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

Company Case No. 24/1863 SC/COMP

IN THE MATTER OF: **AIR VANUATU (OPERATIONS) LIMITED (IN LIQUIDATION)**
Under the Companies (Insolvency and receivership) Act 2013

BETWEEN: **Morgan John Kelly, Andrew Hanson and Justin Walsh, Liquidators of Air Vanuatu (Operations) Limited (In Liquidation)**
Applicants

AND: **Charles Hugh James Perry, Richard Arcus, Jean Vincent Do, Katura Lavinia Marae Tom, Daniel John Garrigan**
Respondents

Date of Hearing:	***16 September 2024***
Before:	***Hon. Justice M A MacKenzie***
Counsel:	***Mr M J Hurley for the Applicants*** ***Mr M Fleming for the Respondents***
Date of Decision:	***2 October 2024***

DECISION

The applications

1. There are three applications before the Court:

   a) An application by five creditors to set aside the compromise approved by creditors; or alternatively declare they are not bound by the compromise ("*the creditors' application*")

   b) An application by a further creditor, Thierry Yves Bourgeois to be added as a party to the creditors' application.

c) An application by the liquidators seeking directions implementing the creditors compromise, and terminating the liquidation, along with various ancillary orders.

The hearing

2. The Liquidators asked for an urgent hearing of the application for directions implementing the compromise and termination of the liquidation. Mr Hanson, one of the Liquidators, file a sworn statement as to urgency, citing financial and non-financial reasons. A significant financial consideration is the ongoing cost of the liquidation, eroding the value which would otherwise be available to AVOL for its future operations. The application to set aside the compromise was then filed. An urgent hearing date was given.

3. Accompanying the applications were sworn statements. One of the Liquidators, Mr Kelly, has filed three sworn statements in support of the applications.[1] Each of the six applicants has filed a sworn statement. The hearing proceeded on a submissions only basis. That is because neither Mr Hurley nor Mr Fleming required any of the witnesses to give evidence and be cross examined. The Court is not in a position to resolve then any factual disputes. In reality, other than the alleged coercion discussed below, the factual narrative in terms of what the Liquidators did or did not do is not in dispute.

4. One issue raised relates to the suggestion in the application to set aside the compromise that employees were *"coerced"* into voting for the compromise. That is not evidence as it is not set out in any of the sworn statements, as is required by rule 11.4 of the Civil Procedure Rules. Even if it was, it is a hearsay statement as it could only have been put before the Court to prove the truth of its contents. Mr Fleming said in his oral submissions that there was insufficient time to obtain sworn statements from those alleging "*coercion*". I record that no application for adjournment was made to obtain that evidence.

5. The applicants make it clear both in the application and the submissions that they challenge the Liquidators' evidence that they acted in good faith towards all creditors and have acted independently in relation to the compromise. They submit that the Liquidators acted to secure a predetermined outcome. In that event, the applicants should have cross examined Mr Kelly, in order to make submissions critical of the Liquidators, and to ask the Court not to accept their evidence, but rather that they acted to secure a predetermined outcome.[2]

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[1] *Filed on 19 June 2024, 6 September 2024 and 16 September 2024. Another of the Liquidators, Andrew Hanson filed a sworn statement on 11 September 2024 in support of a request for an urgent hearing*

[2] *Tui UK Ltd v Griffiths [2023] UKSC 48 at 70.*

Relevant background

6. Air Vanuatu is the national airline of Vanuatu and operated both domestic and international flights. On 2 May 2024, the Prime Minister wrote to one of the Liquidators, Morgan Kelly advising that the shareholders of Air Vanuatu (Operations) Limited ("*AVOL*") had resolved that AVOL would enter into voluntary liquidation and seeking his consent to act as liquidator.

7. The liquidators were formally appointed on 9 May 2024.

8. AVOL was registered on 17 December 1987. As at the date of liquidation, there were two directors of the company, Joseph Laloyer and Alain Lew. There were five shareholders, with the majority shareholder being the Vanuatu Government. Each of John Salong, Charlot Salwai Tabimasmas, Bob Loughman and Marc Ati held 1 share, with the Vanuatu Government represented by the prime Minister holding 1345996 shares.

9. The Liquidators took a number of steps consequent on their appointment, including a preliminary assessment of AVOL's financial and operational position shortly after appointment. They took immediate steps to ground the fleet of aircraft, to ensure safety and airworthiness of the fleet.

10. A first report was issued to creditors and shareholders on 15 May 2024(revised on 17 May 2024). The report confirmed that AVOL was in significant financial distress and had been underperforming for a long period of time prior to the Liquidators' appointment. Various issues were raised in the report:

    a) The company had a high-cost base and a significant level of debt in comparison to the size of the company's operation.

    b) The number of employees was high for a business of its size and nature.

    c) The company was unable to meet the costs of aviation parts, critical to the operation of the fleet, resulting in aircraft being grounded for extended periods of time. The company had defaulted under supplier arrangements and a number of its insurance policies.

    d) There were deficiencies in the financial information – the books and records were not properly organised and out of date. However, the information in relation to fleet maintenance and engineering records was well kept and easy to access.

    e) AVOL has an Air Operator's certificate ("*AOC*") valid until 15 April 2025.

f) If not for the Government's statement of financial support, the Liquidators have no other choice but to cease operations and wind down the company.

11. Following the initial report, a creditors meeting was held on 22 May 2024. Then, following an assessment of the requirements of the business, 175 staff members were made redundant effective from 6 June 2024. Their entitlements were met by the Vanuatu Government. The Liquidators formed the view that those strategic redundancies gave AVOL the best chance of being successfully restructured.

12. The Liquidators then undertook a marketing campaign with respect to the sale or recapitalisation of the business of AVOL. They received indications of interest from 31 parties and issued non-disclosure agreements ("*NDAs*") to 25 parties. Of those, 16 NDAs were signed and returned and accordingly granted access to the data room created by the Liquidators.

13. Eleven expressions of interest were received. The Liquidators assessed the viability of each proposal with reference to the impact that each proposal would have on the future of the company and its business and the return to AVOL's creditors. The Liquidators determined that the expression of interest received from AV3 Limited ("*AV3*") represented the most viable restructuring option when compared with the other proposals received. AV3 is a special purpose entity wholly owned by the Vanuatu Ministry of Foreign Affairs and was incorporated on 5 June 2024.

14. AV3's proposal was that AVOL's business be restructured by way of a compromise under the Companies (Insolvency and Receivership) Act 2013("the Act"), with the Liquidators' being the proponent of the compromise proposal. On 11 August 2024, the Liquidators issued a report to creditors providing detail of the proposed compromise, and addressing the matters required under section 4 of the Act. The report included a notice to creditors of the Liquidators' intention to hold a meeting of creditors via AVL for voting on the resolution for the proposed compromise on 21 August 2024. A revised report was issued on 19 August 2024 to reflect updates to the list of creditors.

15. The revised report set out the liquidation strategy, which included an accelerated recapitalisation and sale process. It explained the nature of the expressions of interest received. Seven related to the recapitalisation of AVOL, one for the acquisition of AVOL's assets and business and three related to asset acquisition. The Liquidators explained that they determined that a going concern sale or recapitalisation would likely offer a better outcome to creditors compared to an asset only sale outcome as there would likely be a higher return to more classes of creditors and the prospect of preserving the business was maximised (limiting crystallisation of several contingent creditor claims and maintaining staff employment where possible). As noted in the report, feedback during the

expression of interest phase was that the AOC was of value to interested parties. Following discussion with the Civil Aviation Authority Vanuatu, AVOL's AOC would only be preserved if the company was recapitalised. The liquidators were clear that although short term financial support had been secured by the liquidators, the funding was limited. As such, an urgent solution was required to mitigate the risk of AVOL having to close its operations and terminate its staff.

16. AV3's proposal was for the recapitalisation of AVOL's business, as follows:

a) AV3 would contribute USD 3.3 million into a fund under the terms of the creditors compromise in 3 tranches – the first USD 1.1 million upon approval of the creditors compromise, the second 4 months later, and the third 10 months after the approval of the compromise.

b) The moratorium period is 10 months.

c) AVOL will be released form all creditor claims once the compromise fund was distributed to affected creditors (other than those specifically identified as not being compromised).

d) There would be a Deed of Compromise.

e) The Liquidators will adjudicate and admit or reject claims.

17. The liquidators identified various classes of creditors.

Class A – secured creditors. The only class A creditor is Bred Bank. No funds to be distributed as the debt would not be compromised.

Class B – Partially secured creditors. There are two creditors in this class. These creditors are the aircraft lessors and financiers. No funds to be distributed to class B creditors as the arrangements will be retained post compromise.

Class C.1- Priority creditors. There are 285 creditors in this class. These are retained employee claims. No funds to be distributed.

Class C.2- Priority creditors. There are 422 creditors in this class. These are superannuation entitlement amounts owing to employees. They will be paid in full. Amount outstanding estimated to be USD 0.05 million.

Class C.3- Priority creditors. There are 25 creditors in this class, with an estimated value of USD 0.99 million. These are other employee claims, which relate to outstanding employee entitlements claims owed to employees who have been made redundant or resigned, and the claims of retained employees that are

extraordinary or disputed. These claims are estimated to receive USD 50 cents per dollar on their debt as part of the compromise.

Class D- Vanuatu National Provident Fund ("*VNFP*"). No funds to be distributed. The Government will assume the debt.

Class E- Vanuatu Government Debts. The Government intend to wipe off the debt as part of the compromise.

Class F- General unsecured creditors. There are 993 creditors in this class, with an estimated value of USD 52.19 million. This relates to trade creditors, cancelled booking claims and other sundry claims. The proposal is for these creditors to receive USD 5 cents per dollar.

18. Below is a table setting out the estimated debt and repayment rate based on the creditors compromise scenario.

5.2 Scenario 1 – Creditors Compromise Scenario

USD'm	Notes	Pre-Creditor Compromise Estimated Position	Creditor Compromise Outcome	Post-Creditor Compromise Estimated Position
Assets				
Proposed Creditors Compromise Contribution	1		3.30	
Total Asset Realisations			**3.30**	-
Creditors				
Class A - Secured Creditors	2	(10.66)	-	(10.66)
Class B - Partially Secured Creditors	3	(2.94)	-	(2.94)
Class C.1 - Priority Creditors (Retained Employee Entitlement Claims)	4	(3.19)	-	(3.19)
Class C.2 - Priority Creditors (Superannuation Entitlement Claims)	5	(0.05)	(0.05)	-
Class C.3 - Priority Creditors (Other Employee Claims)	6	(0.99)	(0.49)	-
Class D - Vanuatu National Provident Fund ("VNPF")	7	(9.22)	-	-
Class E - Vanuatu Government Debts	8	(45.33)	-	-
Class F - Other Unsecured Creditors	9	(56.99)	(2.76)	-
Total Estimated Creditor Claims		**(129.37)**	-	**(16.79)**

Summary of Estimated Creditor Returns

Class A	*Debt assumed by Government*
Class B	*Debt retained*

Class C.1	*Debt retained*
Class C.2	*100 c/$*
Class C.3	*Approx. 50 c/$*
Class D	*Debt assumed by Government*
Class E	*Written Off*
Class F	*Approx. 5.2 c/$*

19. At paragraph 4.3 of the report, the Liquidators commented on the creditors compromise proposal. Matters to highlight include that:

a) If the compromise is not accepted, the liquidation will continue. There has been funding to date for the liquidation process and to allow a sale/recapitalisation to be pursued. There were no guarantees that further funding would be secured meaning likely that AVOL's business operations would need to be terminated by the Liquidators and an urgent piecemeal sale of assets pursued, with a likely increase to the creditor pool, and a decrease in return to eligible creditors.

b) The creditors compromise appears to be a viable option for creditors and who should consider the comparison between outcomes between the creditor compromise proposal and an immediate wind down of the company.

c) The creditors compromise would achieve a going concern outcome for the company which preserves the business, maintains staff employment where possible and mitigates against the crystallisation of contingent creditor claims.

d) The terms of the creditors compromise results in the same legal entity as the owner of the business and assets. This approach attempts to preserve the company's AOC, IATA membership, workforce, airport slots and corridors, leases and critical supplier arrangements.

e) AV3 is a Government entity and is likely to have the financial capacity to complete the recapitalisation and fund the recommencement of services.

f) There is a risk that even if the creditors are successfully implemented, key stakeholders may not continue to support AVOL's operations into the future.

g) If the compromise is successful, the Liquidators intend to apply to the Court to have the liquidation brought to an end.

h) If the compromise is accepted and the liquidation of the company is terminated, the Liquidators will not be empowered to further investigate the conduct of the Company and its current and former directors. That the Liquidators are unclear as to whether there may be any potential claims against any parties.

i) The Liquidators costs will not be paid out of the compromise fund.

