IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Company Case No. 685 of 2018

BETWEEN: **ADRIAN MAURICE MOONEY**
Claimant

AND: 1. **ADVENTURES IN PARADISE LIMITED**
2. **MALANI VAKALOLOMA**
Defendants

Date of hearing: ***17th July, 2018***
Delivered: ***24th August, 2018***
Before: ***The Master Cybelle Cenac***
In Attendance: ***Mark Fleming counsel for the claimant, Marie Noelle Patterson counsel for the Second Defendant, First Defendant unrepresented***
Present: ***Adrian Mooney, Malani Vakaloloma***

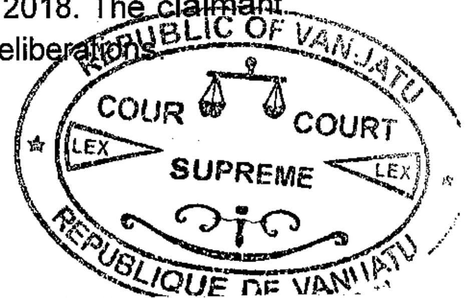
JUDGMENT

Headnote
Liquidation of company - company solvent - grounds of just and equitable remedy due to irretrievable breakdown - quasi-partnership - relationship based on trust and confidence - court's power to grant alternative remedy to liquidation

INTRODUCTION

This matter came up for hearing of the claim on the 17th July, 2018 to liquidate the first defendant company (hereinafter referred to as AIP). The court was satisfied that there had been adequate service of the claim and all proper procedures followed under the court's judgment of the 7th June, 2018 and it was therefore able to proceed unhindered by any technicalities.

The claimant provided in support of his claim sworn statement and second sworn statement both of the 14th June, 2018, sworn statement of 9th July, 2018 and sworn statement of Roger Jenkins (proposed liquidator) of the 5th July, 2018. The claimant also filed submissions of the 9th July, 2018 to aid the court in its deliberations.



The first defendant was surprisingly unrepresented. Counsel for the second defendant, though having represented the first defendant at the hearing of the application by the second defendant to be added as a party to the claim, indicated at the hearing of this claim that she was no longer representing the first defendant. Consequently, the first defendant had entered no defence or any documents in answer to the claim.

In support of her defence the second defendant filed two sworn statements of the 4th July, 2018, sworn statement of the 5th July, 2018 and sworn statement of the 16th July, 2018 in support of submission of same date and a sworn statement of Julie Hawkins (Accountant) of the 13th July, 2018.

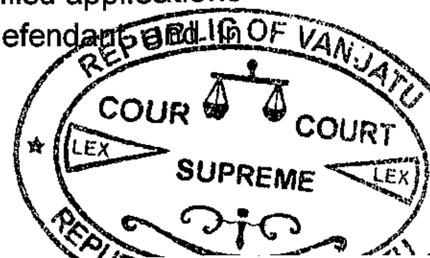
The court noted two other applications on file: (1) Application by the second defendant to tax costs with the claimant filing his objections to the said applications, and (2) Application to strike out parts of Roger Jenkins sworn statement of the 16th July, 2018.

As to the first application, the parties agreed to defer any hearing pending the outcome of this judgment in the event that matters of set-off may need to be taken into consideration.

As to the second application, the main part of the statement which the second defendant sought to be struck out was that the deponent appeared to be named as the appointed liquidator. Counsel for the claimant clarified that the wording of the statement was that Mr. Jenkins was merely indicating his acceptance of the role of liquidator should the court be so minded to liquidate the company. The court accepted this, and determined, in relation to the other objections that it would give what weight, if any, to his statements regarding the personal relationship of the parties as it deemed necessary.

BRIEF BACKGROUND

The claimant and the second defendant were husband and wife, now divorced since 2015 in the New Zealand courts. They share joint custody of their two children with primary care and custody residing with the second defendant. The second defendant resided in New Zealand with the children till about December 2017 when she returned to Vanuatu with them to assume management of AIP. The matter of the division of their matrimonial assets remains undetermined. The first defendant, AIP is listed as one of the assets of the marriage. They are both equal shareholders and directors of AIP. There are ongoing disputes over the division of the assets and matters of child custody. The second defendant has filed proceedings in the New Zealand courts to attend to the matrimonial assets but there is yet to be any finality to those proceedings. The second defendant had filed applications in Vanuatu to stay liquidation proceedings in both this matter and matrimonial case MT1222 of 2018, both of which were dismissed by this court. The claimant has filed applications in New Zealand for breach of court orders against the second defendant



Vanuatu for Habeas Corpus. The second defendant had filed and obtained a restraining order from the Magistrate's Court of Vanuatu against the claimant who was not allowed to come within 100 metres of her. The restraining order has since lapsed.

There have been a number of issues that have arisen in relation to the company and which the claimant says now warrants liquidation of AIP and a liquidator appointed. The second defendant contends that the issues which have arisen have not caused a deadlock to warrant such drastic action in that the parties have been able to agree and make important decisions and that the company is solvent. The second defendant states that she had made an offer to purchase which was unreasonably rejected by the claimant. From her defence of the 27th June, 2018, the second defendant alleges that the actions of the claimant are designed to cause as much damage as possible to her because of the pending matrimonial case.

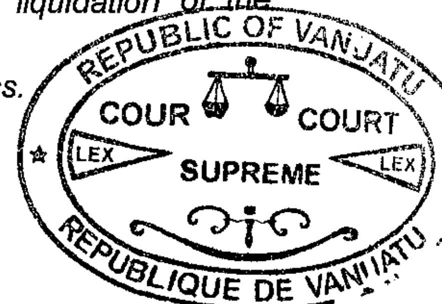
The court is also aware from earlier evidence [sworn statement of the 11th April, 2018 for the second defendant to be added as a party] and additional sworn statement in support of defence of the 4th July, 2018, paras. 17 & 5 respectively that the second defendant is of the firm belief that in addition to seeking to modify the custody orders by eliminating the regular income of the second defendant so that she can no longer provide for the children, the claimant is also attempting to diminish the value of the company so that he can venture out on his own and set up a rival company, taking the lucrative business of AIP. The claimant rejects this entirely and says that the second defendant has frustrated the workings of the company and that he can no longer work with her nor does he wish to. He accepts that an offer to purchase his shares was made but that his rejection is steeped in the knowledge that it is an empty offer as the second defendant cannot hope to fulfil it.

CLAIMANT'S CASE

The claimant asks that the court put AIP into liquidation and appoint a liquidator on the ground that it is just and equitable to do so in spite of the solvency of the company. The claimant contends that the relationship between himself and the second defendant has *"irretrievably broken down, with continual disputes, no mutual cooperation and trust, and is such that the defendant company cannot continue to operate."* The claimant particularised numerous emails, letters and other communications spanning about a year, from 2017 to the present, between the parties, and connected to the parties as evidence suggestive of a serious breakdown. Consideration of these communications will be addressed further on in the judgement.

