IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 24/3198 COA/CIVA

BETWEEN: **CHARLES HUGH JAMES PERRY**
First Appellant

RICHARD ARCUS
Second Appellant

JEAN-VINCENT DO
Third Appellant

KATURA LAVINIA MARAE TOM
Fourth Appellant

DANIEL JOHN GARRIGAN
Fifth Appellant

THIERRY JEAN YVES BOURGEOIS
Sixth Appellant

AND: **MORGAN JOHN KELLY, ANDREW HANSON and JUSTIN WALSH, LIQUIDATORS OF AIR VANUATU (OPERATIONS) LIMITED (IN LIQUIDATION)**
Respondents

Date of Hearing:	***11 November 2024***
Before:	***Hon Chief Justice V Lunabek*** ***Hon Justice M O'Regan*** ***Hon Justice R White*** ***Hon Justice O A Saksak*** ***Hon Justice D Aru*** ***Hon Justice E P Goldsbrough***
Counsel:	***M Fleming for Appellants*** ***E Holmes, M Hurley and C Hurley for Respondents***
Date of Decision:	***21 November 2024***

JUDGMENT

Introduction

1. This is an appeal from a decision of the Supreme Court (*Re Air Vanuatu (Operations) Ltd (in Liquidation), Kelly v Perry* [2024] VUSC 298, MacKenzie J) in which the Supreme Court:

   a) dismissed the appellants' application to set aside a creditors' compromise under Part 2, Division 1 of the Companies (Insolvency and Receivership) Act 2013 ("the CIR Act") that was approved by creditors of Air Vanuatu (Operations) Ltd (In Liquidation) ("AVOL") or, alternatively to declare that the appellants were not bound by that compromise; and

   b) made certain directions sought by the respondents, the liquidators of AVOL ("the liquidators"), relating to the implementation of the compromise, ordered that the liquidation of AVOL be terminated, and made various ancillary orders.

2. The application described in [1] a above was initially brought by the first five named appellants ("the pilot appellants"), but the primary Judge granted an application by the sixth named appellant, Mr Bourgeois, to be added as a party.

3. The pilot appellants are pilots who were employed by AVOL and were made redundant in May 2024. Their evidence was that they were owed varying amounts for unpaid salary payments dating back to the COVID-19 pandemic, unpaid annual leave, severance entitlements and payments in relation to the termination of their contracts in lieu of three months' notice. They strongly oppose the compromise. However, Mr Do voted in favour of the compromise and we were told one of the other pilot appellants did not vote at all. But we were not told which one.

4. Mr Bourgeois is a former director of AVOL. A company of which he is the sole shareholder and director lent a considerable sum to AVOL, which was not repaid when demanded. He was a director of AVOL in 2015 and 2016 and again between 14 November 2023 and 14 April 2024, that is, until just before the liquidation. Mr Bourgeois voted against the compromise, but he was not, in fact, a creditor; it was his company that was. But he would have been permitted to vote on the company's behalf anyway.

5. The appellants challenged the compromise on numerous grounds in the Supreme Court. Their challenge was dismissed by the primary judge and they now renew their challenge in this Court on appeal, albeit with some significant differences, in particular:

   a) They no longer seek an order setting aside the compromise (which, as we detail later has now been implemented) and are therefore now seeking only orders that they not be bound by the compromise; and

   b) They now have a more selective series of points challenging the compromise.

6. The appellants also challenged the order terminating the liquidation but did not pursue that aspect of their case at the hearing of the appeal. As noted above, the liquidation was terminated after the delivery of the Supreme Court decision and no stay was sought. We consider counsel for the appellants was correct to focus his submissions on the key remedy sought by the appellants that is an order that they be excluded from the compromise. We do not consider it is necessary for us to address the appellant's challenge to the termination of the liquidation.

Background

7. The account of the background set out below is adapted from that set out in the Supreme Court judgment. Neither party took issue with this part of that judgment.

Air Vanuatu

8. Air Vanuatu is the national airline of Vanuatu and, prior to the liquidation, operated both domestic and international flights.

9. AVOL was registered on 17 December 1987. As at the date of liquidation, there were two directors of the company, Joseph Laloyer and Alain Lew. There were five shareholders, with the majority shareholder being the Vanuatu Government. Each of John Salong, Charlot Salwai Tabimasmas, Bob Loughman and Marc Ati held 1 share, with the Vanuatu Government represented by the Prime Minister holding 1,345,996 shares.

Liquidation

10. On 2 May 2024, the Prime Minister wrote to one of the liquidators, Morgan Kelly, advising that the shareholders of AVOL had resolved that AVOL would enter into voluntary liquidation and seeking his consent to act as liquidator. The liquidators were appointed on 9 May 2024.

11. Shortly after their appointment, the liquidators took a number of steps, including a preliminary assessment of AVOL's financial and operational position. They took immediate steps to ground the fleet of aircraft, to ensure safety and airworthiness of the fleet.

12. The liquidators' first report was issued to creditors and shareholders on 15 May 2024 (revised on 17 May 2024). The report confirmed that AVOL was in significant financial distress and had been underperforming for a long period of time prior to the liquidators' appointment. Various issues were raised in the report, including:

    a) AVOL had a high-cost base and a significant level of debt in comparison to the size of AVOL's operation.

    b) The number of employees was high for a business of its size and nature.

    c) AVOL was unable to meet the costs of aviation parts, critical to the operation of the fleet, resulting in aircraft being grounded for extended periods of time. AVOL had defaulted under supplier arrangements and a number of its insurance policies.

    d) There were deficiencies in the financial information – the books and records were not properly organised and out of date. However, the information in relation to fleet maintenance and engineering records was well kept and easy to access.

    e) AVOL has an Air Operator's certificate ("AOC") valid until 15 April 2025.

    f) If not for the Government's statement of financial support, the liquidators have no other choice but to cease operations and wind down AVOL.

13. Following the initial report, a creditors' meeting was held on 22 May 2024. Then, following an assessment of the requirements of the business, 175 staff members were made redundant effective from 6 June 2024.

14. The liquidators then undertook a marketing campaign with respect to the sale or recapitalisation of the business of AVOL seeking expressions of interest from parties interested in participating in the restructuring of AVOL or the Air Vanuatu business.

15. The liquidators determined that the expression of interest received from AV3 Limited ("AV3") represented the most viable restructuring option when compared with the other proposals received. AV3 is a special purpose entity wholly owned by the Vanuatu Ministry of Foreign Affairs. It was incorporated on 5 June 2024.

16. AV3's proposal was that AVOL's business be restructured by way of a compromise under the CIR Act, with the liquidators' being the proponent of the compromise proposal.

Compromise proposal

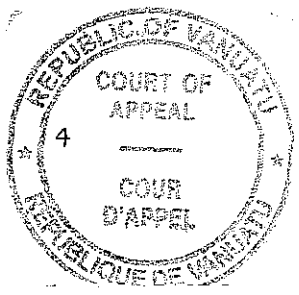
17. On 11 August 2024, the liquidators issued a report to creditors ("the creditors' report") providing detail of the compromise proposal, and addressing the matters required under section 4 of the CIR Act. The creditors' report included a notice to creditors of the liquidators' intention to hold a meeting of creditors via AVL for voting on the resolution for the proposed compromise on 21 August 2024. A revised creditors' report was issued on 19 August 2024 to reflect updates to the list of creditors.

18. The revised creditors' report set out the liquidation strategy, which included an accelerated recapitalisation and sale process. It explained the nature of the expressions of interest received and the process the liquidators had undertaken to solicit expressions of interest in the restructuring of AVOL. Their account of this process in the creditors' report was as follows.

19. The liquidators received indications of interest from 31 parties and issued non-disclosure agreements to 25 parties. Of those, 16 non-disclosure agreements were signed and returned and accordingly granted access to the data room created by the liquidators.

20. Eleven expressions of interest were received. The liquidators assessed the viability of each proposal with reference to the impact that each proposal would have on the future of AVOL and its business and the return to AVOL's creditors.

21. Seven of the expressions of interest related to the recapitalisation of AVOL, one for the acquisition of AVOL's assets and business and three related to asset acquisition. The liquidators explained that they determined that a going concern sale or recapitalisation would likely offer a better outcome to creditors compared to an asset only sale outcome as there would likely be a higher return to more classes of creditors and the prospect of preserving the business was maximised (limiting crystallisation of several contingent creditor claims and maintaining staff employment where possible).



22. As noted in the creditors' report, feedback during the expression of interest phase was that the AOC was of value to interested parties. Following discussion with the Civil Aviation Authority of Vanuatu, the liquidators established that AVOL's AOC would be preserved only if AVOL was recapitalised. The liquidators were clear that although short term financial support had been secured by the liquidators, the funding was limited. As such, an urgent solution was required to mitigate the risk of AVOL having to close its operations and terminate the employment of its staff.

23. AV3's proposal was for the recapitalisation of AVOL's business, as follows:

a) AV3 would contribute USD3.3 million into a fund under the terms of the creditors compromise in 3 tranches — the first USD1.1 million upon approval of the creditors compromise, the second 4 months later, and the third 10 months after the approval of the compromise;

b) The moratorium period was 10 months;

c) AVOL would be released from all creditor claims once the compromise fund was distributed to affected creditors (other than those specifically identified as not being compromised);

d) There would be a Deed of Compromise;

e) The liquidators would adjudicate and admit or reject claims.

24. The liquidators identified various classes of creditors in the creditors' report:

Class A – secured creditors: The only class A creditor was Bred Bank. No funds were to be distributed as the debt would not be compromised.

Class B – Partially secured creditors: There are two creditors in this class. These creditors were the aircraft lessors and financiers. No funds were to be distributed to class B creditors as the arrangements would be retained post compromise.

Class C.1 – Priority creditors: There were 285 creditors in this class. These were retained employee claims. No funds were to be distributed to these creditors.

Class C.2 – Priority creditors: There were 422 creditors in this class. These were superannuation entitlement amounts owing to employees. They were to be paid in full. The amount outstanding was estimated to be USD50,000.

Class C.3 – Priority creditors: There were 25 creditors in this class, with an estimated value of USD990,000. These were other employee claims, which relate to claims for outstanding employee entitlements owed to employees who had been made redundant or had resigned, and the claims of retained employees that were extraordinary or disputed. These claims were estimated to receive US 50 cents per dollar on their debt as part of the compromise.

Class D – Vanuatu National Provident Fund: No funds were to be distributed to the Fund. The Government assumed the debt.

Class E – Vanuatu Government Debts: The Government indicated it would write off the debt as part of the compromise.

Class F – General unsecured creditors: There were 993 creditors in this class, with an estimated value of USD52.19 million. This related to trade creditors' claims, cancelled booking claims and other sundry claims. The proposal was for these creditors to receive US 5 cents per dollar.

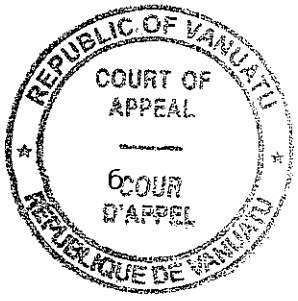
25. Class 2 creditors are represented in either Class C.1 or Class C.3. Class C 2 votes were admitted for USD1.

26. The creditors' report set out the following table indicating the estimated debt and repayment rate based on the creditors compromise proposal:

USD'm	*Notes*	*Pre-Creditor Compromise Estimated Position*	*Creditor Compromise Outcome*	*Post-Creditor Compromise Estimated Position*
Assets				
Proposed Creditors Compromise Contribution	***1***		*3.30*	
Total asset realisations		*-*	***3.30***	*-*
Creditors				
Class A - Secured Creditors	***2***	*(10.66)*	*-*	*(10.66)*
Class B - Partially Secured Creditors	***3***	*(2.94)*	*-*	*(2.94)*
Class C.1 - Priority Creditors (Retained Employee Entitlement Claims)	***4***	*(3.19)*	*-*	*(3.19)*
Class C.2 - Priority Creditors (Superannuation Entitlement Claims)	***5***	*(0.05)*	*(0.05)*	*-*
Class C.3 - Priority Creditors (Other Employee Claims)	***6***	*(0.99)*	*(0.49)*	*-*
Class D - Vanuatu National Provident Fund ("VNPF")	***7***	*(9.22)*	*-*	*-*
Class E - Vanuatu Government Debts	***8***	*(45.33)*	*-*	*-*
Class F - Other Unsecured Creditors	***9***	*(56.99)*	*(2.76)*	*-*
Total Estimated Creditor Claims		***(129.37)***	*-*	***(16.79)***

Summary of Estimated Creditor Returns

Class A	*Debt assumed by Government*
Class B	*Debt retained*
Class C.1	*Debt retained*
Class C.2	*100 c/$*
Class C.3	*Approx. 50 c/$*
Class D	*Debt assumed by Government*
Class E	*Written Off*
Class F	*Approx. 5.2 c/$*



27. The liquidators set out some comments on the compromise proposal in the creditors' report. These comments included the following:

a) If the compromise was not accepted, the liquidation would continue. While there had been funding up to the time of the meeting for the liquidation process and to allow a sale/recapitalisation to be pursued, there were no guarantees that further funding would be secured. If not, it would be likely that AVOL's business operations would need to be terminated by the liquidators and an urgent piecemeal sale of assets pursued, with a likely increase to the creditor pool, and a decrease in return to eligible creditors;

b) The liquidators' view was that the compromise appeared to be a viable option for creditors, who should consider the comparison of outcomes between the compromise proposal and an immediate wind-down of AVOL;

c) The compromise would achieve a going concern outcome for AVOL, which would preserve the business, maintain staff employment where possible and mitigate against the crystallisation of contingent creditor claims;

d) The terms of the compromise would mean the same legal entity, AVOL, would continue as the owner of the business and assets. This approach attempted to preserve AVOL's AOC, IATA membership, workforce, airport slots and corridors, leases and critical supplier arrangements;

e) AV3 is a Government entity and was likely to have the financial capacity to complete the recapitalisation and fund the recommencement of services;

f) There was a risk that even if the compromise was successfully implemented, key stakeholders may not continue to support AVOL's operations into the future;

g) If the compromise was successful, the liquidators intended to apply to the Court to have the liquidation brought to an end;

h) If the compromise was accepted and the liquidation of AVOL was terminated, the liquidators would not be empowered to further investigate the conduct of AVOL and its current and former directors. The liquidators were unclear as to whether there might be any potential claims against any parties. (This aspect of the report was the subject of detailed submission before us and we will discuss it in more detail later in this judgment);

i) The liquidators' costs would not be paid out of the compromise fund.

28. The creditors' report detailed the alternative liquidation scenario. Below the table that appeared in the creditors' report, setting out the likely asset realisation and payout to creditors in this scenario:

$'m USD	*Notes*	*Low ERV*	*High ERV*
Assets			
Cash at bank (pre-appointment account)	*1*	*0.98*	*0.98*

Accounts receivable (pre-appointment)	**2**	*0.40*	*0.64*
Property, Plant and Equipment	**3**	*Commercially sensitive*	*Commercially sensitive*
Inventory	**4**	*Commercially sensitive*	*Commercially sensitive*
Aircraft	**5**	*Commercially sensitive*	*Commercially sensitive*
Land & Buildings	**6**	*Commercially sensitive*	*Commercially sensitive*
Total asset realisations		***6.05***	***9.01***
Costs of realisation			
Insurance (Aviation Policies)	**7**	*(0.14)*	*(0.14)*
Insurance (Non-Aviation Policies)	**8**	*(0.32)*	*(0.32)*
Fleet Inspection and Airworthiness Costs	**9**	*(0.04)*	*(0.04)*
Marketing & Valuation Costs	**10**	*(0.03)*	*(0.03)*
Liquidators' Fees (currently outstanding)	**11**	*(0.79)*	*(0.79)*
Estimated Liquidators' Fees and Costs (to finalise liquidation in wind down scenario)	**12**	*(0.73)*	*(0.61)*
Legal fees	**13**	*(0.58)*	*(0.48)*
Sundry Costs	**14**	*(0.27)*	*(0.22)*
Total costs of realisation		***(2.89)***	***(2.63)***
Funds available to priority creditors		***3.16***	***6.38***
Priority (employee) creditors			
Employee Entitlements (Capped Preference Claim)	**15**	*(1.80)*	*(1.80)*
Total priority (employee) claims		***(1.80)***	***(1.80)***
Funds available to secured creditors		***1.36***	***4.58***
Secured creditors			
Secured creditors	**16**	*(10.66)*	*(10.66)*
Total secured creditor claims		***(10.66)***	***(10.66)***
Funds available to ordinary unsecured creditors		***Nil***	***Nil***
Unsecured Creditors			
Government Loans & Debts	**17**	*(45.33)*	*(45.33)*
Vanuatu National Provident Fund ("VNPF")	**18**	*(9.22)*	*(9.22)*
Trade Creditors	**19**	*(44.18)*	*(44.18)*
Passenger Claims	**20**	*(11.45)*	*(11.45)*
Other Unsecured Creditors	**21**	*(1.36)*	*(1.36)*
Employee Entitlements (Excess over Cap)	**22**	*(2.43)*	*(2.43)*
Total Unsecured Creditors		***(113.9)***	***(113.9)***
Anticipated dividend (cents in the dollar):			
- ***Secured Creditor:***		***12.7 c/$***	***43.0 c/$***
- ***Priority Creditors***		***42.6 c/$***	***42.6 c/$***
- ***Ordinary Unsecured Creditors***		***Nil c/$***	***Nil c/$***

