

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

Civil Case No. 118 of 2013

BETWEEN: TRIDENT HOLDINGS LIMITED
Claimant

AND: IRIRIKI ISLANDS HOLDINGS LIMITED
First Defendant

Coram: Justice Chetwynd

Parties: Mr Napuati for the Claimant
Mr. Morrison for the Defendant

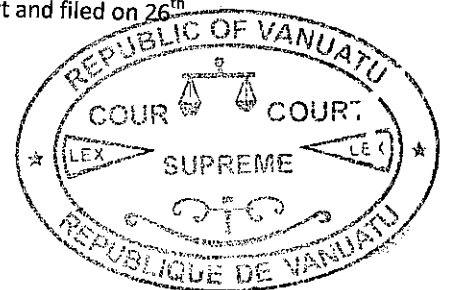
Hearing 8th October 2015

Judgment

1. This case concerns a grounded landing craft or barge ("the Malcos") and the bare boat charter of a tug ("the Nacato"). It does not concern the salvage of the Malcos although the Nacato was intended to be involved in a salvage operation. It is necessary to look at what led up to this state of affairs. There is no real dispute about the initial facts. It has to be said most of them have to be gleaned from the Claimant's evidence because there is very little evidence from the Defendant.

2. There is no real dispute the Malcos went aground off Tanna sometime towards the end of February 2013. The Claimant became aware of the situation through telephone calls between Mr Sean Griffin and Mr Guy Benard on 26th February 2013. Mr Griffin is described in a report¹ by the insurers of the Malcos as the ship's agent and possible Chief Mate. He was representing the Defendant. Mr Benard was an adviser to the Claimant. On or about the 3rd March 2013 there was further contact between the two when Mr Griffin asked for a quotation from the Claimant for assistance to tow the Malcos off the beach. Mr Benard responded saying the assistance would in fact amount to a salvage operation and he could not advise the Claimant to be involved in salvage without being in complete control of the whole operation. Mr Benard was prepared to

¹ See Annexure C to the sworn statement by Mr Guy Benard entitled Expert Summary report and filed on 26th January 2015



advise the Claimant to enter into a bare boat charter of the Nacato. A bare boat charter was described by Mr Benard as being like car hire. All that the Claimant would provide is the vessel. The charterer, the person hiring the vessel, would provide and pay for a crew. The charterer would be in complete control of the vessel, that is, what it was used for and how. This suggestion was accepted and a quotation prepared by Ms Candice Benard a director and the secretary of the Claimant (and incidentally the daughter of Mr Guy Benard). Unfortunately from this point on the parties do not agree what happened or rather they do agree what happened but have different interpretations of consequences of what happened.

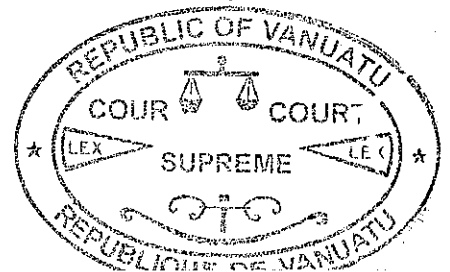
3. The quotation can be seen as an annexure in several sworn statements. It is "2CB 1" to the second sworn statement filed by Ms Benard on 26th August 2013 and as "GB2" to the sworn statement of Mr Benard filed 23rd August 2013. It is undated but there is an Email from Ms Benard (seen as THL 2², "GB2" and "2CB1") which reads:

"The tug Nacato was refuelled yesterday evening, the crew is ready to sail. Please sign the last offer addressed to you as director. I will collect the document as soon as it is ready along with the second cheque of 812,500 VT (2nd quarter) which shall be given before departure. The balance for assistance of M/V Malcos VAT included is 2,031,250 VT to be paid upon return of M/T Nacato."

The Email is dated "Sat, 09 Mar 2013 11:51:46 +1100". It is addressed to the Director of Iririki Island and was sent to Nathan Bucknall, David Turner and FC and was Cc'd to Sean Griffin. The Quotation was addressed to Sean Griffin. It is accepted that the signature seen on the left hand side of the quotation exhibited by Mr Benard (as "GB2") is that of Mr Bucknall. There appears no doubt that Mr Bucknall accepted the quotation. No argument has been raised that he did not have authority to enter into a contract with the Claimant on behalf of the Defendant. The argument, as will be seen later, is that he entered into the contract or charter for the Nacato on behalf of another different legal entity.

