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

Civil Appeal
Case No. 25/2399 COA/CIVA
[2025] VUCA 43

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: JONG PHIL SHIN & JUAN YEUN YU
Respondents

Date of Hearing:	***6 November 2025***
Before:	***Hon. Justice Ronald Young*** ***Hon. Justice Richard White*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Edwin P Goldsbrough*** ***Hon. Justice Maree M Mackenzie***
Counsel:	***F Bong for the Appellant*** ***S Motuliki for the Respondents***
Date of Decision:	***14 November 2025***

JUDGMENT OF THE COURT

Introduction

1. The Republic appeals against an award of damages of VT198,904,522 to the Claimants in consequence of the revocations of their certificates of citizenship and the subsequent refusal by the Vanuatu Investment Promotion Authority (VIPA) to grant them a foreign investor approval certificate.

2. The Republic brings the appeal on limited grounds but at the hearing the Court raised with the parties a number of other matters and counsel also addressed those issues. The proper disposition of the appeal requires the Court to address those additional matters.

3. For the reasons which follow, we allow the appeal and substitute an award of damages of VT71,124,522 in place of the award of the primary Judge.

Background circumstances

4. The Claimants arrived in Port Vila from South Korea in 2008. In 2012, both Claimants were granted, and issued certificates of citizenship of Vanuatu. The Claimants say that the citizenship had been granted to them on the grounds of their adoption in custom in 2009 by the late Harry Iauko, then a

Member of Parliament. We record that the Citizenship Act does not provide a means for adults to obtain citizenship by adoption.

5. Shortly after their arrival, the Claimants established a company, Woorin Motors Ltd. It then commenced operating a garage business, selling and repairing vehicles. The first Claimant, Mr Shin, was the sole director and shareholder of Woorin Motors.

6. On 8 February 2011, the Second Claimant, Ms Yu, acquired a leasehold interest in the property No. 11/OE44/022 in the Korman/Tassiriki area (the Leasehold Property) for VT2 million. The lease, which was for a term of 50 years, commenced on 30 July 1980.

7. Thereafter, the Claimants borrowed substantial amounts from the National Bank of Vanuatu Ltd (NBV) secured by a mortgage over the Leasehold Property. It seems that the Claimants used these funds principally in the business of Woorin Motors and to develop the Leasehold Property so that they could live there and Woorin Motors could also conduct its business there.

8. Commencing in October 2013, the Claimants also operated a restaurant and takeaway business with the name "*Territory Bar and Family Karaoke*" at the Leasehold Property. We will refer to this as "the Bar/Karaoke business".

9. On the Judge's findings, Woorin Motors continued its business until 31 March 2016 when it closed. Likewise, the Claimants continued to operate the Bar/Karaoke business at the Leasehold Property until 31 March 2016.

10. The Citizenship Committee revoked the citizenship certificates of both Claimants (and thereby their citizenship) on 10 October 2014, although the revocations were not communicated formally to the Claimants until 7 June 2017. The letter of the Citizenship Commission recorded that the issue of the Certificates of Citizenship in 2012 had not been approved by the Commission. The Claimants had learned indirectly of the revocations in 2014 shortly after they were made, when they attended at the Customs Department to renew the two business licences. They were then told that further business licences (required by the Business Licence Act, s.2 for the conduct of a business) could not be issued because the Customs Department had received a letter from the Citizenship Commission stating that their citizenship would be revoked. The Claimants received further indirect notification that their citizenship certificates would be revoked when, shortly afterwards, they applied to VIPA for a foreign investor approval certificate (which would have permitted them to continue the Business) but were told that such a certificate could not be issued because VIPA had been informed by the Citizenship Commission that their citizenship had been revoked.

The proceedings in the Supreme Court

11. It seems that the Claimants have not ever commenced judicial review proceedings challenging the lawfulness of the revocation of their citizenship. Nor is there any evidence of them having made any subsequent application for citizenship. Instead, on 11 August 2020, the Claimants commenced the proceedings in the Supreme Court giving rise to this appeal. The Defendants to the proceedings at first instance were the Republic of Vanuatu and VIPA.

12. The statement of claim alleged that by reason of the revocations of the Claimants' citizenship, and they no longer having authority to operate their businesses, they had had to close those businesses with the consequence that they had lost their two businesses and the Leasehold Property and that they were currently stateless (having surrendered their Korean citizenship on becoming citizens of Vanuatu). It concluded with a statement that the Claimants claimed damages.

13. The statement of claim has the curiosity that it did not allege that the revocations of the citizenship had been unlawful or wrongful in some other way. Nor did it identify a cause of action said to give rise to an entitlement to damages, let alone all the material facts necessary to make out a cause of action: cf r.4.1 in the Civil Procedure Rules.

14. Even more curiously, and despite numerous opportunities to do so, the Defendants did not file a defence. Accordingly, on 31 March 2021, the primary Judge entered a default judgment by ordering "*Judgment is entered for the Claimant for an amount to be determined*" and then timetabling the matter to a hearing. The default judgment did not identify the cause of action for which damages were to be assessed.

15. In a judgment delivered on 20 August 2021, *Shin and Yu v Republic of Vanuatu and VIPA* [2021] VUSC 216, the Judge assessed the damages at VT92,000,000. We will set out the elements of that assessment shortly.

The first appeal

16. On appeal, the Court of Appeal permitted the Republic to adduce further evidence and, on the basis of that evidence, allowed the appeal, set aside the judgment so that the new evidence could be tested, and remitted the proceedings to the Supreme Court for further hearing on the quantum of damages: *Republic of Vanuatu v Jong Phil Shin* [2021] VUCA 51, delivered on 12 November 2021.

The second Supreme Court judgment

17. An extraordinary circumstance occurred on the remittal. Despite having obtained the re-trial on the basis that they wished to lead further evidence, the Defendants did not do so. So far as this Court can tell, that circumstance has never been explained by the Republic's counsel.

18. The Judge delivered judgment on the re-trial on 17 July 2025: *Jong Phil Shin & Juan Yeun Yu v Republic of Vanuatu; Vanuatu Investment Promotion Authority and National Bank of Vanuatu Limited (Interested Party)* [2025] VUSC 191. NBV had been joined to the proceedings as an Interested Party in 2023, on its own application. It is not clear what interest it had in the proceeding other than obtaining access to the judgment sum to be awarded. NBV was not named as an Interested Party on the present appeal and it took no part in the appeal hearing.

19. It is evident that the Republic or its counsel must bear much of the responsibility for the long period which elapsed between the Court of Appeal remittal and the retrial.

20. The assessment of damages seems to have been conducted on the assumed basis that the revocations of the Claimants' citizenship had been unlawful and that the damages pursuant to the

default judgment were to be assessed in the manner of an assessment for negligently caused economic loss. There is however no express statement to that effect.

21. We mention that even if the revocations of the Claimants' citizenship had been unlawful (which they may well have been, if only because of the apparent denial of procedural fairness), this would not of itself have entitled the Claimants to damages, as damages are not an available remedy on judicial review. Damages are a well-recognised remedy for a tort, but the tort should be identified so that the appropriate principles governing the assessment will be known. The Defendants have not at any stage contended that the damages should be confined to the period it would have taken the Claimants to being a successful claim for judicial review and/or for the Citizenship Commission to consider the revocations afresh after providing procedural fairness.

22. In the judgment on 17 July 2025, the Judge reassessed the Claimants' damages. The Judge found:

(i) the loss of both the garage and Bar/Karaoke businesses was caused by the revocation of the citizenship certificates and was not too remote, at [56]-[57], [88]-[92];

(ii) the Claimants were entitled to the loss of profits from both the garage and Bar/Karaoke businesses from the date of their closures on 31 March 2016 until the time of the assessment in July 2025, at [69];

(iii) the loss in respect of the garage business should be assessed as a loss of profits of VT4 million per year for a period of 11 years (2015 to 2025, both years inclusive) at [76];

(iv) the loss in respect of the Bar/Karaoke business should be assessed as a loss of profits of VT1,200,000 per year for the same period of 11 years, at [95]-[97];

(v) the Claimants were entitled to an award of VT40 million for the loss of the Leasehold Property, this being its assessed market value in December 2020 when they were evicted from it on NBV enforcing its security, at [134];

(vi) the Claimants were entitled to an award of VT55,959,522 representing the amount by which their indebtedness to NBV had increased between October 2014 when their citizenship had been revoked and the time of the assessment in July 2025, at [137]-[138];

(vii) the Claimants be awarded VT7,500,000 each for 'pain and suffering', at [144];

(viii) Interest should be awarded for each of the assessed business losses.

23. For convenience, and for ease of comparison, we set out the Judge's 2021 and 2025 assessments side by side:

	2021 Assessment VT	2025 Assessment VT
Loss of the Woorin Motors business	6,000,000	44,000,000
Loss of the Bar/Karaoke business	3,000,000	13,200,000
Loss in respect of Leasehold Property	70,000,000	40,000,000
Difference in loan balance	N/A	55,959,522
Pain and suffering	10,000,000	15,000,000
Interest on the Woorin Motors loss	2,000,000	23,650,000
Interest on the Bar/Karaoke business loss	1,000,000	7,095,000
Total	92,000,000	198,904,522

24. On 17 July 2025 the Judge entered judgment for the sum of VT198,904,522 against both the Republic and VIPA.

25. Given limitations in the nature and quality of the evidence presented at both trials, the assessments have been difficult. The Judge referred more than once to the need for the Court to endeavour to quantify the damages at best it could using the limited available evidence. The Judge referred in this respect to *Remy v Kyong Sik Jang* [2018] VUCA 5 at [30]-[34], in particular to the statement that, in the case of inadequate evidence allowing a detailed assessment of an established loss, the Court "*in the quest for justice will endeavour to quantify the damages suffered as best it can on the limited evidence available*". The Judge also referred to the statement in *McGregor on Damages* that when "*precise evidence is obtainable, the Court naturally expects to have it [but when] it is not, the Court must do the best it can*" and to the statement of Deane J in *Commonwealth of Australia v Amann Aviation Pty Ltd* [1991] HCA 54, 174 CLR 64 that "*the mere fact that damages cannot be assessed without difficulty and uncertainty does not, however, relieve a court from the responsibility of attempting to assess them as best it can.*" The circumstances were such as to make it apposite for the Judge to remind herself and the parties of these principles.

The Appeal

26. The Notice of Appeal to this Court named only the Republic as Appellant. VIPA did not appeal, even though the judgment had also been entered against it. When we pointed this out to the parties, Mr Bong for the Republic applied to join VIPA as an Appellant. Ms Motuliki for the Claimants sensibly did not oppose the joinder and we made an order to that effect.

27. The Notice of Appeal contains three grounds but the Appellants abandoned the second, and it need not be addressed. We will address the remaining grounds in the reasons below. Before doing so, it is appropriate to state some general matters.

Matters of principle

28. The starting principle is that in an action for negligently caused economic loss, claimants are to be put in the same position as they would have been had the tort not occurred. The application of that starting principle is qualified by other principles: the loss must be caused by the tort, must not be too remote and claimants are usually required to take reasonable steps to mitigate the loss.

29. It is for claimants to prove, on the balance of probabilities, that the claimed negligence of the defendant caused the injury or loss for which they seek damages. Generally, this requires claimants to prove both the loss and that "*but-for*" the claimed negligence, the claimed injury or loss would not have occurred. But even when that test is satisfied, it is still necessary to consider "*whether a particular act or omission ... can fairly and properly be considered the cause*" of the loss: *Fitzgerald v Penn* [1954] HCA 74; 91 CLR 268 at 276. So, it has been said that causation is essentially a question of fact, to be resolved as a matter of common sense: *March v Stramare (E &MH) Pty Ltd* [1991] HCA 12; 171 CLR 506. In addition, a defendant will be liable only for those consequences of its negligence which are not too remote. Defendants are not liable for consequences which are not reasonably foreseeable: *Overseas Tankship (UK) Ltd. v Morts Docks and Engineering Co. Ltd. (the Wagon Mound No. 1)* 1961 AC 388. Defendants must be able to foresee the *kind* of injury suffered rather than its exact extent or manner of occurrence: *Chaplin v Hearse* [1961] 106 CLR 112.

30. Generally, when a defendant's negligence causes the destruction of the claimant's property, the damages will be assessed at the date of the loss. There are exceptions. For example, during periods of high inflation, an assessment at the date of loss may under compensate the claimant as, by the date of assessment, the cost of securing replacement property may have risen steeply. But circumstances of that kind are not present in this case.

31. Again generally, damages for negligently caused loss of property are assessed by reference to the market value of the property lost at the date of its loss: *Liesbosch Dredger v S.S Edison* [1933] AC 449. When the lost property was income earning, the market value should take account of the income earning potential by capitalizing the prospective profits. That is to say, the market value of an income earning asset will be higher to reflect its income earning potential. Expert valuation evidence will usually be required in such cases to establish the value of the property lost. If there was impairment of the income earnt from the property before it was wholly lost, an additional award for that loss can be made. If, unusually, the lost potential for future profits is not included in the market value, the present day value of the profits foregone may be able to be recovered in addition.

32. This approach does not preclude awards for associated losses, liabilities or expenses incurred, subject of course to the principles concerning causation, remoteness and mitigation.

33. Claimants are compensated for having been held out of their money between the date of the loss and the date of the award by an award of interest.

34. As is apparent, the assessment in this case was not structured in this manner.

Woorin Motors Ltd not a Claimant

35. As noted, the Judge awarded the Claimants VT44 million for the loss of profits by the Woorin Motors business, together with an amount of VT23,650,000 for interest.

36. In order to assess the loss of profits, the Judge noted that the VAT records of Woorin Motors showed the following total sales and income from 2009 to 31 March 2016.

a) 2009 - VT8,120,000;

b) 2010 - VT18,420,150;
c) 2011 - VT18,864,611;
d) 2012 - VT13,178,628;
e) 2013 - VT3,480,300;
f) 2014 - VT1,346,000;
g) 2015 - VT3,439,755; and
h) 2016 (Jan – Mar) - VT320,200

37. Then, using the statements of purchases and expenses of the Woorin Motors business for the same period, the Judge assessed that the garage suffered a loss of profits of VT4 million each year from 2015 to 2025 inclusive (11 years), at [76]. On that basis, the judge awarded the Claimants damages of VT44 million for the loss of the garage business.

38. At the commencement of the hearing of the appeal, we raised with the parties that Woorin Motors had been the entity conducting the garage business and not the Claimants personally so that the claimed loss of profits arising from the closure of the garage business had to be the loss of Woorin Motors, and not of the Claimants personally. Put slightly differently, that the Claimants had been awarded damages for a loss which they had not themselves suffered.

39. The sworn statement of Mr Shin demonstrated amply that Woorin Motors conducted the garage business. Amongst other things it had obtained the business licence; it imported the vehicles which it then sold; and it submitted the VAT returns and paid the VAT.

40. It can be concluded that, if the Claimants had a cause of action against the Republic in respect of the revocations of citizenship, then so did Woorin Motors. It was in the immediate contemplation of the Citizenship Commission that the revocations of the Claimants' citizenship would preclude the issue to Woorin Motors of the business licence it required in order to conduct business in Vanuatu (Business Licence Act, s.2) and thereby be a cause of loss to it. Its letters to the Customs Department and VIPA in October 2014 are sufficient evidence that that was so. Woorin Motors was accordingly within the class of persons to whom a duty of care could be owed and Woorin Motors could have brought its own action.

41. The principles derived from the English case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204 are reasonably clear, even if their application is not always straightforward. We refer to the statement of the principles by Bathurst CJ in *Ekes v Commonwealth Bank of Australia* [2014] NSWCA 336:

> *[150] The principles are well established. When a company suffers loss by a breach of duty owed to the company, no action lies at the suit of a shareholder to make good a diminution in the value of the shareholder's shareholding where that loss merely reflects the loss suffered by the company .... That principle extends to include losses suffered as a result of diminution in the value of a person's shareholding, loss of dividends and other amounts which the shareholder might have obtained from the company had it not been deprived of its funds ... The principle extends to a case where both the company and the shareholder have a claim for breach of duty which caused the loss ... .*

[151] However the principle does not prevent a shareholder from suing for a breach of duty owed to him or her where the loss is separate and distinct from the loss suffered by the company .... (citations omitted)

42. In accordance with these principles, the Claimants could not sue to recover for themselves the loss suffered by Woorin Motors. It was Woorin Motors which had the cause of action.

43. Ms Motuliki sought to avoid this consequence. First, she submitted that the issue was foreclosed by the entry of the default judgment as it meant that the only remaining issue in the trial was the assessment of the damages claimed by the Claimants. Ms Motuliki contended, in effect, that issues concerning the identity of the person suffering the loss were 'liability' issues and so encompassed by the default judgment.

44. Secondly, Ms Motuliki emphasised that it was the Claimants who had established Woorin Motors (it was named after their daughter) and that Mr Shin was its sole shareholder and director. The Claimants had controlled Woorin Motors and its day-to-day operations. She submitted that Woorin Motors had simply been the means by which the Claimants had earned an income. Although Ms Motuliki did not use this expression, her submission was to the effect that Woorin Motors was in substance the *alter ego* of the Claimants so that its status as a separate legal entity should be disregarded.

45. We are unable to accept these submissions. As to the first, the default judgment foreclosed only the issue of whether the claimed conduct had caused the Claimants some loss and rendered the Defendants liable to them for damages. The Claimants still had to prove the loss said to have been caused by the impugned conduct, as well as the matters bearing on the assessment of the damages for that loss. As this Court observed in *Remy v Kyong Sik Jung* [2018] VUCA 5 at [13], *"it is trite law that a party who asserts the loss must identify that loss and prove it"*. And as the Judge noted at [31] in the primary judgment, the Claimants were required to satisfy the Court both as to the *fact* of the damage as well as its *amount* (emphasis added).

46. Moreover, the Judge's task was not, as Ms Motuliki submitted, to assess the damages *claimed* by the Claimants. It was to assess, in accordance with the principle, the *entitlement* of the Claimants to damages for the losses caused by the assumed negligence.

47. As to Ms Motuliki's second submission, the separate legal personality of Woorin Motors, as an incorporated entity, could not, and cannot be ignored. While there are limited circumstances in which the 'corporate veil' may be lifted, this case is not one of them. It cannot be said that Woorin Motors was no more than an agent of the Claimants in its conduct of the garage business. Generally, the Courts have frowned on attempts by those who have benefitted from their incorporation of a company to conduct a business (for example, by protection from personal liability and protection of personal assets) to have the 'corporate veil' lifted later when it no longer suits them.

48. In short, it was not possible for the Claimants to claim for themselves the loss suffered by a Woorin Motors even though Mr Shin is its sole shareholder and director. It is accordingly appropriate to grant the Appellants leave to amend the notice of appeal to raise this as a ground.

49. For this reason alone, the appeal must be allowed to set aside the sum of VT44 million allowed for the loss of the garage business and the sum of VT23,650,000 in respect of the interest on that component in the assessment.

50. That conclusion makes it unnecessary for the Court to consider other aspects of the assessment of the Woorin Motors loss.These include the fact that the Judge did not assess the damages by reference to the value of the Woorin Motors business as at the date of its loss (31 March 2016), the fact that the assumed loss of VT4 million per year exceeded the total sales and income (before deduction of expenses) of Woorin Motors in each of the three years before it ceased business on 31 March 2016, the fact that the Judge awarded loss of profits for 11 years (commencing in 2015) even though Woorin Motors continued to trade until 31 March 2016, and the evidence indicating that the Claimants' financial position may have become stretched, if not parlous, by the end of 2014 in any event.

No allowance for the effects of COVID-19 – Bar/Karaoke business

51. The appellants submit that the Judge had erred in failing to reduce the award for loss of profits because the restrictions resulting from the COVID-19 epidemic would, independently, have caused some reduction in the earnings, and consequently profits, of the two businesses.

52. We propose to deal with this contention quite shortly.

53. We decline to interfere with the Judge's award on this ground for two reasons:

    (i) we are disallowing the award in respect of Woorin Motors in any event; and

    (ii) the Appellants' notice of appeal makes this complaint only in respect of the amount awarded in respect of the Woorin Motors business and not in respect of the Bar/Karaoke business.

The Loss of the Leasehold Property and the loan balance

54. On the Judge's findings, NBV, in the exercise of its powers as mortgagee, had obtained an order for possession of the Leasehold Property in April 2020, at [111]. In December 2020 the Claimants were evicted from the property, at [24]. Using its power of sale, NBV sold the Leasehold Property in April 2021 for VT40 million and applied that amount in reduction of the Claimants' indebtedness to it. As will become apparent, despite that reduction, the Claimants still had a substantial indebtedness to NBV and it has continued to accumulate.

55. The Claimants sought damages for the loss of the Leasehold Property and, in addition, claimed the difference between the amount of their indebtedness to NBV at the time of the revocations of their certificates of citizenship and at the time of the re-trial in 2025.

56. As noted earlier, the Judge allowed VT55,959,522 in the assessment in respect of the increase in the Claimant's indebtedness to NBV between December 2020 and the assessment in July 2025. In addition, the Judge allowed VT40 million, being her assessment of the market value of the Leasehold Property at the time of the Claimants' eviction in December 2020.

57. Strictly speaking, any amount allowed with respect of the loss of the Leasehold Property should have been awarded to Ms Yu alone, as she was the sole registered proprietor. However, it was not suggested that anything turned on the fact that the Judge had treated the Claimants as co-owners.

58. The background to these assessments is this. The evidence accepted by the Judge indicated that Ms Yu had executed a transfer to acquire the Leasehold Property on 8 February 2011 (for a consideration of VT2 million) and six days later, on 14 February 2011, had executed a mortgage to NBV securing a loan of VT4,640,000. Subsequent variations of mortgages increasing the amounts secured to VT24,661,000 were executed (curiously, neither the original transfer, the original mortgage nor the two variations of mortgage were registered until 5 June 2012). Further variations of the mortgages to NBV were made with the last, on 1 October 2013, increasing the sum secured by Ms Yu's interest in the leasehold property to VT53,035,000. Each of the mortgage and mortgage variations secured the liability of both Claimants as customers of NBV.

59. The Judge found that that loss of the Leasehold Property had been caused by the revocations of the Claimants' citizenship, at [113]-[114]. The Judge then reasoned as follows:

(i) the Claimants had been evicted by NBV from the property in December 2020, in the exercise of its enforcement powers, at [124];

(ii) the Claimants were entitled to damages, being the market value of the Leasehold Property at December 2020, at [125];

(iii) the valuation of the Leasehold Property on which the Claimants relied was unreliable and should be ignored, at [129];

(iv) the Defendants had provided two valuations: one in January 2021 estimating the value at VT40 million and one in July 2021 estimating the value to be VT52 million, at [126];

(v) it was appropriate to rely on the valuation closest in time to the Claimants' eviction, at [133];

(vi) the market value of the Leasehold Property in December 2020 was accordingly VT40 million, at [133], and this was the amount awarded.

60. Although seeking damages with respect to the increase in their loan position with NBV, the Claimants did not provide evidence by way of loan contracts (as distinct from the mortgages), interest rates, bank statements, account balances, or other like documents to demonstrate the loan position from time to time. Nor did they provide the communications between them and NBV from time to time, and they provided only limited documentary evidence of the various enforcement actions taken by NBV. These were surprising omissions as, even if the Claimants had lost the original account statements and other documentation provided by NBV, its participation in the proceedings as an Interested Party must have meant that they had a ready means of obtaining them. In addition, the Claimants could have had recourse to third party discovery and subpoenas as a means of obtaining the documentary records. It is evident that the absence of evidence of this kind was a source of major difficulty for the Judge in the assessment of the Claimants' damages.

61. The Judge found that the loan balance at the time of the revocations of the Claimants' citizenship in October 2014 was VT53,035,000, at [135]. It is possible that this was an under-estimate as the mortgage had been varied to that amount some 12 months previously.

62. Then, in order to establish the position in July 2025, the Judge made use of findings by Andrée Wiltens J. in *National Bank of Vanuatu Ltd. v Yu*, an unreported judgment published on 6 April 2022, on the claim by NBV for judgment against Ms Yu for the sum due to it after realisation of its security.

63. Andrée Wiltens J. accepted evidence from an NBV employee that there were two loans secured by the mortgage over the Leasehold Property and that, at 9 September 2021, the outstanding balances of those loans were:

VT93,317,309 (with interest accruing at the rate of VT20,377 per day);
VT15,677,213 (with interest accruing at the rate of VT8,969 per day).

The aggregate outstanding balance was VT108,994,522.

64. The Judge took the figure of VT108,994,522 as being the current loan balance, ie, the balance at the time of assessment. That was clearly an error, given that interest (probably at a default rate) must have been continuing to accrue after September 2021, with the consequence that the outstanding balance is likely to have been much higher.

65. The difference between VT108,994,522 and the figure of VT53,035,000 is VT55,959,522 and that is the amount which the Judge allowed in the assessment for the increase in the Claimants' loan position attributable to the revocations of their citizenship.

66. As already seen, the Judge did not allow any amount for this head of loss in the 2021 assessment.

The award for the market value of the Leasehold Property

67. It is apparent that the Judge awarded the sum of VT40 million as compensation for the loss of the Leasehold Property.

68. That loss had to be assessed at the date the Claimants lost the Leasehold Property. The Judge selected the date of eviction as the time of the loss. No complaint was made about that. Even if the Judge had selected April 2020 when NBV obtained the order of possession or April 2021 when the Property was sold, the result is unlikely to have been different.

69. The question is whether the Claimants suffered loss in the sense of financial detriment by reason of NBV exercising its right to possession in 2020 and its power of sale in 2021. For the reasons which follow, the answer should have been "none".

70. The Claimants had an asset which secured their indebtedness. On NBV enforcing its right of sale of the asset, the Claimants were entitled only to any surplus once the secured debt was discharged.

71. But the amount owed by the Claimants to NBV in December 2020, as secured by the mortgage, must have well exceeded its market value. We say that because, on the Judge's findings, the Claimants' indebtedness to NBV at the time of the revocations of their citizenship was VT53,035,000.

With the addition of interest on the outstanding sum (probably a higher default interest rate) from October 2014, that indebtedness would have been significantly greater at December 2020.

72. Yet, the value of the Leasehold Property in December 2020, on the Judge's findings, was VT40 million. That is supported to some extent by the fact that NBV realised VT40 million on the sale of the property on 19 April 2021, only four months later. (As the Valuer General noted in his estimate of the value of the property in July 2021, only 9 years then remained on the term of the lease and leaseholds reduce in value the closer the lease comes to the end of its term).

73. In short, the Claimants had only negative equity in the Leasehold Property in December 2020. They had the right to have the proceeds of sale applied to reduce their indebtedness and that is what occurred. Hence, they did not suffer loss on the sale of the Leasehold Property and so were not entitled to damages on that account.

The increase in the indebtedness to NBV

74. For convenience, we repeat that the Judge awarded VT55,959,522, saying that this was the amount of the increase in the Claimants' indebtedness to NBV between October 2014 when their citizenships was revoked and the time of the assessment in July 2025. In fact, it was the increase in the Claimants' indebtedness to 9 September 2021, as the Judge used the evidence of the total indebtedness at that date for the purposes of the comparison.

75. The Appellant's primary position was that it had been wrong of the Judge to award damages for the increase in the Appellants' loan balance, in addition to the awards for loss of business profits, because the latter had been the source of funds used for the loan repayments. They contended that, once the Appellants had been compensated for loss of profits, it was an over-compensation for them also to be compensated for the deterioration in their loan position as the profits, if received at the time, would have been applied to satisfy the loan obligations.

76. As we are setting aside the award to the Claimants for the loss of profits of Woorin Motors, this contention of the Appellants loses some of its practical application. However, the award of VT13.2 million for the loss of profits in the Bar/Karaoke business and the award of VT7.095 million as interest on that award means that it must still be addressed.

77. There is force in the Appellant's submission. The Claimants should not receive both the assessed loss of income and the amount (ignoring interest for the moment) by which their debt increased because that amount of income was not applied in reduction of their debt. This means that the judgment sum should also be reduced by VT20,295,000.

78. As to the balance of VT35,664,522 (VT55,959,522 minus VT20,295,000) a correct characterisation of what could be claimed is important. In effect, the Claimants sought damages for both the lost income resulting from the (assumed) negligence of the Republic and for losses resulting from their inability to make use of that income to reduce their liabilities to NBV.

79. It is now established that the wrongfully caused and foreseeable loss of use of money may, in an appropriate case, sound in damages: *Hungerfords v Walker* [1989] HCA 8; 171 CLR 125 at 142-145 (Mason CJ and Wilson J), 152 (Brennan and Dawson JJ). The *Hungerfords* principle has been

recognised by this Court: *Vanuatu Copra and Cocoa Exporters (VCCE) Ltd v Vanuatu Coconut Products Ltd* [2011] VUCA 29 at [17]; *EZ Company Ltd v Republic of Vanuatu* [2017] 19 at [16]; and *Remy v Kyong Sik Jang* [2018] VUCA 5 at 25.

80. The Citizenship Commission (whose assumed negligence has given rise to the claim) should have foreseen that the Claimants would have borrowings themselves or in their associated businesses. After all, borrowings by persons in business are commonplace. Moreover, it is commonplace for the borrower to be the entity with the assets capable of providing security, and for the borrowed funds to be used in an associated business. In addition, the fact that the Citizenship Commission notified the Customs Department and VIPA is evidence by itself of its knowledge that the Claimants were in business, at least of some kind.

81. This means that losses suffered by the Claimants by reason of being unable to service their loans, ie, the losses resulting from the inability to use funds from the businesses in loan and interest payments should be regarded as a proper head of damage. The Claimants are not precluded from recovering those losses by the principles derived from *Prudential Assurance Co*, to which we referred earlier, as this was a loss of the Claimants "*separate and distinct*" from that of Woorin Motors.

82. Usually, *Hungerfords* damages are assessed by reference to the interest costs incurred, or the interest paid away, caused by the defendant's tort. A simple comparison of the loan balance at one date compared with the balance at a later date is not appropriate. Matters which make such an approach inappropriate include:

(a) It precludes identification of the loss caused by the inability to make use of the funds. In the present case, the Claimants already had a substantial indebtedness to NBV at October 2014 which was not caused by the Citizenship Commission's assumed negligence and they would have been incurring significant interest liabilities after October 2014 in any event. The assessment must be made of the loss attributable to the loss of use of the funds and a simple comparison of loan balances at different points in time is not a measure of that loss;

(b) it makes no allowance for whether claimants have, or have not, made use of funds otherwise available to them nor the purpose for which any drawdowns on the loans were made;

(c) it does not allow consideration of whether the increase/deterioration in the loan balance is solely, or even principally, attributable to the respondent's tort;

(d) it precludes consideration of whether amounts other than interest have been debited to the account, for example, bank fees or amounts expended by the bank in enforcement actions; and

(e) it does not permit consideration of whether the default rates charged by the lender are so high as to constitute an unlawful penalty. Defendants do not have to foresee that financiers will charge unlawful default rates.

83. Claims for *Hungerfords* damages should be properly proved. This invariably requires tender of all the loan documentation including loan contracts, account statements, and evidence of the interest rates applicable from time to time. Expert accounting evidence is also usually required.

84. Unfortunately, evidence of this kind was not provided in this case.

85. We note that there was evidence from which it could be inferred that the Claimants' financial position was already 'stretched' at the time their citizenship was revoked. First, on the Judge's findings, the Claimants indebtedness to NBV at October 2014 was already VT53,035,000. If their interest rate was, say, 5%, the annual interest cost was VT2,651,750, before any repayments of principal. Yet, the evidence set out above indicated that the total income of Woorin Motors and the Bar/Karaoke business in 2014 (before deduction of expenses) was VT3,151,280, that is, only some VT500,000 more than the assumed interest cost. Even if the expenses of the businesses are ignored, that left little scope for day-to-day living costs, let alone repayments of principal. Perhaps the Claimants had some savings but there has been no evidence of savings being used to fund business activities.

86. Secondly there are suggestions in the judgment of Andrée Wiltens J that the Claimants had been in arrears on the NBV loans even before October 2014. For example, Andrée Wiltens J. recorded:

(i) evidence from the NBV employee that there had been a "*regular lack of agreed repayments since 2014*";

(ii) Ms Yu had made three applications to set aside the default judgment obtained by NBV on 24 August 2015, namely, on 25 July 2017, 18 May 2018 and 11 December 2019. This seems significant because it indicates that NBV had taken action before 24 August 2015 to enforce its security;

(iii) NBV's records demonstrated that Ms Yu had been in breach of her repayment obligations from 2014, at [21].

87. It is possible that the NBV employee was referring to defaults occurring in 2014 but after 14 October, but this seems improbable. It is to be remembered that the Claimants did not close the businesses on 14 October 2014 when their citizenship was revoked. The two businesses continued in operation and indeed the total income of Woorin Motors increased by more than VT2 million in 2015. In any event, the Claimants must have been sufficiently in arrears by at least mid-2015 to prompt NBV to take enforcement action. This was admittedly after the revocation of the Claimants' citizenship but at a time when the Claimants still had access to income from the two businesses.

88. However, the Judge accepted that it was in October 2014 that the Claimants ceased making regular repayments on the loan, at [107]. The Judge drew that inference without reference to the matters set out above, but the Republic did not submit that she had been wrong to do so. Accordingly, despite some reservations, we will proceed on the same basis.

89. This brings us back to the issue of the amount which the Claimants should be allowed in the award for the loss of use of the funds. It is simply not possible for this Court to make a conventional assessment of the amount to be awarded for the Claimants' loss of use of the funds.

90. In the particular and unusual circumstances of this case, we consider it appropriate to adopt a robust approach. Even if the Judge's assessment of the losses in the Woorin Motors business may have been generous, it did still suffer a substantial loss and the Claimants were deprived of the use of

those funds. In addition, they suffered the loss of use of the funds from the Bar/Karaoke business. Given the extent of their existing indebtedness to NBV, it is probable that they incurred a substantial liability to NBV for interest which would not have been the case had the funds from the businesses been available to them at the time. It is reasonable to infer that at least some of the liability was incurred by the application of higher default rates of interest. There is an extent to which the Respondents contributed to the Claimants' present predicament by failing to assist the Judge in identifying the appropriate principles for the assessment. Both parties agreed that this Court should make its own assessment, rather than remitting the matter for yet another retrial. That is obviously a sensible course.

91. In these circumstances, and despite the unsatisfactory nature of the material before the Court, we have decided not to interfere with the award of the remaining VT35,664,522 to the Claimants.

Conclusion

92. For the reasons set out above, the appeal is allowed.

93. We set aside:

(i) the award of VT44 million in respect of the loss of profits of Woorin Motors and the award of VT23,650,000 for interest in respect of that loss;

(ii) the award of VT40 million being the value of the Leasehold Property;

(iii) VT20,295,000 being part of the award of VT55,959,522 for the increase in the Claimants' loan balance.

94. The award to the Claimants of interest of VT7,095,000 on the Bar/Karaoke business should be increased to VT7,260,000 in recognition that some four months have now elapsed since the primary judgment was delivered.

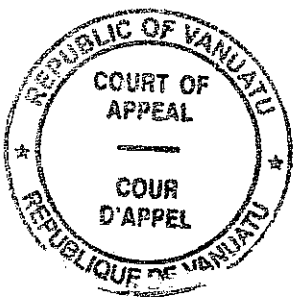
95. The award of VT198,904,522 is therefore reduced to VT71,124,522.

96. We repeat that we have not set aside the whole of the amount allowed by the Judge for the increase in the Claimants' loan balance, taking the view in the particular circumstances of this case that it can appropriately be regarded as a measure of the Claimants' entitlement to *Hungerfords* damages. However, we emphasise that the approach we have taken should not be regarded as a precedent for future *Hungerfords'* claims.

97. Given the manner in which the Appellants conducted the entire proceedings, we will make no order as to costs even though the appeal is being allowed and the award reduced.

98. We make the following orders:

(i) the appeal is allowed;



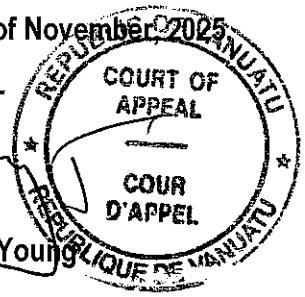
(ii) the judgment of the primary Judge is set aside;

(iii) in its place, judgment is entered for the Claimants in the sum of VT71,124,522;

(iv) there be no order for costs.

DATED at Port Vila, this 14th day of November, 2025

BY THE COURT



Hon. Justice Ronald Young