

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

Civil
Case No. 19/453 SC/CIVL

BETWEEN: Nivalette Nguyen
Claimant

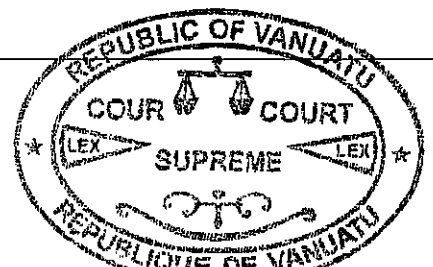
AND: Frank Vere
First Defendant
Republic of Vanuatu
Second Defendant

Date of Hearing 25 August 2021
By: Justice G.A. Andr e Wiltens
Counsel: Ms M. Nari for Claimant
Ms M. Vere for the First Defendant via AVL
Mr H. Tabi for the Second Defendant
Date of Judgment: 10 January 2022

Judgment

A. Introduction

1. This was a Claim for damages arising out of the sale of a boat, the MV Loloma by Mr Vere in 2009 to Lakatoro Trading Centre ("LTC"), of which Ms Nguyen is Director and shareholder. Following the transfer of ownership, Mr Vere alleged the full purchase price had not been paid. Mr Vere subsequently obtained judgment by default in respect of his Claim for the balance of the purchase price, and enforced that judgment by sale of another vessel, MV Marata, through the office of the Supreme Court Sheriff on the basis that it too was an asset of LTC, a fact disputed by Ms Nguyen.



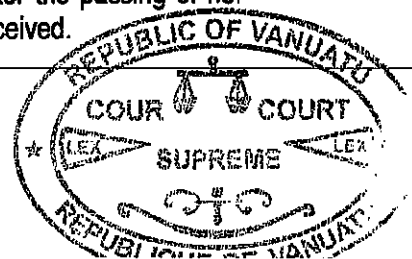
2. The Claim alleges that Mr Vere had acted dishonestly in claiming the purchase price shortfall; and further that the Sheriff had acted negligently in assisting in the enforcement of the judgment debt. Both aspects of the Claim led to losses accruing to LTC, for which damages were claimed.

B. Background

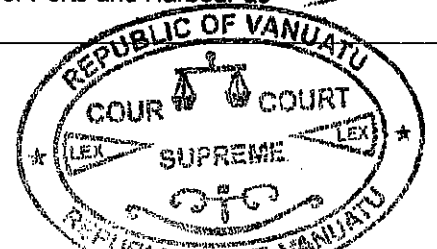
3. This present Claim initially progressed without any steps taken by Mr Vere. A trial was scheduled for 27 April 2021, which was to proceed "on the papers", following agreement between Ms Nari and Mr Tabi. However, Mr Vere then belatedly filed a Defence with a supporting sworn statement. Neither document had been served on Ms Nari or Mr Tabi. Accordingly, the trial was adjourned and re-scheduled for 25 August 2021, with timetabling directions issued to ensure the matter would be ready for trial. Those directions were complied with.
4. At trial, the Claimant's case was dealt with by the production of sworn witness statements. None of those witnesses was required by either Defendant for cross-examination.
5. Similarly, the Second Defendant's case was dealt with by the production of a sworn statement. This witness was also not required for cross-examination.
6. The First Defendant's case was presented by calling Mr Vere. He produced 2 sworn statements as his evidence-in-chief, and he was then cross-examined and re-examined.
7. At the conclusion of receiving the evidence, all 3 counsel sought time to file written closing submissions, which application was granted. No counsel sought to be permitted to also present oral submissions:
 - Ms Nari was to file and serve her final submissions by 8 September 2021; she did so on 9 September 2021.
 - Ms Vere was required to file and serve her final submissions by 22 September 2021; she did so on 27 September 2021.
 - Mr Tabi was to file and serve his final submissions by 6 October 2021; these were not forthcoming, but (after a grace interval due to the passing away of Mr Tabi's parent) when enquiry was made of Mr Tabi on 13 December 2021, the response received was that Mr Tabi relied on the submissions he had filed on 25 February 2021 in respect of the 27 April 2021 hearing which had been adjourned.
8. This is my reserved decision and the reasons for it.

