IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

Civil Case No. 46 of 1995

(Civil Jurisdiction)

In the matter of Section 319 of the Companies Act [CAP 191].

AND : **PLANTATIONS REUNIES DE VANUATU LIMITED, a local Vanuatu Company of Norsup, Malekula in the Republic of Vanuatu.**

First Plaintiff

AND : **M.S.A. a business carried on as a Partnership between MOSES EDRIC, ROBERT PAUL, KALMET BENNY and the First Plaintiff.**

Second Plaintiff

AND : **DAVID RUSSET of P.O.Box 377, PORT-VILA, VANUATU.**

Defendant

Coram: LUNABEK J
Mr. Garry Blake for the First and Second Plaintiffs
Mr. John Malcolm for the Defendant

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

JUDGMENT

This is a summons brought pursuant to Section 319(1) and (2) of the Companies Act (CAP 191) by the above named First and Second Plaintiffs/Creditors of North Island Timber Company Limited (the

"Company"). They seek an order against the above named Defendant/Director of the Company, making him personally responsible for the liabilities of the company pursuant to the Section. The Defendant, Mr. David Russet, is a resident and local businessman of Vanuatu. During the period from 1 November 1991 and 30 June 1992, he was a director and/or general manager of North Island Timber Company Limited (NORTICO) (the "Company"). The First Plaintiff, Plantations Réunies de Vanuatu Limited, is a local Vanuatu Company of Norsup, Malekula in the Republic of Vanuatu. The Second Plaintiff, M.S.A., is a partnership carrying on business in Vanuatu under the registered business name M.S.A. the partners of which are the first Plaintiff, Moses Edric, Robert Paul, and Kalmet Benny.

The summons was issued in 1995 on the part of both Plaintiffs as creditors of Nortico in order to recover debts incurred pursuant to trading business between Nortico and both plaintiffs during the period 1 November to 30 June 1992. The Debts in question are subject to a default judgment in the Supreme Court of Vanuatu in proceedings No.88 of 1994. On 17 November 1994, pursuant to the application of the First Plaintiff, Plantations Reunies de Vanuatu, Nortico Limited was placed into liquidation. (Re Supreme Court Order - Civil Case No.131 of 1994). The Plaintiffs could not recover any debts from Nortico Limited in liquidation. They, thus, brought proceedings against the defendant who was, at the relevant times the debts were incurred, namely 1 November 1991 - 30 June 1992, the general manager of the Company in order to recover their respective debts under Section 319 of the Companies Act. They seek for the following declarations and orders:-

1. A declaration under Section 319 of the above mentioned Act that the business of the Company was carried on from 1st November 1991 to 30th June 1992, or alternatively to 10th October 1994 (the date of the commencement of the winding up of the Company), with intent to defraud creditors and for other fraudulent purposes by reason of the fact that the Company continued to trade and to obtain goods and/or services on credit from the Plaintiffs without any means or prospect of being able to pay or provide for payment of the purchase price thereof, and further that the Defendant as a director of the Company was knowingly party to the carrying on of the business of the company in the manner aforesaid.

2. A declaration that the Defendant is liable to pay to the Plaintiffs the following sums :-

First Plaintiff	-	Vatu 2,686,293
Second Plaintiff	-	Vatu 517,281

being the amount of debts owing by the Company to the Plaintiffs in respect of goods and/or services supplies to the Company during the period aforesaid or such part of the said sums as to the Court shall seem fit with all necessary account, inquiries and directions.

3. Payments by the Defendants to the Plaintiffs of the sums to which such declaration extends.

4. An order that the Defendant pay to the Plaintiffs the costs of and incidental to this application.

5. Or that such other Order may be made in the premises as the Court may think fit.

Pursuant to Orders issued by this Court, the Plaintiffs were directed to file their points of claim and the defendant to file their response before the matter is set down for hearing. On 3 June 1996, the matter was heard and both counsels signed and submitted to the Court, a statement of Agreed Facts in the following terms :-

1. The plaintiffs operate business in Malekula.

2. North Island Timber Company Limited ("NORTICO") was incorporated on 26 September, 1988 and was involved in logging on Malekula.

