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

Company
Case No. 685 of 2018

BETWEEN: **ROGER JENKINS**
Applicant

AND:
1. **ADVENTURES IN PARADISE LIMITED**
2. **ADRIAN MAURICE MOONEY**
3. **MALANI VAKALOLOMA**

Respondents

AND:
1. **I-COUNT LIMITED and ICOUNT ACCOUNTANTS CONSULTANTS ADVISORS**
2. **BANK SOUTH PACIFIC (VANUATU) LIMITED**

Interested Parties

Date of hearing: ***4th December, 2019***

Delivered: ***20th February, 2020***

Before: ***The Master Cybelle Cenac-Dantes***

In Attendance: ***Mark Fleming counsel for the Applicant and the First and Second Respondents***
Marie Noelle Patterson counsel for the Third Respondent absent
Garry Blake counsel for the First Interested Party absent with excuse
Mark Hurley counsel for the Second Interested Party

Present: ***Roger Jenkins***

JUDGMENT

Headnote
Liquidated company - pooling of assets of related company - surrendering of secured creditor' s security by conduct - no right of secured creditor to claim interest post liquidation - whether payments to unsecured creditors permitted under the law

A. INTRODUCTION

1. This is an application by the Liquidator of Adventures in Paradise (AIP) to pool the assets of Wilbur Holdings, a company he believes is related to AIP in order to pay off all remaining creditors and himself, and complete the liquidation.

B. BRIEF BACKGROUND

2. A liquidation order was made by this court on the 24th August, 2018 under the just and equitable principle as the directors/shareholders (the Second and Third Respondents) were no longer able to work together. At the time of judgment the company was still solvent. Following the said order Mr. Jenkins was appointed Liquidator on the 7th September, 2018 and commenced the process of liquidating the said company. He submitted a first report to the court on the 7th December, 2018 and the court has been updated periodically on the status of the liquidation. As it currently stands, Mr. Jenkins has realised all the assets of AIP, but there still remain outstanding balances to creditors, including himself. Two of those creditors have been allowed to enter into these proceedings as interested parties 1 and 2 above.

3. There is currently a judgment in the New Zealand Court concerning distribution of the personal and business assets of the Second and Third Respondents. Wilbur Holdings, the subject company of this pooling application is also the subject of the New Zealand judgment, wherein the said court directed the Second Respondent (Adrian Mooney) to sell the assets of Wilbur Holdings to first, pay off all remaining debts of AIP, and any surplus, to be distributed between Adrian Mooney and Malani Vakaloloma (the Third Respondent).

4. At the date of hearing, the assets of Wilbur Holdings had not yet been sold. While in the process of writing this judgment I have informed all counsel, the Liquidator and Mr. Mooney that any monies realised from the sale prior to the delivery of my judgment are not to be distributed.

C. LIQUIDATORS'S CASE

5. The Liquidator's case and the resultant issues were succinctly summarised by counsel for the Liquidator and counsel for Bank of the South Pacific (BSP) and I-Count:

    1. That the Liquidator has the right to pool the assets of Wilbur Holdings as a related company to pay off the remaining debts of AIP.

    2. That the Liquidator has priority to be paid first out of any proceeds of sale following the realisation of the assets of Wilbur Holdings if a pooling order is made.

    3. That BSP has, by its conduct, surrendered its charge under the law and can no longer be treated as a secured creditor but must now be classed as an unsecured creditor.

    4. That BSP does not have the right to claim any interest on its debt after AIP was put into liquidation.

    5. That the Liquidator was not in compliance with the law when he paid unsecured creditors in priority over the secured creditors.

6. The essence of the Liquidator's case is that:

    (a) When BSP failed to exercise its rights under Schedule 7, Clause 7 of the Companies (Insolvency & Receivership) Act[1] (hereinafter called "the Act"), it impliedly elected to surrender its charge over the assets of AIP. The Liquidator argues that this conduct was evident when BSP voluntarily submitted itself under the liquidation, by putting their claim to the Liquidator and later accepting part payment towards the debt.