C. Evidence

9. Ms Nguyen produced 4 sworn statements as her evidence in chief. She confirmed that she was a director and shareholder of LTC with her late husband. It was her late husband who had entered the agreement with Mr Vere for LTC to purchase MV Loloma in 2009. She stated that the purchase price of VT 8 million was fully paid to Mr Vere by June 2010. Ms Nguyen alleged that, despite that, in 2013 Mr Vere fraudulently lodged a Claim, soon after the passing of her husband, alleging that VT 3 million of the purchase price had not been received.

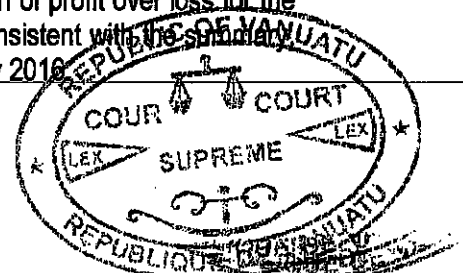


10. Ms Nguyen became aware of Mr Vere's claim in March 2013 and sought time to look into the matter. However, judgment by default was issued on 16 May 2013. [I note that the default judgment sum is incorrect. Figures have been transposed, resulting in an inflated sum of VT 4,045,00 being calculated – it should have been VT 3,145,000].
11. Following the default judgment coming to Ms Nguyen's attention she sought the assistance of two different lawyers. She stated that the lawyers did not understand her predicament nor the fact that LTC is a separate legal entity which did not own MV Martata. In any event, the LTC auditors and National Bank of Vanuatu ("NBV") records confirmed to Ms Nguyen that LTC had fully paid for MV Loloma.
12. The LTC auditor's report for the year ending 31 December 2009 was appended to Ms Nguyen's first sworn statement, and shows the purchase as well as noting the asset. [Of note, this report also records the purchase in the 2009 financial year of MV Marata for VT 6.2 million.]
13. The typed spreadsheet produced as the NBV record is headed in handwriting "MV Rosalie Payments". It shows payments purportedly by LTC of VT 2 million on 28/7/09; VT 250,000 on 24/11/09, 18/12/09, 12/3/10, 29/3/10 and 10/6/10; and payments of VT 50,000 on 29/4/10 and 4/6/10. The document concludes with a notation that VT 3,350,000 is the total paid. Thereafter, in handwriting, is an added notation that on 21/1/10 a payment of VT 5 million was made.
14. As additional evidence to support the payments made, the NBV statement for LTC's bank account for 31/12/09 to 10/6/10 was also appended to Ms Nguyen's sworn statement. On reading the statement the only relevant payments shown are VT 500,000 on 21/1/10 relating to F/Rosalie; and VT 250,000 on 12/3/10, 29/3/10 and 10/6/10 all identified as F/- Frank Vere – a total of VT 1,250,000.
15. Ms Nguyen then stated that on 30 May 2016 an Enforcement Warrant was issued by the Supreme Court, enabling the seizure of MV Marata (not MV Loloma). The Warrant authorised the seizure and sale of this vessel as it was "...an asset belonging to [LTC] registered under the name of Bernard Nguyen (late) who owns the business". Ms Nguyen complains the Warrant was not served on her personally.
16. Ms Nguyen stated that she explained, although to whom is unclear, that MV Marata was owned by her and her husband, not LTC. LTC merely operated the vessel. She appended to her sworn statement a copy of the vessel's registration with the Department of Ports and Harbour which records the vessel to be owned by Nguyen Bernard as of 12 September 2010. [However, cf: paragraphs 12 and 18 of this decision]. The register records the vessel's domicile as "LTC, Malekula".
17. Ms Nguyen also appended a copy of the Grant of Administration in her favour of the estate of the late Bernard Nguyen Van Tang, issued on 5 December 2013. She did not elaborate on the significance of this. I assume she anticipated the Court would understand that she was the beneficiary of her late husband's estate and entitled to what was previously his property.
18. Ms Nguyen further appended a Vanuatu Financial Services Commission Certificate of Registration. This evidences that MV Marata was registered to Nguyen Nivalette on 12 July 2016. A further record of the vessel's registration with the Department of Ports and Harbour as

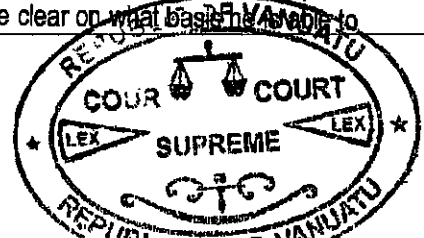


at 8 July 2016 was also appended, showing Nguyen Nivalette as the owner and the domicile at Malekula.

19. A further document appended to Ms Nguyen's sworn statement was a letter from Dinh Trading Limited dated 22 July 2016. It records that Mr Dinh Van Than sold MV Marata to Mrs Nivalette Nguyen sometime in 2005.
20. Ms Nguyen made an application for the 30 May 2016 Enforcement Warrant to be suspended, but that was refused by the Master of the Supreme Court on 19 July 2016. The basis for the refusal appears to be the Master was satisfied the vessel was an asset not owned by Ms Nguyen as claimed but by LTC, the judgment debtor, as evidenced by the company's auditor's report of 2009.
21. The application sought MV Marata be released to Ms Nguyen forthwith. It also sought an order that LTC pay the judgment debt and costs to Mr Vere by fortnightly instalments of VT 100,000, which could be seen as an admission the debt was properly owing. The application recorded that Mr and Mrs Nguyen had borrowed the funds to purchase the vessel, giving their home property as security.
22. On 29 July 2016, the Sheriff sold MV Marata, by way of tender advertised on 6 July 2016, to Mr Vanua Pakoro for VT 5.1 million. Ms Nguyen complains that the receipt for this payment is not "official".
23. On 9 August 2016, the Chief Registrar of the Supreme Court's Trust Account paid VT 4,115,000 (being the miscalculated judgment debt plus VT 70,000 costs) to Mr Vere out of the funds received from the sale of MV Marata.
24. Ms Nguyen alleges that the fraudulent claim by Mr Vere against LTC for the balance of the purchase price for MV Loloma has caused her to lose MV Marata. She explained further that the Sheriff was negligent in executing the improper sale by way of tender. In her view, the Sheriff was obligated to take legal advice and check official records, which would have resulted in ascertaining the true position, namely that her husband had passed away and that MV Marata was not the property of LTC. In short, she alleged the Sheriff had not exercised due care as an officer of the Court.
25. Ms Nguyen accordingly claimed the loss of business income arising from the wrongful sale of MV Marata. She itemised those as loss of income as against Mr Vere at VT 280,000 per week for July 2016 amounting to VT 2,240,000. She further claimed expenses of VT 90,000. As against the Republic of Vanuatu she sought VT 10,442,000 being the loss of the ship "After major repairs @ 31 December 2009". Reference is then made to the auditor's report for that financial year which purportedly makes reference to this. I am unable to locate such reference.
26. In support of the claim for damages, a document headed "Profit and Loss" was appended to Ms Nguyen's sworn statement. The document covered the period January to June 2016 and related to the operation of MV Marata. It showed net profit in January 2016 of VT 668,350, in February 2016 of VT 451,970, in March 2016 of VT 322,345, in April 2016 of VT 685,025, in May 2016 of VT 358,280 and in June 2016 of VT 884,520. There is a breakdown of profit over loss for the month of June 2016, recorded as VT 538,546. Not only is this inconsistent with the Claim but it does not sit well with the Claim for loss of VT 2,240,000 for July 2016.

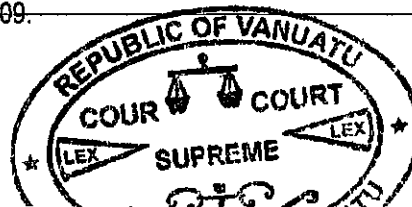


27. Ms Nguyen's second sworn statement sought to provide "correct" details regarding the loss alleged. What was now appended was described as the "...correct record" for June 2016. It is unclear who prepared this document. As a result, the Claim was amended to be 4 months of average profits being VT 2,247,000, plus interest at 5% from 9/3/18 to 10/9/20 of VT 280,875, plus the same additional expenses of VT 90,000.
28. Ms Nguyen's third sworn statement was entirely repetitious and of no assistance.
29. Ms Nguyen's final sworn statement was a response to Mr Vere's second sworn statement.
30. She explained that NBV keep records for only 7 years, and therefore going back and checking to see what payments had been made was problematic. She explained that a NBV staff member had prepared the schedule referred to in paragraph 17 above, and that it related to payments from LTC to her late husband's account and to Mr Vere's account relating to his other ship MV Rosalie.
31. She stated that on 28 July 2009, LTC paid VT 2 million to the account of MV Rosalie, and that on 24 November and 17 December 2009 LTC made 2 further cash payments of VT 250,000 each. She stated that a further cheque payment of VT 500,000 was made on 21 January 2010; followed by 2 cheque payments to Mr Vere of VT 250,000 on 12 March 2010 and 29 March 2010. The appended NBV records and LTC bank statement confirmed these details.
32. Ms Nguyen continued, and stated that on 4 June 2010 a further cheque was paid from LTC to Mr Vere in the sum of VT 50,000. The bank statement shows a withdrawal of such an amount on that day, but does not record that it was by cheque, nor does it in any way refer to Mr Vere or MV Rosalie. However, Ms Nguyen also produced a NBV Credit Advice of this date which records a cash deposit to the MV Rosalie account on behalf of LTC.
33. Ms Nguyen stated that the final payment to Mr Vere was by cheque on 10 June 2010 in the sum of VT 250,000. The NBV records confirm this payment.
34. Ms Nguyen provided further evidence in that she stated that Mr Vere produced 3 receipts on 19 June 2010, each in the sum of VT 250,000 reflecting the payments made on 12 and 29 March, and 10 June 2010.
35. Adding up all those payments, Ms Nguyen concluded that the payments totalled VT 3.85 million. These payments actually total VT 3,800,000, an overpayment of VT 800,000 assuming there was no other reason for LTC to pay funds to Mr Vere. I note that no other reason was adverted to in the evidence.
36. In support of the Claim, Yves Romon also provided a sworn statement. He was the LTC administrative officer, and has been so employed since 2008. He stated that MV Marata was the property of Mr and Ms Nguyen, not LTC; and that ownership was later transferred to Ms Nguyen after her late husband passed away. Further, he stated that LTC records did not show any outstanding debt owing to Mr Vere regarding the purchase of MV Loloma.
37. Lastly, Maximilien Nguyen also produced a sworn statement in support of the Claim. He repeats the evidence of his mother (the Claimant), but does not make clear on what basis he is able to



do so from any independent perspective. His statement is largely hearsay, and it provides little assistance to the Court.

38. For the First Defendant, Mr Vere gave oral evidence, supplementing the 2 sworn statements he produced.
39. In his first statement he made clear that his dispute was not with Ms Nguyen, but LTC. In pressing his claim against LTC, he noted that no defence had been filed, which permitted judgment by default to be entered. He maintained that Ms Nguyen had no standing to bring the present Claim, that the matter had already been determined by the granting of the judgment by default, and he sought the Claim be struck out.
40. Mr Vere's second sworn statement he maintained that LTC had not paid the full price for MV Loloma, and that as a result an Enforcement Warrant had been issued permitting the seizure and sale of MV Marata. He denied there being any fraud involved in his Claim, and he appended 2 letters of demand by lawyers instructed by him to pursue the remainder of the MV Loloma purchase price which had been sent to LTC in 2010 and 2012. Mr Vere stated that no response was received to either correspondence.
41. He then instructed the Claim be filed, which was not defended and resulted in the default judgment of 15 May 2013. Curiously, he appended 2 documents dated 11 April 2013. The first is a Notice of Beginning to Act, filed by Mr J. Kilu on behalf of LTC; the second is a Defence to the Claim. Mr Vere stated that neither he, his counsel nor the Court had a copy of these documents until after the default judgment had issued. A search of the Court file confirms the absence of these documents. I also note that the copies provided did not show the usual Supreme Court stamp with confirmation of the date filed.
42. Mr Vere pointed to paragraph 4 of the Defence as being quite contrary to what Ms Nguyen now claims, namely that it records that the judgment debt was admitted, although not in the full sum of VT 3 million. [I also noted the Defence made mention of "bad cheques", something Ms Nguyen was at pains to point out in her evidence was not correct.]
43. Mr Vere further appended an 18 August 2014 Supreme Court Minute in which it was recorded that Mr Kilu had instructions to seek to set aside the default judgment. Mr Vere continued that no such application was ever made, and eventually on 30 May 2016 the Enforcement Warrant issued. He stated that the Warrant was properly served, as evidenced by Ms Nguyen's application to suspend the same, which records that she was first aware of the matter on 6 July 2016.
44. Mr Vere stated that Ms Nguyen changed the registration of MV Marata to her name on 8 July 2016, before applying on 13 July 2016 to suspend the Enforcement Warrant. He noted the admission in the document regarding the judgment debt. He noted also the statement in the application that Ms Nguyen was unaware of the debt previously. He maintained that to be incorrect as he had personally served her with the Claim and his supporting sworn statement, and he appended a Proof of Service duly signed by Ms Nguyen to evidence that.
45. Mr Vere appended also a copy of the agreement regarding the sale of MV Loloma. The agreement provided for a deposit of VT 5 million followed by monthly payments of VT 500,000, with completion of payment for the vessel by 30 November 2009.



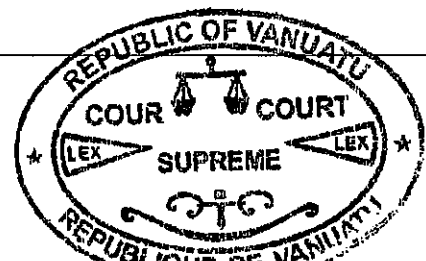
46. Mr Vere appended copies of 5 undated cheques from LTC to him personally, each in the sum of VT 250,000. These cheques do not appear to have been presented.
47. Mr Vere was cross-examined.
48. The lawyer's letters to LTC of 2010 and 2012 were put to him and he was asked if they had been served on LTC. He said it was a long time ago, that he didn't know, but he thought the first was given to the ship's Captain. He served the second letter to the LTC Office to a female staff member. He advised her to get legal advice when she suggested to him that the matter be disposed by payments over time.
49. Mr Vere was questioned about whether he accepted that he had received VT 3.85 million as set out in the schedule appended to Ms Nguyen's fourth sworn statement. When asked if he had received those funds, he replied it was a long time ago, but when he made his Claim, he was still VT 3 million short of the full purchase price. He accepted that he had been paid VT 5 million towards the purchase price. He denied that his Claim in 2013 was in any way false.
50. Mr Vere confirmed that his son owned MV Rosalie, but he operated the vessel for his son.
51. The final witness was the current Sheriff, Metoloa Poilapa, who is attached to the office of the Chief Registrar of the Supreme Court. His evidence was sourced from the records held by his office. Those records confirm evidence earlier referred to in this decision (which does not bear repeating) without adding to it. Mr Poilapa considered that what had been done by the Sheriff was in accordance with Orders of the Supreme Court.

D. Findings

52. I was able to make an assessment of the veracity and accuracy of Mr Vere as a witness although he gave his evidence via video link. I accepted his evidence. He rightly conceded that these events occurred a long time ago, and he was hesitant about exact details, which was to his credit considering the lapse of time. He was however, sure and consistent to deny any wrong-doing on his part.
53. I was unable to make an assessment of the other witnesses as their evidence was not challenged before me.
54. However, the only other witness of real concern, was Ms Nguyen. I will deal with her evidence shortly. The evidence of Yves Romon, Maximilien Nguyen and Metoloa Poilapa did not assist me. Their evidence was largely repetitious of what Ms Nguyen and Mr Vere put forward.

(i) Claim against Mr Vere

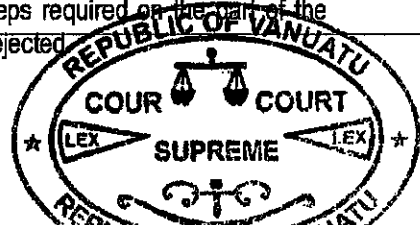
55. The allegation of fraudulent conduct by Mr Vere in bringing his Claim for the shortfall of the purchase price for MV Loloma is rejected. There is no support for such allegation, as I accept Mr Vere's evidence on this. His evidence is confirmed by the 2 letters he caused lawyers to write to LTC demanding the balance of what he said was still owed. That was followed by his Claim when those letters were ignored.



56. There is clear evidence that Mr Vere's Claim was properly served on Ms Nguyen, which afforded her the opportunity to defend the matter, an opportunity spurned for reasons not advised to the Court. Apart from the miscalculation as to the correct sum, as no steps had been taken to defend Mr Vere's Claim, the judgment entered by default cannot be criticised or faulted – that step follows the standard procedure set out in the Civil Procedure Rules.
57. Had the Notice of Beginning to Act and the Defence prepared by Mr Kilu been filed with the Court, then judgment by default would have been irregular – but that is not what occurred.
58. Further, had Mr Kilu proceeded to file his signalled application to set aside the judgment by default, the Enforcement Warrant could not have issued without the application being first heard. Unfortunately, again, that is not what occurred. Those failings have not been explained.
59. Ms Nguyen's criticism of the Master's decision to not suspend the Enforcement Warrant is unjustified. There is clear evidence that MV Marata was an LTC asset. The protestations that the vessel was Ms Nguyen's is not accepted.
60. My conclusion is that the agreement to purchase MV Loloma was poorly supervised in terms of accounting by both Mr Vere and LTC. The agreement provided for the complete purchase price to have been paid by 30 November 2009. All the evidence demonstrates this did not occur, with part payments continuing into mid-2010. Further, there is evidence not of monthly payments of VT 500,000, but of smaller amounts.
61. I conclude, that to satisfy Mr Vere, LTC gave him a series of undated cheques, which he was to bank at certain times – there is no evidence as to the exact arrangements. I have no doubt that this added to the confusion over how much had been paid at any particular time. It is clear that Mr Vere considered he had not been fully paid, and LTC also thought so, as evidenced by the admissions and the further cheques issued. In those circumstances, it is little wonder that Mr Vere brought his Claim.
62. In fact, LTC paid too much for MV Loloma, by VT 800,000. Fortunately, Mr Vere did not also deposit his further 3 LTC cheques that he had in his possession, each for VT 250,000.

(ii) Claim against the Sheriff

63. The letter by Dinh Van Than is of note. He stated that Ms Nguyen had purchased MV Marata in 2005. However, it was registered in the name of Mr Nguyen. Further, it appears that LTC then purchased this vessel in 2009 – as is shown in the LTC auditor's report for the year ending 31 December 2009.
64. The vessel was never registered to Ms Nguyen until, suspiciously, shortly after the Enforcement Warrant had issued. I repeat, I do not accept that MV Marata was the property of Ms Nguyen at any time.
65. The steps taken by the Sheriff were appropriate. The contention by Ms Nguyen that the Sheriff was obligated to undertake investigation and to also seek legal advice is not the correct position in law. The Sheriff takes his instructions from the Supreme Court. The Enforcement Warrant was to be executed in a timely manner and without further steps required on the part of the Sheriff. That is what occurred. All criticisms of the Sheriff are rejected.



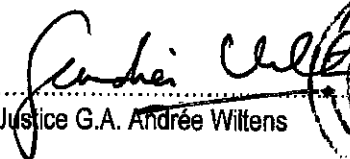
(iii) Evidence as to Loss

66. Although it is not necessary to do so in light of my other findings, I do not accept the various calculations submitted by Ms Nguyen as to what is claimed to be the loss arising from what she alleges occurred. Her evidence as to this aspect of the Claim is simply inadequate.

E. Result

67. Ms Nguyen's claim fails as against Mr Vere and as against the Sheriff fails and is dismissed.
68. However, this case is a travesty. It is clear that had Ms Nguyen taken steps at the appropriate times, there would not have issued a default judgment nor an Enforcement Warrant and LTC would still own the MV Marata. Numerous opportunities existed for Ms Nguyen to rectify the situation. Her actions have consigned her to her present fate.
69. Although I accept that Mr Vere did not fraudulently commence his action, he has nevertheless obtained more than he should have. In effect he had unjustly enriched himself as a result of this litigation. In fairness, that situation cannot be allowed to stand.
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.
72. Costs: Ms Nguyen has failed in her Claim. Mr Vere has 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 bear their own costs of this action. However, the Sheriff has succeeded in his defence of the Claim. Accordingly, Ms Nguyen is to pay his costs of this matter, which I set at VT 125,000. Those costs are to be paid within 21 days.
73. There will be a further conference in respect of this matter at 8am on 31 January 2022 for Mr Vere to explain to the Court either that he has paid back the debt or has made suitable arrangements to do so. If not, the matter will be transferred to the Master for enforcement.

Dated at Port Vila this 10th day of January 2022
BY THE COURT


Justice G.A. Andrée Wiltens