29. The liquidators commented on the liquidation scenario as follows:

a) Accounts receivable were estimated to be recoverable at a rate of between 25-40 percent.

b. The assets would be sold off on a piecemeal basis. Specific values were withheld on the basis they were commercially sensitive, but the total realisable value of assets was estimated to be between USD6.05 million (low ERV) and USD9.01 million (high ERV). The realisable assets had been valued by specialist valuers.

b) The liquidators estimated that the secured creditor would receive US 12 cents in the dollar, priority creditors 42.6 cents in the dollar and ordinary unsecured creditors would not receive anything. The unsecured creditor pool included employee entitlement claims over the VT 1 million preferential cap per employee under the CIR Act. The excess of these claims over the cap are unsecured debts in the liquidation and not subject to preferential treatment.

c) Liquidators' fees to complete the wind down were included as a cost of realisation.

Creditors' meeting

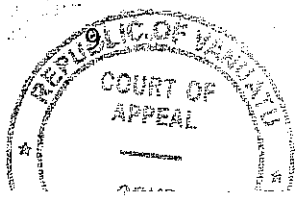
30. There was a single creditors' meeting on 21 August 2024. The resolution to be voted on at that meeting was:

> *That the creditor compromise proposed by the liquidators in accordance with Part 2, Division 1 of the Companies (Insolvency and Receivership) Act No. 3 of 2013, the terms of which are set out in the report to creditors dated 11 August 2024, shall be approved, noting that the approval of the compromise, including any amendment, by each class of creditor shall not be conditional on the approval of the compromise, including any amendment, by every other class of creditor voting on the resolution.*

31. Each creditor was provided with one vote, irrespective of the value of the debt claim value. The outcome of the vote of the affected creditors was that a majority of creditors in both value and number voted in favour of the resolution. In his sworn statement filed in the Supreme Court, Mr Kelly confirmed that only creditors who were compromising all or part of their debt voted on the proposed compromise at the meeting. The issues relating to the way in which the vote was taken and the fact that the resolution was passed at a meeting at which all creditors could vote were also important aspects of the appeal to this court, to which we will return later in this judgment.

Deed of Compromise

32. The Deed of Compromise was executed on 3 September 2024 following the approval of the compromise. The compromise was subject to a number of conditions. It provided for the liquidators to assume a role as "*compromise administrators*" It also provided that, to provide financial support to AVOL after the liquidation is terminated, AV3 would provide a letter of comfort to AVOL notifying AV3's intention to contribute funds to support AVOL's ability to meet its future financial obligations. The proposed letter of comfort is to be addressed to the directors of AVOL. It specifically provides



that it is not a guarantee.

Application by liquidators to court

33. Following on from this, the liquidators made an urgent application to the Supreme Court seeking directions to implement the compromise and to terminate the liquidation. A number of factors were emphasised in relation to the request for an urgent fixture. A significant factor, at least from the liquidators' point of view, was that liquidation specific costs were estimated to be USD111,000 per week. These liquidation costs would erode the value which would otherwise be available to AVOL for its operations. The liquidators also considered there are other non-financial factors making the application urgent. The primary judge accepted the need for urgency and the hearing of both the liquidators' and appellants' applications were heard on 16 September 2024, with judgment delivered on 2 October 2024.

Supreme Court judgment

34. It is not necessary to summarise the Supreme Court judgment in detail. We will refer to the primary judge's findings in more detail when we address the specific challenges to them in the appeal. In brief, the primary judge:

a) Rejected the appellants' contentions that the liquidators had coerced creditors into agreeing with the proposal (at [4]) and that the liquidators had not acted in good faith on the basis that both allegations had no evidential foundation (at [5]).

b) Did not accept there had been a misclassification of creditors for the meeting to consider the compromise (at [77]), and, in particular, rejected the contentions there should have been a separate class for the pilot appellants (at [70]) and that the voting had been manipulated by the liquidators (at [76]).

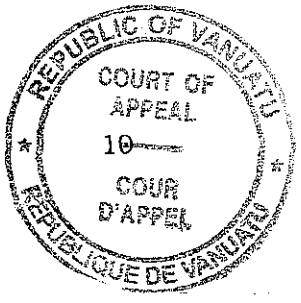
c) Rejected the appellants' submission that the information provided to creditors in the compromise proposal was insufficient for the creditors to make a reasoned judgment in relation to the proposal or that there had been material non-disclosure in the compromise proposal (at [107] and [108]). In particular:

(i) It was not necessary to specify the names of other parties who had submitted proposals to the liquidators to revive AVOL (at [81]);

(ii) Sufficient reasons were given why AV3's proposal was accepted (at [84]);

(iii) It was clear that liquidators' fees would be payable in a continued liquidation but not if the compromise was accepted (at [88]);

(iv) The figure for the amounts owed to the former pilots was what the liquidators had derived from AVOL's records. If, as the pilot appellants argued, they were owed much more than that, they would be able to claim it in the course of the implementation of the compromise (at [89]);



(v) The complaint that the liquidators had failed to investigate various potential claims by AVOL against directors, the Government, and Airbus was rejected: the reasons for this were explained in the compromise proposal (at [100]);

(vi) The property available to pay creditors' claims had not been misstated (at [101]);

(vii) The liquidators had identified the value of AVOL's assets as best could be done in the circumstances and withholding commercially sensitive information was justified (at [103]);

(viii) There was no failure by the liquidators to specify financial information in the compromise proposal given there had been no audited accounts for AVOL since 2021 (at [104]).

d) Found there was no unfair prejudice to the appellants (at [113]);

e) Made the orders sought by the liquidators to implement the proposal and terminated the liquidation (at [159]).

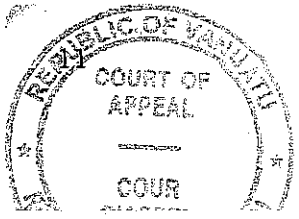
Events after the Supreme Court judgment

35. The appellants filed their notice of appeal to this court on 10 October 2024. They did not seek a stay of the Supreme Court orders. As the Supreme Court had, this court allocated an urgent fixture for the appeal. On 11 October 2024, the liquidators notified creditors that the compromise had been implemented, AV3 had paid the first tranche of the USD 3.3 million it had agreed to pay, and the liquidation of AVOL had been terminated.

Applications to adduce evidence in this Court

36. The appellants applied to adduce as evidence in this Court a sworn statement of Mr Bourgeois, which supplements his Supreme Court statement. The respondents sought leave to adduce two sworn statements by Mr Kelly, updating this Court on developments since the Supreme Court hearing, correcting aspects of the evidence before the Supreme Court and providing evidence in relation to a new point raised by the appellants in this court for the first time. We admitted all of these statements on a provisional basis so that counsel could address us on them, but on the basis that we would rule on their admissibility in this judgment.

37. The admission of Mr Bourgeois' statement was opposed by the respondents on the basis that the proposed evidence was not fresh, having all been available at the time of the Supreme Court hearing. Mr Bourgeois deposed that he became involved in the case only just before the Supreme Court hearing because he was overseas and that he did not therefore have time to place the information now contained in his proposed affidavit before the Supreme Court. It is problematic as to whether that means the evidence is fresh: There are also issues about the cogency of this evidence. Much of it is assertion and expression of opinion from someone who has not been qualified as an expert witness. As it turned out, there was only fleeting references to this evidence at the hearing and we



have decided that it is appropriate to admit it. However, we did not find the evidence of any great significance in relation to the issues we need to resolve in the appeal.

38. As mentioned earlier, Mr Kelly's statements update this Court on events since the Supreme Court hearing. This evidence appears to be fresh, since it relates to events since the time of the Supreme Court hearing and in some cases, correct evidence that was before the Supreme Court. For the most part it is not controversial. We therefore admit this evidence as well.

The statutory scheme

39. Section 3 of the CIR Act provides for compromises with creditors under Part 2, Division 1 of the CIR Act. Under s 3, directors, receivers, liquidators and some classes of secured creditors may propose a compromise. The liquidators did so in the present case.

40. Section 4 of the CIR Act sets out what steps the proponent of a compromise must take. Section 4 provides:

> ***4 Notice of proposed compromise***
>
> *(1) The proponent must compile, in relation to each class of creditors of the company, a list of creditors known to the proponent who would be affected by the proposed compromise, setting out:*
>
> *(a) the amount owing or estimated to be owing to each of them; and*
>
> *(b) the number of votes that each of them is entitled to cast on a resolution to approve the compromise; and*
>
> *(c) if there are classes of creditors, the class or classes to which each creditor belongs.*
>
> *(2) The proponent must give to each known creditor, the company, any receiver or liquidator, and deliver to the Registrar for registration:*
>
> *(a) notice in accordance with Schedule 1 of the intention to hold a meeting of creditors, or any 2 or more classes of creditors, for the purpose of voting on the resolution; and*
>
> *(b) a statement:*
>
> *(i) containing the name and address of the proponent and the capacity in which the proponent is acting; and*
>
> *(ii) containing the address and telephone number to which inquiries may be directed during normal business hours; and*
>
> *(iii) setting out the terms of the proposed compromise and the reasons for it and specifying (where applicable):*

(A) *the property of the company that is available to pay creditors' claims; and*

(B) *the duration of any proposed moratorium period; and*

(C) *the extent to the which the company is released from its debts; and*

(D) *the conditions (if any) of the compromise to commence, continue or terminate; and*

(E) *the order of distribution of proceeds amongst creditors; and*

(F) *the cut-off date for claims to be included; and*

(iv) *setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved; and*

(v) *setting out the extent of any interest of a director in the proposed compromise known to the proponent; and*

(vi) *explaining that the proposed compromise and any amendment to it proposed at a meeting of creditors or any classes of creditors will be binding on all creditors, or on all creditors of that class, if approved in accordance with section 8; and*

(vii) *containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval; and*

(c) *a copy of the list or lists of creditors referred to in subsection (1).*

41. Section 5 sets out the effect of a compromise. It provides:

5 Effect of compromise

(1) A compromise, including any amendment proposed at the meeting, is approved by creditors, or a class of creditors, if, at a meeting of creditors or that class of creditors conducted in accordance with Schedule 1, the compromise, including any amendment, is adopted in accordance with that schedule;

(2) A compromise, including any amendment, approved by creditors or a class of creditors of a company in accordance with this Division is binding:

(a) on the company and on all creditors, or,

(b) *if there is more than 1 class of creditors-on all creditors of that class, to whom notice of the proposal was given as if it were a contract between them,*

but does not bind any secured creditor who has given notice under subsection 5A(1) so long as that notice has not been withdrawn.

(3) *If a resolution proposing a compromise, including any amendment, is put to the vote of more than 1 class of creditors, it is to be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise, including any amendment, by each class is conditional on the approval of the compromise, including any amendment, by every other class voting on the resolution;*

(4) *The proponent must give written notice of the result of the voting to:*

(a) *each known creditor; and*
(b) *the company; and*
(c) *any receiver or liquidator; and*
(d) *the Registrar.*

42. A compromise is approved by creditors, or a class of creditors, if a majority in number and value of creditors or the class of creditors, vote in favour of the resolution: Clause 18, Part 6, Schedule 1 of the CIR Act. The effect of a compromise is that it is binding on the company and all creditors.

43. The relevant provisions of the CIR Act substantially mirror those of Part 14 of the Companies Act 1993 (New Zealand) ("the 1993 NZ Act"), which means the authorities on the provisions of the 1993 NZ Act are of assistance in interpreting and applying those of the CIR Act.

44. An essential feature of a compromise under the CIR Act is that it becomes effective if approved by the requisite majority; no prior approval of the Court is required as is the case in relation to compromises under the legislation of a number of other jurisdictions, including under Part 15 of the 1993 NZ Act. The contrast between Parts 14 and 15 of the 1993 NZ Act was emphasised in the leading New Zealand authority on Part 14 of the 1993 NZ Act, *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62 ("*Trends*"). In that case the majority said:

[63] By way of contrast [with Part 15], under Part 14:

(a) *There is no need to seek court orders (and thus a prima facie endorsement of the classes as proposed by the proponent);*

(b) *A compromise does not require the court's sanction. Rather, a compromise is effective once approved by a qualified majority of creditors;*

(c) *Under s 232(3)(b), a material irregularity in obtaining approval permits, but does not require, the court to intervene in respect of a compromise;*

(d) *The grounds for intervention available to the court under s 232(3) are expressed in general terms but with a focus (given the specificity of the language) on providing a remedy for prejudiced creditors.*

45. The limited role of the Court in respect of compromises under Part 14 of the 1993 NZ Act (and, by analogy, the CIR Act), was emphasised in another New Zealand case, *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy Ltd* [2013] NZHC 3458. In that case, Winkelmann J (as she then was) said:

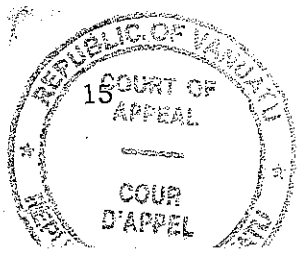
> *[182] ...The substantive merits of a proposed compromise are an issue for the creditors. As is apparent from the Law Commission report [that preceded the 1993 NZ Act], the unfairly prejudicial limb was intended to provide a residual power to the Court, to prevent abuse of the procedure. The Court's role does not involve substituting its views of the compromise for that of the required majority of creditors. Nor does it involve the Court in second guessing the wisdom or sense of fairness of creditors in voting by the required majorities in favour of the proposal.*

46. The power of the Court to intervene in a creditors compromise is contained in ss 7, 8 and 9 of the CIR Act, which is substantially the same as s 232 of the 1993 NZ Act. Section 7(3) is of greatest relevance in the present context, given the appellants' objective of obtaining an order that they not be bound by the compromise. Section 7(3) provides:

> ***7 Powers of Court***
>
> ...
>
> *(3) The Court may order that the creditor is not bound by the compromise or make any other order that it thinks fit if the Court is satisfied, on the application of a creditor of a company who is entitled to vote on a compromise, that:*
>
> *(a) not enough notice of the meeting or of the matter required to be notified under section 4 was given to that creditor; or*
>
> *(b) there was some other material irregularity in obtaining approval of the compromise; or*
>
> *(c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs; or*
>
> *(d) in the case of a secured creditor, the interests of the creditor would be materially prejudiced by the terms of the compromise.*

47. The focus of the present appeal is on s 7(3)(b) (material irregularity) and (c) (unfair prejudice). The appellants say both of these provisions are engaged. However, s7(3)(c) is inapplicable to Mr Do because he voted in favour of the compromise and the other appellant who did not vote.

48. Section 7(3) has not been considered by either the Supreme Court or the Court of Appeal in Vanuatu prior to this case. However, as noted earlier, s 232 (3) of the 1993 NZ Act is in almost the same terms and s 232(3)(b) and (c) are identical to s 7(3)(b) and (c). For this reason, much of the argument before us focused on the decision of the Supreme Court of New Zealand (SCNZ) in *Trends*. Both parties relied on it. Before we address the parties' arguments, we will set a brief summary of *Trends*.



Trends

49. In *Trends*, the directors of a company in financial difficulties proposed a creditors' compromise. The compromise proposal favoured smaller over larger creditors and placed all of the creditors within one class for voting purposes. The compromise was approved by the requisite majority of creditors, voting in a single class, but challenged by four unsecured creditors with larger debts. The compromise proposal involved all debts being paid in full up to $1,000, with an additional fund being shared pro rata. This was favourable to many smaller creditors who would receive a return of up to 100 per cent, but unfavourable to the challenging creditors who would receive between 11 and 18 per cent of the debts owed to them. In addition, the compromise was favoured by "insider" creditors (that is, those who were closely associated with the proponents of the compromise proposal) possibly on the basis that liquidation could expose the company's directors to potential claims for breach of their directors' duties. The insider creditors were to receive nothing in the proposal but were allowed to vote.

50. *Trends* was something of an extreme case and its helpfulness in addressing the present appeal is not because of similarity of the facts of the cases but because the SCNZ set out some general guidance on Part 14 of the 1993 NZ Act that can be applied in analysing the CIR Act provisions relating to compromises.

51. The SCNZ noted in *Trends* that the appeal primarily turned on the approach which should be taken to classification of creditors where: (a) some are closely associated with the company (in the sense of being insiders) so that their interests are not closely aligned with those of the outside or arm's length creditors; and (b) the returns offered on debts are not proportional to the amounts owed.

