

to the first judgment debtor (Mr. Fonua) by the garnishee (TCC). Mr. Fonua argues that the application is misconceived because the directors' remuneration is not a debt presently owing by TCC.

The facts

- [2] The relevant facts are simple. On 14 February 2017 ANZ Bank obtained a judgment against Mr. & Mrs. Fonua for \$371,639.12 plus interest and costs. The judgment debt remains unpaid.
- [3] TCC is a public enterprise for the purposes of the Public Enterprises Act. Mr. Fonua is a director of TCC having been appointed for a term of 3 years from 1 October 2015. Under the Public Enterprises Act (as amended in 2010) Mr. Fonua's remuneration is fixed by the Minister of Public Enterprises with the consent of Cabinet.
- [4] Mr. Fonua currently receives directors' remuneration of \$12,500 per annum pursuant to a directive of the Minister dated 19 October 2015. Mr. Fonua does not dispute this but says he receives the remuneration monthly. ANZ Bank wishes to attach the directors' remuneration payable by TCC to Mr. Fonua to satisfy (at least in part) its judgment.

The opposition

- [5] Mr. Fonua contends that the application to garnishee the directors' remuneration is misconceived because TCC does not owe him a debt. Mr. Nui referred me to Order 32 Rule 1(b) Supreme Court Rules which requires an applicant for a garnishee order to show that some person within the jurisdiction of the Court 'owes money to the judgment

debtor'. It is essential he says that a relation of debtor and creditor exists between the judgment debtor and the garnishee.

- [6] He referred me also to Webster's Dictionary definition of the word 'owe' which included:

...to be under obligation to pay or repay in return for something received: be indebted in the sum of...

- [7] Mr. Nui argued that salary and wages cannot be attached and by analogy neither can directors' remuneration in a case such as this where the remuneration is earned monthly. He said that *Australia and New Zealand Bank Group Ltd v Paunga* (Supreme Court, Tonga, CV 39 of 2010, 12 August 2011, Scott LCJ), where the then Chief Justice held that it was 'beyond doubt' that the debtor's salary could be garnished was not properly argued and was wrongly decided.

- [8] For ANZ Bank Mr. Stephenson submits that the Minister's directive of 19 October 2015 creates a present debt owing by TCC to Mr. Fonua which may be attached.

- [9] Mr. Stephenson argues that I should give a construction to the Rules consistent with their purpose which in the case of the enforcement provisions is to provide avenues by which a judgment creditor may obtain payment of what the Court has already decided is owed by gaining access to the property or money of the judgment debtor.

- [10] He submits that it is the Minister's directive that creates the debt which it is TCC's obligation to pay. The fact that TCC and Mr. Fonua may agree to pay the debt monthly is 'not the issue' as all the Court needs to

be concerned with is that an amount is owing not that it is immediately payable. Mr. Stephenson emphasised that ANZ Bank does not seek to accelerate the payment and accepts that it cannot stand in a better position as regards payment than does Mr. Fonua.

Discussion

[11] I am not greatly assisted by dictionary definitions as a method of deriving legal meaning. Dictionary definitions are acontextual but the meaning to be ascribed to words or phrases in statutes or, as in this case, the Rules of the Court depend critically on context (Richard Posner '*Reflections on Judging*' at pg 180).

[12] Mr. Stephenson is correct that the Court must construe the Rules consistent with their purpose. The submission reflects what was said by Hall V.C. in *In re Cowan's Estate* (1880) 14 Ch.D 638, 642-643 where it was held that money which was or might come into the hands of a receiver in the future for payment to a judgment debtor was subject to attachment. Hall V.C. said:

..yet the good sense of the matter is that such money should be available for the purpose of discharging the claims of creditors, and that the clauses which give the remedy by attachment ought to receive a favourable construction by enabling the creditors to resort to such money.

[13] In *Tapp v Jones* (1875) 10 L.R. 591 the debtor and the garnishee had an agreement under which the garnishee was to pay a sum of money by

monthly installments. The Court ordered the garnishee to pay both the debt then due as well as accruing debts as they became due.

- [14] I note that in the commentary on Garnishee Proceedings in the White Book Volume 1 (1976) upon which Mr. Niu relied the following extract appears:

But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt in the latter case there is not.

- [15] A debt is a definite sum of money which one party is due to pay to another either in return for the performance of some service or upon the occurrence of some event or condition (other than a breach of contract which a compensable in damages).
- [16] Consistent with the purpose of the Rules and the authorities a garnishee 'owes money' to a judgment debtor if the garnishee is under an obligation to pay it either at once or at some future time. A debt need not be immediately payable and the fact that a garnishee may become entitled to refuse payment is not a sufficient reason not to make an order (*Sparks v Young* (1858) 8 ICLR 251 referred to in Halsbury's *Laws of England* 4th Edition Vol 17 at 527). Forms 14 and 15 in the Rules refer to 'debts due or accruing due' indicating that existing debts payable in the future may be subject to a garnishee order.

- [17] I do not accept Mr. Niu's submission that there is not a debt presently owing by TCC to Mr. Fonua. Directors of public enterprises are appointed for terms of up to three years. Mr. Fonua was so appointed. Under section 12(2) of the Public Enterprises Act it is the Minister of Public Enterprises with the consent of Cabinet who fixes the directors remuneration. Pursuant to Cabinet Decision No 1160 dated 2 October 2015 and written advice on behalf of the Minister to the then Chief Executive Officer of TCC dated 19 October 2015 the annual remuneration payable to directors of TCC (other than the Chairperson) is fixed at \$12,500 per annum. It is the directive that creates the debt. Mr. Fonua is entitled to payment of the debt by virtue of the fact that he holds office as a director.
- [18] The directive says nothing about the remuneration being payable monthly but even if it did on the authority of *Tapp v Jones* the remuneration would still be a debt owing and subject to attachment.
- [19] The analogy that Mr. Nui makes between salary/wages and directors' remuneration is a false one. An employee is engaged under a contract of service where the duty to render service and the duty to pay salary or wages are dependant. A failure of the employee to render the services contracted for absolves the employer of any obligation to pay. A director is not an employee but an office holder. He is the controlling mind and will of the company. Unlike an employee a director exercises independent functions derived from the general law, the company's constitution and statute and not from a contract of service upon which payment of remuneration depends.

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

CV 53 of 2016

[20] Mr. Nui did not suggest that there was any inconvenience or hardship that would be caused to either Mr. Fonua (other than the obligation to pay his due debts) or to TCC in attaching the directors' remuneration. TCC has no objection to me making the order sought. In the absence of good reason to refuse the order in the exercise of my discretion (of which there is none) the result for which Mr. Fonua contends would frustrate rather than give effect to the purpose of the enforcement provisions in the Rules.

[21] It is not necessary for me to decide whether *Paunga* represents the law in Tonga. A decision on that should await an appropriate case.

Result

[22] ANZ Bank's application is successful. It should submit an order in form 15 for approval by the Court.

[23] ANZ Bank is entitled to costs to be fixed by the Registrar if not agreed.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over the seal.

NUKU'ALOFA: 9 June 2017

**O.G. Paulsen
LORD CHIEF JUSTICE**