The claimant is of the opinion that the facts pleaded establish the following:

a. *"That the company accountants have recommended the liquidation of the defendant company.*
b. *The management of the company is such that it is in distress.*



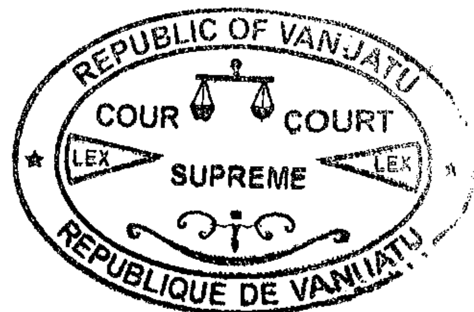
c. *The second director is seeking to withdraw money despite the accounts of the company being uncertain.*
d. *The issuance of violence order ex parte by the second director is such that the directors cannot work together.*
e. *There is a real prospect that the company will become insolvent due to the second directors actions in respect of Carnival Australia.*
f. *Due to the level of issues on a personal level it will be impossible for the directors to carry out their duties pursuant to the Companies Act in caring for the best interests of the defendant company, and,*

That the level of the breakdown means that the defendant company is frustrated in commercially sensible operations, with a loss of confidence by key clients, meaning significant agreements will be lost." The claimant feels that *"despite attempts to resolve the breakdown in the relationship, [he] is unable to deal with, work with or have any meaningful communication with the second director."*

The claimant pleads that the level of debt at the moment stands at approximately AUD$730, 000 plus AUD$176, 000 in overdraft. That the value of the company with the cruise boats, based on an independent valuation of July, 2017 stands at AUD$1.6 million and that without these cruise contracts the company has only its name goodwill, plant and equipment and value attributable to the tours and services offered by the defendant company. He wants the court to act quickly before all is lost.

SECOND DEFENDANT'S CASE

The second defendant objects to the claim entirely and states that there is no justification for putting the company into liquidation. She states that the company is solvent which can be seen from its financial records and the admission of the claimant himself and that in spite of the breakdown of their marriage, that does not automatically translate into the breakdown of their professional relationship. She submits that there is no deadlock as the claimant has attempted to represent, and in spite of disagreements on certain matters the parties have been able to reach consensus. She asserts that there remains trust and confidence in the relationship and that AIP continues to operate daily in providing the services for which it was set up. She is adamant that it is not any behaviour on her part that warrants an order for liquidation, but rather, it is the claimant who does not come to the court with clean hands in his attempts to sabotage the efforts of the company and run it into the ground so as to obtain just such an order so that he could set up a rival company and poach all the lucrative business of the defendant company. For these reasons she asks that there should be no relief given by the court as requested by the claimant.



DISCUSSION

The onus of proving that there has been a breakdown in the relationship of the parties rests with the claimant. From the outset he is faced with the obstacle that the company, by his own admission, that of the second defendant, the accountants and Roger Jenkins and Julie Hawkins all recognise that the company is at present solvent. Further, there is also the matter of the substratum of the company still being intact, continuing its daily operations and generally continuing to engage in the business for which it was set up.

The matter at bar is whether, in spite of this, the relationship between the directors/shareholders has broken down to such a degree that it is not possible for the company to continue to operate without considerable frustration to both parties leading to the eventual demise of the company.

This claim has been filed under **section 15(2)(c) of the Companies (Insolvency & Receivership) Act**[1] which provides:

(1) A liquidator may be appointed by the court on the application of:

(a).........

(b) a director of the company; or

(c) a shareholder of the company; or

(d) ....

(e) ....

(2) The court may appoint a liquidator if it is satisfied that:

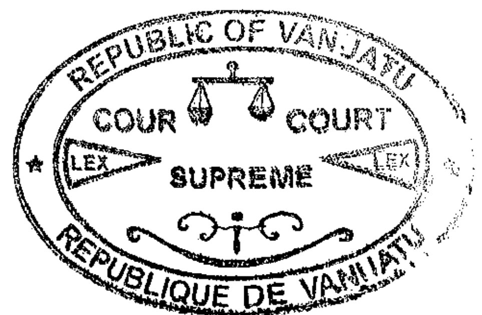
(a) ....

(b) ....

(c) it is just and equitable that the company be put into liquidation.

It has become a long standing principle, by the leading authority of **Ebrahimi,**[2] that while there may be established criteria for the court ordering liquidation on the just and equitable principle, this ground is best established by looking at the circumstances of each case in determining whether they call for liquidation. **Ebrahimi** set out some of those elements that could be present to justify such an order:[3]

[1] No. 3 of 2012 of the Laws of the Republic of Vanuatu
[2] Ebrahimi v Westbourne Galleries Ltd and Ors., [1973] AC, p. 361
[3] Ibid, para. G



(i) *An association formed or continued on the basis of a personal relationship involving mutual confidence;*

(ii) *An agreement or understanding that all, or some of the shareholders shall participate in the conduct of the business;*

(iii) *Restriction on the transfer of the members' interest in the company.*

In other words, resort to the just and equitable ground is not limited to the above conventional criteria but has been expanded to cases of mismanagement or misconduct in the affairs of a company.[4] The case law is clear that the Ebrahimi criteria is not exhaustive, as the principle of just and equitable remains a question of fact dependant on the circumstances of each case.

The legislation provides little guidance as to what the court must consider in order that it can justify an order on the just and equitable ground, particularly where the claimant pleads a breakdown in the relationship. Notwithstanding, much of the case law points to some consideration of partnership law. That is, that the court could legitimately examine the rights and expectations of individuals in the company in deciding whether certain legal rights could be insisted upon. This premise is based on the dicta of the appeal court in **Ebrahimi**[5] that *"a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it .... were not necessarily merged in its structure; that, while the "just and equitable" provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way......."*

This is not to suggest that a company is to be treated as a partnership under the guise of a company, thereby justifying a non-application of company law, but simply to suffuse the good faith rule present in partnership law into obligations of parties under the Companies Act. More and more, the case law leans in favour of the application of the partnership principle and the primacy of the relationship between the parties to ascertain whether grounds under the just and equitable rule can be set up to show that a breakdown in personal relations can warrant a winding up or liquidation.

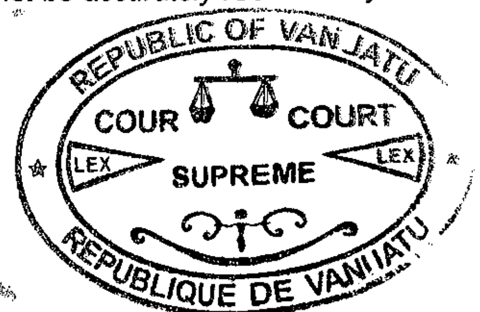
Thomas V Mackay[6] explains quite simply the correlation between the application of partnership law to the company law consideration of the just and equitable principle:

> *"The reference to partnership can be misleading. The company is just that, a corporate structure. It is not necessary to show that any partnership agreement or deed was entered into before the principle can be invoked. However there are circumstances in which the relationships between the company members cannot be accurately resolved by*

[4] Re Chemical Plastics Ltd. [1951]VLR 136 at 142

[5] Supra, n. 2, p.379, para. B-H

[6] Thomas v Mackay Investments Pty Ltd. and Ors. [1996] ACSR, p. 300



the application of strict principles of company law. In those cases it may be appropriate to superimpose equitable consideration on legal principles to give effect to the agreement or understanding which exists between the parties."