52. The majority of the SCNZ favoured an approach to classification of classes for the purposes of Part 14 that differed from the approach that had been taken in related to court-approved compromises of the kind provided for in Part 15 of the 1993 NZ Act. The majority was of the view that if the creditors had approved a compromise that reflects a fair business assessment by creditors, it should be given effect to. Classification had to allow for such a fair business assessment. The majority referred to this as the "working assumption" underlying Part 14, and continued:

> *[65] ... [W]e regard the classification of creditors not as an end in itself but rather as instrumental; that is as facilitating a process that will produce compromises which, in accordance with the policy of the Act, appropriately bind those who voted against them. The appropriateness or otherwise of classification decisions is to be assessed in light of this purpose.*

53. The majority said the "working assumption" could be displaced where certain creditors may not have a "class-promoting view" by reason of other interests in a company (such as interests as shareholders or directors). The effect of this analysis, in the majority's opinion, was that the insider creditors in *Trends* should have been dealt with in a separate class. Also, because of their differential returns, small creditors of under $1,000, who would receive a 100 per cent return, should have been placed in a separate class than the larger challenging creditors who would receive between 11 and 18 per cent returns.

54. As a result of the misclassification of creditors, the SCNZ held that the creditors' compromise should be set aside on the basis of material irregularity (in terms of s 232(3)(b)) and unfair prejudice (s 232(3)(c)). The minority considered there had been no misclassification of creditors but also found there had been a material irregularity and that the proposal was unfairly prejudicial to the creditors who challenged the compromise.

55. As said in *Trends*, the primary responsibility for classification rests with the proponent of a compromise. In determining what classification is appropriate, it is appropriate for the proponent to look at whether a compromise approved in the manner proposed will withstand challenge under s.232(3).

56. The primary focus in *Trends* related to misclassification and in that context addressed s.232(3)(b) and (c). In relation to s.232(3)(b) and (c), the majority said:

> [70] *...A challenge to a compromise based on a misclassification complaint can be accommodated under either or both of subs (3)(b) and (c).*
>
> [71] *There will be situations in which subs (3)(b) is engaged other than by misclassification; for instance, if misleading information is supplied to creditors or where the meetings are not convened or conducted in accordance with the requirements of the Act. But, assuming appropriate candour on the part of the proponent and properly convened and conducted meetings, there will be little or no scope for resort to this subsection where creditors have been classified in accordance with our approach.*
>
> [72] *The position in respect of subs (3)(c) is broadly similar. In assessing unfair prejudice under s 232(3)(c), the focus is on the substantive fairness or otherwise of a compromise. A compromise may be substantively unfair if the outcome for creditors is less satisfactory than would result from liquidation (which in most cases will be the alternative to a compromise). This is said to involve a vertical comparison. Substantive unfairness may also arise where creditors are not treated equally under a compromise. In this instance, the comparison is said to be horizontal. While unfairness of both kinds could, in theory, arise independently of a misclassification complaint, we think that cases in which this might arise will be rare, as we will now explain.*
>
> [73] *Whether a vertical comparison results in substantive unfairness will usually depend on an evaluation of uncertain and perhaps contested contingencies. Such an evaluation will seldom be precise and may be susceptible to more than one opinion. More significantly, the scheme of Part 14 is that such an evaluation is primarily for the creditors affected. In the normal course of events, it is not for the court to second-guess that evaluation. We accept that there may be some cases, albeit not often, where the balance of advantage is so clearly weighted one way (that is either in favour of the compromise or against it) as to be an important consideration in terms of s 232(3)(c). It does, however, seem plausible to assume that demonstrable substantive unfairness for particular creditors will not arise in the absence of misclassification. This is because, as we have noted, the scheme of the legislation is that the required business assessment can be left to a qualified majority of the creditors who can be trusted to understand their own interests.*
>
> [74] *A compromise which proposes differential treatment of creditors is not necessarily unfair. But differential treatment between creditors in the same class will almost inevitably raise concerns as to classification; this because differentially treated creditors are unlikely to share sufficient common interest to warrant classification together.*

57. The majority judgment of the SCNZ said that, given there was substantial overlap between the analysis under paras (b) and (c), they would confine the details of the discussion to s.232(3)(c) and said there was scope for debate as to the substantive fairness of the compromise.

58. In *Trends*, the majority held at [88] that there was a material irregularity and unfair prejudice for the purposes of s232(3)(b) and (c) arising from a misclassification of creditors for two reasons, namely:

a) the inclusion of insider creditors along with arm's length creditors was inappropriate as they were on opposite sides of the underlying bargain;

b) a single classification of all arm's length creditors was inappropriate given the vastly different treatment accorded to their debts.

59. Guidance can also be obtained from the decision Full Federal Court of Australia in *Sino Group International Limited v Toddler Kindy Gymbaroo Pty Ltd* [2023] FCAFC 110; (2023) 168 ACSR 311 (*Sino Group*). In summary, the court decided that the following factors should be considered when assessing whether a compromise is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a creditor or group of creditors within the meaning of s 445D(1)(f)(i) of Corporations Act 2001 (Cth):

a) the legislation assumes that the creditors are best placed to judge their interests, so a setting aside will not be ordered lightly;

b) the mere fact that a creditor is prejudiced by the operation of the deed is not a sufficient reason to terminate a deed;

c) the test is not merely discrimination or prejudice, but *unfair* discrimination or *unfair* prejudice; some degree of discrimination is not necessarily unfair. What is required is a better return to creditors than an immediate winding up;

d) when deciding whether a [compromise] deed unfairly prejudices or discriminates against a creditor or group of creditors, consideration must be given to what those purportedly prejudiced creditors would receive, or would be likely to receive, on a winding up, and the reasonableness of any conclusions reached by the administrator on that question; and

e) in respect of determining what is unfairly discriminatory:

(i) there must be reasonable grounds for differentiation between creditors of an equal class (for example, ordinary unsecured creditors) that accord with the object and spirit of the legislation and circumstances may exist where certain creditors must be paid in full to ensure their continued support for the company to allow it to continue to trade;

(ii) there will be circumstances when ordinary commercial common sense will demand, in the case of priority creditors, a loss of priority, and in the case of unsecured creditors, some degree of discrimination;

(iii) where a deed proposes to preserve the company to achieve the objects of the legislation, there should be no expectation of equal treatment of unsecured creditors where such treatment would defeat that purpose; and

f) ultimately, if there is no *prima facie* evidence of misfeasance, concealment or a materially inadequate preliminary examination, and the compromise offers both real financial benefits credibly estimated on preliminary investigation to exceed those available on liquidation, and indirect or collateral benefits from the survival of the company's business, and no worthwhile avenues for further recovery in litigation are identified, a major creditor's curiosity or preference for further exploration of speculative claims is unlikely to render termination of the compromise in the interests of the creditors as a whole.

60. This was recently endorsed by the Full Federal Court in *Project Sea Dragon Pty Ltd v Canstruct Pty Ltd* [2024] FCAFC 141 (*Project Sea Dragon*).

Grounds of appeal

61. Counsel for the appellants, Mr Fleming, raised four grounds of appeal. These were that:

a) the primary Judge had misinterpreted section 4(2)(b)(iii)(A) of the CIR Act and this error had led her to a wrong conclusion on the appellants' submission that there had been a failure in the compromise proposal to disclose the property available to creditors under the proposal;

b) the primary Judge had erred in concluding that there had been no misclassification of creditors for the purposes of the taking of votes on the creditors' proposal at the meeting of creditors. It was argued that there should have been separate meetings for separate classes of creditors. In particular, the appellants argued that the pilot appellants should not have been in the same class as the retained employees of AVOL;

c) that the primary Judge had erred in concluding that the creditors' proposal was not unfairly prejudicial to the appellants;

d) that the primary Judge had been wrong to conclude that it was just and equitable to terminate the liquidation under section 52 of the CIR Act.

62. As we noted earlier, we do not consider it is necessary to address the last of these grounds. We will deal with the three grounds of appeal in the above order.

Ground 1: Definition of "Property available as part of a Deed of Compromise"

63. As mentioned earlier, section 4 of the CIR Act sets out the requirements relating to the notice of compromise proposal. One of these requirements is that the proponent must give each known creditor (and others) a statement setting out the terms of the proposed compromise and the reasons

for it and specify where applicable "the property of the company that is available to pay the creditors' claims" (s 4(2)(a)(iii)(A)).

64. One aspect of the proposal was that AV 3 would contribute USD3.3 million into a fund from which creditor claims could be met. The compromise proposal said that the property available to pay creditors' claims was that USD3.3 million. Mr Fleming argued that this was incorrect. The focus of Mr Fleming's argument was the definition of "property" in section 1 of the CIR Act, which defines property in broad but inclusive terms. He said the primary Judge had misinterpreted this definition.

65. We see nothing in this argument. There was, in fact, no issue as to what the term "property" meant. Rather, the issue was whether the creditors' report had correctly described what property was *available to pay creditors' claims*. The primary Judge said she tended to the view that, when section 4(2)(b)(iii)(A) of the CIR Act is read in light of its text and purpose, the reference to property available to pay creditors' claims is referring to property available *as part of a compromise* (at [101]). We agree.

66. However, it was apparent that the real gravamen of the appellants' argument was that the creditors' report did not clearly identify the property of the company that would be available in the event that the compromise was not approved, so that creditors could get a clear understanding of the alternative that would be available to them in the event that the compromise failed. We see this as an aspect of the appellants' contention that there was a material irregularity in obtaining approval of the compromise in that adequate information was not provided in the creditors' report. We address that now.

Inadequate information in creditors' report

67. Mr Fleming argued that the creditors' report was misleading because it omitted important information about AVOL. In particular, he argued that it was not sufficient for the liquidators to say in the proposal that they had been unable to conduct a full investigation of certain matters and if the proposal was accepted, such investigations would not occur.

Investigation of issues

68. The evidence before the Court from the liquidators was that they had considered these matters but did not have funding to conduct a full investigation or obtain advice on them, and made a decision to proceed with the compromise with urgency given the importance of maintaining AVOL's AOC and other rights to allow it to resume full operations in the event the compromise was accepted.

69. Mr Fleming referred to the possibility of action against the auditors of AVOL, the directors of AVOL and others, but his submission focused in on three issues, namely:

a) the letter of comfort provided by the Government to AVOL's auditors;

b) a potential claim against Airbus in relation to a deposit of USD20 million that had apparently been forfeited when AVOL could not complete the contract to which it related;

c) alleged preferential payments.

70. Mr Fleming emphasised the importance of liquidators investigating potential claims by the company in liquidation in order to find out whether recoveries that would improve the payout to creditors can be established. He referred us to *Paddington Gold Pty Ltd v Wave Pty Ltd (subject to a deed of company arrangement)* [2023] WASC 263 in the regard. In that case, the Western Australian Supreme Court adopted (at [21]) the following observation by the New South Wales Court of Appeal in *Vero Insurance Ltd v Kassem* [2011] NSWCA 381 at [83]:

> *A deed [recording a compromise] may be set aside under s 445D(1)(g) [of the Corporations Act] where there is a public interest in the affairs of a company being examined by a liquidator. It may be "detrimental to commercial morality" to dispense with the opportunity for the investigation of the affairs of a failed company.*

71. We do not see that observation as applying to the present case. That is because there has been at least a preliminary investigation by the liquidators and there is no real prospect that further investigation would have ensued if the liquidation of AVOL had continued. As the liquidators made clear, there was no funding source from which they could have financed the obtaining of expert advice and undertaking of investigation. All of this was clearly explained in the creditors' report.

72. We now turn to the three issues mentioned above.

73. The first is the letter of comfort. This related to the audit of the financial statements of AVOL for the year ended 31 December 2021 (though similar letters had been provided in earlier years). It was addressed to the auditors of AVOL. It provided:

> *On behalf of the government of the Republic of Vanuatu, being the shareholders of Air Vanuatu (Operations) Ltd, we confirm that we shall continue to provide financial support for the forthcoming years to the above-mentioned company and all wholly owned subsidiary companies to enable them to meet their debts as and when they fall due.*
>
> *This advice is provided so as to enable the company to continue to prepare its accounts on a going concern basis.*

74. The primary Judge noted that the first-named appellant has given notice that he will be seeking full payment of his unpaid wages and other entitlements from the Government on the basis that the letter of comfort is enforceable by him. She recorded (at [98]) a submission made to her on behalf of the liquidators to the effect that the requirements for a Government guarantee are set out in s 60 of the Public Finance and Economic Management Act [CAP 244] and observed that there was no evidence before the court to show that the assurances in the letter of comfort would meet those statutory criteria.

75. In his evidence before the Supreme Court, Mr Kelly noted that the letter of comfort was a matter raised at the meeting of creditors. He said that his view was that the assurances provided in the letter of comfort were provided for a limited purpose of the auditor's going concern assessment, and were not guarantees or promises to pay AVOL's debts. He therefore considered that the letter of comfort was not a material matter requiring disclosure, given that it had been given for the purpose of the most recent audit report of AVOL in 2021 and it was unlikely that current creditors could claim that their debts were covered by it.

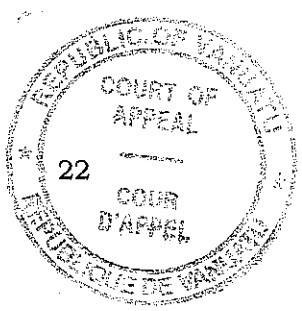
76. Mr Fleming accepted that enforcing the letter of comfort against the Government would be "challenging". It is not clear whether the first-named appellant intends to continue the claim described above, at [74] to enforce the letter of comfort if the present appeal is dismissed. In case he does do so, we will not express a view about the enforceability of the letter of comfort, other than to say that we do not have any evidence before us that contradicts Mr Kelly's assessment.

77. The primary Judge noted that the appellants had not provided any expert opinion to counter Mr Kelly's evidence and had not cross-examined him, and in those circumstances there was no reason to reject Mr Kelly's assessment of the position (at [100]). We agree.

78. Having said that, we consider it would have been preferable for the liquidators to obtain some advice about the enforceability of the letter of comfort, if only to foreclose the concerns expressed by the appellants in relation to it in these proceedings. Indeed, we consider there may be some validity in Mr Fleming's criticism of the conduct of the liquidation by the liquidators. But it is not appropriate to say more than that in light of the fact that the conduct of the liquidation was not before us and we did not hear argument about it. All we need to say is that we see criticism of the conduct of the liquidation as having no relevance to the issue before us, unless it could be shown that the conduct of the liquidation led to a material irregularity in obtaining approval of the compromise or to unfair prejudice to the appellants in relation to the compromise. Our focus is on the allegations of material irregularity and unfair prejudice.

79. The second issue relates to what was referred to as the "plane claim". This claim related to a non-refundable deposit made by AVOL to Airbus pursuant to a contract for the supply of aircraft dated 5 February 2019. The evidence of the liquidators before the Supreme Court was that they had investigated this and formed the opinion that there was no contractual right to recover this deposit. The inquiries made by the liquidators did nothing to dispel the view that the deposit was not refundable and, as the liquidators did not have funding to take the matter further and the contract was governed by the law of England with a compulsory arbitration clause, they concluded the claim was not an asset of the company and not a material matter requiring disclosure. In his sworn statement adduced in this Court, Mr Bourgeois set out his understanding of the contract with Airbus and attached the relevant provisions of that contract. There was nothing in these to dispel the liquidators' assessment. However, Mr Bourgeois referred to the fact that the Prime Minister had recently met with Airbus and others, and he surmised that this claim would have been discussed. He said in the event that AVOL was able to continue trading as a result of the acceptance of the compromise, it may be able to offset the USD20 million against the original contract or a new contract. Even if that were true, the plane claim would not have been an asset in the liquidation of AVOL in the event the compromise failed.

80. In any event, this evidence is speculation on Mr Bourgeois' part. In the absence of any specific evidence that contradicts the unchallenged evidence of the liquidators, we do not see any basis for differing from the primary Judge's assessment that the treatment of the plane claim in the compromise proposal did not amount to a material irregularity in obtaining approval of the compromise.



81. The third issue relates to the allegation that preferential payments were made to some creditors. In his evidence before this Court, Mr Bourgeois expressed concern that there had been a material misstatement of financial information and that payments had been made which he believed were preferential payments. He set out the list of these payments which he considered amounted to preferential payments.

82. As we understand it, the allegation made by Mr Bourgeois is that these payments were voidable payments.

83. There is nothing in the evidence before us that would allow us to conclude that payments that had been made were voidable payments. In those circumstances, we are unable to conclude that there is any basis to reject the unchallenged evidence of Mr Kelly that the liquidators investigated voidable transactions, voidable charges and the like, that those preliminary investigations indicated that there was no documentary evidence to support the claims, that the oral evidence was inconsistent and conflicting and that some cases were likely to be contested and involve protracted litigation.

Financial information

84. The appellants also argue the creditors' report was incomplete and therefore inaccurate because it omitted important information.

