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

Civil Case No. 98 of 2007

BETWEEN: HARRY IAUKO & ORS
Claimants

AND: HAM LINI VANUAROROA
RIALUTH SERGE VOHOR
WILLIE JIMMY TAPANGARARUA

First Defendants

AND: AIR VANUATU OPERATIONS LIMITED (AVOL)
Second Defendant

Coram: **Tuohy J**

Counsels: **Mr. Loughman for Claimant**
Ms. Harders for 1st Defendants
Mr. Malcolm for 2nd Defendant

Date of Hearing: **28, 29 June 2007**

Date of Decision: **2 July 2007**

RULING

Introduction

1. Up until 15 June 2007, the 24 Claimants constituted the Board of Directors of AVOL. The first-named claimant Harry Iauko was the Chairman. On 15 June, 2007 the new Minister of Infrastructure, Mr. Vohor, wrote to each of the claimants as follows:

" In line with the circumstances of your appointment to the position of the Director and following the past practice with the Board of Air Vanuatu in that when there is a change of the Minister responsible for the national carrier, there is a change of the Board of Directors and in Extraordinary General held in Port Vila by the three Shareholders, it was unanimously resolved that your position as a Director of Air Vanuatu (Operations) Limited is terminated, effective today 15th June 2007".

2. The Claimants claim that the termination was unlawful and they seek reinstatement to their position as directors and chairman. Pending determination of their substantive claim, they have applied for interim orders suspending the terminations, reinstating them to their positions and restraining the appointment of new directors.

3. This application is opposed by the First Defendants. AVOL does not take a position for or against. Its counsel has advised that it abides the decision of the Court.

Facts

4. AVOL is a private company incorporated in Vanuatu. The information provided to the Court as to its shareholding is unclear. The papers initially filed by the Claimants contained no information on the point which is of crucial importance. On Thursday, the first day of the hearing, the Court was advised by counsel for AVOL that there were 3 shares of 100 VT each, one held by each of the 3 First Defendants. At the reconvened hearing on Friday, the Court was given by counsel for AVOL, without objection, a copy of the latest annual return of the company which shows that there are 1,000,000 shares of VT 100 each and 200,000 shares of VT 1,000 each, which are held as follows:

Ham Lini Vanuaroroa	1
Edward Nipake Natapei Tuta	
Fanua "Arikii" (former Minister of Infrastructure)	1
Willie Jimmy Tapangararua	1
Vanuatu Government	1,199,997
	1,200,000

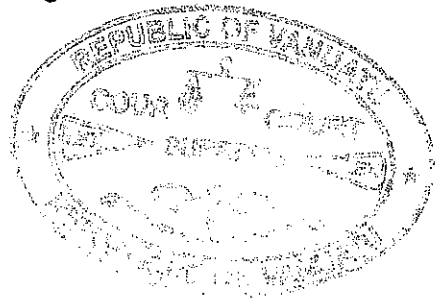
5. However, at the same time, Mr. Malcolm advised that his instructions were that the annual return was mistaken and that the 1,200,000 shares were held as follows:

Ham Lini Vanuaroroa	1,199,998
Willie Jimmy	1
Edward Natapei or Serge Vohor	1
	1,200,000

6. Mr. Iauko made an additional sworn statement for the reconvened hearing attaching declarations of trust signed by Ham Lini, Willie Jimmy and Edward Natapei who were at the time respectively the Prime Minister, the Minister of Finance and Economic Management and the Minister of Public Utilities and Infrastructure. The declarations stated that each of them was the proprietor of one ordinary share in AVOL which each held in trust on behalf of the beneficial owner, the Republic of Vanuatu.

7. It is strange that the Court is left with uncertain information on this point, despite the fact that the 3 counsel between them represent the erstwhile Chairman and Board of the company, the shareholders of it and the company itself. Nevertheless, I am satisfied from all the information that, between them, Ham Lini, Willie Jimmy and Edward Natapei or Serge Vohor own or control 100% of the shares in AVOL.

8. The articles of association of AVOL contain the following relevant articles:



"97: *The company may by ordinary resolution, of which special notice has been given in accordance with Section 143 of the Act, remove any director before the expiration of his period of office notwithstanding anything in these articles or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company".*

"98: *The company may by ordinary resolution appoint another person in place of a director removed from office under article 97,..... ".*

"51: *An annual general meeting and a meeting called for the passing of a special resolution shall be called by twenty-one days notice in writing at the least, and a meeting of the company other than an annual general meeting or a meeting for the passing of a special resolution shall be called by fourteen days notice in writing at the least. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of meeting and, in case of special business, the general nature of that business, and shall be given, in the manner of that business, and shall be given, in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the articles of the company, entitled to receive such notices from the company:*

Provided that a meeting of the company shall, notwithstanding that it is called by shorter notice than that specified in this article, be deemed to have been duly called if it is so agreed-

(a) *in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat; and*

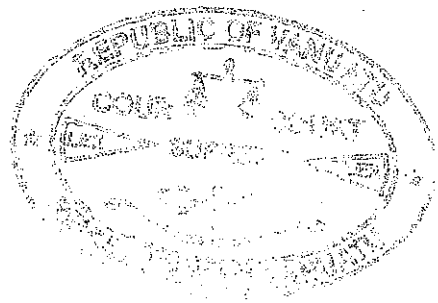
(b) *in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 95 per cent in nominal value of the shares giving that right.*

9. Mr. Willie Jimmy made a sworn statement for the reconvened hearing annexing the Minutes of an Extraordinary General Meeting of AVOL held on 15 June 2007. These show that the quorum consisted of the 3 First Defendants. The first resolution passed was a waiver of the 21 days notice. Resolution 3 was to terminate the 24 claimants as directors. All resolutions were approved unanimously.

10. Mr. Iauko also annexed to his sworn statement a document described as an employment contract between the Board of Directors as employer and himself as employee under which he purported to "*take up employment with the Board as a member of the Board of Directors as well as Chairman of the Board*". It provides in Clause 10:

"The employee's termination as a director and chairman of the employer shall be in accordance with the company's Articles of Association and the Company's Act. In the event the employee is terminated as aforementioned, this contract shall also terminate.

He relies upon this document to protect his position as Chairman and member of the Board.



The Law

11. The law in relation to deciding applications for interim injunctions is well-known. The principles are set out in the decision of the House of Lords in **American Cyanamid v. Ethicon Ltd** [1975] AC 396, which has been followed and developed in all countries applying the common law including Vanuatu.

12. The Courts have conventionally approached the enquiry in two stages (reproduced in Rule 7.5 of the Civil Procedure Rules):

- Is there a serious question to be tried in the substantive dispute between the parties?

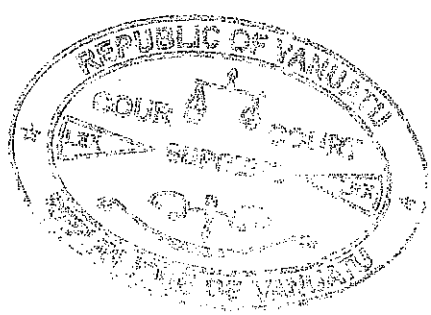
- If so, then does the balance of convenience favor the grant or refusal of relief?

These however are merely guides to be used in deciding where the overall justice of the case lies: **Klissers v. Harvest Bakeries** [1985] 2 NZLR 140, 142 per Cooke P.

Discussion

A Serious Question to be Tried?

13. The Claimants allege that the termination was unlawful on a number of bases. Initially Mr. Loughman queried whether all the shareholders had agreed to the termination. That was before Mr. Willie Jimmy's sworn statement had been filed annexing the Minutes of the Extraordinary General Meeting. It is clear from them that the Prime Minister, the Minister for Finance and the present Minister for Infrastructure did all agree.



14. Mr. Loughman then submitted that there was no documentary evidence that Mr. Vohor was now the holder of Mr. Natapei's share so the Court could not be satisfied that the resolutions had been agreed by all shareholders.

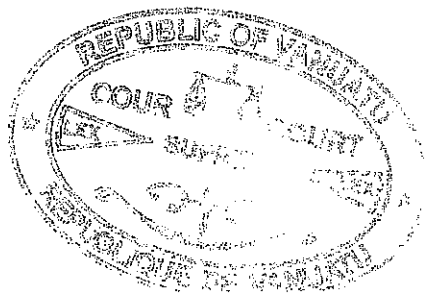
15. There are two answers to this. First, although no declaration of trust or consent to act as shareholder were produced for Mr. Vohor, the sworn statement of Willie Jimmy states that Mr. Vohor is one of the 3 shareholders along with Mr. Lini and himself. There is no evidence to contradict that statement.

16. In any event, it is common ground that Mr. Natapei has been replaced as Minister for Infrastructure by Mr. Vohor and that the share is held on trust for the Republic by the holder of that office for the time being. Thus, even if the formalities of transfer have not yet been attended to, the holder of that share in equity is Mr. Vohor. It is unrealistic to expect the Court not to recognize that fact.

17. It was further submitted that the notice required by the Articles of Association and s. 143 of the Companies Act was not given in respect of the extraordinary general meeting. Again there are two answers to that submission.

18. The first and most obvious is that Article 51 specifically permits the period of notice to be shortened if agreed by the holders of 95% of the shares. Here 100% of the shareholders agreed to waive the notice altogether.

19. Secondly, 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



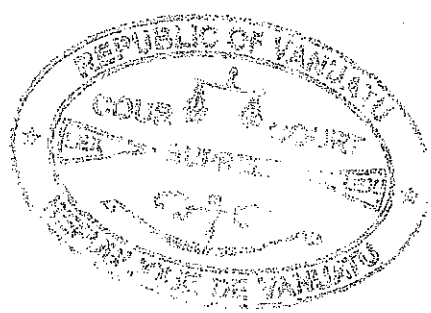
relation to the passing of resolutions at such meetings. The relevant case law is collected in **Atlas Wright (Europe) Ltd v. Wright and Anor** [1999] EWCA Civ 669. The common sense of this principle is obvious when it is considered that the memorandum and articles of association of a company act as 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.

20. So the claims of unlawfulness appear to be without any real substance. There was no other basis upon which it was argued that the terminations were unlawful. Accordingly I am not satisfied that there is a serious question that the terminations were unlawful. Ultimately it is the right of the shareholders of a company to decide whether to terminate or appoint directors, subject, of course, in this case to their duty to act solely in the interests of the nation, the Republic of Vanuatu, for whom they hold their shares in trust.

21. It also has to be remembered that to obtain interim orders for reinstatement, the Claimants must establish not only that there is a serious question as to whether their terminations were unlawful, but also as to whether they have a consequential right to permanent reinstatement. This issue is discussed under the topic of the balance of convenience.

The Balance of Convenience

22. The general rule is that if damages are an adequate remedy, then an interim injunction should not be granted. In this case, the claimants have claimed damages. If they are ultimately successful in obtaining a ruling that their terminations were unlawful, they will be entitled to damages. Mr. Loughman did not suggest any reason why that would not be an adequate remedy for them and I can see none. Accordingly on this ground alone, the present application must fail.



23. There are additional reasons why interim reinstatement ought not to be granted even if there was a serious question about the legality of the terminations. The first is that generally equitable principles are against the grant of an injunction to compel the continuation of a personal relationship in the nature of employment when the employer does not want the relationship to continue. An example cited in argument was **Bainbridge v. Smith** (1889) 41 Ch. D. 462, 474 in which the Court indicated that it would not grant an injunction to compel a company to continue with a managing director which it did not want. On the other hand, in **Virelala v Air Vanuatu** [1999] VUSC 15, CC 29 of 1997, CC 29 of 1997, the Chief Justice held that this rule is not absolute in the circumstances of modern day Vanuatu and reinstated the claimant as Managing Director of Avol. He did however describe the case as an exception to the general rule.

24. The other additional reason is that even if there has been some procedural error in the terminations, it is obvious the shareholders do not want the claimants as directors, and they can at any time repeat the process if necessary to cure any irregularities there may have been. In those circumstances, the Court would exercise its discretion against the grant of an injunction which would quickly be rendered nugatory.

Mr. Iauko's Employment Contract

25. This adds nothing to his position since Clause 10 merely says that his termination as director and chairman shall be in accordance with the articles and the Companies Act. As set out above no good argument has been made that it was not.

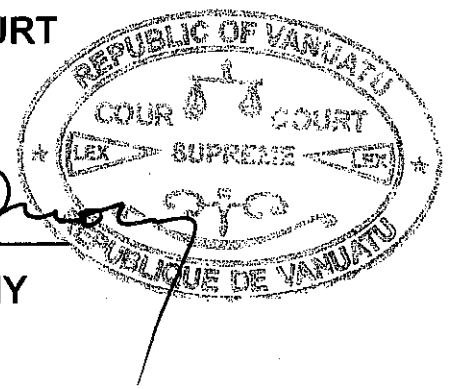
26. In any event, the equitable principle referred to above would prevent any injunction to enforce specific performance of an employment contract against the unanimous wishes of the members of the employing company.

Conclusion

27. This application for interim orders therefore fails on a number of counts and is dismissed. There will be an order for costs in favour of the First Defendants in a sum to be agreed or fixed by the Court on application made before the first case management conference for the substantive proceeding which is fixed for Friday 3 August at 8 a.m.

Dated at Port Vila this 2 July 2007

BY THE COURT



C.N. TUOHY

Judge