20. The report details the alternative wind down scenario. Below is a table setting out likely asset realisation and payout to creditors.

5.3 Scenario 2 – Wind Down Scenario

$'m USD	Notes	Low ERV	High ERV
Assets			
Cash at bank (pre-appointment account)	1	0.98	0.98
Accounts receivable (pre-appointment)	2	0.40	0.64
Property, Plant and Equipment	3	Commercially sensitive	Commercially sensitive
Inventory	4	Commercially sensitive	Commercially sensitive
Aircraft	5	Commercially sensitive	Commercially sensitive
Land & Buildings	6	Commercially sensitive	Commercially sensitive
Total asset realisations		**6.05**	**9.01**
Costs of realisation			
Insurance (Aviation Policies)	7	(0.14)	(0.14)
Insurance (Non-Aviation Policies)	8	(0.32)	(0.32)
Fleet Inspection and Airworthiness Costs	9	(0.04)	(0.04)
Marketing & Valuation Costs	10	(0.03)	(0.03)
Liquidators' Fees (currently outstanding)	11	(0.79)	(0.79)
Estimated Liquidators' Fees and Costs (to finalise liquidation in wind down scenario)	12	(0.73)	(0.61)
Legal fees	13	(0.58)	(0.48)
Sundry Costs	14	(0.27)	(0.22)
Total costs of realisation		**(2.89)**	**(2.63)**
Funds available to priority creditors		**3.16**	**6.38**
Priority (employee) creditors			
Employee Entitlements (Capped Preference Claim)	15	(1.80)	(1.80)
Total priority (employee) claims		**(1.80)**	**(1.80)**
Funds available to secured creditors		**1.36**	**4.58**
Secured creditors			
Secured creditors	16	(10.66)	(10.66)

Total Secured creditor claims		(10.66)	(10.66)
Funds available to ordinary unsecured creditors		Nil	Nil
Unsecured Creditors			
Government Loans & Debts	**17**	(45.33)	(45.33)
Vanuatu National Provident Fund ("VNPF")	**18**	(9.22)	(9.22)
Trade Creditors	**19**	(44.18)	(44.18)
Passenger Claims	**20**	(11.45)	(11.45)
Other Unsecured Creditors	**21**	(1.36)	(1.36)
Employee Entitlements (Excess over Cap)	**22**	(2.43)	(2.43)
Total Unsecured Creditors		(113.97)	(113.97)

21. At paragraph 5.3 of the report, the Liquidators comment on the wind down scenario as follows:

a) Accounts receivable are estimated to be recovered at a rate of between 25-40 percent.

b) The assets would be sold off on a piecemeal basis. Specific values have been withheld on the basis they are commercially sensitive, but the total realisable value of assets is estimated to be between USD 6.05 million (low ERV) and USD 9.01 million (high ERV). The realisable assets have been valued by specialists as detailed at paragraph 5.3.

c) The Liquidators estimate that the secured creditor will receive USD 12 cents in the dollar, priority creditors 42.6 cents in the dollar and ordinary unsecured creditors will not receive anything. Notably, the unsecured creditor pool includes employee entitlement claims over the VT 1 million preferential cap per employee under the Act. The excess of these claims over the cap are unsecured debts in the liquidation and not subject to preferential treatment.

d) Liquidators' fees to complete the wind down are included as a cost of realisation.

22. There was a vote at the creditors compromise meeting. The resolution to be voted on was framed as follows-

> *"That the creditor compromise proposed by the Liquidators in accordance with Part 2, Division 1 of the Companies(Insolvency and Receivership) Act No. 3 of 2013, the terms of which are set out in the report to creditors dated 11 August 2024, shall be approved, noting that the approval of the compromise ,including any amendment ,by each class of creditor shall not be conditional on the approval of the compromise, including any amendment, by every other class of creditor voting on the resolution."*

23. As recorded in the report, each creditor was provided with one vote irrespective of the value of the debt claim value. The outcome of the vote of the affected creditors was that a majority of creditors in both value and number voted in favour of the resolution. In his sworn statement filed on 16 September 2024, Mr Kelly confirms that only creditors who were compromising all or part of their debt voted on the proposed compromise at the meeting. In response to an issue raised in the creditors' application, Mr Kelly said that based on the votes counted at the meeting, the proposed compromise would have been approved by both number and value if the Government had abstained from the vote. Excluding the Government, there were 305 creditors with a total debt of USD 53,844,792 who voted in favour of the compromise. There were 18 creditors with a total debt of USD 3,946,093 who voted against the compromise.

24. The Deed of Compromise was executed on 3 September 2024 following the approval of the creditors compromise. The compromise is subject to a number of conditions. Saliently, the Liquidators will assume a role as "*compromise administrators*" and that to financially support AVOL after the liquidation is terminated, AV3 will provide a letter of comfort to AVOL notifying AV3's intention to contribute funds to support AVOL's ability to meet its future financial obligations.

25. Following on from this, the Liquidators made an urgent application to the Court seeking directions to implement the compromise and terminating the liquidation. A number of factors informed this approach. A significant factor, at least from the Liquidators' point of view is that liquidation specific costs are estimated to be USD 111,000 per week. These liquidation costs erode the value which would otherwise be available to AVOL for its operations. The Liquidators also consider there are other non-financial factors making the application urgent.

26. Five creditors, being pilots and former employees of AVOL have applied to set aside the creditors compromise, or alternatively seek that they are not bound by the compromise. One of the applicants, Jean-Vincent Do voted in favour of the compromise. Another creditor made a last-minute application to be added as a party to the creditors' application. I will deal with the issues raised by the applicants in more detail when considering the application, but broadly speaking, the applicants mount a trenchant attack on the integrity and fairness of the creditors compromise.

Application to add a party

27. The application filed on 16 September 2024 to add Thierry Bourgeois as a party to the application to set aside the compromise and other orders is not opposed by Mr Hurley. Mr Bourgeois is a former director of AVOL and a creditor. He asserts he is a secured creditor of AVOL. This is disputed by the Liquidators.

28. Mr Bourgeois is a creditor and voted against the compromise. In the circumstances, he has an interest in the proceeding, and it is necessary to add him as a party to the application pursuant to rule 3.2 of the Civil Procedure Rules.

29. Therefore, Mr Bourgeois is added as a party to the creditors' application.

Application to set aside the compromise or that the applicants are not bound by the compromise

The application

30. The applicants seek that the compromise is set aside. Alternatively, they seek an order that they are not bound by the compromise. In the event that the compromise is set aside, a number of orders are sought in relation to the powers and duties of the Liquidators.

31. Five of the applicants are pilots who were employed by AVOL.[3] They were made redundant in May 2024. According to their sworn statements, they are owed varying amounts for unpaid salary payments dating back to the covid 19 pandemic,

[3] Charles Perry, Daniel Garrigan, Jean-Vincent Do, Katura Marae-Tom and Richard Arcus

unpaid annual leave, severance entitlements, termination of contract payments in lieu of three months' notice. Mr Perry and Mr Garrigan place emphasis on the written assurance given by the government for audit purposes. Mr Perry in particular is critical of what he perceives to be the Liquidators inaction in relation to the written assurance.

32. The sixth applicant, Thierry Bourgeois, is a former director of AVOL. He was first a director in 2015/2016 and more recently between 14 November 2023 to 14 April 2024. As well as providing details of the debt owed to him by AVOL, Mr Bourgeois sets out his view of how AVOL had been operated prior to the liquidation. He believes the company was insolvent and had been for several years. His position is that he is owed approximately USD 1,1000,000 under a promissory note dated 1 January 2024 that had its origins with a loan he made following Cyclone Pam in 2015. The parties to the agreement are AVOL and Bourgeois and Co Ltd, and not Mr Bourgeois in his personal capacity. The Liquidators consider him to be an unsecured creditor but he believes he is a secured creditor. Mr Hurley said, during submissions, that the Liquidators strongly dispute that he is a secured creditor. It is the company and not Mr Bourgeois who is the creditor. It is important to note that determination of class for voting purposes is for the Chairperson of the meeting and not the creditor.[4] Therefore, I proceed on the basis that he is an unsecured creditor.

33. A number of issues are raised in relation to the information provided to creditors to inform them as to the compromise proposal and the voting processes. They are detailed at paragraphs 15-24 (inclusive) of the application and are wide ranging. They include:

a) Names of other interested parties not disclosed;
b) No reasons why AV3 should be accepted;
c) Misrepresentation of facts regarding fees;
d) Admission potential claims not being pursued;
e) Non-disclosure of written assurance by Government;
f) Admission of inaccurate financial records being used in the compromise;
g) Property value and details not disclosed;
h) Audits not provided;
i) No reference to the "*plane claim*";
j) Property not identified in breach of the statutory duty in s 4(2)(b)(iii)(A);
k) Liquidators excuse as to why not pursuing claim;
l) Material misstatement of applicants' class of claims;

[4] *Clause 16, Part 6, Schedule 1 of the Act*

m) Demand compromise meeting not proceed;
n) Coercion and intimidation to vote "*yes*";
o) Unjust, unfair and prejudicial vote at meeting- pre determined outcome;
p) Material non-disclosure of vital information and facts.

The response

34. The Liquidators oppose the application and seek that it is dismissed.

35. They submit that the Court does not have the power to set aside the compromise in its entirety, but in any event there is no material irregularity in relation to the compromise and nor is it unfairly prejudicial to the applicants. The Liquidators further submit that the Court should decline to make an order that the applicants are not bound by the compromise.

36. Emphasis is placed on the fact that, based on the information available to the Liquidators, the compromise is estimated to return a better outcome to creditors of AVOL compared to the piece meal sale of the company's assets. This is because the compromise mitigates against the crystallisation of contingent creditor claims (including claims for priority employee entitlements), reduces the company's general creditor pool and preserves the going concern of certain assets of the company.

The Law

The statutory scheme - The Companies (Insolvency and Receivership) Act 2013

37. The Companies (Insolvency and Receivership) Act 2013 ("the Act") provides for compromises with creditors under Part 2, Division 1 of the Act. A Liquidator of a company may propose a compromise.[5]

38. Section 4 of the Act sets out what steps the proponent of a compromise must take. Section 4 says:

"4 Notice of proposed compromise

[5] *section 3(c) of the Act*

(1) The proponent must compile, in relation to each class of creditors of the company, a list of creditors known to the proponent who would be affected by the proposed compromise, setting out:

(a) the amount owing or estimated to be owing to each of them; and

(b) the number of votes that each of them is entitled to cast on a resolution to approve the compromise; and

(c) if there are classes of creditors, the class or classes to which each creditor belongs.

