IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Companies (Insolvency and Receivership) Act No. 3 of 2013

Company
Case No. 16/3841 SC/COMP

BETWEEN: MOCHA LIMITED T/AS VANCORP CONSTRUCTION
Claimant

AND: IRIRIKI ISLAND HOLDINGS LIMITED
Defendant

Date of hearing:	*June 14th, 2017*
Date of Judgment:	*June 20th, 2017*
Before:	*Justice Paul Geoghegan*
In Attendance:	*Counsel – Mark Fleming for the Claimant*
	Counsel – Dane Thornburgh for the Defendant
	Counsel – Daniel Yawha for the supporting creditor Trident Holdings Ltd.

JUDGMENT

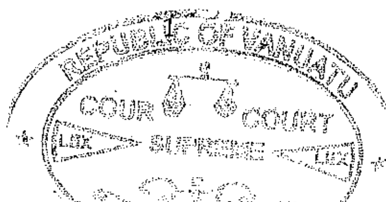
1. These proceedings involve a claim by Mocha Limited ("*Mocha*") in respect of a debt of AUD$1,419,200.87 alleged to be owed by Iririki Island Holdings Ltd. ("*Iririki*") in respect of construction work undertaken by Mocha to repair the Iririki Island Resort owned by Iririki after substantial damage was caused by cyclone Pam in March 2015.

2. It is asserted by Mocha that Iririki has no defence in respect of the debt claimed, that the debt is not disputed and that the Court should place Iririki in liquidation and appoint a liquidator. These applications are opposed by Iririki on a number of grounds however because of the way these proceedings have developed a preliminary point required to be determined by the Court is whether or not Iririki has a right to appear in these proceedings. This judgment is to be determine that issue.

Background

3. There is no dispute that after the devastation caused by cyclone Pam in March 2015 Iririki engaged Mocha to undertake significant construction work to repair Iririki Island Resort owned by Iririki and located on Iririki Island in Port Vila. The details of the construction carried out are irrelevant to the issue to be determined.

4. It is clear from the evidence filed, that in the latter half of 2016 a director of Mocha, Mr. Foots became concerned regarding payment of various accounts outstanding in respect of the construction work undertaken by Mocha. There were numerous



discussions and correspondence between Mr. Foots and various representatives of Iririki regarding this issue over a period of time.

5. Pursuant to Section 19(1) of the Companies (Insolvency and Receivership) Act No. 3 of 2013 ("*the Insolvency Act*") Mocha served a statutory demand on Iririki on September 27th, 2016.

6. Section 20 of the Insolvency Act requires any company who wishes to challenge this statutory demand to make an application within 10 working days of the date of service of the demand[1]. That time limit is a strict one and Section 20(3) of the Insolvency Act provides:

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

7. There was no dispute in this case that Iririki did not apply to set aside the statutory demand within that 10 day period.

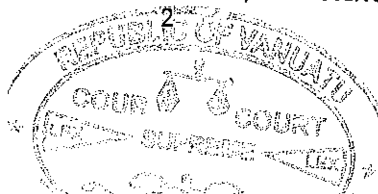
8. Section 19 (2) (d) of the Insolvency Act requires a company served with a statutory demand to do one of four things "*to the reasonable satisfaction of the creditor, within 15 working days of the date of service, or any longer period that the Court may order*". Taking any of the actions referred to would have the effect of satisfying the statutory demand given that it would need to be undertaken to the "*reasonable satisfaction of the creditor*".

9. One of the issues in this case is whether or not, within the 15 working days prescribed by the Act, Iririki did one of the four things referred to, namely a "*compound with the creditor*"[2]. Mocha says that no such compound occurred at all.