3. The Defendant was at all relevant times an Executive Director of Nortico, namely during the period from 1988 to June 1992.

4. From November, 1988 to June 1992 the Plaintiffs provided petrol and other services such as shipping to Nortico on monthly credit terms.

5. In or about April 1989, Nortico employed John Peter Berg as a saw technician. On 20 April 1992, on the application of North Island Timber Company Limited, his work Permit was extended until 21 April 1993.

6. During the period from 1 November - 30 June 1992, the Plaintiffs at the request of John Berg of Nortico supplied goods and services to Nortico for which payment was never made by Nortico.

7. On 26 August 1994 the Plaintiffs obtained a judgment against Nortico in respect of the non payment by Nortico for goods and services provided by the Plaintiffs during the period 1 November 1991 - 30 June 1992.

8. On 17 November 1994, such judgment having not being satisfied Nortico was wound up.

9. At the time the debts the subjects of the judgment were incurred, there was no reasonable prospect of the Plaintiffs' ever receiving payment of these debts by Nortico.

10. For various reasons and in particular cash flow problems, the business of North Island Timber was not successful.

It follows then that from the above statement of Agreed Facts the following is established as submitted by Mr. Blake on behalf of the Plaintiffs :-

(a) The Company North Island Timber Company Limited ("NORTICO") incurred certain debts to the Plaintiffs during the period November 1991 - June 1992 (the "relevant period") in respect of certain goods and services provided to Nortico by the Plaintiffs on credit.

(b) The request to the Plaintiffs on behalf of Nortico for the supply of such goods and services was made by John Peter Berg.

(c) During the relevant period Berg held a work permit relating to his employment by NORTICO as a *"Saw Technician and Training Officer"* :-

i) On 16 March 1992, the Manager of NORTICO applied for the renewal of Mr. Berg's Work Permit with effect from 21 April 1992. The renewal was sent to the *"Manager, North Island Timber"* and the post office Box to which it was sent was Mr. Russet' box (see page 37 of the bundle of documents EXH.1A).

ii) Mr Berg' s residency permit was also renewed on 5 June 1992 with effect from 20 April 1992. (See page 39 of the bundle).

(d) At the time the debts referred to in (a) were incurred, there was no reasonable prospect of the Plaintiffs ever receiving payment of those debts by Nortico.

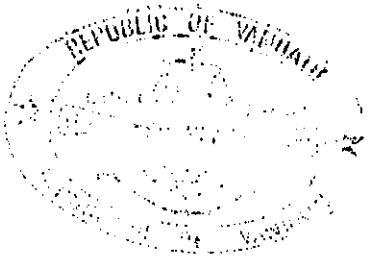
Mr. Gabriel des Fontaines gave evidence for the Plaintiffs. He worked for P.R.V. for 13 years (as from 16 of June 1977 until July 1992). P.R.V. is involved in cocoa , coconut plantations, workshop, store, bakery and is a partner in Malekula Shipping Agency (M.S.A.). He knew David Russet, had good relationship with him and set up business with him as director of North Island Timber Company Limited in respect of the saw mill, logging operations. He also said that most of the time, Russet and his Secretary stayed with him at home. He provided fuel, store credit concerning supply of goods, mechanical repairs and transport of logs and saw Timbers. He described the terms of business trade between P.R.V. and Nortico as terms of good relationship and Trust and that P.R.V. provided to Nortico credit terms up to 2 to 3 months. He said further he knew John Berg on November 1991, and he was the saw mill manager, the Foreman of the exploitation. He went on to say that John Berg ordered fuel because Russet was not always there. John Burg will have more responsibility on Malekula, and he said, by doing so, it will allow Mr. Russet not to come so often. He further said Russet will concentrate on his business in Vila and to exploit logs, it represents big

saving for him to fly to Norsup every month. He said previously Russet paid for the supply of goods in the store and telephone communications made to him on credit and, John Berg used the facilities for credit.
He said he did recall about a meeting and when he was asked if he recalled Russet saying Berg will be liable for the debts of the company, he answered : No. However, he did admit that Berg is personally responsible for debts made for his personal food and telephone communications and said that Berg always settled his debts with the store and paid for his telephone communications and he always gave him (Berg) credits. He stated further that at the meeting held in 1991, no discussions were made about Trading terms between P.R.V. and Nortico but Berg will have more responsibility. He said after that meeting, he is still in good relationship with Russet until the time Mr. Andre Caillard became President of P.R.V. and checked the accounts of P.R.V. and found out the debts. He said he got annoyed with Russet because the debts of Nortico are not settled. He said, in April or May, he rang Russet and told him he will appreciate if he could pay the debts because he will be in trouble with President Caillard. He told President Caillard that Russet always paid his debts. He stated also that Russet told him that he is going to settle the debts and if he can recall, he said Russet told him he is going to replace the fuel. When he was questioned about a contract signed between Nortico and John Berg, he said he had never seen the contract before and a copy was sent to him by Mr. Perinet. He did not stop to provide credit to Nortico but the decision to stop it was Mr. Caillard's in June 1993. He said Russet was betrayed him and he would not give credit to someone if he was told not to provide him with credit any more.

Under cross-examination, he did recall about the meeting but he said he did not recall about the exact date but the said meeting took place at his house. When he was questioned about the accounts of December 1991 and June 1992 he said that all the bills were sent to Berg on behalf of Nortico. He further stated in his re-examination that it is the usual practice between them that the bills were delivered to Norsup or handed to Russet when he came over.

The Defence call two (2) witnesses. The defendant, David Russet was the First witness to give evidence. In his evidence, he said he lived in Port-Vila, Vanuatu at P.O. Box 377. Prior to November 1991 - June 1992, he was the Director of Nortico and did play an active role in the management of that

company. But he denied playing an active role or any role in the management of Nortico after November 1991. He also denied he knowingly defrauded the Plaintiffs. He repeated he did not play an active role in the management of Nortico between the period November 1991 - July 1992. He said during that period he did not receive any letter from Mr. Des Fontaines or the Director or President of P.R.V. or M.S.A. to settle the debts of 2.9 million of Vatu. He denied also that a telephone conversation took place between him and Des Fontaines sometimes in April 1992. He said he was not aware that Nortico or Mr. Berg owed monies to the Plaintiffs until he found out on 2 July 1992 and he took it as personal debts of Mr. Berg. He further said that prior to July 1992 he did not contact P.R.V. or Des Fontaines and that he never received any invoices. He said he tried to settle the problem because he is in charge of other works in the country and also because of his good relationship with the Plaintiffs. He stated that Mr. Berg was employed by Nortico until Mid-November 1991 and then became self-contractor. He said he did discuss about these arrangements with Des Fontaines on a meeting that took place on 14-15 November 1991 at Des Fontaines' house. He did recall about the terms of the meeting but not about the duration. He further said that during the meeting he told Mr. Des Fontaines about the purpose of his visit with his secretary. He said the purpose is to restructure the management of Nortico and he said he did it with a clear purpose in mind knowing that they have commercial relations every months, it was important that Des Fontaines knew about this future management on Malekula. He said he was insisted on the fact that up until the meeting with Des Fontaines, he was responsible for Nortico's debts with P.R.V. and other companies and that he was signing or he was going to sign an agreement with Mr. Berg on the basis of which John Berg will be responsible for the Company's business on Malekula. He said he asked Des Fontaines to reconcile the accounts so that he could pay for all of the Company's debts and that as from 1 December 1991 he said they do not want any more debts of Nortico, his Agents or employees and that in the event that debts are owed subsequently, Nortico and David Russet would not be responsible for these debts. He said Des Fontaines did approve his decision and asked some questions relating to future management under the responsibility of Mr. Berg. He then said that after his return to Vila, he did not receive any requests for payment for the debts.



Under cross-examination, the defendant confirmed that he was the Director of Nortico but that he had no shares. He was then referred to a letter of 22 September 1992 written by him to Mr. Perinet and he had then accepted he had shares and said it will depend on the court to rule if he has shares or not but he did not defraud the creditors. He said the activities of Nortico are mainly : logging, saw milling and marketing. He denied to have plan or intention to set up a logging operation on Santo but said Santo and Vila are international ports and constitute good opportunities for marketing. He denied also having conversation about the intention to establish logging operation on Santo for Nortico. On the question of agreement between Berg and Nortico, he said both parties have good idea to sign the contract. Mr. Berg would get a better return on a long term basis. Then he was asked : who had logging licence? He answered : Nortico had. Berg had no licence. Further he said, it was Berg responsibility. He said he (Russet) did arrangements with Malekula Local Government and the Forestry Department and the custom owners. In the course of his cross-examination, he said he gave special attention to the deal with custom owners and that at one stage he did receive one complaint through Forestry Department on behalf of a custom owner and, as he said, this was after Berg was left and, he said, he asked Forestry Department to double check on Malekula and let him know. And when he was asked whether the said custom owner is an employee of NORTICO or Berg's employee, Mr. Russet said he has to go through his records, he cannot answer that question.

In respect of the new agreement made between Berg and NORTICO, he said Berg would be responsible. He was then asked : you put this in agreement and gave delegation to Berg so that Nortico won't get in trouble?. He answered : That's correct. Later he said the Company will postpone the operations, so no more credits to Nortico. To the question: but how NORTICO paid for the logging? He answered : We postpone logging operations. He did not tell Mr. Des Fontaines, he did not have to, he said. Mr. Berg left Vanuatu on June 1992, the defendant said he did not contact him. He was then referred to his letter of 31.03.93 sent to Mr. Andre Caillard Chairman of P.R.V. in which Russet wrote : "Mr. John Berg also acknowledge his debts to P.R.V. to Mr. Des Fontaines..." and was asked : How do you know that ? He answered : "I did not know. It's a good question". Then he said, Des Fontaines told him and later on admitted, "... Well, actually ... Berg was tired we met him at Hotel Rossi and Berg would like to go to New Zealand for holidays and brought funds with him upon his return" and, he added,

"during our discussions he told us that he had debts". He went on to say that when he dealt with P.R.V., Mr. Des Fontaines was the Director and agreed to give credits to NORTICO whereas he should have stopped that. On the question : - You knew Berg was continued to log ? He replied: "it's normal by the signing of the agreement". Further he was asked : - Do you know that Berg might buy fuel from P.R.V.? He answered : No but he said he was not disagreed with that, it was possible, depended on negotiation with Des Fontaines. He was then questioned about conversations he had with the Westpac Bank Manager on 2 July 1992. The said conversations were noted on the said Bank Manager's diary.
(It should be noted that Mr. Malcolm objected that the defendant be questioned on the bank's record on the basis of hearsay evidence rule. He was then overruled on the basis of Section 3 of the Banker's Book Evidence Act 1879. when he was then questioned again about his conversations with the Manager of Westpac Bank Corporations on 2 July 1992, the defendant said he did not recall saying anything and finally said it is Des Fontaines to be blamed.

The second witness for the Defence was Mrs Bernier. She is the Secretary/ Accountant of Nortico. She gave evidence to the effect that she was in Malekula in November 1991 with Mr. Russet and that they had a meeting with Des Fontaines. She said she recalls partly that David Russet told Mr. Des Fontaines not to give any more credits to Nortico.
She further said they did talk about the situations of John Berg who will take over the responsibility of any debts incurred and owed to P.R.V. She also said she did not receive any invoices.

I think it is important and appropriate in this case to set out in full the evidence on both sides in order to properly deal with the issues that arise in this case.

Section 319 of the Companies Act provides :

> ***(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of***

the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitations of liability, for all or any of the debts or other liabilities of the company as the court may direct.

On the hearing of an application under this subsection the official receiver or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2) ***Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge Or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.***

For the purpose of this subjection, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of the company is carried on with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in manner aforesaid, shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding VT 500,000 or to both.

(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made.

Having regard to the language of Section 319 of the Companies Act and the admitted facts, the only question to be determined by this Court is whether Mr. Russet was "Knowingly" a party to Nortico incurring debts for which there was no reasonable prospect of it ever paying.

However, in order for this Court to answer the question put before it, counsel for the Defendant submitted that whilst this matter is a civil action it carries imprisonment as a possible penalty. He,then, respectfully submitted that the burden of proof upon the Plaintiffs is the criminal burden of proof that is the one of the beyond reasonable doubt. It should be noted that there is no direct authority to the point before the Courts of this country. This is the first application that is brought before this Court under Section 319 of the Companies Act CAP 191. In sub-section 3 of the above Section 319, this Court has a discretion to impose criminal sanction. Because, there is a discretion, it was submitted for the Defendant that the standard of proof to be applied is the criminal standard of the beyond reasonable doubt.

Mr. Blake on behalf of the Plaintiffs submitted that such a proposition is patently false and flies in the face of accepted legal principles about the standard to be applied in civil cases. He then referred this Court to Nishina Trading Co. Ltd -v- Chiyoda Fire & Marine Insurance Co. Ltd (1969) 2 W.L.R. 1094 (C.A.). This is one of the civil actions in which the commission of the crime is alledged in civil proceedings and the question arises as to which standard of proof to be applied. In his judgment, Lord Denning M.R. said (at p.1101):

"The court need not be satisfied beyond reasonable doubt (as in the criminal law) but it should find on balance...".

In Hornal -v- Neuberger Products (1957) the rule seems to be that no more than proof on a preponderance of probabilities is needed.

In Nishina Trading's case, Edmund Davies L.J. cited an accurate and helpful summary on the question of standard of proof to be applied in these types of cases from Professor Cross on Evidence, 3rd Ed. (1967) at p.98 in these words :

> ***" Although there were previous decisions which were not discussed by the Court of Appeal, Hornal's case may be taken to have settled the English Law for the time being. An allegation of criminal conduct, even of murder, need only be established on a preponderance of probability in a civil action when the commission of a crime is alleged in civil proceedings, the stigma attaching to an affirmative finding might be tought to justify the imposition of a strict standard of proof; the person against whom criminal conduct is alleged is adequately protected by the consideration that the antecedent improbability of his guilt is "a part of the whole range of circumstances" which have to be weighed in the scale when deciding as to the balance of probabilities".***

It must be said that although this Court is not bound by any decisions of any other Courts, save the decisions of our own Court of Appeal, I nevertheless, share the view that it can allow itself to be guided and influenced by decisions of Courts within the Common Law system and indeed decisions of French Courts to the extend of their relevancy within the meaning of Article 95 (2) of the (Vanuatu) Constitution. In that sense, it can thus enrich its own jurisprudence by putting to good use and effect, those rules of Law which have proved wise and successful and to have been well tested in other jurisdictions.

In that respect, I agree with the submissions made by Mr Blake on behalf of his clients that the correct standard to be applied is the civil standard of proof on preponderance of probabilities. It is my view that the criminal standard of proof is inappropriate to the determination of any fact in any

civil action tried in any Court in Vanuatu where there are no statutory provisions to the contrary.

I turn now to the question of whether Mr Russet was *"knowingly"* a party to Nortico incurring debts for which there was no reasonable prospect of it ever paying.

It is submitted on behalf of the Defendant that the Plaintiffs are required to prove the Defendant actually carried on business with the intent of defrauding the Plaintiffs; That the Defendant did it knowingly intentionally and was an active part in this alleged fraud. Further that defraud and fraudulent purpose connote actual dishonesty. It is further submitted for the Defendant that the mere status of being a director of a company does not ipso facto mean that, that person had full knowledge of all the Companies transactions. Therefore to be liable, the Plaintiffs have to prove the Defendant had knowledge of the transactions relied on. It was further submitted on behalf of the Defendant that Mere inertia is not enough. Some positive step is required and that the Plaintiffs must prove the Defendant intended to benefit or to protect himself at the expense of the creditors and it is therefore submitted that, in the present case:

- There is no active participation
- There is no benefit to the Defendant
- There was no actual dishonesty by the Defendant and, thus, the claim must be dismissed.

It is submitted on behalf of the Plaintiff that the Defendant clearly knew that Nortico could be incurring debts and this submission is based upon the following evidence:

(a) That the logging operations of Nortico were continuing on Malekula during the relevant period and the logging operation required the acquisition of certain goods and services;

(b) That prior to November 1991, Nortico had for some three (3) years acquired such goods and services on credit from the Plaintiffs on a regular basis in connection with the operation of its business on Malekula;

(c) That Mr Russet knew that Nortico had no reasonable prospect of repaying any debts it incurred after November 1991;

(d) That Mr Russet knew that Nortico did not have the cash flow resources to acquire such goods and services with cash at the time that the goods in question were acquired. Credit terms would therefore always be required by Nortico in order to obtain such goods.

Furthermore, it was submitted on behalf of the Plaintiffs that even if one considers the relationship Mr Russet was seeking to establish with Mr Berg under the terms of the contract between Berg and Nortico appearing at p. 154 of the bundle:

(a) It was clearly intended by the parties that logging should continue during the relevant period;

(b) John Berg had no legal right to log on his own account. He had no licence nor any agreement from custom owners to do so;

(c) Nortico retained him as an employee. See also the work permits current for him during the relevant period and the application lodged on 16 March 1992 to renew his existing permit;

(d) Mr Berg could be no more than an employee of Nortico as it was only in that capacity he was granted a permit to reside in Vanuatu and he did not hold a business licence; and

(e) That, whilst it was intended that Berg would pay certain expenses of Nortico, the liability for those expenses remained Nortico's.

Consequently, it is submitted , it is clear that Mr Russet knew that debts would necessarily be incurred by Mr Berg in the name of Nortico as and from December 1991 and that Nortico would be unable to pay the debts. (Reference be made to point No. 9 of the Agreed Statement of Facts).

I respectfully agree and accept this excellent submission. The expression ***"party to the carrying on of the business"*** means no more than ***"participates in" "takes part in"*** or ***"concurs in"*** so it involves some positive steps of some nature. I agree with counsel of the Plaintiffs that the issue should not be placed on Russet personally. It is not Russet who is personally responsible for the debts but it was Nortico Company. Indeed, there is no issue before this Court about the quantum and I also accept the point that the question of whether Mr Russet did receive or not any invoices as to the goods and/or services corresponding to Relevant Period are not of relevance before this Court, for they have been the subject matter of the Supreme Court proceedings in Re Civil Case No. 88 of 1994. As there is no requirement to deliver invoices to Mr Russet personally but to the Company, they have been delivered to Mr Berg. Mr Russet know that prior to November 1991, Nortico had for some three (3) years acquired goods and services on credit from the Plaintiffs on a regular basis in connection with the operation of its business on Malekula. He knew also that Nortico did not have the cash flow resources to acquire such goods and services with cash at the time that the goods in question were acquired. Credit terms would therefore always be acquired by Nortico in order to obtain such goods. It follows then that in this case, Mr Russet knew that Nortico could not pay and also he knew that Nortico could not have credit from any other company else, particularly at Norsup, Malekula. He, nevertheless, allowed the Company to operate and incurred debts. Therefore, I have no hesitation to hold that Mr Russet knew that debts have been incurred by Nortico to the Plaintiffs.

As agreed by the parties, Mr Russet was the Director and/or Managing Director of Nortico since 1988 until June 1992 which covered the period 1 November 1991 - 30 June 1992 *"The Relevant Period"*; and as such, he could not sit and do nothing.

As General Manager of Nortico, Russet signed an agreement with Mr Berg on 30 November 1991 (See bundle at p. 154) in order to give more responsibilities of the Company to Mr Berg so that Nortico would not be in trouble. He did so knowingly and deliberately so that Nortico would not be responsible for the debts. He knew that Mr Berg had no licence to log, thus he (Berg) had no right to log. Nortico Company only had licence to log. In any event, he went on to sign the agreement with Mr Berg as a self-contractor to

assume the obligations of the company. This is in my view an indirect way of transferring and/or assigning the Company's y to a third Party without the creditors' consent. This is bad in law and this constitutes a clear evidence of an actual dishonesty by the Defendant.

As Manager of Nortico, he applied on 16 March 1992, for the renewal of Mr Berg's work permit with effect from 21 April 1992. The renewal was sent to " *The Manager, North Island Timber" and the Post Office Box to which it was sent was Mr Russet's Box (P. O. Box 377).* (See page 37 of the Bundle). Mr Berg's residency permit was also renewed on 5 June 1992 with effect from 20 April 1992 (See page 39 of the bundle). The application for the renewal of Mr Berg's work Permit was made on 16 March 1992 thus, within the Relevant Period. It must be said that, in this case, Mr Russet was not a Manager in a situation of ***"Mere inertia".*** He did take some positive steps in the "carrying on of the business" of the company during the Relevant Period. He did so by signing the Agreement with Mr Berg so as to assign the debts of the company to him (Berg), notwithstanding the fact that he knew that Berg had no right to log on his own account. Further he did intervene to renew Mr Berg' s Work and Residency Permits as it was only in that capacity as the employee of Nortico that he was granted a permit to reside in Vanuatu and that he did not hold a business licence. It is not surprising to understand, thus, that the intention behind such a manoeuvring plan, because this is what it is a manoeuvring plan, is in fact to allow the company to continue logging operations on Malekula during the Relevant Period by acquiring goods and services on credit from the Plaintiffs, knowing that the company had no reasonable prospect of repaying any debts incurred within such period. This is, thus, a clear participation of the Defendant as ***"party carrying on of the business"*** within the meaning of Section 319 (1) of the Companies Act CAP 191.

As Manager of Nortico, Mr Russet did intervene after Mr Berg left the country to clear or solve any outstanding payment of fees to the custom owners on Malekula. As Mr Russet admitted during the course of his cross-examination that he gave special attention to the deal with custom owners and that at one stage he did receive one complaint through the Department of Forestry and that he told the Forestry Department to double check on Malekula and to let him know and as he said, this was after that Mr Berg left the country. This is a good example which indicates that Mr Berg was the employee of Nortico, and that the contract between Nortico and Mr Berg is just a sort of ***"legal cloth"*** to cover up the real intention to defraud Plaintiffs/Creditors.

In the light of the above considerations and in assessing all the facts, it is more probable than not that Mr Russet is taking some positive steps in the carrying on of the business of the company in a fraudulent manner.

I am, therefore, reasonably satisfied that this is a clear case of conduct of defrauding creditors which falls under Section 319 of the Companies Act CAP 191.

Further, I find it difficult to believe Mr Russet in his evidence as a reliable witness. I do not think it appropriate to go back to the evidence of the defendant but I found his evidence full of inaccuracies. As far as, Mrs Bernier' s evidence is concerned, she is not an independent witness. It seems to me that she told the Court what she was told to say.

Therefore, having considered all the evidence in this case, I accept the evidence of Mr Des Fontaines.

I have been referred to the case of William C Leitch Brothers Ltd (1932) 2 ch 71 at (p 77) in which, Maugham J. came to the following conclusion:

> ***"The conclusion of fact to which I am bound to come is that, at any rate from March 1, 1930, the company was carrying on business with intent to defraud creditors, to the knowledge and, indeed, under the direction of the Respondent. That leads me to the question of the true construction of S. 275 of the Companies Act, 1929, a question of great difficulty. In my opinion I must hold with regard to the meaning of the phrase carrying on business "With intent to defraud creditors" that, if a company continues to carry on business and to incur debts at a time where there is to the knowledge of the Directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud..."***.

I respectfully agree and accept this conclusion and I will be guided by it and I will give the same interpretation regarding the words *"with intent to defraud creditors"* in Section 319 (1) of the Companies Act (Vanuatu)CAP 191.

In this case, I agree with Counsel for the Plaintiffs that given the Defendant's admission as to Nortico's inability to pay the debts, the relevant intent is established. (See § 9 of the Agreed Statement of Facts). On the same line of thought I must hold that with regard to the meaning of the phrase carrying on business *"with intent to defraud creditors"* that, if a company continues to carry on business and to incur debts at a time where there is to the knowledge of the Director and/or Manager no reasonable prospect of the creditors ever receiving payment of those debts, it is in general, a proper inference that the company is carrying on business with intent to defraud: and, I am satisfied that the Defendant knew that Nortico incurred debts during 1 November 1991 to 30 June 1992 and I hold further that the Defendant deliberately went on contracting in the name of the company in order, as he hoped, to safeguards his position, and without any regard to the interests of the Plaintiffs/Creditors.

It is worth pointing out that Section 319 of Vanuatu Companies Act CAP 191 reproduces Section 332 in the Companies Act of 1948 (English). Therefore, I think that what Lord Denning M.R. said in his judgement in Re

Cyona Distributors Limited C.A.(at p. 902) when applying Section 332 of the Companies Act of 1948, can be adopted in this case without any difficulty. I will, thus, adopt it as my own. It appear that section 319 is deliberately framed in wide terms so as to enable the Court to bring fraudulent persons to book. If a man has carried on the business of a company fraudulently, the court can make an order against him for the payment of fixed sum: see in Re William C. Leitch Bros Ltd. (1932) 2 ch. 71. An order can be made either at the suit of a liquidator, etc..., or of a creditor. The sum may be compensatory. Or it may be punitive. The Court has full power to direct its destination. The words are quite general: *" all or any of the debts or other liabilities of the company as the Court shall direct"*. By virtue of these words the Court can order the sum to go in discharge of the debt of any particular creditor; or that it shall go to a particular class of creditors; or to the liquidator so as to go into the general assets of the company, so long as it does not exceed the total of the debts or liabilities. Certainly when an application is made by a creditor who has been defrauded, the Court has power to order the sum to be paid to that creditor. Thus when a creditor applies, he applies on his own account. He is the master of his own application. This is exactly the situation of the Plaintiffs/Creditors, in this case.

It will be noted that the debts are not proved on the hearing of the Summons but they have already been the subject of a Supreme Court proceedings in Re Civil Case No. 88 of 1994. There is no difficulty to ascertain the creditors of the company in this case: They are respectively the First and Second Plaintiffs who have been defrauded within the meaning of the Section 319 of the Companies Act CAP 191. The amount of debts claimed respectively by both Plaintiffs/Creditors are specified in the Summons on the basis of the Supreme Court judgement in Re Civil Case No. 88 of 1994 referred to above.

On the basis of these considerations, the Court makes the following declarations and orders under Section 319 of the Companies Act CAP 191:

1- That the business of the Nortico company was carried on from 1st November 1991 to 30 June 1992, with intent to defraud creditors and for other fraudulent purposes by reason of the fact that the company continued to trade and to obtain goods and/or services on credit from the Plaintiffs without any means or prospect of being able to pay or provide for payment of the purchase price thereof, and further that the Defendant as a Director of the Company knowingly party to the carrying on of the business of the Company in the manner aforesaid.

2- That the Defendant is liable to pay to the Plaintiffs the following sums:

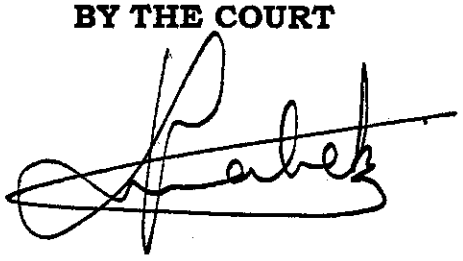
First Plaintiff-	Vatu	2, 686, 293
Second plaintiff	Vatu	517, 281

being the amount of debts owing by the company to the Plaintiffs in respect of goods and/or services supplied to the company during the period aforesaid, with interest at the rate provided from the date hereof;

3- Costs and expenses of the Plaintiffs and their counsel, shall be paid by the Defendant to be taxed failing agreement.

DATED AT PORT VILA this 24th day of June 1996.

BY THE COURT



LUNABEK VINCENT
Judge.