(2) The proponent must give to each known creditor, the company, any receiver or liquidator, and deliver to the Registrar for registration:

(a) notice in accordance with Schedule 1 of the intention to hold a meeting of creditors, or any 2 or more classes of creditors, for the purpose of voting on the resolution; and

(b) a statement:

(i) containing the name and address of the proponent and the capacity in which the proponent is acting; and

(ii) containing the address and telephone number to which inquiries may be directed during normal business hours; and

(iii) setting out the terms of the proposed compromise and the reasons for it and specifying (where applicable):

(A) the property of the company that is available to pay creditors' claims; and

(B) the duration of any proposed moratorium period; and

(C) the extent to the which the company is released from its debts; and

(D) the conditions (if any) of the compromise to commence, continue or terminate; and

(E) the order of distribution of proceeds amongst creditors; and

(F) the cut-off date for claims to be included; and

(iv) setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved; and

(v) setting out the extent of any interest of a director in the proposed compromise known to the proponent; and

(vi) explaining that the proposed compromise and any amendment to its proposed at a meeting of creditors or any classes of creditors will be binding on all creditors, or on all creditors of that class, if approved in accordance with section 8; and

(vii) containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval; and

(c) a copy of the list or lists of creditors referred to in subsection (1)."

39. The statutory requirement in terms of s 4 is for the proponent, in this case the Liquidators, to do three things- compile a list of creditors and to include the information required by s 4(1)(c), give each known creditor notice of the intention to hold a meeting of creditors for the purpose of voting on the resolution and give each known creditor a statement containing the information detailed in section 4(2)(b).

40. Section 5 sets out the effect of a compromise;

Effect of compromise

(1) A compromise, including any amendment proposed at the meeting, is approved by creditors, or a class of creditors, if, at a meeting of creditors or

that class of creditors conducted in accordance with Schedule 1, the compromise, including any amendment, is adopted in accordance with that schedule.

(2) A compromise, including any amendment, approved by creditors or a class of creditors of a company in accordance with this Division is binding:

(a) on the company and on all creditors, or,

(b) if there is more than 1 class of creditors-on all creditors of that class, to whom notice of the proposal was given as if it were a contract between them,

but does not bind any secured creditor who has given notice under subsection 5A(1) so long as that notice has not been withdrawn.

(3) If a resolution proposing a compromise, including any amendment, is put to the vote of more than 1 class of creditors, it is to be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise, including any amendment, by each class is conditional on the approval of the compromise, including any amendment, by every other class voting on the resolution.

(4) The proponent must give written notice of the result of the voting to:

(a) each known creditor; and

(b) the company; and

(c) any receiver or liquidator; and

(d) the Registrar.

5A Secured creditor may opt out of proposed compromise

(1) At any time before the commencement of the meeting of creditors required to be held under Schedule 1, any secured creditor that holds a charge or security interest over the whole or substantially the whole of the property of the company may give notice of non-participation to the address specified under subclause 4(c) of Schedule 1.

(2) The effect of the notice is that the secured creditor elects that the proposed compromise, if approved, does not apply in respect of:

(a) the property of the company over which the secured creditor has a charge or security interest; and

(b) the secured creditor, and the secured creditors rights, in respect of that property.

(3) Where a notice is given by a secured creditor under subsection (1), that secured creditor is nevertheless entitled to attend and participate in any meeting of creditors held under Schedule 1, but is not entitled to vote unless the creditor first withdraws the notice given under subsection (1).

41. A compromise is approved by creditors, or a class of creditors, if a majority in number and value of creditors or the class of creditors, vote in favour of the resolution.[6] The effect of a compromise is that it is binding on the company and all creditors.

42. The power of the Court to intervene in a creditors compromise is contained in ss 7-9 of the Act. In terms of the application to set aside the compromise or order that the applicants are not bound by the compromise, the relevant provision is section 7, which says:

"*7 Powers of Court*

(1) On the application of the proponent, any secured creditor, or the company the Court may:

(a) give directions in relation to a procedural requirement imposed by this Division, or waive or vary any such requirement, if it is satisfied that it would be just to do so; or

(b) order that, during a period specified in the order, beginning not earlier than the date on which notice was given for the proposed compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting on it:

(i) proceedings in relation to a debt owing by the company be stayed; or

(ii) a creditor is refrained from taking any other measure to enforce payment of a debt owing by the company or

(c) order that a secured party is refrained from exercising all or any of the rights under Part 9 of the Personal Property Securities Act No.17 of 2008; or

(d) make an order to protect the interests of any or all secured creditors.

(2) Unless the Court rules otherwise, or the secured creditor has given notice under subsection 5A (1) and that notice has not been withdrawn,

[6] *Clause 18, Part 6, Schedule 1 of the Act*

paragraph (1)(b) applies to every secured creditor and all property of the Company over which that creditor has a charge.

(3) The Court may order that the creditor is not bound by the compromise or make any other order that it thinks fit if the Court is satisfied, on the application of a creditor of a company who is entitled to vote on a compromise, that:

(a) not enough notice of the meeting or of the matter required to be notified under section 4 was given to that creditor; or

(b) there was some other material irregularity in obtaining approval of the compromise; or

(c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs; or

(d) in the case of a secured creditor, the interests of the creditor would be materially prejudiced by the terms of the compromise.

(4) An application under subsection (3) must be made not later than 10 working days after the date on which notice of the result of the voting was given to the creditor."

43. Section 7(3) is the applicable provision. There is no suggestion that not enough notice of a meeting was given to a creditor. The basis for the application is section 7(3)(b) and/or (c) of the Act. I will consider whether there was some material irregularity in obtaining approval of the compromise or whether it was unfairly prejudicial to the applicants. One of the applicants, Mr Do, cannot avail himself of s7(3)(c) because he voted for the compromise.

44. Section 7(3)(b) and (c) does not appear to have been considered previously by either the Supreme Court or the Court of Appeal in Vanuatu. However, the New Zealand Companies Act 1993 contains an identical provision, being section 232(3)(b) and (c). Section 232 says:

"(1) On the application of the proponent or the company, the Court may—

(a) Give directions in relation to a procedural requirement imposed by this Part of this Act, or waive or vary any such requirement, if satisfied that it would be just to do so; or

(b) Order that, during a period specified in the order, beginning not earlier than the date on which notice was given of the proposed

compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting on it, —

(i) Proceedings in relation to a debt owing by the company be stayed; or

(ii) A creditor refrain from taking any other measure to enforce payment of a debt owing by the company.

(2) Nothing in subsection (1)(b) of this section affects the right of a secured creditor during that period to take possession of, realise, or otherwise deal with, property of the company over which that creditor has a charge.

(3) If the Court is satisfied, on the application of a creditor of a company who was entitled to vote on a compromise that—

(a) Insufficient notice of the meeting or of the matter required to be notified under section 229 of this Act was given to that creditor; or

(b) There was some other material irregularity in obtaining approval of the compromise; or

(c) In the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs, —

the Court may order that the creditor is not bound by the compromise or make such other order as it thinks fit.[7]

(4) An application under subsection (3) of this section must be made not later than 10 working days after the date on which notice of the result of the voting was given to the creditor."

45. Given that section 232(3)(b) and (c) are identical to section 7(3)(b) and (c) of the Act, considerable assistance can be derived from the way section 232 has been applied in New Zealand.

46. In *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy Ltd & Ors* [2013] NZHC 3458, the Court considered the Court's role in a compromise and said;

"[182] ...The substantive merits of a proposed compromise are an issue for the creditors. As is apparent from the Law Commission report, the unfairly prejudicial limb was intended to provide a residual power to the

[7] *emphasis added*

Court, to prevent abuse of the procedure. The Court's role does not involve substituting its views of the compromise for that of the required majority of creditors. Nor does it involve the Court in second guessing the wisdom or sense of fairness of creditors in voting by the required majorities in favour of the proposal."

47. The leading case in New Zealand in relation to s232(3) (b) and (c) is *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62. It is relied on by the applicants in support of the application to set aside the compromise, or to exclude the applicant creditors from the compromise.

48. Trends Publishing had financial difficulties. In 2015, its directors proposed a compromise with all unsecured creditors. It provided no direct return for those associated with the company, favoured smaller over larger creditors and placed all of the creditors within one class for voting purposes. The proposal was considered at a meeting of creditors. The compromise was approved by the qualified majority. The challenging creditors voted against the proposal. They sought orders under section 232 of the Companies Act. The compromise proposal identified 62 unsecured creditors. Three of the creditors were described as "*inside creditors* ". The balance of the debts had been incurred at arm's length and in the ordinary course of business.

49. The Supreme Court noted that the appeal primarily turned on the approach which should be taken to classification of creditors where: (a) some are closely associated with the company (in the sense of being insiders) so that their interests are not closely aligned with those of the outside or arm's length creditors; and (b) the returns offered on debts are not proportional to the amounts owed.

50. The Supreme Court majority judgment discussed the debate (primarily in other jurisdictions) as to whether classes of creditors should be defined by reference to their interests or rights and said this debate has arisen most commonly in respect of two particular situations. In the first, the issue has been whether those who are closely associated with the control of the company (insiders) should be permitted to vote with those whose legal rights (whether as creditors or members) are the same but who are not closely connected to the company. The other situation, the issue has been whether those who have two different relationships with the company should be separately classed, for instance whether shareholders who are also debenture holders should be classed separately from those who are only shareholders or debenture holders.

51. After considering cases from overseas jurisdictions, the legislative history and scheme of Part 14, the Supreme Court regarded the classification of creditors not as an end in itself but rather as instrumental; that is as facilitating a process that will produce compromises which, in accordance with the policy of the Act,

appropriately bind those who voted against them. The appropriateness or otherwise of classification decisions is to be assessed in light of this purpose. Therefore, the Supreme Court favoured a purposive approach.

52. The Court said that a broad approach to classification can be taken. Creditors can be classed together, where, despite differences in interest or rights, they can be expected to vote on the basis of a "*class promoting view*". Where creditors whose pre-compromise rights and interest are materially the same are treated differently under the proposed compromise, however, separate classes will almost certainly be required. I adopt the approach taken to classification by the majority in *Trends*, given that s.7(3) mirrors s.232(3).

53. I set out in full what the Supreme Court said about the approach to classification at [64] – [68]:

> "**A restated approach**
>
> [64] *The purpose of Part 14 was to provide a mechanism for the approval of compromises which was easier and cheaper to negotiate than the s 205 process. In light of this purpose and the differences between Part 14 and s 205, we consider that a restated approach to classification is required under Part 14. As will become apparent, however, the approach we favour builds on the purposive approach taken by earlier authorities.*
>
> [65] *Consistently with the views expressed in Re C M Banks Ltd and applied in Re Milne and Choyce Ltd, we regard the classification of creditors not as an end in itself but rather as instrumental; that is as facilitating a process that will produce compromises which, in accordance with the policy of the Act, appropriately bind those who voted against them. The appropriateness or otherwise of classification decisions is to be assessed in light of this purpose.*
>
> [66] *The policy of Part 14 is that the approval of a compromise which reflects a fair business assessment by creditors should be given effect to. This is based on the working assumption that such a business assessment will reflect the common interest of all those who are to be bound by it. If all creditors share a common interest in maximising the return on their debts and can be expected to vote accordingly (which will usually be the case), differences between them (whether in terms of rights or interests) will be of no practical moment. Those advancing a proposed compromise, and the courts in dealing with any challenges to it, are entitled to take a broad approach to classification. For classification purposes, a complete identity of rights or interests is not required. This means that creditors can be classed together, where, despite differences in interests or rights, they can be expected to vote on the basis of a "class-promoting view".73 Differences in rights or interests which are not material to whether creditors can be expected to vote on this basis can thus be ignored.*

> [67] *But where, on the other hand, such common interest as the creditors share is, for some creditors, outweighed by other considerations, the working assumption may well be displaced. In that situation, the votes of the creditors can no longer be taken to represent the best interest of all members of the class. Where creditors whose pre-compromise rights and interests are materially the same are treated differently under the proposed compromise, however, separate classes will almost certainly be required. Also relevant will be the benefits and drawbacks of the proposal for particular creditors or groups of creditors. Allowance must therefore be made for the possibility that creditors might, by reason of other interests in a company (for instance as shareholders or directors), not share the same class-promoting view as other creditors.*
>
> [68] *There may be other circumstances in which the working assumption could be displaced but classification should be based on an assessment of the rights and interests of the creditors in relation to the company and not on matters extraneous to the company. Within any group of creditors, there will be some whose personal circumstances make them more or less willing to accept a compromise. Thus, a creditor who is facing financial pressure may be particularly inclined to accept a proposal which offers an immediate payment. Similarly, a creditor who feels personally let down by the company might, for this reason, be inclined to reject a compromise. We see no need for separate classification of such creditors."*

54. As said in *Trends*, the primary responsibility for classification rests with the proponent of a compromise. In determining what classification is appropriate, it is appropriate for the proponent to look at whether a compromise approved in the manner proposed will withstand challenge under s.232(3).