    Further, by BSP now coming into the liquidation they could not claim interest post-liquidation unless there were surplus funds which could be applied.[2]

    (b) The argument for justifying a pooling of assets is that AIP and Wilbur are related within the meaning of Clause 22, Schedule 6 of the Act. The Liquidator states that they share the same directors and shareholders, and that there was intermingling of the two companies. The Liquidator's evidence of this intermingling is that Wilbur Holdings used the accounts of AIP as it had none, and that it was a debtor of AIP in the amount of approximately VT55 million which, if paid, would have kept the company solvent and not in the near bankrupt state it now finds itself. The

[1] Laws of the Republic of Vanuatu, No. 3 of 2013
[2] Ibid, Schedule 7, Clause 25

Liquidator states therefore that Wilbur Holdings contributed to the demise of AIP on account of its default in paying this debt.

Counsel provided case law[3] to support his arguments and to show that it was just and equitable to make such an order, particularly in light of the fact, that without an order, the liquidation would be indefinitely stalled and the Liquidator would not be paid.

(c) Further to this argument, counsel for the Liquidator admitted that the main reason for the application was to satisfy the remaining fees and expenses of the Liquidator and to ensure that he was paid in priority to BSP.

7. The issue was raised by the court as to the impact of the New Zealand judgement on the current application and any possible orders. Counsel was of the view that a favourable order from this court would not be incongruent with the New Zealand judgment, as the effect of this court's order would simply be to set up the priority of payment to be applied from the proceeds of sale of Wilbur Holding's assets.

D. BSP and I-COUNT's REPLY

8. Both I-Count and BSP filed submissions on the 10th and 11th September, 2019 respectively. Only counsel for BSP appeared in court to make oral submissions. Mr. Blake chose to rely on his written submissions.

9. I-Count argued that there is no relationship between the two companies sufficient to justify a pooling of assets. With no direct evidence that Wilbur Holdings held those properties on trust for AIP, and that they formed part of their assets, the court would essentially be piercing the corporate veil without good cause.

10. They both argued that when the Liquidator undertook to pay unsecured creditors over secured creditors he was acting contrary to the legislation.

11. BSP posits that at no time was there an express or implied surrendering of their charge. They stated that the Liquidator, throughout the process, up till the current application, accepted their claim as a secured creditor and was now estopped from arguing otherwise. It was their position that such a demotion would undoubtedly place them at a gross disadvantage.

[3] (a) Re Universal Distributing Company Limited (1993) 48 CLR; (b) James Henry Stewart v ATCO Controls PTY LTD. (2014) HCA 15; (c) David James Lofthouse v Environmental Consultants International PTY LTD (2012) VSC 416; (d) Grapecorp Management PTY LTD v Grape Exchange Management Euston PTY LTD (2012) VSC 112; (e) Surfer's Paradise Investments PTY LTD (2003) QCA 458

12. As they are the registered holders of the charge over assets of AIP, they are of the view that their debt sits to be paid in priority to the Liquidator, that they are under no obligation to pay in part or in full towards the outstanding invoices of the Liquidator as represented by Mr. Fleming, and that they are entitled to claim interest post liquidation.

E. DISCUSSION

13. I will deal with the issues in the following order:

(1) That BSP has, by its conduct, surrendered its charge under the law and can no longer be treated as a secured creditor but must now be classed as an unsecured creditor.

(2) That BSP does not have the right to claim any interest on its debt after AIP was put into liquidation.

(3) That the Liquidator was not in compliance with the law when he paid unsecured creditors in priority over secured creditors.

(4) That the Liquidator has the right to pool the assets of Wilbur Holdings as a related company and to pay off the remaining debts of AIP.

(5) That the Liquidator has priority to be paid first out of any proceeds of sale following the realisation of the assets of Wilbur Holdings if a pooling order is made.

(i) Issue 1:

That BSP has, by its conduct, surrendered its charge under the law and can no longer be treated as a secured creditor but must now be classed as an unsecured creditor

14. Secured creditors have no obligation to lodge a claim with the Liquidator as their debt is secured by an asset or assets of the company, whether floating or fixed, and it rests with them whether they choose to come into the liquidation. Several options are available to them[4]:

1. They may sell to satisfy their debt.
2. They may value the property and claim in the liquidation as an unsecured creditor for the balance.
3. They may surrender the whole of their charge and claim in the liquidation for the whole of the debt and claim as an unsecured creditor.
4. They may exercise their rights under the Personal Properties Securities Act[5].

[4] Supra, n. 1, Schedule 7, Clause 7
[5] The Laws of the Republic of Vanuatu, No. 17 of 2008

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15. On the other hand, an unsecured creditor must lodge a claim with the Liquidator, which can be accepted or rejected, if they wish to come into the liquidation.[6]

16. For the purposes of this case, BSP would be considered a secured creditor on account of their registered GSA over the assets of AIP as secured and registered under the Personal Properties Securities Act.[7] Presumably, BSP would fall under Clause 16(1)(g) of the Act as a priority claim, second only to the Liquidator and employee claims. I-Count would be an unsecured creditor and therefore rank equally with other unsecured creditors.

17. The Liquidator has justified his sale of all the assets of AIP, including those assets secured by BSP on the ground that BSP had, by its conduct, surrendered its charge. I will now examine what structures are in place under the Act to allow for such a surrender and for the Liquidator to have sold all the assets of AIP.

18. Clause 11 of the Act provides that the Liquidator could have sold the property of AIP, secured by BSP only if BSP had submitted a valuation and claim, which he accepted, wherein, it would allow him to sell that property and pay the assessed value to the secured creditor BSP.

19. Alternatively, if BSP had not yet sold the property or submitted any claim or valuation to the Liquidator, if he wished to sell that part of the property of AIP, secured by BSP, he would be required under Clause 12 to call upon BSP to exercise its power to elect. If BSP then failed to elect, the Liquidator was free to deem the security surrendered and treat them as an unsecured creditor.

20. Apart from the above, Clause 3 of the Act empowers the Liquidator to make a compromised proposal if he is of the view that the assets are insufficient to meet the debts of all creditors. Such a compromise would have to be approved by creditors[8] and subsequently bind all creditors, save for a secured creditor who may opt out of the compromise[9].

21. All these provisions indicate that there are rights assigned to a secured creditor greater than an unsecured creditor. These provisions sought to protect those rights, which only the court[10] has the power to restrict.

[6] Supra, n.1, Schedule 7, Clause 6
[7] Supra, n. 5
[8] Supra, n. 1, Clause 5
[9] Supra, n. 1, clauses 5(2) and 5A
[10] Supra, n.1 Clause 7(1)(c)

22. Further, Clauses 35-36 and 44 require that the Liquidator must call a first creditors meeting within 25 working days of his appointment. The first report must be given to all creditors, together with the notice of meeting. The Liquidator may only dispense with this meeting once he has given notice of this step to the creditors[11].

23. Clause 37 speaks to the purpose of that meeting. Since the Liquidator is to provide the report to creditors prior to the scheduled meeting date, all creditors would be apprised of the company's affairs and how the Liquidator intends to proceed. Any concerns of the creditors would be expected to be raised at this point. The creditors may even wish to apply to the court at this stage to remove the Liquidator.[12]

24. It would therefore appear that the Liquidator has certain restricted powers prior to this first meeting. That is, he cannot dispose of property or do anything in the first 25 days of his appointment, save for protecting, collecting and assessing the assets and liabilities of the company and business and preparing his report to be delivered to creditors.

25. This provision is to ensure *"that creditors are not pre-empted and are involved in the liquidation at the earliest practicable stage."*[13] With all these procedures in place under the Act, it would be highly improbable that a state of affairs would arise where a secured creditor would have impliedly or inadvertently surrendered their charge.

26. The Liquidator argues further that BSP filed a claim, and therefore, under Part 5, Clause 25 they are not entitled to claim further interest post-liquidation except if there is a surplus following sale of all assets.

> (1) The amount of a claim may include interest up to the date of commencement of the liquidation:
>
> (a) At such rate as may be specified or contained in any contract that makes provision for the payment of interest on that amount; or
> (b) .....
>
> (2) If any surplus assets remain after the payment of all admitted claims, interest must be paid at the prescribed rate on those claims from the date of commencement of the liquidation to the date on which each claim is paid, and if the amount of the surplus assets is insufficient to pay interest in full on all claims, payments must abate rateably among all claims.

[11] Supra, n.1, Clause 41
[12] Supra, n.1, Clause 37(1)(b)
[13] Loose Peters and Griffiths Michael, Loose on Liquidators, 4th ed., p.112

27. BSP remonstrates that this clause does not apply to them as they did not file a claim.

28. While I accept the interpretation of the Liquidator as it relates to Clause 25, the issue is then, whether BSP made *'a claim'* within the meaning of the Act with the Liquidator.

29. Within the meaning of the Act the word *'claim'* does not mean *'a claim'* as filed under the CPR but *'a claim'* filed with the Liquidator. I refer for this interpretation to Schedule 7, Clauses 1, 3 and 6. In this context the use of the word *'claim'* means the assertion of a right, not before the court, but before the Liquidator.

30. The correspondence between BSP and the Liquidator spanning the 18th September, 2018 to October 2018 does not to my mind admit of *'a claim'* having been made by BSP with the Liquidator. When we juxtapose Clause 7 of Schedule 7 with the said correspondence, I do not accept that what BSP intended to do was to in fact surrender their security. In their first email to the Liquidator BSP was not submitting *'a claim'* but serving the Liquidator with a Notice of Demand, requesting payment on the defaulted loan and informing, that as the first secured creditor of the company they were entitled to be paid in priority to all other creditors.

31. This first email clearly demonstrates an intention on the part of BSP to remain as the secured creditor. BSP follows up this email asking the Liquidator to advise on how he intends to manage the proceeds of the sale of the company assets secured by their registered GSA *[my emphasis].* Again, BSP is drawing to the Liquidator's attention that they remain and intend to retain their priority as secured creditor. If this were not their intention, there would have been no cause to twice remind of their registered security and priority of ranking.

32. The question I then ask myself is why; if the secured creditor has the right and power to sell the secured assets of the company without reference to the Liquidator[14], would they ask the Liquidator how he intended to manage those sale proceeds. The unchallenged sworn statement of Elizabeth David in support of BSP's submissions and in challenge to the Liquidator's application at paragraphs 7-10 bears out my finding. According to the evidence, the assets of AIP, some of which were secured to BSP were sold without the prior knowledge or consent of BSP. How then, in the absence of following the proper protocols under Clauses 11 and 12 could the Liquidator draw the conclusion that BSP had surrendered its security?

[14] Supra, n. 4

33. Further to the above, the Liquidator replied to these two emails by confirming receipt of their claim and recording them as a secured creditor. While I admit that the use of the word *'claim'* by the Liquidator, uncorrected by BSP could leave one to place such a spin on the actions of BSP, the attendant use of the words "secured creditor" by both parties, on each occasion, together with the twice referenced security, suggest an unequivocal intention on the part of BSP that must override such a careless use of the word *'claim'.*

34. BSP sought to apply an objective test from the perspective of the Liquidator, that he never recognised them as an unsecured creditor by virtue of his own actions and what he communicated to them via his email and his report, both times referring to them as a secured creditor. The case of **Surfers Paradise**[15] refers.

35. The more correct test according to the recent case of **Surfer's Paradise** is, *".....whether the Respondent was required to elect to surrender the security or not and if so, whether its conduct was unequivocal. If both questions can be answered in the affirmative then it seems to me that the law will deem an election to have been made,"*[16] and in that case, the actual intention would be irrelevant and the election would take place by operation of law.[17]

36. At no point between the service of demand and prior to the sale of the assets was BSP required to elect. All they had done to secure their interests was to serve a Notice of Demand on the Liquidator who now stood in the shoes of the Directors and subsequently make an enquiry as to how proceeds of sale of assets would be managed. Having been informed that there were sufficient funds to meet all debts BSP had no reason to yet make any election. The point at which an election would have become imminent would have been if the Liquidator wished to sell the assets under the GSA. At that juncture he would have to ask BSP to elect, or, if BSP had been informed by the Liquidator that there were insufficient assets to pay them and other creditors and BSP then took no step to realise their security.

37. Through no fault of BSP, the Liquidator appeared to have erroneously sold all the assets of AIP, including those secured by BSP's registered GSA without consideration of the protocols which would allow him to do so under the Act. Therefore, the first answer to the question in the test being in the negative, the second answer becomes irrelevant, and the only conclusion then, is that there could be no finding by this court of an election to surrender having been made.

[15] Surfer's Paradise Investments PTY LTD (2003) QCA 458, p. 29
[16] Ibid, para. 36
[17] Ibid, Para. 37

38. Counsel for the Liquidator has placed great stock in the fact that BSP accepted a part payment and that if they had not elected to surrender then the acceptance of the monies was sufficient evidence of that election.

39. No matter the point at which the payment was accepted, it would not change the final outcome. If the payment had been accepted prior to the sale of assets, BSP would have been acting on the information of the Liquidator that there were sufficient funds to pay all creditors and they therefore would have had no cause to either elect to realise their security or surrender it. If the payment was accepted after the sale then it would have been the only reasonable and mitigating step they could have taken as their security would have vanished, with insufficient funds remaining to pay off the debt in full. They would have been left with only one option.

40. I will conclude this discussion by referring finally to the words of Justice Williams in the **Surfer's Paradise** case, so helpfully provided by counsel for the Liquidator.

> Unequivocal conduct communicated to the Liquidator may constitute an election notwithstanding the fact that subjectively there was no intention to so elect. .....It will only be where there is some [*my emphasis*] evidence of equivocation that it would be possible for a court to conclude that the conduct, caught by the words of the statute, does not have that consequence.

41. Based on the facts put forward by both parties there is, very definitely, more than some evidence of equivocation from which I can only make one finding, namely, that BSP did not surrender its charge.

(ii) **Issue 2:**

That BSP does not have the right to claim any interest on its debt after AIP was put into liquidation

42. In light of the matters canvassed in the preceding paragraphs, that BSP did not make *'a claim'* within the meaning of Clause 25 they could not therefore fall to be considered as a creditor not entitled to interest post-liquidation. Because they remained a secured creditor with retained rights to realise their security, albeit sold without engaging the proper procedure, they would be entitled to receive all interests due to them as if they had sold the assets themselves.

(iii) Issue 3:

That the Liquidator was not in compliance with the law when he paid unsecured creditors in priority over secured creditors

43. The Act provides at Schedule 7, Part 3, Clauses 15-19[18] for how a Liquidator is to treat payments to certain creditors. Certain types of creditors are set up as priority creditors and those who fall outside of this are to rank pari passu with each other.

44. The simple answer to this issue is no. The Act is quite clear as to claims that are preferential, inclusive of secured creditors. Unsecured creditors would fall outside of this preference.

45. The evidence of the Liquidator was that he was not paying unsecured creditors in priority to secured creditors but, as the business was still solvent he was merely running it as a going concern in order to retain its value and goodwill for future sales. **Loose on Liquidators**, in support of the conduct of the Liquidator states:

> The liquidator may carry on the business of the company but only so far as necessary for beneficial winding up. It is not sufficient that the carrying on of the business will be of benefit to the company, it must assist the beneficial winding up by way of allowing the sale of the business or its assets or the advantageous completion of contracts. The liquidator will be justified in carrying on the business if he reasonably and bona fide believes this, even if he is subsequently shown to have been mistaken.[19]

46. I believe the Liquidator was attempting to do just that. I believe he acted quite properly in running the business as a going concern while it was still solvent, to ensure little to no value was lost for when a lucrative sale materialised. In fact, as soon as it became apparent some 4-5 months later that the business, in spite of his efforts was now insolvent, the Liquidator ceased making payments to unsecured creditors.

47. When I examine the 70 claims of unsecured creditors, of which 23 were partially paid and the remainder of 47 paid in full, I find it difficult to assess which of these would be considered relevant to keep the business running. Only the Liquidator could have properly determined this, and for this court to declare that he was wrong in paying all these creditors would require a forensic examination of those records of which there has been none put forward in this case. Save for the initial challenge by the Interested Parties querying his actions and requesting specific answers to their written questions, not much more was provided to the court to justify the making of a decision contrary to the actions of the Liquidator.

48. Having said that, I believe that the Liquidator was procedurally incorrect to have made payments towards debts of unsecured creditors in priority to secured

[18] Supra, n.1, Clause 47 also refers
[19] Supra, n. 14, p.106

creditors to keep the business running. The proper procedure would have been to have done the following: since Clause 25 of the Act forbids any supplier of an essential service to a company in liquidation from refusing to provide that service on the basis of defaulting payments, the Liquidator could have compelled them under the Act to perform, or, more realistically, under Clause 25(2), the Liquidator could have paid for the supply of that service which would be recorded as an expense of the Liquidator for the purposes of Clause 15(a), Schedule 7 and rank as a priority payment.[20]

(iv) **Issue 4:**

That the Liquidator has the right to pool the assets of Wilbur Holdings as a related company and to pay off the remaining debts of AIP

49. Before addressing this issue I will avert my mind to the matter of the New Zealand judgment and what bearing, if any, it may have on the final outcome of this judgment.

50. Having read that judgment in full and the orders of that court, I do not believe that there would be a conflict whether I decided to pool the assets of Wilbur Holdings or not. The effect of the New Zealand Judgment is to determine and distribute the marital assets as known to the Judge. In fact, it did not appear that the Judge was even aware of BSP's registered mortgage over the assets of Wilbur Holdings. Even if he was aware, his decision could not be read so as to supersede the Land Leases Act of Vanuatu and BSP's right of sale or right to consent to a sale. Any judgment therefore would have to be read subject to the law. If I am to make an order not to pool, then there would still be no conflict as Mr. Mooney would be allowed to comply with the New Zealand order to sell and pay off the debts, save that my order would merely determine the priority of payment out of those funds due to AIP.

51. The provisions for pooling of assets is contained at Schedule 6, Clauses 22 and 23 of the Act under the just and equitable principle.

52. Before applying my mind to any case law, particularly case law outside the jurisdiction I must first determine what the Act requires.

53. While I am aware that this is a novel case for Vanuatu, and this court, not having the benefit of other Supreme Court or Court of Appeal decisions, is cognisant of the words of Chief Justice Gibbs as cited by Chief Justice Warren[21] *"that even though a matter is novel the court should not proceed on*

[20] Supra, n. 14, p.106
[21] James Henry Stewart v ATCO Controls PTY LTD. (2014) HCA 15, para. 31

general notions of justice without regard to settled principles." And so I proceed with great caution.

54. Clause 22(1)(a) appears to be of wide application, but, lest a court lead itself astray by arbitrary application of the provision, Parliament has fittingly contained that discretion within Clause 23 by providing certain guidelines:

(a) The extent to which the related company took part in the management of the company in liquidation;

(b) The conduct of the related company towards the creditors of the company in liquidation;

(c) The extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company;

(d) Any other matters as the court thinks fit.

55. While subclause 23(1)(a-c) appears to draw *in* the discretion, subclause (1)(d) seemingly enlarges it by giving to the court a power to consider *"any other matters as [it] thinks fit."* This subclause is not, at first blush, as far-reaching as it might appear. It must therefore be read in the context of Clauses 22 & 23, interpreted within strict parameters, allowing only what is reasonable, or else there is a risk that matters not under consideration can be drawn from far and wide and prove random and too vast to be contained.

56. Therefore, the guidelines which will inform me are those provided by the Act as aforementioned. Counsel for the Liquidator has asked that I further consider, under subclause (d):

(1) The extent of the prejudice that may or may not affect creditors; and
(2) The extent to which the Liquidator would benefit from such an order.

57. I do not consider these outside the circumstances of the case and thus the ambit of the guidelines and will therefore consider them under subclause (d).

58. A summary of the issue for the Liquidator, in his words are, *"that the two companies affairs are intermingled. The directors and shareholders are the same. The affairs of Wilbur Holdings have been cared for solely by AIP and incidental costs of finance, staff maintenance, etc have been paid by AIP. There is no effective division, they operate as one. Wilbur Holdings was established as an asset protection entity to hold land and housing separate from the riskier operations of AIP. It has always considered itself as a mortgagor of property that AIP is a joint debtor of under the loan facility used by AIP secured by the mortgages.....Wilbur Holdings is a debtor of AIP for a significant sum of money, VT55 million based upon money taken from AIP to*

pay the loans. .....had this money remained with AIP the remaining creditors would have been paid by now."

59. Both BSP and I-Count object to each of the reasons proffered by the Liquidator to justify a pooling of the assets.

60. While the argument of the Liquidator offers short term appeal for what has proven to be a difficult liquidation process for all, I prefer the arguments of BSP and I-Count. In particular, I reference the arguments of counsel for I-Count for providing the court with a simple and concise breakdown of the key elements, together with relevant facts which the court is to have regard to under the guidelines.

(v) For completeness I now address each of those guidelines.

Guidelines (a) and (b)

(a) I do not accept that Wilbur Holdings took part in the management of AIP or that the conduct of Wilbur Holdings towards the creditors of AIP was of a nature that suggested an intermingled relationship. The fact of their sharing common directors is insufficient to rest the entire pooling application. There would have to be more to give rise to such an order being made. Counsel for the Liquidator highlighted the case of **Lofthouse** as fodder for his argument. I believe the facts of the case tend more in favour of the Interested Parties.

(b) The facts of that case showed a real and genuine intermingling of the subject companies. The companies were all in the business of operators in forest harvesting, forest management and the provision of technology based products to the forest industry. In spite of a restructure to protect the business from liability that might arise from conduct of the other parts of the business, the businesses were conducted as a single enterprise. Some had no bank accounts and they all entered into ad hoc contracts with no consistency on which company was the contracting party.

(c) Even with the tagged on considerations in this case of prejudice to creditors and the Liquidator remaining unpaid, this case demonstrates that there must be a consideration of the whole of the circumstances of the companies and their creditors to warrant any such order being made.[22]

(d) To offer piecemeal arguments around insubstantial facts to avoid an holistic examination of the substantive guidelines would be to lower the

[22] David James Lofthouse v Environmental Consultants International PTY LTD (2012) VSC 416, para. 18

standard set by Parliament in favour of *"a general notion of justice"* to see, primarily, the Liquidator paid.

(e) From the evidence provided I find little by way of concrete facts that these companies were so intermingled as to be indistinguishable, as **Lofthouse** firmly establishes they must be. What I find is that there are similar directors and a company, Wilbur Holdings, which used its assets to secure certain loans for AIP. The argument of I-Count bears mention; *"Just because a company guarantees the liability of a related company to a particular creditor should not give rise to an exposure to having its assets called upon to meet liability of the related company generally."*

(f) Although generous statements were made by counsel for the Liquidator about the relationship between the two companies there was no direct evidence of exactly how the affairs of Wilbur Holdings were cared for by AIP or of how incidental costs of finance, staff maintenance, etc. had been paid by AIP. There was also no evidence or no persuasive evidence to show that the two operated as one. There was no evidence that Wilbur Holdings was established as an asset protection entity to hold land and housing separate from the riskier operations of AIP. There was no evidence that Wilbur Holdings has always considered itself as a mortgagor of property that AIP is a joint debtor of.

Guideline (c)

(a) Although the Liquidator represented that Wilbur Holdings was indebted to AIP in the amount of VT55 million, I found no direct evidence of this, save for a sworn statement of Julie Moffatt. In any event, even if I chose to accept this evidence, it would not prove fruitful as the Act requires that the Applicant must show that the actions of Wilbur Holdings towards AIP gave rise to the liquidation.

(b) As the presiding judicial officer over the liquidation of AIP I can affirm, as does my judgment, and Mr. Fleming who successfully argued for the liquidation, that Wilbur Holdings was neither connected to nor formed any part of those proceedings. The company was liquidated for the sole reason that the Directors, now divorced, could no longer work together, and consequently, the company had to be liquidated. The fact that Wilbur Holdings may owe VT55 million to AIP is immaterial to the present point.

61. These guidelines having not been met, even to the smallest degree, it would, I believe, be beyond the contemplation of the Act to grant an order pooling the assets on the sole basis that the Liquidator would not be paid. My reading of **Lofthouse** finds that such a consideration is ancillary only to the more

substantial grounds. In other words, because the companies in **Lofthouse** could be shown to be so intermingled as to be almost indistinguishable it was not adverse to the law for the court to consider the prejudice that would be suffered by creditors and the Liquidator if no order was made. The substantive guidelines having not been reached in this case, I believe it would be a perversity of the Act for this court to make such an order merely to see the Liquidator paid.

62. It is quite apparent that the Liquidator has undertaken a considerable amount of work during the liquidation process and made valiant efforts to achieve an attractive sale price for the company in spite of the withdrawal of lucrative contracts and it is a shame that he was unable to prioritize all his fees and expenses.

(vi) Issue 5:

That the Liquidator has priority to be paid first out of any proceeds of sale following the realisation of assets of Wilbur Holdings if a pooling order is made

63. The issue at bar was whether the Liquidator was entitled to be paid in priority to BSP out of the proceeds of sale of Wilbur Holdings assets if the application to pool those assets was granted. Having not granted the application this issue is now moot. Notwithstanding, I will still address the priority of the Liquidator as I believe it will once again become relevant once the assets of Wilbur Holdings are sold per the New Zealand Judgment.

64. According to the order of the New Zealand Court the first priority payment must be of all outstanding AIP debts. These funds would have to be recorded as an incoming or expected cash asset of AIP under the said judgment. This means therefore that those funds to be assigned to AIP must be placed in the hands of the Liquidator for final distribution and completion of the liquidation.

65. The two competing priority claims on those funds coming to AIP are BSP and the Liquidator. BSP now has two charges to be met: one by Mr. Mooney following the sale of Wilbur Holdings assets and one to be paid out by the Liquidator.

66. BSP is a creditor of Wilbur Holdings and is therefore, under law, entitled to be paid first out of the proceeds of sale to satisfy all the remaining debts of the Mooney's and AIP as stated in the New Zealand judgment. Following this payment, any surplus is to be handed over to the Liquidator who is to firstly pay himself under Clause 15 of the Act and secondly, BSP, all principal and interest. All other creditors are to be paid in the priority established by law.

67. I think, in the end, it has been quite a circuitous route to get to what might be the outcome most persons were hoping for: BSP gets paid in full including all interests under the AIP liquidation, which will include their debt with Wilbur Holdings, and the Liquidator gets paid in priority to BSP under the assets of AIP.

F. Result

My order is as follows:

1. That the application to pool assets is denied.

2. That once BSP is paid in full as first secured creditor out of the proceeds of sale of Wilbur Holdings any surplus following the payment to BSP is to be transferred to the Liquidator for distribution and completion of the Liquidation.

3. Should there be any remaining debts owed to BSP after their security over Wilbur Holdings has been realised, they are entitled, as the first secured creditor of AIP, to be paid principal and all interest, post-liquidation.

4. That the Liquidator is to be paid in priority to BSP out of the proceeds of sale transferred to AIP.

5. That any surplus of funds following the completion of the Liquidation are to be returned to Adrian Mooney for completion of his obligations under the New Zealand judgment.

6. That all parties are to meet their own costs of this application.

BY THE COURT

MASTER

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU