

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

Civil
Case No. 18/2336 CVL/Civil

BETWEEN: John Fordham
Claimant

**AND: Peter Wederell t/a Total Marine
Solutions**
Defendant

Date of Trial: 9 September 2021
Before: Justice G.A. Andrée Wiltens
Counsel: Mr. R. Sugden for the Claimant
Mr Wederell in person
Date of Decision: 12 January 2022

Judgment

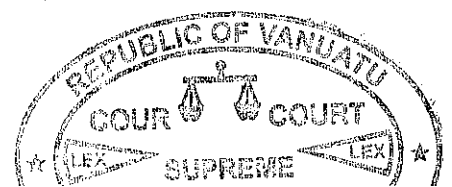
A. Introduction

1. This Claim seeks damages for breach of contract, negligence and conversion. These causes of action flow from Mr Fordham having instructed Mr Wederell, trading as Total Marine Solutions ("TMS"), to make a refit and certain alterations to a boat and trailer.
2. The allegations are that the work was poorly done, such that the boat was not fit for purpose. The poor workmanship resulted in the boat sinking to almost complete submersion, which sinking Mr Wederell was in a position to prevent. However, Mr Wederell is said to have maliciously taken no steps to prevent the boat from sinking.
3. It was further alleged that in the course of doing the agreed work, Mr Wederell had converted a drive shaft previously connected to a dinghy's gearbox, rendering it useless.



B. Background

4. By the time the Amended Claim was filed, on 15 October 2018, Mr Wederell had left Vanuatu and returned to New Zealand. To the Court's knowledge he remains there following the impacts of Covid-19 and the loss of his previous residency status. All communication with him, after the lawyer previously acting for him ceased to act, has been by e-mail. The lawyer previously acting had filed a comprehensive 11-page Defence to the Claim and Counterclaim on 20 February 2019. That is the only active step taken in this litigation by Mr Wederell.
5. Mr Wederell has been given every opportunity to participate in this litigation, as evidenced by the following:
 - On 25 March 2020, as Mr Wederell was unable to return to Vanuatu, he sought further time to file his evidence, which was granted. He was directed to file and serve his evidence by 31 July 2020. The trial was scheduled for 21 and 22 September 2020;
 - On 27 July 2020, after Mr Sugden had sought and been given more time to file the Claimant's evidence, and after Mr Wederell had also sought more time, further directions were made, requiring Mr Wederell to file and serve his evidence by 31 August 2020. The trial dates were maintained in the hope the matter could proceed;
 - After the scheduled trial was unable to proceed, further directions were made on 30 September 2020. Mr Wederell was directed to file and serve all his evidence by 4 February 2021. The new scheduled trial dates were 18 and 19 February 2021;
 - On 16 October 2021, the trial was moved to 2 and 3 March 2021;
 - On 24 February 2021, the trial was again deferred to 26 and 27 July 2021. Mr Wederell was directed to file and serve all his evidence by 1 June 2021, and he was warned that non-compliance might result in his evidence not being accepted by the Court; and
 - On 12 May 2021, the trial was again deferred to be heard on 9 and 10 September 2021.
6. Despite those various directions and the warning given, Mr Wederell has filed no evidence in support of his Defence.
7. The trial of this matter took place on 9 September 2021. Mr Wederell did not seek to participate at the hearing - his final communication with the Court was on 30 September 2020.
8. The trial proceeded by way of Mr Sugden presenting the sworn statements of the Claimant's witnesses. It was then determined that Mr Sugden would file his closing submissions within 28

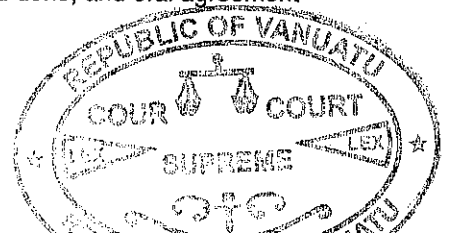


days of the hearing; and Mr Wederell was given the opportunity to file closing submissions within a further 28 days albeit that he had taken no active part in the trial. I then reserved my decision.

9. Mr Sugden's final submissions were filed with the Court on 7 October 2021. A copy was sent to Mr Wederell. Mr Wederell was advised he could file final submissions by 5 November 2021 prior to my preparing my decision.
10. Mr Wederell's response was to again raise the fact that he was stuck in New Zealand, unable to return to Port Vila due to having lost his residency status; and that the expert witness he had intended to instruct had passed away without an opportunity for another to be found, for that person to travel to Vanuatu to inspect the vessel and to then prepare his brief of evidence.
11. The fact that Mr Wederell was in New Zealand was of no concern. He had the option of instructing counsel in Port Vila to act for him at trial, and/or to have a New Zealand-based counsel act via video-link. Mr Wederell was also able to participate via video-link. The fact that the witness he intended to rely on had passed away is unfortunate. However, there are any number of other persons he could have asked to give evidence, who could have come to Vanuatu and inspected the vessel. Alternatively, Mr Wederell's expert could have simply read the statements filed and relied on the photographs produced.
12. The fact that he did not choose those options has resulted in the Claimant's case being uncontested, and with no contrary evidence presented for the Court to take into account. Mr Wederell appears to consider that Covid-19 has caused the world to stop; alternatively, that this case would simply go away. That is not the case. His non-participation at trial is entirely of his own doing, and he must bear the consequences of that.

C. Evidence

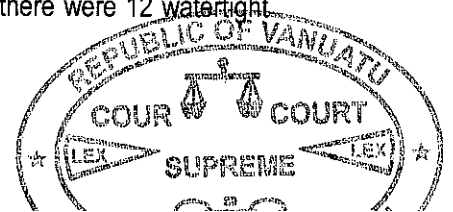
13. I set out below the evidence of the Claimant's witnesses, as set out in their sworn statements. I summarise the effect of what each witness has stated.
14. John Fordham is the Claimant. In 2011-2012, he purchased a catamaran, MV Grace, together with a transporting trailer, from a David Philips. Both boat and trailer required repairs and a refit before use. The boat remained stored in Mr Philip's yard, sitting on its trailer, until 2017.
15. In 2017, it was decided to refit the boat, as Mr Fordham planned to use it to host a buck's party in July 2017 for one of his sons.
16. Another of Mr Fordham's sons, Joshua Fordham, discussed the project with Mr Wederell, initially at Roy's nakamal. Accepting Mr Wederell's statements as to his experience and expertise in these matters, as well as the published advertisements relating to his company TSM, it was agreed that Mr Wederell would undertake the refit. There were discussions regarding what needed to be done, and what Mr Fordham and his sons also wanted done, and oral agreement was reached as to what work would be undertaken.



17. This was augmented by modifications hand drawn by Mr Wederell on a photograph of a similar boat. What was intended was to not only bring the craft back up to usable standard, but to also alter (significantly improve) its performance so that it could be used for open sea fishing. This involved modifications to the boat and replacement of the engines.
18. On 5 December 2017, Mr Wederell towed the boat to his residence at Turtle Bay, Espiritu Santo in order to carry out the agreed work. In early June 2018, the work was nearing completion. Mr Wederell asked Mr Fordham to rent a suitable shed in Luganville to finish off the work, which he did.
19. After Mr Wederell had completed the refit, sea trials were conducted on 19 July 2018. It transpired while moving the boat that the trailer had been inexpertly altered. On the trip, a wheel of the trailer came off, damaging the trailer and leading to the discovery that the wheel bearings had not been properly secured and that insufficient nuts had been applied to hold the wheels properly in place. Eventually the sea trial was undertaken after temporary repairs had been made to the trailer.
20. The trial was a short run across from Luganville to Aore and back. It was discovered that the engines were unable to operate at full capacity, were not in alignment and only produced a speed of 28 knots. The boat appeared to operate very low in the water and to take on water. Those on board were unimpressed and Mr Wederell gave excuses for the poor performance.
21. Following the sea trial, the boat was moored at the Santo Hardware wharf. An attempt was made to wash off the salt water which had splashed onto the decks by using the boat's pump and hose, but that merely sprayed water into cavities at the side of the boat. Mr Wederell took the hose away with a view to repairing it. He stated that the water in the cavities would self-drain.
22. On 20 July 2018, Mr Fordham received a phone call at around 9.30am. As a result, he hurried to the Santo Hardware wharf and found MV Grace partially submerged, with both newly purchased and installed engines underwater despite being lifted as high as hydraulically possible. The key was in the boat's ignition, and the engines made beeping noises. Mr Wederell arrived at the wharf shortly after Mr Fordham. Mr Wederell stated that he had told Joshua Fordham there was something wrong and that the boat should have been shifted 2 hours earlier. Mr Wederell then left the scene, without making any effort to assist in saving the boat from submerging.
23. Mr Fordham stated there were around 6 Santo Hardware staff assisting to prevent MV Grace from completely sinking. As well, Dennis Klenner brought his crane to the site and by securing a strap under the boat managed to lift MV Grace out of the water so that the engines could be emptied of seawater. Some 2.5 hours later, they managed to put the boat back onto the trailer and remove it from the scene.
24. The boat was taken to Silent World Shipping, where efforts were made to remove all salt water traces from the engines.