55. The primary focus in *Trends* related to misclassification and in that context addressed s.232(3)(b) and (c). In relation to s.232(3)(b) and (c), the Court said;

> [70]*"...A challenge to a compromise based on a misclassification complaint can be accommodated under either or both of subs (3)(b) and (c).*
>
> [71] *There will be situations in which subs (3)(b) is engaged other than by misclassification; for instance, if misleading information is supplied to creditors or where the meetings are not convened or conducted in accordance with the requirements of the Act 75. But, assuming appropriate candour on the part of the proponent and properly convened and conducted meetings, there will be little or no scope for resort to this subsection where creditors have been classified in accordance with our approach.*

[72] *The position in respect of subs (3)(c) is broadly similar. In assessing unfair prejudice under s 232(3)(c), the focus is on the substantive fairness or otherwise of a compromise. A compromise may be substantively unfair if the outcome for creditors is less satisfactory than would result from liquidation (which in most cases will be the alternative to a compromise). This is said to involve a vertical comparison. Substantive unfairness may also arise where creditors are not treated equally under a compromise. In this instance, the comparison is said to be horizontal. While unfairness of both kinds could, in theory, arise independently of a misclassification complaint, we think that cases in which this might arise will be rare, as we will now explain.*

[73] *Whether a vertical comparison results in substantive unfairness will usually depend on an evaluation of uncertain and perhaps contested contingencies. Such an evaluation will seldom be precise and may be susceptible to more than one opinion. More significantly, the scheme of Part 14 is that such an evaluation is primarily for the creditors affected. In the normal course of events, it is not for the court to second-guess that evaluation. We accept that there may be some cases, albeit not often, where the balance of advantage is so clearly weighted one way (that is either in favour of the compromise or against it) as to be an important consideration in terms of s 232(3)(c). It does, however, seem plausible to assume that demonstrable substantive unfairness for particular creditors will not arise in the absence of misclassification. This is because, as we have noted, the scheme of the legislation is that the required business assessment can be left to a qualified majority of the creditors who can be trusted to understand their own interests.*

[74] *A compromise which proposes differential treatment of creditors is not necessarily unfair. But differential treatment between creditors in the same class will almost inevitably raise concerns as to classification; this because differentially treated creditors are unlikely to share sufficient common interest to warrant classification together."*

56. The majority judgment of the Supreme Court said that given there was substantial overlap between the analysis under paras (b) and (c), they would confine the details of the discussion to s.232(3)(c) and said there was scope for debate as to the substantive fairness of the compromise.

57. In *Trends*, the majority held at [88] that there was a material irregularity and unfair prejudice for the purposes of s232(3)(b) and (c) arising from a misclassification of creditors for two reasons;

a) the inclusion of insider creditors along with arm's length creditors was inappropriate as they were on opposite sides of the underlying bargain.

b) a single classification of all arm's length creditors was inappropriate given the vastly different treatment accorded to their debts.

Does s7(3) of the Act confer a discretion to set aside a compromise?

58. The first point to make is that although s.7(3) does not contain an explicit power to set aside a compromise, the Court "*may make such other order as it sees fit*". In *Trends*, the Supreme Court confirmed that the compromise should be set aside. Given that s.232(3) and s.7(3) are mirror provisions, there is no reason to limit the interpretation of s.7(3) or interpret it in a different manner to *Trends*. Therefore, it is open to the Court to set aside the compromise.

59. As I have already said, the applicants mount a firm challenge to the Liquidator's actions, and in particular inactions. The matters set out in the application appear to fall into two broad categories:

a) class of creditors and voting

b) sufficiency of information to make a decision on the compromise proposal. This includes lack of disclosure/information and misstatement as to matters relevant to the affected creditors' assessment of whether to accept the compromise proposed.

Classes of creditors and voting

60. The Act (and in particular the compromise provisions) provides for classes of creditors, but is not specific as to what constitutes a class. Adopting the approach taken by the Supreme Court in *Trends*, a useful starting point for the classification analysis is the question "*between whom is it proposed that a compromise be made?*". [8]

61. The primary bargain which the compromise represents is between those who wish the company to keep trading – AV3 (the government)- and those who are owed money which they are they are seeking to recover – the arm's length creditors. What the compromise represents on the side of the arm's length creditors is release of debt in consideration for allowing the company to continue to operate.

[8] *at* [82], *with reference to the approach of Chadwick LJ in Re Hawk Insurance*

62. The applicants contend that both insider creditors and arm's length creditors were included in the same class meeting meaning that:

a) It was unjust, unfair and prejudicial that the legal interests of the applicants should be extinguished by a compromise voted on by a majority who did not have the same legal rights and interests as the applicants.

b) Allowed for creditors who were not required to compromise any debt to vote.

c) Allowed the Liquidators to manipulate the voting to achieve an outcome that would see it extract itself from the liquidation without performing statutory duties.

d) Was to the benefit of the numerically larger group who were not required to compromise, as there was a pre-determined outcome.

63. In the minority judgment of Trends, Elias CJ said "a *compromise may act as a confiscation of an interest in property*". [9] The majority and minority had differing views as to the approach to classification. The majority's view is that those advancing a proposed compromise are entitled to take a broad approach to classification. For classification purposes, a complete identity of rights and interests is not required. This means that creditors can be classed together, where, despite differences in interests or rights, they can be expected to vote on the basis of a "*class-promoting*" view. Conversely, the minority's view is that creditors who have the same legal rights in substance are appropriately classed together for the purpose of voting on proposals. Their assessment is that there is no material irregularity in such treatment whether or not they are "*insiders*" or seek different "*economic*" ends in the compromise. The applicants have focused on the view of the minority in *Trends* as to classification, as the submission strongly made, is that the applicants have different legal rights to other creditors. But that is not how the majority approach classification.

64. In the Liquidators' report of 11 August 2024, various classes of creditors are identified. At paragraph 46 of his sworn statement filed on 16 September 2024, Mr Kelly's unchallenged evidence is that only creditors who were compromising all or part of their debt voted on the proposed compromise at the meeting. That means that certain classes of creditors did not vote. They did not vote if they were not compromising part of their debt. At paragraph 19 of his sworn statement filed on 6

[9] *At [98].*

September 2024, Mr Kelly said he formed the opinion that only certain classes of creditors were affected by the proposed compromise, namely the employee creditors and the general unsecured creditors.

65. Each creditor had one vote. The results of the voting are not broken down as per each class identified in the report. A majority was required by value and number.[10] 306 creditors voted. One of those creditors who voted was the "*government creditors*". They had one vote. Even if excluded, (on the basis they are an "insider") the resolution will still have passed. Mr Kelly deposes that (excluding the government) there were 305 creditors with a total debt of USD 53,844,792 who voted in support of the compromise and 18 creditors with a total debt of USD 3,946,093 who voted against the proposed compromise.

66. While the Liquidators set out various classes of creditors in the report prepared for the meeting to vote on the compromise, there is no evidence before the Court of voting outcomes in respect of each class. That would have been helpful. As explained by the Supreme Court in *Trends*, the usual position is that where there is more than one class of creditors, a qualified majority of creditors within each class must vote in favour of the compromise.[11] Vanuatu has a mirror provision to s.230(3). It is s.5(3) of the Act. However, the resolution put to the creditors expressly rebuts the presumption contained in s.5(3) of the Act. Thus, it would seem that approval of the compromise was not conditional on the approval by all classes voting on the resolution. I note that neither counsel made any submissions as to the effect of the wording of the resolution.

67. The evidence establishes that a majority of creditors, both in number and value voted to approve the compromise, as set out at paragraph 65. It was an overwhelming vote for the compromise. Given that the Court does not know the voting outcomes for each class of creditors, it is prudent to proceed on the basis that for voting purposes, the affected creditors were treated as one class of creditors.[12] That means that the government creditors were on both sides of the transaction. But given they only had one vote, that made no material difference. Interestingly, the minority in *Trends* did not think it mattered if inside creditors were in the same class as arm's length creditors.

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[10] *Clause 18, Part 4, Schedule 1 of the Act. This is different to the position in New Zealand, which requires a "super majority".*

[11] *at [1]. That is because of s.230(3) of the Companies Act*

[12] *That is how the applications have framed their argument regarding classification as a material irregularityin approving the compromise or unfairly prejudicial to a creditor.*

68. The policy of the compromise provisions in Vanuatu must, in light of *Trends*, be that the approval of a compromise which reflects a fair business assessment by creditors should be given effect to. This is based on the working assumption that such a business assessment will reflect the common interest of all those who are to be bound by it. Do the creditors here who voted, share common interest in maximising the return on the debts? The answer to that must surely be in the affirmative. As the majority said in *Trends*, for classification purposes, a complete identity of rights or interests is not required. Creditors can be classed together, where, despite differences in interests and rights, they can be expected to vote on the basis of a "*class-promoting view*".

69. The affected creditors are the creditors who were asked to compromise part or all of their debt. They are employees (superannuation entitlements and other employee claims), and general unsecured creditors. These creditors are owed money by AVOL. Employees or former employees have preferential status up to a maximum of VT 1,000,000.[13] Thereafter, they are unsecured creditors. It could be said there are differences in rights and interests. However, they are all arm's length creditors who share a common interest in maximising the return on their debts and could be expected to vote accordingly. Some of the general unsecured creditors are owed considerable sums of money by AVOL. Frankly, some of the unsecured creditors of AVOL may then have had less, rather than more, incentive to vote in favour of the compromise, depending on the size of the estimated debt relative to the estimated return under the compromise. Like the applicants and other affected creditors, they will have an interest in maximising their return. In that sense, they could be expected to vote on the basis of a "*class-promoting*" view.

70. I do not think the preferential status of five of the six creditor applicants means that for voting they should have been classified separately. Thereafter, they are unsecured creditors. Importantly, they have the same common interest as other unsecured creditors to get as good a return on their debt as possible. The interests of the affected creditors is maximisation of return on debt. In that sense, apart from the government creditors, the affected creditors were all on the same side of the underlying bargain. I do not think that classification miscarried because the government creditors were included in the class as they had one vote and could not materially influence the voting. As I have already said, the required majority was achieved without their vote being taken into account.

