

IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

AC 1 of 2019

NUKU'ALOFA REGISTRY

[CV 35 & 40 &55 of 2014]

BETWEEN : DIANNE WARNER

- Appellant

AND : 1. GE YALU

2. KISIONE TUPOU

3. ANZ BANKING GROUP LTD

4. YANJIAN TONGA LTD

- Respondents

Coram : Handley J

Blanchard J

Randerson J

Counsel : Mr. S. Fonua for Appellant

Mr. W. C. Edwards SC for the First, Second and Fourth Respondents

Mr. W. Edwards for the Third Respondent

Hearing : 11 April 2019

Date of Judgment : 17 April 2019

JUDGMENT OF THE COURT

- [1] On 23 July 2018 the Supreme Court made an order for the winding up of Yanjian Group Co Ltd (the company) and appointed Dianne Warner (the appellant) its liquidator.
- [2] The winding up proceedings were brought by Lord Luani who had obtained judgment against the company and Yanjian Tonga Ltd in the Land Court on 5 May 2017 for TOP\$5,506,000. Both companies appealed.
- [3] On 10 September 2017 this Court reduced the judgment against the company to TOP\$3,380,375 and set aside the judgment against Yanjian Tonga. The companies were separately represented.
- [4] On 24 November 2017 the Lord Chief Justice dealt with an application by Lord Luani for a charging order over certain assets allegedly owned by the company in execution of his judgment against it. The application was opposed by both companies which were separately represented.
- [5] The Chief Justice identified [22] the issue as “whether [the company] has a beneficial interest in any of assets against which a charging of order absolute may be made in favour of Lord Luani”. The basis of the application was that [23] “all assets ... in the possession or under the control of Yanjian Tonga are in fact owed by [the company].”
- [6] The company and Yanjian Tonga argued that they were wholly separate and independent companies and the company had no beneficial interest in any of the assets over which Lord Luani sought a charging order absolute.

[7] On 28 April 2017, shortly before the judgment in the Land Court the company and Yanjian Tonga entered into an agreement which cancelled, without payment, an earlier loan agreement dated 20 August 2013 under which the company lent Yanjian Tonga \$2,278,087 in cash and in chattels which was repayable on 20 August 2021. The cancellation agreement stated that Yanjian Tonga was not indebted to the company.

[8] The Chief Justice was not prepared [48], on the evidence before him, to infer that the cancellation agreement was not genuine. He also found [49], on the evidence before him, that the plant and equipment in the possession of Yanjian Tonga was owned by CCECC, another Chinese Company. The charging order nisi was discharged.

[9] The company was later wound up. On 10 July 2018 the appellant, as its liquidator, applied for the following orders to be made against the respondents Yalu Ge and Kisione Tupou, employees of Yanjian Tonga:

to attend, and be questioned, with all books, records and documents of the company Yanjian Group, which they as employee (as Yalu Ge was) and as accountant (as Kisione Tupou was) of Yanjian Tonga had in their possession, concerning:

- (a) a list of main engineering materials, including rebar, cement, steel mesh, bitumen, small machinery and accessories, with an estimated value of \$1,670,028.77 that formed part of the loan advance from Yanjian Group to Yanjian Tonga in August 2013;
- (b) All mobile office tables, chairs, other office equipment and air conditioners with an estimated value of \$56,100;
- (c) Bank statement of Yanjian Group and Yanjian Tonga showing the cash loan advance of US\$56,952.06 which was equal to \$104,222.45 and of \$447,735.78.

[10] The respondents filed a notice of opposition on several grounds which did not include one that the application was barred by res judicata based on the judgment of the Chief Justice of 24 November 2017.

[11] On 9 August 2018 the appellant applied for the following orders to be made against the ANZ Bank:

- a. The respondent appoint a bank officer to attend the court to be examined and recorded on oath.
- b. At least 5 working days prior to the examination, the respondent produce to the applicant:
 - i. Bank statements in the name of Yanjian Group Co Limited also known as or trading as Chinese Technical Team under account number **1826650** from 2008 to December 2013,
 - ii. Bank statement in the name of Yanjian Group Co Limited also known as or trading as Chinese Technical Team under account number **1613358** from 2008 to the present day,
 - iii. All books, records or documents of the Company in the respondent's possession including but not limited to Bank statement of the company showing the case loan advance of US\$56,952.16 which is equal to TOP\$104,222.45 Pa'anga and TOP\$447,735.78 pa'anga, from the company to Yanjian Tonga Limited on 20 August 2013 or thereabout,
 - iv. Debenture entered into between the company and Yanjian Tonga Limited to secure the loan advance if there is any,
 - v. Any other relevant documents which are in the possession of and control of the respondent.
- (c) The documents are to be delivered by the respondent to the applicant at the office of Sione T Fonua at House of Tonga, Mailetaha, Nuku'alofa.

