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

Company
Case No. 16/3841 SC/COMP

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

Claimant

AND: Iririki Island Holdings Limited (CM – 28331)

Defendant

Date of HEARING:	*June 14th and 16th, 2017*
Date of JUDGMENT:	*August 29th, 2017*
Before:	*Justice Paul Geoghegan*
Appearances:	*Counsel for the Claimant:- Mark Fleming and Supporting Creditor Vila Distribution for the Claimant*
	Counsel for the Defendant:- Dane Thornburgh
	Counsel for supporting Creditor Trident Holdings Ltd, Daniel Yawha

DECISION

1. These proceedings involve an application by the claimant (*"Mocha"*) for the appointment of a liquidator in respect of the defendant Iririki Island Holdings Ltd (*"Iririki"*).

2. The background to the proceedings was set out in an earlier judgment which I issued to determine the right of Iririki to appear in these proceedings[1] however it is appropriate to briefly describe that background.

3. Mocha claims to be owed a debt of AUD$1, 419, 287 alleged to be owing by Iririki in respect of construction work undertaken by Mocha to repair the Iririki Island Resort owned by Iririki, after substantial damage was caused to the resort by Cyclone Pam in March 2015. There is no dispute that Iririki engaged Mocha to undertake the work and that that work was undertaken in 2015 and 2016.

4. It is clear from the evidence filed, that in the latter half of 2016 a Director of Mocha, Mr Ryan Foots became concerned regarding payment of various accounts outstanding in respect of the construction work undertaken by his company. There were numerous discussions and correspondence between Mr Foots and various representatives of Iririki regarding this issue over a period of time.

5. Pursuant to section 19 (1) of the Company's (Insolvency and Receivership) Act No. 3 of 2013 (*"the Insolvency Act"*). Mocha served a statutory demand on Iririki on September 27th, 2016.

6. Section 20 of the Insolvency Act requires any company who wishes to challenge a statutory demand to make an application within 10 working days

[1] Mocha Ltd v. Iririki Island Holdings Ltd [2017] VUSC 76

of the date of service of the demand[2]. The time limit is a strict one and section 20 (3) of the Insolvency Act provides:-

> *"(3) No extension of time may be given for making or serving an application to have a statutory demand set aside, however, at the hearing of the application, the Court may extend the time for compliance with the statutory demands".*

7. There is no dispute in this case that Iririki did not apply to set aside the statutory demand within the mandatory 10 day period.

8. Section 19 (2) (d) of the Insolvency Act requires a company served with the statutory demand to do one of four things *"to the reasonable satisfaction of the Creditor, within 15 working days of the date of service, or any longer period that the Court may order"*. Taking any of the actions referred to has the effect of satisfying the statutory demand given that it needs to be undertaken to the *"reasonable satisfaction of the creditor"*.

9. One of the issues in this case is whether or not, within the 15 working days prescribed by the Act, Iririki did one of the four things referred to, namely a *"compound with the creditor"*[3]. Mocha says that no such compound occurred at all.

[2] Section 20 (1) and (2), (a) Companies (Insolvency and Receivership) Act No. 3 of 2013
[3] Section 19 (2) (iii) of the Insolvency Act

10. On November 23rd, 2016 Mocha filed a claim seeking an order that Iririki be put into liquidation by the Court pursuant to section 15 of the Insolvency Act. The procedure to be adopted in claims of this kind is governed by the Companies (Insolvency and Receivership) Regulation Order No. 11 of 2015 (*"the Insolvency Order"*). Schedule 2 of those regulations sets out various procedural rules in respect of claims of this nature. While the Civil Procedure Rules also apply to claims of this kind they apply *"except in so far as they are modified by or are inconsistent with Schedules 2 and 3 of this Regulation or the Act, as the case may be"*[4].

11. When a claim of this nature is filed, any the defendant company or a creditor or shareholder wishing to defend the claim must file any defence to the claim within 14 days of service[5].

12. Iririki did not comply with that time limit. While a defence should have been filed and served no later than December 23rd 2016, it was not filed until January 18th, 2017.

13. On January 30th, 2017 Mocha filed an application for the appointment of an interim liquidator pursuant to section 16 of the Insolvency Act. It also filed a conditional defence to a claim of set off and cross demand filed by Iririki on February 23rd, 2017.

[4] Section 5 (3) Companies (Insolvency and Receivership) Regulation Order
[5] See clauses 13(2) and 14 of Schedule 2 Companies (Insolvency and Receivership) Regulation Order No. 111

14. On March 13th, 2017 Iririki filed an application expressed to be pursuant to clauses 17 and 19 of Schedule 2 and section 20 of the Insolvency Act. The application stated:-

"The applicant/defendant company applies for the following orders:-

(1) Special leave to apply pursuant to section 17 and section 19 (b) Companies (Insolvency and Receivership) Regulation Order No. 111 for Thornburgh lawyers to appear on the hearing of the application to appoint liquidator;

(2) An order to extend time to apply to have statutory demand dated 27th September 2016 set aside pursuant to section 20 (3) and section 20 (4) Companies (Insolvency and Receivership) Act No. 3 of 2013;

(3) That the statutory demand dated 27th September 2016 be set aside;

(4) An order that the respondent/claimant pay the applicant/defendant's company's costs of and incidental to these proceedings, to be taxed if not agreed".

15. In short, Iririki wishes to have the statutory demand set aside and it also argues that it has a defence and/or set off to the claimant's claims. In that regard it alleges that there has been fraudulent conduct on the part of Mocha which has consisted of systematic and significant overcharging which means that, not only is the amount owing to Mocha in serious question but that Mocha's actions and delay in completing the construction give rise to a very significant counter claim which exceeds the amount allegedly owed to Mocha.

16. In support of its claim in this regard, Iririki has filed sworn statements from various employees of Mocha which, on the face of it, raise concerns regarding possible over charging and fraudulent conduct and it has also filed sworn statements from police officers who confirm that they are investigating the matter and propose to lay charges against the Director of Mocha, Mr Foots.

17. For Mocha, Mr Fleming, while rejecting on behalf of Mocha any claims of improper conduct, also argues that it is simply not open to Mocha to raise these issues at this point and the only issue for the Court to determine is whether or not Iririki is insolvent thereby justifying the appointment of a liquidator.

18. On June 13th Iririki filed a further application for various orders, those orders being as follows:-

a) An order to extend time from 21 days from the date of service of the proceedings being December 19th 2016 to June 14th 2017.

b) An order that any further proceedings in relation to the application to appoint a liquidator is stayed until further order of the Court pending the criminal and/or civil proceedings being resolved.

c) In the alternative, a direction that the application to appoint a liquidator be adjourned to the Registry pending the resolution of the pending criminal and/or civil proceedings.

d) That any further proceedings in relation to the application to appoint a liquidator be stayed until further order of the Court pending the criminal or civil proceedings.

e) That the Court exercise its inherent jurisdiction to order that any further proceedings in relation to the application be stayed until further order of the Court pending the outcome of the criminal or civil proceedings.

f) That the application to appoint a liquidator be adjourned pending the resolution of the pending criminal and/or civil proceedings.

19. It should be noted at this point that the application filed by Iririki and the various sworn statements filed by both parties have also been filed without the leave of the Court. With the exception of an objection by Mr Fleming to sworn statements of police officers filed on behalf of Iririki no objection has been raised by counsel in respect of other statements and accordingly I have taken account of all sworn statements filed. For reasons which will become apparent in this judgment I have not regarded it as necessary to deal with Mr Flemings objection. As would be usual in proceedings of this kind there was no cross-examination of witnesses and no application by counsel to cross-examine.

20. The filing of sworn statements in this way is explained to a significant degree by the way in which this matter has progressed to a hearing.

21. These proceedings have been brought on at very short notice. They were referred to a Supreme Court Judge by the Master of the Supreme Court because of their perceived complexity. I had been asked to allocate a hearing date and had originally allocated Friday, September 22nd 2017. as being the only available date for a hearing. There was subsequently a request by Mr Fleming

for an earlier trial date if such a date was possible given the nature of the proceedings and the public interest attaching to the need for early resolution of applications of this kind.

22. A one week trial which was to have commenced on Monday June 12th was then required to be vacated. Accordingly, a conference was convened on June 7th at very short notice to investigate the possibility of having the application heard the following week. Both counsel agreed that the matter could proceed. I recorded that the issues for determination appeared to be the following:-

a) Should Iririki be given right of appearance in respect of this hearing given their failure to file the appropriate documentation within statutory time limits?

b) Has the statutory demand been compromised?

c) Should the Court, in the exercise of its discretion, appoint a liquidator?

23. I requested both Mr Fleming and Mr Thornburgh to file memoranda of issues so I was clear regarding the outstanding issues to be determined. Counsel filed those memoranda accordingly.

24. Mr Fleming identified the issues as:-

a) Whether special leave should be granted to Iririki;

b) Whether the debt was compounded by Iririki;

c) Whether Iririki is insolvent; and

d) Should the liquidator be appointed.

25. Mr Thornburgh identified the issues as:-

a) The right of appearance of Iririki to appear at the hearing and/or by way of counsel;

b) Whether time should be extended to allow for the setting aside of the statutory demand;

c) If time is extended should the demand be set aside;

d) If not set aside, whether the application, based on the alleged failure of the defendant to answer the statutory demand can be granted.

26. Clearly the issue of leave has been determined and accordingly I focus on the other issues raised by counsel.

CAN OR SHOULD TIME BE EXTENDED FOR THE SETTING ASIDE OF THE STATUTORY DEMAND ?

27. The clear answer to this question is *"No"*.

28. Section 20 (3) of the Insolvency Act provides that:-

"(3) No extension of time may be given for making or serving an application to have a statutory demand set aside, however at the hearing of the application, the Court may extend the time for compliance with the statutory demand".

29. Mr Thornburgh has provided no authority which establishes or suggests that the Court has some ability to extend the time for the filing of an application to set aside a statutory demand despite the clear and unequivocal wording of the Act.

30. In such circumstances there could be no proper basis upon which the Court could extend the time for filing an application to set the statutory demand aside.

WAS THE DEBT COMPOUNDED?

31. The definition of *"compound"* was considered by the Federal Court of Australia in Commonwealth Bank of Australia v Parform Pty Ltd[6]. Sundberg J stated at paragraph [4] that :

> *"To "compound" for a debt is to accept an arrangement for payment of the amount of the debt or of a different amount....it is for the court to decide whether in rejecting it the creditor was acting reasonably in all the circumstances."*

32. For the reasons which follow I do not consider the debt to have been compounded.

33. The evidence clearly establishes that on October 4th the Managing Director of Iririki, Mr Darren Pettiona sent an email to Mr Foots which stated, inter alia:-

[6] [1995] FCA 1445; (1995) 12ACLC 1309

"Further to our meeting and discussions I have attached the summary of all works performed by Vancorp and payments made to date. The attached summary leaves and (sic) outstanding balance of AUD 1,686,948, less rectification adjustments.

Of this payment AUD 349,872 is being raised by the body corporate and should be paid within the next eight weeks. I know you appreciate many of the apartment owners have financial difficulties so initially this amount will be funded by excess levies supported by the financial members and the eventual excess will be allocated to the sinking fund for future capital works.

AUD 462,000 is VAT which given we are now operating should be able to be resolved within the next few months.

The remaining balance of AUD 875,076 IIHL will take responsibility for, we have internally allocated AUD 658,326 from our business interaction insurance to the apartment owners even though legally and commercially we weren't obliged to do this. This was done primarily due to the financial position of many of the body corporate members which would have meant a higher probability that many apartments would have to been (sic) wound up and sold to meet Vancorp's debt. Of this remaining debt I am proposing we pay a minimum of AUD 150,000 per month, our intention is to settle this matter asap and this would represent the minimum monthly payment.

As discussed I am happy to accrue interest on IIHL's portion at a rate of 5% until the date is extinguished.

I am happy to enter a formal agreement to give you a high level of comfort, under this arrangement IIHL will still maintain all their rights under law".[7]

34. Mr Foots replied stating that in general the conditions looked *"okay"* but he wanted to know what Iririki meant by *"rectification adjustments".*

35. On October 6th 2016 Mr Pettiona instructed Mr Geoffrey Gee of law firm Geoffrey Gee and Associates to draw up a payment arrangement between Iririki and Mocha.

36. It appears that Mr Gee sent a draft agreement to both Mr Pettiona and Mr Foots on October 7th.

37. On October 18th 2016, Mr Foots returned the agreement to Mr Gee with copies of his email being sent to the Directors of Iririki. The document was signed by Mr Foots for Vancorp Construction and the relevant terms of the agreement were as follows:-

    a) That the total balance of AUD$1,386,017 would be met by minimum monthly payments of AUD$150,000 by Iririki to Vancorp with the first of such payments being due on the date of the signing of the agreement.

    b) That the sum of AUD$462,000 (being part of the acknowledged total owing) would be paid to Vancorp by way of immediate deposit by Iririki *"of the relevant VAT refunds applicable".*

[7] See 3rd sworn statement Darren Pettiona dated 06/03/17, Exhibit "A" (p.10).

c) That from the date of the agreement all outstanding funds would bear interest at the rate of 5% per annum.

d) That in the event that six months from the date of the agreement funds still remained outstanding a penalty rate of 15% would apply to any balance due.

38. There is no dispute that October 19th 2016 was the last date that there could have been a compounding of the debt.

39. The agreement forwarded by Mr Foots to Iririki was not signed by Iririki. On November 21st 2016, Mr Foots received a document which while substantially the same document, was dated November 5th 2016 and signed by a Mr Stockley, a Director of Iririki. It recorded that the interest rate for late interest would be 7 ½% rather than 15%.

40. Accordingly, as at November 5th 2016, while it appears that the parties had agreed on some of the conditions for settlement of the debt they most certainly had not agreed on all of the conditions and there was no signed contract. In such circumstances it is difficult to see how the debt could have been compounded at all, let alone within the statutory time limits. The fact that the parties were not ad idem on this issue is evidenced by an email sent by Mr Foots to Mr Pettiona on November 22nd:-

"Hi Darren nothing has changed from yesterday's conversation. It is not out intention to wind you up.

We have been given legal advice that this is the only way to go.

The agreement in place is incorrect by company named as contents already void.

In receipt of your teleconference with bred tomorrow we expect to receive a legal and binding agreement on payment terms and timeframe.

This will then terminate the legal action.

In reality we have just taken out a loan with anz to facilitate our own projects as a result of our own cash flow issues.

Look forward to resolving this matter once and for all."[8]

41. While there is no dispute that the sum of $AUD150,000 was paid to Mocha, I reject the submission from Mr Thornburgh that that was in part performance of the concluded agreement and therefore amounted to a compounding of the debt. There was simply no concluded agreement and clearly the payment was made in respect of a debt acknowledged to be due and owing. I conclude that the debt was not compounded.

42. Accordingly the statutory demand issued by Mocha stands.

[8] Ibid note 6. Exhibit "A" (page 32).

IF THE STATUTORY DEMAND STANDS IS IRIRIKI STILL ENTITLED TO ARGUE A DEFENCE, SET OFF OR COUNTERCLAIM TO THE DEBT?

43. The question that then arises is whether, in all of the circumstances of this case, the only issue for the Court to determine is the issue of insolvency or whether Iririki is still, in some way entitled to argue that there is a substantial dispute regarding the debt.

44. Mr Fleming for Mocha, submits that it is not open for Iririki, under the scheme and purpose of the Insolvency Act to be able to come to the Court and argue matters of substantial dispute, counter claim, set off or cross demand. The reason for that is the very clear wording of section 20 (3) of the Insolvency Act which does not permit the Court to extend the time for the filing of an application to set aside the statutory demand. The Court may set the statutory demand aside if it is satisfied that:-

a) There is a substantial dispute as to whether or not the debt is owing.

b) The company appears to have a counter claim, set off, or cross demand or that the demand ought to be set aside on other grounds.

45. It would make a nonsense of the provisions of section 20 if a company, not having taken any steps to set aside a statutory demand could then simply file a defence which had the effect of achieving the same end. The failure to take steps to set aside a statutory demand means that for the purposes of the

hearing of an application to put the company into liquidation the company is presumed to be unable to pay its debts. [9]

46. Section 15 of the Insolvency Act provides that the Court may appoint a liquidator on the application of a creditor of the company if it is satisfied that:-

"(a) The company is unable to pay its debts; or

(b) The company or the Directors have persistently or seriously failed to comply with this Act; or

(c) It is just and equitable that the company be put into liquidation."

47. Section 17 provides that:-

"17. (1) Unless the contrary is proved, and subject to section 18, a company is presumed to be unable to pay its debts if:

(a) the company has failed to comply with a statutory demand".

48. Evidence of failure to comply with a statutory demand is not admissible as evidence that a company is unable to pay its debts unless the application is made within 30 working days after the last date for compliance with the demand.[10] In this case the application was filed within that time limit and accordingly failure to comply with the statutory demand by Iririki is evidence, in itself, that the company is unable to pay its debts. That is a rebuttable presumption.

[9] Section 21(3) Companies (Insolvency and Receivership) Act 2013.
[10] Section 18 Companies (Insolvency and Receivership) Act 2013

49. I accept the submissions of Mr Fleming that in circumstances where the defendant company has failed to take appropriate steps in order to set aside the statutory demand the purpose and objects of the relevant legislation mean that the only issue left for the Court to determine is whether or not the company should be placed in liquidation and accordingly the focus is on the solvency of the company.

50. While section 21 refers to the Court being able to make an order putting the company into liquidation if satisfied that a debt is not the subject of a substantial dispute, or that the debt is not subject to a counter-claim, set-off or cross-demand, it does not give a debtor company the opportunity to run the arguments which it should have run pursuant to an application to set aside a statutory demand. In that sense, s. 21 must be interpreted in accordance with the clear purpose and objects of the Act one of which is to provide a robust and summary process where statutory demands are concerned.

51. The robust procedure provided by the Insolvency Act provides a creditor with a clear avenue to demand payment of an outstanding debt. The strict time limits which apply to an application to set aside a statutory demand emphasize the need for a robust approach. On such an application the Courts task is not to determine the dispute between the parties but to simply consider whether there is a genuine and substantial dispute. If there is, then that dispute must be resolved in the usual way. It would be completely contrary to the scheme and purpose of the Act to enable Iririki to advance its arguments regarding defence and counter-claims when it has failed to comply with clear and strict time

limits. That also includes any arguments relating to the alleged criminal conduct of officers of Mocha.

52. With reference to the allegation of criminal conduct I do not consider that it makes any difference whether the alleged conduct came to light after the issuing of the demand or not. While Mr Thornburgh urges the Court to call on its inherent jurisdiction, the inherent jurisdiction of the Court does not extend to undermining the clear provisions of an Act of Parliament. That does not, of course, deprive Iririki of its right to continue these claims. It is simply deprived of the right to rely on them in these particular proceedings.

53. It follows from that that I conclude that the only issue the Court then has to determine is whether or not Iririki is insolvent, non-compliance with the statutory demand already being evidence that it is unable to pay its debts.

SHOULD THE COURT APPOINT A LIQUIDATOR?

54. Section 5 of the Companies Act sets out what the Court must consider in determining whether to place a company in liquidation. It provides:-

"5. Solvency Test

(1) For the purposes of this Act, a company satisfies the solvency test if:

a) The company is able to pay its debts as they become due in the normal course of business; and

b) The value of the companies' assets is not less than the value of its liabilities.

(2) *A person required to consider whether a company satisfies the solvency test in;*

(1) *May have regard to:-*

a) *Financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; and*

b) *Valuation of assets or liabilities; and*

c) *Such other information in relation to the financial position of the company as is reasonable in all the circumstances."*

55. Non-compliance with the statutory demand is, in itself, evidence of the inability of Iririki to pay its debts as they fall due. The exchange of correspondence between the parties contained in a number of sworn statements filed in these proceedings also provides clear evidence that Iririki was unable to pay a debt which was otherwise due and payable.

56. In addition, as referred to in paragraph [45], Section 17 of the Act provides that failure to comply with a statutory demand creates a rebuttable presumption that a company is unable to pay its debts. Accordingly the onus is on Iririki to satisfy the Court on the balance of probabilities that it is solvent.

57. In his submissions, Mr Fleming referred to the evidence of Mr Daryl Henry, a unit holder in an entity that owns registered interests in eight apartments

located on the Iririki Island Resort. Mr Henry was also Body Corporate councilor from November 2012 to the end of May 2016.

58. It is clear from Mr Henry's evidence that he was involved to a very significant degree in the repair work undertaken to the apartments after Cyclone Pam and in connection with Mocha, Iririki and various other companies or individuals involved in the undertaking of repairs.

59. Mr Henry gave evidence that despite the fact that Iririki had received AUD$ 9, 112, 500 which represented the Body Corporates half of the settlement with Iririki there were financial discrepancies, a failure to make payments and a failure to reconcile expenses and income. Mr Henry deposed that Iririki had not properly accounted for AUD$ 701,194 of the Body Corporate money due and owing. Mr Henry expressed his concern that despite a total of some AUD$ 20 million paid to Iririki by QBE by way of insurance payments there had been a lack of transparency, evidence of costs and a failure to obtain an independent audit of Iririki relating to how the $ 20 million received was spent.

60. Mr Fleming also relied on the evidence of Mr Roger Jenkins who provided three sworn statements on the issue of the solvency of Iririki. Mr Jenkins is an accountant having been admitted to the Australian Society of Certified Practicing Accountants in October 1998. He is a fellow of CPR Australia (previously the Australian Society of certified practitioning Accountants) and has had significant experience in auditing and consultancy and is a liquidator

and receiver of a number of companies in Vanuatu. Mr Jenkins was also the Financial Controller of Iririki Island from 1990 to 1992.

61. In his first sworn statement Mr Jenkins annexed an analysis of the financial statements of Iririki Holdings Ltd for 2013 and 2014. The analysis reveals actual operating losses in 2012 and 2014 of VT 33 million and VT 45 million respectively. He expressed the view that as a result of the destruction wrought by Cyclone Pam it could be assumed that the loss for 2015 would be considerably higher and in summary he stated that his analysis of the financial accounts showed that Iririki was unable to discharge its liabilities when they fell due.

62. In his second sworn statement Mr Jenkins attached an analysis of financial statements for Iririki Holdings in the years 2012 to 2016. The analysis show operating losses in each year with actual operating losses for 2012 to 2014 being VT 279, 380, 568, VT 156, 068, 679 and VT 218, 045, 416 respectively. Projected operating losses for 2015 and 2016 were VT 224, 586, 778 and VT 231, 324, 382 respectively. Mr Jenkins deposed that while the projection allowed for a 3% inflation factor, it did not take account of the difficulties potentially caused by Cyclone Pam and the controversy over the international airport in Port Vila which led to some airlines refusing to fly to Vanuatu.

63. For Iririki, Mr Pettiona exhibited a valuation of the resort conducted on July 19th 2007 which provided a gross valuation of AUD$ 32, 235, 000. Mr Pettiona

stated that indebtedness to Bred Bank constituted AUD$ 13, 810, 000 which meant that there was an equity in the resort of AUD$ 18, 425, 000.

64. Mr Pettiona also referred to an updated valuation being undertaken by another firm of valuers which could expect to record a higher value for a number of reasons principally revolving around the refurbishment of existing hotel facilities and the addition or other facilities.

65. A sworn statement on behalf of Iririki was also filed by Mr Johnathan Law, a chartered accountant and auditor of Iririki since June 30th, 2007. In his statement, Mr Law simply annexed the audited financial statements for the 2015 financial year. It confirmed a loss for the year of VT 26, 450, 240 following on from a loss in 2014 of VT 216, 473, 407. The audit report included a statement that:-

"In the opinion of the Directors, there were no significant changes in the State of affairs of the company that occurred during the financial year, not otherwise disclosed in this report or the financial statement. Further, it is the opinion of the Directors that there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable and that the going concern presumption is therefore appropriate".

66. Mr Law made no comment on the views expressed by Mr Jenkins in his first and second statements as to the fact that Iririki did not satisfy the test of insolvency. While he expressed the opinion that Iririki was solvent he did not

provide any basis as to why he believed that to be so. Accordingly, Mr Jenkins assertions in his first and second statements were not challenged by Mr Law.

67. A third sworn statement of Mr Jenkins responded to the sworn statements filed by Mr Pettiona and Mr Law regarding the solvency of Iririki. Mr Jenkins was critical of the valuation as it included the value of a strata land component which is that part of Iririki Island occupied by apartments owned by third parties. It is clear that those apartments are not the property of Iririki and Iririki would not be able to sell, mortgage or otherwise deal with them. Accordingly, they could not be accessed by Iririki in terms of raising equity and cannot and should not be used as a component in valuing Iririki's assets. I accept that that is the case.

68. Mr Jenkins also observed that the report provided by Mr Pettiona was based on an occupancy rate of 50.3% when historic trading established an occupancy rate of 40.8% and that there must be serious reservations regarding the basis upon which the valuation was conducted as it did not reflect the audited financial accounts for the year in which the financial forecasts were based. While that point may be arguable, having considered the evidence filed I consider that there must be some doubt regarding the valuation relied upon by the defendant. However, even if the valuation established that there was the degree of equity in the property claimed by the defendant that would satisfy only one limb of the statutory test. The defendant is still required to establish that it is able to pay its debts.

69. Having examined the audited financial statements of the four year period from July 1st 2011 to June 30th 2015, Mr Jenkins provided the following evidence:-

"In my opinion the audited financial statements available for scrutiny indicate that the company operates a "distressed, non-viable business" in that is insolvent on both accounts – it is "unable to pay debts as they fall due", and its "assets are exceeded by its liabilities". This situation has existed for several years, even before Cyclone Pam hit on March 13th 2015.

In broad terms, current assets are used to pay current liabilities. The audited financial statement show that current liabilities exceed current assets each year by some VT 240 million. It should be noted that, for year 2015, current assets include a sum of VT 169, 334, 902 received from insurance claims, while the sum of VT 270, 332, 050 is correctly included as a current liability, as this was presumably reserved for payment to suppliers involved in reconstruction.

We note that during the four year period operating losses varied between VT 156 million and VT 281 million per year. Operating losses for this period total VT 934, 612, 754. The continued losses indicate that the company has an "endemic shortage of working capital", rather than a "temporary lack of liquidity". The company appears to be unable to "trade its way" out of this situation"[11].

[11] See 3rd sworn statement Roger Jenkins, Exhibit RJ4, page 11.

70. Mr Jenkins commented directly upon the sworn statement of Mr Law and referred to the following matters :

(a) That shareholder's loans as at June 2015 amounted to some $ 3,219,155 (including interest). Although the currency was not referred to I have assumed it to be Australian dollars.

(b) That total debts owed by the company amounted to a round figure of $ 19,229,200 which, even if the valuation tendered by Mr Pettiona were accepted meant that there was a deficiency in equity of some two million dollars.

(c) That there was a deficiency in assets of some VT 592,168,698.

(d) That a projected statement of financial performance for the year 2016 based on the audited financial statements of the defendant showed an operating loss of VT 289,551,636.

(e) That Iririki had shown negative equity every year since 2011.

(f) That Iririki had been trading in an insolvent situation for a number of years.

71. The evidence of Mr Law, showing as it does, operating losses of a very substantial nature in the years 2014 and 2015 does nothing in my assessment to rebut the presumption that Iririki is unable to pay its debts. The evidence also does not bring into question the opinions expressed by Mr Jenkins in his sworn statements which subject the financial affairs of Iririki to close and careful scrutiny.

72. Having considered the evidence filed in respect of this application I am satisfied that Iririki has failed to rebut the statutory presumption that it is unable to pay its debts. I would also add that I am satisfied that Mr Jenkins' analysis of the financial position of Iririki is correct and that the company is currently unable to pay its debts as they fall due. Accordingly, I am satisfied that the company is insolvent and that an order should be made placing the company under liquidation.

73. Accordingly I make the following orders :

(a) The defendants applications for an order to extend time to apply for the setting aside of the statutory demand and for an order that the statutory demand be set aside are dismissed.

(b) The defendants applications for orders staying the appointment of the liquidator, and/or adjourning the appointment of the liquidator pending the resolution of pending civil and/or criminal proceedings, and/or staying any further proceedings for the appointment of a liquidator pending the resolution of pending civil and/or criminal proceedings are dismissed.

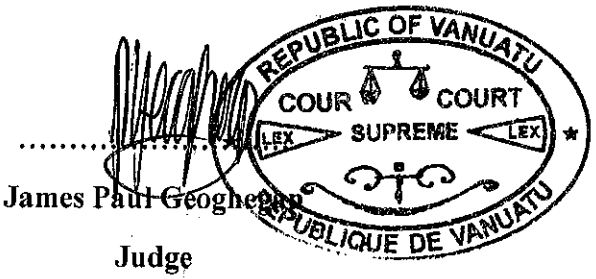
(c) Iririki Island Holdings Ltd is put into liquidation.

(d) Roger Douglas Jenkins is appointed liquidator of Iririki Islan Holdings Ltd.

74. Given that the outcome of this application, the claimant is entitled to costs and costs are awarded on a standard basis to be agreed failing which they are to be taxed.

DATED at Port Vila this 29th day of August, 2017

BY THE COURT



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James Paul Geogheg

Judge