10. On November 23rd, 2016 Mocha filed a claim seeking an order that Iririki be put into liquidation by the Court pursuant to Section 15 of the Insolvency Act. The procedure to be adopted in claims of this kind is governed by the Companies (Insolvency and Receivership) Regulation Order No. 11 of 2015 ("*the Insolvency Order*"). Schedule 2 of those regulations set out various procedural rules in respect of claims of this nature while the Civil Procedure Rules also apply to claims of this kind[3]. They apply: "*except in so far is they are modified by or inconsistent with Schedules 2 and 3 of this Regulation or the Act, as the case may be*".

11. Accordingly when a claim of this nature is served on a defendant company "*any person who, being the defendant company or a creditor or a shareholder of that company*" must file a defence within 14 days after the date on which the claim is served upon that person[4].

[1] Section 20(1), (2) (a) Companies (Insolvency and Receivership) Act No. 3 of 2013.
[2] Section 19 (2) (iii) of the Insolvency Act.
[3] Section 5(3) Companies (Insolvency and Receivership) Regulation Order
[4] See Clauses 13(2) and 14 of Schedule 2 Companies (Insolvency and Receivership) Regulation Order No. 111



12. Iririki did not comply with that time limit. While a defence should have been filed and served no later than December 23rd, 2016 it was not but filed until January 18th, 2017.

13. On January 30th, 2017 Mocha filed an application for the appointment of an interim liquidator pursuant to Section 16 of the Insolvency Act. It also filed a conditional defence to Iririki's set-off and cross demand on February 23rd, 2017.

14. On March 13th, 2017 Iririki filed an application expressed to be pursuant to clauses 17 and 19 of Schedule 2 and Section 20 of the Insolvency Act. The application stated:

"*The applicant/defendant company applies for the following orders:*

(1) Special leave to apply pursuant to Section 17 and Section 19(b) Companies (Insolvency and Receivership) Regulation Order No. 111 for Thornburgh Lawyers to appear on the hearing of the application to appoint liquidator;

(2) An order to extend time to apply to have statutory demand and dated 27th September 2016 set aside pursuant to Section 20(3) and Section 20(4) Companies (Insolvency and Receivership) Act No. 3 of 2013;

(3) That the statutory demand dated 27th September 2016 be set aside;

(4) An order that the Respondent/Claimant pay the Applicant/Defendant's company's costs of incidental to these proceedings, to be taxed if not agreed".

15. The relevant part of this application in terms of this judgment is the application for leave to appear on the hearing of the application to appoint a liquidator. That application is required because of the provisions of clause 17 of Schedule 2 to the Insolvency Order which provides:

"*17. Effective failure to file defence or appearance.*

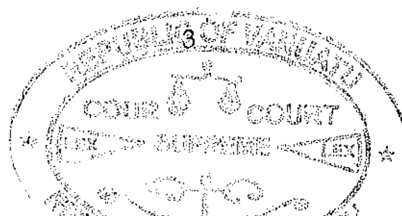
If a person who is entitled to file a defence or an appearance in a proceeding commenced by the filing of a claim under clause 2, fails to file a defence or an appearance within the time prescribed by these Rules, that person is not, without an order for extension of time granted on application made under clause 19 or the special leave of the Court, allowed to appear on the hearing of the proceedings".

16. Clause 19 of Schedule 2 provides as follows:

"*Interlocutory applications*

(1) If a proceeding is commenced by the filing of a claim under clause 2, no interlocutory application (other than an application made with the leave of the Court) may be made to the Court before the date of hearing specified in the Notice of Proceedings served with that claim unless that application is:

(a) An application for an extension or abridgement of time; or
(b) An application under some clause 4(2) or clause (8); or



(c) An application for the appointment of an interim liquidator; or
(d) An application to directions; or
(e) An application to excuse non-compliance with any provisions of this Regulation."

17. There is no clause in Schedule 2 which sets out when special leave is required to be sought however counsel appeared to agree with the proposition that the logical interpretation of clause 17 would be that special leave is required in circumstances where leave for extension of time under clause 19 has not been granted.

18. Clause 17 also refers to filing "*an appearance*". The filing of an appearance is governed by clause 15 of Schedule 2 which provides that:

"*15. Appearance*
A person who, other than the defendant company, intends to appear at the hearing of the proceeding may, without filing a defence, file an appearance in form 11 of Schedule 3:

(a) Stating that he or she person (sic) intends to appear; and
(b) Indicating whether he or she supports or opposes the claim for the application for an order under Section 19 of the Companies Act No. 25 of 2012."

19. Looking at the provisions of the Insolvency Act and the Insolvency Order it is reasonable to consider that clause 15 would not be intended to apply to counsel for a defendant company which intended to file a defence, but rather to other parties such as creditors of a company who either wish to support or oppose the claim. It could also be seen as applying to a defendant company itself which supported the application but wished to be heard at any hearing of the application.

20. It is accordingly argued by Mocha that, despite the fact that Iririki has filed a significant number of sworn statements in these proceedings that it does not have the right to appear in respect of the application.

21. For Iririki, Mr. Thornburgh submits that:

    (a) By virtue of clause 19(2) of Schedule 2 the claim was not a claim to which section 2 of the Insolvency Order applies and therefore clause 17 does not apply to the claim. The applicable rules are accordingly the Civil Procedure Rules No. 49 of 2002 which contain no limitations on representation or appearances.

    (b) Alternatively, if clause 17 does apply to the issue of the defendant company's appearance then the Court has discretion under clauses 17 and 19 and by way of the inherent jurisdiction of the court to grant leave for the defendant company to appear at the hearing. The factors to be considered by the Court in the exercise of that discretion would be the length of the delay, explanation for the delay and the degree of prejudice which might be suffered by either party if leave was granted or not granted.

22. For Mocha, Mr. Fleming submits that this must be considered as an application for special leave by Iririki and that such an application must be unsuccessful as:

    (a) The application is made pursuant to the wrong sub-clause of Clause 19 and not made during the time prescribed, namely by 13th December 2016, a defect which cannot be cured by leave;

    (b) That no grounds exist which would warrant "*special leave*" being granted; and

    (c) There is no satisfactory evidence or explanation for the delay in filing the defendant's defence.

Discussion

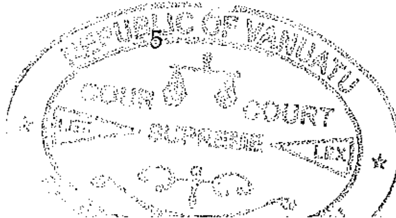
23. Given the wording of clause 17 the application filed by Iririki is somewhat curious. The reference to clause 19(e) is erroneous as clause 17 clearly applies to an application under clause 19(1)(a) which is an application for an extension or abridgement of time. That makes perfect sense, as the defendant company would be asking for an extension of time for the late filing of a statement of defence. It is clear that clause 19(e) is not applicable to an application under clause 17. There has been no application to amend that application and accordingly the Court is left with an application for special leave to apply under clause 17. While conceivably the Court could grant Iririki's application under clause 19(e) of the Regulations that would simply excuse the non-compliance. It would not have the effect of extending the time for the filing of the defence, something which is expressly required by clause 17.

24. Before turning to the issue of special leave I shall address the submissions of Mr. Thornburgh in terms of his alternative arguments. Before doing so however I wish to address submissions made by Mr. Thornburgh that there had been no application by Mocha to strike out the defence filed or set aside the same, despite the time that has passed since the filing of the defence. Mr. Thornburgh appeared to submit that is a matter of some significance and should be taken into account by the Court. I disagree. I do not consider that Mocha was required to take any steps in respect to the late filing of the defence by Iririki. Iririki had a clear time limit in terms of filing the defence and should have applied to the Court for an order extending the time to do so. There is no significance in Mocha having not having taken any steps to apply to have the statement of defence struck out or otherwise set aside.