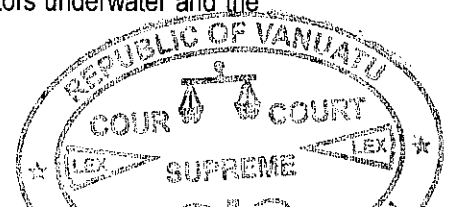


25. At 1.50pm that day, Mr Fordham received an e-mail from Mr Wederell denying all liability for what had occurred. He produced a copy of that e-mail as an exhibit to his sworn statement.
26. Apart from paying Mr Wederell's various invoices as the work progressed, Mr Fordham separately paid:
- VT 3,280,001 to Intraco for the 2 new Suzuki 200 h.p. engines installed in the boat;
 - VT 60,800 for the 400 litres petrol required for the sea trial; and
 - VT 71,600 for batteries installed on the boat, despite Mr Wederell having also invoiced for batteries but not supplied any.
27. Mr Fordham appended the invoices and statements to evidence these payments. He also appended photographs of MV Grace prior to any work undertaken by Mr Wederell, and subsequently when the boat had partially submerged and was being winched up and out of the sea. Those photographs give a dramatic depiction of the situation.
28. Joshua Fordham confirmed the meeting with Mr Wederell at Roy's nakamal. Mr Wederell was keen to undertake the project and professed the experience and knowledge to be able to do so. Discussions between them continued for a number of weeks. Mr Wederell produced a photograph of a similar boat and suggested that be the template on which the refit could be based. He suggested reshaping the rear end, moving the wheelhouse back and building it in, fitting new engines, wiring and electrical connections.
29. On the basis that Mr Wederell was to quote for each part of the work and not proceed without Fordham agreement, that was the final arrangement entered into. Joshua Fordham appended a TMS advertisement, as well as an e-mail by Mr Wederell setting out his experience and expertise.
30. Joshua Fordham agreed with Mr Wederell that outboard engines should be fitted to the boat. He sought out a supplier and discussed the options. He was advised the supplier and Mr Wederell would consult, which is what occurred, and he appended e-mail correspondence reflecting that. Following the consultation between Mr Wederell and the engine supplier, the Fordhams agreed to install 2 new Suzuki 200 h.p. engines, at a cost of VT 1,640,000 each.
31. Joshau Fordham referred in his sworn statement to 10 separate written proposals/suggestions from Mr Wederell as the project progressed, which were all accepted by the Fordhams.
32. Despite completing his work a little later than promised, on 16 July 2018 Mr Wederell provided a Condition Survey Report setting out the then current condition of MV Grace for insurance purposes. The report confirmed the boat was 7.5 metres in length, was fibre-glass hulled, and had had a "...major rebuild". The trailer was also reported to have been extensively rebuilt. The report indicated that new hydraulic steering had been fitted, and that there were 12 watertight



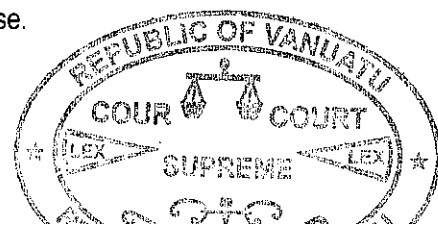
compartments below deck, with a self-draining deck. The anchor and rode were reported to be new, as were the 2 Suzuki 200 h.p. outboard engines and all the electrics. In Mr Wederell's opinion, MV Grace held a value of VT 25 million, based on Australian prices, import duty and VAT.

33. Joshua Fordham stated that the Fordhams agreed to Mr Wederell's proposal to also refit the trailer, even though it was working satisfactorily. Mr Wederell asked Joshua Fordham to take the trailer to Asco Motors to fit new wheels and bearings. That this was poorly done was discovered when attempting to move MV Grace to Luganville. One of the trailer wheels came off, and another almost fell off soon into the trip. It was clear that the correct nuts had not been used and as a result many wheel mounts had sheared off. They were replaced by the wheels and mounts from the Fordhams' water trailer. Mr Wederell told Joshua Fordham that he had tried on 3 occasions to get the correct nuts from Santo Engineers, but each time the wrong nuts had been delivered. Joshua Fordham therefore concluded that Mr Wederell was aware of the trailer issue prior to the attempt to move MV Grace to Luganville, but he had made no mention of that.
34. Joshua Wederell went on the sea trial. He took over the helm while Mr Wederell checked the instruments and electrics to ensure all was well. Joshua Fordham considered the boat performed badly, appeared to be low down in the stern and would not go as fast as had been expected. He thought the engines did not rev properly. The trial was across the channel to Aore Island and back. At Aore, they tied up and Mr Wederell made adjustments to the engines, which proved to be of no effect.
35. On return, it was decided to leave MV Grace tied up at the Santo Hardware wharf for the night. Joshua Fordham then wanted to wash the foredeck, using the deck wash pump, but it sprayed water everywhere prompting Mr Wederell to state that it was missing an O-ring, which he would fix overnight.
36. Later the same day, Joshua Fordham took his brother Chris to see the boat. While there, Chris leant against the helmsman's chair, only for the top seat to fall to the floor as it had not been properly installed. On inspection it was clear the screws fastening it had been screwed into plywood without any backing.
37. Early the next morning Mr Wederell went to Joshua Fordham's office to get the ignition key for MV Grace so that he could repair the deck wash pump. He told Joshua that there was a small amount of water in one of the baffles at the rear of the boat. He left at 8.33am, as evidenced by the security camera, with MV Grace's keys. Joshua Fordham next saw those keys in the boat's ignition, in the ON position.
38. At around 9.30am or 9.40am, Joshua received a phone call from Mr Wederell, advising that the boat had sunk. The conversation was terse and Mr Wederell hung up in the middle of the discussion. When Joshua Fordham arrived at the wharf, he found Mr Wederell assisting to pull the boat closer to shore. The boat was down in the stern with the motors underwater and the

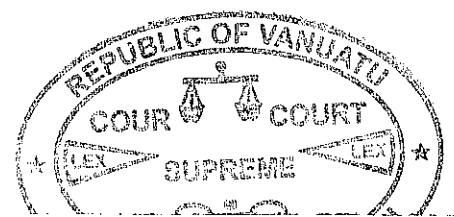


water level being up to the base of the helmsman's chair. He heard a beeping noise coming from the engines, even though while he was there no one had attempted to start them.

39. With the assistance of Santo Hardware staff and their crane, the boat was lifted out of the water, drained somewhat of seawater and put onto the trailer. It proved to be a very difficult task. Mr Wederell did not assist. The engines were then drained and washed before being sprayed with marine CRC and filled with diesel and oil, as was advised by Mr David Morgan, a marine engineer. Mr Trent Thomas of Silent World assisted with this at Fordhams' Forney Enterprise's yard.
40. The boat remained at the yard. One day in October 2018, Joshua Fordham noticed small blocks of wood on the floor below the boat. They had fallen out of the grid that made up the rear platform between the two engines. Joshua Fordham found they had been screwed in place with very little glue and had simply fallen out when the wood dried.
41. Joshua Fordham confirmed issues with Mr Wederell's work on MV Grace, as follows:
- (i) Failing to properly secure the cabin seat for the helmsman so that it fell over, and the passenger seat was also not secure.
 - (ii) Supplying and installing 6 rod holders out of 8, no outriggers out of 12 and not installing electric fishing reels.
 - (iii) Charging three times for wheel house lighting, cables, lugs and switches, and for batteries which Mr John Fordham had purchased for VT 71,000.
 - (iv) Extremely poor finish to the new wheel house, and supplying and fitting different coloured cabin windows.
 - (v) Failing to supply and fit 4 inspection ports and fitting 8 that were of poor quality and not watertight.
 - (vi) Failing to fit a fold away ladder.
 - (vii) Failing to do most of the quoted work on the trailer and removing a number of wheel nuts causing one wheel to fall off causing damage to the trailer.
 - (viii) Failing to complete the painting of the boat.
42. Joshua Fordham further stated that Mr Wederell had erroneously removed the bracing of one of the electric fishing reels that Joshua Fordham had personally purchased for the boat and which was replaced at a cost of NZ 886. As well, it was alleged that Mr Wederell had been given a roll of black plastic for the purposes of completing his work on MV Grace. Although he used only a small proportion of this, perhaps 20%, he retained the balance for his own use.



43. Joshua Fordham alleged that Mr Wederell had also wrongly removed and kept the drive leg of the 40 h.p. engine of a dinghy that the Fordhams owned. Although it was subsequently returned to the Fordhams, it was no longer of any use due to having broken while an attempt to insert a new bearing by force was made by Mr Wederell. This followed a request by Joshua Fordham that Mr Wederell undertake this task, but it has no connection with the MV Grace and trailer agreement entered into which is the basis for the present Claim.
44. Moderan Fabrice set out his qualifications, expertise and experience gained over some 50 years as a Marine Surveyor. At the end of July 2018, he was asked to inspect MV Grace and produce a report as to possible causes for it becoming submerged. He produced the report and several photographs supporting his opinion. He concluded the main reason for the sinking was due to the weight of the outboard engines, each weighing some 250 kgs. He further considered that the cover deck plate was of poor quality, without being sealed and that that was the cause of the starboard aluminium extension being nearly completely full of water.
45. In his view, the movement of the waves while MV Grace was tied up at the wharf resulted in sea water entering the pipes coming from the engines to the back of the boat due to a lack of proper sealing. That created extra weight at the back of the boat. Further, as there was no return valve, the drainage system was unable to work. Consequently, water accumulated at the rear of the boat and settled in the ballast tank 2.
46. Mr Fabrice considered better engines for the boat would have been 150 h.p.; that there should have been a sealed back door and at least one automatic bilge pump per compartment. He also pointed to the risk of sparks with most of the electric cables being sited very close to the fuel filters.
47. He considered the boat to be "very dangerous", with a high risk of being lost at sea. He ended his report: "The only positive point is that the boat sunk when it was on the mooring...."
48. Dennis Klenner is the Manager of Santo Hardware. He stated that MV Grace is the only vessel to have sunk while moored at their wharf, regardless whether the bow of the boat is pointing to sea or to shore.
49. On 20 July 2018, his staff approached him in the morning and advised him that MV Grace was sinking. He immediately went to the wharf and saw MV Grace immersed in seawater. Mr Wederell was present and he commented: "It's f....d". Mr Wederell assisted in trying to move the vessel closer to shore.
50. Mr Klenner did not see Mr Wederell on board MV Grace, nor did he see anyone attempt to start the boat's engines, prior to the arrival of Mr John Fordham.
51. On 2 August 2018, Gary Vasconcellos inspected MV Grace for Mr John Fordham. He is a Marine Surveyor and Consultant, holding the qualifications of Dip MTA and RMS IIMS. He stated he



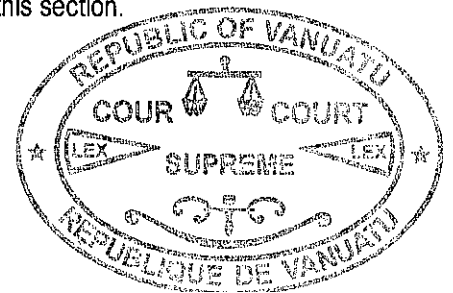
has many years experience. He appended the report to his sworn statement, and a series of photographs which evidenced his findings.

52. Mr Vasconcellos relevantly noted, in summary, that there are 2 through hull fittings on the inside aft of each hull for a deck drain. However, there are no stopcocks for the drains, even though they are below water level. He further noted a through hull for the sea water deck wash and 2 bung holes in each hull's transom and 2 in the bridge deck area. The hull had not been anti-fouled. He also noted the lack of a magnetic compass, and that the windscreen windows were of different tints.

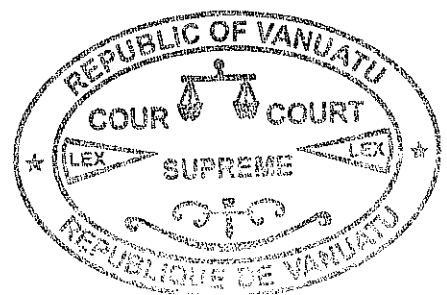
53. Beneath a heading described as "Defects leading to the incident and sinking" the following are noted:

- Designed as a sealed wash deck, but 6 spinoff hatches were fitted in the deck not designed for submersion;
- Those spinoff hatches were not properly sealed;
- The engines were too heavy for the pods and do not comply with the vessel's manufacturer's specifications;
- The engine mounting pods have a buoyancy of 100kg each but the engines displace 269kg each. Inadequate buoyancy for these engines;
- The transom was cut down over the bridge deck to 70mm above the deck and left open;
- The conduit for the engine controls and fuel lines were fitted too low in the transom;
- The conduit was cut to take the steering hoses, making them not watertight;
- No bilge pups fitted – this was highlighted by capitalising all the letters;
- Bungs not in place in the watertight bulkheads;
- Combing holes fitted below the waterline and no stopcocks or one-way valves installed;
- Waterline too low at the stern because of excess weight aft.

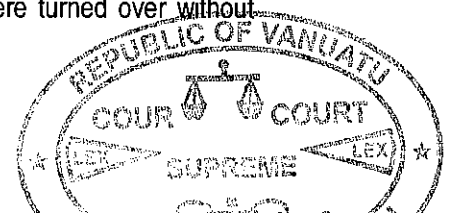
54. Mr Vasconcellos included in his report a section titled "The Incident Report". I am satisfied it is entirely based on hearsay. Accordingly, I did not place any weight on this section.



55. Mr Vasconcellos continued with some "Findings and Recommendations". He considered that all the electric cabling needed to be tied up and labelled; and the helm's chairs through bolted. He considered the boat required greater flotation in the stern or the fitting of specified weight engines. He also thought the transom needed to be raised or washboards installed. Further, he opined bilge pumps and float switches were needed. He stated that the engine cable control conduit needed to be repositioned to 250mm from the top of the pod and the conduit sealed. He recommended that all the spinoff hatches be removed and the holes either filled in or covered by screw down covers. He considered the through hull fittings be re-positioned, and the door in the port side sealed.
56. Mr Vasconellos concluded that when inspected, MV Grace was not seaworthy, and that putting to sea should at all costs be avoided. He opined that the sinking had been caused by the ignorance of the boat builder not following fundamental factors of flotation, stability, safety, and manufacturer's specifications. He ended by offering his opinion that the refit work was not carried out to a professional standard, noting that many of the fittings used above deck are suitable only for below deck and Cabin areas.
57. Comparing other similar vessels, and having regard to the 16 July 2018 value ascribed to the vessel by Mr Wederell, Mr Vasconcellos concluded that MV Grace was worth VT 2.8 million plus or minus 10% at the time of his inspection.
58. Rayman Leung was invited on the sea trial of MV Grace on 19 July 2019, having 10 years boating experience at Luganville, and 4 years of driving and berthing a 30-foot long power catamaran.
59. He explained that the conditions during the trial were not rough. He considered that MV Grace performed very poorly and listed heavily when turning. He confirmed they stopped at Aore, where Mr Wederell attempted to sort out engine problems, but without success. When returning, Mr Wederell connected his laptop computer to obtaining readings regarding engine rpms and boat speed. The engines could only achieve 4,500 rpms – they should have reached 5,500 to 6,000 rpms in his view. The maximum speed the boat achieved was 24 - 25 knots, which was "...very slow for the size and type of vessel with such huge motors".
60. Mr Leung observed that MV Grace sat alarmingly low in the water, with water below his feet when the boat was stationary. Had the deck been truly self-draining, as Mr Wederell stated, the water should have drained away. He noted that the engines were not correctly aligned, which he pointed out to Mr Wederell. He stated that when underway, there was an unusual amount of wash reaching the engines with spray well above the engine cowling, which he also pointed out to Mr Wederell. He spotted also that the electronic gauges did not display any information regarding the motors.
61. He considered the boat "...needed a lot more work to be done to it before its refit could be considered completed."



62. Franklyn William has no qualifications but has worked as a builder for 17 years prior to commencing his own business. He inspected the woodwork on MV Grace after the submersion incident. In his opinion, the woodwork done was very poor and not up to building standards.
63. He reported that the back steps had fallen apart due to insufficient glue, no dowels used, and the use of wood not properly dry – he appended photos of the woodwork showing this. The ceiling straps were not cut in the proper way in his view, and the screws used to attach the same should have been countersunk.
64. David Morgan is a Mechanical Engineer, with relevant qualifications from Scotland and USA, and with over 40 years industry experience. He attended MV Grace on 20 July 2018 with a view to attempting to save the engines following their submersion in sea water.
65. On inspection, Mr Morgan considered the engines far too heavy and fitted too far apart for the type of boat and configuration. The engine mounting pods were designed by the manufacturer for a maximum power rating of up to 140 h.p. and a weight of 360 lbs each. The Suzuki engines fitted weighed over 500lbs each. He also commented that the pods extended over the transom by some 14 inches, with no wash boards fitted, which would add to the weight issue if sea water got over the main deck. He considered the engines too far from the boat's centre of buoyancy and from its centreline across the stern. He also noted the lack of bilge pumps or hand pumps, and an open transom with open rear bilges not fully sealed at deck level.
66. Mr Morgan opined that the open deck area was too large for the for the small deck drains.
67. Mr Morgan considered the vessel unsuitable for use in the open sea.
68. Mr Morgan went on to give his view as to how the vessel sunk. They are consistent with the views of other witnesses regarding weight, insufficient sealing, and lack of bilge and other pumps to drain away water. This does not warrant repeating in detail.
69. Mr Morgan considered it clear, on inspection of the engines, that saltwater had got into the engines and the engine control modules. He reported they had not been submerged for long before being washed out with fresh water. Then the oil and diesel were drained before being replaced.
70. The engines were turned over by hand initially, and later by using power tools after removing the spark plugs. This was done to remove air from inside the cylinders and fill them with fuel/oil mix to preserve the engines. The engines could not be run to dehumidify them as the main wiring harness of each engine control module and the solenoids were badly burnt when they shorted out following immersion.
71. His inspection established that the engines had been turned over while still immersed in sea water, which caused the damage he found. Had the engines not been turned over, such damage would not have occurred. In his view it was possible the engines were turned over without



anyone operating them. If the keys were ON, and the batteries connected and operating, an electrical current could have been sent when the solenoids shorted out, causing the starting motors and fuel pumps to activate. He considered that possibility to be consistent with the beeping noise others heard at the time. The other possibility is that someone attempted to turn over the engines, but he saw no one attempt to do that.

72. The damage caused to the engines was so great, it was more economical to purchase replacements rather than attempt repair.
73. Mr Morgan also gave evidence relating to the engine leg of the Fordham's dinghy. I did not consider that evidence as it was not relevant to this Claim.

D. Mr Wederell's Defence and Counterclaim

74. While Mr Wederell was legally represented, he caused a Defence and Counterclaim to be filed in response to the Claim. Subsequently, there was an application to file an Amended Claim, which was not opposed. Counsel then acting for Mr Wederell filed an Amended Defence. This document did not include the previous issue raised by way of Counterclaim. Accordingly, the Counterclaim no longer has any effect and is treated as having been abandoned.
75. Mr Wederell has filed a sworn statement with the Court dealing with discovery issues.
76. The Defence to the Amended Claim alleged that it was the Fordhams who wanted the 200 h.p. engines, not Mr Wederell. I note that Josh Fordham appended a text from Mr Wederell in which he stated the 200 h.p. engines were probably not a bad idea, and were the same weight as the 150 h.p. engines. He stated it was always nice to have the option of more power than needed.
77. The Defence admitted Mr Wederell had indicated he was capable of doing the refit, but denies all alleged assertions as to qualification. The advertisements produced by TMS run counter to this in re-assuring prospective clients of the range of services offered.
78. The Defence disputed the many alleged proposals mentioned by the Fordhams. Mr Wederell stated they were simply invoices for work done. The documents were not appended to any of the witnesses' sworn statements. However, I note that Mr Wederell's list of discoverable documents lists not only invoices, but also quotes.
79. The Defence denies that a sea trial took place as alleged, and says the vessel was left overnight at Santo Hardware's wharf against Mr Wederell's advice. It is palpably wrong to say there was no sea trial. Mr Wederell maintains that he suggested the boat be rafted against a larger vessel, with the bow facing out to sea – the implication being that the waves were at least a cause for the submersion. Other witnesses differ in their opinions as to the cause for the submersion.
80. The Defence alleges that Mr Wederell told Joshua Fordham the next morning to turn the boat around a.s.a.p. as it had taken some water on board, but he declined to do so. Mr Joshua

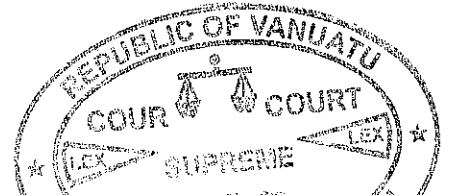


Fordham does not respond to this suggestion in his evidence, but agreed that Mr Wederell had referred to some water ingress.

81. When the Fordhams arrived at the wharf and saw the boat partly submerged, Mr Wederell thought a heated situation would soon arise, and he therefore removed himself from the scene. This conforms with what Mr John Fordham and Mr Joshua Fordham have stated.
82. All the aspects of the refit criticised by Joshua Fordham as evidencing poor workmanship were denied. The suggestions made that the boat was not seaworthy were denied, and the sea trial was pointed to as having demonstrated that the vessel was sea worthy and fit for purpose. There is an abundance of evidence to counter this. The final comment by Mr Fabrice is telling in this regard.
83. The Defence alleges the Claimant failed to mitigate his loss by the manner in which the engines were dealt with following their submersion. It was also asserted that Mr Wederell was denied the opportunity of rectifying any issues. I note that the Defence does not deal with Mr Wederell's immediate denial of all liability, which was proffered with undue haste in the early afternoon of the submersion. Mr Morgan was called in to assist the Fordham's and the steps taken were in compliance with his advice. It is difficult to see what else could have been done in the circumstances.

E. Findings

84. There was clearly an agreement between Mr John Fordham and his son, Joshua on the one hand and Mr Wederell on the other hand to effect repairs and improvements to MV Grace and the trailer. The agreement was largely an oral contract, but there was a photograph relied on as a basis for at least some of the modification to the boat, and some 10 propositions from Mr Wederell which were agreed to by the Fordhams as the project proceeded. I accept the evidence of Mr John Fordham and Mr Joshua Fordham as to this.
85. The agreement was a contract for work to be done and material supplied as agreed from time to time orally and in writing between the Fordhams and Mr Wederell, trading as TMS. Accordingly, section 10 of the Sale of Goods Act (1896) UK ("SGA") applies.
86. The end result was in breach of the agreement. The vessel passed over by Mr Wederell did not conform to what the Fordhams had wanted. He produced an unseaworthy boat, one that was clearly unfit for the purpose the project had been undertaken, namely to take out a party of celebrants on a high-speed catamaran to go on a fishing trip out at sea ahead of a wedding. That offends against section 19 of SGA. Further Mr Wederell had failed to exercise the due care and skill he had indicated to the Fordhams qualified him to undertake the refit.
87. The losses accrued to the Fordham's is clearly within the reasonable comprehension of the parties: *Hadley v Baxendale* (1846) 156 ER 145. I do not accept the positioning of the vessel at the wharf with the bow facing the shore had but a significant effect which contributed to the boat's

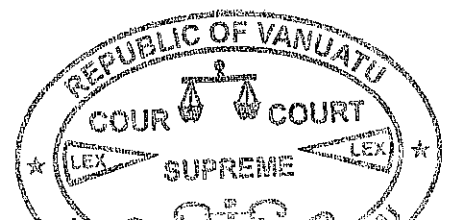


submersion. The other factors mentioned by witnesses relating to weight, poor or no sealing on component parts and lack of bilge pumps were the major contributing factors. What Mr Wederell does not deal with in his Defence is that he was at the scene before the Fordhams, could and should have raised the alarm, and if it was so important, turned the boat around. Instead, having assisted to pull the boat closer to the shore, he departed the scene.

88. The workmanship by Mr Wederell has been evidenced as being negligent, in that an experienced and expert boat builder, which is what Mr Wederell held himself out to be, would not have made the numerous errors in the construction that the witnesses have adverted to: in particular I point to the evidence of Mr Fabrice, Mr Vasconcellos, Mr William and Mr Morgan which I accept.
89. I do not consider the aspect of converting the engine leg was anything to do with the contract that is the basis for this litigation. It was a totally separate arrangement, unrelated to the causes of action claimed.

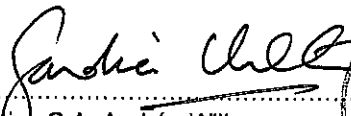
F. Result

90. There is evidence, from Mr Wederell himself, that prior to the sea trial, MV Grace had a value of VT 25 million, plus or minus 10%. I accept the value was VT 25 million. After the submersion, the vessel was valued at VT 2.8 million by Mr Vasconcellos – I accept that figure also. The difference equates to the Fordham's loss arising directly from Mr Wederell's breach of contract and poor/negligent workmanship.
91. There is no measure by which I can calculate the loss accruing in respect of the trailer.
92. I accept that Mr Wederell separately invoiced and paid for batteries to be supplied and installed onto MV Grace. In fact, Mr John Fordham purchased the batteries ultimately installed at a cost of VT 71,600. He warrants reimbursement for that by Mr Wederell.
93. I accept also that in order to undertake the sea trial, Mr Forham purchased the necessary fuel at a cost of VT 60,800. It was all contaminated by the submersion and is a consequential loss for Mr Fordham. As Mr Wederell is responsible for the submersion, he is to pay for this.
94. I accept that in the course of the project the Fordham's supplied Mr Wederell with a roll of black plastic. Although only using some 20% of the roll towards the project, Mr Wederell did not return the remainder to the Fordhams, thereby converting the same, with a value of VT 15,732.
95. By my calculation the total loss established on the balance of probabilities is VT 22,348,132. Judgment is entered to Mr Fordham in that amount, together with interest on that sum at 5% per annum as from the date of the Claim, namely 30 August 2018 until the judgment debt has been fully paid.
96. Mr Fordham is entitled to the costs of this action. I set the costs at VT 200,000. The costs are to be paid within 21 days.



97. Ordinarily, I would now set a further conference date for Mr Wederell to attend Court and advise either that he has paid the judgment debt or made suitable arrangements to do so over time. However, given his present location and lack of recent communication, I see little point in that. I leave the matter in Mr Sugden's hands as to how to proceed to enforce this judgment.

Dated at Port Vila this 12th day of January 2022
BY THE COURT


Justice G.A. Andrée Wiltens

