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

CV 25 of 2021

IN THE MATTER OF: An application to restore **TONGA SATELLITE LIMITED** ("the company") to the Register of Companies pursuant to section 338 of the *Companies Act* 1995 ("the Act")

BY: **KACIFIC BROADBAND SATELLITES INTERNATIONAL LTD** ("Applicant")

AND: **REGISTRAR OF COMPANIES** ("Registrar")

AND: **GOVERNMENT OF TONGA** ("Government")

Application to restore Tonga Satellite Limited to the Register of Companies

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs D. Stephenson for the applicant
Mr S. Sisifa SG for the Government
Date of hearing: 2 June 2021
Date of order: 2 June 2021
Date of reasons: 8 June 2021

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11 JUN 2021
11:40am

The application

1 By application filed on 19 April 2021, Kacific Broadband Satellites International Limited ("**Kacific**") seeks an order pursuant to s 338 of the *Companies Act* 1995 ("**Act**") that Tonga Satellite Limited ("**TSL**") be restored to the Tongan Register of Companies, and consequential orders.

2 At the conclusion of the hearing, having considered the material filed on the application and having heard from counsel for the parties, I granted the application and gave brief reasons. I indicated to the parties that I would provide full reasons for the decision in due course. These are those reasons.

Section 338

3 Section 338 of the Act provides:

> **338 Court may restore company to Tongan register**
>
> (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 —
>
> (i) there were not proper grounds for the removal;
>
> (ii) the company was a party to legal proceedings;
>
> (iii) the company was in receivership or liquidation or both;
>
> (iv) the applicant was a creditor or a shareholder or a person who had an undischarged claim against the company; or
>
> (v) the applicant believed that a right of action existed, or intended to pursue a right of action, on behalf of the company, under Part IX; 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 —
>
> (i) was a shareholder, director of the company;
>
> (ii) was a creditor of the company;
>
> (iii) was a party to any legal proceedings against the company;
>
> (iv) had an undischarged claim against the company; or
>
> (v) was the liquidator, or a receiver of the property, of the company;
>
> (b) the Registrar;
>
> (c) with the leave of the Court.
>
> (3) Before the Court makes an order restoring a company to the Tongan 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.

Grounds

4 Kacific contends that it has standing pursuant to s 338(2)(a)(ii) and (iii) of the Act and relies on the grounds set out in s 338(1)(a)(ii), (iv) and (b) of the Act. More particularly:

4.1 on 8 February 2021, a Notice of Change of Status of TSL was registered which recorded that it "has ceased to carry on business";

4.2 on 1 March 2021, a Registrar's Notice of Removal was registered which removed TSL from the Register;

4.3 the basis for removal of TSL from the Register was that the company had failed to file its annual return;

4.4 Kacific is a creditor of TSL in relation to a debt owed by TSL since 15 June 2019 and which remains unpaid;

4.5 at the time TSL was removed from the Register on 1 March 2021, Kacific had already taken legal steps to enforce payment of the debt by commencing arbitral proceedings on 19 January 2021;

4.6 notice of the arbitral proceedings was served on TSL on 19 January 2021;

4.7 the arbitral proceedings were in progress at the time TSL was removed from the Register and they remain in progress (with the next interlocutory step due on 7 June 2021); and

4.8 it is otherwise just and equitable for TSL to be restored to the Register.

Kacific's evidence

5 The application is supported by the affidavit of Christian Patourax, Kacific's Chief Executive Officer, sworn in Singapore on 16 April 2021. In summary, Mr Patourax deposed that:

5.1 Kacific is a company registered in Vanuatu. It carries on business as a satellite operator providing high-speed broadband internet services throughout South East Asia and the Pacific island regions.

5.2 Between January 2017 and January 2019, Kacific had discussions with representatives of the Kingdom of Tonga and with Tonga Cable Limited regarding the possibility of connecting the Kingdom (including its remote outer islands) to satellite broadband, with a focus on the Government's e-government initiative and as a backup solution for the Kingdom's undersea

internet cable.

5.3 On 20 January 2019, Tonga suffered an unexpected and sudden internet blackout as a result of damage to its fibre-optic submarine cable. Mr Patourax, who was attending the Pacific Islands Telecommunications Convention in Hawaii at the time, organised a task force which flew to the Kingdom to assist in re-establishing Tonga's internet access. The team deployed equipment in the Kingdom using Kacific's broadband satellite connectivity.

5.4 Subsequently, negotiations took place regarding a long-term agreement pursuant to which Kacific would provide satellite beam capacity services to the Kingdom.

5.5 On 2 April 2019, TSL was incorporated. TSL's capital consists of one share held by the Government of Tonga. Upon registration, TSL's named directors were Hon, Tu'i Uata (then Minister for Trade and Economic Development), Hon. Pohiva Tu'i'onetoa (then Minister for Finance and National Planning), Hon. Mateni Tapueluelu (then Minister of Police, Revenue & Customs), Hon. Poasi Tei (Minister for MEIDECC) and Hon. Saia Piukala (then Minister for Public Enterprises and for Health).

5.6 On 9 April 2019, Kacific and TSL signed a Framework Services Agreement ("**FSA**") pursuant to which Kacific agreed to provide satellite beam capacity services to TSL for a 15 year term to enable TSL, in turn, to provide internet coverage across the Kingdom including its outer islands. TSL's director, the Hon. Tu'i Uata, executed the FSA for and on behalf of TSL.

5.7 Pursuant to the terms of the FSA:

5.7.1 the contract price for the services was US$5,760,000;

5.7.2 Kacific was to invoice TSL for that amount by 30 April 2019;

5.7.3 TSL was to pay the invoiced contract sum in one instalment by 15 June 2019; and

5.7.4 the governing law of the FSA is the law of Singapore.

5.8 On 16 April 2019, Kacific issued its invoice for the contract sum.

5.9 TSL failed to pay the contract sum, by the due date, or at all.

5.10 On 18 June 2019, Kacific sent an overdue notice to TSL to pay the invoice. TSL did not respond.

5.11 On 16 June 2020, the Attorney General of Tonga, Mrs Linda Folaumoetu'i, wrote to Mr John Appleby, a New Zealand based lawyer, then engaged by Kacific, and asserted that Mr Tu'i Uata "*was not authorised to sign the FSA on behalf of TSL on 9 April 2019*", that the Tongan Cabinet had terminated the FSA and all transactions in relation to TSL had been discontinued as

of 25 October 2019.

5.12 On 14 December 2020, Kacific issued a Dispute Notice pursuant to the terms of the FSA notifying TSL of the existence of a dispute between the parties. TSL failed to respond.

5.13 On 19 January 2021, Kacific commenced arbitral proceedings against TSL and the Kingdom of Tonga by issuing a Notice of Arbitration under and pursuant to the Arbitration Rules of the Singapore International Arbitration Centre. The Notice of Arbitration was served on both TSL and the Kingdom of Tonga. The claim against the Kingdom is based on alleged representations by various government officials to Kacific that TSL had actual or apparent authority to act for and on behalf of the Kingdom and that the Kingdom would 'stand behind' TSL in the performance of its obligations under the FSA, upon which, Kacific relied when it decided to enter into the FSA.

5.14 On 1 February 2021, the Attorney General acknowledged receipt of the Notice of Arbitration and advised that she was acting on behalf of TSL and the Kingdom.

5.15 On 12 February 2021, the Attorney General filed a Response to the Notice of Arbitration on behalf of the Kingdom only, which stated, relevantly:

5.15.1 Neither TSL nor the Kingdom ever authorised Mr Tu'i Uata to sign the FSA as their agent or representative [2].

5.15.2 The Ministers listed on TSL's company registration form as its directors had no knowledge that they were directors of TSL at that time, they never signed a consent form to be directors, they had not once met as TSL's Board nor did they pass any special resolution authorising Mr Tu'i Uata to sign the FSA on behalf of TSL or the Kingdom [4].

5.15.3 At no time was there any actual or apparent authority granted to TSL to act on the Kingdom's behalf as there was a Cabinet Taskforce discussing satellite matters, not TSL or Mr Tu'i Uata [14].

5.15.4 The actions by Mr Tu'i Uata in setting up TSL, and registering it, did not fully comply with the legal requirements of the Tongan *Companies Act*, *Business Licences Act*, *Public Enterprises Act* and *Communications Act* and policy requirements of the Ministry of Public Enterprises, Ministry of Communications and the Ministry of Labour [16].

5.15.5 The Kingdom did not sign the FSA and therefore is not a party to it [17].

5.15.6 Mr Moala (then Chief Engineer at MEIDECC) was an employee of the Government of Tonga but was not authorised to make

commitments in relation to the FSA [18].

5.15.7 Cabinet decision dated 31 July 2019 was only for TSL to negotiate with Kacific. Neither Cabinet nor TSL endorsed, through any resolution, the signing of the FSA on 9 April 2019 [27].

5.15.8 Cabinet decision dated 25 October 2019, which provided that the Service Agreement between TSL and Kacific that was signed by the former Minister, Mr Tu'i Uata on 9 April 2019 in Fiji be terminated, is a clear direction from Cabinet that the agreement was not authorised by Cabinet. In the same decision, former Ministers, Mr Tu'i Uata, Mr Mateni Tapueluelu and Dr Saia Piukala were removed from being directors of TSL effective from 9 October [29(a)].

5.15.9 TSL was supposed to negotiate the details of the contract with Kacific and submit the details back to Cabinet for its approval before signing on behalf of Government pursuant to Cabinet decision dated 31 July 2019. Those instructions were never carried out by TSL [29(b)].

5.15.10 Cabinet decision dated 5 February 2021 provides that Cabinet decisions dated 28 September 2018 and 12 October 2018 which set up TSL be rescinded and that TSL be deregistered [29(c)].

5.15.11 On or about 11 February 2021, TSL was struck off the Register of companies in Tonga [29(d)].

5.16 TSL did not file any response to the Notice of Arbitration.

5.17 The arbitral tribunal was constituted on 16 March 2021.

5.18 The Cabinet decision to deregister TSL was made with knowledge of, and in response to, the Notice of Arbitration.

5.19 The Business Registries Office recorded that on 8 February 2021, the Registrar of Companies recorded a change of TSL's status to "Struck-Off" with a comment that the company had ceased to carry on business. Mr Patourax disputes the date stated in the Response on which TSL was struck off the Register because the Notice of Removal shows that TSL was removed from the Register on 1 March 2021 for "failure to file annual return".

5.20 As at 1 March 2021, when TSL was removed from the Register, Kacific was a creditor of TSL, and in that capacity, had already commenced arbitral proceedings against TSL.

5.21 Accordingly, Kacific seeks orders that TSL be restored to the Register so that the arbitral proceedings presently in progress can be concluded and legal remedies available to Kacific in respect of the debt owed by TSL can be pursued.

Government's evidence

6 The Government, as TSL's former sole shareholder and second respondent in the arbitration proceedings, opposes the application.[1]

7 The Government filed 11 affidavits. Four are from the former directors of TSL, with the notable omission of any affidavit from Mr Tu'i Uata. Each of the directors' affidavits follow a similar form and content. Also notably, many of the statements in the affidavits are prefaced by the words "as far as I am aware" without disclosing the source of any knowledge or belief. Notwithstanding, in summary, those directors deposed that:

7.1 On 28 September 2018, by decision no. 846, Cabinet decided to establish a satellite company, to look into other forms of connectivity than the sole fibre optic cable link that Tonga currently uses.

7.2 The loss of internet connectivity in about January 2019 was an 'eye-opener' for the need for a 'redundancy plan'[2] in relation to Tonga's internet connectivity.

7.3 There were ongoing talks with Kacific in relation to proposed satellite connectivity services, but they were only discussions and no decisions were made on whether to engage Kacific.

7.4 On 12 October 2018, Cabinet directed that:

7.4.1 the newly established public enterprise, TSL, be registered as a company under the *Companies Act*;

7.4.2 Government had approved start-up funds for TSL of $50,000; and

7.4.3 the directors be appointed as TSL's board (with Mr Tu'i Uata also appointed as Chairperson of the board).

7.5 TSL never met the 'prerequisite requirements' of a public enterprise.

7.6 They never completed the prescribed form for consent to act as a director of TSL as required under s 16A of the Act.

7.7 They never convened a TSL board meeting.

7.8 There either never was, or they did not sight, any constitution of TSL relating to its capacity, rights, powers or privileges as required by s 20 of the Act.

7.9 They became aware of Mr Tu'i Uata entering into the FSA with Kacific from various sources, including the media. That was a 'surprise' because there was never a Cabinet decision, board or shareholder resolution authorising Mr Tu'i Uata to enter into the FSA on behalf of TSL.

7.10 TSL was "nonoperational to be profitable and efficient as expected of a

[1] Memorandum filed 21 May 2021.

[2] Which I interpret as being meant to read 'contingency plan'.

comparable company... it never had an office, CEO, employees or assets".

7.11 The $50,000 start-up fund allocated by Government was never utilised by TSL.

8 Further, Mr Tapueluelu deposed that:

8.1 Notwithstanding Cabinet's decision no. 918, in which he was appointed as one of TSL's directors, he was never approached or informed that he would be so appointed prior to the issuing of that decision. He was only aware that he was a director of TSL when he received an email from a representative of Kacific which attached a list of TSL directors.

8.2 On 4 August 2020, he wrote to the Registrar of Companies and requested that he be removed as a director of TSL from the online Business Registry records.

8.3 'Overall, he was never aware that TSL existed'.

9 In his affidavit, the Hon. Rev. Dr Pohiva Tu'i'onetoa, now Prime Minister of Tonga, added:

9.1 He did not attend the Cabinet meeting on 12 October 2018 because he was away on official duties abroad.

9.2 He only became aware of Mr Tu'i Uata having entered into the FSA when he mentioned it during a Cabinet meeting.

9.3 On 24 May 2019, some six weeks after the FSA had been executed, he emailed Keith Moala in the following terms:[3]

"Keith,

Please as part of your job if I were you is to list your actions to be done in chronological order. First in that list if I were you, ***I must ensure that the company Tonga Satellite Ltd is properly set up legally, because that is the company that I want to work for in the future in order to make all my dreams come true. As I understand this work has not been done properly,*** *and you and Public Enterprises Ministry have been mandated to establish this company properly, but you have not come back to the Task Force with that product. The Task Force is waiting for that product.* ***You have sent me a budget proposal but without the legal status.*** *We cannot name the baby and registered [sic] it if she is yet to be born or come into existing business.*

Secondly, after step one is completed, we then confident [sic] to deal with outsiders because we have a proper legal status to work from as a base. You talk about negotiating with Kacific. If you do that who are you representing. If TSL, who are the directors? What are the TSL rules? What are their objectives? Is it a government public enterprise or a private business of the directors? Have you get [sic] the approval of the directors

[3] Exhibit E.

to carry out this negotiation on behalf of TSL? ***Government is different from TSL, and the two should no [sic] be mixed together. Of course we can interchange the two together internally, but when we are facing third parties we must ensure who is the legal entity that we are representing because actions can be sued by third parties, and especially in this case, it is a multi-million dollar deal!!!***

During our last discussion ***I reiterated the need to regularise the existing agreement with Kacific by TSL because there is no TSL now.*** *Government cannot be said is the same thing as TSL? Have you discussed this with Crown Law or your peers at Public Enterprise Ministry to see what our options are for the future, and how we can approach Cabinet to fund this agreement. This is involve [sic] legal advices and you and Public Enterprises should carry out this work towards this regularisation. It appears you work independently with your peers at PE, that is not what we intended from the Task Force because the work is a teamwork.*

Please forget thinking about negotiating to outsiders now until we regularise our legal position. ***You talk about negotiation with Kacific. If that goes ahead, you may end up add more issues [sic] to the present equation that we are still trying to solve.***

My advice is very clear in this matter. There is no two ways about this in my mind. ***You should decline the invitation from Kacific and inform them of the existing position of TSL. It has not been properly form as legal entity [sic] and therefore the contract is void.*** *However, you are working tirelessly to have this company established properly in legal form but it will take longer than it was anticipated and it cannot be completed by 30th of June 2019. It may take three months or more, given the Budget time for the country is the whole month of June.* ***However you are very much interested in the existing written agreement even TSL was not in existence during the time of signature.***

I believe you should inform Kacific of this position right away to avoid someone is (personally) liable for his signature.

Please I believe the best thing is to complete the current work on legal status and bring forth the legal structure of TSL to the Task Force first.

I believe the issue with ITU for continuing registration is different. But can be negotiated on behalf of Government if I understood you correctly of the issues surrounding it during our last discussion.

Do not hesitate to discuss my comments here with HON TU'I UATA *if you want to do that."*

[emphasis added]

10 Ilaisaane Manukalo Vea, the current Acting Head of Budget Division at the Ministry of Finance, deposed to being aware of Cabinet's Decision no. 918, dated 12 October 2018, as referred to above. She also confirmed that the $50,000 start-up fund that was allocated to TSL was identified internally within the Ministry budget and allocated under the Government General Fund program 4 in the 2019/20 estimate. The TSL start-up fund was never used and it lapsed at the

end of the 2020 financial year. The fund was then transferred to the Government Cash Reserves.

11 The excerpts of Ministry accounts exhibited to Ms Vea's affidavit[4] do not actually specify any allocation of $50,000 to TSL. Instead, the highlighted entries in the exhibits for the 2019/20 financial year, refer to a "Government General Fund", a Sub-program 02 being for "Consultants and Technical Assistance" and thereunder, for "Purchase of Goods and Services", a single sum of $100,000.

12 Sione Pulotu 'Akau'ola is, and was at all material times, the CEO for the Ministry of Public Enterprises. He deposed, relevantly:

12.1 On or about October 2018, he was "instructed by the then Minister of Commerce, Consumer Trade, Innovation and Labour (as it was then known), the Hon. Dr Tu'i Uata, and one Piveni Piukala endorsed by (the late) Hon. 'Akilisi Pohiva, to quickly draft a submission to Cabinet. The Cabinet submission was to facilitate the Company Registrar's requirements to register the satellite company, by filling out the prescribed form for the registration of the company, including the names of the directors of the company". He was instructed by Dr Tu'i Uata to include the names of the directors referred to above. [6]

12.2 TSL was registered on 2 April 2019 "without proper consultation with the Ministry to meet the relevant requirements of establishing a public enterprise". [8]

12.3 On 11 January 2019, by Cabinet decision no. 17, the Prime Minister's Reform Task Force for Public Enterprises was set up. The purpose of the task force was to be responsible to Cabinet for its roles in the reform of public enterprises, including the performing of directorship roles for the newly established TSL. The submission was issued by the Prime Minister's office to Cabinet, not from the Ministry of Public Enterprises. [10]

12.4 The members of the task force included four of the directors of TSL (excluding Mr Tapueluelu). [11]

12.5 TSL never met the prerequisite requirements of a public enterprise under the *Public Enterprise Act* because:

12.5.1 there was no needs assessment report, Business Case and Proposal to be presented to the task force and the board of directors;

12.5.2 there was no start-up Business Plan and Budget presented to the board of directors pursuant to s 18 of the *Public Enterprises Act*;

12.5.3 the task force never approved the company's Constitution that is required for business registration pursuant to s 16 of the *Companies*

[4] Exhibits B and C.

Act;

12.5.4 there was no business licence issued by the Registrar of Companies, only the Certificate of Incorporation;

12.5.5 there was no permanent office for TSL's operations which was contrary to s 16(2)(d) of the Act;

12.5.6 the appointment process for the TSL board of directors was not complete as there were no signed consents by the Chair and directors which was required pursuant to s 16A of the Act;

12.5.7 the TSL board never had any board meetings nor did they ever pass a resolution to approve the Chairman, Dr Tu'i Uata, to enter into any agreement on behalf of TSL; and

12.5.8 TSL was never operational because there was no Chief Executive Officer, no employees and no assets. [13]

12.6 Because the task force was directed to also perform directorship roles for the newly established TSL, in practice, the intention was that all relevant documents and decisions relating to TSL would first be submitted to the task force for discussion and scrutiny before being submitted to the TSL board of directors for final approval as required under the *Public Enterprises Act*. However, no matters relating to TSL were brought to the task force for further referral to the board of directors. [14]

12.7 He was surprised to learn that Dr Tu'i Uata had signed the FSA with Kacific because the task force had not provided any resolutions, nor had Cabinet approved, such steps to be taken by Dr Tu'i Uata. [15]

12.8 After frank discussions with then Acting Minister of Public Enterprises, Hon. Vuna Fa'otusia, it was decided that he was to draft a submission to Cabinet to discontinue any works or transactions regarding TSL until they settled the issues concerning the establishment of TSL and the execution of the FSA. [16]

12.9 As a result, a policy paper was submitted to Cabinet and on 25 October 2019, in decision no. 1195, Cabinet rescinded its previous decisions no. 846 dated 28 September 2018 and no. 918 dated 12 October 2018 and directed that all operations and transactions in relation to TSL cease and be discontinued effective from the date of the decision and that the Service Agreement (FSA) between TSL and Kacific that was signed by former Minister, Dr Tu'i Uata, on 9 April 2019, be terminated. [17]

12.10 On or about 4 February 2021, he prepared a policy paper for Cabinet to approve the deregistration of TSL from Tonga's Company Register because:

12.10.1 TSL was not properly set up according to the *Public Enterprises Act*;

12.10.2 TSL did not adhere to legal requirements under the *Companies Act*; and

12.10.3 the failure by Dr Tu'i Uata to obtain proper authorisation from the TSL board and Cabinet to enter into the agreement with Kacific. [18]

12.11 On 5 February 2021, as a result of the policy submission, Cabinet issued decision no. 84 whereby it rescinded its decisions no. 846 dated 28 September 2018 and no. 918 dated 12 October 2018 and directed the Ministry of Trade and Economic Development to process the deregistration and removal of TSL from Tonga's Company Register. [19]

13 Soane Patita Vahe is, and was at all material times, the CEO of the Ministry of Revenue & Customs. He deposed to the requirements of s 24 of the *Revenue Services Administration Act* by which the Minister of Revenue and Customs may require every person liable for consumption tax to apply, in the prescribed form, for a Taxpayer Identification Number ("**TIN**"). Pursuant to s 26, the Minister may require a taxpayer to state the taxpayer's TIN in any tax return, notice, or other document used for the purposes of any revenue law. The Ministry's records show that TSL was neither registered nor issued with a TIN.

14 Distaquaine Tu'ihalamaka is the Chief Executive Officer and Registrar of Companies within the Ministry of Trade and Economic Development. She deposed, in summary:

14.1 to the circumstances leading to the registration of TSL on 2 April 2019 and the issuing of its Certificate of Incorporation;

14.2 pursuant to s 16A of the Act, TSL was required to keep at its registered office signed consents by each of its directors although it was not required to file those consent forms with the Registry when submitting its application for registration;

14.3 the purpose of a Certificate of Incorporation pursuant to s 18 of the Act is only to confirm that all the requirements of the Act as to the registration have been complied with and, that from the date of incorporation stated in the certificate, the company has been incorporated under the Act. In other words, a Certificate of Incorporation is conclusive evidence of the formation of a company [12];

14.4 a company cannot operate or carry on business only with a Certificate of Incorporation but must also hold a valid business licence pursuant to s 4 of the *Business Licences Act*. In other words, a Certificate of Incorporation and Business Licence are required for the operation of a company [13];

14.5 since its registration, there is no record of TSL ever applying for or holding a valid business licence nor of it ever having registered a Tax Identification Number [14];

14.6 Cabinet's decision no. 1195 on 25 October 2019 which included the

removal of three of TSL's directors (Tu'i Uata, Tapueluelu and Piukala) was not implemented until 1 February 2021 because the prescribed forms for the change of directors were never lodged together with the Cabinet decision [17];

14.7 when a company meets the requirements to be removed from the Register under s 327 of the Act, the status of the company changes from "Registered" to "Struck-Off" on the Register. The terms "remove", "removal", "deregistered", "deregistration" and "struck off" are used interchangeably in the Registry, due to a defect in the computer system. However, they have the same effect as "removed" under the Act [22];

14.8 on 5 February 2021, by decision no. 84, Cabinet directed that its previous decisions no. 846 dated 28 September 2018 and no. 918 dated 12 October 2018 be rescinded, and for the Ministry to process the deregistration and removal of TSL from Tonga's Company Register [23];

14.9 on 10 February 2021, she sought legal advice from the Attorney General's office in relation to the implementation of Cabinet decision no. 84 [24];

14.10 on 11 February 2021, she implemented Cabinet decision no. 84 and removed TSL from the Register, on the ground that she, as Registrar, was satisfied that TSL had ceased to carry on business pursuant to s 327 (1)(b)(i) of the Act [25];

14.11 that was recorded through a Notice of Change of Status being registered which became effective as at 8 February 2021 [26];

14.12 further, as a result of TSL failing to file its annual return, which was due in August 2020, a Registrar's Notice of Removal was registered pursuant to s 326 of the Act thereby displaying TSL's entity status as "struck off" on the ground of failure to file its annual return. That notice was filed on 1 March 2021, although no documents were actually filed because the Registry system is programmed to automatically remove a company from the Register once the six month period to file an annual return expires [35].

15 The Attorney General deposed[5] relevantly that:

15.1 on 19 January 2021, she received the Notice of Arbitration;

15.2 on 1 February 2021, she mistakenly informed the Singapore International Arbitration Centre that she was representing both TSL and the Kingdom of Tonga;

15.3 after carrying out enquiries and obtaining full instructions from the Kingdom of Tonga, she realised that she was only acting for the Kingdom "and not for Tonga Satellite Limited for it's a separate legal entity";

15.4 on 12 February 2021, she corrected that mistake and informed the parties

[5] Affidavit sworn 21 May 2021 and supplementary affidavit sworn 25 May 2021.

to the arbitration that she only represents the Kingdom and not TSL.

16 The day before the hearing, the Solicitor General, Mr Sisifa, filed an affidavit in response to certain submissions made on behalf of Kacific (which are referred to further below). In summary, Mr Sisifa deposed that:

16.1 it was he, not the Attorney General, who provided legal advice to the Registrar in response to her request concerning the implementation of Cabinet's decision no. 84; and

16.2 on 10 February 2021, when the Registrar sought legal advice, she was 'well aware of the arbitral proceeding against TSL'.

17 In her email exchange with the Solicitor General, the Registrar wrote:

> *"I understand that this is quite urgent so we had a look at section 327 on grounds for removal from register. We are considering s 327(1)(b)(i) The Registrar is satisfied that the company has ceased to carry on business, however am being mindful that there is currently a legal issue between Tonga Satellite Ltd and a foreign company. They will question why there was no public notice to allow them to file an objection under s 330."*

18 To which, on 11 February 2021, the Solicitor General replied, relevantly:

> *"1. As Registrar, you may pursue removal of the company under section 327(1)(b)(i) if you are satisfied that the company has ceased to carry on business.*
>
> *2. You [sic] satisfaction in our view may be supported by CD no. 84 of 5 February 2021.*
>
> *3. The necessary notice that is required of the Registrar to file under section 327(1)(b)(i) is a notice under section 326 which provides...*
>
> *...*
>
> *5. It should be noted that a 'notice that a company has been removed from the Tongan register' under section 326, is separate and distinct from a 'notice of intention to remove a company' under sections 327(4) and 329.*
>
> *6. A notice of intention to remove a company under section 327(4) and 329 only applies to removal of a company under section 327(1)(c),(d) and (e), and does not apply to a removal under section 327(1)(a) and (b).*
>
> *7. We are therefore of the view that an objection to a removal from register under section 330 does not apply to a removal under section 327(1)(a) and (b), and specifically section 327(1)(b)(i) in the instant case. ..."*

Government's submissions

19 On behalf of the Government, the Solicitor General, Mr Sisifa, filed written submissions. The chronology provided therein included the following:

> *"9. On 26 April 2019, His Majesty's Cabinet in Cabinet Decision No. 528, decided to defer the documents in relation to the Kacific Agreement. They also directed that the TSL Chairman (Honourable Tu'i Uata) provide additional documents in relation to the establishment of TSL.*

10. On 31 July 2019, His Majesty's Cabinet in Cabinet Decision No. 867 made a decision to:

a. Accept the contract offered by Kacific;

b. Negotiate details of contract and submit to Cabinet for approval before signing; and

c. Order Government to make necessary payments to Kacific after signing the contract."

20 It will be recalled that the 31 July 2019 decision was referred to by the Attorney General in the Response filed on behalf of Government in the arbitration.[6] The 26 April 2019 decision was not. More importantly, however, for some unexplained reason, neither of those Cabinet decisions were exhibited to any of the affidavits filed on behalf of the Government. As such, the actual text (as opposed to the precis above) of those decisions was not in evidence.

21 Otherwise, the submissions on behalf of the Government, and to which Ms Macomber spoke during the hearing, may be summarised as follows:

21.1 As the Act does not contemplate repeat (or annual) removals,[7] the effective date of TSL's removal was 8 February 2021.

21.2 Notwithstanding that s 18 of the Act provides that a Certificate of Incorporation is conclusive evidence of the formation of a company, TSL never completed the 'pre-requisite requirements under the law to enable it to be recognised as a fully operational company':

21.2.1 a company cannot operate or carry on business only with a Certificate of Incorporation;

21.2.2 pursuant to s 4 of the *Business Licences Act*, a company must hold a valid business license to carry on business activity;

21.2.3 TSL never held a valid business licence;

21.2.4 therefore, TSL had no legal basis to be operating as a company or carrying out any business activity; and

21.2.5 further, any business activity that was conducted must be deemed unlawful.

21.3 The ground in s 338(1)(a)(ii) of the Act relied upon by Kacific, namely, that as at the date of its removal, TSL was a party to legal proceedings, should be rejected because:

21.3.1 even though the Act does not define the term "legal proceedings", that term and others such as 'proceeding', 'claim' or 'dispute' throughout the Act, 'mainly refer to court proceedings';

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[6] [5.15.7] hereof.

[7] Citing *'Amanaki v Government of Tonga* [2020] TOSC 56 at [50].

21.3.2 international arbitration cannot fall within the definition of 'legal proceeding' as it is a quasi-judicial form of proceeding which is not being presided over by a Judge;

21.3.3 the *Companies Act* applies to companies, whether local or overseas, that are registered in Tonga. Therefore the reference to legal proceedings in s 338(1)(a)(ii) only applies to legal proceedings in the courts of Tonga;

21.3.4 the unlawful signing of the FSA occurred on 9 April 2019 and the Notice of Arbitration was issued on 19 January 2021 but the *International Arbitration Act* only came into force on 3 March 2021. Pursuant to clause 20 of the Constitution, that Act cannot apply retrospectively.

21.4 The Government disputes that Kacific has an 'undischarged claim' against TSL because:

21.4.1 TSL was never set up properly and never fulfilled the pre-requisite requirements under the law to be a fully operational company;

21.4.2 Tu'i Uata was never authorised by either TSL's board of directors or Cabinet to enter into the FSA; and

21.4.3 therefore, the FSA was never lawful from the outset.

21.5 It would be unjust to restore TSL because:

21.5.1 it was formed, but was never set up completely to be able to conduct business activity;

21.5.2 as such, any business that it conducted, including the signing of the FSA, was unlawful; and

21.5.3 it was removed from the Registry on the ground that it had 'ceased to conduct business'.

Kacific's submissions

22 On behalf of Kacific, and in response to the Government's submissions, Mrs Stephenson submitted, in summary:

22.1 In accordance with s 18 of the Act, the certificate of incorporation issued for TSL on 2 April 2019 was conclusive evidence that all the requirements of the Act as to registration had been complied with, and from that date, TSL was incorporated under the Act.

22.2 TSL was not removed from the Register until 1 March 2021. Pursuant to s 326 of the Act, a company is removed from the Tongan Register when a notice is filed by the Registrar stating that the company is removed from the Tongan Register is registered under the Act. The "*Registrar Notice of Change of Status*" filed on 11 February 2021 was not a notice pursuant to

s 326. It was not until 1 March 2021 that the Registrar filed a "*Notice of Removal*" recording TSL's entity status as "*Struck Off*" which was the notice required by s 326. Otherwise, if the 11 February notice fulfilled s 326, the 1 March notice would have been entirely unnecessary.

22.3 By reference to *Moehau & Epic International Limited v Kingdom of Tonga & Registrar of Companies*[8] and *Amanaki v Govemment of Tonga*[9] and the New Zealand decisions referred to therein, the following principles are instructive:

22.3.1 It will be unusual for the Court to refuse to restore a company where restoration is required to enable the Applicant to pursue remedies against the company provided by the substantive law.

22.3.2 The Applicant bears the onus of establishing standing and of the ground(s) upon which it relies. Thereafter, restoration should follow unless an evaluative judgment of any discretionary factors weighs against the restoration, the onus of which is on the Respondent.

22.3.3 If the Applicant can satisfy any of the grounds in s.338(1)(a), then it will be unnecessary to consider the just and equitable ground in s.338(1)(b). However, even if the Court is satisfied that one of the s.338(1)(a) grounds exists, it still has a residual discretion whether to restore the company to the register.

22.3.4 As Bell AJ observed in *Salamanca Investments Limited (in Liq) v Wellington City Council and ors*:[10]

> *"...An application to restore a company to the register is not the occasion for a thorough examination of the merits of the applicant's claim. The process is a relatively summary one. The cases show that the merits of claims are rarely subject to in-depth scrutiny. In some cases, the courts check that claims will not be statute-barred. That aside, as long as the applicant appears to have a genuine case (as opposed to one which is frivolous, vexatious or without merit) which it is pursuing in good faith, the courts have not required an applicant to prove more."*

22.4 Kacific has standing, as required by s 328(2)(a), to bring the application under s 328(1) because at the time TSL was removed from the Register (being 1 March 2021):

22.4.1 Kacific was a creditor of TSL (s.338(2)(a)(ii)) in that TSL owed Kacific the contract price under the FSA; and/or

22.4.2 TSL was a party to legal proceedings brought by Kacific (s.338(2)(a)(iii)) in the form of the Singapore arbitral proceedings,

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[8] Unreported, CV 51 of 2016 (26 April 2017)

[9] [2020] TOSC 56

[10] [2011] NZHC 572

required by the FSA, commenced on 19 January 2021, and by which, Kacific seeks relief in respect of the said debt.

22.5 If the Court is satisfied that Kacific has the requisite standing pursuant to s 338(2), either as a creditor of TSL, or a party to legal proceedings against TSL at the time that TSL was removed from the Register, then the corresponding grounds for restoration contained in s.338(1)(a)(ii) (the company was a party to legal proceedings) or s.338(1)(a)(iv) (applicant is a creditor) are also satisfied. In those circumstances, restoration of TSL to the Register should be ordered subject only to any residual discretion whether to restore the company.

22.6 Further, pursuant to s 338(1)(b), it is also just and equitable to restore TSL to the Register because:

22.6.1 TSL (through its shareholder) has clearly demonstrated that it does not intend to fulfil its contractual obligations to Kacific under the FSA. Prima facie, it has no legal basis for this position. Mr Uata was named on the public record as a director of TSL and a Minister of the Tongan Government at the time that the FSA was signed. Kacific was entitled to assume that Mr Uata had authority to sign the FSA as a director of TSL. The FSA created a binding contractual obligation on TSL to pay the contract price by 15 June 2019.

22.6.2 With full knowledge that the arbitral proceeding had commenced on 19 January 2021 against both TSL and the Government, Cabinet, together with senior officers of the Government, proceeded to engineer the removal of TSL from the Register for the clear purpose of frustrating the arbitral proceeding against TSL.

22.6.3 The Registrar of Companies (who is also the CEO of the Ministry of Trade & Economic Development) was responsible for implementing Cabinet decision no. 84 of 5 February 2021 *"that the Ministry ... process the deregistration and removal of the Tonga Satellite Limited...from Tonga's Company Register."* The Registrar sought legal advice from the Attorney General's office. At that time, the Attorney General was also counsel on the record for the Government in the arbitral proceedings and was subject to a deadline to file a Response to the Notice of Arbitration by 12 February 2021. On 11 February 2021, the Registrar filed the "Notice of Change of Status" recording TSL's status as "struck off". On 12 February 2021, the Attorney General filed the Response on behalf of the Government, which included that TSL had been struck off the day before.

22.6.4 For the reasons stated above, TSL was not removed by the 11

February filing and was only removed, in accordance with s 326, on 1 March 2021. Therefore, the statement in paragraph 29(d) of the Response was misleading in that it inferred that TSL no longer existed as a legal entity as at 11 February 2021.

22.6.5 In simultaneously advising Government as the sole shareholder of TSL, advising Government in relation to the arbitral proceeding against it and TSL, and advising the Registrar in relation to the implementation of Cabinet's direction to remove TSL from the Register, the Attorney General was clearly in an ethical conflict of interest.

22.6.6 By s 337(1)(b) of the Act, the Registrar, of her own motion, could have restored TSL on the basis that, at the time it was removed, it was a party to legal proceedings. Although the Attorney General was clearly aware of the active arbitral proceeding against TSL at the time that the Registrar sought advice regarding implementation of Cabinet's directive, it does not appear that that information was ever disclosed to the Registrar. Had it been disclosed, the Registrar may have taken a prudent approach and declined to remove TSL from the Register.

22.6.7 It is apparent that pressure was brought to bear upon the Registrar to "fast track" TSL's removal so as to (i) comply with Cabinet's directive and (ii) enable the Attorney General to include the statement in the Response that TSL had been struck off the Register. In other words, the needs of Government were prioritised ahead of the fair and proper application of the law.

22.7 Kacific has a genuine dispute, supported by a written signed contract, which it has attempted to resolve with TSL before commencing arbitral proceedings. Further, Kacific's claim:

22.7.1 raises serious questions to be tried;

22.7.2 has been brought in good faith; and

22.7.3 is not frivolous or obviously without merit.

23 In response to the Government's bases for opposing the application, Kacific submitted:

23.1 There is no requirement at law that every company must carry on a business activity and obtain a business licence. Shelf companies are an obvious example of companies which exist but do not undertake any business activity. Section 4 of the *Business Licences Act* requires every business person in the Kingdom, carrying on a business activity, to hold a valid business license. 'Business person' is defined, relevantly, as *"... a* registered company (including an overseas company) ... carrying on any

business activity, whether for profit or not for profit". 'Business Activity' is defined, relevantly, to include "...any activity carried on by a business person for the purpose of generating revenue in trade, commerce or industry ....". Therefore, a business person is only required to hold a business licence if they are carrying on a business activity. TSL's intended business was to provide high speed broadband service via satellite throughout Tonga. Before it could carry on that business and provide that service, TSL needed to secure connectivity to Kacific's broadband satellite. Pursuant to the terms of the FSA, Kacific agreed to provide the necessary broadband satellite connectivity upon payment by TSL of USD$5,670,000. Once the satellite connectivity was paid for and established, TSL could commence its business of providing broadband services within Tonga. As a consequence of TSL failing to pay Kacific, TSL has never been in a position to carry on its proposed (or any) business activity. Therefore, the requirement for it to hold a business licence has never been triggered.

23.2 Further, any business activity carried on without a business licence does not deem such business activity to be "unlawful". Section 19 of the *Business Licences Act* provides that a business person who carries on a business activity without a business license commits an offence and is liable to fines up to a maximum of $1,000 and imprisonment. The business activity itself is not voided or unlawful - it is the business person carrying out the activity who is penalized.

23.3 To the Government's submission that the arbitral proceedings are not 'legal proceedings' for the purposes of s 338(1)(a)(ii):

23.3.1 the meaning of "legal proceedings" in s.338(1)(a)(ii) must be taken to be an expansive reference intended to cover all manner of proceedings available at law. Narrowing the meaning to Court proceedings in the manner suggested by the Government not only places an unnecessary limit on the plain words of the section, it also limits recognition of available and legitimate legal remedies, such as arbitration. In the absence of clear limiting words in the section itself, this cannot have been the intention of the Legislature;

23.3.2 the *Reciprocal Enforcement of Judgments Act* provides for registration and enforcement in Tonga of judgments given in foreign countries which accord reciprocal treatment to judgments of Tonga. A "*judgment*" is defined in that Act to include '... an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place'. The definition is a clear recognition that arbitral awards are as capable of registration and enforcement in Tonga as a judgment of a court

and that both are the result of a legal proceeding;

23.3.3 specific recognition and enforcement of international arbitral awards is now available in Tonga following the enactment of the *International Arbitration Act* which came into force on 3 March 2021. Section 46(6) of that Act permits an arbitral tribunal to award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in that court. An arbitral award made at the outcome of an arbitration proceeding enjoys the same status as a court judgment;

23.3.4 the Government's submission regarding any retrospective application of the *International Arbitration Act* to the arbitral proceeding commenced by Kacific is misconceived. The arbitral proceeding is governed by the SIAC rules, not the Tongan *International Arbitration Act*. The provisions contained in Part 10 of the Act will only be engaged if any award made in the arbitral proceeding is sought to be recognized or enforced in Tonga.

23.4 The Government's submission that "legal proceedings" should be interpreted as meaning only court proceedings *in Tonga*, lacks legal authority and is inconsistent with the underlying rationale of s 338. A company incorporated in Tonga has full rights, powers, privileges and capacity to carry on or undertake any business or activity, do any act or enter into any transaction both within and outside Tonga.[11] It is entirely inconsistent with these unfettered rights and powers that legal proceedings which might arise as a consequence of those rights and powers would be confined only to the Courts of Tonga. The plain wording of the section is clear and simply does not justify the restrictive interpretation that the Government seeks to place upon it.

23.5 The Government's submission that TSL was not set up properly as a public enterprise under the *Public Enterprises Act*, and for that reason also, the FSA was unlawful, is misguided and lacks a fundamental understanding of the effect of incorporation of a company under the Act. TSL became a legal entity in its own right on 2 April 2019. The Registrar deposed that, upon being satisfied that TSL's application was properly completed, she issued the certificate of incorporation. From that date, TSL had full capacity, rights, powers and privileges to undertake any business or activity, to do any act or enter into any transaction. The entering into of the FSA on 9 April 2019 created legally binding obligations on both parties. The fact that TSL, at that time, had not met the additional requirements of being a public enterprise under the *Public Enterprises Act* did not have any impact on, or relevance to, the contractual obligations created under the

[11] Companies Act section 20(1)

FSA.

23.6 Sections 22(1)(b)(c) and (d) of the Act (a codification of the common law 'indoor management rule') preclude the Government from now asserting, as against Kacific, that Mr Uata, a director of TSL, was not authorized to sign the FSA on behalf of TSL.

23.7 The Government's submissions in this regard are matters which have been raised in its Response and are directly in issue in the ongoing arbitral proceeding. Therefore, it would be premature for this Court to engage in a determination of these issues in the context of this application where the merits of claims are rarely subject to in-depth scrutiny. The Arbitral tribunal is the appropriate body whose jurisdiction has been engaged and which has authority to determine these matters in accordance with the law of Singapore.

Consideration

24 Notwithstanding Royal Assent to the Act having been granted in 1998, the only previous decisions in relation to s 338 appear to be *Moehau & Epic International Limited v Kingdom of Tonga & Registrar of Companies* (unreported, CV 51 of 2016, 26 April 2017) ("***Moehau***") and, more recently, *'Amanaki v Government of Tonga* [2020] TOSC 56 ("***Amanaki***").

25 It is convenient to recite the applicable principles on applications such as the present from the decision in 'Amanaki, commencing at [29].

26 In *Moehau*, Paulsen LCJ adopted the New Zealand approach to applications for restoration of companies pursuant to s.329 of the Companies Act (NZ) with a caveat that care must be taken to have regard to any material differences in the wording of the respective sections. For the purposes of the instant application, the relevant parts of the two provisions are virtually identical.

27 Sections 338(2)(a) and (b) identify those who may apply to restore a company to the register. Others must obtain the Court's leave under s.338(2)(c).

28 The grounds for restoration are set out in ss 338(1)(a) and (b). If the applicant can satisfy any of the grounds in s.338(1)(a), then it will be unnecessary to consider the just and equitable ground in s.338(1)(b). However, even if the Court is satisfied that one of the s.338(1)(a) grounds exists, the word "may" in the chapeau to s.338 means that it still has a residual discretion whether to restore the company.[12]

29 As noted in Kacific's submissions, generally, it will be unusual for the Court to refuse to restore a company where restoration is required to enable the applicant

[12] *Wellington City Council v Registrar of Companies* [2015] 3 NZLR 411 at [97]; *Re Trade Indemnity New Zealand Ltd, McSwain v Registrar of Companies* HC Auckland CIV 2003-404-6684, 12 December 2003 at [6].

to pursue remedies against the company provided by the substantive law.[13] The contest on such an application is between principles of access to justice and rules of pure administrative convenience.[14] In *Re Pranfield Holdings Ltd*, the Court stated the approach as:[15]

> *"...the somewhat peremptory power of the Registrar to remove deadwood from the corporate scene, will not prevail against the rights of those so removed, or of others with whom they have dealt, to reinstate the company to pursue remedies provided by substantive law, unless it is plain that the proceeding, if unsuccessful, will still be nugatory. This principle puts grand notions of access to law ahead of mere rules for administrative ease."*

30 The applicant bears the onus of establishing standing and of the ground/s upon which it relies. Thereafter, restoration should follow unless an evaluative judgment of any discretionary factors weighs against restoration, the onus of which is on the respondent.

Date of removal

31 The evidence and submissions revealed some controversy between the parties as to the date on which TSL was removed from the Register, namely, 8 February 2021 versus 1 March 2021.

32 Section 326 of the Act provides:

> **326 Removal from register**
>
> A company is removed from the Tongan register when a notice is filed by the Registrar stating that the company is removed from the Tongan register is registered under this Act.

33 The Act does not contain any prescribed form for such a notice. Exhibit I to the Registrar's affidavit bears the title "Particulars of Registrar Notice of Change of Status". It was filed on 11 February 2021 but states an " effective date" of 8 February 2021. The entity status was recorded as "Struck-Off" with the comment: "Company has ceased to carry on business". The basis for the Registrar's satisfaction that TSL had ceased to carry on business was never explained in her affidavit. Ms Macomber submitted that it could be inferred from Cabinet's decision no. 1195 on 25 October 2019 directing, inter alia, the cessation of all TSL's operations and transactions, and decision no. 84 on 5 February 2021, by which the previous decisions establishing TSL were rescinded. I will return to these matters further below.

34 While at paragraph 26 of the Registrar's affidavit, she repeated that the change of status became effective as of 8 February 2021, the reason for that apparent retroactive effect was nowhere to be found in her affidavit or the Act. Ms

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[13] *Moehau* at [28] citing *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 *Re Salamanca Investments Ltd; Wellington City Council v Registrar of Companies* [2015] 3 NZLR 411.

[14] *100 Investments Limited v Registrar of Companies* [2020] NZHC 880 at [33].

[15] *Re Pranfield Holdings Ltd* (2001) 9 NZCLC 262,577 at [20].

Macomber was unable to assist.

35 Exhibit J is entitled "Particulars of Registrar's Notice of Removal". It was filed on 1 March 2021 showing the status of TSL, again, being "Struck-Off". The balance of the document is difficult to understand. Immediately below the word "Status" is "20-May-2021". Directly under that, in bold, are the words "Previous Value". Under that, are the words "Failure to file annual return". The form of that notice is different to the previous in that there is no "Effective date" field shown and beside the field "Submitted by" has been left blank whereas on the previous notice, the corresponding field contains the word "Tonga".

36 The differences in the format of each document were never explained save that the 1 March 2021 notice was apparently automatically generated by the Registry system six months after the date on which the company's annual return fell due in August 2020.

37 In circumstances where, according to the Registrar, a system status of "struck off" is equivalent to "removal" as provided in Part XVII of the Act, and, as stated in *'Amanaki,*[16] the Act does not contemplate repeat removals, I am satisfied that TSL was removed from the Register on 11 February 2021.

38 Ultimately, however, and as both counsel accepted, any issue as to the date of removal was irrelevant to the determination of the application for restoration because the arbitral proceedings were commenced on 19 January 2021, that is, before either of the contended for dates of removal.

Was Kacific a creditor of TSL at the time of removal?

39 Contrary to the Government's submissions[17] erroneously directed to Kacific having an 'undischarged claim' against TSL, the first ground advanced by Kacific in its submissions is confirmed to the first limb of s 338(1)(a)(iv), namely, that as at the date of TSL's removal from the Register, Kacific was (and remains) a creditor of TSL.

40 As explained in *'Amanaki,*[18] a 'creditor' is generally defined as one to whom another person owes money.[19] Section 236 of the Act (within Part XIV - Compromises with Creditors) and s.249 (within Part XVI – Liquidation) define "creditor", relevantly, as including a person who, in a liquidation, would be entitled to claim in accordance with s.312 that a debt is owing to that person by the company. Section 312 broadly defines "admissible claims" against a company in liquidation as a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or liability or a liability for damages.

41 To assert that one is a creditor of another assumes, at least, the existence of either an admitted, or lawfully determined, legally enforceable debt. Here, that

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[16] [50]

[17] Part B

[18] [62]

[19] Mozley & Whiteley's Law Dictionary, 10th Edition, 1988.

question as between Kacific and TSL has not been admitted by TSL and, upon any restoration of TSL to the Register, is an issue before, and yet to be determined by, the arbitral tribunal. It is not a matter which should or can be determined by this Court on an application such as the present.

42 In *Re Salamanca Investments Ltd; Wellington City Council v Registrar of Companies* [2015] 3 NZLR 411 ("***Salamanca***"),[20] Bell AJ observed that in cases where a creditor wishes to have a company restored to the register for the purpose of starting or continuing a legal proceeding against the company, an application to restore a company to the register is not the occasion for a thorough examination of the merits of the applicant's claim. The process is a relatively summary one in which the merits of claims are rarely subject to in-depth scrutiny. In some cases, the courts check that claims will not be statute-barred. That aside, as long as the applicant appears to have a genuine case (as opposed to one that is frivolous, vexatious or without merit), which it is pursuing in good faith, the courts have not required an applicant to prove more. Bell AJ explained this 'low threshold' as the law's 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.

43 In Australia, the test has been described no higher than appearing that the claim raises a serious question to be tried, and that all other ways of seeking relief have been exhausted.[21]

44 Therefore, this court is not required, equipped or concerned with determining whether, as a matter of law, Kacific *was/is* a creditor of TSL but rather whether Kacific's *claim* to being a creditor of TSL is genuine, not frivolous, vexatious or without merit, is being pursued in good faith, raises a serious question to be tried, and that all other ways of seeking relief have been exhausted.

45 As articulated in the Notice of Arbitration, Kacific's claim is a simple one:

45.1 TSL was incorporated on 2 April 2019;

45.2 on 9 April 2019, Kacific and TSL entered into the FSA;

45.3 by which, TSL requested Kacific to supply and Kacific agreed to supply specified satellite communications services, for a specified price;

45.4 Kacific claimed payment of the contract price pursuant to the terms of the FSA;

45.5 despite repeated demands, TSL has failed, refused and/or neglected to pay the contract in accordance with the terms of the FSA, or at all; and

45.6 as a result, TSL is indebted to Kacific for the contract price; alternatively, TSL is liable in damages for breach of contract.

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[20] Ibid at [104] referred to in *Moehau* at [33].

[21] *Holli Managed Investments Pty Ltd v ASC* (1998) 160 ALR 409; *Newham v ASIC* (2000) 35 ACSR 147.

46 On the evidence adduced by, and submissions made on behalf of, Kacific, I am satisfied that its claim is genuine, not frivolous, vexatious or without merit, is being pursued in good faith, raises a serious question to be tried, and that all other ways of seeking relief have been exhausted.

Government's contentions

47 I have reached that conclusion mindful of the fact that, in its opposition to this application, the Government, as TSL's former sole shareholder, did not actually engage directly with any of the above considerations. Instead, and as I apprehend the submissions made on its behalf by counsel representing the Solicitor General, the Government sought to have this Court determine, in the context of an application to restore TSL to the Register, that Kacific's claim against TSL in the arbitration cannot succeed (or to use summary judgment parlance, that it has no real prospects of success), and therefore to restore TSL to the Register would be futile (or 'nugatory' as per *Pranfield*), for three main reasons:

47.1 TSL was 'not set up properly' in that it 'never completed the pre-requisite requirements under the law to enable it to be recognised as a fully operational company';

47.2 Mr Tu'i Uata was not authorised by Cabinet or the TSL Board to enter into the FSA; and

47.3 by reason of TSL not holding a business licence, the FSA is unlawful and therefore unenforceable.

48 For the reasons which follow, the Government's approach was misconceived and it submissions must be rejected. I will address each in turn.

First Government contention: "TSL was not set up properly ..."

49 The Government's first argument that "TSL was not set up properly in that it 'never completed the pre-requisite requirements under the law to enable it to be recognised as a fully operational company" appears to have been raised in its Response as referred to in paragraph 5.15 above. Therefore, it is an issue before the arbitral tribunal to consider and determine, and in accordance with Singaporean law.

50 However, as the Government also raises this issue as a basis for its opposition to TSL being restored, for that purpose, and in that context only, I make the following findings and observations, in accordance with Tongan law:

50.1 Apart from a reference to Part II of the Act as "clearly stat(ing) the essential requirements as to the incorporation of a company", none of those requirements were ever specified by the Government in its submissions.

50.2 The Government did not make any submissions as to how non-compliance with any of the unspecified requirements of the Act affected TSL's status as a registered company under the Act, its legal ability to enter into the

FSA or how any non-compliance might vitiate the FSA or render it unenforceable at law.

50.3 By clause 8.1 of the FSA, each party warranted that it was "duly established under the Laws of the jurisdiction in which it is incorporated" and that it had "full power and authority to enter into and perform its obligations under" the agreement.

50.4 Sections 18 (which was acknowledged in the Government's submissions) to 20 of the Act provide:

> **18 Certificate of Incorporation**
>
> A certificate of incorporation of a company issued under section 17 is conclusive evidence that —
>
> (a) all the requirements of this Act as to registration have been complied with; and
>
> (b) on and from the date of incorporation stated in the certificate, the company is incorporated under this Act.
>
> **19 Separate legal personality**
>
> A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the Tongan register.
>
> **20 Capacity and powers**
>
> (1) Subject to this Act, any other enactment and the general law, a company has, both within and outside Tonga —
>
> (a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and
>
> (b) for the purposes of paragraph (a), full rights, powers and privileges.
>
> (2) The constitution of a company may contain a provision relating to the capacity, rights, powers or privileges of the company only if the provision restricts the capacity of the company or those rights, powers and privileges.

50.5 A certificate of incorporation for TSL was issued on 2 April 2019. Therefore, from that date:

50.5.1 all the requirements of the Act as to registration had been complied with;

50.5.2 TSL was a separate legal entity; and

50.5.3 it had full capacity to enter into the FSA.

51 As to the more specific concerns expressed by the directors and other witnesses who gave affidavit evidence, as recited in paragraphs 7 and 12.5 above:

51.1 The provisions of the *Public Enterprises Act* ("**PEA**") apply in addition to,

and not in substitution for, the provisions of the *Companies Act*.[22] The PEA applies to public enterprises. Public enterprises are defined as being the entities listed in the Schedule to that Act.[23] TSL is not, and never has been, listed among the 13 entities in the Schedule. Therefore, at all material times, the PEA did not apply to TSL.

51.2 Further, even if the PEA applied, that Act does not contain any provision to the effect that non-compliance with any of its operational requirements, such as failure of the Chairman of the board to deliver to the Minister a draft business plan not later than 2 months before the commencement of each financial year (s 18),[24] or failure by the board to appoint a Chief Executive officer (s 26), or failure by the CEO to employ any necessary support staff (s 27), could invalidate any transaction entered into by TSL such as the FSA. More significant non-compliances or misconduct are dealt with by potential removal of directors (s 14(6) and (7)).

51.3 Section 16 of the Act does not require a Government task force to approve TSL's Constitution. That provision sets out the form and content requirements for an application for registration of a company. Subsection (1)(d) requires the application to include a document certified by at least one applicant as the company's Constitution where the company does not adopt the standard Constitution provided for in the First Schedule to the Act. Section 32(3) provides that, except in so far as the provisions of the Standard Constitution are excluded or modified by, or are otherwise inconsistent with, the provisions of the Constitution of the company under s 33, the provisions of the Standard Constitution are deemed to be included in the Constitution of the company. In the absence of any evidence that the application for TSL's registration contained any other provisions for its Constitution, the Act's Standard Constitution was TSL's Constitution. As noted above, in issuing TSL's Certificate of Incorporation (on the same day as the application for registration was submitted), the Registrar was satisfied, and thus confirmed, that the application for registration fulfilled all the requirements of the Act.

51.4 Section 16(2)(d) of the Act does not require a company to have a 'permanent office' for its operations. It requires an application for registration to state the registered office of the proposed company. Here, the application for TSL described that, perhaps not surprisingly, as the office of 'Tonga Cable Limited'.

51.5 Section 16A of the Act does not expressly require a signed consent to complete the appointment process of a company director. It requires a

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[22] Section 6 of the PEA.

[23] Ss 2 and 5(1).

[24] The PEA does not contain reference to any "needs assessment report", "Budget" or "Business Case and Proposal" as referred to by Mr 'Akau'ola.

company to keep at its registered office a signed consent by each person named as a director of the company in the prescribed form and to produce such consents to the Registrar of Companies when required to do so by written request. Insofar as the evidence on behalf of the Government was that none of the original five directors of TSL provided written consents to act (although Mr Tu'i Uata was not heard from), s 151 provides that a person shall not be appointed a director of a company unless he [or she] has, in the prescribed form, consented to be a director and certified that he is not disqualified from being appointed or holding office as a director of a company. Curiously, s 14 of the PEA does not require the consent of a director appointed to the board of a public enterprise. They are simply appointed by the Minister, with the consent of Cabinet. In any event, and importantly to the instant case, s 157 of the Act provides that the acts of a person as a director are valid even though the person's appointment was defective or he/she is not qualified for appointment.

51.6 The Act does not require board meetings. Clause 99 of the standard constitution provides that a director of a company *may* convene a meeting of the board by giving notice in accordance with the clause. Clause 105 permits the board to regulate its own procedures.

Second Government contention: "Mr Tu'i Uata was not authorised"

52 The Government's second argument that Mr Tu'i Uata was not authorised by Cabinet or the TSL board to enter into the FSA has also been raised in its Response in the arbitration. Therefore, again, that is a matter to be considered and determined by the arbitral tribunal, according to Singaporean law. However, insofar as the issue is advanced by the Government on this application, I make the following findings and observations:

52.1 None of the evidence adduced on behalf of the Government, nor its submissions, referred to any statutory provision or other legal principle to support the apparent assertion that, to be valid and enforceable at law, the FSA had to have first been approved by Cabinet.

52.2 Section 128 of the Act provides that a company shall not enter into a major transaction unless the transaction is approved by special resolution (meaning a majority of 75%) or contingent on approval by special resolution. By reference to s 106(1)(b), the special resolution is to be passed by a company's shareholders. Assuming for present purposes that the FSA was a "major transaction" as defined in s 128(2), and that no special resolution was passed by the Government approving TSL's entry into the FSA, the question arises as to whether that breach of the Act has, or might have, any bearing on Kacific's claim. The Act is silent as to the consequences of a breach by a company of s 128.

52.3 Following on from s 20 of the Act, referred to above, s 21(1) provides,

relevantly, that no act of a company is invalid merely because the company did not have the capacity, the right or the power to do the act. Further, pursuant to ss (3), the fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act.

52.4 The question is further answered by s 22, which provides:

> **Dealings between company and other persons**
>
> (1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights or interests from the company that —
>
> (a) this Act or the constitution of the company has not been complied with;
>
> (b) a person named as a director of the company in the most recent notice received by the Registrar under section 158 —
>
> (i) is not a director of a company;
>
> (ii) has not been duly appointed; or
>
> (iii) does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise;
>
> (c) a person held out by the company as a director, employee or agent of the company —
>
> (i) has not been duty appointed; or
>
> (ii) does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise;
>
> (d) a person held out by the company as a director, employee or agent of the company with authority to exercise a power which a director, employee or agent of a company carrying on business of the kind carried on by the company customarily have authority to exercise, does not have authority to exercise that power;
>
> (e) a document issued on behalf of a company by a director, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine —
>
> Unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a) to (e), as the case may be.
>
> (2) Subsection (1) applies even though a person of the kind referred to in paragraphs (b) to (e) of that subsection acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company or with a person who has acquired property, rights or interests from the company has actual knowledge of the fraud or forgery.

52.5 There is no evidence before me that, at the time of entering the FSA, Kacific had knowledge of any of the relevant facts founding the Government's second argument.

52.6 And finally, s 189 provides:

> **Method of contracting**
>
> (1) A contract or other enforceable obligation may be entered into by a company as follows:
>
> (a) an obligation which, if entered into by a natural person, would, by law, be required to be by deed, may be entered into on behalf of the company in writing signed under the name of the company by —
>
> (i) two or more directors of the company;
>
> (ii) one or more directors of the company;
>
> (iii) if the constitution of the company so provides, a director, or other person or class or persons whose signature or signatures shall be witnessed; or
>
> (iv) one or more attorneys appointed by the company in accordance with section 190.
>
> (b) an obligation which, if entered into by a natural person, would, by law, be required to be in writing, may be entered into on behalf of the company in writing by a person acting under the company's express or implied authority;
>
> (c) an obligation which, if entered into by a natural person, would not, by law, be required to be in writing, may be entered into on behalf of the company in writing or orally by a person acting under the company's express or implied authority.
>
> (2) Subsection (1) applies to a contract or other obligation —
>
> (a) whether or not that contract or obligation was entered into in Tonga; and
>
> (b) whether or not the law governing the contract or obligation is the law of Tonga.

53 Accordingly, I am satisfied that the Government's second contention is not a sufficient basis for refusing the present application.

Third Government contention: "The FSA is unlawful"

54 The Government's third contention is that by reason of TSL not holding a business licence, the FSA is unlawful and therefore unenforceable.

55 To date, the Government has not raised this issue in its Response in the arbitration. Once again, however, if and when the Government (or TSL) raises this issue, it will fall for consideration and determination by the arbitral tribunal, and in accordance with the laws of Singapore. On the hearing of this application,

the Government did not adduce any evidence, nor did it make any submissions in relation to this issue, according to the laws of Singapore. For that reason alone, and for the purposes of this application, this contention too is misconceived.

56 Nonetheless, as it has been raised on this application as a basis for not restoring TSL to the Register, I will deal with it on the basis that it has been put, namely, according to the laws of Tonga.

57 Of all the Government's submissions, this one, at first blush, appeared to have some merit. However, upon closer examination, and for the reasons which follow, that appearance too was only superficial.

58 The preamble to the *Business Licences Act* ("**BLA**") describes it simply as 'an Act providing for the licensing of business activities'.

59 Relevantly, s 4 of the BLA provides:

> **Business person shall hold licence**
>
> Subject to this Act, every business person in the Kingdom carrying on a business activity shall hold a valid business licence.

60 The terms 'business person' and 'business activity' are defined as per paragraph 23.1 above.

61 I do not accept Mrs Stephenson's submission that s 4 in not engaged on the facts of this application because until TSL paid the FSA price, and Kacific then provided the services, TSL was not able to engage in any business activity. As both counsel accepted during argument, there can be little doubt that TSL's purpose in entering the FSA was to be able to 'generate revenue' by on-selling communications services to end users, particularly in the outer islands, once the satellite connectivity was established. Therefore, in my view, when TSL entered into the FSA, it engaged in business activity. Thus, pursuant to s 4, at that time, TSL was required to have a business licence. It did not have one and therefore it contravened s 4.

62 Pursuant to s 19(1) of the BLA, and subject to subsection (1A), a contravention of s 4 constitutes an offence, which, for a first offence, attracts a fine not exceeding $50 for each day the offence continues to a maximum of $500. Subsection (1A) provides that if the Registrar determines that a business person is acting in violation of subsection (1), then the Registrar shall inform the business person of the offence in writing with all relevant details of the offence and provide the business person five working days within which to apply for a business licence or an amended business licence. It would appear from the use of the word "shall" that the purpose of ss (1A) is that a fine will not be imposed until the Registrar has issued the notice and the five days have elapsed. That interpretation is supported by regulation 13 of the *Business Licences Regulations* which provides that where a licensee fails to comply with the Act or the Regulations, the Registrar *may* impose a penalty as prescribed under the Act. Further, where the Registrar imposes a penalty, he/she shall advise the licencee in a written communication.

63 Here, there is no evidence of the Registrar issuing to TSL any notice under ss 19(1A), or penalty in accordance with regulation 13, nor of any legal proceedings being taken in the Magistrates Court pursuant to s 20. It must follow therefore, that, at the relevant time, the Registrar did not determine that TSL was acting in violation of the Act.

64 The Government did not advance any authority or analysis for its conclusion that TSL's breach of s 4 of the BLA renders the FSA unlawful and therefore unenforceable. The contention raises two issues, namely:

64.1 does a breach of s 4 render the relevant business activity (here, entering into the FSA) unlawful; and

64.2 if it does, is Kacific precluded from seeking to enforce the FSA?

65 The BLA does not contain any express provision to the effect as contended for by the Government. The question therefore becomes whether the Government's contention can be supported on the proper interpretation of the Act as a whole.

66 The modern common law approach to statutory interpretation by consideration of the text, context and purpose of the relevant enactment has been discussed by the Court of Appeal on a number of occasions.[25]

67 As noted, there is nothing in the text of the BLA which provides that a contravention of s 4 renders the relevant business activity unlawful. The Government's contention would require s 4 to be read as prohibiting any business activity by any business person who does not have a business licence. Section 4 does not say that.

68 That may be contrasted with s 5 which describes the circumstances in which a business license will not be issued. They include where a person is carrying on a 'prohibited activity'. Section 3 defines a 'prohibited activity' as any of the activities listed in Schedule 1 to the Act. Section 19(3) prescribes additional penalties for any person carrying on a prohibited activity. According to the said Schedule, the entering into an agreement such as the FSA is not a prohibited activity.

69 The context in which s 4 operates is that it simply gives effect to the essential purpose of the BLA, namely, to require business persons to be licensed. The only other positive requirements in the BLA are that a business licence is to be:

69.1 displayed in a conspicuous place in or at the licencee's principal place of business (s 16); and

69.2 produced on demand by the Registrar or a police officer who has reason to believe that a business person is required to hold a business license (s 17).

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[25] For example, see *Wiebenga v 'Uta'atu* [2005] TOCA 5, *Crown v Schaumkel* [2012] TOCA 10 and *R v 'Atoa* [2019] TOCA 16.

70 In my view, the purpose of the BLA, as evidenced by its operative terms, does not include invalidating any business activity (other than, arguably, a 'prohibited activity') conducted by a business person without a business licence.

71 Further, in *Yang v Manoa* [2016] TOCA 3, the Court of Appeal cited with approval the explanation by the plurality of the High Court of Australia in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 513 [23] that an agreement may be unenforceable for statutory illegality in three categories of case, namely, where:

71.1 the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;

71.2 the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act, the doing of which, is prohibited by the statute; or

71.3 the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a contract associated with or in the furtherance of illegal purposes.

72 In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract ... as void and unenforceable'.

73 As a matter of legislative construction, the likelihood of adverse consequences for the "innocent party" to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language: *Gnych v Polish Club Limited* (2015) 255 CLR 414 at [45].

74 The law in England concerning the rights of a party where the statute only penalises the other party is to the same general effect: *Yang v Manoa*, ibid, at [22].[26]

75 Moreover, where legislation provides for a penalty in the event of non-compliance with a statutory command, it is presumed that the statutory penalty is intended to cover the field in terms of consequences, and not render acts in contravention of the statute illegal or invalid: *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 219–220, 226–227 and 244; *Gnych v Polish Club Ltd*, ibid, at 427.

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[26] Citing Chitty on Contracts Vol 1, 29th edition (2004) at para 16 – 153.

76 The nature of the Government's contention here is tantamount to a purported defence of *ex turpi causa non oritur actio* (no cause of action should arise from illegal acts). The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts: *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 (CA),[27] where Kerr LJ identified three main categories of cases where the *ex turpi causa* defence would prima facie succeed:

76.1 Where the plaintiff sought, or was obliged, to found his claim on an illegal contract or to plead its illegality in order to support his claim.

76.2 Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct.

76.3 A residual category covered by the general principle cited above.

77 His Lordship added, however, that the defence must be approached "pragmatically and with caution, depending on the circumstances".[28]

78 In the Tongan context, the ex turpi causa defence was explained by the Court of Appeal in *Prasad v Leonard* [2015] TOCA 17:

> *"[23] What is often referred to as the ex turpi causa defence is based on public policy and was stated as follows in the oft-quoted dictum of Lord Mansfield CJ in Holman v Johnson (1775) 1 Cowp 341 at p 343:*
>
> > *"No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."*
>
> *[24] The way in which the defence is to be applied has been widely debated and the question of what acts constitute turpitude for the purpose of the defence and the relationship the turpitude must have to a claim has been the subject of conflicting lines of authority. For the purposes of Tongan law the inconsistencies have been authoritatively resolved by the recent decision of the Supreme Court of the United Kingdom in Les Laboratoires Servier v Apotex Inc [2015] AC 430.*
>
> *[25] Lord Sumption's judgment provides clear direction on two pivotal issues in this case. The first concerns the acts that constitute the illegality. The paradigm case, as Lord Sumption said (at 446), is a criminal act. But there is, in addition, a limited category of acts which he described as "quasi–criminal", one of which is the infringement of statutory rules enacted for the*

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[27] Referred to in *Leason v Attorney-General* [2014] 2 NZLR 224 at [93].

[28] At 35.

protection of the public interest and attracting civil sanctions of a penal character. ....

[26] The second issue concerns the relationship of the illegality to the claim. In Laboratoires the Supreme Court confirmed the earlier decision of the House of Lords in Tinsley v Milligan [1994] 1 AC 340 which rejected a test that would require the court to decide whether it would be "an affront to the public conscience" to grant the plaintiff relief. The value judgment required by such a test was recognized as likely to give rise to uncertainty and, potentially, to injustice.

[27] While unanimous in dismissing the public conscience test, the House in Tinsley v Milligan had been divided on what should take its place. The majority preferred the "reliance test" whereby the claim would be barred only if the claimant needed to rely on (i.e. to assert, whether by way of pleading or evidence) facts which disclosed the illegality. The minority preferred a test that would bar any claim tainted by a sufficiently close factual connection with the illegal purpose. For present purposes it does not matter which test is adopted. As Lord Sumption commented in Laboratoires at 442;

> *"Both are intended to exclude those consequences of an illegal act which are merely collateral to the claim. Neither makes the application of the illegality defence dependent on a value judgment about the significance of the illegality or the consequences for the parties of barring the claim. For present purposes, it is enough to point out that neither test is discretionary in nature. Neither of them is based on achieving proportionality between the claimant's misconduct and his loss, a concept derived from public law which is not easily transposed into the law of obligations."*

79 In *Leason v Attorney-General*,[29] the New Zealand Court of Appeal noted that in other jurisdictions different policy reasons for the defence of ex *turpi causa* have been adopted, such as the need for consistency, coherence of the law and the integrity of the legal system. For example, in the Canadian Supreme Court decision of *Hall v Hebert* [1993] 2 SCR 159 at 176, McLachlin J on behalf of the majority stated:

> *"A more satisfactory explanation for [the case law], I would venture, is that to allow recovery in these cases would be allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web".[30] We see thus that the concern, put at its most fundamental, is with the integrity of the legal system."*

80 That statement has been expressly adopted by the High Court of Australia in *Miller v Miller* (2011) 242 CLR 446 at [15] where the majority remarked that

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[29] Supra, at [103]

[30] Ernest J Weinrib "Illegality as a tort defence" (1976) 26 UTLJ 28 at 42.

"*the central policy consideration at stake is the coherence of the law*". It has also been endorsed by Lord Sumption, writing extrajudicially, that "*if the law stigmatises the conduct of the Claimant as illegal or criminal, it is inconsistent for it to allow legal rights to be founded on that conduct*".[31]

81 Application of the above principles immediately exposes the misconception in the Government's contention. The unlawful conduct complained of is that of TSL, not Kacific. There is no evidence or even suggestion that Kacific has engaged in any unlawful conduct upon which it must rely to advance its claim in the arbitral proceedings against TSL. Therefore, and by analysis and application of the laws of Tonga, the failure by TSL to obtain a business license prior to its entry into the FSA does not render Kacific's claim pursuant to the FSA unenforceable.

82 For those reasons, the Government's third contention also fails.

Are the arbitral proceedings "legal proceedings"?

83 Being satisfied that Kacific has established its first ground for the restoration of TSL, there is, strictly speaking, no need to further consider or determine the other grounds upon which it relies. However, as the Government has opposed the application on those grounds as well, I will address them.

84 The Government's submissions in relation to this ground may be reduced to this: "legal proceedings" for the purposes of s 338(1)(a)(ii) means only court proceedings in Tonga and therefore excludes the subject arbitral proceedings between Kacific and TSL.

85 As noted in the Government's submissions, the term "legal proceedings" is not defined in the Act. Therefore, once again, this issue calls for an exercise in statutory interpretation.

86 At the outset, it does not follow, as the Government submitted, that the use of the phrase "legal proceedings" and other words throughout the Act such as 'proceeding', 'claim' or 'dispute', only refer to court proceedings. There is nothing in the text of s 338 or any other provision within the Act which expressly excludes arbitral proceedings. Equally, that phrase does not appear anywhere within the Act. That is perhaps not surprising given that, despite a number of domestic statutes referring to arbitration or arbitral awards,[32] Tonga does not presently have any domestic commercial arbitration legislation. It was only on 3 March 2021 that the *International Arbitration Act* came into force. Nonetheless, the Supreme Court has in the past, and by application of common law principles, acknowledged, and given effect, to domestic arbitration awards: e.g. *Fletcher*

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[31] "Reflexions on the Law of Illegality" (speech to the Chancery Bar Association, 23 April 2012) at 17 (available at <www.supremecourt.gov.uk>).

[32] For example, the Asian Development Bank Act, Carriage of Passengers and Luggage by Sea Act, Co-operative Societies Act and its Rules, Civil Aviation (Airport Charges) Regulations, Communications Act, Foreign Investment Act, Petroleum Mining Regulations, Shipping Act, Tonga Electric Power Board Act, and many more.

Construction Co Ltd v Montfort Bros [1995] Tonga LR 142.

87 The context and purpose of s 338 are important indicators to the proper resolution of this issue. Generally speaking,[33] once a company is removed from the Register, and subject to its restoration, the company ceases to be a separate legal entity. Therefore, without either a decision by the Registrar to restore the company, or an order of the Court, any form of legal proceedings taken against the company prior to its removal will become a nullity because the company, as a party to such proceedings, no longer exists.

88 The evident purpose therefore of provisions such as s 338, and its equivalent in other corresponding legislation throughout the region, is to enable a party with a claim against the company to pursue whatever legal rights and remedies that party has, or may have, to their just conclusion. In this case, Kacific and TSL chose arbitration as the procedure for determining their disputes under the FSA.

89 Subject also to ss 256 and 257 of the Act (referred to below), s 338 is also a means of preventing those in control of a company from seeking to avoid liability for any debts incurred or loss and damage caused by the company to another party by simply having the company removed from the Register. The provision is not concerned with whether, upon restoration, the plaintiff or claimant, if successful, will actually recover any such debt or damages when seeking to enforce any judgement or award. Where the company has no assets, liquidation may well follow. However, there are a myriad of other types of relief that may be available to an aggrieved party. and to which it cannot have recourse. without an order following the completion of successful legal proceedings.

90 All legal proceedings involve processes by which the parties to a legal dispute are to be heard and for a lawfully appointed person or tribunal to determine the dispute and the parties' respective rights and obligations, according to law.

91 Arbitral proceedings are a process agreed by the parties to an agreement by which an independent qualified person/s is/are appointed by the parties to hear and determine their dispute according to the law of the place the parties have chosen. By force of the law of contract, the parties are bound by the outcome to their agreed procedure. Domestic commercial arbitration legislation elsewhere provides for the recognition and enforcement of arbitral awards as judgements of the Court. In Tonga, the recently introduced *International Arbitration Act* provides for that in respect of awards in international arbitrations, for the purposes of enforcement in Tonga.

92 It is also notable, as submitted on behalf of Kacific, that since its commencement in 1967, the *Reciprocal Enforcement of Judgments Act*, recognises[34] a 'judgment' as including not only an order of a court but also:

> *"... an award in proceedings on an arbitration if the award has, in pursuance*

[33] Excluding, for example, the operation of Part XIX and s 365 of the Act.

[34] Section 2.

of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place"

93 By those various considerations, s 338 and its reference to "legal proceedings" should, in my view, be interpreted broadly and beneficially. There is ample authority to support that approach. At a rudimentary level, legal dictionaries define "legal proceedings", variously, as "any civil or criminal proceeding or enquiry in which evidence is, or may be, given; and includes an arbitration"[35] and "all proceedings authorised or sanctioned by law, and brought or instituted in a court of justice or legal Tribunal, or the acquiring of a right for the enforcement of a remedy".[36]

94 Further, in *Bristol Airport plc v Powdrill and Others* [1990] 2 ALL ER 493 (CA), leave of the court or the consent of an administrator of an insolvent airline company was required before an airport could exercise its right to detain aircraft for unpaid airport charges. The court held the words "no other proceedings may be commenced or continued" meant either legal proceedings or quasi-legal proceedings such as arbitration and that "judicial or other proceedings" would include proceedings other than judicial (legal) proceedings. In *Commissioner of Inland Revenue v Robertson* [2017] NZHC 31 at [115], the High Court identified dicta that supported a wide interpretation of the term "legal proceedings against the company"[37] and that "legal proceedings" covered not just court proceedings but other forms of dispute resolution such as arbitration.[38]

95 In *Robertson*, it was observed that the breadth of the term "legal proceedings" in the insolvency context gave rise to an inherent "asymmetry" for while legal proceedings against the company are barred, the company, under the control of the liquidator, retains all ordinary rights and powers, including the power to take proceedings against third parties.[39]

96 The corresponding provisions in the Tongan *Companies Act* are instructive on this issue. Section 256 provides, in terms, that at any time after the making of an application to the Court for the appointment of a liquidator to a company, and before a liquidator is appointed, the company or any creditor or shareholder of the company may apply to the Supreme Court or Court of Appeal, as the case may be, for an order staying any application or proceeding against the company pending in that Court or in the case of any other application or proceeding pending against the company in any court, apply to the Supreme Court for an order restraining the application or proceeding. The text of the provision is clearly confined to curial proceedings. As noted above, that may be explicable by the absence of any domestic commercial arbitration legislation in Tonga. Since the

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[35] Stroud's Judicial Dictionary, 4th edition, Sweet & Maxwell.

[36] Blacks Law Dictionary, revised 4th edition, West Publishing Co.

[37] Citing *In re International Pulp and Paper Co* (1876) 3 Ch D 594-599.

[38] Citing *Kiwi Marketing v Prima Technologies Ltd (in liq)* HC Hamilton CIV-2007-419-1804, 15 May 2008; *Downer Construction (NZ) Ltd v One Hobson Street Ltd (in liq) HC* Auckland CIV-2007-404-2374, 3 August 2007.

[39] At [117].

introduction of the *International Arbitration Act*, provisions such as sections 11 and 31 of that Act, empower the Supreme Court to make orders for interim measures in arbitral proceedings.

97 However, s 257 of the Act provides, relevantly, that with effect from the commencement of the liquidation of a company, and unless the liquidator agrees or the Court orders otherwise, a person shall not commence or continue legal proceedings against the company or in relation to its property. The text of that provision is self-evidently not limited or confined to court proceedings. The purpose of the provision is to protect other creditors of a company in liquidation, and to avoid dissipation of the company's funds by a liquidator having to defend legal proceedings against the company. If a limited interpretation of the term "legal proceedings" were to be applied, as only being court proceedings, the protective purpose of the provision could be subverted by a party instead taking arbitral proceedings (pursuant to an arbitration agreement between the parties) against the company. In my view, that could not be presumed to have been Parliament's intention.

98 Accordingly, I find that the term "legal proceedings" in s 338 includes both court and arbitral proceedings.

99 In relation to the second limb of this argument by the Government, I do not accept the submission[40] that as the Act applies to companies, whether local or overseas, that are registered in Tonga, s 338(1)(a)(ii) only applies to legal proceedings in Tonga.

100 Again, s 338(1)(a)(ii), by its express terms, is not limited to legal proceedings conducted only in Tonga. A 'company' is defined in s 2 of the Act, relevantly, as 'a company registered under Part II'. TSL is a company that was registered under Part II of the Act. Therefore, the Act applies to TSL. The object of s 338(1)(a)(ii) is the company, or here, TSL; not Kacific.

101 It will be recalled that s 20 of the Act provides, relevantly, that a company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction, both within and outside Tonga. If a company is permitted by the Act to enter into transactions outside Tonga, then it is highly conceivable, that in the event of disputes arising out of those transactions, that company may become involved in legal proceedings outside of Tonga. Therefore, to limit legal proceedings for the purposes of s 338(1)(a)(ii) to only legal proceedings within Tonga would be inconsistent with giving effect to the obvious beneficial purpose of the provision by allowing parties such as Kacific to pursue their claimed legal rights against a Tongan company in accordance with the manner, mode and location to which the parties agreed to submit any dispute about their respective legal rights and obligations arising from their transaction or other dealings.

102 For those reasons, I am satisfied that Kacific has established its second ground

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[40] [33]

for restoration under s 338(1)(a)(ii), namely, that at the time it was removed from the Register, TSL was a party to legal proceedings.

Is it just and equitable to restore TSL to the Register?

103 By the use of the disjunctive "or" at the end of s 338(1)(a), it is clear that only in the event the Court is not satisfied of any of the grounds in that subsection will the Court be required to consider the "just and equitable" ground in subsection (b). Therefore, as Kacific has established two of the grounds in subsection (a), again, it is unnecessary for the Court to consider subsection (b).

104 However, yet again, the Government saw fit to oppose the application on this ground also. Unfortunately, that decision seems to have overlooked or misread the opening words to subsection (b): "*for any other reason ...*" which clearly mean that if there is some other reason not already considered within the various grounds set out in subsection (a), then that other reason may be considered in determining whether it is just and equitable to restore the company. Here, the submissions on behalf of the Government did not identify any other reason under this head. Instead, it simply repeated[41] that it would be "unjust" for the Court to restore TSL to the Register because TSL was formed "but was never fully operational", "it was never set up completely to be able to conduct business activity", it was removed because it had "ceased to conduct business" and any business it did conduct including the signing of the FSA "was unlawful".

105 With the possible exception of TSL being removed because it had ceased to conduct business, I have addressed the other arguments and, as explained above, am not satisfied that any of them justify refusing the application to restore TSL to the Register.

106 The submission that TSL was removed because it had ceased to conduct business does little more than repeat the evidence of the Registrar as the formal reason under s 327(1)(b)(i) for her decision to remove TSL. The submission never sought to explain why the fact that TSL was determined by the Registrar to have ceased to carry on business would now make it unjust or inequitable to restore TSL to the Register.

107 The submission is also logically inimical to the Government's earlier submission that TSL was never set up properly to be able to conduct business in the first place. In other words, TSL could not have ceased something it never commenced.

108 As I have already found, by entering into the FSA, TSL engaged in business activity for the purposes of the BLA. Prior to that, by its various representatives, TSL participated in negotiations with Kacific which led to the execution of the FSA. The only reason TSL did not continue the business activities for which it was established was because it refused to pay Kacific the FSA contract price

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[41] [37]

and, as a result, Kacific has not yet provided the satellite connectivity services for TSL to on-sell.

109 I have reservations, therefore, about the asserted basis, accuracy and timing of the Registrar's decision to remove TSL. As discussed with Ms Macomber during submissions, the Registrar did not in fact specify in her affidavit how, on 11 February 2021, she formed the view that TSL had ceased to carry on business.[42] The email exchanges between the Registrar and the Solicitor General on 10 and 11 February 2021 do not identify any basis for that belief other than the Solicitor General referring to Cabinet decision no. 84 dated 5 February 2021. Meanwhile, the arbitration had been on foot since 19 January 2021 and the Responses of TSL and the Government were due on 12 February 2021.

110 That Cabinet decision did not state any reason for the removal of TSL. Ms Macomber suggested that it could be inferred from the decision referring to the earlier decisions in 2018 (no. 846 dated 28 September 2018 and no. 918 dated 12 October 2018), by which TSL was established and its original board of directors appointed, being 'rescinded', that TSL had ceased to carry on business. I have difficulty in accepting the self-serving logic of that submission. It is the equivalent of saying that a deceased person no longer works because he is deceased. It does not explain what caused him to become deceased.

111 Even if one adds Cabinet decision no. 1195 dated 25 October 2019, which was also distributed to the Registrar as CEO of the Ministry of Trade and Economic Development, in which Cabinet determined that all operations and transactions in relation to TSL "shall cease and be discontinued", three of its directors be removed from the TSL board, that the FSA "be terminated" and that the Attorney General advise on the legality and legal implications of the FSA, the reasons for Cabinet's decision to effectively 'erase' TSL and direct its removal from the Register, have never been explained.

112 In all legal proceedings to which it is a party, Government (and its statutory emanations) is expected to conduct itself as a 'model litigant': *Hausia v Fatongiatau* [2002] TOCA 11 at [13]. That conduct will usually include acting with complete propriety, fairly and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants.[43]

113 In my view, having regard to the discretionary nature of the power to restore provided by s 338, and particularly the residual "just and equitable" ground, it was reasonable to expect the Government, as part of its opposition to this application, to provide a full and frank explanation for Cabinet's decision on 5 February 2021 to direct that TSL be removed from the Register. It did not do so. Notwithstanding Mr 'Akau'ola's reference to a policy paper having been prepared and submitted

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[42] [25].

[43] See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155; *ASIC v Hellicar & ors* [2012] HCA 17.

to Cabinet, and which presumably would have provided some insight to the rationale for the course ultimately taken, that paper was never exhibited to any of the material filed on behalf of the Government. In anticipation of possible reliance on a statutory prohibition against disclosure of such a document,[44] I asked Ms Macomber if her instructions permitted her to explain the lack of explanation in this regard. She was unable to assist.

114 A further observation may be made about Cabinet decision no. 84. It was clearly a direction to the Ministry, of which the Registrar is also the CEO, for the Registrar to remove TSL. As such, in my view, the Registrar acted on it as if the decision was a request pursuant to s 327(1)(d) of the Act by TSL's shareholder to remove it from the Register. The grounds on which such a request may be made, as specified by ss (2)(a), include that the company "has ceased to carry on business". But that ground also requires that the company "has discharged in full its liabilities to all its known creditors and has distributed its surplus assets in accordance with its constitution and th(e) Act". On that basis, ss (4) required the Registrar to remove TSL only if she was satisfied that notice of intention to remove had been given in accordance with s 329, that no person had objected pursuant to s 330, and if there was any objection, the Registrar had complied with s 331. That is consistent with the Registrar's stated concern to the Solicitor General that "*They will question why there was no public notice to allow them to file an objection under s 330*".

115 The circumstances, manner and timing in which the Registrar implemented Cabinet's decision is also troubling in light of her being aware that there was a 'legal issue between TSL and a foreign company'. Her affidavit did not explain the source of her knowledge, or what, if anything, she did to ascertain the nature of that 'legal issue'. By contrast, in his affidavit, the Solicitor General averred [13] that 'the Registrar at the time was well aware of the arbitral proceeding against TSL'. In that knowledge, it was open to the Registrar, pursuant to s 337(1)(b), to restore TSL on that ground. Conversely, she ought to have declined to remove TSL in the face of the known arbitral proceedings.

116 By analysis of the known facts, the timing of key events, the unanswered questions about the Government's conduct leading to TSL's removal and its opposition to this application, I am compelled to agree with the submissions on behalf of Kacific,[45] and am satisfied that there is sufficient basis to support an inference, that the Government proceeded to "*engineer the removal of TSL from the Register for the clear purpose of frustrating the arbitral proceeding against TSL*".

117 The apparent rationale for that course was, in my opinion, ill-conceived and, arguably, unnecessary.

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[44] Such as clause 138 of the Cabinet Manual of His Majesty's Cabinet CAP. 01.01.2.

[45] [5.03]

118 It was ill-conceived for at least two reasons. Firstly, by its very existence, s 338 provided, what in this case were quite clear grounds, in favour of the restoration of TSL. Secondly, most of the Government's bases for opposition ignored the glaring fact that issues as between Kacific and TSL in relation to the FSA will fall to be determined according to the law of Singapore.

119 Removal was also probably unnecessary. Without venturing any view whatsoever on the merits of Kacific's claim or the possible outcomes to the arbitration, if one assumes, only for the sake of illustration, that Kacific is successful against TSL, then what will be the likely practical consequences?

120 On the material before me, at the time of its removal, TSL had no assets. Its value was only that of the share held by the Government (the value of which was not disclosed on the application for registration). If then, at some point in the future, Kacific obtains an order for recognition and enforcement of any award pursuant to s 59 of the *International Arbitration Act*, it will be unlikely to recover anything as against the non-existent assets of TSL. That may then lead to a liquidator being appointed. Save for any potential actions by a liquidator against any of TSL's directors for any breaches of the Act, that will be the end of the matter and TSL may well end up being removed again at some point thereafter.

121 The removal was also unnecessary to protect the Government against Kacific's claim against it in the arbitration. I do not presume to be in a position to posit any comprehensive analysis of the various claims and defences raised in the arbitration. However, it appears tolerably clear from the Notice of Arbitration and Government's Response that if TSL defends the claim against it, including on any of the bases advanced on this application, and is successful in avoiding the FSA or having it declared unenforceable, or the Government is able to achieve that result, the derivative claim against the Government is likely to fail. That is because if the FSA is, for some reason according to the law of Singapore, unenforceable, then there will be nothing in terms of TSL's liability for the Government to 'stand behind' or 'be bound by'. On the other hand, if TSL either does not defend the claim or fails in any defence of it, the claim against the Government proceeds on somewhat different facts including alleged representations made by various Government officials. It is conceivable that if any of the elements for the actionable representation and estoppel claim, amounting effectively to an alleged guarantee by the Government, are not established to the satisfaction of the arbitral tribunal, that claim will fail.

122 Therefore, it is regrettable, in my view, that Government adopted the course of removing TSL and in opposing this application on the forlorn grounds that it did. Doing so has likely done little to enhance, and may even have damaged, the Government's reputation for being a responsible and reliable international trading partner.

123 For those reasons, I am satisfied that it is just and equitable to restore TSL to the Tongan Register of Companies.

Conclusion

124 Kacific's application is granted.

125 Pursuant to s.338(1) of the *Companies Act*, Tonga Satellite Limited is to be restored to the Tongan Register of Companies.

126 Pursuant to s 339(1) of the Act, the Registrar of Companies is to register a notice forthwith that Tonga Satellite Limited is restored to the Tongan Register of Companies.

127 Pursuant to ss 338(3), Tonga Satellite Limited and its directors shall forthwith comply with any provisions of the Act or any regulations made under the Act, with which the company had failed to comply before it was removed from the Register.

128 Tonga Satellite Limited shall not be removed from the Tongan Register of Companies other than by application to, and order of, this Court.

129 Further, and for the avoidance of doubt, pursuant to:

129.1 s 335, TSL's removal does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the Register;

129.2 s 338(4), all reasonable steps are to be taken by the directors of TSL to place the company in the same position as if it had not been removed from the Tongan Register; and

129.3 s 339(2), upon its restoration, TSL shall be deemed to have continued in existence as if it had not been removed from the Register.

130 The Government shall pay the Applicant's costs of and incidental to the application, to be taxed in default of agreement.

NUKU'ALOFA
8 June 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE