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

Company
Case No. 16/3841 SC/COMP

BETWEEN: Iririki Island Holdings Limited (CM – 28331)

Applicant

AND: Mocha Limited (CM – 34680) T/As Vancorp Construction

Respondent

Date of Hearing:	***September 28th 2017***
Date of Judgment:	***October 12th , 2017***
Before:	***Justice Paul Geoghegan***
Appearances:	***Dane Thornburgh for the Applicant***
	Mark Fleming for the Respondent

DECISION

1. On August 29th I issued a judgment which resulted in Iririki Island Holdings Ltd (*"Iririki"*) being placed in liquidation and Mr Roger Jenkins being appointed as liquidator of the company.[1]

2. On August 31st an application was filed on behalf of Iririki for an order staying the judgment pending appeal. It was accompanied by a sworn statement of a Director of Iririki, Mr Shane Pettiona.

[1] Mocha Ltd v. Iririki Island Holdings Ltd [2017] VUSC 132

3. It was clear that the application for stay was opposed by the liquidator and in a Minute issued on August 31st I recorded that I was unable to hear from the parties that day as I was engaged in a criminal trial and was then engaged in trials on Pentecost and Ambrym which meant that I did not anticipate returning to Port Vila for at least three weeks. I determined that in the circumstances the overall interests of justice and the parties would best be served by granting a stay on an interim basis pending the scheduling of a short hearing so that counsel for both parties could be heard in respect of the matter. I also took into account the fact that any appeal in respect of my earlier judgment would be heard in the next Court of Appeal session commencing on November 6th.

4. Accordingly I made an interim order staying the orders made in my judgment of August 29th. I directed that counsel were to file memoranda advising the Court when they would be able to file submissions addressing whether or not the interim order should be sustained and that my Associate would liaise with counsel regarding the allocation of a hearing. I directed that no further sworn statements were to be filed without the leave of the Court.

5. My commitments did not permit me to allocate a hearing until September 28th by which time a significant number of sworn statements had been filed. By the time the hearing commenced the following applications and sworn statements had been filed:-

    a) Application to stay judgment pending appeal dated 31st August 2017

b) Application by Darren Pettiona as a director of Iririki pursuant to section 52 Companies (Insolvency and Receivership) Act 2013 (*"the Insolvency Act"*), dated 21st September 2017

c) Application by Iririki for leave to be granted nunc pro tunc for the filing of sworn statements and applications after August 31st 2017

6. The following sworn statements were filed:-

a) Sworn statement of Shane Pettiona dated 31st August 2017.

b) Sworn statement of Shane Pettiona dated 1st September 2017;

c) Sworn statement of Shane Pettiona as to urgency merits of appeal and undertaking as to damages dated 1st September 2017;

d) Sworn statement of Shane Pettiona dated 11th September 2017;

e) Sworn statement of Jonathan Law dated 13th September 2017;

f) Sworn statement of Roger Jenkins dated 25th September 2017;

g) Sworn statement of Shane Pettiona dated 26th September 2017;

h) Sworn statement of Corine Hamer dated 27th September 2017;

i) Sworn statement of Julie Hawkes dated September 27th 2017.

7. The sworn statements of Corine Hamer and Julie Hawkes refer to being in support of a sworn statement of Deppie Stzrochlic however I am not aware of any sworn statement of Deppie Stzrochlic having been filed.

8. In short, there was a plethora of sworn statements some of which I had not had the opportunity to see or read prior to the hearing.

9. What had been directed was a hearing on the issue of whether or not the stay should be sustained pending appeal. Other matters have arisen however such as whether or not the appeal is regular in form, it having been filed by a director of Mocha purporting to act for, on behalf of, or as, the company itself.

10. Mr Thornburgh advised at the outset of the hearing that he did not expect or anticipate the application filed under section 52 of the Insolvency Act to be dealt with in this hearing. That application is an application which seeks orders *"revoking"* my earlier judgment placing the company in liquidation and appointing the liquidator together with an order terminating the liquidation of the company. I made it clear that I was not prepared to deal with that application and that it would, if necessary, be dealt with at a later time.

11. Subsequent to the hearing of the application for stay Mr Thornburgh sought an order to reopen the application and to permit further evidence to be filed. I dealt with that application on October 3rd and issued a Minute declining the application. The reasons for doing so are set out in that Minute.

