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

Civil Case No.129 of 2013

BETWEEN: PETER FORGARTY
Claimant

AND: AIR VANUATU (OPERATIONS) LIMITED
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. R. Sugden for the Claimant*
Mr. E. Nalyal for the Defendant

Date of Judgment: *3 March 2017*

JUDGMENT

1. This case is a prequel to Isleno Leasing Company Limited v. Air Vanuatu (Operations) Limited ("*AVOL*") [2016] VUCA 43 which was concerned inter alia with the enforcement of a Deed of Release which in terms of the judgment:

> "... (was) ... *signed on 17 October 2011 by persons who purported to be acting for and with the authority of the parties to these proceedings*" and which "*Deed was intended to settle a long standing dispute and litigation between the parties over the lease of an aircraft by AVOL from Isleno entered into on 30 September 2009*" ("the Isleno case").

2. In its judgment the Court of Appeal gives a brief outline of the events leading up to the Deed in the following (edited) passages:

> *"6. There had been ongoing discussions between the parties and the principal shareholders and directors of AVOL about a claim by Isleno for damages arising from the lease of the aircraft. The shareholders of AVOL are representatives of the Government who hold the shares in that capacity. Both sides were expressing a desire to settle the claim. On Friday 14th October 2011 there was a board meeting of AVOL. ...*
>
> *7. At that meeting two things happened that were central to the issues canvassed at trial. First, a resolution was passed concerning Isleno's claim. Secondly, the CEO, Mr. Laloyer, who was present at the meeting when it started and when the Isleno resolution was passed was suspended and Mr. Fogarty was appointed as the new CEO. A possible reason for this was discussed in evidence. It was suggested that it related to an Enquiry into an unrelated aircraft incident.*
>
> *8. Two versions of the minutes of the meeting were tendered in evidence. Whilst the text concerning the discussion and resolution on the Isleno's claim differ neither expressly authorized settlement of the claim on particular terms or the execution*

of a deed of release. One version of the minutes is unsigned, and another is signed by the chairman of the meeting, Mr. Mariasua. It seems he was removed from that office by the government shareholders of AVOL very soon after the meeting but for present purposes that event need not be explored."

(my underlining)

And later, in relation to the execution of the Deed, the Court of Appeal observed:

"11. Then followed the execution of the Deed. It bears a type-written date 17th October 2011 (the following Monday). It has been signed by Mr. Fogarty on behalf of AVOL and his signature has been witnessed by Mr. Mariasua. ...

13. Because of the sudden removal of Mr. Laloyer and the appointment of Mr. Fogarty as CEO AVOL's case put in issue whether Mr. Fogarty was duly appointed to the office of CEO. This issue led to reliance at trial being placed by Isleno on s. 193 of the Companies Act [CAP. 191] inforce at the relevant time. The so-called "in-door management rule" was also relied upon. Section 193 provided:

"193. Validity of acts of directors

The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

(my underlining)

And lastly, in the present context, I repeat para. 16 where the Court of Appeal said:

"Mr. Fogarty said he signed the Deed on Monday 17th October 2011 before 8am at the office of Mr. Mariasua. He took advice from Mr. Mariasua about the Deed. He had not seen a copy of the minutes before he signed the Deed. Ms. Ngwele was there. Mr. Fogarty had also signed an employment contract with AVOL at 7.30pm on 14th October 2011 after the board meeting concluded. ..."

(my underlining)

This latter paragraph refers to events that are the subject matter of the present case which challenges the lawfulness of Mr. Forgarty's employment contract and appointment as CEO/Managing Director Acting of AVOL.

The Pleadings

3. The original claim comprised of 20 paragraphs was filed on 13 June 2013 and referred to events that closely preceded and followed the signing of a contract of employment between the parties on 14 October 2011. The claim sought 2 declarations and payment of various sums under the contract and general damages for breach of contract and unjustified dismissal together with costs to be taxed if not agreed.

4. On 22 November 2013 a defence was filed in which AVOL denied the authority of the Board to appoint or employ the claimant as the claimant's immediate

predecessor Joseph Laloyer had not been lawfully suspended and the Board itself had been dismissed on 14 October 2011. The employment contract was also unlawful and invalid because the claimant "*did not have a residency permit nor work permit*" at the relevant time. Alternatively, the defence pleads that the claimant's "*employment contract was procured by fraud*" and further, that the claimant conspired with (named individuals) to defraud AVOL by signing a Deed of Release dated 17 October 2011. Finally, the claimant's "*purported employment was in breach of the rules of natural justice and therefore invalid*".

5. On 29 October 2014 after a change of counsel, the claimant filed a much shorter amended claim confined to the claimant's employment contract and comprised of 8 paragraphs. He claimed VT9,000,000 and interest as well as damages for breach of an implied term of trust and confidence as well as exemplary damages and costs.

6. In its defence to the amended claim AVOL other than admitting its identity denies all paragraphs of the amended claim and repeats and relies on its defence filed on 22 November 2013.

The Evidence

7. The claimant called **Ted Drew** a former employee and director of AVOL who produced a sworn statement [Exhibit P(1)]; **Yoan Mariasua** the presiding chairman at the AVOL Board meeting on 14 October 2011 who produced 2 sworn statements [Exhibits P(2) (A) and (B)] and finally the claimant himself produced 3 sworn statements [Exhibits P(3)(A); (B) and (C)]. All were cross-examined by defence counsel.

8. AVOL called **Simeon Athy** the Director General of the Prime Minister's Office and member of the AVOL Board who produced his sworn statement [Exhibit D(1)]; and **Joseph Laloyer** the Managing Director and CEO of AVOL and an ex-officio member of the AVOL board on 14 October 2011 who also produced a sworn statement [Exhibit D(2)] and who during cross-examination, identified and produced two Memos of his dated 21 April 2011 [Exhibit P(4)] and 16 May 2011 [Exhibit P(5)] respectively. Both defence witnesses were cross-examined. Notably both witnesses attached to their sworn statements an earlier sworn statement he had provided in Civil Case No. 212 of 2012 the Isleno case.

9. At an early stage in the proceedings counsels agreed and filed written submissions on a preliminary issue namely – "*whether or not a valid contract of employment was concluded between the parties*". The claimant argued for the affirmative and AVOL contended the negative. It was common ground that prior to and during the AVOL board meeting of 14 October 2011 Joseph Laloyer was CEO and managing director of AVOL. However he had been suspended by the time the meeting ended at "*19.00hrs (7pm)*".

The Suspension of Joseph Laloyer

10. Defence counsel referred to Sections 143 and 196(2) of the Companies Act which collectively requires a 28 day notice to be given to AVOL and "*the director concerned*" of a resolution "*to remove a director*" or to appoint someone in his place. Failure to give such a notice renders any resolution passed not "*effective*". In this case no notice(s) were given and counsel submits therefore that the suspension of Mr. Joseph Laloyer was invalid and of no effect as was the appointment of the claimant to act in his place.

11. Section 196 is headed: "*Removal of directors*" and refers to the removal (not suspension) of a director. Furthermore special notice under subsection (2) is only required if removal occurs "*under this section*". Therefore, if there is an alternate removal power given in the AVOL Articles of Association then removal of a director could be effected without any need to invoke section 196(1) and without the need for a special notice.

12. In my view Article 100 is an alternative avenue available to the shareholders to remove a director(s) from the AVOL Board. It provides:

> "*The company may by ordinary resolution of which special notice has been given in accordance with Section 143 of the Act, remove any director before the expiration of his period of office notwithstanding anything in these articles or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company*".

13. Notable by its absence and unlike Section 196, there is no requirement in the Article that notice of the removal resolution be served on the director to be removed or that a meeting of the company or shareholders must be held to pass the said resolution. The "*special notice*" requirement under Section 143 is directed at the company and requires it "(to) *give its members notice of any such resolution*".

14. Claimant's counsel without referring to either section and after conceding that the defendant company's Articles of Association do not expressly confer on the directors or the AVOL Board, power to suspend the Managing Director, nevertheless submits, that such a power is implied in Article 81 which provides that "*... the business of the company shall be managed by the directors ...*". In other words the suspension and replacement of the managing director and CEO is a "*business of the company*" to be "*managed by the directors*".

15. Claimant's different counsel at the trial also refers to Article 81 and submits that the suspension and replacement of the CEO is an "*internal matter*" of AVOL and "*doesn't have any effect on the claimant's position at all*". Besides the CEO "*was*

only suspended for 1 month on full benefits, not dismissed and therefore sections 96 (sic) *and 143 had no application*".

16. I cannot agree that the suspension of Joseph Laloyer is entirely irrelevant to the claimant's appointment or employment which was only made possible because of it. Needless to say if Joseph Laloyer's suspension and removal was unlawful and ineffective then his position was not vacated in terms of Article 90 and he would be entitled to a declaration and injunction and to be reinstated and, any appointment made in the interim would be similarly tainted and in breach of the mandatory provisions of Articles 91 and 100.

17. The claimant's submission also seeks to draw a distinction between a "*suspension*" and the removal of a director which is the expression used in section 196(2) of the Act. In my view the suspension of Joseph Laloyer constituted a removal however temporary it may have been intended to be (***see:*** Pierre v. Republic of Vanuatu [2014] VUSC 62 esp. **para. 19**]. In the present case there is no suggestion that Joseph Laloyer was accorded any natural justice in his abrupt and unilateral suspension.

18. The submission also ignores the provisions of Article 100 which expressly incorporates the mandatory notice requirements of Section 143 into the process for the removal of a director. Furthermore Article 110 which specifically deals with the appointment and removal of the Managing Director does not include a power to suspend which is expressly granted in the same Article, to the Managing Director when dealing with other employees and servants of the defendant company. The absence of such a power to suspend the Managing Director is clearly intentional and cannot be implied by relying on the general provisions of Article 81.

19. Needless to say if there was power to suspend the managing director and then appoint his replacement without actually removing him as a director as the claimant submits, then the number of directors of the defendant company would number eight in total during the suspension period and that figure exceeds the maximum number of directors allowed in Article 76(1) of the defendant company's Articles of Association which clearly states: "*The number of Directors shall be seven*". I reject the submission that the suspension of Joseph Laloyer does not affect the claimant's position at all and I find that the suspension of Joseph Laloyer was ultra vires, unlawful, null and void.

The Absence of a Quorum

20. Defence counsel's submission is: "*there was no quorum at the meeting of the directors of the defendant on 14 October 2011 as only 3 out of the 7 directors purportedly made the resolution for the appointment of the claimant*".

21. The submission in my view, confuses the discrete requirement of a quorum for the holding of a meeting of the defendant company and the number of votes required to pass a resolution at such a meeting. The former is governed by Article 76(c) which clearly states: *"the quorum for holding a valid directors' meeting shall be four"* and the latter is governed by Article 107 which relevantly states: "*all questions arising at any meeting of directors ... shall be determined by a majority of votes of the members present*".

22. In the present case the Minutes of the AVOL board of directors meeting of 14 October 2011 signed by the chairman on 15 October 2011 clearly records the presence of 7 members at the commencement of the meeting at "*16.30hrs*" (4.30pm) and although 2 members left during the course of the meeting and the Managing director was excused by the chairman and left the meeting when it commenced discussing the item concerning the Recommendation of Panel on CoI Report, the quorum at the meeting was comprised of the 4 remaining members and never fell below that number until the meeting ended. It was during the reduced quorum number that the 2 impugned resolutions were passed by a "*... majority of votes of the members present*" ***ie.*** three (3) votes and one (1) abstention. I reject the defendant submissions on this issue.

23. The impugned resolutions are:

    (1) "*The meeting resolved that Mr. Laloyer be suspended for a maximum of one month ...*" (the "suspension resolution");

    (2) "*the meeting resolved to appoint Mr. Peter Fogarty as Acting Chief Executive Officer of Air Vanuatu (Operations) Limited until further notice*" (the "appointment resolution").

24. A consideration of the resolutions clearly and immediately discloses a potential inconsistency between them in so far as Mr. Laloyer the incumbent CEO had been suspended "*for a maximum of one month*" whereas his replacement the claimant was to be appointed acting CEO "*until further notice*". The inconsistency is, unfortunately, not removed or clarified in the claimant's employment contract as might be expected, instead, it is exacerbated by the term of the contract which appointed the claimant "*... for a period of 6 months ...*" (not until further notice as resolved) with a commencement date: "*14.10.11*" and a completion date: "*14.04.12*".

25. Given the incumbents suspension "*for a maximum of one month*" his suspension would end on 14 November 2011 and presumably he would be expected to resume his substantive position as managing director and CEO of AVOL while his replacement, the claimant, would continue to be employed as "*CEO/Managing Director Acting*" on a higher monthly salary! That is a recipe for disaster and was certainly not in the best interests of AVOL which it was the duty of the directors to promote and protect.

The Employment Contract

26. The time-line between the ending of the AVOL Board meeting on 14 October 2011 and the execution of the claimant's employment contract was a mere "*30 minutes*" and gives rise to the very strong inference that the claimant's 3 page typewritten employment contract had been prepared before the meeting took place or was prepared in an unseemly haste at the end of the meeting without reference to the relevant resolutions and certainly before the meeting Minutes had been typed up and signed by the chairman and whatsmore on the undisputed evidence, before notice of his suspension had been communicated to Joseph Laloyer.

27. Given the intervening weekend there has been no attempt on the claimant's part to explain or clarify why the chairman acted with such haste but it is clearly recorded in the relevant Minutes that during the course of the discussions on item C. 5 concerning the recommendations of the Panel on the COI Report in the absence of Joseph Laloyer and before the passing of the resolutions:

> "*There were arguments on both sides where member Athy stressed he had not seen a copy of the COI Report and cannot make sound decision on something he has not read and advised that chairman Mariasua meet and discuss further with the Prime Minister Livtunvanu before further discussions.*
>
> *Member Athy also stated that these were all political motivated and planned and disagrees to discuss further the issue until chairman Mariasua discuss with Prime Minister Livtunvanu and left the meeting*".

28. It is also undisputed that after abruptly leaving the Board meeting Member Athy went and briefed the Prime Minister about the meeting and that same evening the Prime Minister issued a "*Travelling Minute*" terminating the appointment of Mr. Mariasua, Mr. Wesley Rasu, Mr. Ted Drew, and Mr. Charol Arnhambat as directors of AVOL and appointing their replacements with effect from 14 October 2011.

29. The Prime Minister had also previously written to the AVOL chairman and Joseph Laloyer on 25 September 2011 expressing his intention to restructure Air Vanuatu and directing the Board to:

> "*Please ensure that no major decisions including employment are taken without first consulting me. It is important that whatever we do, we must be able to sustain the ramifications of these decisions in the long term*".
>
> (my underlining)

30. In view of the above email coupled with Member Athy's repeated advice during the Board meeting, there can be no doubting that the chairman must have been aware that what the Board was proposing to do on 14 October 2011 (barely 2

weeks after the email) without first consulting the Prime Minister, was in direct defiance of his clear directive.

31. Finally the appointment resolution does not expressly authorize or direct the chairman to prepare and/or execute the claimant's contract of employment on behalf of the board or AVOL and therefore the claimant's employment contract is in breach of Article 105 and 110 which states:

> "*The directors may from time to time appoint one or more of their body to the office of Managing Director for such term ... at such remuneration and generally on such terms and conditions as they may think fit ...*".

32. In my view the power to appoint the Managing Director is a power given to "*the directors*" (plural) acting collectively. It is not a power given to the company for which the acts of a single director might be sufficient to bind the company. Therefore in the absence of a specific resolution delegating that collective power, no single director may exercise it.

33. Although I accept that there is an AVOL board resolution to appoint the claimant that is not enough to satisfy the requirements of the Articles and the claimant's employment contract illustrates the problem(s) that can occur when the requirements of the Articles are not strictly complied with.

34. For instance, the appointment resolution nowhere mentions the "*remuneration*" of the claimant; or the "*term*" of his contract; or any other "*terms and conditions*". As a consequence, the chairman in purportedly effecting the appointment resolution unilaterally executed a contract "*... for a period of 6 months*" at a monthly remuneration that exceeded that being received by the substantive Managing Director and with a termination clause that was so heavily weighted in the claimant's favour that it could be read as excluding termination of the claimant for "*just cause*" or under Section 49 of the Employment Act.

35. The claimant's employment contract is plainly not an "*arms length*" agreement that protected the legitimate interests of AVOL as employer nor was it one that was authorized or agreed by the AVOL Board as required in terms of Article 110.

The Absence of a Work Permit

36. The claimant's employment contract was not made subject to the provisions of the Labour (Work Permit) Act [CAP. 187]. As was alluded to in the amended defence and expanded in the submissions of defence counsel to the effect that the absence of a work permit rendered the claimant's employment contract illegal in its formation and certainly in its performance by the claimant. Neither was the commencement date deferred till after the grant of a valid work permit.

37. This issue was conceded by claimant's counsel in his closing submissions where he writes:

> "*It is clear from Mr. Fogarty's evidence that he did begin to work in Vanuatu without a work permit because his first act at the office was to put in the application for a work permit* (not produced). *Thus he clearly did breach the Labour (Work Permits) Act. This is therefore a case in which the contract was not illegal but its performance became illegal (but did not have to continue to be illegal)*".
>
> (my underlining)

38. The evidence confirming the above is to be found in the claimant's sworn statements where he deposed in Exhibit P(3)(A):

> "*5. On 14 October 2011 I executed a written employment contract with the defendant;*
>
> *6. By reason of the contract I was appointed to the position of Acting CEO/Managing Director of the Defendant for a fixed period of 6 months which commenced on 14 October 2011; and*
>
> *12. In my capacity's as Acting CEO I recall that I attended work on 14, 17, 18 and 19 October 2011*".

and in Exhibit P(3)(C):

> "*3. I did not have a work permit on 14 October 2011 which, in my experience is not uncommon for non-citizen employees*".

39. It is also common ground that the claimant in his capacity as Acting CEO of AVOL signed a Deed of Release on 17 October 2011 between Isleno and AVOL without a Board resolution authorizing him to do so. Indeed the relevant resolution required the CEO "(to) *write to lawyers of both parties to agree on a deed of release that will be beneficial to both parties*".

40. Claimant's counsel submits that the lack of either or both permits (work and residence) only makes the performance of the contract in Vanuatu, illegal – not the contract itself. Furthermore as Section 2(2) of the Labour (Work Permits) Act made it AVOL's duty as employer to obtain a non-citizen employee's work permit, the claimant had a potential claim for negligence against AVOL should he be successfully prosecuted (whatever that means).

41. Section 2 of the Labour (Work Permits) Act [CAP. 187] provides so far as relevant:

> ""*(1) It shall be an offence for any non-citizen worker to whom this Act applies to take up or to continue in any employment in Vanuatu, without first having obtained a work permit or, where such permit has been issued, otherwise than in accordance with the conditions thereof.*

(2) *Every employer who wishes to employ any non-citizen worker shall make application for a work permit to the Commissioner of Labour in the form and manner prescribed in Schedule 1.*

(3) *The Commissioner of Labour may issue work permits valid –*

~~*(a) where the employment is not the subject of a written contract, for 2 years;*~~

(b) where the employment is or is to be the subject of a written contract, for 3 years or the duration of the contract, whichever period is the less.

.....

(5) *An employer who wishes to retain the services of an employee in respect of whom a work permit has been issued beyond the expiry of the period for which such permit is valid, shall make application ... to the Commissioner of Labour not less than 60 days prior to the date of expiry of such permit.*

.....

(10) *It shall be a condition of the issue of every work permit or its renewal ... that the employer shall train a citizen worker.*

.....

18 (2) *Any person convicted of an offence against the provisions of this Act .... shall be liable in the case of a first offence to a fine not exceeding VT 100,000 ...*"

42. For present purposes it is only necessary to highlight some notable features of the above provisions including:

- It is a criminal offence punishable with a fine of VT100,000 for a non-citizen worker "*... to take up or to continue in any employment*" without a valid work permit;
- The expression "***to take up***" employment includes in my view, the entry into and the performance of a contract of employment; and *"to continue"* employment refers to an existing employee continuing in the same position with the same employer;
- A work permit must be "***obtained***" (past tense) by a non-citizen worker before taking up or continuing employment;
- The word "***first***" serves to emphasize when the work permit must be obtained **ie.** before taking up or continuing employment;
- The training of a citizen worker is a statutory condition of every grant or renewal of a work permit to a non-citizen worker.

43. From the foregoing I am firmly of the view that employment of a non-citizen worker without a pre-existing valid work permit is a criminal offence and any

employment contract entered into without "*first having obtained*" a valid work permit is illegal.

44. In arriving at this conclusion I am guided by the observations of Lord Russel of Killowen CJ when he said in Attorney General v. Carlton Bruce [1988] 2QB 158 at p. 164:

> "*The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject viz. to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed (and once ascertained) ... It is not open to the court to narrow and whittle down the operation of the Act by consideration of hardship or business convenience, or the like.*"

45. In the context of the present case, I am also mindful of the rule of law enunciated by Baron Parke when he said in Cope v. Rownlands (1936) 46 R. R. 532 at p. 539/540:

> "*It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by statute, though the statute inflicts a penaly only, because such penalty implies a prohibition and it may be safely laid down notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?*"

46. In this latter regard the Labour (Work Permit) Act besides having a revenue-collecting purpose, also has, a discernible protective or public policy purpose, namely, the prevention, in the public interest, of the uncontrolled employment of non-citizen workers in Vanuatu and, further, in ensuring that citizen workers will be trained to eventually take over the positions for which non-citizen workers are granted work permits."

47. I also disagree with counsel's submission as to the meaning and effect of subsection (2) which is directed at an "*employer*" whereas subsection (1) is directed at a "*non-citizen worker*" who, by definition, includes "*a director or manager of a company but does not include an employer*". Furthermore the subsection in using the expression "*who wishes to employ*" is clearly directed at a prospective employer and further reinforces the time when the work permit must be applied for ***ie.*** before a contract is entered into or commences.

48. In the absence of a clear resolution under Article 105 authorizing or delegating to the chairman power to make and/or sign the employment contract, claimant's counsel sought to rely on Section 46 of the Companies Act [CAP. 191] more especially subsection (1)(b) which provides:

"*A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, express or implied*".

(my underlining for emphasis)

And subsection (2) provides:

"*A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto*".

49. I confess that the submission is misconceived as the claimant's employment contract is not "*... by law required to be in writing ...*" in so far as Section 9 of the Employment Act [CAP. 160] clearly states:

"*A contract of employment may be made in any form, whether written or oral:*

Provided that a contract of employment for a fixed term exceeding 6 months or making it necessary for the employee to reside away from his ordinary place of residence shall be in writing and shall state the names of the parties, the nature of employment, the amount and the mode of payment of remuneration, and, where appropriate, any other terms and conditions of employment including housing, rations, transport and repatriation."

(my underlining)

50. On the face of it, the claimant's employment contract was not a contract of employment for "*a fixed term exceeding 6 months*" nor did it in terms, require the claimant "*to reside away from his ordinary place of residence*" which was at Teoumaville, Teouma, Efate Island nor was provision made for his repatriation. Indeed the claimant's formal notification letter issued by the chairman on 15 October 2011 directed the claimant "*... to report to the secretary of Board to commence duty as agreed by the Board*" and the claimant himself deposed that on 17 October 2011 he attended to the premises of the Defendant Company and took office as Acting CEO. The claimant's employment contract is not within any of the provisions of Section 46(1) and is therefore unprotected under Subsection (2). This was also conceded by counsel during his closing address.

51. Accordingly I reject claimant counsel's submissions and find that the claimant's employment contract was not "*effectual in law*" and in the absence of a work permit is illegal, void and unenforceable.

The removal of the AVOL Board of Directors

52. In its defence and counsel's submissions is a reference to the AVOL board of directors being terminated and removed on 14 October 2011, pursuant to a "*Flying Minute*" issued by the shareholders and dated 14 October 2011. In the circumstances counsel submits that the chairman personally had no standing or authority to prepare or execute the claimant's employment contract on behalf of AVOL.

53. Claimant's counsel submits that there is no evidence capable of proving that the "*Flying Minute*" had issued before 7.30pm on 14 October 2011 (being the date and time of execution of the claimant's employment contract) and no evidence that the claimant knew of its existence or of the dismissal of the chairman of AVOL when he signed the employment contract. Furthermore it was necessary for the shareholders of AVOL to pass an ordinary resolution at a general meeting and no such meeting was called in terms of the relevant Articles of Association of the defendant company.

54. Although unnecessary for the outcome of this case, in deference to the extensive submissions of counsels I make the following observations. In my view claimant's counsel concerns with the timing of the "*Flying Minute*" and the signing of the claimant's employment is misconceived and a red herring.

55. Article 76(b) of the AVOL's Articles of Association clearly provides that the directors are appointed by the shareholders and the directors shall continue to hold office until they (1) "*resign*" or (2) "***are removed by the shareholders***" or (3) "*become disqualified from office*". Article 90 also states inter alia that the office of a director shall be vacated if he is removed from office under Section 196(1) of the Companies Act [CAP. 191] which in turn provides (omitting an irrelevant proviso):

"*The company may by ordinary resolution remove a director before expiration of his period of office, notwithstanding anything* (sic) *its articles or in any agreement between it and him ...*".

(***cf.*** the provisions of Article 100 set out in para. 12 above)

56. If I may say so this is a very strong provision that renders the notion of a term of office for a director meaningless, because shareholders can always intervene at any time to secure his removal.

57. Counsel also submits that to be effective as a defence, the claimant had to be aware that the chairman had been dismissed or removed and further the claimant had signed the employment contract in spite of having that knowledge. Presumably this is because of the provisions of Section 193 of the Companies Act.

58. Nowhere in Section 196 is any notice required to be given to anyone other than to "*the company*" and "*to the director concerned*", of a resolution to remove him. This is manifest from a reading of the provisions of sub section (2) and especially section 143 of the Act which requires notice of such a resolution "... (to be) ... *given to the company and the company shall give its members* (not the director concerned) *notice of such resolution ...*" within the prescribed time(s) from the date of the meeting at which the resolution is to be moved and even if the said

meeting occurs before the expiration of the prescribed time(s) nevertheless the notice "*... shall be deemed, to have been properly given for the purposes thereof*".

59. Plainly the purpose of the notice under Section 143 is to ensure that the shareholders of the company are notified in advance of the resolution to remove a director that was appointed by them. In my view that requirement is unnecessary or fulfilled where the removal is instigated by the shareholders of the company.

60. In this case the removal of the four (4) AVOL directors including the chairman was initiated and effected by the AVOL "*members*" themselves (***ie***: shareholders) in exercise of their power under Article 76(b) read with Article 100 by way of a "*Travelling Minute*" dated 14 October 2011 signed by the Prime Minister and the Minister of Finance and effective from that date. In my view the notice requirements of Section 143 was substantially complied with and even if it should turn out not to be the case, then the right of the removed directors to damages and compensation are preserved in Article 100 but their removal cannot be challenged.

61. As was said in Ford's "*Principles of Corporation Law*" (6th edn) at paragraph 1424:

> "*The removal of a Director by members of the Board, whether under the law or under the articles, may in a particular case be a breach of contract on the part of the company for which the director may be entitled to sue for damages. Where removal is attempted in the absence of a power to remove or in a manner not authorized by the act or the articles, a director may apply for a declaration that the attempt is invalid and for consequential injunctions restraining any attempt to exclude him or her from office. However, declaration and injunction are equitable remedies, which will not be granted to enforce a personal relationship against the will of the parties. If therefore, it is shown that a majority of members do not want the plaintiff as a director, any available remedy in damages must suffice*".

62. Then counsel submits that the "*Travelling Minute*" is ineffective to dismiss any of the directors because only a resolution passed by the shareholders at a general meeting can effect that result. This is said to be the inevitable result of Articles 54 to 62. Again I disagree. This was not a removal under Section 196 as assumed rather, the removal by the shareholders AVOL, was under Article 76(b) read with Article 100.

63. Furthermore AVOL is a "*private company*" (***see***: Section 38 and Article 137) to which the provisions of Section 41 of the Companies Act applies. That section reads (with irrelevant omissions):

"41. Passing of resolutions by entries in minute book etc.

(1) Anything which may be done by a company registered under Part 2 by resolution, ... passed at a meeting of the company may, ... be done by a private company in the same manner or by resolution passed, without a meeting or any previous notice being required, by means of an entry in its minute book signed by ... the members having the right to vote on that resolution, ...

(2) It shall not be necessary for a private company to hold an annual general meeting if everything required to be done at that meeting by resolution, ... is, within the time prescribed for the holding of the meeting, done by means of an entry in its minute book in accordance with this section.

(3) ....

(4) For the purposes of this section a memorandum pasted or otherwise permanently affixed in the minute book and purporting to have been signed for the purpose of becoming an entry therein shall be deemed to be an entry accordingly, and any such entry may consist of several documents in like form, each signed by ... one or more members.

(5) ...

(6) ...

(7) The provisions of section 144 shall apply to resolutions which have been passed by means of entries in the minute book of a private company in accordance with the foregoing provisions of this section to the same extent as if those resolutions had been passed at a meeting of the company".

(my underlining)

64. Under the sub-heading: Decision-Making Without Meetings the learned author of Gower and Davies: "*Principles of Modern Company Law*" (8 edn) summarized the reforms introduced in the UK in 1989 and by the Companies Act 2006 provisions relating to written resolutions in the following terms (at p. 416):

"*Overall, the policy of the legislature can be said to have been to remove most of the obstacles to the taking of members' decisions by written resolutions, rather than at a meeting thus encouraging private companies to proceed in that way, since the meeting procedure is necessarily more cumbersome*".

65. As for the procedure for passing written resolutions the learned author writes (at p. 417):

"*The statute requires a copy of the proposed written resolution to be sent at the same time (as far as reasonably practicable) to every member entitled to vote. However, if this can be done without 'undue delay', the company may submit the same copy to each member in turn ... or employ a combination of simultaneous and consecutive circulation ... Near-simultaneous circulation is important because it prevents the proposers circulating the resolution first to its likely supporters ... thus securing their support before the opponents have had an opportunity to put their case to the other members. In this connection it is worth noting that the written resolution is passed at the point at which it secures the*

requisite majority of the members, whether or not all the members to whom the resolution has been sent have voted that time ... or whether indeed all the members have been sent copies of the resolution at that point. If a proposed ordinary resolution is sent to a 51% shareholder and he signifies his assent to it, before any of the other shareholders have opened their emails, the resolutions will be adopted at that point".

(my underlining)

66. In the present case the relevant written resolutions are contained in a document addressed to the AVOL Board of Directors and bearing the official stamps of the executing shareholders which reads:

"**CONFIDENTIAL – Travelling Minute**

From: Hon. Meltek Sato Kilman Livtuvanu
Prime Minister

To: Hon. Moana Carcasses KALOSIL, MP
Minister of Finance

Subject: Termination of Current Board of Directors of AVOL and Appointment of New board of directors

Date: Friday 14th October 2011

DECISION

The shareholders resolve to terminate the following person as Board Members of Air Vanuatu from the date of this letter.

1. Yoan Noel Mariasua
2. Wesley L. Rasu
3. Tedd Drew
4. Cherol Arnambat

The Shareholders also resolves that Messrs. Simeon Athy's and George Maniuri's appointments as Board Members continue with Mr. Athy serving as Chairman representing the Chairman of Shareholders.

It further resolves to approve the name of the following, as additional members of board of directors of Air Vanuatu (Limited) Operations.

1. Juris Ozols
2. Morris Kaloran

SHAREHOLDERS APPROVAL

Hon. Meltek Sato Kilman Livtuvanu (MP) (signed)
Prime Minister (Chairman)

Hon. Moana Carcasses KALOSIL (MP) (signed)
Minister of Finance & Economic Management
& Shareholder."

67. In light of Section 41 and the foregoing citations from Gower and Davies "*Principles of Modern Company Law*" and in the absence of any evidence of breaches of the provisions of either Section 41 or Section 144 or any sworn statements from the two signatories, I am satisfied that the "*Travelling Minute*" assented to by the Prime Minister and the Minister of Finance is valid and effected the removal of the four (4) named AVOL directors from the moment it was signed on 14 October 2011 without any prior notice being provided to them. Needless to say I reject counsel's submissions to the contrary based on documents prepared after 14 October 2011.

68. In light of the foregoing the entire claim is dismissed with standard costs to the defendant company to be taxed if not agreed.

DATED at Port Vila, this 3rd day of March, 2017.

BY THE COURT

D. V. FATIAKI
Judge.