In the case at bar the claimant alleges that a breakdown in the relationship of the two directors/shareholders merits an order for liquidation. The onus is therefore on him to provide the court with evidence of the breakdown. As in **Ebrahimi**,[7] he must be able to show the acts done to him; in the context of a small domestic company in which the parties were working in equal partnership has had or will have serious consequences. Consequently, no order will be made without a close examination of the relationship between the parties and an interrogation of the circumstances of the case to ascertain whether there is any merit to his claim.

The parties were married but divorced in 2015 in New Zealand. They have two children together and a number of jointly owned assets which have yet to be distributed as the assets remain the subject matter of litigation before the New Zealand court. There have been a number of applications by both sides regarding custody and other related issues to the children of the marriage. There has been a restraining order (DVO) issued against the claimant by the second defendant less than a year ago. These facts would tend to indicate a personal relationship fraught with issues which remain unresolved since 2015.

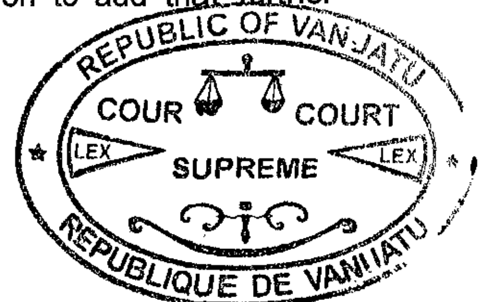
The second defendant has suggested to the court that the personal issues of the parties have not bled into their professional relationship, and in fact they work well together and have had continuing constructive discussions on the way forward for the company. She argues that the claimant has conflated the breakdown in their personal relationship to convince the court that this is the major contributory factor leading to the breakdown of their professional relationship. The claimant's counter-argument is that he has highlighted the breakdown of the personal relationship as it is a genuine factor, which has, in part, contributed to the professional breakdown in terms of a lack of mutual trust and confidence on both sides.

The evidence in this case was confined to numerous sworn statements, without any of the deponents being cross-examined. In many instances the court was left with nothing but assertions and cross-assertions, and therefore I have had to ascertain the veracity of statements made without the benefit of some of that evidence being tested under cross-examination.

EVIDENCE OF THE CLAIMANT AS TO IRRETRIEVABLE BREAKDOWN

In his claim and second sworn statement, both of the 14 June, 2018, the claimant asserts that as early as 18 July, 2017 disputes began to arise between the parties that appeared unresolvable, which led him, through his lawyer, to suggest a sale of the business if the disputes could not be fixed. He went on to add that further

[7] Supra, n. 2, p.372, para. C, D & G



disputes arose over the appointment of a general and operational manager being appointed before the current managers were dismissed and that he, the claimant, was not in favour of upsetting the status quo and changing management while the Inland Revenue Department (IRD) audit in New Zealand was in abeyance. He stated that he disapproved of what he viewed as the second defendant's unilateral decision to terminate the contracts of the current managers with no consideration for severance payments in spite of the claimant having extended the contracts of the managers for an additional two (2) months following their mutual decision to do so following AGM of the 22 December, 2017. He produced email of the 4 December, 2017 in which he stressed further managerial issues; unpaid suppliers, suppliers making demands for payments, 500 cheques awaiting signature, late payments from cruise ships, incomplete monthly invoicing, arrival of cruise ships with no managers in place, severance payments due to outgoing managers, former managers being offered contracts with rival companies.

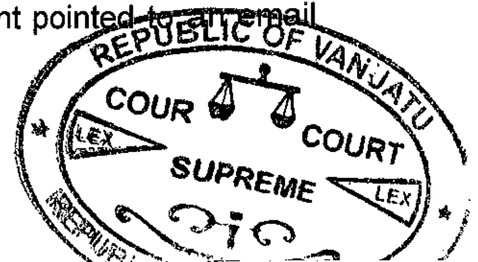
By the 1 December, 2017 lawyers for the claimant were writing that it was critical that the parties meet to work through the operations of the business, at least till the matter of the IRD was sorted, and at the AGM of the 22 December 2017 the transcript of the meeting recorded, under 'other business', that: *"Adrian again stressed that the co-management of the company by himself and Lani was unrealistic based on historical and ongoing differences of the company's vision and inability to agree on basic day to day operations of the business.*

The chairman Dan suggested that as a resolution on the issue could not be reached between both parties, the situation created a 'dispute between shareholders.' Accordingly, he proposed the following options be considered:

(i) Mediation process in an effort to reconcile shareholders differences
(ii) The business be sold
(iii) The shareholders consider buying each other out
(iv) Dissolving of the company assets"

By the end of January, 2018 dispute arose over whether severance pay was due to the outgoing managers, both parties having received conflicting information from the same chambers. The lawyer representing the company Geoffrey Gee advised that payment should be made and the second lawyer, John Malcolm representing the second defendant in her individual capacity advised that severance payments should not be paid.

The claimant further stated that the obtaining of the DVO further closed off communication with the second defendant and there was a period of communicating through the company accountants. By the 11 January, 2018 the second defendant was threatening action due to mismanagement, and company accountants, in an email of the 12 January, 2018, were again suggesting dissolution of the company and voluntary liquidation as the only way forward. The claimant pointed to an email



sent by the second defendant to carnival cruises, a client, on the 18 January, 2018 which he suggested would have raised red flags with the client that all may not have been well with AIP and the second defendant was warned in an email by the accountants of the potentially damaging effect on the company of that communication with Carnival Cruises.

The claimant pointed to accusations made to the second defendant by AIP's I.T providers of the 17 January, 2018 that there was evidence that attempts were being made to hack into the computers of the company from the address of the second defendant, and consequently, the access of the second defendant was blocked. There was no denial by the claimant that these actions taken by the technicians were not approved by him and the court infers that they were.

And finally, the claimant produced the sworn statement of Roger Jenkins of the 5 July, 2018 who gave evidence, that based on what he understood to be a toxic relationship between the parties, with no trust and confidence, both domestically and commercially, he was of the view, that in order to avoid insolvency the directors *"needed to work closely together, combining their expertise and experience with a great deal of hard work,"* without which it would be *"impossible to consolidate their efforts"* and insolvency would be inevitable.

HAS THE CLAIMANT DISCHARGED THE ONUS ON HIM TO PROVE THE BREAKDOWN OF THE RELATIONSHIP

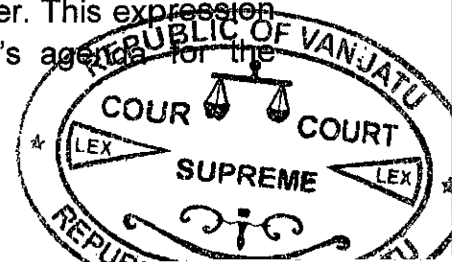
I do not propose to refer to all the allegations and counter allegations raised in the evidence. I will focus on what I consider to have been the principal concern of the claimant. In so doing, this is no indication that all of the evidence on both sides has not been equally considered and weighed.

The principle concern which appeared to be consistently raised by the claimant surrounded the management of the company. That is, the differing approach to management which the directors took and which manifested in a number of incidents as evidence of their managerial deadlock. A review of the evidence of the claimant detailing specific incidents and acts involving the second defendant are merely peripheral to establishing the larger issue of the management of the company and indicative of the claimed managerial deadlock.

The minutes and transcript of the AGM of the 22 December 2017 paints a damning picture of two directors unable to arrive at a happy compromise or agreement on the way forward.

I will now attend to the details in the aforementioned AGM minute and transcript.

From the outset of the meeting there appeared to be discontent. At the said meeting, the second defendant expressed her intention to now be based in Port Vila for the purpose of managing the business with a date for handover to her. This expression seemed to have been centred around the second defendant's agenda for the



business, without previous agreement of the claimant. In fact, the claimant disagreed with a change in management, stating that the current managers were competent.

Though they eventually seemed to arrive at an agreement there continued, immediately thereafter, to be a statement by the second defendant that she would look after the office until new management was in place. The claimant again disagreed, in spite of his seeming agreement earlier for managerial positions to be advertised. The claimant was of the view that the management of the company needed more than one person and he was concerned that they would be unable to secure suitable managers thereby placing the business at risk. The claimant seemed unable to reconcile the second defendant's reasons for why the current managers could not be kept while the second defendant was insistent that the salaries were too high and had to be cut.

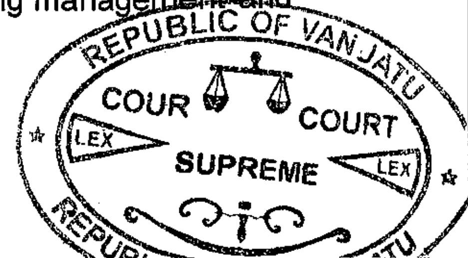
The claimant's proposal was that rather than release the managers they could look to reduce expenses elsewhere such as a reduction in shareholders dividends and debt repayments. He was also of the view that the current salaries were in keeping with best practices, and in fact, were below current bench marks. The second defendant remained adamant that the salaries were excessive. In the final analysis they agreed to replace the managers but to extend their contracts to the end of January if suitable replacements could not be found.

There continued a further discussion on severance payments to the managers which the second defendant and claimant fundamentally disagreed on, with the second defendant raising an issue regarding jurisdiction and whether that matter did not fall under the purview of the New Zealand court as it was dealing with the matrimonial asset of which the company formed part.

There was disagreement about the insertion of a non-compete clause in the continued contracts of the managers with the second defendant insisting that it should and could be done and the claimant indicating that he did not think this was appropriate for an extension to a contract but only if a contract was being renewed.

There was disagreement over the second defendant's working relationship with the current managers, a concern expressed by the claimant. The second defendant stated that she had no issue with the managers.

The claimant expressed a concern over and sought clarification on exactly what the role of the second defendant was meant to be. She proposed being responsible for the running of the cruise boats, meeting with Carnival head office and seeing to the day to day operations of the business. The claimant expressed his further concern over how the intertwining of their roles would realistically work as, from his perspective they could not work together and the proposed structure as put forward by the second defendant was not in the best interests of the company. The claimant stated that while it could be cost effective he felt that the ongoing management and



health of the business would be significantly jeopardized and he did not see their working together as a viable option.

Discussion was again raised regarding the benefit of not changing managers until after the IRD as well as the possibility of a sale of the business if they could not come to some mutual agreement.

The meeting culminated in the claimant again stressing that he could not see co-management as a realistic option based on historical and ongoing differences in the company's vision and inability to agree on basic day to day operations of the business. As a result, the chairman noted that as agreement could not be reached the situation created a dispute between shareholders.

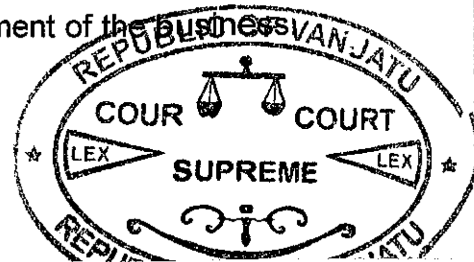
There is no doubt, based on the evidence, that the company is, at present, solvent. There is also no doubt that the transcript of the AGM reveals a chasm between the management styles of the directors. The claimant seems willing to continue with current managers that he considers competent and not overpaid, willing to make compromises elsewhere, e.g. as against his own shareholder dividends in an effort to reduce costs, while the second defendant persists in her position that the managers have to be replaced and salaries of incoming managers reduced, with no consideration of alternative options to reduce costs.

Based on the operations of the business and the work carried on by the managers for the last 7 years I would have to conclude that the matter of dispute over the managers and whether they should be retained or new managers retained and salaries reduced and whether new managers with little experience would affect the health of the business is significant enough to amount to a deadlock between the directors.

While the transcript reveals some eventual compromise, the fact that the directors, more particularly the claimant, kept reverting to the matter of the managers throughout the meeting, even when it seemed that some agreement had been reached, is evidence to the court of a compromise arrived at with the greatest reluctance on the part of the claimant, with numerous attempts, both prior to and following the agreement to convince the second defendant that her proposal may not necessarily be in the best interest of the company.

I accept the evidence of the claimant that there is a substantial breakdown in the relationship and the directors are unable to co-manage or to deal with simple or even major decisions arising with the business without considerable jeopardy to the company. The inability of the directors to come to some real common ground on an issue as important as the managers and management of the company is so important as to make or break the financial back of the company.

The claimant has, throughout, maintained that there is no mutual trust and confidence between the parties which can only lead to the detriment of the business.



The second defendant has tried to convince the court that there is no loss of trust and confidence. I find this hard to believe in light of, not only the evidence of the claimant but also that of the second defendant. The whole of her evidence tended towards the mismanagement, in her view, of the business by the claimant.

1. At para 5(e) of her sworn statement of the 4th July, 2018 in support of her defence she made accusations of appropriation of funds from the company by the claimant.

2. In her email to Carnival Cruises of the 18 January, 2018 she states that she was coming back to Port Vila to regain control of "*her*" companies and to manage "*her*" companies. Her seeking to regain control is suggestive of an extreme displeasure with the way things were being done.

3. In her sworn statement of the 4 July, 2018 she states that the claimant had represented that the company was short of funds and could not pay its suppliers and this was why she assumed management and disagreed with the renewal of managers contracts.

4. She accused the claimant of keeping from her the fact of the managers starting their own company and taking business of AIP and that this was the fault of the claimant for having not taken up her suggestion to insert non-compete clauses in their extended contracts.

5. She further accused the claimant of being the reason why they had lost the Mystery Island Tours to their former managers which accounted for VT30 million annually and taking no step against the managers for their breach of contract in using the privileged information at their disposal to acquire the Mystery Island contract.

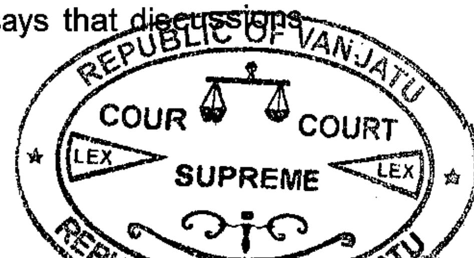
6. She accused the claimant and the managers of failing to renew 145 tours with Carnival Cruises.

7. She accused the claimant of allowing the insurance cover to lapse till the last minute and causing them to almost lose a substantial amount of business.

8. In her defence she states that in spite of numerous requests for full disclosure she is still unaware of the full indebtedness of the company.

9. She accuses the claimant of blocking her internet access to the company online records and bank accounts

With all these accusations openly made against the claimant by the second defendant it is difficult for the court to believe her when she says that discussions



between the two have been healthy and useful and that trust and confidence still abounds. The second defendant has pointed to numerous instances she puts down to mismanagement and neglect of the claimant and even goes so far as to state that these acts are deliberate tactics to diminish the asset of the marriage and her sole form of income for her and their children.

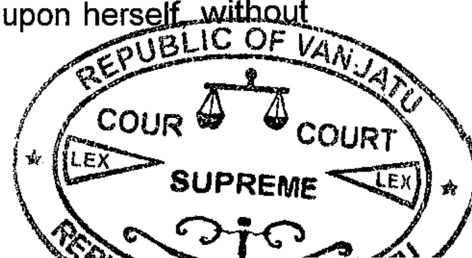
The impression which the court has been left with is that on account of the breakdown in the personal relationship of the directors and with their ongoing matrimonial and custody disputes in New Zealand this has bled into their professional relationship.

While the court accepts that the business was purchased by the directors with the intention that both would participate equally, based on their equal shareholding, circumstances such as taking care of the children by the second defendant took precedence over the last decade and primary management of the company fell to the claimant.

The solvency of the company and its reputation obviously did not occur by accident and could have only come about as a result of concerted, decided action and decisions of the claimant.

I do not therefore believe that the claimant, after over a decade of building a AUD$1.6 million business would likely throw it away in a vengeful effort to spite the second defendant, causing him to lose all the value and goodwill if a sale were to occur. The evidence shows a director willing to sacrifice his own needs and seek alternative resolutions to problems rather than someone attempting to destroy a company. If he has now taken ill-timed and possibly wrong steps since the second defendant has become a full participant in the business or even prior to her full participation it is not sufficient to establish mala fides on his part. I therefore cannot give weight to unsubstantiated allegations of the second defendant that the claimant is seeking to diminish the asset.

I believe that the second defendant has no trust and confidence in the management of the company by the claimant. If she did there would have been no cause to have uprooted herself and her children and returned to Port Vila to manage, as she puts it, *"her companies."* It is quite clear that the second defendant believes that her management style is best. The transcript of the AGM and even her own evidence reveals a person who makes demands and insinuates herself wherever she deems it necessary. There appeared to be no discussion between the parties of her returning full-time to take over management of the business after nearly a decade, yet still she came in and assumed that responsibility. In spite of agreement regarding extension of contracts she went ahead and informed the managers that there would be no renewal of contracts, she went ahead and contacted Carnival cruises raising an issue that could have had potentially damaging repercussions to the business and was warned of this by the accountants. These things she took upon herself without



consultation with the claimant, yet at every instance has accused the claimant of the same or similar behaviours.

There is nothing materially different in the evidence of the second defendant to convince the court that the claimant's assertions of a dispute are not genuine or conflated. Their evidence tended to corroborate the evidence of the other as it related to these disputes. The only difference was how each party chose to apply that evidence in support of their respective claims. The claimant's assessment of what that evidence showed and meant seemed far more plausible than that of the second defendant who attempted to whitewash the disputes to convince the court that in spite of the ongoing differences the parties had exhibited a degree of magnanimity that lent itself to continued good working relations.

THE LAW

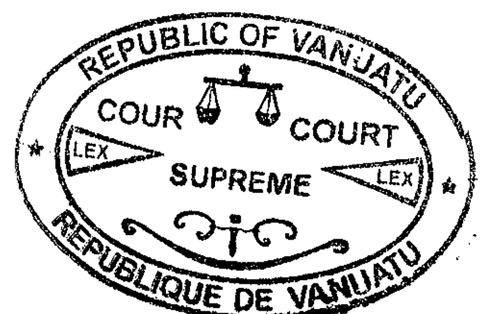
The second defendant has raised the point that the claimant does not come to the court with clean hands[8] and therefore is estopped from asking for the remedy of liquidation.

Encapsulated within that equitable principle would, I believe, be the premise that the other partner must not himself/herself act in a way that makes it impossible for the other partner to cooperate with him/her.[9]

My assessment of the evidence is that the claimant has not approached this matter with unclean hands, nor has he been uncooperative with the second defendant. I believe that this is a simple matter of a personal relationship having broken down, bleeding into the professional which has led to a mutual break down in trust and confidence. This has now led to circumstances where the claimant feels that he is frustrated in his management efforts and that he and the second defendant cannot properly see eye to eye on the day to day operations of the business which would inevitably hamper the continuing success of the company.

In the case of **Ebrahimi,** it was argued that to opt for liquidation on the sole basis that the directors/shareholders could not agree would be to set a bad precedent leading to commercial suicide as it could be used as an overhanging threat for shareholders/directors to get their own way.[10]

While this may be true, the court would always be weary of liquidating a solvent company save in circumstances where one or other of the parties is able to show that the relational breakdown no longer profits a continuation of the business as the breakdown has effectively led to a deadlock.



[8] Supra, n. 2, p.362 B
[9] Ibid, p.365 A
[10] Ibid, p. 369 & 370 B, C & D

In the case of **Re Yenidje Tobacco Co.,**[11] **Ebrahimi** was distinguished on the ground that the machinery of the company provided no way out of the deadlock and the company was accordingly wound up due to the breakdown in the relationship.

We see a similar circumstance in the case at bar. Though the parties have provided no Articles of Association to point to how a deadlock between directors is to be dealt with, it is clear from the evidence that there is no alternative to a deadlock save for the options put to the directors by the chairman at the AGM; mediation, liquidation, sale, buy out. Outside of these options I can see only one other option available that could break any director deadlock and that would be nomination of other directors to create a majority. There is no evidence to suggest that this is an option in this case. The lobbing back and forth between the parties, with no real consensus moving forward suggest that the directors are at the mercy of each other with no way to achieve their proposed positions without unanimous agreement, or else the other unwillingly giving in to the other.

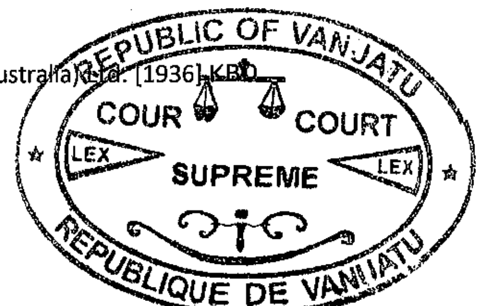
Because any decision to liquidate the company would be based on its peculiar facts it would be useful to look at case law in which decisions to wind up were made.

The case of **Amazon Pest Control**[12] the court found that there was a breakdown of cooperation between the parties, that there was a loss of confidence between the members, that management of the company on critical issues was deadlocked and that a mismanagement of funds would warrant a lack of confidence. In this case, in spite of the company being solvent and seemingly well run the court still ordered a winding up.

Catombal Investments[13] involved brothers who were unable to reach agreement for 20 years on the future of the business. The court applied quasi-partnership principles on the basis that it was a family company which was reflected in the shareholding which was shared and equal. The court found that though there was no deadlock in management as the parties could continue to exercise control of the company and make majority decisions, although there was no failure of the substratum and the company had no issue with achieving the object for which it was formed it nonetheless ordered a winding up on the just and equitable principle as the court found that the brothers no longer wished to be engaged in the company but instead desired to realize their equity and be released from it.[14]

In **Re Melbourne**[15] it was argued that if the company was wound up it would have no assets to satisfy creditors, but if not wound up the company could continue its operations profitably and pay creditors. The court held that there was insufficient

[11] [1916] 2 CH. p. 368, 369, A, H & 376 D, E
[12] Amazon Pest Control Pty Ltd. [2012] NSWSC
[13] Catombal Investments Pty Ltd. [2012] NSWSC
[14] Ibid, para 23-25
[15] Re Melbourne Carnivals Pty Ltd. [1926] VLR & Davis & Co. Ltd. v Brunswick (Australia) Ltd. [1936] KBD



evidence for accepting the view that the winding up would be fatal to the interests of creditors and the company was accordingly wound up.

In **Miller V Friendly Islands**[16] the court found that the antagonism between the parties bordered on hostility which it found to be deep-seated and entrenched with vitriolic allegations littered throughout the evidence. One director resented the others attempts to interfere in his management and deposed that the very petition of the other director was designed to cause harm to the company. The other deposed that he had no confidence in the others management and in fact saw him imperilling the position of shareholders. In spite of the solvency of the company the court felt it had little choice but to order a winding up.

In **Van Wijk**[17] provided by the claimant the evidence disclosed that the parties could not reach agreement as to the operations and management of the company. That the language of the parties was acrimonious and the court had no confidence that any agreement could be reached and the court was of the view that the disputes between the parties was affecting the ongoing business of the company. The court did recognise that the company was under a contract that could be terminated if it was wound up but felt that the ongoing conduct of the business required material cooperation and a level of trust between the parties. The company was therefore wound up.

In **Asia Pacific**[18] also provided by the claimant the court found a quasi-partnership requiring mutual cooperation and a level of trust and that that relationship had broken down. That there was an express agreement between the parties that both sides would participate in the conduct of the business which required the concurrence of them both for particular types of decisions. The court also looked at the alternative remedy of the minority buying out the other but determined that the majority could not in fact afford the buy out and though the company was solvent it ordered a winding up.

In **Australian Securities**[19] provided by the claimant the court noted that it would be an extreme case that would warrant the winding up of a solvent company and found that a strong case had been made for doing so on the evidence that there was serious reason to have concern over the competency of the management of the company, and

In **Citi Project**[20] provided by the second defendant the evidence before the court was that there was a breakdown in the relationship leading to the parties communicating through solicitors, that there was no proper maintenance of

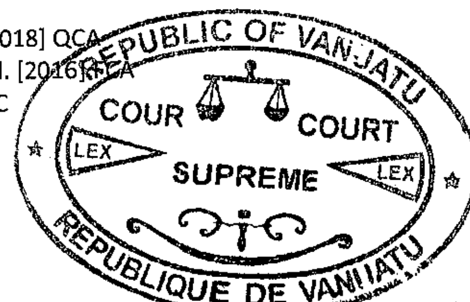
[16] Miller v Friendly Islands Fishing [2002] TOLawRp 53; [2002] Tonga LR

[17] Van Wijk (Trustee), in the matter of Power Infrastructure Services Pty Ltd. v Power Infrastructure Services Pty Ltd. [2014] FCA

[18] Asia Pacific Joint Mining Pty Ltd. v Allways Resources Holdings Pty Ltd. & Ors. [2018] QCA

[19] Australian Securities and Investments Commission v Sino Australia Oil & Gas Ltd. [2016] FCA

[20] Citi Project Marketing Pty Ltd. and Anor v VG projects Pty Ltd. & Ors. [2017] QSC



accounts, that the petitioner was being excluded from information, denied internet access, denied access to bank accounts and corporate key changed. The petitioner maintained that there were a number of intractable issues that could not be resolved in the absence of a liquidator. The respondent on the other hand argued that appointment of a liquidator would cause prejudice to shareholders. That is, would cause serious detriment to operations of business through the negative publicity and amount to an act of default under their loan accounts.

The court did not in this case order a winding up on the ground that there was no quasi-partnership and that though there was a breakdown in the relationship it did not prevent the company from operating and paying its creditors, the company purpose had not failed, that the company was solvent and that there were other avenues for redress available to the petitioner.

WOULD AN ORDER FOR LIQUIDATION BE FATAL TO THE COMPANY

The second defendant has maintained that a liquidation order would be fatal to the company in that it would inevitably lead to a termination of AIP's agreement with Carnival Cruises. She refers to clause 3.4 of their agreement, shown as exhibit MV2 annexed to the additional sworn statement of the second defendant of the 4th July, 2018 in support of her defence.

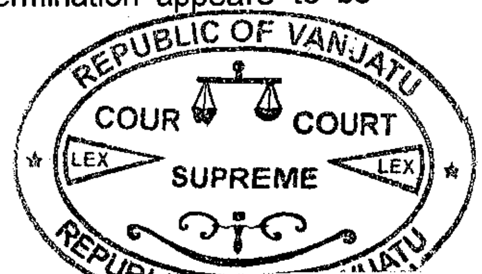
I am not convinced, on the evidence, that a liquidation order would automatically lead to a termination of that agreement. I note that the clause uses the word *"may"* which suggest that liquidation would not compulsorily lead to a termination. In other words, there would very likely be some consideration of the pros and cons, on both sides with continuing with the contract.

Parties entering a contract for commercial reasons seek to obtain all the financial benefits which follow and it would be unreasonable to assume that a contract which has been in place for the better part of a decade would be so cursorily ended merely because the company was in liquidation.

Liquidation is not an automatic death sentence for a company and its commercial partners. The role of a liquidator is not limiting. *"A liquidator's principal duties is to protect the assets and then to realise and apply the proceeds amongst the creditors and shareholders..."* [21] In other words, the liquidator will do all in his power to preserve the commercial contracts of the company particularly as they form the lion's share of the value of the company.

Further, the provision at clause 3.4(ii) is that termination *"may"* ensue on insolvency or assignment to creditors or proceedings for bankruptcy, reorganisation, arrangement, and readjustment or if a receiver or trustee is appointed. There is no specific reference in the clause to termination should liquidation proceedings be filed or granted. The apparent intent behind the suggested termination appears to be

[21] Street J in Re Allebart Pty Ltd [1971] 1 NSWLR 24



based on a situation where the company becomes insolvent or bankrupt and consequentially certain remedial actions taken to satisfy creditors by way of a possible receiver or trustee.

It is to be noted that there is a distinct difference between a receiver and a liquidator. A receiver's main duty is to a secured creditor (usually a bank) whereas a liquidator *"has responsibilities to investigate past activities connected with the company, and, in appropriate cases, to initiate such further proceedings, civil or criminal, connected therewith as the circumstances may dictate. It is his duty to discover not only breaches of the Companies Act, but also conduct falling short of the requisite standards of commercial morality.*[22]

As an officer of the court, the liquidator in a winding up by the court must maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is his duty to the whole body of creditors, the whole body of shareholders, and to the court to make himself thoroughly acquainted with the company's affairs, and to suppress or conceal nothing coming to his knowledge in the course of his investigation which is material to ascertain the exact truth…" [23]

The cases of **Re Melbourne** and **Van Wijk** are instructive in that the dicta of the first found *"no sufficient reason for accepting the view that a winding up would be fatal to the interests of all creditors"* [24] in spite of the fact that allowing the company to continue would mean its continuing to operate profitably and pay-off its creditors.

The court in **Van Wijk** recognised that the feature of a contract that Power had with BHP Billiton was that *"a winding up application and certainly the making of an order for the appointment of a liquidator would enliven an ability on the part of BHP Billiton to terminate."* [25] Notwithstanding, the court ordered a winding-up.

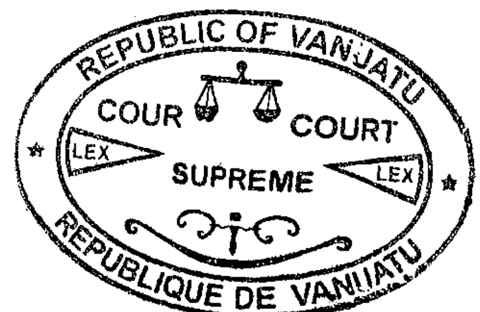
CAN THE COURT ORDER AN ALTERNATIVE REMEDY TO LIQUIDATION

The second defendant has requested that if the court is minded to liquidate that it first consider an alternative remedy. As to what that alternative remedy might be counsel for the second defendant did not specify. Nonetheless, I will examine whether this is within my purview to grant.

Section 15 (2) of the Companies (Insolvency & Receivership) Act provides for a liquidator to be appointed by the court on a number of grounds, one of which is the just and equitable principle.

Counsel for the claimant helpfully referred the court to **Van Wijk** and an article, **"A proper approach to winding up" from the Proctor Magazine: Queensland Law Society published in May 2018**[26] which discussed just this issue. Both the named

[22] Ibid
[23] Halsbury's 4th ed. Vol 7(2) para. 1566
[24] Supra, n. 15, p. 293
[25] Supra, n. 17, p. 6, para. 24
[26] Vol. 38, No. 4 and Supra, n. 18



case and the article set out the provisions of the Australian Act (**Section 467 (4)),** [27] which provides for consideration of an alternative remedy. S.467(4) is comparable to S. 15 (2)(c) of the Vanuatu Act as it relates to liquidation on the just and equitable ground only. It would be useful I think to set out the said Australian section in its entirety:

> *(4) where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the court, if it is of the opinion that:*
>
> *(a) the applicants are entitled to relief either by winding up the company or by some other means; and*
>
> *(b) in the absence of any other remedy it would be just and equitable that the company should be wound up;*
>
> *must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.*

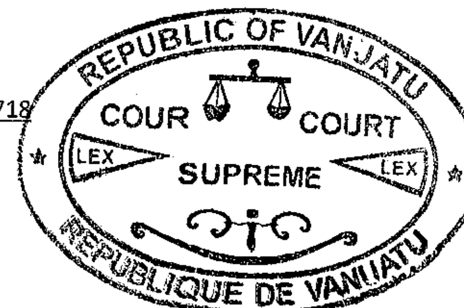
It is clear from an examination of both sections of the two pieces of legislation that the Australia Act provides for the additional consideration by the court of an alternative remedy, if necessary, while the Vanuatu Act does not.

Therefore, in light of this obstruction, no alternative, however viable can be canvassed by the second defendant nor considered by this court.

Even were the court to consider that the Vanuatu Act allowed for such consideration, or that in its inherent jurisdiction it could so grant, the court would have to consider whether the claimant was acting unreasonably in seeking to put the company into liquidation instead of pursuing some other suitable remedy.

Such consideration would bring to mind the alternative remedies to liquidation proposed at the AGM: mediation, buyout, and sale. The court's conclusion would be, that based on the intractable positions of the second defendant on major issues, as previously discussed, mediation would very likely be an exercise in futility. The court would also conclude that the option of a sale to a third party would also seem implausible as the claimant has maintained throughout that AIP is her sole source of income and therefore would seek to hold on to her shares and the whole of the company. And finally, the court would look to the possibility of the second defendant being able to buyout the claimant and would conclude, based on the limited evidence of the second defendant that it was not a possibility. Therefore, the claimant being well apprised of all these facts would, himself, inevitably conclude, as would the court, that the pursuit of an alternative remedy was either not a real possibility and/or

[27] Corporations Act 2001;
https://www.legislation.gov.au/Details/C2018C00031/Html/Volume_2#_Toc504660718



was unavailable and the court could therefore only find that the claimant was not being unreasonable in pursuing liquidation as his only remedy.

CONCLUSION

The case at bar is ideally suited to a liquidation order. And the court is led to the ineluctable conclusion, based on the case law and the evidence that a liquidation order is the only appropriate remedy that can be granted against the background of this case for the following reasons:

1. There is a loss of confidence and trust between the directors/shareholders.

2. That management of the company on critical issues is deadlocked and the court has no confidence that any agreement or satisfactory agreement could be reached. Even were the court to accept that the parties had reached agreement on some of their issues the court would still have no confidence that disputes would not continue to arise and in fact escalate.

3. There is no clear way out of the deadlock as concurrence is needed from both directors on particular decisions like management and there is no apparent option to substitute the current directors or nominate additional directors to create a clear majority in order to alleviate the deadlock.[28]

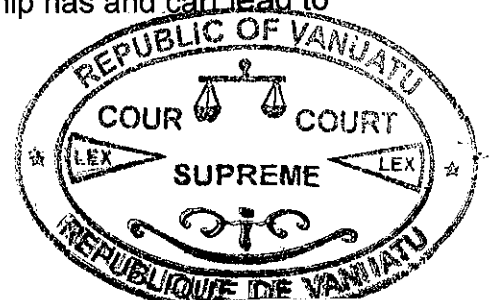
4. Accusations by the second defendant against the claimant of mismanagement of funds and loss of business suggests a serious lack of confidence in the claimant.

5. Neither party appears to have any confidence in the others management, and in fact, each seems to believe that the others management is likely to imperil the position of the company and lead to insolvency.

6. The company appears to be in distress having lost both the Mystery Island and Santo Tour contracts, with issues arising daily over operational issues: unpaid suppliers, suppliers making demands for payments, 500 cheques awaiting signature, late payments from cruise ships, incomplete monthly invoicing, arrival of cruise ships with no managers in place, severance payments due to outgoing managers, former managers being offered contracts with rival companies.

7. There is evidence on both sides that leads the court to conclude that there are issues surrounding the competency of the management of the company, that is to say, that while individually each may prove competent managers, together, the court feels that the toxicity in the relationship has and can lead to

[28] Supra, n. 15



fatal decisions and therefore the court has concern over the overall competency of the management of the company in the joint hands of the parties.

8. The parties had resorted to communication through their accountants and solicitors, both prior to and following the DVO.

9. That the company accountants by email of the 12th January, 2018 had recommended liquidation due to the ongoing disputes between the parties.

