

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

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CV 69 of 2013

BETWEEN: PACIFIC FORUM LINE LIMITED - Applicant

AND : MOAPA ENTERPRISES LIMITED - Respondent

R. Stephenson for the Applicant
Lord T. Tupou KC for the Respondent

DECISION

- [1] On 12 August 2013 the General Manager of the Applicant [PFL] served a statutory demand upon the Manager of the Respondent [Moapa] at its registered office in Nuku'alofa, pursuant to the provisions of Section 298 of the Companies Act 14/1995.
- [2] A copy of the demand notice is Exhibit A to the affidavit of the General Manager, Derek Leonard, sworn on 23 September 2013. It is not in doubt that the notice complied with the requirements of Section 298(2)(b) to (d).
- [3] On 21 August 2013 Moapa's Managing Director wrote to the Solicitor for PFL, Mr Stephenson. A copy of the letter is Exhibit E to Mr Leonard's affidavit. Mr Prasad advised Mr Stephenson that the sum

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demanded was disputed (and that accordingly the appointment of a liquidator was not appropriate - see Section 298(2)(a) and Section 250(4)(a)).

[4] On 26 September 2013 PFL filed the present application for Moapa to be put into liquidation on the ground that it had failed to comply with the statutory demand and was therefore presumed, by virtue of Section 296(a), to be unable to pay its debts (Section 250(4)(a)).

[5] On 9 November 2013 Moapa filed an application to set aside the statutory demand. Unfortunately, the application was out of time since Section 299 requires the application:

- (a) to be made within 10 working days of the service of the demand; and
- (b) to be served on the creditor within 10 working days of the service of the demand.

As has been seen, the demand was served on Moapa just under 2 months before the application to set aside was filed.

[6] It might be thought, for all the reasons helpfully set out by Lord Tupou in paragraphs 7(h) to (i) of his written submissions filed on 31 October, that the court would have the discretion (ordinarily embodied in order 5 of the Supreme Court Rules) to extend the time to apply for the statutory demand to be set aside. Section 299(3) is however quite explicit:

"No extension of time shall be given for the making or serving an application to have a statutory demand set aside, but at the hearing of the application, the Court may extend the time for compliance with the statutory demand.

[7] The position now is that Moapa, having applied under Section 299 is subject to the powers of the Court conferred by Section 300. In other words, it now has the burden (imposed by Section 296) of proving, on the balance of probabilities, that it is able to pay the statutory minimum of \$1000 (Companies (Liquidation) Regulations 1995, Regulation 5 – and see *Re Tweeds Garages Ltd* [1962] Ch 406; [1962] 1 All ER 121). In the event that Moapa fails to satisfy the Court that this is the case, then the application will be dismissed and an order made under S250(4) putting it into liquidation.

[8] Following delivery of this ruling I will give further directions for the progress of this matter which will apply equally to applications CV70 and CV71 of 2013.

DATED: 15 November 2013.




M.D. Scott
CHIEF JUSTICE