

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

CV 35 of 2018

Solicitor General  
01/08/19  
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**BETWEEN:**           DIANNE WARNER

**Applicant**

**AND:**                GE YALU

**First Respondent**

**KISIONE TUPOU**

**Second Respondent**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

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

**Date of Hearing:**    **12 July 2019**  
**Date of Ruling:**   **31 July 2019**

**RULING**

**The application**

- [1]   The applicant is the liquidator of Yanjian Group Co Limited (In Liquidation).  
I shall henceforth refer to the company as "Yanjian Group."

rec'd 01/08/19  
HK

- [2] Yanjian Group is an overseas company that traded in Tonga until around 2012/2013. It was, however, never registered in Tonga. The applicant was appointed liquidator of Yanjian Group on 23 March 2018.
- [3] This ruling concerns applications, made in reliance upon s. 275 of the Companies Act, for orders for the examination of the first and second respondents on oath, and for the production by them of documents said to be in their possession or under their control. The respondents oppose the applications.
- [4] In his written submissions, Mr. Fonua attached a schedule of documents that the applicant is seeking which goes beyond what is sought in the notice of application. He did not apply to amend the application or refer me directly to the schedule, nor did he justify a request for additional documents. I proceed on the basis that all I am concerned with are documents that fairly fall within the categories described in the notice of application.
- [5] I should mention (as I did in my ruling in the related proceeding under CV 40 of 2018), that the applicant has filed what was called a “Submissions Booklet of Counsel for the Applicant,” consisting of 192 pages that are not in evidence and I disregard it.
- [6] I should also mention, that the applicant has commenced an action against a company called Yanjian Tonga Limited, under CV 55 of 2018 (CV55). In that action she relies upon two causes of action. In the first cause of action, she pleads that a loan agreement between Yanjian Group and Yanjian Tonga Limited dated 20 August 2013 was cancelled at undervalue. She seeks recovery of the advance in reliance upon s. 306 of the Companies Act. In the second cause of action, she seeks the pooling of the assets of Yanjian Group and Yanjian Tonga Limited and payment of the sum of TOP\$3,380,335. In this instance, she relies upon s. 280 of the Companies Act. The sum sought in the applicant’s second cause of action is the amount of a judgment obtained in the Court of Appeal by Lord Luani against Yanjian Group (ACs

6/7 of 2017). It appears, Lord Luani is Yanjian Group's major, if not only, creditor.

### **The statutory provisions**

[7] The Companies Act relevantly provides in ss. 270 and 275 as follows:

#### **270 Power to obtain documents and information**

(1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person to deliver to the liquidator such books, records or documents of the company in that person's possession or under that person's control as the liquidator requires.

(2) A liquidator may by notice in writing require —

....

(e) a receiver, accountant, auditor, bank officer or other person having knowledge of the affairs of the company;....

— to do any of the things specified in subsection (3).

#### **275 Powers of Court**

(1) The Court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 270 to comply with that requirement.

(2) The Court may, on the application of the liquidator, order a person to whom section 270 applies to —

(a) attend before the Court and be examined on oath or affirmation by the Court or the liquidator or a law practitioner acting on behalf of the liquidator on any matter relating to the business, accounts or affairs of the company;

(b) produce any books, records or documents relating to the business, accounts or affairs of the company in that person's possession or under that person's control.

[8] These provisions are based on ss. 261 and 266 of the Companies Act 1993 (NZ) and decisions of the New Zealand courts were relied upon by the applicant. In his written submissions, Mr. Edwards argued that New Zealand cases are distinguishable or not applicable to the circumstances of this case. I do not accept that submission and have derived much benefit from them.

- [9] The applicant has not been clear about what particular statutory provisions she relies upon for each of the orders sought in the notice of application. Specifically, it is not apparent to what extent she relies upon s. 275(1) or s. 275(2). For each respondent, I shall deal first with the application of s. 275(1) and then s. 275(2).

## **The First Respondent**

### *The orders sought*

- [10] In respect of the first respondent the orders sought are:

The first respondent attends the court to be examined and recorded on oath.

At least 10 working days prior to the examination, the first respondent produce to the applicant all books, records or documents of the Company in that person's possession including but not limited to:

- i. A list of main engineering materials, including rebar, cement, steel mesh, bitumen, small machinery and accessories, with an estimated value of \$1,670,028.77 that form part of the loan advance from Yanjian Group Co Limited (YGCL) to Yanjian Tonga Limited (YTL) in August 2013.
- ii. All mobile office tables, chairs, other office equipment and air conditioners with an estimated value of \$56,100 pa'anga.
- iii. Bank statement of YGCL or YTL showing the cash loan advance of:
  1. US\$56,952.16 which is equal to 104,222.45 Pa'anga;
  2. 447,735.78 Pa'anga.
- iv. Debenture entered into between YGCL and YTL to secure the loan advance from the YGCL to YTL.

The documents are to be delivered by the first [respondent]...to the applicant at the office of Sione T Fonua at Mailetaha, Nukualofa.

The costs of and incidental to this application.

*The evidence*

- [11] The applicant has filed two brief affidavits.
- [12] In her first affidavit, the applicant gives evidence:
- (a) That she wishes to examine a loan advance in the sum of \$2,278,087 from Yanjian Group to Yanjian Tonga Limited on 20 August 2013;
  - (b) That a notice under s. 270(1) of the Companies Act, requiring Mr. Yalu to produce documents and be examined had been served upon him, but he had refused to comply;
  - (c) That based on a list of management staff, Mr. Yalu was in the management staff of Yanjian Group between 2010 and 2013;
  - (d) That Mr. Yalu is now the co-ordinator and manager of Yanjian Tonga Limited; and
  - (e) The financial accounts of Yanjian Tonga Limited for the 2015 year show a balance of a loan advance from Yanjian Group to Yanjian Tonga Limited of TOP\$2,221,719.
- [13] In her second affidavit the applicant:
- (a) Attaches the loan agreement of August 2013 between Yanjian Group and Yanjian Tonga Limited, in respect of an advance of TOP\$2,278,087.
  - (b) Attaches Yanjian Tonga Limited's financial statements for the 2015 and 2016 years, showing a balance of the loan advance of \$2,221,719;
  - (c) Re-asserts, that Mr. Yalu was an employee of Yanjian Group and that he is now the co-ordinator and manager of Yanjian Tonga Limited;
  - (d) Asserts that Mr. Yalu has "very valuable knowledge of the affairs and accounts of Yanjian Group, particularly when the loan advance was arranged and recorded";

- (e) States that whilst the loan agreement between Yanjian Group and Yanjian Tonga Limited was cancelled on 28 April 2017 “ownership of the funds and equipment” referred to under the agreement remains to be determined.

[14] Mr. Yalu has filed an affidavit in opposition to the application in which he relevantly states:

- (a) That he has been the Manager of Yanjian Tonga Limited since August 2015;
- (b) That between 2008 and July 2012 he was a translator with the “Chinese Road Project Team,” and was not an employee of Yanjian Group;
- (c) That he was not in Tonga or working for Yanjian Group when the loan agreement of August 2013 was signed;
- (d) He attaches a copy of a loan cancellation agreement between Yanjian Group and Yanjian Tonga Limited dated 28 April 2017;
- (e) That he has no knowledge of the making of the loan agreement of August 2013, but he noted it amongst the documents of Yanjian Tonga Limited when he returned to Tonga in August 2015;
- (f) He has no “knowledge or documents other than the company documents of Yanjian Tonga Limited”;
- (g) The liquidator wrote to him on 15 May 2018 requiring him to be interviewed and produce documents and he replied on 21 May 2018 advising of his position that he would not be interviewed;
- (h) On 18 June 2018, the applicant had written to Yanjian Tonga Limited requesting that it produce financial records and other documents and on legal advice it did not produce any documents or agree to give any evidence to the applicant; and

- (i) That the applicant's demand to interview both him and the accountant of Yanjian Tonga Limited is improper, as it is for use in an action against Yanjian Tonga Limited.

***The application of section 275(1)***

[15] Under s. 275(1), the Court may order a person who has been served with a notice under s. 270(1) to comply with the requirements of the notice. For the same reasons I set out in paragraphs [17]-[19] of my ruling in CV 40 of 2018 of 31 July 2019, I am satisfied that that the first respondent falls within the category of "any other person" upon whom such a notice may be served for the purposes of s. 270(1).

[16] A notice under s. 270(1) must notify the recipient exactly of the documents that the liquidator requires him or her to produce. The notice that was served upon Mr. Yalu, which is annexed as exhibit A to the applicant's first affidavit, did not require production of the same documents that are the subject of this application, but other documents of a different nature. It follows that the applicant is not seeking compliance with the notice and is not entitled to any orders under s. 275(1). I therefore turn to consider s. 275(2).