4. The terms of the quotation are relatively straightforward. There is a heading "General conditions" followed by the phrase Bare boat/time charter. The quotation continues by stating the tug is hired on bare boat basis without crew. It then continues with an authorisation that the crew members of the Malcos can operate the tug. This was on the basis the crew of the Malcos were familiar with the operations of the Nacato. It says THL (the Claimant) will provide food (presumably for the crew). The quotation states it is the responsibility of Iririki Marine Holdings Ltd to repatriate the crew members of the Malcos to Port Vila so that they can operate the Nacato. The duration of the time charter was a maximum of 60 hours and any time over that would be paid for at the reduced rate of 40,000VT per hour plus VAT. The quotation required 50% to be paid

² THL 2 is an annexure to a document entitled Evidence in Support of the Claimant Declarations which is a short sworn statement (and annexures) by Mr Guy Benard filed on 6th October 2015



before the departure of the Nacato and the remainder to be paid on its return. Ms Benard's Email of 9th March seems to confirm that 25% had been paid prior to the Email being sent and a further 812,500 VT (as referred to in the Email) afterwards. The Claimants' accept the Defendants paid 1,625,000 VT.

5. What happened next is a little unclear but it can be put this way. The weather was bad. Cyclone Sandra was lurking to the north west of Tanna. There was a chance the cyclone would move closer and threaten Tanna. The first attempts to tow the Malcos off the beach failed. The weather deteriorated and further attempts were put off. However, the weather started to improve and whoever was directing the salvage operations asked for the Nacato to remain on station. The situation can be seen from a series of Emails from "THL 4 " onwards. There are also copies of Emails annexed to Mr Benards sworn statement filed 23/8/13 at "GB6 ,7, 8 and 9". "THL 15" is a report detailing the final efforts to re-float the Malcos and confirms the instructions from Iririki Resorts to abandon the salvage operations. The charter would have ended at 6 am when the Nacato returned to Port Vila.

6. On the 25th March 2013 an invoice was sent by the Claimant to Iririki Island Resorts Ltd. The invoice covered the period from 1st March 2013 at 12 am to 23rd March 2013 at 6 am, a total of 324 hours. 60 of the hours charged were charged as per the original quotation and the balance charged at the "reduced rate" of 40,000VT per hour. This is in accordance with the quotation accepted by Mr Bucknall on or about 9th March 2013.

7. On 2nd April the Claimant wrote to Iririki Island Resorts Ltd querying non-payment of the invoice ("THL 18"). The letter was sent by registered mail and as an attachment to an Email. In response Mr David Turner Emailed the Claimant saying:-

"Dear Trident Holdings

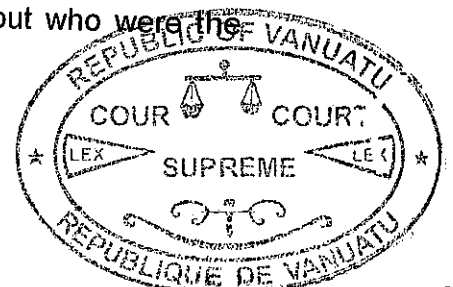
Iririki Island Resort Ltd is not the owner of LC Malcos. LC Malcos is owned by Iririki Marine Ltd, as such Iririki Island Resort is not responsible for the apparent debt you claim.

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 discuss this matter."

8. That response sums up the case. The Defendant says the Claimant has sued the wrong company. The proper defendant should be Iririki Marine Ltd who owned the Malcos. Other than that the Defence to the Amended Claim Filed 6th December 2013 (filed on 10th April 2014) admits the rest of the claim, including the amount of the final invoice and what is left owing.

9. Both the Claimant and the Defendant seem to have become fixated with the ownership of the Malcos. The issue is not who owned the Malcos but who were the



contracting parties to the bare boat charter. The answer to that question does not depend on the ownership of the Malcos. Unfortunately the main players in the events of February, March and April of 2013, namely Nathan Bucknall, David Turner and Dean Head have all left the employment of the Defendant. There is no evidence from them except contemporaneous Emails and other documents which emanated from them or which were sent to them.

10. There is annexure THL 2 which is an Email dated 6/3/2013 from Ms Benard addressed to Nathan Bucknall as Director of Iririki Island. It had attached to it the original quotation. The mode of address was not corrected by Mr Bucknall. There was no response asking Ms Benard to amend the details of the quotation to show the charterer was Iririki Marine Ltd.

11. There is an Email from Ms Benard dated 13/3/2013. It is annexure THL 6. It is addressed to Iririki Island Resorts Ltd. It was sent to Mr Bucknall and Mr Turner. It was Ccd to FC@iririki.com and to two addresses for Mr Griffin. It had an attachment which appears to be an Updated Situation Report. The rest of the detail is too small to make out (it may be the annexure at THL 12).

12. The response to the Email is annexure THL 7. It comes from Nathan Bucknall General Manager of Iririki Island Resort. It was sent to the Claimant and to Mr Turner. It was C'cd to FC @ Iririki and to the two addresses of Mr Griffin. There is no correction by Mr Bucknall as to the addressee. It is also shown as annexure GB 5.

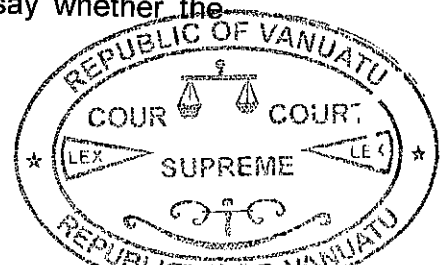
13. There is an Email from David Turner CEO Iririki Island dated 18/3/13. It is annexure THL 14. It is addressed to Mr Bucknall and the Claimant. This Email is also shown as annexure GB8.

14. There is annexure B1(6). It is an Email from Mr Dean Head at an address shown as FC@iririki.com. He signs himself as Dean Head Financial Controller for Iririki Island Resort. Anything addressed to FC @iririki would have gone to him.

15. There is annexure THL 12. It is an updated situation report from the Claimant dated 17th March 2013. It was sent to Iririki Island Resorts Ltd. There is no correction to the details by the Defendant or any of those persons who have been involved in the negotiations or arrangements.

16. The only evidence to come from the Defendant was from Mr Anthony Perira. He filed a sworn statement on 11th August 2015. He describes himself as the Managing Director at Iririki Island Resort. He quite honestly says that he did not hold that position at the time of the events relative to the proceedings. He goes on to describe administrative arrangements between Iririki Island Holdings Ltd and Iririki Marine Ltd. (He refers to the latter as Iririki Marine Holdings Ltd).

17. In answer to questions from the Bench he confirmed that Iririki Island Resort was the trading name of Iririki Island Holdings Ltd. He was unable to say whether the



trading name was registered in any way. He did say that no other commercial or business entity traded as Iririki Island Resort.

18. It is clear to me that the three persons who were most involved with the negotiations in February March 2013 on behalf of the Defendant were Mr Turner as CEO or Managing Director, Mr Bucknall as General Manager (and Director - see THL 1) and Mr Dean Head as Financial Controller. Those gentlemen were cavalier with their use of the name of Iririki Island Resort which has been confirmed as the trading name for Iririki Holdings Ltd. At no time during negotiations did they attempt in any way to correct the Claimant and say that all contracts and charters were between the Claimant and Iririki Marine Ltd. It was only after the final bill was delivered that they started to play the name game. Unfortunately for the Defendant, all the evidence suggests, and I so find, by then the charter had been agreed between Trident Holdings Ltd, the Claimant and Iririki Island Holdings Ltd, the Defendant. As I indicated earlier, it matters not a jot that the owner of the Malcos was another legal entity. The Claimants were not negotiating with the owners of the Malcos they were negating and concluding a charter agreement with the Defendant.

19. Judgement must be entered for the Claimant. The Defendant shall pay the Claimant the sum of 13,911,250 VT. The Defendant will pay interest at the rate of 10% per annum on that sum from the date of issue (29/5/2013) to the date of payment. This is a daily rate of 3,811 VT. The amount of the judgment and interest shall be paid forthwith. I shall fix an enforcement conference for Friday 6th November at 3:30 pm. If the parties reach agreement as to how the judgment debt will be paid then they can write to the Court with details of the agreement and the enforcement conference will be vacated. I am unable to award damages for "resisting payment" as claimed. The Defendant shall pay the Claimant's costs and such costs will be taxed on a standard basis if not agreed.

DATED at Port Vila this 9th day of October 2015.

BY THE COURT


D. CHETWYND

Judge

