

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

CV 38 of 2017

01/03/18
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IN THE MATTER OF: LUNA'EVA ENTERPRISES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1995

**BETWEEN: LUNA'EVA ENTERPRISES LIMITED
Plaintiff**

**AND: RAMPRA INVESTMENT LIMITED
Defendant**

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. L Niu SC for the plaintiff
Mr. W Edwards for the defendant**

**Hearing: 8 November 2017
Date of Ruling: 21 November 2017**

RULING

The issue

[1] On 16 August 2017 Rampra Investment Limited ('Rampra') served upon Luna'eva Enterprises Limited ('Luna'eva') a statutory demand in respect of an amount of \$2,005,676 that it claims is owing to it for goods

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which I shall refer to as the sale agreement and the management agreement.

[5] The sale agreement is between Moapa and Luna'eva. It states also that the Prasads joined in the agreement. The recitals record that Moapa was selling to Luna'eva the stock, fixtures, fittings, motor vehicles and goodwill of its business and that Luna'eva had assumed debt owed by Moapa to Rampra. The relevant provisions were:

[5.1] By clause 1 Moapa sold and transferred to Luna'eva its assets and purported to transfer the debt.

[5.2] Clause 2 stated that Luna'eva did not assume any obligation or liability of Moapa except for the assumed/transferred debt.

[5.3] By clause 3 the purchase price of the business was \$750,000. The amount of \$100,000 was credited as paid and the balance of \$650,000 was payable by four installments of \$162,500 on the 15th day of the months of May, June, July and August 2015.

[5.4] Schedule 1 lists the assets being purchased. The purchase price of \$750,000 was the sum of the value of all the assets and consumption tax amounting to \$4,103,050 less the amount of the debt said to be owing to Rampra of \$3,353,050.

[6] The parties to the management agreement were Luna'eva and its director 'Etiluna Mafi of the one part and Rampra and the Prasads' son, Rulesh Prasad, of the other. The recitals record that Luna'eva had purchased the 'Business' of Moapa and acquired the debt owed by Moapa to Rampra amounting to \$3,500,000 (a different figure than in the sale agreement). Importantly, it records also that Rampra only agreed that the debt was transferred to Luna'eva on condition that

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to say that Luna'eva paid nothing for the business. It has paid \$355,000 to or for the credit of Moapa under the sale agreement.

[8] From around 10 June 2015 Luna'eva made it clear that it would not perform the management agreement. Mr. Mafi wrote to the Ministry of Foreign Affairs stating that it did not have work contracts in place with Sanjeet Nand and Justin Prasad. In addition, Luna'eva's lawyer wrote letters to Sanjeet Nand forbidding him to enter Luna'eva's premises and to Mr. Prasad advising him that he could not visit or attend Luna'eva's premises except if he was visiting as landlord.

[9] Luna'eva says it took this action for a number of reasons. First, because Mr. Prasad was managing the business contrary to undertakings given to Government at the time Luna'eva applied for its business license. Secondly, that the management agreement was an illegal contract and thirdly, that demand had been made upon Luna'eva to pay a substantial tax debt owed by Moapa.

[10] On 27 August 2015 Mr. Mafi emailed Mr. Prasad in an effort to resolve the dispute that had arisen between Rampra and Luna'eva. He wrote:

As you have noted and agreed on the meeting of the 18th August, 2015, the Management Agreement with Mr. Rulesh Prasad is invalid and void. So any Payables or Accounts under Luna'eva undertaken by that Management is invalid.....

I am proposing the following:

Pay for the Rampra debt and duly identified and discounted to a more reasonable value...

[11] Mr. Mafi's proposals were not acceptable to Mr. Prasad or Rampra.

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Enterprises Limited and Moapa Enterprises Limited (In Liquidation) CV 42 of 2015, where His Honour notes in the Judgment the following:-

- 1 The amount of stock and/or goods provided by the Creditor valued at T\$2,005,676.00; and
- 2 The finding that Luna'eva Enterprises Limited is liable to pay for the Debt owed to Rampra Investment Limited.

The statute and principles

[15] The relevant statutory provisions for present purposes are ss. 296, 298 and 299 of the Companies Act 1995 which are materially the same as sections 287, 289 and 290 of the Companies Act 1993 (NZ). They read as follows:

296 Meaning of "inability to pay debts"

Unless the contrary is proved, and subject to section 297, a company is presumed to be unable to pay its debts if — (a) the company has failed to comply with a statutory demand; ...

298 Statutory demand

(1) A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.

(2) A statutory demand shall —

(a) be in respect of a debt that is due and is not less than the prescribed amount;

(b) be in writing;

(c) be served on the company; and

(d) require the company to pay the debt or enter into a compromise under Part XIV or otherwise compound with the creditor or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 15

- (a) A debt arises where there is money owing from one person to another and there is an existing obligation to pay that money.
- (b) Consequently an unliquidated claim, such as a claim for damages, does not constitute a debt.
- (c) A due debt is one that is due and payable by the company to the creditor serving the demand at the date of service of the demand.
- (d) Consequently a debt is due only if the creditor is entitled to immediate payment from the company.
- (e) Contingent and prospective debts, not being due debts, cannot be the subject of a statutory demand.
- (f) It is up to the plaintiff seeking to set aside a statutory demand to show that there is an arguable and genuine and substantial dispute as to the existence of the debt. Put another way, the dispute cannot be fanciful or insubstantial.
- (g) The mere assertion that a dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.
- (h) If such material is available the dispute should normally be resolved other than by means of proceedings in the Court's Companies Act jurisdiction.
- (i) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise

[20] Rampra's approach incorrectly conflates the value of the goods and the existence (and amount) of a debt. It also assumes that Moapa had not made any payment to Rampra for the goods. This may not be the case and one would expect, given the credit terms said to have existed between Rampra and Moapa, that payments would have been made.

[21] Despite there having been a previous Court action concerning the same matters and the parties having filed affidavits Mr. Niu is still able to make the strong point that no document has ever been produced by Rampra to show that in the books of Rampra a debt was owed by Moapa (let alone a debt in respect of the supply of the goods). There is also no evidence of a demand having been made for payment of such a debt.

[22] On the state of the evidence I am satisfied that there is a substantial dispute as to the existence of the debt that is the subject of the statutory demand.

If there is a debt is it due for payment?

[23] The management agreement did not require Luna'eva to pay the debt immediately or on any particular date. The debt was to be paid within a period of five years and from the operation of Luna'eva's business. The management agreement was stated to be irrevocable for the first five years or until the debt was paid in full (whichever came first). Luna'eva renounced the management agreement after only a few months and before any payment was made to Rampra.

[24] Faced with the obstacle that it is difficult to see how it can be argued that any debt owed by Luna'eva to Moapa is immediately payable Mr. Edwards submitted that Luna'eva was obliged to pay for the goods immediately (and not within five years) because the goods had been

renunciation and the management agreement remains binding on both parties. Secondly, Rampra has accepted Luna'eva's renunciation as a rescission of the management agreement and terminated it. If the management agreement remains on foot there is a substantial dispute both as to whether there is a debt owed and if it is due (for reasons set out in this ruling). If the management agreement has been terminated by Rampra then it is at an end and Rampra has a claim in damages not in debt (*Johnstone v Milling* (1886) 16. Q.B.D. 460). In either case the statutory demand cannot be sustained.

Was the debt acknowledged?

- [29] Mr. Edwards' next submission is that in his email of 27 August 2015 Mr. Mafi acknowledged the Rampra debt. I do not agree. In that email Mr. Mafi makes a clear statement that the management agreement was null and void before proposing terms of settlement. This is consistent with the argument that Luna'eva now advances that the management agreement was an illegal contract and unenforceable.

Was the management agreement illegal?

- [30] This takes me to the question whether the management agreement was an illegal contract. Luna'eva argues that the management agreement is illegal in breach of the Foreign Investment Act and therefore unenforceable against it on well-established principles (*Chitty on Contracts Vol 1, 204 at 16-007 and Holman v Johnson* (1775) 1 Cowp 341).
- [31] In *Prasad anor v Leonard anors* [2015] Tonga LR 31 the Court of Appeal said of the Foreign Investment Act at [21]:

cancelled. He also notes that Rampra did not have a foreign investment registration certificate.

[38] Mr. Edwards argues that it was Luna'eva (a Tongan company) and not Rampra that was carrying on the business. He submits Rampra did not intend to breach the Foreign Investment Act and all that Rampra did was to protect its debt whilst at the same time continuing supply to Luna'eva. The supply of goods by a foreign company is not, he argues, a breach of the Act.

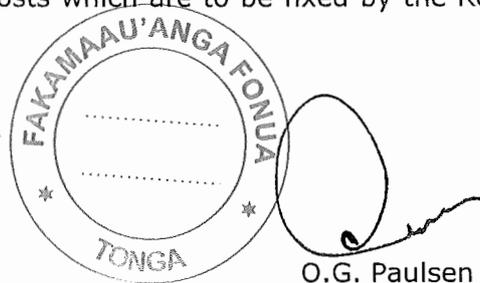
[39] I am satisfied that there is a substantial dispute as to whether the management agreement was illegal both in its formation and performance because of the following matters. Luna'eva acquired Moapa's business. The business it acquired was an activity reserved for Tongan investors. Rampra is not a Tongan investor nor did it hold a foreign investment registration certificate. It was not lawful for Rampra to carry on the business. It is clearly arguable that it was Rampra and not Luna'eva that carried on the business in fact. Through Rulesh Prasad, who was appointed by the Prasads for the benefit of Rampra to manage the business, and the restrictions imposed on Luna'eva the management agreement conferred upon Rampra control over the business and operations of Luna'eva and its revenue. This was the intention of the management agreement as the recital reads 'Rampra has agreed that the said debt to be transferred to the "Business", on condition that Rulesh or his nominees will have management control of "The Business"'.

[40] Consistent with all of this, the primary purposes of the management agreement were to generate revenue for the payment of the debt said to be owed to Rampra and to maintain Rampra's access to the Tongan

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[46] Luna'eva is entitled to its costs which are to be fixed by the Registrar if not agreed.



O.G. Paulsen

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