[12] The Bank filed a notice of opposition on several grounds which did not include one that the application was barred by res judicata based on the judgment of the Chief Justice.

[13] The applications, including a motion for judgment in default of a defence in the substantive proceedings, were referred to Niu J on 12 November 2018. Shortly afterwards the Judge gave an *ex parte* direction which included a provisional

view [6] that the three applications by the applicant “had been decided on 24 November 2017, and if so estoppel by record and/or res judicata may apply”.

[14] He directed counsel to consider both points “I have raised” and come prepared to argue it on 21 November.

[15] He had raised the point earlier on 24 August 2018 when the substantive proceedings were before him. He then suggested that the claim against Yanjian Tonga really involved an attempt to reverse the decision of the Chief Justice on 17 November 2017 and was misconceived because that decision was binding.

[16] His Honour heard counsel on 21 November 2018 and gave judgment on 30 November dismissing both applications and the substantive proceedings, in each case with costs. He said [50]:

“ the subject matter of these applications and court proceedings have been finally decided between these same parties, namely, Lord Luani and Yanjian Tonga.... Now Mrs. Warner as liquidator is substantially representing Lord Luani who is the main creditor of [the company] to make this claim against Yanjian Tonga.... in respect of the same subject matters, namely the loan agreement..... The order is res judicata.”

[17] The appeal challenged the finding that the proceedings were barred by res judicata.

[18] In Tonga the doctrine of res judicata is embodied in s.99 of the Evidence Act which provides:

“Every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies of facts directly in issue in the case actually decided by the court.....”

[19] Counsel for the appellant submitted that this defence was not available to the respondents because the parties in the proceeding were not parties to the proceedings before the Chief Justice or their privies.

[20] Lord Luani is not a party to these proceedings brought by the liquidator of the company, and she is not his privy. The company was a separate legal person and there is no privity between it and its shareholders or creditors, even a major creditor such as Lord Luani.

[21] Moreover in making these applications and bringing the substantive proceedings, the liquidator was invoking statutory powers available to her as liquidator which were not available to the company before the winding up. This indicates that a liquidator invoking such powers is a different legal person to the company, unlike the position when a liquidator sues to enforce pre-existing rights under the general law. Compare the position of a liquidator when reviewing proofs of debt who can exercise powers which were not available to the company before it was wound up: *Re Exchange Securities Financial Services Ltd* [1988] Ch 46, 48.

[22] The company and Yanjian Tonga were parties to the proceedings before the Chief Justice, separately represented, but on the same side of the record. There was no dispute between the two companies which the Chief Justice resolved.

[23] There may be res judicata estoppels between co-defendants if certain conditions are satisfied. This was explained by Sir George Lowndes, giving the judgment of the British Privy Council in *Munni Bibi v Tirloki Nath* [1931] 58 LR Ind App 158, 165-6

“ three conditions are requisite (1) there must be a conflict of interest between the defendants (2) it must be necessary to decide the conflict to give the plaintiff the relief he claims and (3) the question between the defendants must have been judicially decided.”

[24] There was no conflict between the companies and it follows that the decision of the Chief Justice did not create any res judicata estoppels between the companies.

[25] The appeal must therefore be allowed and the following orders are made:

- (1) Appeal allowed
- (2) The judgment of the Supreme Court of 30 November 2018 is set aside
- (3) The proceedings are remitted to the Supreme Court to be heard and determined according to law by a different judge.
- (4) The first, second and fourth respondents are to pay jointly and severally the appellant's costs of the proceedings in this Court and of the proceedings in the Supreme Court down to and including 30 November 2018.
- (5) No order as to the costs of the third respondent.



J Handley
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Handley J

P. Blanchard
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Blanchard J

A. Randerson J
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Randerson J