

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

Company
Case No. 23/3250 SC/COMP

**UNDER THE COMPANIES
(INSOLVENCY AND RECEIVERSHIP)
ACT 2013**

IN THE MATTER OF: THE PROPRIETORS- STRATA PLAN NO. 0089

**BETWEEN: MARIA REID
CLAIMANT**

**AND: THE PROPRIETORS- STRATA PLAN NO.0089
DEFENDANT**

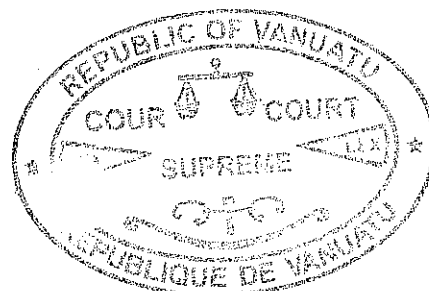
Hearing of Application: *8th day of March, 2024*
Before: *Justice W. K. Hastings*
Counsel: *Mr. M. Hurley for the Claimant*
Mr. A. Bal for the Defendant

JUDGMENT ON LIQUIDATION

1. The claimant seeks orders that the defendant company be put into liquidation under s 15(2)(a) of the Companies (Insolvency and Receivership) Act 2013 (the CIR Act), and that a liquidator be appointed.

Background

2. On 21 July 2022, the defendant and the claimant entered into a Deed of Settlement of Civil Claim 155 of 2020 in which the defendant agreed to pay the claimant AUD 900,000 plus interest agreed at 14%. Clause 4(d) of the Deed of Settlement stated that the claimant was entitled to seek default judgment against the defendant if the defendant did not pay the agreed amount by 20 July 2023. On 3 October 2023, default judgment was entered in favour of the claimant in Civil Case No 113 of 2022 (filed to give effect to clause 4(d)) for AUD 900,000 plus interest at an agreed rate of 14%.
3. On 12 October 2023, the claimant issued a statutory demand under s 19 of the CIR Act. This was served on the defendant on the same day. The defendant failed within 15 working days of service of

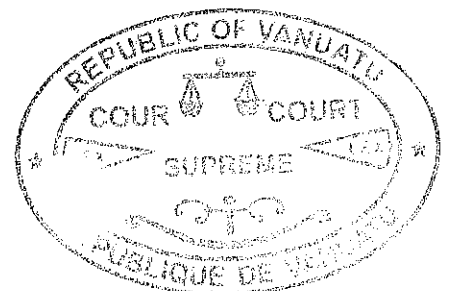


the demand to pay the debt, enter into a compromise, otherwise compound with the creditor or give a charge over its property to secure payment of the debt.

4. The claimant filed this claim to put the defendant into liquidation on 24 November 2024. The claim was accompanied with a notice of proceeding and the sworn statement on the claimant in compliance with regulation 3 of the Companies (Insolvency and Receivership) Regulation Order No 111 of 2015. The liquidation hearing was scheduled for 25 January 2024.
5. The liquidation hearing set down for 25 January 2024 was vacated as a result of insufficient public notice of the hearing. This was recorded in my Minute of 25 January 2024. A fresh hearing date was scheduled for 8 March 2024. The notice of the hearing was published in the Official Gazette on 8 February 2024. Notice was also published on the Vanuatu Financial Services Commission internet site on 6 February 2024.

The Defence

6. The defendant had filed a defence on 21 December 2024 but this was not on the physical court file, and the defendant did not serve it on the claimant, until after the vacated hearing on 25 January 2024. The claimant filed a reply to the defence this morning, 8 March 2024.
7. The defence relies on s 15(2) of the Strata and Community Titles Act (the SCT Act), which provides that the "*provisions of the Companies Act [Cap. 191] do not apply to the body corporate*" and s 15(4A) which states that "*the body corporate has the powers granted to it under this Act.*" On this basis, the defence pleads that the defendant did not have the capacity to enter into the Deed of Settlement, does not have the power to pay the settlement sum, and does not have the power to pay the default judgment. For these reasons defendant did not apply to set aside the statutory demand because it has no effect.
8. The claimant in reply relies on the repeal of the Companies Act [Cap. 191] and its replacement by the Companies Act 2012 which came into force on 31 August 2015, the same day the CIR Act came into force. Mr Hurley submitted that Parliament intended the new Companies Act and the CIR Act to replace the old regime, so that the reference in s 15(2) to a now repealed Act is redundant. Mr Hurley also submitted that "*company*" is defined in s 2 of the CIR Act to include "*every other body corporate incorporated in Vanuatu.*" This, he submitted, means the CIR Act applies to the defendant.
9. I agree with Mr Hurley. The reference in s 15(2) is to an exemption from a repealed Act and in any event does not refer to the CIR Act. On Mr Bal's analysis, every body corporate incorporated by virtue of s 15 of the SCT Act would have immunity from suit arising from any action not specifically mentioned in the SCT Act. The preferable interpretation of s 15(4A) is that the body corporate, in addition to the powers it has under the Companies Act 2012, also has the powers granted to it under the SCT Act. The provision does not restrict the defendant from entering into a Deed of Settlement. This interpretation is consistent with s 16(2) of the SCT Act which states that the powers of the body corporate "*include*" the following list of powers. The use of the word "*include*" means the list is not exhaustive. This interpretation is also consistent with s 15(4) which states that the body corporate



"must ... be capable of suing and being sued", with the broad definition of "company" in s 2 of the CIR Act.

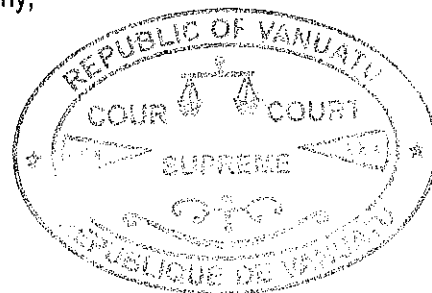
10. I also accept Mr Hurley's submission that defendant pleaded that it relied *"on the terms of the Settlement Deed in full"* in its defence in Civil Case 113 of 2022. It cannot now say the same deed is a *"nullity or alternatively void in respect of the Defendant because the Defendant had no power to enter into it"* as is pleaded at para. 3(c) of the defence in this case.
11. For these reasons, the defence fails.
12. Mr Bal raised another related matter. Annexed to the sworn statement of Robert John Herd dated 7 March 2024 and filed 8 March 2024 is an application to set aside the default judgment entered in Civil Case No. 113 of 2022. Mr Herd's sworn statement is in respect of that application, not the present proceedings. Mr Bal made me aware of the application in case it had an effect on this proceeding. I am of the view it does not. Default judgment was entered in Civil Case No 113 of 2022 because the claimant was entitled to seek it by virtue of clause 4(d) of the Deed of Settlement. The Deed of Settlement was created to resolve Civil Claim 155 of 2020. The Deed of Settlement remains in place regardless of whether or not the default judgment entered in Civil Case No 113 of 2022 is set aside.
13. I turn now to the claim.

The claim

14. The claimant alleges the defendant is unable to pay its debts in terms of s 15(2)(a) of the Act. Section 17 of the Act provides that a company is presumed to be unable to pay its debts if it has failed to comply with a statutory demand. The statutory demand was properly constituted under s 19(2) and was properly served on 12 October 2023. No application was made to set it aside. As indicated above, the debt was not paid or any other arrangement made within 15 days of service of the statutory demand. Sufficient public notice was given of today's hearing and no one apart from the defendant sent notice of a wish to appear. Mr Hurley deposed in his sworn statement of 8 March 2024 that the claimant informed him that the debt remains unpaid as of today.

Result

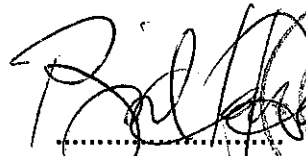
15. I am therefore satisfied that the company is unable to pay its debts and make the following orders:
 - a. The Proprietors – Strata Plan No. 0089 (the Defendant Company) be put into liquidation by the Court under section 15(2)(a) of the Companies (Insolvency and Receivership) Act No. 3 of 2013;
 - b. Mark Stafford of SFAI Barrett & Partners, Chartered Accountants & Consultants, PO Box 240, Port Vila be appointed the liquidator of the Defendant Company;



- c. The Defendant Company pay the Claimant's costs of and incidental to this Claim, to be taxed if not agreed.
16. The Orders are stayed until 4pm on Friday 22 March 2024.

DATED at Port Vila this 11th day of March, 2024

BY THE COURT


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Justice W. K. Hastings