25. As to the submission that clause 17 does not apply to this claim due to the operation of clause 19(2), clause 19 is a clause which applies to the filing of interlocutory applications. clause 19(1) provides that no interlocutory application other than one which is made with the leave of the Court may be made to the Court before the date of hearing specified in the notice of proceeding served with the claim, unless that application is of a kind specified in clause 19(1)(a) (2)(e).

26. Clause 19(2) provides that:

    "*If a defence is filed in a proceeding commenced by the filing of a claim under Clause 2 and the hearing of that proceeding is adjourned for a fixture on a defended basis, the*



Court rules apply as if the proceeding had been commenced by a claim filed under the Court rules and not by a claim filed under Clause 2".

27. There is no definition of "*court rules*" but I consider it clear that what is intended by that reference is a reference to the Civil Procedure Rules No. 49 of 2002.

28. I do not accept Mr. Thornburgh's submissions in this regard to be correct. I do not consider that clause 19(2) can be read in such a way as to displace the requirements in clause 17. I consider that clause 19(2) must be read as contemplating the filing of a defence in compliance with Schedule 2. To read clause 19(2) in the manners suggested by Mr. Thornburgh would be to render clause 17 nugatory. I do not consider that a correct interpretation of the clauses of Schedule 2 would bring about that result.

29. Accordingly I consider that clause 17 applies and that the leave of the Court is required for the filing of a defence outside the prescribed time for doing so.

30. As to the argument by Mr. Thornburgh that the court has discretion under clauses 17 and 19 of Schedule 2 and by way of the inherent jurisdiction of the Court to grant leave for Iririki to appear at the hearing, I consider that clauses 17 and 19 must be read separately.

31. Clause 19(3) of Schedule 2 provides that:

"*(3) to avoid doubt, this clause does not limit the inherent jurisdiction of the court*".

32. It is worthy of note that the reference to inherent jurisdiction applies to clause 19 only.

33. Clause 17 provides that either an order under clause 19 or alternatively the special leave of the Court is required to allow an appearance in a hearing of the proceedings. For the reasons already given, focus falls upon whether or not special leave should be granted to Iririki in the circumstances of this case.

34. Referring to the issue of special leave, Mr. Fleming submitted that Iririki applied in this special leave application to excuse non-compliance with the regulations pursuant to clause 19(1)(b). He submits that what should have been applied for in the required time, was an order under clause 19(1)(a) as it specifically refers to an "*extension of time*". Such an order needed to have been granted before the liquidation hearing under an application filed within the 14 days period. I assume that the prescribed 14 day period that is referred to is the period set out in clause 14 of Schedule 2 which prescribes the time for filing a defence. If so, I do not read the regulations in that way and do not consider that Iririki was required to file an application for leave within the 14 day period.

35. Mr. Fleming urged the Court to take the approach referred to by the New South Wales Supreme Court in the matter Land Enviro Corp. Pty. Ltd.[5] where Bereton J. stated:

"*As the decision of the High Court of Australia in Aussie Vic Plant Hire v. Esanda[6] establishes, it is not open to the court in those circumstances to make an order further*

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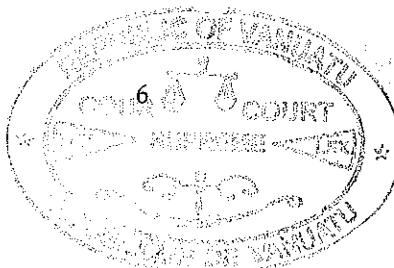
[5] [2013] NSWSC 1087
[6] [2008] AGCA 9



extending time after the time to compliance expired [see also: NA Environment Holdings Pty Limited v. Perpetual Nominees Limited]. In order to secure to such an extension, it was necessary, not only to file an application before 18 June, but to bring that application before the Court on an urgent basis, in order to obtain an order extending time. That was not done and, though I have considerable sympathy to the position in which Mr. Zdrilic finds himself, that sympathy cannot confer jurisdiction of the court to make an order that the High Court has held cannot be made in the present circumstances".