85. Mr Bourgeois' statement in this court appended draft accounts for AVOL for the 2022 and 2023, that had been emailed to him and other stakeholders in AVOL in April 2024. Both showed substantial losses made by AVOL. He said the liquidators would have had these and should have included information based on them in the creditors' report. The email accompanying the draft accounts made it clear these were very provisional drafts, there was a shortage of qualified staff to complete them and that there was "still a lot of work to be done in this area".

86. Mr Fleming argued the creditors' report did not contain adequate financial information. He cited the judgment of the minority in *Trends*, in which a failure to provide financial information was seen as a material irregularity. The primary judge rejected the comparison of this case with *Trends*, pointing out that in *Trends* there was very little financial information set out in the compromise proposal proposed by the directors of the company (at [104]). In this case, the liquidators as independent and experienced professionals had prepared financial information as best could be done from the very poor records available to them.

87. We do not consider there was any irregularity in relation to the financial information in the creditors' report. We agree with the judge that there is no basis for comparison between this case and *Trends* in that regard. And we do not see why including information from draft financial statements known to be incomplete and inaccurate would have assisted creditors in assessing the compromise proposal.

88. Mr Fleming raised other matters in his notice of appeal but did not elaborate on them at the hearing. We mention them briefly:

    a) He challenged the judge's finding that it was not necessary to set out the names of other parties who has submitted competing proposals for restructuring of AVOL. We see nothing in this point: the AV3 proposal was the one the creditors had to consider and the clear advice

was that the only alternative was a wind-down liquidation. The other proposals were in the past;

b) He also challenged the judge's finding that it was not necessary to set out why the AV3 proposal was preferred to the others. We reject that challenge for the same reason.

89. We do not consider the appellants have established any error by the primary judge in respect of these matters.

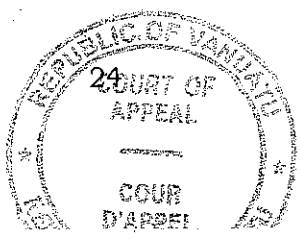
Ground 2: Classes of creditors

90. The appellants challenge the finding of the primary Judge that there was no misclassification of creditors, and that a single class of creditors was appropriate (at [77]). Applying the analysis of the majority in *Trends*, the primary Judge concluded that all affected creditors who voted at the meeting had a common interest in maximising the return on their debt even if their rights and interests were different, and could therefore be expected to vote on the basis of a "class-promoting" view.

91. Mr Fleming was critical of two aspects of the classification of creditors. First, he said the Government should not have been included in the same class as other creditors. However, we see this as largely academic, because it is clear from the voting figures provided by the liquidators that the inclusion or exclusion of the Government from the voting would have made no difference to the outcome.

92. Mr Fleming was also critical of the fact that retained employees and those who had been made redundant and had unpaid entitlements were placed in the same class. In this Court he modified that argument further by arguing that the retained employees should not have been part of the compromise at all, because they retained their full entitlements and were not therefore compromising anything. He said their voting as a majority gave an unfair advantage over the former employees and the general unsecured creditor classes. He said this was a material irregularity in obtaining approval of the compromise and was also unfairly prejudicial. As noted above, at [31], Mr Kelly's evidence was that only creditors who were compromising all or part of their debt voted on the proposed compromise at the meeting. But we consider Mr Fleming had a point that the retained employees were not compromising anything, and yet they still voted, which contradicts Mr Kelly's evidence. However, for reasons we will come to, we do not think this error in Mr Kelly's evidence is a material matter.

93. We have already set out the relevant analysis from *Trends* as to the way in which creditors should be classified for the purposes of compromise proposals. We adopt the majority position in *Trends*, though we acknowledge that the minority position in that case does have support in other jurisdictions. Applying the analysis of the majority, we accept Mr Fleming's submission that the fact the retained employees did not compromise any rights meant that they had different interests from creditors who were, in fact, compromising their right and so they should have been in a separate class for the purposes of voting or, alternatively, should not have been part of the compromise at all. While the submission that the retained employees should not have been part of the compromise was not advanced in the Supreme Court, we do not see any prejudice to the respondents in allowing it to be raised in this Court. The evidence adduced in this Court from Mr Kelly was in part aimed at providing the liquidators' response to the submission and we heard argument on it from counsel in both written and oral submissions.



94. Having said that, we are conscious of the concern expressed by Lord Millett NPJ in the decision of the Hong Kong Final Court of Appeal in *UDL Argos Engineering and Heavy Industries Co Ltd v Li Oi Lin* [2001] HKFCA 19, (2001) 4 HKCFAR 358. He commented as follows:

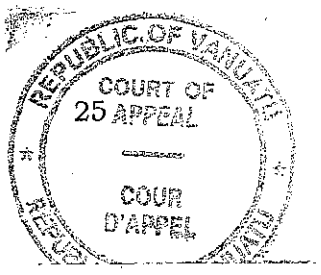
> *26. Why, it may be asked, should persons with divergent interests be allowed to vote as members of the same class ... ? The first is the impracticality in many cases of constituting classes based on similarity of interest as distinct from similarity of rights. ... A second is that the risk of empowering the majority to oppress the minority ... is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the Scheme and would deprive a beneficent procedure of much of its value.*

95. The significance of that concern is that, in the present case, the most fragmented classification of classes that would have been possible would have seen the pilot appellants and the other former employees in a single class. There was never the possibility that the five first-named appellants would be in a class on their own. It was clear that there was no material difference in the position of these former employees. That is significant because the voting figures provided by the liquidators indicate that, even if such a class had been constituted, the proposal would have been comfortably approved by the necessary majority of that class. It is also notable that the resolution put to the creditors' meeting (as set out above, at [30]) specifically provided that the approval of the compromise by each class of creditor was not conditional on the approval of the compromise by every other class of creditor voting on the resolution.

96. Counsel for the respondents, Ms Holmes, argued that the classification of creditors had no impact on the outcome of the vote and, therefore, even if there had been an irregularity in classification, it was not "material". She relied on the two sworn statements of Mr Kelly, which were adduced in this court.

97. In his first sworn statement adduced in this court, Mr Kelly deposed as follows in relation to the meeting of creditors:

> *At the meeting of creditors, there was an overall attendance of 427 persons which can be broken down as follows:*
>
> *a) 370 attendees/creditors who were able to vote; and*
>
> *b) 57 observers who were not able to vote.*
>
> *There was a total of 324 creditors who voted in respect of the Compromise Resolution at the meeting of creditors. There were 46 attendees who were able to vote in respect of the Compromise Resolution but did not do so.*
>
> *266 of the creditors who voted were retained employees of the company.*
> *The overall outcome of the voting in respect of the Compromise Resolution (voting outcome) was as follows:*



For (No.)	For (Value)	Against (No.)	Against (Value)
306	USD 80.4m	18	USD 3.9m

...

If the one Government vote (with a value of USD45.9m) was not counted in the voting outcome, the result would have been as follows:

For (No.)	For (Value)	Against (No.)	Against (Value)
305	USD 34.5m	18	USD 3.9m

If the one Government vote and the votes of the 266 retained employees of the company were not counted in the voting outcome, the result would have been as follows:

For (No.)	For (Value)	Against (No.)	Against (Value)
39	USD 33.6m	18	USD 3.9m

98. This indicates that the compromise would have been easily approved by a majority of creditors (even if those standing to receive US 50 cents and those standing to receive US 5 cents were classed together). As both of these groups stood to receive a better return from the compromise than from a wind-down scenario, it could be said that they could be expected to vote on the basis of a class-promoting view.

99. However, in his second statement adduced in this court, Mr Kelly provided greater detail on the voting outcome, by reference to the classes of creditors identified in the creditors' report. This indicated that even if the US 50 cents group and the US 5 cents group had been treated as separate classes, the proposal would have been approved by a majority of both classes. He deposed as follows:

> *I have reviewed each creditor vote and placed each in the classes as described in section 3 of the respondents' report to creditors dated 11 August 2024 (and revised on 19 August 2024) (Creditors Report) in relation to the compromise. I now provide a complete breakdown of the voting in respect of the compromise at the meeting of creditors on the basis of the classes referred to in the Creditors Report in the following tables:*

Table 1 – Including the votes of Class C.2	For		Against	
	Count	Value (USD)	Count	Value (USD)
Class A	-	-	-	-
Class B	-	-	-	-
Class C	274	1,796,414	3	564,508

Class C.1	*266*	*917,205*	-	-
Class C.2	*246*	*246*	*2*	*2*
Class C.3	*8*	*878,963*	*3*	*564,506*
Class D	*1*	*9,279,396*	-	-
Class E	*1*	*45,871,754*	-	-
Class F	*30*	*23,392,006*	*15*	*3,381,589*
Total	*306*	*80,339,570*	*18*	*3,946,097*

Table 2 – Excluding the votes of Class C.2	*For*		*Against*	
	Count	*Value (USD)*	*Count*	*Value (USD)*
Class A	-	-	-	-
Class B	-	-	-	-
Class C	*274*	*1,796,414*	*3*	*564,508*
Class C.1	*266*	*917,205*	-	-
Class C.2	*Note*			
Class C.3	*8*	*878,963*	*3*	*564,506*
Class D	*1*	*9,279,396*	-	-
Class E	*1*	*45,871,754*	-	-
Class F	*30*	*23,392,006*	*15*	*3,381,589*
Total	*306*	*80,339,570*	*18*	*3,946,097*

Note – Class C.2 creditors are represented in either Class C.1 or Class C.3. Class C.2 votes were admitted for USD1.