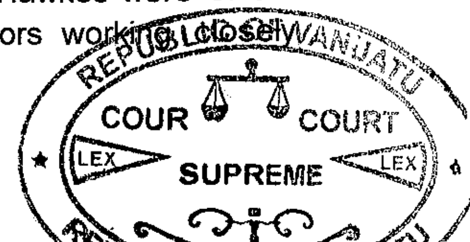
Further, the evidence of Roger Jenkins and Julie Hawkes that the company is currently solvent is weighed against both their findings that the solvency of the company is fragile and would, no doubt, be largely dependent on the parties working closely together.

Mr. Jenkins, after an examination of the company's financial performance was of the view that while the company enjoyed a healthy debt ratio of 1:1 in 2013 it had increased to 2:1 by 2017 once he removed under assets *"Related Party Unsecured Loans"* and rightfully placed it under liabilities as these were loans provided to the directors with no intention of repayment. His finding was therefore, that if such an increase in the liabilities from 2014 onwards continued along a similar trend the company would be headed for insolvency. His only solution for the parties to redirect that trend was to work closely together and his understanding that there were serious issues between the directors would not lend itself well in assisting the directors to avert the projected insolvency.

The evidence of Julie Hawkes did not materially differ from that of Mr. Jenkins in that she readily accepted that the *"Related Party Unsecured Loans"* related to drawings by the directors and that a shift of that debt from assets to liabilities essentially increased the company's debt ratio from 1:1 in 2013 to 2:1 in 2017. Her finding was that this debt ratio increase was attributed to the drawings of the shareholders exceeding profitability and not performance of the company. She was of the opinion that the company could return to a positive debt ratio before the end of 2019 if the directors reduced the amount of their drawings. She went on further to add that profitability would improve as a result of the directors taking over management of the business which would save the company significant costs.

Unlike Mr. Jenkins she did not offer an opinion on what might be the likely outcome for the company if the directors could not in fact work together.

In effect, it appears to the court that both Jenkins and Hawkes were of the view that good management would involve the directors working closely



together in order to avert the possibility of insolvency and bring the company back to its once highly profitable footing.

And while Hawkins did not provide comment on the likely outcome for the company if the directors could not work together, I am satisfied that both experts recognise the value to the company of the directors working well together.

10. From the evidence of Julie Hawkins, her recommendation to return the company to a positive debt ratio was to reduce the amount of drawings by the directors. This had been a suggestion put to the second defendant by the claimant at the AGM in answer to her proposal to replace the current managers. The proposal was rejected by the second defendant.

    Consequently, if agreement could not be reached on the matter of reduced drawdowns as between the directors and this is a factor raised in the evidence of Ms. Hawkins that this was a critical issue for the financial health of the company that is enough for the court to suppose, alongside the evidence of the malcontent of the directors with each other's management style that the company is headed for insolvency.

11. According to the second defendant she was not given full disclosure of the company accounts and had been excluded from accessing company records online.

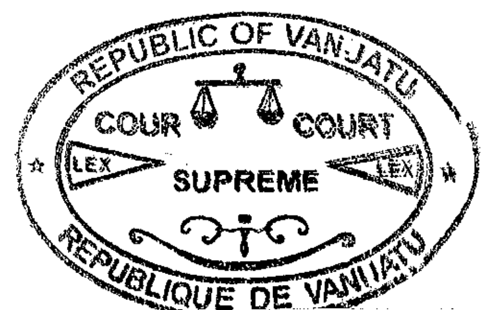
12. The option for the second defendant to buyout the claimant does not appear to be a viable one. The second defendant's offer was merely put forward as a generic proposal, devoid of detail on exactly how this would occur. There was no detail regarding debt repayments or evidence as to whether the second defendant could reasonably afford the buyout. The buyout is therefore uncertain, with the possibility that the ultimate outcome might still be an order for liquidation if she was unable to comply with an order.[29]

13. The claimant has expressly stated that he cannot work with the second defendant and no longer wishes to be engaged in the company but wishes to realize his equity and walk away.

Even if the second defendant were able to prove that:

- There was no deadlock in management,
- That the parties could continue to exercise control of the company, and

[29] Supra, n. 18, p.20



- That there was no failure in the substratum[30]

the principles enunciated in **Catombal** would be applicable to bar since they formally address this issue and this court would still order liquidation on the basis that the relationship has decidedly broken down, that the set-up of the company does not provide for an alleviation of any deadlock, coupled with the differing management styles of the parties and that the claimant no longer wishes to be involved in the company but simply to realise his equity.

Even if the court were to conclude that there is not a deadlock at present, the court has no confidence, based on the fragility of the relationship of the directors and the fact that their relationship appears to now be irrevocably altered that a deadlock would not arise in the not too distant future and the parties would be once more faced with the unpalatable remedy of liquidation.

For the avoidance of doubt, I refer to the second defendant's case of **Citi Project** which is distinguishable on this court's findings:

(a) There existed a quasi-partnership between the directors/shareholders,
(b) That the partnership relationship has broken down,
(c) That the breakdown has prevented the company from functioning at its optimum, and in fact the company shows signs of distress,
(d) That though the purpose of the company has not failed, and
(e) That the company is presently solvent, it is not likely to maintain that state for the foreseeable future, and
(f) There are no other available avenues under statute for the claimant to obtain redress.

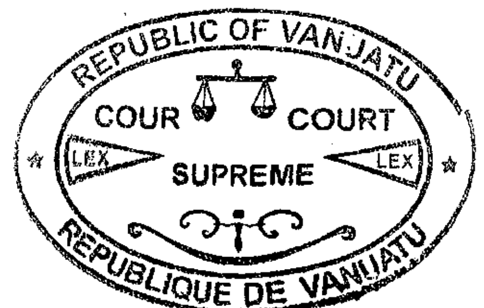
My order is as follows:

1. That the company Adventures in Paradise is put into liquidation pursuant to Section 15 (2) (c) of the Companies (Insolvency and Receivership) Act 2013.

2. That the second defendant is given an opportunity to submit the name of a second liquidator alongside Roger Jenkins named by the claimant for the consideration of the court.

3. That consideration of liquidator to be appointed is scheduled for the 4th September, 2018 at 9 a.m.

4. That application of the second defendant for costs to be taxed is deferred to the next hearing.

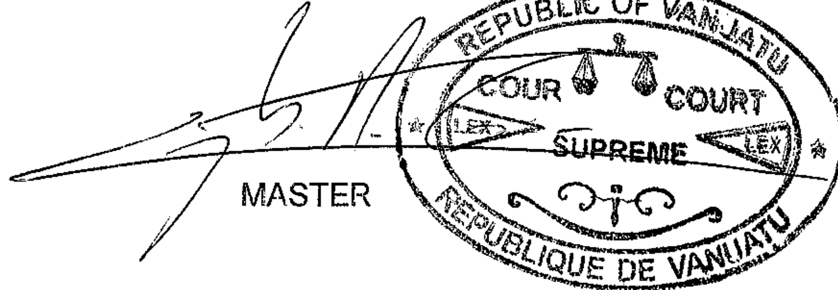


[30] Supra, n. 13

5. That consideration of costs for the hearing of this claim is deferred to the next hearing.

6. That counsel for the parties are encouraged to meet prior to the next hearing to try to arrive at a compromise for costs and possible set-off.

BY THE COURT



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