***The application of s. 275(2)***

[17] Before s. 275(2) is engaged, the applicant must establish that Mr. Yalu is "a person to whom section 270 applies" (s. 275(2)). It is not the case, as Mr. Edwards argued in his written submissions, that the issue is whether Mr. Yalu was an employee of Yanjian Group.

[18] The applicant relies specifically upon s. 270(2)(e), which refers to "a receiver, accountant, auditor, bank officer or other person having knowledge of the affairs of the company." The New Zealand courts have held that the operative requirement of the equivalent of s. 270(2)(e) is "knowledge of the affairs of the company," and whether a person has the requisite knowledge of the affairs of the company will turn on the particular facts and aspects of the case (*Managh v*

*Currie* (2011) 10 NZCLC 264,841, at [24], *Re Communication and Energy Workers Union Inc* (1996) 7 NZCLC 261,264, and *Walker v Angus & ors* (supra) at [37] and [38]). I agree with that approach.

- [19] Mr. Edwards argued that Mr. Yalu was never an employee of Yanjian Group and was in China when the loan agreement of August 2013 was signed and, that he does not therefore have any knowledge of the arrangements relating to the loan agreement which is the focus of the applicant's enquiries.
- [20] The applicant's evidence that Mr. Yalu was an employee of Yanjian Group relies on the fact that his name appears on what is said to be a list of management staff of Yanjian Group. The provenance of that document is uncertain. The name of Yanjian Group does not appear on the document. The applicant has failed to prove that Mr. Yalu was ever an employee of Yanjian Group.
- [21] That is not an end of the matter. It is not disputed that Mr. Yalu has held a management position with Yanjian Tonga Limited since 2015, that the 2015 and 2016 financial statements of Yanjian Tonga Limited (both completed after Mr. Yalu began working for the company) record a balance of the advance from Yanjian Group of \$2,221,719 and, that the loan agreement was cancelled on 28 April 2017. Mr. Yalu does not say that he has no knowledge of the circumstances under which the loan agreement was cancelled. The question then becomes, in my view, whether as a result of his employment with Yanjian Tonga Limited since 2015 in a management position, Mr. Yalu can be considered as having knowledge of the affairs of Yanjian Group. As was noted in *Walker v Angus* (supra), at [43], such knowledge may extend to include information regarding the company's assets and liabilities.
- [22] The focus of the applicant's enquires in the liquidation is the advance of August 2013. The existence of the advance and the obligation to repay it are acknowledged in the financial statements of Yanjian Tonga Limited for the 2014, 2015 and 2016 years. The loan agreement is said to have been cancelled in April 2017, during the period that Mr. Yalu was the manager of Yanjian Tonga

Limited. In those circumstances, I am satisfied that Mr. Yalu must have knowledge of the affairs of Yanjian Group as it relates to the composition of the advance and of the circumstances under which the advance was cancelled to a sufficient degree to fall with the category of a person “having knowledge of the affairs of the company,” described in s 270(2)(e).

[23] The next issue becomes whether I should exercise my discretion to make orders under s. 275(2). In *Walker v Angus* (supra), at [45], Mander J noted that the Court must balance the need to enable a liquidator to obtain information to investigate the affairs of the company against the effect of an order on the party being compelled to produce the documents. At [48] and [51] he said:

[48] There is a public interest for liquidators to obtain information expeditiously and with as little expense as possible. However, requirements for the production of information should not lead to oppressive consequences. The information being sought will need to be referable to a line of inquiry which will benefit the company in liquidation. When assessing the effect on a person required to produce records or documents relating to the business affairs of the company, other considerations are the reasonable expectations of privacy of financial information and the relationship of the person with the company. The more distant the person from the company, the more onerous the obligation will likely be viewed.

..

[51] The power is to be exercised after careful balancing of the relevant factors. The Court is required to take into account the reasonable requirements of the liquidator to carry out his or her task, as well as the need to avoid the making of an order which will result in wholly unreasonable, unnecessary, or oppressive consequences for the person obliged to comply.

[24] Mr. Edwards argues that the enquiries of the applicant and this application are oppressive as the debt alleged to be owing by Yanjian Tonga Limited has been discharged. He relied upon findings of mine in a ruling of 24 November 2017 in LA 29 of 2015. The short answer to this submission is that in its ruling of 17 April 2019, under AC 1 of 2019, the Court of Appeal has held that my ruling did not create any res judicata estoppels between Yanjian Group and Yanjian Tonga Limited. Furthermore, as appears from CV 55, the applicant is not seeking

recovery of the advance as a debt due to Yanjian Group, but on the basis of statutory causes of action under the Companies Act.

