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

Civil Case No. 51 of 2009

IN THE MATTER OF: SPECTRUM INVESTMENTS LIMITED

AND

IN THE MATTER OF: THE COMPANIES [CAP. 191]

BETWEEN: PACIFIC AUTRONICS LIMITED
Claimant

AND: SPECTRUM INVESTMENTS LIMITED
First Defendant

AND: ASHIK LAL
Second Defendant

AND: ALEX BODIAM
Third Defendant

AND: ARVIND LAL
Third Party

Before: ***Justice D.V. Fatiaki***

Counsel: *Mr Garo (of the PNG bar) and Mr J Kilu for the Claimant and Third Party*
Mr D Thornburgh for the First, Second and Third Defendants

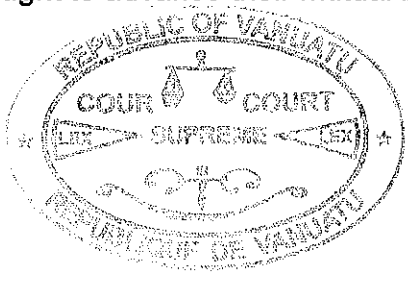
Date of Judgment: *2nd June 2014*

JUDGMENT

1. The central issue in this long outstanding matter concerns the validity of a resolution of the members of **Spectrum Investments Ltd** (**SIL**) to issue 180,000 Preference Shares at VT100 each, and the subsequent allotment thereof to **Pacific Autronics Ltd** (*PAL*) on 23 August 2002.

BACKGROUND

2. **Arvind Lal** (*Arvind*) and **Ashik Lal** (*Ashik*) are brothers. Arvind is the older. Arvind and **Alex Bodiam** (*Bodiam*) first met in 1991 in Port Vila. They became close friends and remained so until June 2004. Until then the three men worked together harmoniously and together sought to advance their mutual business interests.



3. In June 2004, Arvind and Bodiam had a major falling out over a personal issue unrelated to their business interests. Ashik, it seems, sided with Bodiam. Since June 2004, the good working relationship that hitherto existed has completely failed.

4. PAL was incorporated by Arvind on 4 April 1995, its shares being held by him and his family. The company carries on business as a supplier of automotive and marine spare parts and accessories.

5. Bodiam is the proprietor of **Bodiam Engineering Ltd** which since the early 1990's has carried on business in Port Vila.

6. In 1996 SIL was incorporated by Bodiam and Arvind. In 1998 they decided to utilize SIL to carry on the combined business of panel beating and spare parts trading, including the importation of second hand engines and automotive parts from Korea.

7. Ashik moved to Vanuatu from Fiji in 1998 and was employed by SIL as its General Manager.

8. SIL was incorporated with an authorized share capital of VT35 million divided into 350,000 shares of VT100 each. At a directors meeting of SIL on 19th October 1999 the shareholding was restructured and new shares were allotted so that issued capital of 150,000 shares was held as follows:

PAL	– 50,000 fully paid ordinary shares
Ashik	– 50,000 fully paid ordinary shares
Bodiam	– 50,000 fully paid ordinary shares

9. The meeting also resolved that the directors henceforth would be Arvind, Bodiam and Ashik.

10. From 1996 PAL took steps to acquire leasehold land to be held in the name of SIL with the intention that the business being established by SIL would be conducted on its own land. Pending that event, SIL rented space in premises from Bodiam.

11. In 1997 PAL acquired a leasehold title which was registered in the name of SIL. PAL paid VT1,633,000 in cash and kind to acquire the title. In October 2000, the directors of SIL consented to PAL erecting a large pre-fabricated warehouse on the lease. PAL agreed to pay for the construction as SIL did not have any establish financial stability and there was already a mortgage over the leasehold title to support a loan to SIL.

12. The defendants agree that at the time it was anticipated that the building would cost VT8 million. However the cost blew out. By August 2001, PAL had borrowed just over VT10 million from Westpac to complete the construction. The loan nominally carried interest at 25% but reduced to 13.5% if promptly paid.

13. The building was finished in September 2001. PAL moved into part of the premises and SIL moved into another part. SIL commenced paying PAL VT45,000 per month

for *"management fees"*. In April 2002 this monthly payment was increased to VT55,000, apparently as PAL was having difficulty meeting payments to Westpac. Regrettably no basis for the quantification of this fee was recorded between the parties, nor was there any discussion as to the rights and the obligations of PAL and SIL in relation to the financing and use of the new building.

14. From early 2002 various issues arose between the directors as to what these arrangements were or should be. The minutes of the directors meeting held on the 30 March 2002 illustrate the uncertainties and concerns where it states:

> "***Land and Office Space Issues***: *Some disagreements have arisen between Spectrum and Pacific Autronics due to the unclear nature of the land/office arrangements. It was confirmed that Spectrum directors did give consent to Pacific Autronics to build on Spectrum land, however it was not clear whether (a) there was a land rental value agreed, or (b) whether it was the whole or partial block of land that was consented to Pacific Autronics. Likewise, there is no rental agreement between Pacific Autronics, who own the building, and Spectrum as to the space, both outside and inside, that is occupied by Spectrum, or a rental value. Spectrum currently pay 45,000 vatu per month to Pacific Autronics. Ashick thought this was a contribution to buy into the building and Arvind said it was rent. It was not clarified at this meeting but needs to be as Spectrum needs to know whether this payment is an expense or equity investment. Arvind proposed several options to resolve the issues: (1) He buys out the land from Spectrum; (2) Spectrum buys out the building from Pacific Autronics. Kathy suggested that the current arrangement could continue if only the specific were clarified in writing through rental agreements. We would need to know the fair market value of renting the land space and the fair market value of renting the workshop space. The net difference is what can be paid out. A rental agreement should be able to specify all the issues currently under contention."*

15. After the meeting, Arvind noted on his copy of the minutes that advice from lawyers (Julian Motis) should be requested to suggest the best way forward. Later director's minutes suggest that getting advice from Mr Motis had been mentioned at the meeting and that the directors were anticipating this would happen. The land and office space issues were mentioned again at a director's meeting on 6th April 2002 but nothing had been agreed by that time.

16. The issues were still outstanding on 9th May 2002 when the next director's meeting took place. At that meeting Bodiam was accompanied by Mr Jim Woodford (Woodford) who he introduced to the meeting as his General Manager at Bodiam Engineering Ltd. The minutes of the meeting record that Ashik had talked to Mr Motis' secretary, but nothing concrete had yet been produced.

17. **Item J** of the minutes of 9th May 2002 meeting relevantly records:

> *"ALEX PROXY AS DIRECTOR: Alex asked the other directors whether they were comfortable with Jim acting as his proxy when he was away. They agreed and that he should have the back files to read. Kathy pointed out that Jim needs to realize that SPECTRUM is Alex's personal investment and not a BODIAM*

Engineering investment. Jim said he does not mind doing this as a favour. Alex mentioned that Jim could be compensated if and when SPECTRUM pays any dividends."

18. Bodiam was intending to spend time in Tonga. Later in this judgment evidence given by Arvind about the discussion behind this item is addressed.

19. The minutes of the 9th May 2002 meeting were taken by a secretary (Kathy) and later ostensibly approved by each director. The approval was signed personally by Arvind and Ashik but Bodiam's approval was signified by Woodford signing on his behalf.

20. Minutes of a director's meeting on 25th May 2002 record that Mr Motis was expected in Port Vila in June, and on the land issue that Ashik is to provide information to Woodford in order for him to consider preliminary recommendations. Bodiam was represented at that meeting by Woodford.

21. At the next director's meeting on 1st June 2002, Woodford was asked to prepare a number of settlement options for submission to a meeting to be held in the presence of Bodiam.

22. No meeting attended by Bodiam occurred. However at the director's meeting on 22 June 2002, five options were put forward for discussion by Woodford. Arvind has given evidence that he had telephone discussions with Bodiam in Tonga on 18th and 19th June 2002, during which the restructuring of the shares in SIL was discussed. That telephone conversations between them occurred at this time is not denied by Bodiam. Arvind says that he discussed a preference share option which he and Mr Motis had been discussing. PAL would be allotted preference shares to protect its investment in the building and to allow PAL to use a portion of the warehouse without disturbance or rent. Arvind says that Bodiam replied that so long as PAL investments were protected, the three shareholders each continued to hold VT5 million ordinary shares, and that they all had equal voting shares, the proposal was acceptable. Whilst Bodiam says he does not remember the conversations, it is implicit in his other evidence that he now denies agreeing to such a proposal.

23. The evidence does not include minutes of director's meetings between June and 23 August 2002, but it is clear that Mr Motis had been consulted. On 21 August 2002, Mr Motis was in Vanuatu and possible ways forward were discussed with him. On that day a meeting occurred at Mr Motis' office. Woodford and Arvind were present and both gave evidence about it. They both say Ashik was also present, but Ashik says he did not attend as he was ill with a hangover. For reasons later given I generally prefer the evidence of Arvind and Woodford. I find that Ashik was present, but I consider nothing turns on this as the meeting on 21st August 2002 was neither a formal meeting of directors nor a member's meeting. It was simply a meeting with the lawyer to discuss possibilities and to prepare for a shareholder's member meeting which was then held two days later.

24. The evidence of Arvind about the meeting with Mr Motis, which is consistent with that of Woodford, is that Arvind estimated PAL's expenditure associated with the SIL lease, including the construction of the warehouse, PAL's loan from Westpac, and various cash advances made by PAL to be in the vicinity of VT18 million. He says Mr Motis explained that due to the complexities of the situation about the building and PAL's investment, an allotment to PAL of 180,000 preference shares would be a solution. Monthly fees to be paid for PAL's financial exposure should be raised to VT55,000 and PAL should have exclusive indefinite rights to use the frontage of the SIL property without rental. Mr Moti explained that the proposal would in fairness protect every party.

25. Arvind and Woodford say that the preference share proposal was agreed to by those at the meeting over other options also discussed, and Mr Moti was instructed to prepare the necessary documents to implement the proposal at a member's meeting to be held on 23 August 2002.

26. A meeting of members was held on 23 August 2002. Present were Arvind, Ashik, Woodford, Mr Moti and Mr Moti's secretary. The minutes were kept by the secretary. They record that Woodford *"by power of attorney for Alex Bodiam"* was present representing Bodiam, and that he acted as Chairman of the meeting; that 180,000 preference shares each to the value of VT100 were created out of the authorized capital; that an application for the preference shares from PAL was approved; and that the secretary was to attend to the formalities for the allotment of the shares.

27. The resolution creating the preference shares provided that the preference shares shall confer on their holders the following rights and privileges:

> *"2.1 as to capital, the right on a winding up or other return of capital to repayment, in priority to any payment to the holders of any other shares in the capital of the Company, of the amounts paid up on the Preference Shares held by them (including any premium);*
>
> *2.2 as to voting, the right receive notice of, to be present and speak at and to vote, either in person or by proxy, at any general meeting of the Company or by way of written resolution if:*
>
> *(a) any resolution is proposed for the winding up of the Company, in which case the holders may only then vote at such general meeting on the election of a chairman and any motion for adjournment and the resolution for winding up; or*
>
> *(b) the meeting is convened for the purpose of considering a reduction of the capital of the Company; or*
>
> *(c) the proposition to be submitted to the meeting abrogates or varies or otherwise affects the special rights and privileges attaching to the Preference Shares.*

On a show of hands every holder of Preference Shares present in person shall have one vote and on a poll every such holder present in person or by proxy shall have one vote for every Preference Share held by him;

2.3 *as to the Company's building complex situate on land comprised in Title No. 12/0633/399, the right of continued occupation, enjoyment and use of those parts of the premises currently occupied by the holders of the Preference Shares in connection with the operation of their business without payment of any land rent, fees or charges;"*

28. At the same meeting a number of mutual options to acquire shares were executed. PAL was granted separate options by Ashik and Bodiam to acquire their 50,000 shares for VT5 million; Bodiam was granted an option by Ashik to acquire his 50,000 shares for VT5 million; Ashik was granted an option by Bodiam to acquire his 50,000 shares for VT5 million; and PAL granted to each of Bodiam and Ashik separate options to acquire PAL's 50,000 ordinary and 180,000 preference shares for VT23 million. The options are similar in form and each provided that it could be exercised by written notice served on the grantor at any time after 1 September 2003. The witness statements are silent about the part these options were to play in the overall scheme proposed by Mr Moti, and they did not receive attention at trial save for noting that the option granted by Bodiam was *"signed on behalf of Alex Bodiam by his Attorney Jim Woodford"*.

29. Following the meeting on 23 August 2002, it seems that the parties carried on their business relationships as before in a friendly and cooperative way. But everything changed in June 2004 after Arvind and Bodiam fell out. Arvind ceased receiving financial information about SIL. At a Director's meeting held on 21 July 2004 in Arvind's absence, the other directors resolved to withhold the monthly payment of VT55,000 from PAL.

30. As the party's relationship had broken down, Arvind offered to sell PAL's shareholdings in SIL to the other shareholders for VT23 million (the face value of the PAL shares) or at market value. This offer did not receive a satisfactory response. Rather, allegations were raised against Arvind that the issue of the preference share was invalid, and later again that the allotment of the preference shares was fraudulent. It was said that no consideration was given for the preference shares which remain unpaid. PAL's day to day operation of its business from the SIL premises was also being interfered with by SIL obstructing parking and access for PAL's customers, and by SIL soliciting them. SIL also allege that PAL owed VT20,500,000 rent for the use of the SIL premises, and rendered an invoice to PAL for that amount.

31. Court proceedings were issued in 2008 but were for some reason aborted. The present action was then commenced by PAL.

THE PLEADINGS

32. PAL sought against SIL, Ashik and Bodiam a declaration to the effect that the preference share allotment was valid, and an order directing SIL directors to call a meeting of members, and for damages to be assessed.

33. At some point during pre-trial conferences it was suggested to the lawyers for PAL that Arvind should be a party to the proceedings. Arvind was then joined by PAL as a third party. This was procedurally incorrect: *see*: **Civil Procedure Rules, r. 3.7.** Arvind was represented throughout by the same lawyers as PAL. He should have been joined as a co-claimant. Although Arvind was joined as third party, the proceedings have gone ahead as if he were a co-claimant. The defence and counterclaim has proceeded on the same footing with PAL and Arvind being the defendants to the counterclaim. In reality PAL and Arvind are claimants in the proceedings and nothing turns on the irregularity.

34. In their defence, the defendants raise several grounds seeking to invalidate the allotment of the preference shares. In particular they alleged that the meeting on 23 August 2002 was not duly convened, that Woodford was acting without authority, that Woodford's appointment as Chairman was not made in accordance with the articles of association and **s. 137** of the **Company's Act** [Cap. 191], that Woodford had never held a power of attorney granted by Bodiam, and that Bodiam never approved the resolution creating the preference shares.

35. It is further alleged by Ashik and Bodiam that at the meeting on 23 August 2002, Ashik was subjected to unconscionable coercion by Arvind and Mr Moti to pass the resolution. They allege Ashik did not understand the significance of the resolution and that there was an unequal balance of power as Ashik had no legal qualifications. In consequence they allege Ashik's will was overborne.

36. In the counterclaim an alternative allegation is added that Arvind acted in breach of his fiduciary duty as a director by preferring his own interest to those of other shareholders, in particular, by diluting the shareholding of the other members and receiving preference shares without consideration.

37. The defendants sought a declaration that the meeting on 23 August 2002 and any resolution passed were invalid and of no effect. They also claimed Vt 5 million damages for breach of fiduciary duty.

38. PAL and Arvind in their reply asserted the validity of the meeting and resolution, pleading that Woodford was acting *"as proxy"* for Bodiam and under a power of attorney.

THE TRIAL

39. At trial the parties concentrated their evidence on the validity or otherwise of the 23 August 2002 meeting and the resolution creating the preference shares. The claims for loss, damages and rental arrears were not developed.

40. Woodford and Arvind gave evidence for the claimants. Bodiam and Ashik gave evidences in support of the defence and counterclaim. Each witness verified his pre-trial statement and numerous documentary exhibits. Each was cross examined.

41. Much of the evidence dealt with the back ground facts set out above and is not contentious. The contentious aspects of the evidence is most conveniently dealt with under the particular issues which were identified by counsel at the end of the trial, and in their written submissions. As refined and reordered by me those issues are:

    1. Was a "*power of attorney*" granted to Woodford by Bodiam and was Woodford validly representing Bodiam at the 23 August 2002 meeting pursuant to a power of attorney?

    2. Was the resolution of 9 May 2002 agreeing to Woodford being "*proxy*" for Bodiam a valid proxy authorizing Woodford to represent Bodiam at the meeting of members on 23 August 2002. If so, was the scope of Woodford's authority limited in any way that impinges on the validity of the meeting and the resolution?

    3. Was the resolution of 23 August 2002 valid having regard to the challenges made to the validity of the meeting and the role taken by Woodford?

    4. Was there consideration given by PAL for the allotment of the preference shares?

    5. Was Ashik's will over borne by unconscionable conduct on the part of Arvind and Motis?

    I deal with each of these questions in turn.

Q1. The Power of Attorney

42. It is convenient to deal with this question first as I am satisfied that the claimants cannot rely on the alleged "*power of attorney*", even if one exists. The evidence about the existence of a power of attorney is unsatisfactory. It is apparent that Mr Moti understood that there was one but no power of attorney has been produced in evidence. The evidence does not describe how or from whom Mr Moti gained his understanding.

43. Woodford says a power of attorney in his favour was amongst documents he was given following the director's meeting on 9 May 2002, but he says it was returned with

other papers to Bodiam and SIL when he left his employment long before the proceedings commenced. Woodford may have been mistaken about what he saw as his oral evidence shows he had a deficient understanding about "*powers of attorney*" and "*proxies*", and the differences between the two.

44. Possibly a power of attorney of some sort was amongst the papers that Woodford was given, but if so the terms of the power are not known. It may have been one limited to the operation of Bodiam Engineering Ltd's bank accounts. Absent an instrument constituting the power of attorney (which PAL is required to produce), its terms cannot be ascertained and on this ground alone could not be relied upon in this proceeding by the claimant. There is however another reason against the claimant's reliance on a power of attorney. There is no evidence that the instrument, if it existed, was stamped in compliance with the **Stamp Duties Act** [CAP. 68], and s. 19 of that Act prevents an unstamped instrument being pleaded or given in evidence in any civil proceedings.

Q2. The Effect of the Resolution of 9 May 2002

45. The word "*proxy*" is not a technical word. It is a word often used in general conversation. In its ordinary use it has three distinct meanings. The **Oxford English Dictionary** defines "*proxy*" as:

> *"1. The agency or one who acts by appointment instead of another, the action of a substitute or deputy;*
>
> *1. A document empowering a person to represent and act for another, a letter of attorney;*
>
> *2. A person appointed or authorized to act instead of another, an attorney, substitute, representative, agent."*

46. The actual meaning in a particular situation will depend on the context in which the word is used. In the minutes of 9 May 2002 I consider "*proxy*" is used in the third of the dictionary meanings. Woodford is appointed or authorized to act instead of Bodiam, as his substitute or agent. However, the document recording the resolution appointing Woodford meets the second of the dictionary meanings.

47. There is no common law right on the part of a member of a company to vote by a proxy: Harben v. Phillips [1883] 23 Ch D 14 and New South Wales Henry George Foundation v. Booth [2002] NSWSC 245. It is necessary to identify a statutory authority permitting a member to vote by proxy. That authority exists in **s. 137** of the **Company's Act**, but is subject to the limitations and procedural forms set out in that section and in the articles of association. The defendants rely heavily on the third proviso to s. 137 (1) of the Act which qualifies the right to vote by proxy and relevantly reads: *"Provided that, unless the articles otherwise provide..... (c) a proxy shall not be entitled to vote except on a poll."*

48. The defendants point out that there was no poll called for at the meeting on 23 August 2002, and accordingly they submit Woodford had no right to vote in support of the resolution. However the "*articles of association*" of SIL do provide in **Article 66** that on a show of hands every member present in person or by proxy shall have one vote. Subject to the appointment of Woodford as proxy being otherwise valid, Bodiam was present by proxy through Woodford, and Woodford had the right to both speak and vote on Bodiam's behalf.

49. **Articles 71 to 73** require that there be a written instrument appointing a proxy. Article 73 provides that the instrument shall be in form set out in the article *"or a form as near as the circumstances admit".* Article 73 is therefore discretionary not mandatory. Although the form set out in Article 73 contemplates that a particular meeting will be identified, that does not prevent the execution of a general form of proxy: **Halsbury's Law of England**, 3rd edition, **Vol. 6** at **para 668**.

50. The resolution on 9 May 2002, being general in its nature and operation, therefore operates as a standing appointment. However the appointment must still sufficiently comply with **Article 72**, and include the basic requirements necessary to constitute a valid appointment for the purposes of the Articles. To meet those basic requirements the instrument must sufficiently identify: (1) the appointing member, (2) the company in respect of which the authority is to operate, (3) the name of the proxy, and (4) be under the hand of the appointer or his attorney.

51. In this case I consider the resolution of 9 May 2002 clearly meets the first 3 basic requirements. The resolution clearly identifies the member appointing the proxy. In the circumstances of this case there is no need to add the member's address or any further description to complete the identification. The resolution is recorded in the minutes of a director's meeting and relates to the business of SIL. The identity of the appointee is also established by the minutes.

52. The fourth requirement is prescribed not so much by the form in Article 73 which is directory, but by Article 71. The Minutes of the 9 May 2002 meeting were not signed by Bodiam, but by Woodford. I accept the defendant's submission that a proxy cannot attest to his own appointment, and in this respect the resolution fails to meet the words of Article 71. However the intent of Articles 71-73 is clear.

53. The intent is to provide the company with evidence on which it can rely that the member has granted authority to the proxy to act on the member's behalf. If that proof is otherwise clearly available to the company in a particular case, the failure of the member to sign an instrument of appointment is an irregularity of the kind which shareholders can waive. The claimants rely on the observation of Tuohy J in **Harry Iauko & Ors. v. Air Vanuatu Operations Ltd** [2007] VUSC 66, where he said that:

> *"....., a principle of law has developed through case law (called after the leading case the Re Duomatic principle) that the unanimous consent of all shareholders who have a right to attend and vote at a general meeting can override formal (including even statutory) requirements in relation to the passing of resolutions at such meetings. The relevant case law is collected in Atlas Wright (Europe) Ltd v. Wright*

and Anor [1991] EWCA Civ 669. The common sense of this principle is obvious when it is considered that the memorandum and articles of association of a company act as a contract binding on its members: see s. 30 Companies Act. All parties to a contract are free to waive its provisions if they see fit."

54. In this case the members, all present at the meeting on 9 May 2002, did agree to the standing appointment of Woodford as Bodiam's proxy and I agree with the submission of the claimants that they effectively waived formal procedural requirements that would otherwise stand in the way of Woodford exercising whatever authority Bodiam had by the appointment given him.

55. There is a further ground which I consider overcomes the absence of Bodiam's signature on the minutes. Bodiam in his evidence confirmed that the Minute records what was agreed at the meeting and he has thereby ratified the appointment of his proxy in the terms recorded. Bodiam denies that the appointment as recorded authorized Woodford to vote in favour of a reconstruction of the shareholding of SIL or in favour of the issue of preference shares, but that is a different question. The appointment of his proxy in terms of the Minutes is confirmed by him. In due course I consider whether those terms granted only a limited authority which did not extend to agreeing to the resolution passed on 23 August 2002.

56. To complete the discussion on the formal requirements of **Articles 71-73** I note that **Article 72** requires an instrument appointing a proxy to be deposited at the office of the company not less than 48 hours before the holding of the meeting. I consider this requirement is met as the minute which constitutes the instrument of appointment was within the SIL office from the time the Minutes were completed.

57. The defendant submits that the appointment on the terms recorded in the minutes did not authorize Woodford to vote as he did at the meeting on 23 August 2002. Bodiam said in evidence that the appointment was not intended to extend so far.

58. The scope of the proxy as between Bodiam and his fellow members and SIL, is to be determined objectively, not according to his subjective and unstated intentions. The terms of the appointment, as recorded in the minute, are extremely general and do not descend to detail. To that extent the terms leave room for different interpretations. However, other material assists in determining the scope of the authority granted to Bodiam.

59. That there was uncertainty about land and office space issues is recorded in the Minutes of the director's meeting of 30 March 2002. These issues required resolution. The item in the Minutes of 9 May 2002 immediately preceding the proxy item referred to the land issues which still need to be settled. From this background it can be inferred that the proxy's authority extended to the resolution of these issues. However the proxy item is headed *"Alex Proxy as Director"*. That heading, standing alone, raises a question whether the authority was to extend to voting on a resolution that required approval at a meeting of members, not just at a director's meeting.

60. The scope of the authority given to Woodford was addressed directly in the sworn statement of Arvind. In **para 22** he deposed:

> *"When we held a meeting the Board of Directors of SIL on 9th May, 2002 Alex Bodiam attended with a Jim Woodford. Alex Bodiam advised us as directors and shareholders of SIL that he would be traveling to Tonga for several months and that in his absence the then General Manager of Bodiam Engineering, James Elwood Woodford ("Jim Woodford") would act as his proxy in relation to all attendances associated with his directorship and shareholding of SIL. He asked Ashik Lal and I if we would accept Jim Woodford as a proxy for Alex Bodiam whilst he, Alex Bodiam, was out of the country. We agreed as Directors and shareholders, in my case representing PAL, to Jim Woodford's appointment as Alex Bodiam's Proxy in all such meetings".*
>
> (my underlining)

61. This is very specific evidence that Bodiam informed the meeting that the proxy's authority would extend to shareholder issues. Arvind was not challenged on this evidence in cross examination, nor was it challenged by Bodiam or Ashik in their evidence. In my opinion this unchallenged evidence from Arvind establishes that the appointment of Woodford as Bodiam's proxy was a general one not subject to the limitations which Bodiam now says he intended to (but did not) impose.

62. Moreover, both Arvind and Woodford gave evidence that the preference share proposal was discussed with Bodiam before the meeting of 23 August 2002, and once the meeting occurred Woodford said Bodiam was informed of the outcome. Woodford gave evidence that email exchanges occurred between him and Bodiam on the topic, and that these emails would have been recorded on Bodiam's work computer from which Woodford sent them.

63. No satisfactory explanation was given by Bodiam for the failure to discover his telephone and email records.

64. I record at this point that I was generally unimpressed with the evidence of both Bodiam and Ashik on the contentious issues. I consider both witnesses lacked objectivity in their answers on questions relating to the possible justification for the preference share issue. For example, when asked to comment on the resolution of 23 August 2002 Bodiam said of the Minutes: *"This document is rubbish, it is lies. It was an ego thing for Arvind".* He agreed that PAL had spent money on the construction of the warehouse but when asked: *"How do you think PAL should be credited for that?"* He answered: *"No idea. We set this up together and we got equal shares together until this rubbish started".* And when *asked "Don't you think it unfair not to reward PAL for such investment in the warehouse".* He answered: *"No I don't think it is unfair. We were originally equal partners everyone put in what they could."*

65. On the case which Bodiam and Ashik were propounding, SIL, and through the company both of them, would get all the benefits of the warehouse and PAL's considerable outlay for nothing in exchange. Bodiam's responses to questions on this

topic reflect adversely on his credit. His failure to properly address the request for telephone and email records does no credit to his case.

66. On the other hand, I was generally impressed by the evidence of Arvind who I consider made reasonable and realistic attempts to resolve the issues that had arisen with his fellow shareholders. Where it is necessary to prefer the evidence of one side to the other, I prefer the evidence of Arvind and Woodford.

67. I therefore find that Bodiam was aware of the proposed preference share issue before 23 August 2002 and was aware of the outcome of the meeting, yet he made no complaint about it until after he and Arvind fell out in 2004. In effect, by his acquiescence in the meantime he is taken to have ratified the issue of the preference shares and accepted it as a reasonable resolution of the long standing land and office space issues.

68. I therefore find in answer to the second question posed for determination that Woodford was validly representing Bodiam at the meeting on 23 August 2002, and was acting within the authority granted to him by his appointment when he voted in favour of the resolution.

Q3. <u>Was the resolution of 23 August 2002 valid having regard to the challenges made to the validity of the meeting and the role taken at it by Woodford?</u>

69. The complaints made by the defendants are that 14 days notice was not given calling the meeting of members, and Woodford did not qualify under the articles to be Chairman. Once it is accepted that Woodford held a general proxy to represent Bodiam and to vote on his shares, it follows that he could vote in favour of waiving the requirement of 14 days notice. **Article 53** specifically provides that a meeting called by shorter notice shall be deemed duly called if it is so agreed by a majority in number of members having a right to attend and vote at the meeting, being a majority holding not less than 95 percent in nominal value of the shares. Here the agreement to hold the meeting without 14 days notice is to be implied as the holders of all the shares were present and raised no objection to the meeting proceeding.

70. **Articles 59-61** deal with the role Chairman. They contain various provisions for the appointment of a member as chairman. Woodford, although a proxy holder, was not a member. However his appointment nonetheless was a mere irregularity of the kind that members have the power to waive: (*<u>see</u>*: Harry Iauko's case cited above). As Bodiam must be taken to have accepted the outcome of the meeting it is not open to him later when the proceedings were commenced to complain that the meeting was procedurally irregular in a way that is not shown to have had any effect on the outcome of the meeting. I find that the validity of the resolution 3 August 2002 is not impugned by the procedural irregularity of the chairmanship.

Q4. Was there consideration given by PAL for the allotment of the preference shares.

71. The defendants accept that PAL financed the construction of the warehouse, but say they agreed only to an outlay of VT8 million and not to a sum slightly in access of VT10 million. This submission overlooks the evidence that there was an unexpected over run in costs that had to be met to complete the warehouse.

72. Having conceded the expenditure by PAL, the defendants submit, first, that the monthly payments of VT45,000 and later VT55,000 were repayments on account of PAL's capital outlay, and therefore to treat PAL's expenditure as consideration for the allotment is to double count. Secondly the defendants submit that in any event as this expenditure had occurred long before the allotment, it was *"past consideration"* and therefore not good consideration for the allotment.

73. I consider the defendant's submissions are misconceived. The evidence shows that PAL borrowed in excess of VT10 million from Westpac at an interest rate of 13.5% per annum. The interest liability on the loan would be in the order of VT112,000 per month. The monthly payments made to PAL cannot be characterized as a repayment of capital. On the contrary, SIL's monthly payments seem very reasonable. The excess of the monthly liability to Westpac over and above the monies received from SIL is presumably to reflect PAL's own use of part of the premises.

74. By 23 August 2002 PAL and Arvind estimated the total expenditure for the benefit of SIL to be in the vicinity of VT18 million. The estimate is the reason for the allotment of preference shares to the same face value. The issue of 180,000 preference shares valued at VT100 each rather than some other number is not a mere coincidence. SIL was in reality indebted to PAL for the moneys expedited on its behalf to establish the warehouse and was liable to PAL. If nothing had been done to settle the uncertain issues over the land and office space, PAL could have taken action against SIL to recover its expenditure. The allotment of the preference shares removed that possibility.

75. The consideration for the allotment was the discharge of SIL's liability to account to PAL for Vt 18 million. The consideration was given contemporaneously with the allotment and was not past consideration. It is for this reason that the preference shares were allotted as fully paid.

Q5. The allegation of unconscionable conduct

76. Ashik gave evidence that is not supported by the evidence of Arvind and Woodford that he was told at the meeting on 23 August 2002 that as Arvind and Woodford would vote in favour of the resolution, his vote did not matter. Ashik said that for this reason he felt compelled simply to go along with the others and to approve a proposal that he did not understand. I do not accept his evidence.

77. In August 2002 the parties were on good terms. Ashik acknowledges that he relied at that time on his older brother Arvind to protect his interests. I consider that his will was not over borne as he now alleges but that he willingly went along with his brother, relying on him to achieve a fair outcome for all the parties.

78. In support of the allegation of unconscionable conduct it is submitted that the allotment of preference shares had the effect of unfairly advantaging Arvind to the detriment of the other ordinary shareholders by diluting the value of their shares and reducing their voting rights. This submission misunderstands the purpose of the allotment and the terms attaching to the preference shares.

79. As to value, absent the allotment, SIL was potentially liable to PAL for VT18 million being the expenditure had and received for its benefit. After the allotment this liability was removed, although on a winding up PAL had a priority for VT18 million. Unless and until a winding up occurred the allotment of the preference shares was beneficial to the value of the ordinary shareholders as the current liability of VT18 million was removed.

80. The preference shares gave a measure of security to PAL in respect of its expenditure, but the security only operated in the event of a winding up. There is nothing unconscionable about that situation.

81. As to the allegation that the ordinary shareholders voting rights were watered down, this overlooks that the voting rights attaching to the preference shares only arise in the very limited circumstances set out in the resolution. For the day to day operation of SIL, the voting rights of the holders of ordinary shares remained unaffected by the allotment. Again there is nothing unconscionable about the limited voting rights attaching to the preference shares.

82. For these reasons I consider the claimants have made out their case for a declaration as to the validity of the allotment of preference shares. I consider the counterclaim should be dismissed.

83. The relief claimed in the amended particulars of claim also seeks an order that the directors of SIL convene a meeting of members. The intended purpose of this order was not discussed at trial or in final submissions. I consider that the better course is for the Court simply to make the declaration sought by the claimants but to give the parties liberty to apply for consequential orders should that became necessary. Hopefully the parties can now give sensible consideration to one side of the dispute buying out the other as originally proposed by Arvind before the proceedings were issued. The alternative may well be an order that SIL be wound up on "*just and equitable*" grounds which this would be a very costly outcome for all the shareholders.

84. The Court therefore orders:

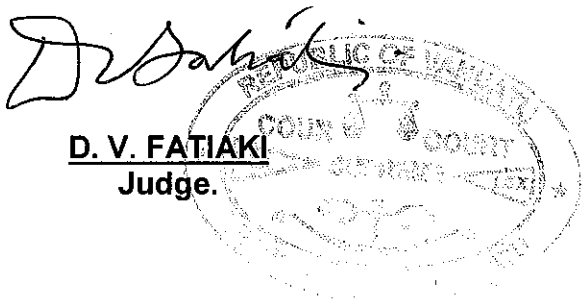
    (1) A declaration that Pacific Autronics Ltd is the holder of 180,000 preference shares of VT100 each credited as paid up and 50,000 ordinary shares of VT100 each credited as paid up.

(2) The defendants pay to the claimant and the third party one set of costs on the standard basis for the proceedings to date which order is presently enforceable.

(3) Liberty to the parties to bring the matter on for further consideration of consequential orders on 7 days notice should that be necessary.

DATED at Port Vila, this 2nd day of June, 2014.

BY THE COURT



D. V. FATIAKI
Judge.