EVIDENCE TO BE CONSIDERED IN THIS APPLICATION

12. The sworn statements listed in paragraph 6 (b) to (i) (inclusive) have been filed without the leave of the Court and accordingly I need to determine which of those sworn statements should be considered by me in respect of this application.

13. In dealing with this issue I consider that a robust approach should be taken to the admission of evidence in order to avoid an application for stay operating as a de-facto hearing of the appeal. In this regard I consider that the two sworn statements of Mr Pettiona dated September 1st and his further sworn statement dated September 11th are relevant to issues regarding the application for stay. Leave is accordingly granted for the filing of those statements.

14. I am not prepared to grant leave in respect of the sworn statement of Jonathan Law dated September 13th 2017. That effectively amounts to fresh evidence which arguably should have been filed at the time the Court was considering the application for the appointment of a liquidator as it goes to the issue of the company's alleged insolvency. It will also be hopefully be clear from this judgment that I do not consider that evidence to be necessary to determine the application for stay.

15. I decline to grant leave for the filing of the sworn statements of Roger Jenkins dated September 25th, Shane Pettiona dated September 26th, Corrine Hammer dated September 27th and Julie Hawkes dated September 27th. They refer to clearly contestable assertions of fact most of which, in my assessment are not relevant to the issue of whether or not a stay should be granted and in the case of the sworn statements of Corrine Hammer and Julie Hawkes are filed in support of a sworn statement which is not even before the Court.

16. I consider that the issue to be determined can be adequately determined on the basis of those sworn statements in respect of which leave is granted.

NOTICE OF APPEAL

17. For the liquidator, Mr Fleming submitted that the notice of appeal was incompetent as was the application for a stay. There was considerable focus in the submissions of both counsel on this question with Mr Fleming arguing that the making of an order placing the company in liquidation severely limited A directors usual powers and that various steps would need to be complied with by the directors before they could file a notice of appeal. An issue was also raised as to whether or not a director has standing in the matter and can be a party to the judgment appealed from.

18. For Iririki Mr Thornburgh referred to a number of issues in this regard, including what he submitted was a constitutional right of appeal.

19. Having considered the matter I have reached the conclusion that the issue of whether or not the appeal is regular is an issue for the Court of Appeal and not the Supreme Court. It is not the role of the Supreme Court to act as a filter in the appellate process. I consider that only the Court of Appeal can determine the issue of whether or not an appellant has appropriate standing or has followed the correct processes for filing an appeal against a judgment of the Supreme Court.

20. For that reason I do not consider that I need to determine the issue of standing or whether the appeal is competent or regular.

APPLICATION TO STAY THE JUDGMENT IN THESE PROCEEDINGS

21. The application for stay has been filed in the name of Iririki on instructions from the directors of the company. Mr Thornburgh submitted that Iririki had standing to bring the application seeking a stay on the basis of the residual power vested in the directors to do so. Mr Thornburgh relied upon the English authorities in Re: Diamond Fuel Company[2] and Sands (as Trustee In Bankruptcy) v. Lyne[3] as authority for that submission.

22. In Sands the Court was dealing with an appeal by a bankrupt in respect of the bankruptcy order made against him. The Court observed that the right of a bankrupt to appeal against the bankruptcy order was dictated by *"common sense and fairness"* given that the bankrupt's status had been fundamentally changed. The Court also observed however that:-

> *"In the same way, where the Court has made an order for the winding up of a company, the company acting by its directors are allowed to appeal against the winding up order even though the powers of the Directors have come to an end: See Re Diamond Fuel Company (1879) 13 Ch Div 400".*

[2] (1879) 13 Ch Div 400
[3] [2016] EWCA CIV 1159

23. In Anfrank Nominees Pty Ltd v. Connor[4] Kennedy J referred to the right of appeal as an *"exceptional right"* deriving from *"necessity"*. Mr Thornburgh also referred to a decision of Associate Judge Bell in Aotearoa Kiwi Fruit Export Limited v. ANZ Bank Ltd[5] where he observed at paragraph 11 that:-

> *"Once an order is made that a company be put into liquidation, the company itself would have a right to appeal against an order for liquidation, but the person who can exercise that right is the liquidator because he now has custody and control of the company and he has the power under the schedule of the Companies Act to issue proceedings on behalf of the company. But a liquidator is never going to be interested in pursuing an appeal against a decision putting a company into liquidation because he owes his appointment to the order which appointed him. I have never in my experience seen any liquidator interested in pursuing an appeal to obtain an order setting aside the order under which he was appointed."*

24. Associate Judge Bell also observed at paragraph 16 that:-

> *"If a Director wishes to challenge a liquidation decision on appeal, he is not exercising any power of control over the company itself. Instead, he is exercising an independent right which arises out of the fact that he has lost his control in management of the company because of the liquidation decisions".*

25. Although these cases refer to the right of appeal, it would follow that they also apply equally to an application for a stay of judgment pending appeal.

[4] (1989) 1ACSR 365
[5] (High Court), Touranga, CIV – 2011 – 470 – 679, 3 February 2012

26. Mr Thornburgh submitted that the appropriate test to be applied in the case for a stay of proceedings was set out by the High Court of Australia in Federal Commissioner of Taxation v. Myer Emporium Ltd (No. 1)[6] where at paragraph 8, Dawson J stated:-

> *"It is well established by authority that the discretion which at [order 70r.12 of the High Court Rules] confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify a departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.....special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory.... Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where, for whatever reason, there is a real risk that will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed".*

27. Accordingly, in Mr Thornburgh's submission this matter should be determined simply applying the usual test to be applied on any application for a stay.

28. Mr Fleming acknowledged that in previous decisions the courts of Vanuatu have held that directors of companies in liquidation have standing on behalf of

[6] [1986] HCA 13

the company to challenge a winding up order, the issue having been dealt with on the basis of the common law[7]. However he submitted that the situation fundamentally changed with the introduction of the Companies Act No. 25 of 2012, the Insolvency Act and the Company's (Insolvency and Receivership) Regulation Order No. 111 of 2015. He submitted that the effect of the new legislation was to significantly restrict the basis upon which an application such as the one before this Court can be dealt with.

29. In support of that submission Mr Fleming relies on Schedule 4, section 4 of the Insolvency Act. That section provides that:-

> *"Except where sub clause 6 (2) applies, with effect from the commencement of the liquidation of a company, a person must not, unless the liquidator agrees or the Supreme Court Orders otherwise, commence or continue legal proceedings against the Company or in relation to its property."*

30. Sub clause 6 (2) refers to the right of a secured creditor to take possession of property over which that creditor has a charge and is accordingly not relevant.

31. Mr Fleming submits that in order to obtain an order under section 4 Iririki would need to establish inter alia, that it is solvent, that there is no prejudice to all creditors, and that there is merit in allowing an insolvent company to trade. Mr Fleming submitted that the foremost issue is whether the company was insolvent with other factors to be taken into account including the interest and protection of all current creditors and the public, generally, that justice is seen

[7] Vanuatu Indigenous Development Alliance Limited v. Jezabelle Investment p/l CAC 33 of 2008

to be duly administered, and legislative policy against delaying the liquidation due to associated risks. In this regard, the interests of the directors of a company are immaterial.

32. Mr Fleming also submitted that a Court does not have jurisdiction to retroactively make such orders after the Directors engaged in the proscribed conduct, which in this case is the filing of an appeal and an application for stay.

33. Mr Fleming's submissions rely heavily on an analysis of and comparison with, Australian legislation, namely the Corporations Act 2001 which regulates various matters arising from the liquidation of a company. Mr Fleming referred to section 471 A (1) of the Corporations Act 2001 which provides that while a company is being wound up by the Court:

"A person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company.....".

34. What is required in order to perform a function or power as an officer of the company, is the approval of the Court.

35. Mr Fleming also referred to section 482 (1) and (1A) of the Corporations Act 2001 which provides that:

"At any time during the winding up of the company, the Court may, on application make an order staying the winding up....".

36. Such an application can only be made by the liquidator, a creditor or contributory of the company. Mr Fleming acknowledges that there are no similar provisions in Vanuatu law.

37. Mr Fleming then relied on various authorities dealing with the Australian legislation to support his overall submissions that both the notice of appeal and the application for a stay were incompetent and should be dismissed, the necessary leave not having been obtained.[8]

38. In Deputy Commissioner of Taxation v Soiland Pty Ltd (In Liq)[9] Parker J remarked that:-

> *"9. It is accepted that upon the making of a winding up order it is no longer open to an officer of the company.....to commence an appeal proceeding to set aside the winding up order without the approval of the liquidator or the Court, as once was possible under the common laws".*

39. In Land Enviro Corp Pty Ltd (In Liq) the Court observed that:-

> *".....section 471 A (1) A (d) requires that, if the approval of the Court to the performance or exercise of a function or power as an officer of a company in liquidation is to be sought by such an officer, that approval must be sought and obtained before the performance or exercise of the relevant function or power as undertaken. In the present case, the relevant step taken by Mr Zdrilic was the filing of the two notices of appeal. Although*

[8] See: Land Enviro Corp Pty Ltd (In Liq) v. Hickie [2015] FCA 766
: Deputy Commissioner of Taxation v. Soiland Pty Ltd (In Liq) [2010] FCA 168
: Deputy Commissioner of Taxation v. VA Corporation of Aust. Pty Ltd [2013] FCA 1279

[9] Ibid 7

he endeavored to file an application whereby he sought the requisite approval to section 471 (A (1A) d)on 21 January 2015, at the same as he in fact filed the two notices of appeal, he had not obtained that approval prior to filing those notices of appeal. The consequence of that failure is that the appeals purportedly commenced by the filing of each of those Notices of Appeal are incompetent and must be dismissed."

40. Mr Fleming submitted that the principles extracted from the authorities relied upon were as follows:-

a) That a grant of stay is only given in *"exceptional circumstances"*.

b) Where the Stay is sought in respect of laws designed to protect the public, these are in a *"special class"* and require a more stringent approach.

c) The orders pursuant to Schedule 4 Section 4 of the Act that would enable the application to be heard, cannot be given retrospectively. Doing so could put the Court in the position of condoning the wrong conduct.

d) The main consideration should be given to:-

i) Solvency of the company;

ii) Damage to the company if the liquidator cannot perform its lawful duty;

iii) Detriment to creditors (secured and unsecured);

iv) Community concerns over the administration of justice;

v) Damage to unknown creditors and future creditors who may trade with the company unaware of its insolvency;

vi) Merits of the proposed appeal;

vii) The legislative policy against delay to the liquidation process;

viii) Whether all debts have been paid, and what provisions the future debts are made, and the source of funding for same.

DISCUSSION

41. On the issue of standing I consider that the directors have sufficient standing to file this application for stay. In this regards I apply the observations of Associate Judge Bell in Aoteoroa Kiwi Fruit Export Ltd and regard the directors as having an independent right as referred to. Strictly speaking the directors should have applied to be joined to the proceedings as interested parties and such an application would have been granted. In considering the overall justice of this case however I do not consider that such a step is necessary and determine that the application may proceed as filed.

42. As to the issue of the application itself, it is not simply the relevant company legislation which may be said to govern the issue of a stay. In this regard I refer to the Western Pacific Court of Appeal Rules 1973 which provide at rule 26 that:-

"Stay of Proceeding or Execution

26 (1) Except so far as the Court of Appeal or a Judge thereof, or Judge of the High Court, or in the case of the Gilbert and Alice Islands Colony the Senior Magistrate thereof, may direct: –

(a) *An appeal shall not operate a stay of execution or of any proceedings pursuant to any decision of the High Court; and*

(b) *No intermediate act or proceeding shall be invalidated by an appeal.*

(2) *On any appeal, interest for such time as execution has been delayed by an appeal shall be allowed unless the Court of Appeal otherwise orders."*

43. Accordingly, the rules governing the filing of civil appeals before the Court of Appeal in the Republic of Vanuatu contemplate and allow for the Supreme Court granting a stay of judgment in appropriate circumstances.

44. Such a situation was considered by the New Zealand Court of Appeal in Yan v. Mainzeal Property and Construction Ltd (in Receivership and Liquidation) & Rochina Global Real Estate Ltd (In Liquidation).[10] That case involved a director of Rochina Global Real Estate, Mr Yan, applying for a stay of a High Court judgment appointing a liquidator for the company, pending appeal to the Court of Appeal. In the High Court, Brown J had adopted the view that he had no jurisdiction to stay an order for liquidation. Mr Yan argued that jurisdiction was conferred on the Court by virtue of rule 12 (3) of the Court of Appeal (Civil) Rules 2005 which provided that pending the determination of an appeal the Court appealed from may order a stay of the proceeding in which the decision was given or a stay of execution of that decision.

[10] [2014] NZCA 86

45. While not finally determining the matter the Court observed at paragraph 23 that:-

> *"... it is not apparent that the Companies Act intended to exclude the jurisdiction to grant orders by way of interim relief under rule 12 (3) (b). Further, the policy considerations do not require an outcome that displaces rule 12 (3) (b)."*

46. While the Court of Appeal did not have to finally resolve the question as to whether there was jurisdiction to make an interim order under rule 12 (3)(b) it identified the following criteria as applicable to a stay application:-

(a) Whether the appeal may be rendered nugatory by the lack of a stay;

(b) The bona fides of the appellant as to the prosecution of the appeal;

(c) Whether the successful party will be injuriously affected by the stay;

(d) The effect on third parties;

(e) The novelty and importance of questions involved;

(f) The public interest in the proceeding;

(g) The overall balance of convenience; and

(h) The apparent strength of the appeal.

47. The reason the Court of Appeal in Yan did not have to decide the matter was that it was satisfied that there was no merit in the application in any event.

48. I consider that all of the factors referred to in Yan would be applicable to the consideration of an application for stay pending appeal in this jurisdiction.

49. Despite the volume of evidence filed on behalf of Iririki there was surprisingly little detail provided as to the effect on the company of the making of a liquidation order. Some of the evidence before the Court challenged factual assertions made by Mr Jenkins. That evidence was neither relevant nor helpful.

50. My analysis of the sworn statements in respect of which leave is granted revealed the principal evidence in support of a stay as being the following:-

a) In his sworn statement of August 31st Mr Shane Pettiona stated at paragraph 11 that:-

"I confirm if the liquidator is allowed on site, that same will have an irreversible effect on our business and if we are unsuccessful with our appeal we will be unable to recover from the effect of the proposed course by lawyers for Mocha".

b) In his sworn statement of September 1st , Mr Pettiona stated that two offers had been received from different entities for the purchase of the business. The status of the offers is not clear from the evidence, however at paragraph 16 of the sworn statement Mr Pettiona stated:-

"If the stay order is not granted we will lose the right to continue the good-will as created with the purchasers and/or conclude the agreements pending the appeal".

c) In a further sworn statement of September 1st , Mr Pettiona referred to a story in a local newspaper, the Daily Post, regarding Iririki being placed in liquidation and stated at paragraph 7 that:-

"... if the stay hearing is not heard and granted staying the orders that the appeal will become nugatory as the damage of removing the management and power from the Directors and the public damage will be irreversible making the appeal futile".

51. This evidence is extremely general in its nature and no detail is provided as to how the effect of liquidation would be *"irreversible"* or how the business would be *"unable to recover"*. It is clear also from the general nature of the evidence that Mr Pettiona does not necessarily distinguish between the company on the one hand and the interests of the Directors, shareholders, employees and creditors all of which may be different in nature.

52. The general nature of the evidence is explained, to a degree, by the fact that given a liquidators power to take control of the company's assets and realise those assets, the specific consequences of liquidation in terms of the future operation of the company cannot be stated with any certainty.

53. What can be readily appreciated however is that the effect of a liquidation is dramatic and has a serious effect upon all of those persons who have an interest in the company. This is evidenced by part 3 section 10 of the Insolvency Act which provides as follows:-

"The principal duties of a liquidator of a company are, in a reasonable and efficient manner:-

a) to take possession of, protect, realize and distribute the assets, or the proceeds of the realization of the assets, of the company to its creditors in accordance with this Act; and

b) if there are surplus assets remaining, to distribute them, or the proceeds of the realization of the surplus assets, in accordance with section 48."

54. As observed by the Vanuatu Court of Appeal in Vanuatu Indigenous Development Alliance Ltd v Jezabelle Investments Pty Ltd[11]:

"Once a winding up order is made, the process of liquidation follows. It is necessary that prompt steps be taken by liquidators to replace the management of the company, to secure the assets of the company such as they may be, and to realize them. Reversal of the winding up process at best is extremely difficult and likely to be costly for those with interests in the financial position of the company."

55. Applying the factors as referred to by the New Zealand Court of Appeal in Yan to the circumstances of this case, the following may be said:-

a) Whether the appeal may be rendered nugatory?

In the circumstances of this case the observations of the Court of Appeal in Vanuatu Indigenous Development Alliance Ltd are

[11] Ibid 7

clearly relevant and applicable to this case. Applying that observation it could readily be accepted that unless the stay is granted, the process of liquidation may result in some irreversible commitments being made (lawfully and properly) by the liquidator.

b) The bona fides of the appellant as to the prosecution of the appeal.

It can be readily accepted in this case that there is no question as to the bona fides of the Directors regarding the prosecution of this appeal. That is demonstrated by Mr Pettiona's willingness to pay a significant sum to the Registrar's Trust Account pending the outcome of the appeal. A related and relevant matter is that the next Court of Appeal session commences on November 6th and accordingly the parties can reasonably expect the issue to be finally determined by November 17th.

c) Whether the successful party will be injuriously affected by the stay?

This is a situation where it could not be said that the liquidator would be injuriously affected by the stay. The issue is more properly couched in terms of public policy and whether or not in all of the circumstances taking into account the public policy factors behind company liquidations whether it would be appropriate to grant a stay in all of the circumstances. In this regard, the fact that the appeal is able to be determined within five weeks is a relevant factor which weighs in favour of a stay being granted.

d) The effect on third parties.

This is also connected to public policy issues as it is not readily apparent that a brief stay of the Supreme Court order would have a detrimental effect upon third parties.

e) The novelty and importance of questions involved.

There is no particular novelty or importance in this case although the importance of the issue to the directors of the company is clear.

f) The public interest in the proceeding.

This is again tied to public policy and the wider interests of the community in ensuring that insolvent companies are not permitted to trade.

g) The overall balance of convenience.

I consider that in the circumstances of this particular case the overall balance of convenience lies in favour of a stay being granted rather than being denied. I base this view on the difficulties which may be experienced in the event that the appellant is successful and the liquidation has to be *"unwound"*.

h) The apparent strength of the appeal.

This is a difficult issue to assess. The Court has clearly reached the view that the company is insolvent although that finding was principally based on the inability of Iririki to rebut a presumption created by the failure to comply with a statutory demand. However if the appellant is able to persuade the Court of Appeal that there was sufficient evidence before the Supreme Court to find that the presumption of insolvency was satisfactorily rebutted or

alternatively should Iririki be successful in persuading the Court of Appeal that Mr Laws most recent sworn statement as to the solvency of Iririki should be taken into account then it may have a reasonable prospect of success. In addition, Iririki intends to argue that I should have exercised my discretion to stay the making of a liquidation order, given subsequent disputes being raised in relation to the original debt owed by Mocha. All that can be said is that Iririki's appeal could not be said to be meritless.

56. While Mr Fleming's submission that Schedule 4, section 4 operates to ensure that the due administration of liquidation is not hindered by unnecessary legal actions, this is an unusual case. This matter involves the directors of a company through purported residuary powers, challenging the decision which placed the company in liquidation. As a matter of common sense and fairness I take the view that the directors must have a right to challenge the Court's decision and must also have a right to ask the Court to stay its judgment pending an appeal.

57. While Mr Fleming is correct in raising Schedule 4 section 4, I am not satisfied that the section is intended to apply in the way that he suggests to require the directors of Iririki to obtain the leave of the Supreme Court regarding this application. While one can readily appreciate the applicability of that section to litigation which existed prior to the company being placed in liquidation as well as proceedings which a director, shareholder or creditor may wish to initiate after the liquidation I do not consider that it necessarily applies to a

challenge to the Courts judgment placing the company in liquidation, or that it overrides the Court's power to grant a stay of the judgment vested in it by the relevant Court of Appeal rules. It follows from that that I do not consider that the factors referred to by Mr Fleming and set out in paragraph [40] are applicable in the circumstances of this case.

58. In all of the circumstances therefore, I am satisfied by a very narrow margin that the stay order made by me on August 31st should remain in place pending determination of the appeal by the Court of Appeal and I order accordingly.

59. In these circumstances, I consider that the issue of costs should be reserved pending the outcome of the appeal.

DATED at Port Vila this 12th day of October, 2017

BY THE COURT

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

.....

James Patrick Geoghegan

Judge