- [25] The next issue that arises is whether it is oppressive for the Court to exercise its powers under s. 275(2) when the liquidator has already commenced proceedings against Yanjian Tonga Limited and might thus obtain some unfair advantage in those proceedings which may be considered an abuse of process (*Walker v Angus* at [85]). I am satisfied that the enquiries the applicant wishes to make are entirely proper ones and in accord with her duties and functions as liquidator of Yanjian Group. The evidence before me is that the advance was cancelled for what, on the face of it, may well have been no (or inadequate) consideration. It is proper that the applicant investigate that transaction for the benefit of the company's creditor. I cannot see that the applicant is seeking any unfair advantage, but only the same knowledge as Yanjian Tonga Limited possesses about the facts relevant to the composition and cancellation of the advance, from which a decision may be made as to how to discharge her duties (*Smith v Official Assignee* [1992] NZFLR 241 referred to in *Farrar and Watson "Company and Securities Law in New Zealand"* 2<sup>nd</sup> ed at pg 904 and *Re Friendly Island Fishing Company Limited* [2003] Tonga LR 327).
- [26] The next issue concerns the documents that are being sought. The notice of application has been inexpertly drafted, but the intention is clear. What the applicant is primarily seeking are documents that confirm the composition and fact of the advances under the loan agreement. Given that the parties saw fit to formally document the advance and the amounts of the advance (broken down into constituent elements, precisely stated as to amount), and the full amount of the advance has then been included in the financial statements of Yanjian Tonga Limited in the 2014, 2015 and 2016 years, one can reasonably infer such documents are in the possession or under the control of Mr. Yalu.
- [27] For the reasons given I intend to exercise my discretion and make orders requiring Mr. Yalu to attend to be examined on oath and to produce documents in his possession or under his control as are set out later in this ruling.

## **The Second Respondent**

### *The orders sought*

- [28] The second respondent is being sued in his capacity as a Chartered Accountant in the firm JKCA Accountants, who it is said, are the accountants of Yanjian Tonga Limited.
- [29] In respect of the second respondent, the orders sought mirror the application against the first respondent.

### *The evidence*

- [30] In her first affidavit, the applicant refers to having served a request on Saulala Tufui of JKCA Accountants, who she says produced Yanjian Tonga Limited's accounts for the 2015 year.
- [31] In her second affidavit the applicant:
- (a) Attaches the loan agreement of August 2013 between Yanjian Group and Yanjian Tonga Limited, in respect of a loan of \$2,278,087.
  - (b) States that the second respondent is the accountant of Yanjian Tonga Limited and prepared the financial statements of the company for the 2015 and 2016 years;
  - (c) Attaches Yanjian Tonga Limited's financial statements for the 2015 and 2016 years, showing a balance of the loan of \$2,221,719;
  - (c) Asserts that by preparing the financial statements of Yanjian Tonga Limited the second respondent "has knowledge and information about the affairs of Yanjian Group such as bank statements and list of equipment relating to the advance";
  - (d) Says that a notice was served on the second respondent (that purports to be a notice under s. 270(1)) requiring the second respondent to produce the documents that are the subject of the application;

- (e) Says that whilst originally agreeing to meet with the applicant the second respondent subsequently refused to do so upon the instructions of Yanjian Tonga Limited.

[32] For the second respondent, two affidavits were filed. The first was an affidavit of Saulala Tufui, who is a senior accountant with JKCA Accountants. The second affidavit was made by Sisikakala Vaipulu, a director of Yanjian Tonga Limited.

[33] In his affidavit, Mr. Tufui gives evidence that:

- (a) He is the person responsible within JKCA Accountants to prepare the annual accounts of Yanjian Tonga Limited;
- (b) JKCA Accountants have never acted for Yanjian Group and hold no documents or records for that company;
- (c) The documents kept on JKCA's file "apart from the notes and the accounts" of Yanjian Tonga Limited are the loan agreement of 20 August 2013, the cancellation agreement of 28 April 2017 and bank statements of Yanjian Tonga Limited for the period 25 June 2014 to 30 June 2017;
- (d) JKCA Accountants does not hold any "agreements or other documents" on file which relate to the matters that the applicant is seeking;
- (e) The applicant's notice under s. 270(1) was received and responded to;
- (f) Yanjian Tonga Limited has not permitted the release of any of its documents; and
- (g) That they have no knowledge or information on the file other than "what is based on the agreement and bank statements."

[34] The affidavit of Sisikakala Vaipulu states that the directors of Yanjian Tonga Limited resolved to oppose the applicant's application.

***The application of section 275(1)***

[35] In so far as the applicant seeks compliance with the notice issued under s. 270(1), for reasons I have explained in relation to the first respondent, I am satisfied that that the second respondent falls within the category of "any other person" upon whom such a notice may be served.

[36] The documents that a liquidator may require to be produced under s. 270(1) are limited to books, records or documents "of the company in that person's possession or under that person's control." As Mander J said in *Walker v Angus* (supra), at [63]:

...While a liquidator can require information to be provided regarding the affairs of the company, he or she does not have the power to require production of documents that belong to any other entity other than the company. The power to require production of another person's documents is an extraordinary power reposed in the Court in the exercise of its discretion upon application by a liquidator.

[37] I am satisfied that the documents being sought by the applicant are documents of Yanjian Tonga Limited and not Yanjian Group and the applicant is not entitled to any orders under s. 275(1). I therefore turn to consider s. 275(2).

***The application of s. 275(2)***

[38] Before s. 275(2) is engaged the applicant must establish that the second respondent is "a person to whom section 270 applies" (s. 275(2)). As noted earlier, the operative requirement is "knowledge of the affairs of the company," and whether a person has the requisite knowledge of the affairs of the company will turn on the particular facts and aspects of the case.

[39] Mr. Edwards argued that as the second respondent had not acted on any business affairs of Yanjian Group he had no knowledge of the affairs of that company. I do not accept that is the case. JKCA Accountants prepared the annual financial statements of Yanjian Tonga Limited. They show the advance

for at least three financial years. Mr. Tufui acknowledges that JKCA Accountants are the accountants of Yanjian Tonga Limited and retains notes and bank statements, which one would expect were used in the preparation of the financial statements. It must be the case that the firm received instructions confirming the advance as well as the reduction and then cancellation of it. I am satisfied that Mr. Tupou has knowledge of the affairs of Yanjian Group as it relates to the composition of the advance and of the circumstances under which it was cancelled to a sufficient degree to fall with the category of person “having knowledge of the affairs of the company,” described in s 270(2)(e).

[40] I do not see any additional matters relevant to the exercise of my discretion that I have not previously referred to that might suggest it is inappropriate for me to exercise my discretion in favour of the applicant.

[41] For the reasons given, I intend to make orders requiring Mr. Tupou to attend to be examined on oath and to produce such documents as are in his possession or under his control (or the possession or control of JKCA Accountants) as are set out below.

### **Result**

[42] I make the following orders:

- (a) The first and second respondents are to attend before the Court on a date to be fixed, as set out in (b) below, and to be examined on oath or affirmation by the applicant or a law practitioner on her behalf on any matter relating to the business, accounts and affairs of Yanjian Group;
- (b) The date for such examination shall be determined at a conference to be held before Niu J at **9am on 26 August 2019**;
- (c) The respondents shall at least 10 days prior to the said examination produce:

- (i) Any bank statements of Yanjian Tonga Limited recording advances made by Yanjian Group to Yanjian Tonga Limited;
- (ii) Any lists/statements/accounting records of the engineering materials, machinery, accessories and office equipment (as well as their values) that formed part of the loan advance of August 2013 from Yanjian Group to Yanjian Tonga Limited;
- (iii) Any debenture securing payment of the said loan advance;

that are in the possession or under their control (including, in the case of the second respondent, in the files, records and databases of JKCA Accountants).

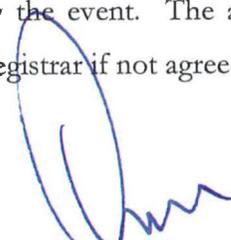
- (d) Such documents that are in the possession or under the control of the respondent's shall be delivered to the offices of the applicant's lawyer, Sione T Fonua, at Mailetaha, Nuku'alofa.

[43] I note that in its ruling of 17 April 2019 the Court of Appeal directed that this proceeding be determined by a Judge other than Nui J. I do not consider that such ruling precludes Niu J from conducting the examination of the respondents.

[44] I can see no reason why costs should not follow the event. The applicant is entitled to her costs which are to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 31 July 2019.



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