36. Mr. Fleming also referred to the Vanuatu Court of Appeal decision in Vanuatu Indigenous Development Alliance Limited v. Jezabelle Investments Pty Limited[7] where the appellant company had failed to file an application to set aside the statutory demand and then filed a defence to the application for a winding up order.

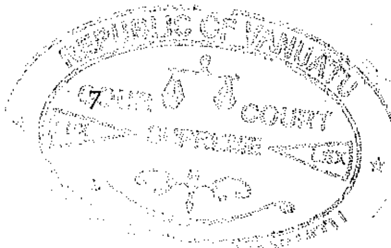
37. The difficulty with those cases is that I consider them to be distinctly different from this case. In the Land Enviro Corp. Pty. Ltd. case the court was dealing with an application to set aside the statutory demand. The decision was essentially that the court, in the circumstances of that case, was not in a position to make an order extending time. But the issue for determination in this case is not one of whether or not the court can extend the time for the filing of an application to set aside the statutory demand but one of the right to be heard.

38. Similarly in the Vanuatu Indigenous Development Alliance Limited case the appellant company had appeared on the hearing of a winding up petition. It had requested an adjournment on the basis that the alleged debt was disputed and directions were made requiring the appellant company to file and serve a response to the petition within 21 days. It did not do so and the Chief Justice at first instance refused any further adjournment of the hearing as he considered that no good reason or rational explanation had been given for non-compliance with the previous directions of the court. Again, that is a different issue from the issue being determined in this case and accordingly I do not accept Mr. Fleming's submission that the application for special leave is time barred.

39. The reality of this case appears to be that it had originally been placed before the Master who then directed an adjournment for administrative reasons which are not relevant. The Master had then resumed carriage of the matter before referring the proceedings to a Supreme Court judge on the basis of the complexity of the matter. It would appear that no timetabling directions have been made.

40. In considering what constitutes "*special leave*" counsel were unable to refer me to any authorities in Vanuatu on this point. Mr. Fleming submits that the language engaged by clauses 17 and 14 of Schedule 2 is stringent and require circumstances such as those required in an application for special leave to appear. It is submitted that the review of authorities in court rules in relevant jurisdictions show that special leave should only be granted in "*extra ordinary and special circumstances*" and should only be given where there is a "*substantial question of law*", "*compelling and valid explanations given for delays*", and only in cases where there has been "*gross miscarriage of justice*". It is submitted that this is not such a case given that, in effect, Iririki has caused its own misery by dilatory conduct on its part.

[7] CAC 33 of 2008



41. Mr. Fleming referred to a number of authorities namely, Air New Zealand Limited v. Air New Zealand Pilots Association (Inc.)[8], Muollo v. Creative Engineering Design Limited[9], Pritam Singh v. The State[10] and a discussion paper the High Court of Australia which referred variously to an adequate or satisfactory explanation for the delay, prejudice to the other party or third parties if leave was granted, whether an appeal was unmeritorious and whether exceptional and special circumstances existed and a substantial and grave injustice had would occur.

42. All of those authorities reveal the high threshold which must be met in order to justify a grant of special leave.

43. What must be noted however, is that each of those authorities refers to an application for leave to appeal. Accordingly each of those authorities relate to circumstances where the applicant party has had an opportunity in a court of first instance and sometimes beyond, to argue its case. That is not the case here.

44. For Iririki, Mr Thornburgh did not expressly address the meaning of the terms "*special leave*" but rather referred to the courts inherent jurisdiction to enlarge and/or abridge time and to avoid injustice[11] Mr. Thornburgh referred to the following factors which needed to be taken into account when determining whether to extend time through the exercise of an inherent jurisdiction as being:

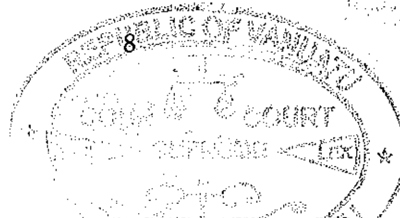
(a) Length of delay;
(b) Explanation for the delay;
(c) Degree of prejudice which may be suffered by the applicant if not granted;
(d) Degree of prejudice which may be suffered by the respondent if extension granted.

45. Having considered the authorities I do not accept the submissions of Mr. Fleming that the threshold for special leave is as stringent as referred to in the authorities on which he relies. As I have said, each of those cases involved the granting of leave to appeal. This is a hearing at first instance and the court, while having regard to the legislative framework applying to any particular proceedings, must act with some caution before denying the right of any party to appear in proceedings which fundamentally affect them.

46. While it is logical that appellate courts would be wary to ensure that there should be stringent criteria applied to leave to appeal in circumstances where an appellant has already exercised the right to have his or her arguments fully heard and considered, different considerations apply when a matter is coming before a court for the first time. And while I acknowledge that time limits in insolvency matters are more stringent and less flexible than in other proceedings, a court must always take care to avoid injustice,

47. I consider the circumstances of this case that the threshold for special leave cannot be equated to that which is involved in considering an application for leave to appeal. I

[8] AEC 89/92
[9] CA 240/04
[10] (Supreme Court of India [1950] AIR 169
[11] R v. Bloomsbury & Marleybone County Courts [1976] 1OER 897; Samuels v. Linzi Dresses [1981] QB115 at 126



would state the test as being no more than the court being satisfied of the factors which would normally be applicable to the granting of leave together with the court being satisfied as to the reasons for any failure to obtain what might be regarded as "*ordinary*" leave as contemplated in an application under Rule 19 together with consideration, if possible, of the merits of the case. Accordingly, I consider the appropriate factors which I should consider in determining whether special leave should be granted are the following:

(a) Length of delay;
(b) Explanation for the delay;
(c) The degree of prejudice which may be suffered by either party in the event if leave either not being granted or granted;
(d) Any explanation as to why special leave is required;
(e) Prospects of success for applicant for special leave.

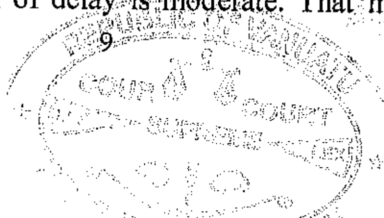
48. In considering these issues I accept the criticism of Mr. Fleming in respect of the fact that the application for leave was not accompanied by any sworn statement addressing these specific issues which would need to be addressed in the granting of leave. That is of particular significance in this matter where a significant number of sworn statements attaching an equally significant number of exhibits have been filed. It may even be that the sworn statements are not considered as relevant or admissible with reference to the ultimate issue which the court has to decide in the application for appointment of a liquidator. It is however, too early to make a determination in respect of that matter and in the event that that should be the eventual outcome, that does not prevent the Court from having reference to the filed sworn statements or parts of those statements in support of the application for leave to appear.

49. Accordingly I address the factors at which I have referred to above as follows.

Length of delay

50. The claim was filed on November 23rd and served upon Iririki on November 28. It had been preceded, as already referred to, by service of the statutory demand. Mr Fleming referred to the fact that the evidence of a Director of Iririki, Mr Pettiona is that he became aware of the statutory demand on October 8, 2016 and failed to take any steps in respect of it. The same thing then occurred in respect of the failure to file a defence. The evidence also appears to establish that Mr Pettiona after receiving a letter from Mocha's lawyer before the claim was filed and served retained lawyers on the date of receipt of that letter and accordingly was in receipt of legal advice. In summary therefore, Mr Fleming submits that the Directors by their own admission knew that there was a serious issue in regard to the debt owed to Mocha and yet it was only some five months after that time that they took steps in response to the demand and three months in response to the claim, thereby demonstrating a total disregard for the law. Further, Mr Fleming points to the fact that Iririki has given no explanations as to why they did not file a defence.

