

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

**Civil Appeal
Case No. 15/668 CoA/CIVA**

BETWEEN: **IRIRIKI ISLAND HOLDING LIMITED**
Appellant

AND: **TRIDENT HOLDINGS LIMITED**
Respondent

Date of Hearing: *Monday 11th April 2016 at 10:00am*

Date of Judgment: *Friday 15th April 2016 at 4:00pm*

Coram: *Hon. Chief Justice Vincent Lunabek*

Hon Justice John von Doussa

Hon Justice Ronald Young

Hon Justice Oliver.A.Saksak

Hon. Justice Daniel Fatiaki

Hon. Justice Dudley Aru

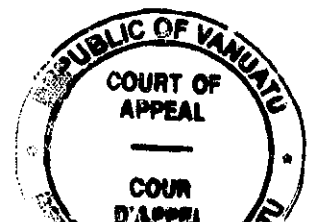
Hon. Justice Paul Geoghegan

Counsel: *Mr Nigel Morrison for the Appellant*

Mr Less Napuati for the Respondent

JUDGMENT

1. In February 2013 the barge MV Malcos ran aground on Tanna Island. Trident Holdings, the owner of the tug Nacato were asked to provide a bare boat charter of the Nacato to assess and if possible remove the MV Malcos from its grounding.
2. Trident provided the Nacato but it was unsuccessful in removing the barge. The essence of the case in the Supreme Court and in this Court is who did Trident contract



with to provide the bare boat charter and therefore who is responsible to pay the unpaid portion of their charter account some VT 13, 911,250.

3. Trident's case is that the company Iririki Island Holdings Ltd is the other party to the contract. Island Holdings denies this. It says Iririki Marine Holdings Ltd the owner of the MV Malcos was the contracting party. This Company was insolvent and was struck off the register of companies subsequent to the charter.
4. In the Supreme Court the Judge rejected the claim that Marine Holdings was the contracting party. The Court gave judgment for Trident against Iririki Island Holding Ltd for the full amount of the claim.
5. Island Holdings case is that the Judge's conclusion as to who contracted with Trident was against the weight of the evidence. Counsel submitted that the Judge's conclusion was motivated, wrongly, by the fact that Marine Holdings had, by the time of trial, been wound up.

The Evidence at Trial

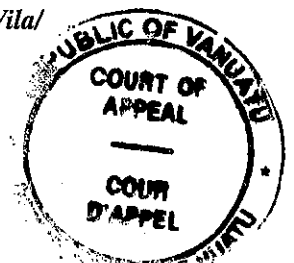
6. Shortly after the Malcos ran aground its Captain, Mr Sean Griffin and Mr Nathan Bucknell (described as General Manager of Iririki Island Resort) contacted Mr Guy Benard as a principal of Trident. After discussion it was agreed Mr Benard would provide a quote for a bare boat charter of the Nacato from Trident. In such a charter, Trident would provide the Nacato and the charterer would provide and pay for the crew.
7. The quote is addressed to Mr Sean Griffin. It Provides:

"TRIDENT HOLDINGS LIMITED

INVOICE

***Mr Sean GRIFFIN
Po Box 2016
Port Vila***

***Ref: Hire of our tug NACATO for assistance to M/V MALCOS- Port Vila/
Tanna/ Port Vila***



General conditions: Bare boat/time charter

1. *The tug is hired on bare boat basis without crew:*

THL authorizes the crew members of M/V MALCOS to operate << NACATO>> since they are familiar with the tug. Food will be provided by THL.

It is the responsibility of IRIRIKI MARINE HOLDINGS LTD to repatriate the crew members of the M/V MALCOS to Port Vila to operate <<NACATO>>

2. *Duration of time charter: maximum 60h. If the assistance provided exceeds 60 hours. THL will be charging at a reduced rate of 40,000VT + VAT per hour.*

TOTAL: 3.450.000 VT + VAT

DISCOUNT FOR PROVIDING CREW MEMBERS: 200.000VT

GRANT TOTAL: 3.350.000 VT + VAT

Payment conditions

50% to be paid before departure

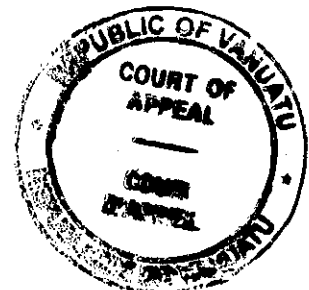
50% at completion of assistance

Please confirm your written acceptance if the terms and conditions meet your approval, thank you.

(Signed)

*Candice Benard
Secretary*

8. The quote was returned signed by Mr Nathan Bucknall. The quote is not dated but there is an Email of 9th March from Candice Griffin (nee Benard) asking Mr Bucknall as "Director" to sign the quote. The Email is addressed "To the **Director OF IRIRIKI ISLAND**: As well as Mr Bucknall, a copy is sent to Mr David Turner and Mr Sean Griffin.
9. Ms Benard advises she will need the second cheque of VT 812,500 before departure of the tug with the balance to be paid on return of the tug. The additional VT 812500 was paid and the tug left for Tanna almost immediately. Unfortunately the tug was not able to rescue the barge.



10. On 17th March, Mr Benard on behalf of Trident prepared and sent an updated report on the charter. At that stage the tug was still at Tanna under the charter. The updated report was addressed under the heading "Charterer" to "Iririki Island Resorts Ltd". The report said that Trident was by then owed VT 5.945.000 plus VAT for the charter work to date. There was no response to this report. On 22nd March, Mr Griffin instructed the Nacato to sail back to port and the charter ended on its return to Vila on 23rd March.
11. On 25th March, Trident sent an account addressed to "Iririki Island Resorts Ltd" for an outstanding VT 13.911.250 for the charter, taking account of the deposit originally paid. In terms of the charter the invoice was immediately payable.
12. No payment was received. On 2nd April, Mr Benard sent a letter and Email addressed to Iririki Island Resorts Ltd, Mr Nathan Bucknall, described as General Manager, with a copy to Mr Turner.
13. Mr Turner responded on the same day. He said:

"Dear Trident Holdings

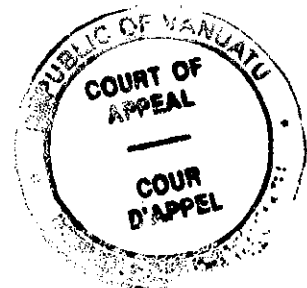
Iririki Island Resort Ltd is not the owner of MC Malcos. MV Malcos is owned by Iririki Marine Ltd, as such Iririki Island Resort is not responsible for the apparent debt you claim.

Iririki Marine Ltd will also be claiming force majeure for at least 4 days due to being unable to use the tug due to cyclone Sandra.

I am available to meet to discuss this matter.

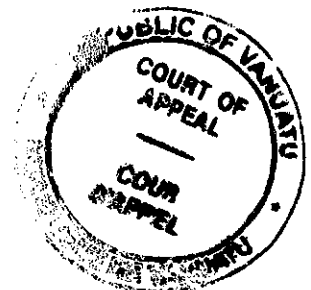
*Regards
David Turner"*

14. Trident responded on 3rd April asking if Mr Turner could clarify the functions of himself and Mr Bucknall. Mr Turner replied saying he was the CEO and managing Director of Iririki Island Resort. Shortly afterwards it became apparent Iririki Marine Holdings Limited could not pay the salvage account. [There was some confusion between the parties about the various entities in this case.]



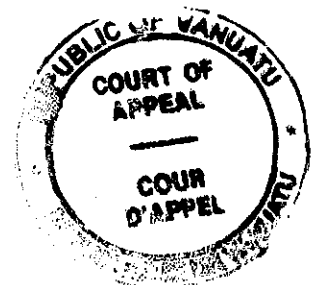
Discussion

15. There are only two relevant companies. Iririki Island Holdings Limited which Counsel advised is the holding company for the resort. Iririki Marine Holdings Limited is the company which owned the barge the Malcos and is its only asset. It operated it between the islands of Vanuatu. Iririki Island Resorts is simply a business name. It is not a legal entity as such. There was no clear evidence as to the extent of its function.
16. Mr Nathan Bucknell signed the quote from Trident as an acceptance. At the time of this charter Mr Bucknell was a director of both the Iririki Island Holdings company and of the Marine Holdings company. He was also described as a General Manager but there was no description of what entity. Mr Turner was not a director of either company at the relevant time.
17. The only evidence called at trial by Iririki Island Holdings or Iririki Marine Holdings or Iririki Island Resort was from Mr Anthony Pereira who was then the Managing Director of Iririki Island Resort. He had no personal knowledge of the circumstances leading to the charter of the Nacato. He said in his sworn statement that the contractual agreements with Trident were all entered into by Mr Bucknell and Mr Turner on behalf of Iririki Marine Holdings. This evidence was not admissible at trial. Mr Pereira had no personal knowledge of any such arrangements. He mentioned he had relied upon business records in reaching this view but no such records were produced in evidence.
18. Counsel for the appellants submitted that the reference to Iririki Marine Holdings in the quote for the charter by Trident illustrated that Trident knew they were contracting with Iririki Marine Holding. We reject that submission. The only reference to Iririki Marine Holdings in the quote was to confirm it had the obligation to return the crew of the Malcos to Vila to operate the Nacato. This arrangement was hardly surprising given Iririki Marine Holdings owned the Malcos and employed its crew. Indeed if the charter was with Marine Holdings the contract would hardly need to say Iririki Marine Holdings was responsible for the repatriation of the crew.



19. The Judge concluded that the evidence overwhelmingly pointed to Mr Bucknall and Mr Turner negotiating the charter as the Manager of Iririki Island Resort. This was the business that was owned by the holding company Iririki Island Holdings. Iririki Marine was a separate entity, not involved in the operation of the resort at all but in the provision of sea transport to the Vanuatu Islands.
20. We are satisfied that the inferences from the evidence was that the charter dealings were all between Trident and Iririki Island Resorts. This was the business name of the Iririki Island Holdings Limited. These inferences establish a prima facie case that the charter contract was between Iririki Island Holdings and Trident.
21. We have noted that the appellant did not call any admissible evidence to challenge the inferences from the negotiations of the charter that Mr Bucknall and Mr Turner were negotiating on behalf of the Iririki Island Holding Company.
22. We consider the failure by the appellant to call evidence from Mr Bucknell and Mr Turner or at least one of them raises the question as to how the absence of such evidence should be treated by the Courts.
23. In Barret & Sinclair v McCormack [1999] VUCA 11, the Court said:

“The unexplained failure by a party to give evidence or to call witnesses may, although not necessarily must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party’s case. The failure may also be taken into account in deciding whether to accept any particular evidence that relates to a matter on which the absent witness could have spoken, and entitles the trier of fact the more readily to draw any inference fairly to be drawn from other evidence that could have been explained had the opposing party chosen to do so by calling the absent witness. However, this principle cannot be employed to fill gaps in the evidence (Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 at 308, 312, 320-21). In Fabre v Arenales (1992) 27 NSWLR 437 at 449 Mahoney JA, with whom the other members of the Court of Appeal of New South Wales agreed, observed:

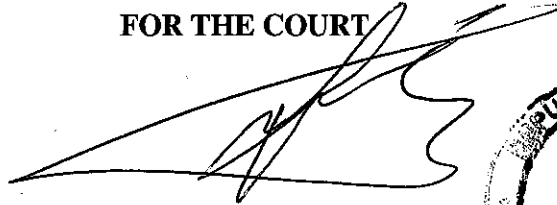


"The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so."

24. We are satisfied that the evidence of Mr Bucknell or Mr Turner was crucial to the appellant's case and by not calling them as witnesses in the Supreme Court this Court is entitled to infer that the appellant chose not to call them because to do so would not have supported the appellant's case.
25. Those persons were not called to give evidence and in the circumstances this failure strengthens the inference that Iririki Island Holding was the charterer. We are satisfied the Judge in the Supreme Court was correct when he concluded Trident had established their contract was with the Iririki Island Holding Limited.
26. For this reasons the appeal will be dismissed. We award costs to the respondent of VT 50.000.

DATED at Port Vila this 15th day of April 2016

FOR THE COURT



Hon. Vincent Lunabek

(Chief Justice)