[13] *Clause 16(1) and (2), Part 3, Schedule 7 of the Act.*

71. I have also considered whether the common interest the creditors share is outweighed by other considerations. These include treatment under the compromise and the benefits and drawbacks of the proposal. Objectively speaking, the estimated return under the compromise to the applicants is better than general unsecured creditors, being USD .50 cents compared with USD .05 cents. But unlike Trends, it is not a situation where the arm's length creditors are being treated "*vastly differently*". All affected arm's length creditors are compromising their debt.[14]

72. As the majority said in *Trends*, within any group of creditors, there will be some whose personal circumstances make them more or less willing to accept a compromise. The majority saw no need for separate classification of such creditors. It could be thought that the applicants fall into such a category. The inference from the sworn statements of the applicants is they feel poorly treated by AVOL, but that is not a reason to classify them separately.

73. As set out above, the applicants raise an issue about coercion, and pre determination of the compromise outcome. In the application, it is suggested that the Liquidators coerced retained employees into voting for the compromise [15] There is no evidence of coercion before the Court. It is an assertion contained in the application and is not evidence. There was no application to adjourn the hearing to put such evidence before the Court.

74. So, the only evidence about asserted coercion is contained in Mr Kelly's sworn statement filed on 16 September 2024. He denies that he or the other Liquidators coerced any creditor into voting in any particular way. He said they met with particular creditors, including employees, to explain the content of the second report including the terms of the proposed compromise, and at no stage did the Liquidators force, pressure or intimidate any employees. The Liquidators also deny that there was any pre-determined outcome. With respect, this submission should not have been made absent an evidential foundation and without a challenge to Mr Kelly's evidence.

75. Mr Kelly categorically denies that the Liquidators manipulated the voting to achieve a particular outcome, or that there was a pre-determined outcome. While there are

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[14] *In Trends, the small creditors were receiving a full, or near full return on their debt. Whereas other creditors were offered a return of 11-18 percent on their debts - so, 11-18 -100 percent. The Supreme Court said there would be an appearance of substantial unfairness. Here, the return for the affected creditors is estimated to be USD .50 cents per dollar of USD .05 cents- so 5 percent – 50 percent.*

[15] *At paragraphs 21 and 22 of the application*

a large number of unsecured creditors, some of the debts are significant, as evidenced at Appendix E of the compromise report. For example, Air Lease Corporation's debt is estimated to be USD 32,720,343.34. Australian Customs Services debt is estimated to be USD 1,041,546.00. The circumstances are very different to *Trends*, where there was manipulation by including small creditors, who were owed $1000 or less in the compromise. They were to get what they were owed and were not in any real sense, compromising their rights. The Supreme Court said the treatment they were to receive under the compromise was so different from that of larger creditors that they ought not to have been classified with them.

76. I do not consider that the Liquidators manipulated the voting to achieve approval of the compromise. Mr Kelly's uncontroverted evidence speaks for itself. Mr Kelly makes it clear that that the Liquidators at all times acted independently and in the interests of the company's creditors. He confirms that they have a duty to act in the interests of the company's creditors as a whole.[16]

77. I do not consider that there has been a misclassification of creditors, for the reasons detailed above. A single class of creditors was appropriate. In summary, the affected creditors who voted had a common interest in maximising the return on their debt, even if their rights and interests were different. They could be expected to vote on the basis of a "class-promoting" view. The affected creditors were on the same side of the underlying bargain (apart from the government creditors). I do not think there is any appearance of substantial unfairness either. As I have said, the affected arm's length creditors are not treated "vastly differently" under the compromise as all are compromising all or part of their debt, as discussed at paragraph 71. Therefore, there is no material irregularity under s 7(3)(b) or unfairness under s 7(3)(c) in terms of classification of creditors.

Sufficiency of information to make a decision on the compromise proposal

78. The applicants are highly critical of the financial information available to the creditors in order to vote on the compromise proposal. I assess this is a key aspect of the application. Both the Court of Appeal and the Supreme Court in *Trends* considered that failure to provide information can be a material irregularity under s

[16] *Sworn statement filed on 16 September 2024 at paragraph 15.*

232(3)(b) and said it could also make a compromise unfairly prejudicial to a creditor under s 232(3)(c).

79. Was there was adequate information for the creditors to undertake a vertical comparison? As the Court of Appeal said in Trends, "*a generic rather than a prescriptive approach to the provision of information is required. The statutory assumption appears to be that a proponent will make a full disclosure of all material that will be sufficient to enable a third-party creditor to make an accurate and considered decision on whether to agree*".[17]

80. For ease of reference, I deal with the various matters the applicants say mean that there has been an insufficiency of information or misstatement so as to render the compromise materially irregular or unfairly prejudicial, as set out in their application.

Names of interested parties not disclosed

81. There is no dispute that the details and names of other interested parties who expressed an interest in either sale or re capitalisation have not been disclosed to creditors. The rationale is set out in the Liquidators report and in Mr Kelly's sworn statement filed on 16 September 2024. Interested parties were required to sign non-disclosure agreements. The reasons proffered are commercial sensitivity for interested parties and to avoid prejudicing any future sale process in the event that the creditors did not approve the compromise. In any event, it is irrelevant. In terms of deciding whether or not to accept the compromise, the issue for the creditors was not a relative comparison between compromise options but rather between the compromise proposal and what the return would be to affected creditors if the liquidation continued.

No reasons given why AV3 proposal should be accepted

82. The applicants assert that the Liquidators used their "position of power" and pushed the AV3 proposal without explaining or giving evidence as to why the proposal was best for the company and the creditors. An allied point is that there is no information provided how and why a piecemeal sale of assets would not realise greater returns for the creditors.

[17] *Trends Publishing International Limited v Advicewise People Limited [2017] NZCA 365 at [68]*

83. Insofar as the compromise is concerned, the property available for the compromise is USD 3,300,000, to be made available by AV3 in three separate tranches. The terms of the compromise are clearly set out in the report for the compromise meeting, as detailed above. Based on the compromise, it is assessed that employee claims would be paid at the rate of approximately USD .50 in the dollar and unsecured creditors would be paid at the rate of USD .05 cents in the dollar.

84. This is a recapitalisation proposal. The point of the compromise is to enable AVOL to continue to operate, and to do this, creditors were asked to release debt in consideration for allowing AVOL to continue to operate. The reasons for the AV3 proposal are set out in the Liquidators' report at paragraphs 2.2.3, 2.2.4 and 4.3 in particular. This is the information set out at paragraph 19 above. Significant factors appear to be that the compromise is a going concern outcome, it attempts to preserve the company's AOC, prevents crystallisation of several contingent creditor claims and provides a better return to creditors than a wind down scenario. I do not accept that the Liquidators did not give any reasons as to why the AV3 proposal should be accepted, given the information provided in the compromise report. Such a suggestion is misconceived.

85. In proposing the compromise, the Liquidators indicated that creditors should consider a comparison of outcomes. In that regard, there needs to be information available to the affected creditors to be able to undertake a vertical comparison- a comparison between the compromise as opposed to a wind down and sale of the assets of AVOL. The Liquidators provided information in the report as to the most likely alternative scenario to the compromise. Their view is that, in the event of the compromise not being approved, the most likely scenario would be a wind down of the company and a piece meal sale of assets.

86. An asset sale would lead to crystallisation of contingent debts and the Liquidators' costs would also be paid. For the purposes of the compromise, the Liquidators costs are excluded, so that the full pool of USD 3,300,000 as available for creditor claims. In the event of an asset sale, it is estimated that employee claims would be paid at the rate of USD 42.6 cents in the dollar and unsecured creditors would receive nothing.

Misrepresentations relating to Liquidators fees

87. I cannot accept the assertion that the Liquidators have misrepresented fees and legal costs by not referring to them in the compromise scenario but including them in the alternative wind down scenario. There is no doubt that the fees are significant, and as such a highly relevant consideration for creditors in assessing the compromise against a wind down scenario.

88. Liquidators and legal fees are excluded from the compromise scenario because they are not to be paid out of the funds available for the compromise. That is part of the compromise arrangement. Whereas if the compromise was not accepted, and the company assets are sold off, the Liquidators fees, as would ordinarily be the case, are payable from the property that would otherwise be available to the creditors. This is explained by Mr Kelly at paragraph 18 of his sworn statement filed on 16 September 2024. The estimated value of Liquidators and legal fees in a wind down scenario is USD 2.1 million.[18] That the pool of funds available to creditors would be diminished by USD 2.1 million is information creditors needed to be able to make an appropriate assessment.

Misstatement of amount owing to the 25 creditors

89. The applicants say that the Liquidators have materially misstated the amount owing to the 25 creditors in their class. They estimate the amount to be USD 10 million, whereas the Liquidators estimate the amounts owing to be USD 990,114. As Mr Kelly explains in his sworn statement of 16 September 2024, those claims relate to employee entitlement claims of employees who had resigned or were made redundant and have outstanding entitlement balances or have disputed outstanding entitlement balances. The figure was formulated after he and his staff reviewed the books and records of AVOL in relation to those claims as well as the information and documents submitted by those creditors as part of the informal proof of debt process conducted during the liquidation. He notes also that the Liquidators have not adjudicated on any creditor claims, so it is difficult to see any prejudice to those creditors.[19] I agree. They are able to file formal proof of debt claims, which will then be assessed by the Liquidators.

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[18] *refer paragraph 5.3 of the compromise report*

[19] *Clause 16, Part 6, Schedule 1 of the Act provides that the Chairperson has the power to determine for the purpose of the meeting the value of a creditors claim against the company*

Potential claims not being pursued/non-disclosure

90. The applicants raise concerns as to the Liquidators not properly or fully investigating claims against other parties; the directors, the "written assurances" given by the government for audit purposes, and auditors. They are critical of the lack of disclosure of the written assurance and the plane claim in the compromise report. The Liquidators submit that the non-pursuit of potential avenues for recoveries is not an irregularity, or alternatively any irregularity is not material.

91. The applicants have not provided any evidence to the Court from a suitably qualified expert as to areas for investigation which could lead to recoveries for creditors. In *Trends*, an affidavit from an accountant opined that there were areas of investigations which could lead to recoveries for creditors including claims based on:[20]

    (a) reckless trading;

    (b) directors' duty of care;

    (c) directors' duty to act in good faith and in the best interest of the company;

    (d) investigation into related party transactions;

    (e) keeping of books and records; and

    (f) actions against third parties.

92. Conversely, Mr Kelly explained in detail what steps the Liquidators took in relation to potential recoveries for creditors.[21] Mr Kelly deposed that the Liquidators had formed the view that there were no potential claims that could justifiably be construed as potential assets of the company that should be taken into account by creditors for the purposes of voting on the compromise. In particular, they had not identified sufficient evidence to establish whether there were any claims against the directors, the government, or the auditors, including reasonable prospects of success or whether there would be any recovery for the benefit of creditors. Mr Kelly also deposed that the Liquidators conducted preliminary investigations into voidable transactions, voidable charges, undervalue transactions, excessive

[20] *This is detailed at [61] of the Court of Appeal's judgment*
[21] *I refer in particular to paragraphs 19 to 24 of his sworn statement filed on 16 September 2024.*

consideration with directors and inadequate consideration with directors under Schedule 6 of the Act. Initial investigations indicated there was no documentary evidence to support any claims, the oral evidence was inconsistent and conflicting, and some claims were likely to be contested and involve protracted litigation. In the absence of sufficient evidence to warrant the Liquidators doing so, they were not able to continue incurring fees and costs to continue their investigation.

93. As Mr Kelly said, creditors were advised in the compromise report that if the compromise was accepted and the liquidation terminated, the Liquidators would not be empowered to further investigate the conduct of the company and its current and former directors. The Liquidators made it clear that they were unclear if there may be potential claims against any parties. And that without further funding the Liquidators would not have the financial capacity to pursue any potential claims (should there be such a claim).

94. The applicants raise the plane claim as a potential avenue in terms of a recovery for creditors. This was referred to briefly in the Liquidators first report to creditors. The plane claim is not specifically referred to in the liquidator's report of 11 August 2024. In 2019, AVOL paid a deposit of USD 20 million to Airbus pursuant to a contract dated 5 February 2019 for the purchase of a number of aircraft. The contract was terminated as AVOL was unable to fund the balance of the purchase price. Mr Kelly explains the steps taken to investigate the plane claim in his sworn statement filed on16 September 2024. He deposes that based on the information and documents available, the Liquidators formed the view that AVOL did not have a contractual right to recover the deposit paid to Airbus. At paragraph 36 of his sworn statement, he said he formed the opinion that the plane claim was not an asset of AVOL and was not a material matter to disclose in the report. He details the further enquiries made to inform their view about that issue.

95. The applicants allege that the Liquidators failed to disclose the terms and conditions of the written assurance of the Vanuatu government to AVOL, "*who promised to pay all debts and liabilities of AVOL*". By consent, letters signed by the Prime Minister and other government ministers addressed to ICount Accountants were tendered to the court. The most recently is date 6 September 2022. It relates to the audit of the financial statements of Vanuatu for the year ended 31 December 2021. It is described as a letter of support. It says;

> *"On behalf of the government of the Republic of Vanuatu, being the shareholders of Air Vanuatu (Operations) Limited, we confirm that we*

shall continue to provide financial support for the forthcoming years to the above-mentioned company and all wholly owned subsidy companies to enable them to meet their debts as and when they fall due.

This advice is provided so as to enable the company to continue to prepare its accounts on a going concern basis".

96. The applicants' position is that the written assurance means that their debts should be repaid in full. It is a "*thing in action*"; an enforceable promise. Mr Perry has given notice, as required by section 6 of the State Proceedings Act, to the Attorney General, seeking full payment of his unpaid wages and other entitlements, as well as notice of his intention to commence action to recover payment. The written assurance was raised in the creditors meeting before voting. It was raised by Mr Perry and Mr Daniel Garrigan. The response of the Liquidators was that they could not comment on alleged historical representations made by the Vanuatu government prior to the liquidation of the company. But that the Vanuatu government had provided significant financial support to the company until shortly prior to the liquidation.

97. Mr Kelly addresses the written assurances in his sworn statement filed on 16 September 2024. This issue was raised in the meeting as detailed in the minutes of the meeting. Audit reports for AVOL for the financial years ending 2016-2020 and 2021 (in draft) refer to a written assurance form the Vanuatu Government in relation to providing financial support to AVOL for the purpose of the auditor's going concern assessment. His view is that the written assurances were provided for that limited purpose only and not said to be guarantees or promises to pay AVOL's debts at that time or in the future. He formed the opinion that the written assurances were not material matters requiring disclosure, as;

a) Given the age of the most recent audit report (2021), it was unlikely that the written assurance would apply to any of the current creditors of the company such that they could claim their debts could be covered by the written assurance.

b) The written assurances were given in relation to debts incurred in that financial year and given for the limited purpose of supporting the ongoing concern opinion of the auditor.

c) We're not guarantees or promises to meet AVOL's debts.

98. Both Mr Fleming and Mr Hurley made submissions about the legal enforceability of the written assurance. The applicants proceed on the basis that the written assurance is a legally binding promise. That has informed their position that it should have been disclosed. The difficulty with that is that it is for a Court to determine and not the applicants.[22] Mr Hurley does not accept that the written assurance is legally enforceable. He points to section 60 of the Public Finance and Economic Management Act [CAP 244] which specifies what is required for a Government guarantee. There is no evidence before the Court to show that the written assurances would meet the statutory criteria for a Government guarantee.

99. A point well made by Mr Hurley is that the Court's focus should not be on an analysis of whether the Liquidators views on the validity or otherwise of potential claims was correct or not. It is not an exercise in second guessing the Liquidators views. The question is whether the lack of reference to possible recoveries in the report meant either material non-disclosure or a lack of information to make a reasoned judgment as to whether to accept the compromise or not.

100. Mr Kelly has explained why potential avenues for recoveries to creditors were not detailed in the report, as discussed above. I make four points. First, the applicants have not provided any expert opinion to counter Mr Kelly's evidence. So, there is not an evidential foundation from a suitably qualified expert to suggest that the Liquidators did not adequately consider potential recoveries.[23] Second, the unchallenged evidence is that the Liquidators did. The fact that Mr Kelly was not cross examined about this leaves it specifically unchallenged, and so in the normal course it would be accepted; *Fisher v Wylie* [2021] VUCA 5. Mr Kelly said the Liquidators had not identified sufficient evidence to pursue any claims avenues, such as the potential for claims against the directors, government, auditors, the plane claim and the written assurances. In those circumstances, the lack of detail

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[22] *I have considered one of the cases cited by Mr Fleming in his submission, Anglican Development Fund Diocese of Bathurst v Palmer [2015] NSWSC 1856. I do not intend to undertake an extensive analysis of the case. It involved a letter of comfort given as part of a commercial banking arrangement. The letter provided security for a $50.1 million loan facility from the Commonwealth Bank of Australia. The Court held that the question was whether the terms of the letters of comfort, seen against the events which surrounded its inception, reflect an intention to create legally binding relations? The Court said the letter of comfort was a commercial document. Its meaning is to be determined by what a reasonable business person would have understood it to mean. The Supreme Court of New South Wales considered that the letter of comfort, seen against the events that surround its inception, reflect an intention to create legally binding relations. Its purpose, formality, terminology and substantive content all evince that intention. It was required as security for the transaction.*

[23] *Both Mr Perry and Mr Bourgeois provide their view of both the operation of AVOL and possible recovery avenues. However, I assess their evidence to be inexpert opinion. I appreciate Mr Bourgeois was a director of AVOL, but there is no evidence that either applicant is for example, an insolvency expert with suitable qualifications and experience to give substantially helpful evidence about insolvency issues*

in the compromise report is explicable. Third, I accept Mr Hurley's submission that it is not for the Court to undertake an analysis of whether the Liquidators views were correct or not. The issue for the Court is whether based on the evidence there was material non-disclosure, an aspect of which relates to potential recoveries. Fourth, the Liquidators fairly explained in the report that approval of the compromise would mean that any potential claims would not be further investigated. For these reasons, I do not consider that the lack of disclosure about potential recoveries was material given the matters discussed above.

The information provided to creditors

101. Under s 4(2)(b)(iii)A of the Act, the statement to be given to creditors when a compromise is proposed required the Liquidators to detail the property of the company available to pay creditors claims. This can be construed in two ways. The first is that given the statutory context, this refers to the property available for the compromise. That is because the statement must set out the terms of the proposed compromise and the reason for it and specifying (where applicable) ***the property of the company that is available to pay creditors' claims. (Emphasis added).*** The second is that it refers to all assets (or potential assets or recoveries) of a company. I tend to the view that when the provision is read in light of its text and purpose, it is referring to the property available as part of a compromise. In any event, I intend to consider what information was available to creditors about company property, beyond the pool of funds to settle creditor claims.

102. The Liquidators do not accept that they failed to comply with their statutory responsibilities to provide information to creditors in relation to the property available to pay creditors' claims. First, the compromise report sets out the property available to pay creditors claims under the compromise proposal, being USD 3,300,000. Second, they provided the most accurate information they were able to obtain in relation to the assets and liabilities of AVOL based on the investigations they undertook since appointment as well as the books and records of AVOL. In the report, the Liquidators set out the estimated values of the tangible assets at paragraph 5.3. It is true that the individual values (the low ERV and the high ERV) of realisable assets have been withheld from the creditors. However, the Liquidators set out the total value of the realisable assets. The reason for withholding individual values is commercial sensitivity in the event that the compromise was not approved by the creditors. This is understandable.

103. As Mr Kelly points out in his sworn statement filed on 16 September 2024, the Liquidators identified the assets and liabilities of AVOL to the best of their knowledge. I assess the Liquidators were candid with creditors as they acknowledged that they had encountered difficulties in obtaining financial information in relation to AVOL and that there were inaccuracies in the books and records maintained by AVOL. By inaccuracies, Mr Kelly explains they were referring primarily to the values ascribed to the company's assets and liabilities as contained in the books and records and not the existence of assets and liabilities. The inaccuracies hampered the ability of the Liquidators to provide an accurate estimate of the value of the assets and liabilities.

104. It is true that there are no audited accounts beyond the draft 2021 accounts, but the difference between the compromise proposal put forward here and the situation in *Trends* is that the Liquidators, who are independent and experienced professionals have prepared the financial information. In *Trends*, very limited financial information was available to the creditors. I note also that the Liquidators are not under a duty to provide audited accounts. What they are required to do is to keep accounts and records of the liquidation.[24]

105. The provision of information was considered in the minority judgment in *Trends,* and was said to be a material irregularity. Some context is needed. The two directors of Trends Publishing sought advice from an experienced insolvency practitioner, a Mr Khov, about the options open to it. He advised on and later formulated the compromise. However, no evidence was provided by Mr Khov. However, the challenging creditors adduced evidence from an experienced insolvency practitioner to support a submission that affected creditors were more likely to receive a greater return from a liquidation than through the compromise[25]. The statement circulated by Trends to creditors did not contain any financial information at all. After a request by one of the creditors, Callaghan, for further information a one-page summary of Trends financial position was provided two days before the creditors meeting. It did not show inter-company balance assets that appeared on Trends financial statements of $24.8 million and investments in subsidiaries of $7.4 million. The Supreme Court said the one page summary was inadequate, no information was provided as to intercompany indebtedness, there were no accounts for 2013-2015, no details as to the amount and source of the fresh capital and no information as to potential claims against Callaghan(which might have constituted a contingent asset which the creditors should have been

[24] *Clause 15(1)(a), Part 3, Schedule 2 of the Act*
[25] *As set out in Advicewise People Ltd and Ors v Trends Publishing International Ltd [2016] NZHC 2119.*

able to consider), and nor was there any information given about the related party transactions which a liquidator could have investigated.

106. I consider that the information available to creditors for the purposes of voting on the compromise is significantly greater than was available to creditors in Trends;

- First, the Liquidators identified the assets and liabilities of AVOL, based on their investigations and the books and records of AVOL. This included valuations of the realisable assets, and details of the liabilities.

- Second, the amount and source of the fresh capital to put the compromise into effect was clearly identified.

- Third, the position under the compromise proposal and under a wind down approach are set out in the report, along with the comparative advantages and/or disadvantages.

- Fourthly, the Liquidators acknowledged that there may be inaccuracies in the books and records, and the lack of audited accounts since 2021.

- Fifth, the report detailed that if the compromise was accepted and the liquidation terminated, then the Liquidators would not be empowered to investigate the conduct of the company and its current and former directors.

- Sixth, the Liquidators specifically noted that they were unclear as to whether there may be potential claims against any parties, and explained the lack of funding available to pursue claims (if any).

107. Given the discussion above, I consider that there was sufficient information provided by the Liquidators for the creditors so that they could make a reasoned judgment as to whether to accept the compromise. That included having sufficient information to undertake a vertical comparison between the compromise proposal and what the return would be under a wind down and sale of assets. The funds available for the compromise were clearly set out in the report, as well as the source of the funds. Financial information, including the asset and liability position of the company, is detailed in the report. The Liquidators were transparent that they were unclear about any potential avenues for recovery, and that without further funding they would not have the financial capacity to pursue any potential claims (should there be such a claim). The reasons for the compromise are set out in detail in the report, as were the reasonably foreseeable consequences. The creditors could be

under no illusions that the compromise involved a recapitalisation to preserve AVOL's business, and enable it to continue to operate, and employ staff.

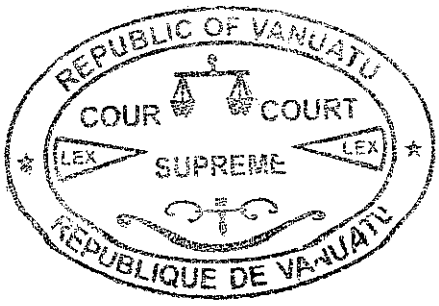
108. In all the circumstances, I do not consider that there was either material non-disclosure or inadequate information given to creditors in order to make a reasoned judgment whether to accept the compromise or not, so as to be a material irregularity in terms of s.7(3)(b) or unfairly prejudicial under s.232(3)(c) of the Act.

Unfairly prejudicial?

109. In assessing unfair prejudice under s.232(3)(c), the focus is on the substantive fairness or otherwise of a compromise. A vertical comparison in this case involves a comparison between the compromise and the wind down scenario. A compromise may be substantively unfair if the outcome for creditors is less satisfactory than would result from the alternative. A horizontal comparison relates to differential treatment of creditors.

110. As the majority noted in *Trends*, whether a vertical comparison results in substantive unfairness will usually depend on an evaluation of uncertain and perhaps contested contingencies. Such an evaluation will seldom be precise and may be susceptible to more than one opinion. More significantly, such an evaluation is primarily for the creditors affected. In the normal course of events, it is not for the court to second guess that evaluation.[26]

111. Under a vertical comparison, the affected creditors are estimated to receive a better rate of return than under a wind down scenario. One of the unknowns of an asset sale is the realisable value of assets, when sold in a "*fire sale*". In his sworn statement Mr Perry deposes that the compromise is irregular, unfair and prejudicial as it will stop the creditor applicants from being able to recover money owed to them for many years hard work. However, the position is unlikely to be any different if the liquidation continued. That is because proceedings cannot be issued against a company in liquidation unless the Liquidator agrees or the Supreme Court orders otherwise.[27] The applicants would not have an automatic right to take legal steps to recover unpaid entitlements if the liquidation continued.



[26] *at [73]*
[27] *Clause 4, Part 3, Schedule 4 of the Act.*

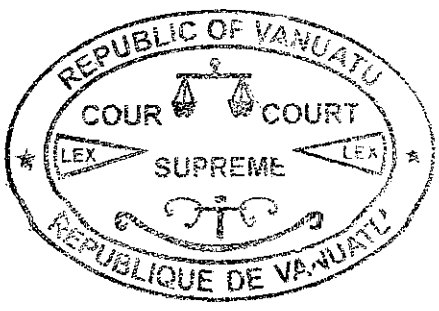
112. In terms of the horizontal comparison, the applicants are in a better position in terms of the percentage recovery of the debt, as opposed to general unsecured creditors. This is unlike the situation in *Trends* where creditors with debts of $1000 or under would it be paid in full.

113. It cannot be said there is substantive unfairness to the applicants based on either a vertical or horizontal comparison. Another factor relevant to substantive unfairness is that even before the compromise was approved, Mr Perry had signalled his intention to pursue a claim against the Government relating to the written assurance. The compromise does not affect his (or the other applicants) right to take such action. Further, having regard to *Buttle v Allen* CA 131/93, 29 October 1993, there may (or may not) be other avenues for the applicants.

114. For the sake of completeness, I will briefly address other complaints, such as a lack of Liquidation Committee, or that the Liquidators did not acquiesce to Mr Perry's demand that the compromise meeting not proceed. There was no Liquidation Committee. While the Act provides for Liquidation Committees, there is no requirement in the Act that there must be such a Committee formed. Nor can I see how the fact that the compromise meeting went ahead, despite one creditor's objection, is a material irregularity or unfairly prejudicial. There is a discretion for a Chairperson to adjourn a meeting, with the prior agreement of the creditors,[28] but they are not obliged to do so. I do not think those matters are relevant to the considerations under s 7(3)(b) or (c) of the Act.

Outcome

115. I decline to set aside the compromise. I do not consider that there was any material irregularity in obtaining approval of the compromise or that it is unfairly prejudicial to the applicants under s.7(3)(b) or (c) for the reasons set out the preceding paragraphs. For the same reasons, I do not consider that the applicants should be excluded from the compromise. Briefly, in summary, I do not consider that there was a misclassification of creditors, the creditors had sufficient information to make a reasoned judgment on the compromise, there was not material non-disclosure and the compromise is not substantively unfair on either a vertical or horizontal comparison.



[28] *Clause 7, Part 4, Schedule 1 of the Act*

Should the Court make the orders sought to implement the creditors compromise and terminate the liquidation ?

116. The Liquidators seek a number of orders so as to implement the terms of the compromise. They also seek that the liquidation is terminated.

117. A Deed of Compromise was entered into on 3 September 2024 by the Liquidators, Air Vanuatu (Operations) Limited (in liquidation) ("*the company*") and AV3 Ltd ("*AV3*") and is annexed to Mr Kelly's sworn statement file on 6 September 2024. The salient terms of the Deed of Compromise are set out at paragraph 23 of Mr Kelly's sworn statement dated 6 September 2024. They are:

a) AV3 will contribute USD 3,300,000 to a fund to be distributed to affected creditors, to be paid in three tranches of USD 1,100,000 over a 10 month period;

b) All the shares in the company are to be transferred to AV3 following receipt of the first tranche of the contribution sum;

c) During the period of the compromise, the Liquidators will assume a role as "*Compromise Administrators*", with the power to adjudicate creditor claims and distribute the compromise sum;

d) The Liquidators will only have the powers detailed in the application;

e) In the event of a default under the compromise as set out in the Deed of Compromise, the Compromise Administrators will be empowered to call a meeting of the affected creditors to decide whether or not to terminate the compromise. In the event that affected creditors vote to terminate the compromise then the share transfer and termination of the liquidation will be set aside.

118. AV3 has indicated that it intends to provide a letter of comfort to AVOL of AV3's intention to contribute funds to support the company's ability to meet its future financial obligations. The draft letter of comfort is attached to Mr Kelly's statement and helpfully, makes it abundantly clear that it is not intended to be a guarantee.

119. It is unnecessary for me to set out the background to the Deed of Compromise as it is explained in detail at paragraphs 6- 24 (inclusive).

The orders sought

120. Orders are sought to give effect to the conditions of the compromise and the Deed of Compromise and for the liquidation to be terminated.

121. The Liquidators seek a number of orders as set out in the amended application filed on 12 September 2024. In the outline of submissions, the orders sought are categorised as:

a) Share transfer orders;
b) Liquidation termination orders;
c) Powers orders;
d) Remuneration orders;
e) Personal liability relief;
f) Operational orders;
g) Reversionary share transfer orders.

Legal basis for the proposed orders

122. The Court does have the power to terminate a liquidation under s.52 of the Act. Unlike New Zealand, there is no express power to approve a compromise in Vanuatu.[29] Section 7 of the Act sets out the powers the Court has in relation to a compromise. On a plain reading of s7, it does not enable the Court to make the orders as sought. Mr Hurley does not suggest that is the statutory basis for the orders the Liquidators are asking the Court to make. Rather, it is submitted on behalf of the Liquidators that the Court's power to make the orders is found in s.52 of the Act, and clause 22(a), Part 4 of Schedule 2 of the Act.

123. Section 52 says;

> *52 Termination of liquidation by Court*
>
> *(1) A person specified under this subsection may apply to the Court for an order to revoke the appointment of the liquidator:*
>
> *(a) the liquidator of the company; or*
>
> *(b) a director of the company; or*

[29] See Part 15 of the New Zealand Companies Act

(c) a shareholder of the company; or

(d) a creditor of the company; or

(e) the Registrar.

(2) The Court may, at any time after the appointment of a liquidator of a company, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company.

(3) The Court may require the liquidator of the company to give a report to the Court with respect to any facts or matters relevant to the application.

(4) If the Court makes an order, the company ceases to be in liquidation and the liquidator ceases to hold office with effect on and from the making of the order or any other date specified in the order.

(5) The Court may, on, or at any time after, making an order, make any other order that it thinks fit in connection with the termination of the liquidation.

And Clause 22(a), Part 4 of Schedule 2 of the Act says;

PART 4 COURT SUPERVISION OF LIQUIDATIONS

22. Court orders

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; or

Discussion

124. It is not the Court's function to consider the merits of the compromise.[30] There are two questions to consider at this point:

a) Is there is jurisdiction to make the orders as sought. If so, should they be made; and

[30] *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy Ltd & Ors [2013] NZHC 3458, and Trends Publishing International Ltd v Advicewise People Ltd [2018] NZSC 62*

b) Whether it is just and equitable to terminate the liquidation.

125. There can be no dispute that the Liquidators have standing to apply for the orders as sought, given they are the duly appointed Liquidators. They may make applications for directions in relation to any matter in connection with the liquidation and to terminate a liquidation.

Share Transfer Orders

126. On the face of it, clause 22(a), Part 4, Schedule 2 confers a broad discretion for the Court to give directions in relation to any matter arising in connection with the liquidation. Mr Hurley submits that the compromise and its terms are matters arising in connection with the liquidation, given that the Liquidators are the proponents of the compromise, and seek the orders to give effect to the compromise proposed to creditors. This must be so as Liquidators have the power to make a compromise or an arrangement with creditors.[31] I accept Mr Hurley's submission that unless the Court orders otherwise, the shares in AVOL cannot be transferred.[32] Clause 22(a) empowers the Court to give effect to the share transfer and to make the ancillary orders sought for the Liquidators to prepare the necessary documentation, and accordingly, I make the share transfer orders as sought. If the Court did not, the terms of the compromise could not be put into effect. It is also appropriate that the share transfer orders are stayed until the Compromise Fund Account is opened and the tranche 1 payment is made by AV3.

Liquidation Termination Orders

127. The issue of whether the Court should exercise its discretion and terminate the liquidation is intertwined with the Deed of Compromise. Termination of the liquidation is part of the deed. That does not however mean that the Court should terminate the liquidation. That is because the Court can only terminate the liquidation if it is just and equitable to do so. In terms of considering whether it is just and equitable, I have been unable to find any authorities or cases from Vanuatu specifically that discuss the factors that a court should or may take into account when deciding whether to make an order under s 52 of the Act.

[31] *Clause 6, Part 2, Schedule 2 of the Act*
[32] *Clause 3(a), Part 2, Schedule 4 of the Act*

128. Therefore, I have looked to other jurisdictions to inform factors relevant to the Court's exercise of its discretion under s 52. There appear to be a number of factors that are taken into account when applying equivalent provisions to s 52 in Papua New Guinea and New Zealand.

Papua New Guinea

129. Section 300 of the Companies Act 1997 is the equivalent provision to s 52. Courts in Papua New Guinea have discussed s 300 and generally agree that the following factors should be considered by courts when deciding whether to grant an application to terminate the liquidation of a company:[33]

1) whether notice of the application has been given to all creditors and contributories;

2) the nature and extent of the creditors must be shown and whether all debts have been or will be discharged;

3) the attitude of creditors, contributories and the liquidator;

4) the current trading position and general solvency of the company should be demonstrated, solvency being of significance;

5) any non-compliance by directors with their statutory duties should be explained;

6) the background and circumstances that led to the order of the liquidation being made;

7) the nature of the business carried on should be demonstrated and whether the conduct of the company was in anyway contrary to commercial morality or public interest.

New Zealand

130. Section 250 of the Companies Act 1993 is the equivalent provision to s 52.

[33] *In re Cakara Alam (PNG) Ltd [2009] PGNC 222; N4054 (20 August 2009); In the Matter of Kamsi Trading Ltd (1-13612) [2005] PGSC 44; SC784 (6 May 2005); Sunset Rentals Ltd (In Liquidation), In re [2020] PGNC 260; N8500 (15 September 2020).*

131. The High Court discussed s 250 in *Bunting v Buchanan.*[34] The Court stated that the Court's discretion to make an order terminating the liquidation of a company is broad and may be exercised if the Court is satisfied that it is just and equitable to make the order.[35]

132. The Court also noted four factors that have proved relevant considerations for courts when determining whether to make such an order.

133. The first three factors were identified in *Re Bell Block Lumber Ltd (in liq).*[36] In this case, Tipping J held that the court should not exercise its discretion to terminate a liquidation unless:[37]

1) All creditors had been paid in full or satisfactory provision has been made for them to be paid in full or they consent to the application; and

2) The liquidator's costs have been fully paid or secured; and

3) All shareholders consent or will be no worse off than if the liquidation proceeded to its conclusion.

134. The Court in *Bunting v Buchanan* stated that the Court's discretion to make orders under s 250, "is generally exercised if [these] three factors... are met."[38] The Court also noted a fourth factor that the Court should take into account, the public interest.[39] This factor was identified in *Canterbury Squid Co Ltd v Southwest Fishery Ltd*, with the court stating that:[40]

> *"...the public should not have ...insolvent companies foisted upon them or allowed to operate in such a way that members of the public may be put at risk."*

135. Cooper J expounded on the public interest factor in *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd,* stating that:[41]

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[34] *Bunting v Buchanan [2012] NZHC 766.*
[35] *At [9].*
[36] *Re Bell Block Lumber Ltd (in liq) (1992) 6 NZCLC 67,690 (HC).*
[37] *At 3.*
[38] *Bunting v Buchanan, above at [9].*
[39] *At [10].*
[40] *Canterbury Squid Co Ltd v Southwest Fishery Ltd HC Wanganui M31/93, 24 August 1993 at 6.*
[41] Foundation Securities (NZ) Ltd v Direct Labour Services Ltd *[2008] NZCCLR 1 at [22].*

> *"The Court will also have regard to the public interest, and be concerned to protect the interests of the present creditors of the company, as well as the interests of those parties who would, in future, have dealings with it if the liquidation were terminated."*

136. While these four factors were identified as relevant to s 250 of the Companies Act 1995, the court confirmed that, "these principles have been consistently held as applicable to a consideration under s 250 of the 1993 Act."[42] The four factors identified are not an exclusive list of factors that may be relevant to the court when determining whether to grant an order under s 250.

137. The difficulty is that I do not think the factors considered relevant in Papua New Guinea and New Zealand are very helpful in the context of termination of a liquidation following a compromise agreement.

138. In his written submissions, Mr Hurley submits that it is just and equitable for the Court to make an order termination the liquidation for a number of reasons:

a) The Act provides for compromises, which give creditors an opportunity to consider an alternative to a wind down of a company's business;

b) The compromise in this case is intended to effect a restructure of AVOL's business so that the airline can continue to operate as Vanuatu's national airline;

c) AVOL is expected to return to financial stability and AV3 intends to provide a letter of comfort as further assurance that AVOL's future liabilities can be met as and when they are due;

d) There is no prejudice to creditors of AVOL given that creditors who have compromised their debts will receive a greater return on their debts than if the company was wound down. For creditors who did not compromise their debts, AVOL intends to meet their obligations into the future.

139. Cases from other jurisdictions demonstrate that a range of factors can be taken into account in deciding whether terminating a liquidation is just and equitable. However,

[42] *Bunting v Buchanan, at [11].*

as noted, they do not seem relevant to a situation where termination is sought due to a creditors compromise coming into effect.

140. In Australia, there is a specific provision addressing termination of a liquidation in relation to a company subject to a deed of company arrangement. Section 482(2A) of the Corporations Act 2001 sets out various mandatory factors to be taken into account in such a case. They include, amongst others, the decision of the creditors to resolve that a company execute a deed of company arrangement, whether the deed of company arrangement is likely to result in the company becoming or remaining insolvent and any other relevant matters. I consider it appropriate to same similar factors into account in assessing whether it is just and equitable to make an order terminating the liquidation.

141. Here, termination of the liquidation is sought as part of the implementation of the compromise. In this particular case, I consider that the relevant factors are that a majority of affected creditors approved the compromise, the interests of affected creditors, whether the compromise is likely to result in AVOL remaining insolvent and the public interest.

142. *The compromise* – it is relevant that a majority of affected creditors voted to approve the compromise which is to restructure the company.

143. *Interests of affected creditors*- this is the key issue for the Court given the nature of the compromise, which involves three separate tranches of money from AV3 to settle the compromised debts. So that means that the affected creditors will not receive payment at once. I would not entertain terminating the liquidation unless there was a mechanism to unravel the compromise in the event of non-payment. A key term of the Deed of Compromise is that if AV3 default on making the payments to settle the claims of the affected creditors then creditors will be given an opportunity to terminate the Deed of Compromise in which case the liquidation of AVOL will be reinstated and the shares transferred back to the original shareholders. It is critical that there is a clear pathway to revoke the compromise in the event of a default. The affected creditors voted to approve the compromise so that AVOL could then proceed with recapitalisation. They have put their faith in AVOL so that needs to be reciprocated in a good faith manner. I doubt very much that affected creditors would want to give AVOL a second chance if they default under the compromise. I put to one side the letter of comfort, as I do not think it assists in determining whether or not to terminate the liquidation. AV3 have agreed to provide USD 3,300,000 to compromise the debts of affected creditors. That is the cornerstone of the

compromise and they are obligated to do so. The creditors will be able to vote to revoke the compromise if there is a default, which is an important protection for creditors.

144. *Whether the compromise is likely result in AVOL remaining insolvent* – there is no doubt AVOL was in a hopeless financial situation. Termination of the liquidation will likely have a positive impact on the solvency of AVOL going forward. Liquidation specific costs are significant. In support of the request for urgency, Mr Hanson deposed that liquidation costs are estimated to be USD 111,000 per week, which will no longer be incurred if the liquidation ends. These costs erode the value which would otherwise be available to the company. As I have already said, 175 employees were made redundant effective form 6 June 2024. Mr Kelly deposed that those strategic redundancies have given AVOL the best chance of being successfully restructured. Then there is the letter of comfort. Taken at its face value, AV3 state an intention to contribute funds to assist Air Vanuatu to meet its financial obligations during the comfort period. It does not purport to be a guarantee. Probably more relevantly, in the compromise report[43], the Liquidators note that it is their understanding that AV3 intends to enter into arrangements with third parties who have expressed interest in funding the business of AVOL to support it into the future. They note their understanding that negotiations between AV3 and third parties are ongoing, but no commitments have yet been reached, and that the compromise is not conditional on AV3 entering into any arrangements with third parties. While it would seem that there are no guarantees of third party assistance, there are various signs that AVOL is in a position following the recapitalisation to be financially stable. Going forward, AVOL must have the solvency test set out at s 5 of the Companies Act to the fore.

145. *Public interest*-it is in the public interest for there to be a solvent national airline operating in Vanuatu. I agree with the sentiments expressed in Canterbury *Squid* though, that the public should not have insolvent companies foisted on it, and the risks that carries to members of the public, and as is evident in this case, to its employees. On balance I consider that the public interest does favour terminating the liquidation so that the restructure of AVOL can take place so that there is a national airline operating in Vanuatu. A going concern outcome means that Air Vanuatu can continue to provide critical domestic air transport services.

[43] *At paragraph 2.2.4*

146. After taking into account the relevant factors detailed above, I consider that it is just and equitable to terminate the liquidation. A key factor is that fact that there is a mechanism to revoke the Deed of Compromise in the event of a default. Also, as noted, it is in the public interest for there to be a national airline operating in Vanuatu.

147. I make an order terminating the liquidation.

Compromise Administration Orders

148. As detailed in Mr Hurley's submissions, following the making of an order terminating the liquidation, the compromise and the Deed of Compromise contemplate that the Liquidators will become "*Compromise Administrators*". Orders are sought to assist the liquidators to undertake the role of compromise administrators, and give them protection in relation to payment of remuneration and costs and relieve them of personal liability. In relation to remuneration and personal liability, there are currently orders in place.[44] They seek 5 categories of orders:

a) Powers orders;
b) Remuneration Orders;
c) Personal Liability Relief;
d) Operation Orders;
e) Reversionary Share transfer Orders.

149. Mr Hurley submits that jurisdiction for making these orders is s.52(5) of the Act as these orders are connected to the termination of the liquidation of AVOL within the meaning of s.52(5) of the Act as they are required only in the event that the liquidation is terminated and the compromise is implemented. Mr Hurley further submits that the remuneration orders are also matters arising in connection with the liquidation of the company within the meaning of clause 22(a), Part 4, Schedule 2.

150. Section 52(5) confers a broad discretion for the Court to make any other order it sees fit in connection with the termination of the liquidation. It also contemplates orders being made after the termination of a liquidation. Similarly, clause 22(a) appears to be broad. I have carefully considered whether s52(5) gives the Court the discretion to make the orders sought. Specifically, whether the orders proposed

[44] *See the judgment of Saksak J dated 25 June 2024*

are in connection with the termination of the liquidation? On balance, I consider that the discretion in s52(5) is sufficiently broad for the Court to make the type of orders the Liquidators are seeking. I am satisfied that the orders sought are in connection with the termination of the liquidation. The termination of the liquidation goes hand in hand with the compromise and it is part of the termination of the liquidation that the Liquidators will move to the new role and take all necessary steps to implement the compromise. In addition, clause 22(a) enables directions to be made in relation to any matter in connection with the liquidation .It could be said that the compromise is a matter in connection with the liquidation given that is was proposed and approved during the liquidation.

151. *Powers orders*- The Liquidators seek these orders to empower them, acting as Compromise Administrators, to call for proofs of debt, adjudicate on creditor claims and to pay admitted claims in accordance with the terms of the Deed of Compromise. The orders are sought in order to effect and implement the compromise agreement. These orders are necessary and a protection for creditors, because it is difficult to see how the compromise could be implemented without the liquidators acting as Compromise Administrators.

152. *Remuneration and personal liability relief orders*- As noted above, there are already such orders in force. Essentially, the Liquidators are seeking an extension of those orders to their role as Compromise Administrators. Mr Hurley explains in his submissions that that an order is sought in relation remuneration and costs for work undertaken by them as Compromise Administrators. They also seek orders that they are indemnified by the company and that during the compromise period, the Liquidators acting in their capacity as Compromise Administrators will not be personally liable to any person for loss except if it is caused by fraud or other personal misconduct. I accept that there may be liabilities incurred by the Liquidators acting as Compromise Administrators, such as the costs of adjudicating claims and any appeals arising from the adjudication of claims.

153. These orders are appropriate, for the reasons discussed by Saksak J in the judgment of 25 June 2024. I respectfully adopt his reasoning. As said, these matters are either in connection with the termination of the liquidation or in connection with the liquidation.

154. *Operation orders*- These orders are sought to give certainty to the binding nature of the terms of the compromise and the Deed of Compromise. They do no more

than confirm the terms of the Deed of Compromise, and therefore it is appropriate to make such orders.

155. *The reversionary share transfer orders*- These orders are sought so that the shares can be transferred back to the original shareholders in the event that the compromise is terminated. It is appropriate to make such orders as otherwise there would be no mechanism for the shares to be transferred back.

156. Accordingly, I make the compromise administration orders as sought.

Result

157. The application to set aside the compromise/ declare the applicants are not bound is declined.

158. The Liquidators are entitled to costs in relation to that application, as agreed or taxed.

159. I make the orders as sought by the Liquidators in the amended application filed on 12 September 2024, being:

a) The share transfer orders.
b) The Liquidation Termination orders.
c) The Compromise Administrator orders.

160. Mr Hurley is to file draft orders for sealing.

DATED at Port Vila, this 2nd day of October 2024.

BY THE COURT

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Justice M A MacKenzie

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU