IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU CIVIL CASE No.42 OF 1994

Between : SELB PACIFIC LIMITED

Plaintiff

And : DANIEL MOUTON

Defendant

JUDGEMENT

This is an application before the Court on a Creditor' s Petition for a receiving order to be made against the state of Mr Daniel Mouton on behalf of SELB PACIFIC Limited.

Mr Ozols on behalf of MR Mouton subtmits that the bankruptcy Act 1914 does not apply to his client in Vanuatu on two grounds :

1- That the decision of the Court of Appeal does not apply in the particular circumstances of this case,

2- That his client being a French National would have not have been subject before independence to the British Law applied in the New-Hebrides, and that therefore, the same British law cannot apply to him after Independence.

It is clear that the Constitution of Vanuatu by Article 95 states that the French and English Law that applied in Vanuatu prior to independence and immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu. Wherever possible taking due account of custom. Before Independence it is right to say that the French Law would only apply to French Nationals and their optants and British Law would have applied only to British Nationals and their optants. When the Constitution of Vanuatu was signed, the people of Vanuatu and the signatories to the Constitution of Vanuatu were fully aware of the lacunae in the Laws of Vanuatu. British and French Laws prior to independence would certainly not have applied to indigenous ni-Vanuatu. Only those Laws made specifically for the purpose applied regarding the indigenous ni-Vanuatu. Am I to conclude from this that it was the intention of the signatories to the Constitution that this strange state of affairs should have continued after independence, namely that a lack of Law would mean that Vanuatu would only

operate for the benefit of the British and their optants and the French and their optants, after independence or that the Law would apply to everyone in Vanuatu. I have no doubt that the intention of Parliament or those who signed the Constitution was to bring into effect a state of affairs which would permit the Law to apply to everyone in Vanuatu. Article 95 (2) of the Constitution simply adopts as a Law of Vanuatu the French Law and English Law that applied before independence for the benefit of everyone living in Vanuatu or coming to Vanuatu. It is clear that there are instances where British and French Laws are in conflict with each other. There is no evidence before me that there is any such conflict here. The Court of Appeal in 1988 in the Appeal Case No.2 of 1988 which is now reported in our Law Reports of Vanuatu in Volume 1, the case of Clements v Clements made it quite clear that the Bankruptcy and Insolvency Act of 1914 applied in Vanuatu as part of the Laws of Vanuatu. I agree with Mr Ozols when he says that they did not have to consider nor did they consider the effect of whether French or English Law ought to apply at any given time to any particular foreign nationals, be they English or French, nor where they invited to consider whether the French law of Bankruptcy was also a Law of Vanuatu. Nevertheless I have no doubt that if they had been asked about it, they would have come to the obvious decision that both the French and English Laws of bankruptcy applied equally to everyone in Vanuatu. This raises the problem of which Law should apply at any given time. Mr Ozols says that of course with regards to his client only French Law should apply because only French Law would have applied to him prior to Independence. It is clear that since independence both French and English Laws apply to everyone in Vanuatu. Not French Law to the French and English Law to the English but French and English Laws apply equally to all in Vanuatu, irrespective of nationality because that is the intention of the Constitution and that is what it says in Article95. The Constitution makes laws fo Vanuatu, not for individual foreign nationals in Vanuatu.

These proceedings were started by SELB PACIFIC Limited against Mr Mouton under the English bankruptcy law that applies to Vanuatu. No doubt if they had wished to, they could have started these proceedings under the French Law of bankruptcy that applies in Vanuatu and applies now to all in Vanuatu. There is no other Law made by Parliament which can satisfy the present situation. I rule that in this case English Law applies because the proceedings have been started under British Law, I cannot apply any other Law. I have to consider the British Law which applies in a case where the Court's jurisdiction is sought under British Law and I rule that in this case British Law does apply to Mr Mouton. On the facts of this case I am also satisfied that the 'acts of bankruptcy' as required under section 5 of the Bankruptcy Act have been completed so that Mr Mouton has in fact acted in such a way that he gives cause to this Court to make an order in Bankruptcy against him, namely a receiving order. But Mr Ozols submits, and he refers to two decisions in the Court of Appeal in

England, the case of Noble and the case of Yeatman. The case of Re Yeatman being reported in the Chancery Division in Volume XV1 of 1880 a decision of the Court of Appeal page 283 and he also refers to the case of Noble which is reported at 1964 2 All E. R. at page 523; Both suggest that where there is a bona fide, Appeal lodged and where the Court is satisfied, that a bona fide Appeal has been lodged it ought to exercise its discretion in favour of the debtor not to make an order of Bankruptcy against him pending that Appeal. Section 5 of the Bankruptcy and Insolvency Act of 1914 at subsection 4 says as follows:

"When the act of bankruptcy relied on is non-compliance with the Bankruptcy Notice then, the Court may if it thinks feets stay or dismiss a Petition on the ground that an Appeal is pending from the Judgement or Order".

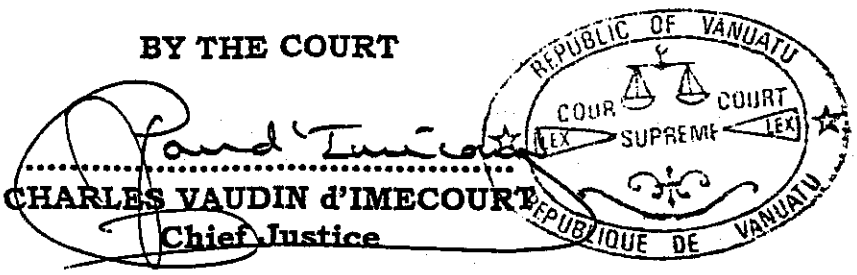
It makes it clear of course, that this is an absolute discretion in the Court. Mr Ozols further states that an act of bankruptcy or an order of bankruptcy, namely a receiving order against his client would have dire consequences. He submits that there may be an ulterior motive for this application namely that it would place his client in a position where he would no longer be able to pursue his appeal. There is no evidence before me that this is the motive behind this application and I dismiss this particular submission out of hand. Regarding the Court' s discretion nevertheless as to whether it should stay a Receiving Order pending an Appeal where the Appeal is a bona fide Appeal, other principles apply.

I am satisfied that there is a bona fide Appeal in this case. I am also aware that the Court of Appeal heard an application to stay proceedings this matter came before them last year and that they refused to stay the judgement. Of course, at that time the Court of Appeal was not aware of any Bankruptcy application that might have been placed before the Court. I wonder if such an application had then be on made, whether the Court of appeal would have permitted the Bankruptcy or Receivership to continue. The Court of Appeal in Vanuatu regrettably only sits once a year, we do not have the means to be able to convene the Court of Appeal as often as we would wish. I am fully aware that a Receivership Order against somebody would have very serious consequences, not only against his ability to work but his ability to obtain credit from other sources that would permit him to carry on his business. In all the circumstances of this case I agree with the learned Judges on the Court of Appeal in England who expressed opinions regarding the manner in which discretion by the Court ought to be exercised when bona fide Appeals are pending. In this particular case I am prepared to make the Receivership Order which is sought against Mr Mouton but I will suspend that order until such time as the Court of Appeal has been able to hear and determine this Appeal. Therefore I make the order sought against Mr Mouton, but I suspend it until after the final determination of the Court of Appeal' s decision in this case.

No assets presently in the possession of Mr Mouton should be disposed off in any way whatsoever.

DATED AT PORT VILA this 30th day of May, 1996

BY THE COURT



CHARLES VAUDIN d'IMECOURT
Chief Justice