

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

**Civil Case**  
**No's 19/2858, 19/2861, 19/2862, 19/2863  
& 19/2864 SC/CIVL**

**BETWEEN: Margaret Lynette Lyne**  
Claimant, CC 19/2858

**AND: Ellen Hatfield as Litigation  
Representative for the Estate of Jill  
Hatfield**  
Claimant, CC 19/2861

**AND: Moyna Exley and Brian Exley by his  
litigation representative Moyna Exley**  
First & Second Claimants, CC 19/2862

**AND: George Tweedale and Rowena  
Tweedale**  
First & Second Claimants, CC 19/2863

**AND: Deborah Rohr, Riley Rohr by his  
litigation representative Deborah Rohr  
and Vaughn Rohr by his litigation  
representative Deborah Rohr**  
First, Second & Third Claimants, CC  
19/2864

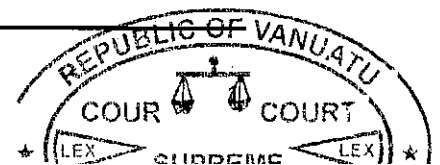
**AND: Adventures in Paradise Ltd (5559) (In  
Liquidation)**  
Defendant

*Date of Hearing:* 20 May 2020  
*Before:* Justice V.M. Trief  
*In Attendance:* Claimants – Mr J. Ngwele  
Defendant – Mr M. Fleming  
*Date of Decision:* 27 May 2020

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**DECISION AS TO LEAVE APPLICATIONS**

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A. Introduction

1. A company in liquidation can only be sued if the liquidator agrees or with the leave of the Supreme Court. The liquidator of the Defendant Adventures in Paradise Ltd (In Liquidation) ('AIPL') has refused consent hence the Claimants' Applications to this Court for leave. They do so upon an undertaking not to pursue AIPL beyond the extent that it is indemnified by a policy of insurance.
2. This Decision determines the Claimants' Applications.

B. Background

3. The Claimants suffered serious injuries in a motor vehicle accident in Port Vila on 20 June 2016. The Claimants allege that the accident was caused when the driver of the bus that they were in veered onto the wrong side of the road and collided with an oncoming vehicle. They have commenced proceedings against AIPL in the Federal Court of Australia ('FCA') for negligence, breach of contract and vicarious liability for the actions of the bus driver, who they allege was AIPL's agent.
4. The Claimants gave AIPL notice of their intention to sue on 6 October 2017. They explain that they were waiting for their injuries to stabilize before filing proceedings. In any case, they filed the FCA proceedings to preserve the limitation date which was due to expire on 20 June 2019.
5. In the meantime, AIPL went into liquidation on 24 August 2018. Clause 4 of Schedule 4 of the *Companies (Insolvency and Receivership) Act* No. 3 of 2013 provides that a person must not, unless the liquidator agrees or the Supreme Court orders otherwise, commence legal proceedings against the company.
6. On 26 August 2019, AIPL's liquidator refused consent. Thereafter the Claimants commenced these proceedings seeking leave.

C. Submissions

7. The Claimants undertake to proceed against AIPL only to the extent that it is indemnified by a policy of insurance. They submit that consequently, the Defendant or its creditors will not be prejudiced by the proceedings.
8. Both parties referred me to *Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liquidation)* [2012] NSWCA 435 at para. 33 for the factors which should be taken into account when determining whether leave should be granted. The Claimants' written submissions address each of these factors such that in Mr Ngwele's submission, the Court should grant leave to the Claimants.
9. Mr Fleming opposed the applications. He outlined that AIPL is very close to being liquidated. The liquidator Mr Jenkins is in lockdown in Australia due to COVID-10 and was not able to swear a statement providing a status update as the liquidation of AIPL. Mr Fleming handed up without opposition Mr Jenkins's email to the effect that he is hoping a sale of land will be completed this week, the debts of the company can

be fully discharged, and he will be able to issue a final report to the Court within a month and apply to have AIPL removed from the register.

10. In APL's submission, a grant of leave would delay the liquidation and cause significant prejudice to the creditors of the company who are close to being paid out. Mr Fleming also submitted that the Claimants' undertaking is insufficient. To the extent that insurance cover is available, it would only be in respect of the third party claim and defence costs. The costs of keeping AIPL on foot while the litigation is complete would not be covered any insurance policy. Mr Fleming stated that despite a request, there has been nothing offered for the significant expenses and costs that will be incurred for future events of management and administration of the company, relating to legal and accounting work and compliance.

D. Discussion

11. The Claimants have provided an undertaking that they will only seek damages insofar as the awards are covered by a valid insurance policy. They state that anything over and above the contractual indemnity limit provided by the insurer will not be sought from the creditors. Accordingly the sole issue I need determine is whether or not AIPL was so insured.
12. The Claimants appear to have taken for granted that a policy of insurance covering AIPL's liability was in place at the time of the motor vehicle accident. At the hearing, I asked Mr Fleming why the liquidator Mr Jenkins did not simply confirm or deny the existence of insurance cover for AIPL. I understood Mr Fleming's reply in part to be that the onus is on the Claimants to show that AIPL had insurance cover. He submitted that there was no evidence as to the existence of such cover therefore leave should be refused and the applications dismissed with costs.
13. Mr Fleming stated that he did not have instructions on this but ventured that because a copy of the insurance policy was not in evidence, he assumed that no request for that had even been made to the liquidator.
14. Rule 7.2(4)(b) of the *Civil Procedure Rules* requires that every application must be filed with a sworn statement setting out the reasons why the order should be made, unless there are no questions of fact that need to be decided in making the order sought, or the facts relied on in the application are already known to the court. The second limb does not apply as none of the facts relied on in the application were already known to the court. I consider that whether or not AIPL was insured is a question of fact that I need to decide, which falls under the first limb.
15. The Claimants filed the Sworn statement of Rita Yousef in support of their applications. Ms Yousef deposes at paragraphs 8 and 9 of her statement that she believes the attachments "RY4" and "RY5" confirm the insurance coverage that indemnifies AIPL concerning any liability for the motor vehicle accident. I am unable to form the same view of those documents as Ms Yousef. Attachment "RY4" is an email dated 30 August 2019 which names the AIG handling adjuster assigned to the Notice of Claims from the Claimants Exley and Exley, Lyne and Hatfield. It doesn't confirm insurance cover for AIPL that I can see.



16. Likewise Attachment "RY5" does not assist. It consists of an email dated 19 August 2019 and attached letter stating only that the law firm HWL Ebsworth are instructed to advise that AIG will not accept service of any documents on behalf of AIPL.
17. I am left to conclude that there is no evidence before me as to a policy of insurance covering AIPL at the time of the motor vehicle accident. The Claimants have undertaken to proceed against AIPL only to the extent that it is indemnified by a policy of insurance. With no evidence of a policy, I must decline to grant the leave sought.
18. I also consider the following factors from *Cassegrain* count against the grant of leave:
- Whether the proceedings will result in prejudice to the creditors – I accept that if leave were to be granted, the liquidation of AIPL would be delayed until completion of the FCA proceedings resulting in significant prejudice to the company's creditors. This is particularly acute considering AIPL is by its liquidator's estimate just a month away from the final report being issued to the Court and the application for AIPL's removal from the register.
  - Whether the cost of the hearing will be disproportionate to the company's resources – I accept the submission for AIPL that the undertaking given is insufficient to cover the costs of keeping AIPL on foot during the period of the litigation. This could have been mitigated by an offer from the Claimants in relation to the expenses and costs that will be incurred, but no such offer has been made.
  - Delay – The Claimants gave notice of their intention to sue on 6 October 2017. They knew that the steps for AIPL to go into liquidation commenced in mid-2018 with the Public Notice of Application for putting Company into Liquidation dated 14 June 2018. However, they have never submitted a proof of debt to the liquidator, nor filed proceedings till a year after that, in June 2019. The delay by the Claimants counts against the grant of leave.

E. Result

19. The Claimants' Applications are **declined** and dismissed.
20. AIPL is entitled to its costs on the standard basis. If not agreed, these are to be taxed by the Master. Once taxed, the Claimants are to pay the costs to AIPL within 21 days.

DATED at Port Vila this 27<sup>th</sup> day of May 2020  
BY THE COURT

  
Viran Molisa Trief  
Judge

