

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

**Civil Case No. 17/2145
SC/CIVL & Civil Case No.
17/2451
(Consolidated)**

**BETWEEN: CAN 052 469 164 PTY, LIMITED (IN
LIQUIDATION) FORMERLY KNOWN
AS CUSTOM SECURITY SERVICES
PTY LIMITED**

First Claimant

AND: ROBERT JAMES NEWHAM

First Defendant

**AND: B & P INVESTMENTS LIMITED
(034136)**

Second Defendant

AND: PAUL NEWHAM

Third Defendant

Date of Hearing: 12th day of March, 2018 at 9:00 AM

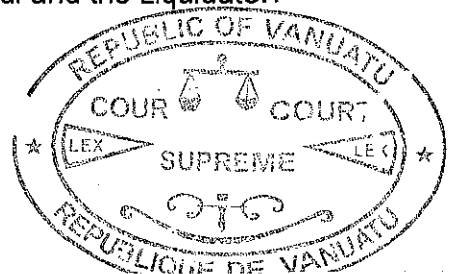
Before: Justice David Chetwynd

**Counsel: Mr Abel Kalmet for First Claimant
Mr Nigel Morrison for First and
Second Defendant
Mr Robert Sugden for Third Defendant**

JUDGMENT

1. This is an application by Robert James Newham ("Bob") for the release for some of the funds restrained by order dated 8/09/17. The application is opposed by Paul Newham ("Paul") and by the Liquidator of an Australian company ("the Liquidator") namely, Custom Security Services Pty Ltd ("CSS").

2. It is necessary to look briefly at the claim by both Paul and the Liquidator.



3. Bob and Paul are brothers. They were in business in Port Vila. They formed a Limited Company B & P Investments Ltd ("B & P"). There is no dispute that Bob and Paul are shareholders in B & P. B & P owned property comprising 3 leasehold titles. As shareholders Bob and Paul have an interest in the proceeds of sale of those 3 titles.

4. It would seem that B & P was incorporated in 2007. Unfortunately in 2010 there was a falling out. Paul has taken no or very little part in running B & P since 2010. Bob continued to run the Sportman's Hotel and a Café. That situation has existed for some 7 years.

5. Bob says he could not continue running the business on his own and decided to put the properties on the market. Paul learnt of this and commenced proceedings for the winding up of B & P. It was based on the just and equitable principle and relies on allegations of changes made by Bob to shareholdings without Paul's consent or knowledge. It is agreed that those changes have now been undone and the situation is that both Bob and Paul are shareholders.

6. The claim by the liquidator concerns money which he says was transferred from the company he is liquidating and used to acquire B & P assets. The Liquidator has produced voluminous evidence consisting of some 500 pages of sworn statement and exhibits.

7. An added complication is the involvement of Mr Hack. He says his claim is based on his firm's work as estate agent in the sale of B & P's property. He says his firm Santo Real Estate had a sole agency agreement with B & P. The commission payable under that agreement is 10%. The Liquidator agrees to pay 5%, the usual rate for real estate commissions. Bob also agrees to payment of 5%. Paul does not, he says any payment should wait for liquidation.

8. Dealing with the liquidator's objections first, his evidence is that VT59,773,673 is owed to Custom Security Services. That figure is set out at paragraph 62 of his sworn statement. Mr Sugden has pointed out that the total is arithmetically incorrect. If you add all the figures together they come to nearer VT89 Million. Subsequently the Liquidator has filed a short statement correcting the total to VT 88,060,439. Mr Morrison points out that he has informed Paul's counsel and the liquidator that the amount restrained by the Court order is VT108,097,460. That being so there would be a surplus if the Liquidator was paid all that is set out in his sworn statement. As



mentioned, the Liquidator does not object to a payment of 5% to Santo Real Estate (in vatu terms 8,437,500). In all the circumstances there does not seem any reason to uphold the Liquidations objection to an interim pay-out of some of the surplus to Mr Robert Newham.

9. Turning now to Paul's objection, he says the company should be liquidated on the just and equitable principle and that payment to Bob now would be tantamount to a preferential payment. He says that payments to the shareholders should not be made until it is clear there are no other creditors. He produces no evidence as to money he says is owing to creditors and his real objection to distribution is that Bob would be in control of the funds and the payments and not some independent liquidator.

10. Paul bases most of his suspicions of Bob's bone fides on the changes to the shareholdings referred to earlier (paragraph 5 above). Bob says he was advised by the Vanuatu Financial Services Commission that those changes were necessary. That is something that can be established by evidence. It is not necessary to go into the details at this time especially as they have been undone.

11. On the face of it there is at least some VT19 Million vatu surplus over the figure claimed by the Liquidator. That is the sum that would be available for distribution between shareholders. Paul has produced no other evidence of other creditor. Bob's evidence is that there is probably only 1 creditor who is owed 1 Million. Paul does say he has a claim for money he introduced into B & P.

12. The funds are now under the control of the Court. Bob therefore is not free to dispose of them as he wants. He is subject to the control of the Court. The injunctive order prevents any further disbursement of funds without a Court order. There is no real evidence that there are creditors who need to be paid before distribution. The case for making an order for the liquidation of B & P is very weak. It is not based on financial considerations, Paul wants the liquidation because he does not trust Bob. Such a liquidation is not in the best interest of the shareholders. It will involve unnecessary costs and expenses. There appears to have been no negotiation as to other methods of settling the differences between Bob and Paul.

13. On the solvency test (see section 5 of the Companies Act, 25 of 2012) B & P would be entitled to make a distribution to the shareholders. If that is the case it seems wrong to say no interim payment can be made by way of distribution. In his defence



filed on 27th October 2017 Paul denies the liquidator's claim. Presumably he will "join forces" with Bob to resist any claim. Even if he does not the Court still will maintain control of the assets of B & P.

14. As for the payment to Mr Hack, he is not a party to the proceedings and I see no real reason why he should be joined. I did allow him to sit in on the application by Bob. The objection by Paul to paying Mr Hack or Santo Real Estate is that neither introduced the buyers of the 3 lease titles. Paul has not produced any evidence and in any event Mr Hack has produced a copy of a Sole Agency agreement. That agreement may make any argument on the introduction of the buyers by some other person otiose.

15. In all the circumstances I do not see any objection to making an order that from the funds restrained by order dated 8th September 2017 a distribution shall be made to both shareholders in the sum of VT2,500,000 each. A further sum of VT8,437,500 shall be paid to Santo Real Estate.

16. The only other matter to raise is the progression of this case. I have set a date and time for a trial preparation conference. That will take place at 2 pm on 16th May 2018. No further notice of that hearing will be issued. A date for trial can then be fixed at that conference.

17. The costs of this application shall be costs in the cause.

DATED at Port Vila this 21st day of March, 2018.

BY THE COURT


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David Chetwyno

Judge

