

**BETWEEN: FRANK VERE**  
*Appellant*

**AND: NIVALETTE NGUYEN**  
*First Respondent*

**AND: REPUBLIC OF VANUATU**  
*Second Respondent*

**Coram:** *Hon. Chief Justice*  
*Hon. Justice John Mansfield*  
*Hon. Justice Raynor Asher*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Viran Trief*  
*Hon. Justice Edwin Goldsbrough*

**Counsel:** *Marisan Pierre Vire for the Appellant*  
*Mary Grace Nari for the First Respondent*  
*Hardison Tabi for the Second Respondent*

**Date of Hearing:** 6 May 2022

**Date of Judgment:** 13 May 2022

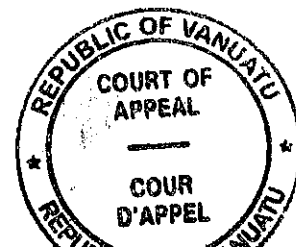
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## JUDGMENT

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### Introduction

- [1] This is an appeal of a decision of 10 January 2022, in which the claimant, Nivalette Nguyen, failed in her claim for damages for the fraudulent sale of a boat, but a company in which she was a shareholder, Lakatoro Trading Centre (**LTC**), was given judgment for a total of VT4,845,000. LTC was not a party to the proceedings.
- [2] There is also an application for leave to cross-appeal by Ms Nguyen. She explained why the cross-appeal application was filed over two months late. Her counsel had been overseas until March, and the assistant in charge did not know much about the case and could take no steps. Then during the period in question Ms Nguyen was suffering from illness, recovering in early April 2022. The delay does not appear to have caused any prejudice. As we set out below we think there is merit in the cross appeal.
- [3] We consider that there are good grounds explaining the delay and that fairness should entitle the cross-appeal to be heard. Leave is therefore granted.

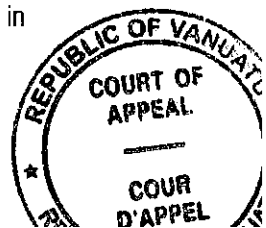


## Background

- [4] In 2009 the respondent Ms Nguyen, was a director and shareholder of LTC, together with her late husband, who is now deceased. It is her evidence that LTC purchased the MV Loloma in 2009. At that time she and her husband owned another boat, the MV Marata, which they allowed to be used by LTC.
- [5] Following the sale of MV Loloma, the owner of the MV Loloma, Frank Vere the appellant, took the view that he had not been fully paid by LTC for the sale of the boat. He sought a default judgment for VT4,045,000. The proceedings do not appear to have been defended by LTC and a default judgment was entered on 16 May 2013. At this stage Mr Nguyen had died. Ms Nguyen appears to have struggled to obtain legal assistance to resist Mr Vere's claims.
- [6] Then on 30 May 2016 an enforcement warrant arising from the default judgment was issued by the Supreme Court. The enforcement warrant was not sought against MV Loloma. It was entered against MV Marata. The warrant against the MV Marata authorised its seizure and sale as an "asset belonging to [LTC] registered under the name of Bernard Nguyen (late) who owns the business". Ms Nguyen swore that the warrant was not served on her personally. This was the ship that Ms Nguyen says was owned by her and her husband, and which she at this stage had the legal ownership interest as the former half owner and as administrator of her husband's estate.
- [7] It is this seizure of the MV Marata, and its sale and the subsequent receipt of the proceeds by the appellant, Mr Vere, about which Ms Nguyen makes her claim, and about which these proceedings are concerned. She alleges that the seizure of the MV Marata and the receipt of the proceeds by Mr Vere, was an act of fraud by Mr Vere, who knew that he had no right to the money or the ship. She maintained that not only did the ship not belong to LTC, but further that LTC had more than paid the sum that was owing for the 2009 purchase of MV Loloma.

## The Supreme Court decision

- [8] The primary judge carefully traced the quite complex factual background in the first part of his judgment. None of his basic findings in fact are in dispute. Indeed, apart from the short paragraphs at the end of the judgment considering the position of LTC, the judgment was not contested by the appellant.
- [9] The primary judge was able to make an assessment of the veracity and accuracy of Mr Vere, and in general terms he accepted his evidence. He rejected the claim that Mr Vere was guilty of fraudulent conduct in obtaining the sale of and the proceeds of the sale of MV Marata. He found there was no support for such an allegation of fraud. He noted that Ms Nguyen had been properly served and for her own reasons did not take any steps. The judgment entered by default could not be criticised or faulted. He found that there were no errors by the Court in the action on the enforcement warrant.
- [10] However, he found that the carrying out of the agreement for sale and purchase of MV Loloma was "poorly supervised in terms of accounting by both Mr Vere and LTC". The complete purchase price was not paid by 30 November 2009 as envisaged by the agreement, but payments continued until mid-2010. It seems that both Mr Vere and indeed LTC thought that there had been a shortfall in the payments made.
- [11] However, they were both wrong. The judge found that before the sale of MV Marata, LTC had in fact paid the full purchase price of MV Loloma, and indeed overpaid by VT800,000.



[12] In crucial paragraphs of his judgment he stated this:

“70. To achieve a just result between the parties, as I accept that in fact Mr Vere was paid more than his purchase price, he must now pay back to LTC that to which he was not entitled. By my calculations he was overpaid by LTC by VT 800,000 for the purchase of MV Loloma. He also received from the Chief Registrar of the Supreme Court the sum of VT 4,115,000 out of the proceeds of the sale of MV Marata, VT 70,000 of which was attributed to his costs. I consider Mr Vere is entitled to those costs, due to Ms Nguyen’s lack of taking appropriate steps.

71. Accordingly, Mr Vere must pay LTC the sum of VT 800,000 plus VT 4,045,000, a total of VT 4,845,000.”

[13] He went on to say that in respect of costs Ms Nguyen had failed in her claim and Mr Vere had succeeded in his defence. However, “... he has been ordered to pay a substantial sum to Ms Nguyen. In the circumstances, I consider it fair that each party bear their own costs of this action”. The Sheriff, having succeeded in his defence, was to have his costs paid by Ms Nguyen, which were set at VT125,000.

### **The parties’ respective cases**

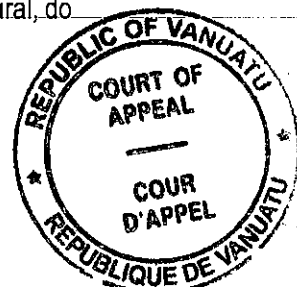
[14] The appellant’s case is straightforward. LTC was not a party, and the Court had no jurisdiction to order a judgment in its favour. The appellant could have added that the claim that succeeded, effectively a claim of money had and received by Mr Vere from LTC as distinct from Ms Nguyen, was never pleaded. The appellant also asserted that the default judgment had settled the issue of what was owed for the sale of MV Loloma, and that the doctrine of res judicata precluded the matter from being reopened.

[15] In the cross appeal, although it was not conceded that the judge’s finding of a lack of fraud was correct, the primary focus was on the judge’s finding that MV Marata was not owned by her but in fact owned by LTC. It was argued that the judge’s finding as to the overpayment was correct, but that the correct owner of the MV Marata was Ms Nguyen, and judgment should have been entered in her favour.

### **Our analysis**

#### *The appeal*

[16] The appeal by Mr Vere against the judgment in favour of LTC must succeed. LTC was not a party to the proceeding. A Court cannot make an order either in favour of a person or against a person, if that person is not a party to the proceeding. Part 3 of the Civil Procedure Rules sets out the requirements for parties, who can be a party and the procedure for the adding and removing of parties. Rule 13.1 on judgments is predicated on a judgment being in favour of a party. A Court only has jurisdiction in any case before it because it has been initiated by a formal process that gives the Court the power to make orders for or against those who are part of that process. The odd occasions where the Court might make an order against a non-party, generally procedural, do not include making an order for the payment of damages.



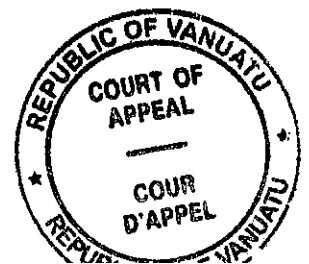
- [17] Indicative of this is the fact that there was no claim in the operative Second Amended Supreme Court claim that LTC was entitled to receive the funds that were overpaid, (although LTC had been a party to earlier gestations of the proceeding).

*The cross-appeal*

- [18] Turning to the cross appeal, it is significant that the appellant himself has filed no appeal against the quantum of the overpayment. Thus although Ms Vire, for Mr Vere, did not concede that the judgment's arithmetical calculations were correct, there being no appeal and indeed no reason for criticism of the judge's calculations, the findings in that part of his judgment must stand. In other words, this finding that there was in fact an overpayment of a total of VT4,115,000 in favour of Mr Vere from the proceeds of the Sheriff's sale of MV Marata is accepted by us as correct.
- [19] In the cross appeal the judge's finding that there had been no fraud by Mr Vere in pursuing the money in obtaining the default judgment and the enforcement warrant was challenged. No real detail in support of the challenge was provided. We find it impossible to go behind the judge's very clear findings, where he rejected fraud. He obviously regarded the error made by Mr Vere as purely a mistake. The evidence fell short of proving fraud. This was an assessment made by the judge who heard Mr Vere give evidence where he was challenged on his actions. There was no obvious error by the judge in his finding on fraud, and we accept it.
- [20] We turn then to the submission that lies at the heart of this appeal. This is that the primary judge was incorrect in finding that MV Marata was owned by LTC and not by Mr and Ms Nguyen in 2009, and then Ms Nguyen following Mr Nguyen's death. It is argued that the judge should have found the opposite, and that it was Ms Nguyen who was entitled to the proceeds of the sale of the MV Marata.
- [21] Ms Nguyen provided four sworn statements setting out her evidence, and a number of annexures. Unlike Mr Vere, she was not required to appear for cross examination. On the face of it, therefore, her evidence was not challenged.
- [22] Among the documents on the court file is an urgent application for suspension of an enforcement warrant, dated 13 July 20156 and signed by Ms Nguyen's counsel. She stated:

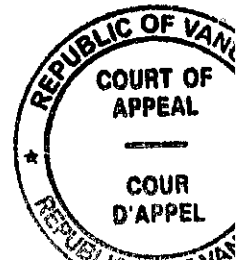
1. *"After the death of the representative of Lakatoro Trading Centre, Bernard Nguyen on 20<sup>th</sup> November 2012, the representative's family was not aware of the debts owing to them until on 6 July 2016 when the enforcement was served on them by the Deputy Sheriff on Luganville, Santo, to seize the marine vessel, MV Marata.*
2. *The marine vessel, MV Marata is not a property of Lakatoro Trading Centre, however, was brought through a loan facility made by Bernard Nguyen and his wife to Tufale Nivalette through Westpac Bank to assist for a purchase of a ship and that Bernard Nguyen and his wife Tufale Nivalette had a mortgage their residential property title no. 11/OE34/021 situated at Tassiriki area, Port Vila, to purchase the said marine vessel, MV Marata."*

- [23] This is not a sworn statement. Mrs Nguyen in her first sworn statement attached a certificate signed by Dinh van Than dated 27 July 2016 headed "*To Whom It May Concern*". In this document it was stated by Mr Van Than:



*"This is to certify that I, Dinh van Than, have sold sometime in 2005 the ship MB Marata to Mrs Nivalette Nguyen. At the time I was the owner of Dinh G Shipping, and MV Marata was one of my ships. It has been sold and paid in full by Mrs Nivalette Nguyen."*

- [24] We note that this is only a letter drafted in 2016 and that Mr van Than did not give evidence. It is hearsay. We note also that the letter states that Ms Nguyen was the sole purchaser in 2005, when Ms Nguyen herself states in her sworn statements that the boat was owned by her and her husband jointly. We place limited weight on this statement.
- [25] The next piece of evidence, which is of importance, is the permanent certificate of registry record of the Republic dated 13 September 2010, showing the MV Marata being registered in the name of Mr Bernard Nguyen. Although there is no reference to Ms Nguyen, this is a statement consistent with Mr Nguyen being the owner of the vessel, rather than LTC. In itself it constitutes significant corroboration of Ms Nguyen's claim. It is a statement from an impartial government authority, and the document was created before there was any dispute over the ownership of the MV Marata. Why would the ship have been registered in Mr Nguyen's name if he did not in fact own it? We note that this document is dated after the statement in the accounts, indicating that LTC owned the MV Marata, which we refer to in more detail below. The certificate supports Ms Nguyen's claim and is highly probative.
- [26] There is a sworn statement of Yves Romon, an administrative officer for LTC, who has been working for LTC since 2008, which states that the MV Marata was the property of Mr and Ms Nguyen, and that LTC was the operator of the MV Marata and not the owner. As an employee of LTC his evidence has to be approached with care, but he was not called on for cross-examination. His evidence is unchallenged. We place some weight on it.
- [27] The next document of relevance is a grant of administration of the estate of Bernard Nguyen van Tang to Marie Nivalette Nguyen dated 5 November 2013. This is again consistent with Ms Nguyen's account of events.
- [28] Finally there is the certificate of registration of the MV Marata in the name of Ms Nguyen. This is a document of the Republic being a permanent certificate of registry, showing Nivalette Nguyen as the owner of the MV Marata. It is dated 8<sup>th</sup> July 2016. There is also a certificate of registration of the Vanuatu Financial Services Commission dated 12 July 2016 showing that the MV Marata was registered under the Business Names Act in the name of Nivalette Nguyen.
- [29] In addition, there are the frequent sworn statements of Ms Nguyen asserting that she and her husband had recently owned the MV Marata, and that after his death she became effectively the sole legal and beneficial owner. These statements were not challenged by Mr Vere.
- [30] As against that there is the document relied on by the primary judge, being a copy of a page from the 2009 accounts of LTC, which shows as one of the fixed assets of LTC - an asset purchased in 2009, being the MV Marata - showing a value of VT6,200,000. The MV Loloma is also listed, as is a third boat, the MV Rocinante. There are no other references to MV Marata.
- [31] This is explained for Ms Nguyen as a way of showing by shorthand that this vehicle was being informally licenced for use by LTC and was earning revenue for LTC. However, she says, it was never owned by LTC and owned at that time by her and her husband, who made it available for use by LTC.
- [32] The judge states that the MV Marata was never registered by Ms Nguyen until "suspiciously, shortly after the enforcement warrant had issued". The judge appears to see the timing as

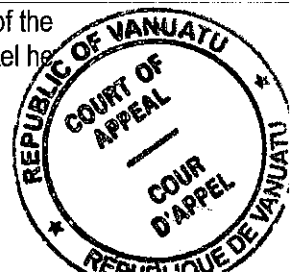


significant. We are unable to see it this way. It is perfectly understandable that it would have taken some time to register the boat in her name, given that Mr Nguyen had died, and it was necessary to obtain letters of administration, which were not completed until 5 November 2013. It is understandable that Ms Nguyen who had not appreciated until 2016 that a claim was being made in relation to the MV Marata, did not push the registration of the boat into her name. It was after all already in the name of her deceased husband and she was the administrator of his estate. She had apparent control over the boat. When she realised that the boat was being sold under a warrant, she completed the change of registration, an understandable reaction to events.

- [33] We are also mindful of the fact that Ms Nguyen's evidence was not challenged by cross examination. We find ourselves unable to go behind it on the basis of a single page from the 2009 LTC accounts, and in this respect we disagree with the primary judge. We find that on the balance of probabilities it was established that Ms Nguyen was the owner of the MV Marata and that therefore the sale of the MV Marata and the overpayment to Mr Vere were a loss to her and not to LTC. We are particularly influenced by the 2010 registration document showing the boat to be an asset of Mr Nguyen, not LTC.
- [34] The cause of action on which Ms Nguyen succeeds is that relied on by the primary judge in respect of the judgment he entered in favour of LTC, of money had and received. While that is not the focus of the pleaded claim which was based on fraud, the facts allege the ownership of the MV Marata by Ms Nguyen, and the loss of the ship and receipt of the proceeds of its sale by Mr Vere. Those pleaded facts contain the essence of a claim for money had and received, and we can see no prejudice to Mr Vere in the case being decided on this basis. He had full notice of the essential aspects of Ms Nguyen's claim.
- [35] We note that other sums were claimed against LTC by Ms Nguyen, for revenue losses arising from the loss of the boat. Claims were made against the Republic arising out of the sale by the Supreme Court sheriff. However these claims which were not allowed by the judge were not pursued in the cross-appeal. In any event, there was not specific evidence proving those claims.

## Conclusion

- [36] Given our findings, Mr Vere received at Ms Nguyen's expense in the amount of VT4,115,000, being the value of the MV Marata. Mr Vere should never have sought the sale of that boat by the Sheriff, and it belonged to Ms Nguyen, and she should have received the proceeds of its sale. There was no error by the Sheriff in enforcing the warrant, obtained by due process, but there was an error on Mr Vere's part in seeking to enforce the judgment when he had already been over-paid the amount owed and in respect of a boat not owned by the judgment debtor. Issues of res judicata do not apply, as Ms Nguyen was not a party to the original default judgment.
- [37] We therefore find that the VT4,115,000 should be paid to Ms Nguyen, and not LTC. We note that in the passage from the judgment quoted in [13] above, the primary judge did refer to that sum being payable to Ms Nguyen, so it may be that he did not at the time focus on who was entitled to that payment as between LTC and Ms Nguyen.
- [38] This means that not only should the appeal be allowed, but also the cross appeal must also be allowed and judgment entered in Ms Nguyen's favour rather than in favour of LTC.
- [39] We do not agree that the costs of the sale of MV Marata of VT70,000 should be deducted from the proceeds of sale as was done by the primary judge. Given that the receipt of the proceeds of the sale of the MV Marata by Mr Vere was a windfall to him, and the receipt of funds from a chattel he



did not own and which belonged to another, those proceeds of sale should not be met by Ms Nguyen.

- [40] We therefore enter judgment for a total sum received for the MV Marata of VT4,115,000. The primary judge also directed repayment of the overpayment of VT 800 000. That overpayment was made by LTC and not by Ms Nguyen, and is not therefore an amount which she can recover on her claim or on this appeal.
- [41] In our view Ms Nguyen is entitled to interest on the VT4,115,000 from the pleaded date of 9 March 2018. In our assessment the appropriate interest rate is 5%, that, being the interest rate sought in the second amended Supreme Court claim.
- [42] In our assessment Ms Nguyen should have been successful in the Supreme Court and is entitled to costs from Mr Vere, both in that Court and in this Court. We fix costs in the sum of VT100,000 in each Court, given the complexity of the issues involved.
- [43] The appeal and cross-appeal did not in the end involve claims against the Republic. Although it was represented by Mr Tabi it took no active steps in the appeal and sought no orders. While appreciating its courtesy, we make no order for costs in favour of the Republic in this Court. The order made in the Supreme Court in favour of the Republic has not been challenged and remains.

#### **Result**

- [44] The appeal is allowed and the judgment in favour of LTC set aside.
- [45] The cross-appeal is allowed, and judgment is entered in favour of the claimant Ms Nguyen in the sum of VT4,115,000.
- [46] Interest is payable on the VT4,115,000 at 5% from 9 March 2018.
- [47] We fix costs to be paid by Mr Vere to Ms Nguyen in the sum of VT100,000 in the Supreme Court, and the same sum in this Court.

**DATED at Port Vila, this 13<sup>th</sup> day of May 2022**

**BY THE COURT**



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**Hon. Chief Justice V. Lunabek**

