IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

Civil Appeal
Case No. 24/1059 COA/CIVA

UNDER THE COMPANIES (INSOLVENCY AND RECEIVERSHIP ACT)

IN THE MATTER OF: THE PROPRIETORS – STRATA PLAN No. 0089

BETWEEN: THE PROPRIETORS – STRATA PLAN No. 0089
Appellant

AND: MARIA REID
Respondent

Date of Hearing:	***14 May 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice O.A. Saksak*** ***Hon. Justice R. Asher*** ***Hon. Justice D. Aru*** ***Hon. Justice V.M. Trief*** ***Hon. Justice E.P. Goldsborough***
Counsel:	***A.E. Bal for the Appellant*** ***M.J. Hurley for the Respondent***
Date of Judgment:	***17 May 2024***

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against a judgment of the Supreme Court of 8 March 2024 which placed the appellant The Proprietors - Strata Plan No. 0089 (the Body Corporate) into liquidation. The appellant is a body corporate, incorporated under s 15 of the Strata Titles Act 2000. The respondent, Maria Reid, is a debtor of the company. She had claimed in the Supreme Court that she was owed by the appellant the sum of AUD$900,000 plus interest at an agreed rate of 14%. The basis for the liquidation was that the company had not paid that sum and was unable to pay its debts. Mark Stafford has been appointed as the liquidator of the appellant.

2. The basis of the claim was a Deed of Settlement of a civil claim entered into on 21 July 2022, in which the appellant agreed to pay to the respondent AUD$900,000. Clause 4(d) of the Deed of Settlement had stated that the respondent was entitled to seek default judgment against the appellant if the appellant did not pay the agreed sum by 20 July 2023. Before the judgment and liquidation, the respondent had already obtained a default judgment against the appellant for the amount claimed in civil case no. 113 of 2022.

3. On 12 October 2023 the claimant had issued a statutory demand under s 19 of the Companies (Insolvency and Receivership) Act 2013. This had been served on the defendant on the same day. The defendant had failed within 15 working days of service of the demand to pay the debt, enter into a compromise, or otherwise compound with the creditor.

4. The claimant had brought the claim to put the defendant into liquidation on 24 November 2023.

Background

5. The chairman of the appellant is Robert John Herd who resides in Queensland. He appears to have the controlling interest over another company, Jive Holdings Limited, and a company that was the beneficial owner of Jive Holdings Limited, Stage Four Limited, as well as being chairperson of the appellant Body Corporate. The significance of these other companies is that Jive Holdings Limited had owed approximately $900,000 to the respondent Maria Reid. On 21 July 2023, Ms Reid entered into a deed of settlement of release with Jive Holdings Ltd and Stage Four Ltd, involving the appellant Body Corporate. Mr Herd, as well as controlling Jive Holdings Ltd and Stage Four Ltd, appears to have controlled the Body Corporate, as all the strata titles in that Body Corporate are owned by him or entities he controls. Mr Herd signed the affixed seal of all three of the companies, (***"the Deed of Settlement"***).

6. The scheme of the Deed of Settlement at paragraphs 3 and 4 was that Stage Four Ltd assigned to Ms Reid part of a debt owed to it by the Body Corporate. Pursuant to that assignment the Body Corporate would pay the settlement sum of $900,000, together with interest to Ms Reid by 20 July 2023. It was provided at paragraph 4(d) of the Deed of Settlement of release that if the terms and conditions in clause 3(b), being the payment of the $900,000, were not satisfied by 20 July 2023, Ms Reid:

> *"... will be entitled to seek default judgment against the Body Corporate, plus interest on the unpaid portion of the principal amount, at the interest rate plus costs, without further notice."*

7. The liquidation hearing took place on 8 March 2024. A notice of hearing had been published in the Official Gazette on 8 February 2024. A notice was also published on the Vanuatu's Financial Services Commission internet site on 6 February 2024. The defendant had filed a defence on 21 December 2023 (the Supreme Court decision states this was 21 December 2024, but we infer this was a typographical error), but it was served somewhat later. Various defences were raised which we consider in this appeal.

8. After summarising the various arguments put up by the appellant, the primary Judge in the judgment of 8 March 2024 stated at paragraph 14:

> *"The claimant alleges the defendant is unable to pay its debts in terms of section 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 the statutory demand. The statutory demand was properly constituted under section 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 ... that the claimant informed him that the debt remains unpaid as of today."*

The first ground of leave to appeal

9. The appellant has sought leave to appeal and the parties appear to consider it necessary to obtain such leave. We do not agree and can see no statutory or other provision that would require leave to be granted for an appeal to proceed. The appellant had the right of appeal in the usual way. If leave was required we would have granted it, given the importance of the issues raised.

First ground of appeal

10. The first ground of appeal was that the primary Judge had erred in law by determining that the Body Corporate appellant was a body corporate for the purposes of s 21 of the Companies (Insolvency and Receivership) Act No. 3 of 2013 (**"the CIR Act"**). It was submitted the Strata Titles Act designated the Strata Titles' body corporates only as body corporates for the purposes which are set out in the Strata Titles Act. It was said that s 15(2) of the Strata Titles Act expressly excluded a body corporate from the operation of the Companies Act and by extension the CIR Act. It was argued that the Appellant is not a body corporate "incorporated" in Vanuatu, and therefore unable to be put into liquidation under the CIR Act.

11. The primary Judge said in relation to this submission:

> *"The reference in section 15(2) [Strata Titles Act] is to an exemption from a repealed Act and in any event does not refer to the CIR Act. The preferable interpretation of section 15(4A) is that a body corporate in addition to the powers it has under the Companies Act 2012, also has the powers granted to it under the Strata Titles Act."*

12. It is necessary to examine the appellant's submission that a body corporate under the Strata Titles Act is not incorporated for the purposes of the CIR Act.

13. Section 1 of the Strata Titles Act defines body corporate as meaning *"a body incorporated by section 15"*.

14. Section 15(1) states that the proprietor or proprietors become by virtue of the Strata Titles Act upon registration of the Strata Plan, a body corporate. Section 15(2) of the Act provides

> *"The provisions of the Companies Act [CAP 191] do not apply to the body corporate."*

15. This is a reference to the old Companies Act, which was repealed in 2012.

16. Under s 15(3) the body corporate is responsible for enforcement of the by-laws and the control, management, and administration of the common property. It is stated at s 15(5):

> *"The body corporate may:*
>
> *(a) sue and be sued on any contract made by it; and*
>
> *(b) sue for and in respect of any damage or injury to the common property caused by any person, whether a proprietor or not; and*
>
> *(c) be sued in respect of any matter connected with the parcel for which the proprietors are jointly liable."*

17. It can be seen from the definition that the body corporate created under the Strata Titles Act is said by the statute to be "*incorporated*".

18. The question raised by the appellant is whether the insolvency and liquidation provisions of the CIR Act apply to such a body corporate. It is submitted that the reference in s 15(2) to the previous Companies Act not applying to the Body Corporate, should be read as applying to the current CIR Act.

19. The enactment of the CIR Act went hand in hand with the enactment of a new Companies Act. The old Companies Act [CAP 191] which it contained insolvency and receivership provisions, was repealed by s 208(1) of the Companies Act 2012. It has also provided:

> *(3) A reference in any other Act or instrument to the "Companies Act [CAP191]" is taken to be a reference to the "Companies Act No. of 2012".*

20. However the insolvency and receivership provisions were not put in the new Companies Act 2012. It contains no such provisions. They were placed in the CIR Act.

21. Under the CIR Act the word "company" is defined in s 1 to mean:

> *"... a company registered or re-registered under the Companies Act and includes every other body corporate incorporated in Vanuatu".*

22. As can be seen, the definition of "company" in the CIR Act is broad. The CIR Act extends the definition to "every other body corporate incorporated in Vanuatu". The appellant was undoubtedly a company incorporated in Vanuatu, albeit not under the Companies Act but under the Strata Titles Act. On its face, the CIR Act applies to a Strata Title Act body corporate.

23. This position is reinforced when the examination of the old definition in the Companies Act [CAP 191] is examined. In that Act "company" was stated to mean "a company formed and registered under this Act or an existing company". There was no reference to any other body corporate incorporated in Vanuatu. Under the new Companies Act 2012 which does not contain any insolvency or receivership provision, a company is defined as meaning a "company registered or re-registered under this Act" as it was in its predecessor. This is in contrast to the CIR Act which has the more extended definition that covers the appellant.

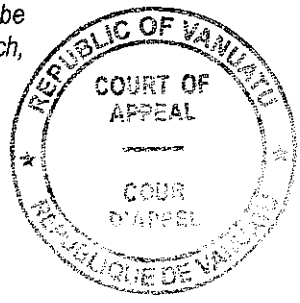
24. Thus although until 2012 it would seem that a body corporate incorporated under the Strata Titles Act would not have been a company as defined in the Companies Act and susceptible to liquidation or receivership, there appears to have been a changed with the enactment of the CIR Act, to cover a wider range of body corporates. Such a wider range would include the appellant. There is nothing to indicate that this was not a deliberate policy change by the legislature, with the intention to extend the liquidation and receivership provisions to all Vanuatu body corporates and not just companies.

25. A range of further arguments were put forward for the appellant. The appellant argued that a body corporate under the Strata Titles Act is formed and not incorporated. Reference was made to the ordinary meaning of "incorporated", and how the formation of a Body Corporate under s 15 of the Strata Titles Act was different. It should not be regarded as incorporated. However this submission runs directly against the words of the Act itself, which refers to the Body Corporate as being "incorporated" under s 15. A definition specified in the Act must trump any dictionary meaning of the word in question.

26. The appellant also submitted that s 10(3) of the Interpretation Act [CAP 132] meant that a reference to a particular Act of Parliament, (the Companies Act [CAP 191]) shall be construed as including a reference to that Act as amended from time to time. That is so, but the Companies Act [CAP 191] was not amended. It was replaced, and the s 10(3) does not cover any legislation that replaces or substantially replaces a repealed Act.

27. It was also put forward by the Appellant that the function of a definition section was not to enact substantive law, but to provide aid in construing a statute. That assertion, while supported by some authority, can mean no more than as was stated in *Gibb v Federal Commissioner of Taxation*[1]. In that case the Australian High Court stated that the function of a definition clause was:

> *...to indicate that when particular words or expressions the subject of a definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include.*



[1] *(1966) 118 CLR 628 at 635*

28. Here the word "company" when used in the CIR Act, (relevantly in relation to liquidation), is defined to include not only a company registered under the Companies Act, but also "every other Body Corporate incorporated in Vanuatu" [emphasis added]. The word "every" is very explicit and it could be said designed to remove any doubt, and any argument of the type raised by the Respondent. A Body Corporate, such as the appellant, falls exactly into that definition, being a body incorporated under a Vanuatu statute, the Strata Titles Act.

29. It is also argued that the use of the word "includes" in s 1 of the CIR Act means that the following words must be a subset of the former. However, that is not a principle of statutory interpretation and would defeat the plain meaning of the definition, which was to extend the type of incorporated body covered by the Act, in contrast to the definition used in the earlier Companies Act. To so limit the definition would be to defeat its plain meaning by imposing an artificial restriction.

30. Therefore this first ground of appeal must fail. The appellant is a body corporate incorporated in Vanuatu. The CIR Act does apply to it. The primary Judge had the power to put it into liquidation.

31. The susceptibility of a body corporate to go into liquidation is somewhat surprising, given that body corporates under the Strata Titles Act will not normally own substantial assets and are not entities concerned with profit making. Nevertheless that is the natural reading of the legislation, and we do not consider the natural meaning to result in a situation so absurd that we should doubt the plain meaning of the words in the various sections set out above. Our practical concern in this appeal is also tempered by the fact that all the Unit Holders in the person of Jive Holdings Ltd, were party to the Deed of Settlement, and the Deed creating the debt has been signed three times by Mr Hurd, who now through his lawyers argues that it can be defeated by a narrow reading of the relevant legislation. A situation such as the present is unusual.

32. This analysis covers the second ground of appeal which reiterates the first. We now turn to the third ground of appeal.

Third ground of appeal

33. It is argued that the primary Judge erred in law by finding that there was a debt that was not subject to a substantial dispute. The applicant had made an application to set aside the judgment debt as the settlement agreement with Ms Reid was beyond the powers of the Body Corporate. In particular it is submitted that the Deed of Settlement signed by the Body Corporate was beyond its powers.

34. We comment first that Mr Herd is, through his companies, asking this Court to find that a commitment he signed three times to pay an undisputed debt of $900,000 is invalid because the Body Corporate he signed for did not have power to commit to the obligation. If he and the Body Corporate are correct in this submission, they are seeking to take advantage of their own wrong.

35. First, the argument of no authority is not a defence that had been pleaded in the statement of defence ultimately filed by the Body Corporate. To the contrary, in that pleading, which governs the defendant's position in this appeal, it is admitted at paragraph 1 that "the Claimant entered into a Deed of Settlement and Release with the Defendant and other parties on 21 July 2022". It is stated in paragraph 3 of the Statement of Defence that the Body Corporate "*... relies on the terms of the Settlement Deed in full....*" These pleadings are entirely contrary to this present submission that the deed is invalid or void because the defendant had no power to enter into it. They are acknowledgements of the Deed being binding. It is not possible on appeal to resile from admissions in the pleadings. For that reason alone this appeal ground must fail. However we go on to consider the claims of a lack of power in the Body Corporate to sign the Deed of Settlement.

36. Second, there was uncontradicted evidence before the primary Judge that a statutory demand under s 17 had been served on the Body Corporate. This was expressly admitted in paragraph 8 of the Statement of Claim, and contrary to the Body Corporate's submission, there was no need to further prove service or annex the demand. It was also admitted at paragraph 9 (b) that the sum demanded had not been paid. Thus despite a complaint by the Body Corporate that non-payment of a statutory demand should not have been accepted as a basis for liquidation under s 15 of the CIR, the presumption in s 17 applied, and the company could be presumed to be unable to pay its debts. Liquidation followed.

37. Third, as we have set out, s 15(5) of the Strata Titles Act provides that the Body Corporate may "sue and be sued on any contract made by it". Mr Herd, for the Body Corporate, in entering into the settlement agreement and signing it, plainly was representing that he was authorised to enter into that settlement deed. As the primary Judge commented,[2] if that is right then every body corporate incorporated under s 15 of the Strata Titles Act would have immunity from suit arising from any action not specifically mentioned in the Strata Titles Act. Section 15(4A) gives the Body Corporate the powers granted to it under the Act, the regulations and bylaws. There is no restriction on the Body Corporate entering into a contract to pay a large sum of money to an individual person. The powers set out in s 16(1) are stated to be inclusive, and not definitive. There is no exhaustive list.

38. Fourth, there is a more fundamental problem that the points raised by the third ground of appeal faces. The Deed of Settlement provided at paragraph 4(d):

> *It is expressly agreed between the parties that if the terms and conditions in clause 3(b) are not satisfied by 20th July 2023, the first defendant will be entitled to seek default judgment against the body corporate, plus interest on the unpaid portion of the principal amount, at the interest rate plus costs, without further notice.*

39. The default judgment on which the claim was based was entered into because Ms Reid was entitled to seek it by virtue of clause 4(d). The clause applies irrespective of any application to set aside the default judgment. Given the lack of any substantive defence on the merits (as against the technical points previously considered) s 15(2)(a) of the CIR Act states that a court may appoint

[2] *Paragraph 9.*

a liquidator if it is satisfied that "the company is unable to pay its debts". Plainly this company was unable to pay the debt of $900,000. It has not paid, and there is no suggestion that it is solvent or that there is any merit based reason for the sum not being paid. Ms Reid was entitled to judgment, and the Judge was able to conclude that the Body Corporate was unable to pay its debts. The primary Judge was entitled to reach the conclusion that he did.

40. We also accept the submission for Ms Reid that all requirements under the CIR Act and regulations, and in particular those provided for in regulation 5 and schedules 1 to 3, were complied with.

Conclusion

41. The Body Corporate, as it is entitled to do, has raised every possible technical argument to avoid the consequences of its commitment in a settlement deed to pay $900,000 plus interest, and its unwillingness or inability to meet that obligation. Those arguments were dealt with clearly by the primary Judge and rejected. We are not persuaded that the judge made any error. We uphold his decision for the reasons we have set out.

Result

42. The appeal is dismissed.

43. The respondent is entitled to costs in the sum of VT150,000.

DATED at Port Vila, this 17th day of May 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek