

IN THE MATTER OF: Air Vanuatu (Operations) Limited in Liquidation

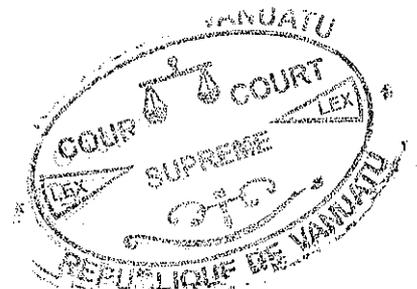
Morgan John Kelly, Andrew Hanson and Justin
Walsh, Liquidators of Air Vanuatu (Operations)
Limited (in Liquidation) LC/- Ernst & Young, 200
George Street, Sydney, NSW 2000, Australia

Applicants

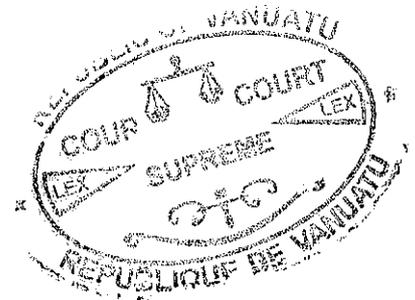
Before: Justice Oliver A. Saksak
Counsel: Mr Mark Hurley for the Applicants
Date of Hearing: 24th June 2024
Date of Decision: 25th June 2024

JUDGMENT

1. I heard Mr Hurley in relation to the application by the liquidators seeking directions filed on 19th June 2024 as supported by the sworn statement of Morgan John Kelly and the sworn statement of Counsel and the written submissions filed on 24th June 2024, and upon being satisfied the application was validly filed pursuant to the provisions of the Companies' (Insolvency and Recovership) Act No. 3 of 2013 (the Act), I allowed the application and issued the orders sought in the application.
2. I now provide reasons.
3. First and foremost, from the sworn statement of Mr Hurley dated 24th June 2024 that the application and sworn statement in support were served on all the shareholders namely Bob Loughman, the Vanuatu Government through its current Prime Minister, Minister John Salong and Minister Marc Ati and on the creditors of Air Vanuatu(operations) Ltd, I am satisfied there have been no queries or responses made or received from any of the named shareholders or the creditors. Therefore the application is unchallenged.



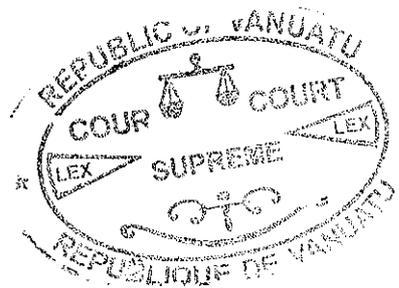
4. Second, at the commencement of the hearing in chambers, Mr Hurley informed that he had received a text message from the Attorney General at 9:44 am confirming that he had seen the application and enquiring whether he should appear as well but advised:
" I don't think our appearance will be necessary"
5. Third, I was satisfied that pursuant to Clause 22 (a) Part 4 and Schedule 2 of the Act this Court has the power to Order that the Liquidators will not be personally liable to any person for loss, except if such loss is caused by fraud or other personal misconduct. Further I was satisfied pursuant to clause 22 (e), Part 4 and Schedule 2 of the Act and Clause 4 of the Regulation Order No. 111 of 2015 that the Liquidator, their employees, their lawyers both internal and external are entitled to be paid remunerations at the rates specified in the schedules marked "A", (Ernest & Young as Partner/Liquidators) "B" (E & Y Employees), " C" for K& L Gates (International Lawyers), "D" for Ridgway Blake Lawyers (Internal Lawyers) and "E" for Hurley Lawyers (Internal Lawyers).
6. Clause 22 (a) of Schedule 2 to the Act states:
" On the application of the liquidator, a liquidation committee, or, with the leave of the Court a creditor, shareholder, or director of a company in liquidation, the Court may:
 - a) *Give directions in relation to any matter arising in connection with the liquidation...."*
7. In my view the Liquidators have standing to seek an order of immunity pursuant to clause 22 (a). Vanuatu lacks case precedents or authority in this aspect of company liquidation and recovery cases, but I was persuaded by Mr Hurley to place reliance on the Australian authorities of Mentha, in the matter of Griffin Coal Mining Co Pty Ltd (Administrator's Appointed)[2010] FCA 146 and Preston, in the matter of Qenes Pty Ltd (Administrators Appointed) [2024] FCA 461.
8. Mentha's case established 4 criteria or principles governing the grant of relief as sought to the liquidators in the case. These are that-
 - a) It is the interests of the company's creditors,
 - b) It is to enable the company's business to continue to trade for the benefit of the company's creditor's,



- c) The creditors are not prejudiced or disadvantaged by the orders sought and stand to benefit from them, and
- d) That notice has been given to those who may be affected by the orders sought.
9. I am satisfied the principles are met by the Liquidators in this case to entitle them to the relief sought in paragraph 1 of the application. Accordingly the order is granted.
10. In relation to the remuneration orders sought in the second relief reference was made to me by Mr Hurley to Clause 14, Part 3 of schedule 3 to the Act which states:
- (1) Subject to paragraph 22 (f) of Schedule 2, a liquidator appointed under section 16 or 17 is entitled to charge reasonable remuneration for carrying out his or her duties and exercising his or her powers as liquidator.
- (2) Unless the Court otherwise orders, a liquidator appointed under section 15 may charge remuneration:
- a) Of an amount no greater than the amount prescribed by regulations, or
- b) At or less than such rate as may be prescribed by regulations.” (my emphasis).
11. Regulation 4 of Order NO.111 of 2015 states:
- “ Unless the Court otherwise orders under clause 14 (2) of Schedule 3 of the Act, the remuneration of a liquidator appointed under sections 13, 14, 15 or 16 of the Act, is to be calculated on an hourly rate in the following manner:
- a) *For work undertaken by the liquidator, VT 30,000 per hour or part of an hour, or*
- b) *For work undertake by an accountant or solicitor employed by the liquidator, VT 30,000 per hour or part of an hour, or*
- c) *For work undertaken by any other employees of the liquidator, VT 20,000 per hours or part of a hour” (my emphasis).*
12. In this case, it is no mystery that the shareholders appointed Ernest & Young as Liquidators by their letter dated 2nd May 2024 following a special resolution made by the company under clause 14 of the Act.



13. In the second last paragraph of the appointment letter the shareholders made an undertaking in the following terms:
- " The government of Vanuatu will meet the costs of liquidation should Earnest & Young consented to the appointed liquidator in this matter. We request you please provide a formal agreement for our consideration and the immediate steps to commence the above service..."*
14. On 3rd May 2024 Mr Morgan Kelly responded accepting the appointment with the proposed Agreement setting out amongst others, details of fees and billing arrangements. I note for comparison the rate of fees for conduct of work set out on page 22 are much higher (except for the Assistant which maintains the amount 285) than the proposed amounts in Schedule B.
15. The Government has given a clear undertaking to meet the costs of liquidation. In my view the rates in Schedule B are fair and reasonable although higher than the rates specified in Regulation 4 of Order No. 11 of 2015 as VT 30,000 and VT 20,000, the Act provides a leeway to the Court to Order amounts " otherwise" higher than VT 30,000 or VT 20,000, if the amounts are fair and reasonable and the conduct of liquidators meet the principles in the Mentha case. The relevant empowering terms is " otherwise" used in Clause 14 (2) and Regulation 4 of Order 111 of 2013.
16. The Appointed Liquidators cannot perform their work adequately for the benefit of the company and its creditors without engaging employees and lawyers both external and internal. The engagement of employees sand lawyers for professional work and service by the Appointed Liquidators are necessary and essential. And it is so far the benefit and interests of the company's creditors.
17. In my considered opinion in view of the complexity of the work required to be done by the Liquidators appointed, the rates proposed in Schedules A, B, C and D are reasonable rates which the liquidators are entitled to charge under clause 14 (1) and (2) of Part 3 of the Act.



18. Accordingly the orders sought in the Second relief of the application are granted as well. The orders are separately issued.

DATED at Port Vila this 25th day of June 2024

BY THE COURT


Hon. OLIVER A SAKSAK
Judge

