu wrote to the Registrar advising that TIL had ceased trading on 7 June 2013 and requesting that it be removed from the register under section 327(1)(b) of the Companies Act. The letter contained nothing to substantiate the assertion that TIL had ceased trading.

[15] Apparently without any further correspondence or enquiry the Registrar made a decision on 12 July 2013 removing TIL from the register under section 327(1)(b)(i) of the Companies Act. The Registrar states in her affidavit that no public notice of her intention to remove TIL was given because the requirement to do so was removed by section 115 Companies (Amendment) Act 2009.

[16] On 22 July 2013 Mrs. 'Uta'atu again wrote to the Registrar clarifying that she had authority as a director of TIL to give notice to the Registrar that TIL had ceased to trade. On 29 July 2013 an officer of the Registrar wrote to Mrs. 'Uta'atu and informed her of the Registrar's decision of 12 July 2013.

[17] It was not until 24 June 2015 that the Minister of Public Enterprises, purporting to act on behalf of TIL, signed an assignment of the lease to TAMA. The assignment was registered that same day. There was no stated consideration for the assignment but in his affidavit the chief executive officer of TAMA, Mr. Tevita Huakau, states that TAMA paid some overdue rent for 2014 and the then current rent for 2015 amounting to TOP$480 and has continued to pay the rent up to February 2018.

The statutory framework

[18] The grounds upon which the Registrar may remove a company from the register set out in section 327 of the Act. In this case the Registrar relied upon section 327 (1)(b)(i) which provides:

> (1) Subject to this section, the Registrar shall remove a company from the Tongan register if —

(b) the Registrar is satisfied that —

(i) the company, has ceased to carry on business;

[19] Section 338 of the Companies Act provides:

(1) The Court may, on the application of a person referred to in subsection (2), order that a company that has been removed from the Tongan register be restored to the register if it is satisfied that —

(a) at the time the company was removed from the register —

...

(iv) the applicant was a creditor or a shareholder or a person who had an undischarged claim against the company; or

...

(b) for any other reason it is just and equitable to restore the company to the Tongan register.

(2) The following persons may make an application under subsection (1);

(a) any person who, at the time the company was removed from the Tongan register —

...

(iv) had an undischarged claim against the company; or

...

(c) with the leave of the Court.

(3) Before the Court makes an order restoring a company to the Tonga register under this section, it may require any provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.

(4) The Court may give such directions or make such orders as may be necessary or desirable for the purpose of placing a company that is restored to the Tongan register under this section and any other persons as nearly as possible in the same position as if the company had not been removed from the Tongan register.

[20] Section 339(1A) provides that if a company has been removed from the register pursuant to section 327(1)((b) before it can be restored the company shall file with the Registrar all past due company returns and pay all outstanding fees and penalties.

[21] Pursuant to section 339(2) a company that is restored to the register is deemed to have continued in existence as if it had not been removed from the register.

Service of the application

[22] The plaintiffs' application was served on the defendants and I directed that it was to also be served upon the directors of TIL and upon TAMA. TAMA gave notice of its intention to oppose

the application and has throughout been represented by Mrs. Stephenson.

[23] When presenting his submissions Mr. Kefu advised me that the defendants were contesting the application from the perspective of the second defendant only and were not representing the views of TIL (or presumably its directors and shareholders). The Registrar has filed an affidavit and opposes the plaintiffs' application. In my view whilst the Registrar should put before the Court any information in her possession relevant to the removal of TIL the usual course should be that she abides the decision of the court and does not actively argue for or against restoration on the merits. Nevertheless I have considered all that was put before me.

The issues

[24] The kernel of the plaintiffs' case is that TIL should be restored to the register so that the plaintiffs can pursue a legitimate claim without which TIL's legal obligations will be neither assessed nor enforced. It appears to me that strictly speaking it is Epic (rather than Mr. Moehau) that would have any claim against TIL but nothing turns on this for present purposes and the defendants did not take the point.

[25] Mr. Kefu advanced three arguments why TIL should not be restored to the register. First, he submitted that the plaintiffs do not have an undischarged claim against TIL to give them standing to make this application. Secondly, he argued that it is not just and equitable that TIL be restored to the register because it has no business, assets, officers or employees and

cannot fulfil its obligations under the Act. Finally, Mr. Kefu argued that the Court should not exercise its discretion to restore TIL as the plaintiffs' claim is futile, the decision to remove TIL was made in the public interest and the plaintiffs have not made any proposal for what he described as 'winding back the clock orders' under section 338(4) and the Court should not do so on their behalf.

[26] For TAMA Mrs Stephenson's submissions foreshadowed the possibility that in any future proceedings the plaintiffs might challenge the transfer of the lease to TAMA. She argued that there was nothing irregular in the transfer of the lease and noted that in acquiring the lease TAMA had acted to its detriment in paying rent. She also noted that the plaintiffs had not registered a caveat against the lease to prevent its transfer.

The purpose of section 338

[27] Section 338 is based on section 329 Companies Act (NZ) and Counsel are in agreement that the New Zealand case law provides helpful guidance on the operation of the section. I accept that is the position subject to the caveat that care must be taken to have regard to any material differences in the wording of the sections.

[28] The New Zealand cases make clear that it will be unusual for the Court to refuse to restore a company to the register where restoration is required so that the applicant may pursue remedies against the company provided by the substantive law (*John Hammonds & Co Ltd v Registrar of Companies* [1999] 3

NZLR 690 (HC) at [57] and *Re Pranfield Holdings Limited* (2001) 9 NZCLC 262,577 at [20] referred to in *Salamanca Investments Limited (in Liq) v Wellington City Council and ors* [2015] NZHC 572).

[29] Turning to the scheme of section 338, I have obtained much assistance from the judgment of Associate Judge Bell in *Salamanca Investments* (supra) at [97] to [102] which I consider sets out the correct approach and which I adopt.

[30] Section 338(2)(a) and (b) set out those who may apply to restore a company to the register. Others not included must obtain the Court's leave under section 338(2)(c).

[31] The grounds for restoration are set out in section 338(1)(a) and (b). The just and equitable ground in section 338(1)(b) does not require consideration if the applicant can satisfy any of the grounds in section 338(1)(a). As to those specific grounds the Court retains a discretion whether to restore a company but restoration should follow unless some discretionary factor against restoration has been established. The onus is upon on the respondent to make out its case for any discretionary factors against restoration. The section does not require the applicant to surmount a residual discretion hurdle before restoration in the absence of any negative factors. However if the applicant relies upon the more general just and equitable ground in section 338(1)(b) the onus rests upon the applicant and discretionary factors both for and against restoration come into consideration.

Do the plaintiffs have an undischarged claim?

[32] Whether the plaintiffs have an undischarged claim against TIL goes to two aspects of this application namely:

[32.1] Whether the plaintiffs have standing to apply for restoration under section 338(2); and

[32.2] Whether the grounds for granting restoration are made out under section 338(1)(a)(iv).

[33] Mr. Kefu argued that the plaintiffs' application was not based on them having an undischarged claim against TIL. This is not correct. Paragraph 3 of the statement of claim is quite specific that this is the ground relied upon.

[34] Mr. Kefu also argued that the term 'undischarged claim' in section 338(1)(1)(iv) and (2)(iv) was limited to liquidated claims. I can see nothing in the section or in principle to support this submission. It is also contrary to the decided cases. By way of example only, in *Salamanca* (supra) the Wellington Council successfully sought to restore a company to the register to seek contribution from it in respect of the Council's potential liability for damages as a result of watertightness defects in an apartment complex. In *Thornton Estates Limited v Registrar* of Companies (2006) 3 NZCCLR 590 Thornton obtained an order to restore a firm of engineers to the register to pursue an action for damages resulting from settlement of a subdivision. These were not liquidated claims.

[35] It was noted in *Salamanca* (supra) at [104] that where an applicant seeks restoration to pursue a claim against a company the standard for assessing the strength of the claim

is uncertain. However the merits of the claim are 'rarely subject to in depth scrutiny' and the threshold is low due to 'the laws interest in allowing access to the courts and the recognition that the court or tribunal to hear the substantive proceeding will be in a far better position to judge the merits of the case'. In my view what must be established by an applicant is that its undischarged claim is genuine and not frivolous or obviously without merit.

[36] Turning to the plaintiffs' claim against TIL, surprisingly little attention was paid to this aspect in Counsels' submissions. As the plaintiffs did not produce the agreement between Epic and TIL to acquire the lease (and did not appear to have provided Mr. Edwards with a copy of it either) I made a direction following the hearing that the defendants file a further affidavit exhibiting the agreement and any other relevant correspondence. An affidavit of Mrs. 'Uta'atu was filed with the agreement and other documents but also setting out the circumstances under which it is said that TIL cancelled the agreement. Mr. Edwards objected to this affidavit but I do not think its contents do the plaintiffs any harm and I have taken account of it.

[37] The defendants' stance, as I understand it, is that the plaintiffs do not have a tenable claim against TIL as the agreement to purchase the lease was validly terminated by TIL and the money paid by the plaintiffs forfeited under clause 5.4 of the agreement. Whether TIL was entitled to terminate the agreement hinges on two aspects neither of which is straightforward. These aspects are, first, whether TIL was entitled on 18 February 2013 to rely on clause 5.3 of the

agreement and call upon Epic to settle within 14 days and, secondly, whether a right of termination arose and was exercised under clause 5.4 when Epic did not settle.

[38] In my view it is at least arguable that TIL's right to rely upon clause 5.3 was spent on 30 November 2007 when it called upon Epic to settle and then itself failed to settle with the consequence that the date for settlement was thereafter at large. If that is so TIL could not require Epic to settle except upon reasonable notice first being given. What is a reasonable period of notice would be determined objectively in all the circumstances of case including the five year delay that had already occurred (D.W McMorland, *Sale of Land* at 11.03).

[39] In so far as clause 5.4 is concerned I note that whilst it refers to forfeiture of the funds paid under the agreement it does not expressly confer any right of termination. As I have also noted earlier TIL does not appear to have given a notice to the plaintiffs terminating the agreement.

[40] Should TIL have wrongfully purported to terminate (or in fact failed to do so) the plaintiffs may seek to enforce performance of the agreement or damages.

[41] In addition, the plaintiffs have paid 40 per cent of the total purchase price amounting to TOP$290,000 which TIL claimed was forfeited under clause 5.4. It is arguable that clause 5.4 is an unlawful penalty and that the plaintiffs may recover all or some portion of the amounts they have paid on that basis.

[42] I have not forgotten the arguments advanced by Mrs. Stephenson which are only relevant in my view to the ability of the plaintiffs to recover the lease. If such relief is sought then TAMA will be a necessary party and will be able to raise the arguments Mrs. Stephenson has put forward. Those matters do not have any bearing on the issue presently before me of whether the plaintiffs have an undischarged claim against TIL.

[43] I am satisfied that the plaintiffs have an undischarged claim against TIL of sufficient merit to confer upon them standing under section 338(2). It also establishes the ground for restoration under section 338(1)(iv).

[44] This therefore leaves the issue of whether I should refuse to restore TIL pursuant to my residual discretion.

Not just and equitable

[45] Mr. Kefu argued that it is not just and equitable to restore TIL to the register. The short answer to this submission is that the plaintiffs do not have to rely on the just and equitable ground under section 338(1)(b) having satisfied me that section 338(1)(a)(iv) applies.

[46] In any event, the fact that TIL has ceased to trade and presently has no assets, officers or employees should not prevent restoration of the company nor does it suggest that the restoration and any consequential proceedings will be a barren exercise. As Associate Judge Bell said in *Salamanca* (supra) at [122] and [125], an applicant who has made out a ground under [*section 338(1)(a)*] does not have to pass an

additional test of showing that restoration will not be nugatory. It is to up to the party opposing to establish that restoration will serve no useful purpose. The defendants have not satisfied me of that in this case.

The discretion

[47] Mr. Kefu relied upon three matters. First, he argued that that plaintiffs' claim is futile as it is unlikely TIL will defend and TIL has no assets and no longer exists. I have already dealt with this above where I noted that the defendants have failed to satisfy me that restoration will be futile. In addition, in light of TIL's status as a public enterprise and the potential for directors of the company to be subject to claims in its liquidation it would be extremely unlikely in my view that the plaintiffs' claims will not be actively defended. One cannot also exclude the possibility, given the relationship between TIL and TAMA and the lack of any significant consideration upon the transfer of the lease to TAMA, that the plaintiffs might not successfully pursue a claim for recovery of the lease itself.

[48] The second argument is that the decision to dissolve TIL was made in the public interest. It is sufficient to say that the public interest does not trump an individual's (or company's) right to remedies it is entitled to under the substantive law.

[49] The third argument is that the plaintiffs have not proposed any "wind back the clock orders" under section 338(4) and have not applied for the appointment of a liquidator if TIL is restored. There is nothing in this. The plaintiff does not presently face any time limitation on claims it may wish to

bring against TIL and it does not follow that upon restoration a liquidator need be appointed. The only ancillary orders that I need to make relate to compliance with TIL's obligations under the Act.

The result

[50] There will be an order under section 338(1) of the Companies Act for the restoration of TIL to the register of companies.

[51] I direct that TIL (and its directors) must forthwith comply with its obligations to file all outstanding annual returns under the Act and pay all relevant fees and penalties.

[52] I reserve leave to any party to apply for any further directions to give effect to this ruling on seven days' notice.

[53] The plaintiffs are entitled to their costs to be fixed by the Registrar of the Supreme Court if not agreed.

SUPREME COURT TONGA

O.G. Paulsen

NUKU'ALOFA: 26 April 2017 **LORD CHIEF JUSTICE**