51. Mr Thornburgh points to the fact that the delay in filing the defence was a period of 36 "*ordinary*" days or, if the Christmas break, public holidays are taken into account, along with other non- working days such as weekends a period of 25 non-working days. Seen in that context the length of delay is moderate. That must also be seen in the



context of the fact that the Court had adjourned the proceedings for a period of some month or months for administrative reasons not relevant to, or at the instigation of, either of the parties.

52. In the circumstances I would not categorise the delays as egregious and would agree with Mr Thornburgh's a description of the delay is "*moderate*".

Explanation for the delay

53. In his submissions Mr Thornburgh referred to the third sworn statement of Mr Pettiona dated March 6th, 2017 which was the evidence given in respect of the application for an extension of time. I have taken that to be a reference to the application to extend time to apply to have a statutory demand satisfied, something which, on the face of it, is prevented by the clear and equivocal wording of section 20 (3) of the Insolvency Act. What is clear however from Mr Pettiona's sworn statement is that there was a significant amount of communication between the parties between September and November 2016 regarding payment of the debt and the alleged compounding of the debt. Having acknowledged in a sworn statement dated March 3rd, 2017 that he had become aware of the statutory demand on October 8th, Mr Pettiona then annexed a somewhat puzzling exchange of correspondence on November 22nd where it appears that a copy of the statutory demand was forwarded by Fleming to Mr Pettiona while on the same date a copy of the statutory demand was forwarded to Mr Pettiona by Mr. Johnathan Law, the principal of Law Partners. As a result Mr Pettiona send a message to Mr Foots on the same date stating "*what is this? I just spoke with you yesterday?*"

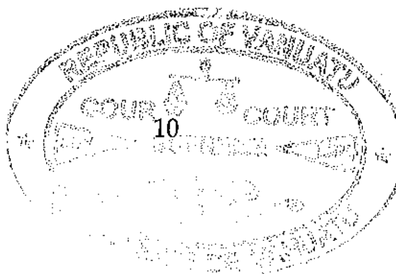
54. In response, Mr Foots forwarded an email to Mr Pettiona stating, inter-alia:

"*Nothing has changed from yesterday's conversation. It's not our intention to wind you up. We have been given legal advice that this is the only way to go. In receipt of your teleconference with Bred tomorrow we expect to receive a legal and binding agreement on payment terms and timeframes. This will then terminate the legal action*".

55. While all of that communication related to this statutory demand the point in referring to is that this was not a case where a debtor is simply refusing to communicate with the creditor. There was active communication between the two.

56. Having said that there is, as Mr. Fleming has pointed out, no evidence explaining the delay in filing the statement of defence late. Mr. Thornburgh submitted that it was clear from the evidence of communication between the parties that negotiations were going on and that the claimant was not intending to wind the defendant company up and that therefore Iririki was not "*displaying any grave urgency to the matter*". The reality of the position is that Iririki is a substantial company and received legal advice and did not take the steps that it should have taken in respect of the matter. The Court is entitled to have received direct evidence as to the reasons for the delay in filing a defence rather than simply being requested to infer that this was a case where no real urgency was required. The filing of the claim itself would have suggested that either there needed to be a specific agreement between the parties that no defence needed to be filed pending settlement of the matter or a defence should have been filed to protect the interests of the defendant.

Prejudice



57. In this regard Mr. Thornburgh refers to the fact that there are complex issues to be dealt with at the hearing of the application including but not limited to:

   (a) Compliance issues regarding the statutory demand;
   (b) The effect of the compromise between the parties as contended by Iririki;
   (c) The test for the court to waive or vary the time requirements according to Section 7(1)(a) of the Insolvency Act;
   (d) The legal effect of the alleged agreement and/or comprise on the application before the Court;
   (e) The effect of Iririki's cross-claim.

58. While Mr. Fleming submits, in effect, that the issues in this case are not complex and that really the only issue which the court has to determine is the issue of whether or not Iririki should be placed in liquidation I think that the matter is somewhat more complex than that. There is a live issue as to whether or not the debt has been compounded and although Mr. Fleming makes the forceful submission that Iririki is not in a position to argue that, given the provisions of Sections 20 and 21 of the Insolvency Act the issue is whether Iririki should be deprived of the opportunity to place arguments before the court. Given the size and nature of Iririki and given the matters before the court I accept that Iririki will face substantial prejudice if it is not granted an opportunity to appear. That is particularly so given that this is a hearing at first instance and not at an appellate level where the parties have already had the benefit of advancing all of the arguments they wish to. As against that prejudice I do not discern significant prejudice to the claimant if Iririki is given the opportunity to appear.

Explanation as to why special leave is required

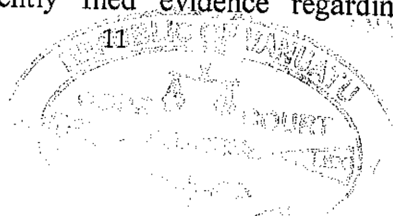
59. As with the issue of the explanation for the delay, there is no specific evidence addressing this point, however I consider that it is possible for the court to assess this situation on the basis of the evidence in court documents.

60. The application for leave to appear was filed on March 13th. For the reasons I have already referred to I consider that application to have been flawed. No application for special leave was actually required and there should have been an application pursuant to clause 19(a).

61. In the normal course of events I would have expected such an application to have been allocated a hearing date so that it be determined as a discrete issue. Such a hearing was not allocated, it would appear, largely because of administrative issues relating to the Master's availability. It was then transferred to the Supreme Court where it was allocated a hearing date in September, but was then brought on at very short notice due to time in the Supreme Court becoming available. The circumstances of the case are somewhat unusual in that regard and looking only at the issue of whether or not Iririki should have the right to appear I do not consider that those circumstances should mitigate against Iririki's application.

Prospects of Success for Applicant for Special Leave

62. In this case it is difficult to assess the prospects of success for Iririki in terms of defending the proceedings. What can be said is that there is a significant amount of evidence including very recently filed evidence regarding a possible criminal



prosecution of Mr. Foots in respect of claims of over-charging Iririki for the construction work undertaken. I would regard this as a neutral factor overall, in the assessment of whether leave should be granted.

63. A final point in respect of the application for leave filed by Iririki is that Mr. Fleming submitted it was most unusual that the application was an application not that Iririki be permitted to appear, but that Thornburgh Lawyers be permitted to appear. I accept that strictly speaking the application should have been one for an order permitting Iririki to appear however in the circumstances I do not consider that matter to be one of particular significance.

Conclusion

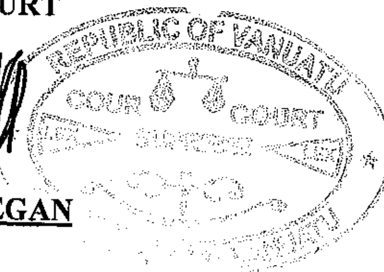
64. While Mr. Fleming's criticisms of Iririki's dilatory conduct has a firm foundation, the delay involved in making an application for leave to appear is moderate, the circumstances surrounding the proceedings mitigate in favour of Iririki being given the opportunity to appear and the prejudice to Iririki in the event of not being permitted to appear is significant. As against that, the prejudice to the Claimant is difficult to discern.

65. Accordingly I am satisfied that Iririki should be given special leave of the court to be permitted to appear on the hearing of this proceeding through its legal counsel Thornburgh Lawyers and that order is made accordingly.

66. I wish to emphasise to the parties that this judgment is simply in respect of the narrow issue of leave to appear and cannot be regarded as having any impact on the remaining issues to be determined in these proceedings. As to costs, given that this is the determination of a preliminary matter they shall be reserved pending the final outrcome of the proceedings.

DATED at Port Vila, this 20th day of June, 2017.

BY THE COURT



J. P. GEOGHEGAN
Judge.