If the votes were counted according to each class identified by the creditors in the compromise report, it would have been passed by each class.

100. We are satisfied that this establishes that any irregularity in classification would not have altered the outcome. So, was any such irregularity material in obtaining approval of the compromise? We note that in *Trends*, there was no analysis of the voting figures that established that the effect of the misclassification in that case was critical to the outcome.

101. In *Sino Group* at [62], the Full Federal Court said, in a similar statutory context, "material" means something that was relevant, and either did affect or might have affected the decision to vote in favour of the compromise. This was adopted by the Full Federal Court in *Project Sea Dragon* at [162].

102. The appellants take issue with the conclusions of the primary judge. Mr Fleming argued that the fact the classification adopted by the liquidators did not affect the outcome did not mean it was not material. He argued that, if creditors had voted separately by class, the outcome may have been different. While that speculation cannot be dismissed out of hand, we consider the best evidence of the likely effect of the classification was its actual effect. Mr Kelly's evidence about the actual outcome is, therefore, decisive. We find there was no material irregularity in relation to the classification of creditors for the meeting.

103. We acknowledge that the minority in *Trends* observed at [122] that, if there was an error in constituting the class of those with the same rights who are entitled to vote, then a material irregularity will have occurred. But that was in the context of their finding that classes should be broadly defined by reference to their legal rights. On that approach, there would have been no misclassification in this case. We therefore prefer the analysis of *Sino Group* as set out above.

104. In respect of Mr Bourgeois, his concern appears to be more that he was not classified as a secured creditor, apparently because he thought the fact the amount owing to his company was represented by a promissory note executed by AVOL meant the debt was secured. On the face of it, this does not seem to justify the classification as a secured creditor, and that is obviously the position that the liquidators took in classifying Mr Bourgeois' company as an unsecured creditor. We do not see it as arguable that there was any call for him to be in a separate class from the other unsecured creditors who were treated in the same way as him. Thus, even if there had been the division of the voting into the classes contended for by the appellants, the outcome for him (or his company) would have been the same.

105. As the way in which creditors were classified was immaterial to the outcome of the voting we reject the contention that the decision to have a single meeting with all creditors voting at that meeting was a *material* irregularity in obtaining approval of the compromise. We therefore reject this ground of appeal.

Ground 3: Unfair prejudice

106. The primary judge addressed this issue as follows:

> *109. In assessing unfair prejudice under [s.7(3)(c) of the CIR Act], the focus is on the substantive fairness or otherwise of a compromise. A vertical comparison in this case involves a comparison between the compromise and the wind down scenario. A compromise may be substantively unfair if the outcome for creditors is less satisfactory than would result from the alternative. A horizontal comparison relates to differential treatment of creditors.*
>
> *110. As the majority noted in Trends, whether a vertical comparison results in substantive unfairness will usually depend on an evaluation of uncertain and perhaps contested contingencies. Such an evaluation will seldom be precise and may be susceptible to more than one opinion. More significantly, such an evaluation is primarily for the creditors affected. In the normal course of events, it is not for the court to second guess that evaluation (at [73]).*
>
> *111. Under a vertical comparison, the affected creditors are estimated to receive a better rate of return than under a wind down scenario. One of the unknowns of an asset sale is the realisable value of assets, when sold in a "fire sale". In his sworn statement Mr Perry deposes that the compromise is irregular, unfair and prejudicial as it will stop the creditor applicants from being able to recover money owed to them for many years hard work. However, the position is unlikely to be any different if the liquidation continued. That is because proceedings cannot be issued against a company in liquidation unless the Liquidator agrees or the Supreme Court orders otherwise (Clause 4, Part 3, Schedule 4 of the CIR Act). The applicants would not have an automatic right to take legal steps to recover unpaid entitlements if the liquidation continued."*

112. In terms of the horizontal comparison, the applicants are in a better position in terms of the percentage recovery of the debt, as opposed to general unsecured creditors. This is unlike the situation in Trends where creditors with debts of $1000 or under would it be paid in full.

113. It cannot be said there is substantive unfairness to the applicants based on either a vertical or horizontal comparison. Another factor relevant to substantive unfairness is that even before the compromise was approved, Mr Perry had signalled his intention to pursue a claim against the Government relating to the written assurance. The compromise does not affect his (or the other applicants) right to take such action.

107. Only the three appellants who voted against the compromise can avail themselves of this ground (CIR Act, s 7(3)(c)).

108. Mr Fleming argued strongly that the pilot appellants were not in a better position as a result of the approval of the compromise. He said the pilot appellants were owed substantially more than the amount specified in the creditors' report. We cannot resolve that on the evidence before us, so we proceed on the basis of the figure set out in the creditors' report. Mr Fleming emphasised the compromise would mean the pilot appellants would not be able to sue AVOL or the Government to pursue their claims under the Employment Act or the general law. He highlighted Mr Bourgeois' evidence that Mr Bourgeois believed other employees who were made redundant were paid their entitlement in full, but the pilot appellants were not. We do not accept that Mr Bourgeois' belief this may have happened is evidence that it did, so we put that argument to one side. Mr Fleming was particularly critical of the differential treatment of retained employees and the pilot appellants.

109. Ms Holmes said the primary judge correctly focused on the comparison of the appellants' position under the compromise when compared to the position they would be in if the liquidation continued when making the vertical comparison referred to in *Trends*. We accept that submission. The difficulty with the argument advanced by Mr Fleming is that it compares the appellants' position under the compromise with the position they would be in if AVOL were not insolvent and not in liquidation. That is a false comparison and inconsistent with the majority judgment in *Trends*. The uncontested evidence before the primary judge and before us is that the estimated return for the appellants from the compromise will exceed their estimated return from a wind-down liquidation. This estimated return from a wind down will be adversely affected by the fact that there will be many more creditors if AVOL ceases trading altogether and the retained employees become redundant. The liquidators' fees of conducting the wind down will be a charge on the proceeds of the wind down (but their fees are not payable out of the money available to creditors under the compromise). The evidence is that in a liquidation, AVOL will have very limited resources to meet the numerous claims it is likely to face.

110. Mr Fleming also argued a horizontal comparison of the position of the retained employees and the pilot appellants showed the retained employees were better off than the pilot appellants. That effectively involved a comparison of the position of the pilot appellants under the compromise with the position they would be in if they had not been made redundant. Again, that is a false comparison. The fact that the pilot appellants were made redundant is a separate matter from their position, as now terminated employees with unmet claims against AVOL, under the compromise. The pilot appellants were treated in the same way as others in the same class and, given the preferential nature of some of the amounts owed to them, better than the general unsecured creditors. The

retained employees did not have claims to be addressed in the compromise because of their retained status, not because the compromise itself preferred them.

111. In short, we agree with the conclusion and reasoning of the primary judge on this aspect of the case.

Result

112. None of the grounds of appeal has been made out. As foreshadowed earlier, we do not need to address the fourth ground of appeal because, as we have found there is no basis to set aside the compromise, there is also no basis to reverse the termination of the liquidation. The appellants made it clear that they were no longer contending for the termination of the liquidation in any event.

113. We therefore dismiss the appeal.

Costs

114. Mr Fleming submitted that, even if the appellants were unsuccessful in the appeal, costs should not be awarded against them. He said there had never been a case like this before in this jurisdiction and the appellants were, he said, of limited means.

115. We do not see any reason to depart from the normal course that costs follow the event. This is not a test case, in that there are clear authorities on similar legislation elsewhere, especially *Trends*.

116. The respondents sought costs of VT2,000,000. We see that as excessive. While we were appreciative of the helpful submissions made by Ms Holmes, we do not consider the appellants should bear the cost of the decision by the liquidators to engage overseas counsel. We therefore order the appellants to pay costs of VT1,000,000 to the respondents.

DATED at Port Vila, this 21st day of November, 2024

BY THE COURT

Hon Chief Justice Vincent Lunabek