

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

Civil Case No.01 of 2014

BETWEEN: GUY BENARD
First Claimant

AND: JEROME H. BRANDT
Second Claimant

AND: CANDICE BENARD
Third Claimant

AND: CELINE BENARD
Fourth Claimant

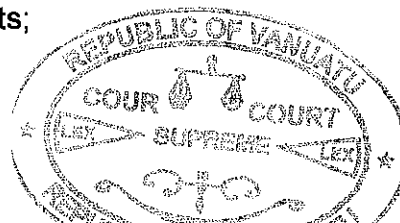
AND: FRANK and LUCIENNE GALLO
First Defendants

AND: SAS BABY BLUE
Second Defendant

Claimants: Mr. G. Benard
Defendants: Mr. G. Blake (as a courtesy)

RULING

1. This claim which was filed on 6 January 2014, has a historical context which for the sake of a better understanding may be briefly chronicled as follows:
 - 3 Dec. 2012 - Claimants filed a claim seeking the return of VT13 million paid under a contract of sale and purchase of a vessel "F/V Baby Blue" which had been rescinded because of a complete failure of consideration in that the vessel was not of a condition or standard required by the contract;
 - 10 Jan. 2013 - First Defendants filed a defence admitting receipt of the purchase price and transmitting the same to their principal who was the vendor;
 - 23 May 2013 - Summary Judgment was granted ordering the refund of the purchase price together with interest of 10% per annum with effect from 1 November 2012 and costs;



2. The defendants appealed the summary judgment orders to the Court of Appeal.

- 26 July 2013 – The Court of Appeal in **Civil Appeal No. 17 of 2013** allowed the appeal and returned the case to the Supreme Court. In its judgment the Court of Appeal indicated how deficiencies in the pleadings might be cured (see: para 24);
- 23 Aug. 2013 – The Supreme Court ordered a notice of discontinuance to be filed in the case;
- 3 Sept. 2013 – The claimants appealed the above order to the Court of Appeal in Civil Appeal No. 24 of 2013 (“*the second appeal*”);
- 23 Nov. 2013 – A consent judgment was entered by the Court of Appeal in the second appeal in the following terms:
 - “1. *This appeal and accordingly Civil Case No. 224 of 2012 are discontinued;*
 2. *The appellants are at liberty to file and serve a fresh claim in the Supreme Court;*
 3. *The Discontinuance of Civil Case No. 224 of 2012 is without prejudice to the claimant’s right to claim interest in the fresh claim from the date of filing Civil Case no. 224 of 2012”.*
- 6 Jan. 2014 – The claimants filed the present claim in a freshly constituted civil claim No. 01 of 2014.

3. This is an opposed application for leave to serve the claim outside Vanuatu. By its nature such an application is usually made ex-parte and must be supported by a sworn statement which fully and fairly discloses all the relevant circumstances in the case.

4. So far as relevant the applicable rule is **Rule 5.14** of the **Civil Procedure Rules 2002** (“*CPR*”) which provides:



Service outside Vanuatu

5.14 (1) A party may apply to the Supreme Court for an order that a claim in the Supreme Court be served outside Vanuatu.

(2) The court may order that the claim be served outside Vanuatu if:

(a)

(f) the claim concerns a contract made in Vanuatu or governed by the law of Vanuatu; or

(g) the claim is based on a breach of contract committed in Vanuatu, whether or not the contract was made in Vanuatu; or

(h) the claim is based on a tort committed in Vanuatu; or

(i) the claim is for damage suffered in Vanuatu, whether or not the tort causing the damage happened in Vanuatu; or

.....

(m) for any other reason the court is satisfied that it is necessary for the claim to be served on a person outside Vanuatu.

(3) This rule also applies to service of a counterclaim and a third party notice.

(4) The court may give directions extending the time for serving the claim, and filing a response and defence to the claim.

(5) The claimant must also serve on the person a copy of the order and each sworn statement made in support of the order.

(6) The claimant must file a sworn statement giving proof of the service.

5. Plainly, the Court is given a wide discretion in the matter. Equally, the claimant bears the burden of establishing to the Court's satisfaction that the discretion should be exercised in its favour. Sub-rule (2) also lists twelve



(12) specific types of claims where an order might be made for service of a claim outside Vanuatu.

6. Having said that I also bear in mind the helpful observations provided in the judgment of *Megarry J.* in **G. A. F. Corporation v. Anchem Productions Inc. (1975) 1 Lloyds Law Reports 601** at pp. 604 – 605):

"1. *There is an overriding consideration that it is a very serious question whether a foreigner ought to be subject to the inconvenience of having to come to this country in order to defend his rights: the Court ought therefore to be exceedingly careful before allowing a Writ to be served out of the jurisdiction.*

2. *The onus lies on the plaintiff to satisfy two requirements, namely, that the case falls within at least one of the limbs of 0.11 of 1, [cf. Our rule 5.14 (2)], and further that the case is otherwise a proper one for service out of the jurisdiction.*

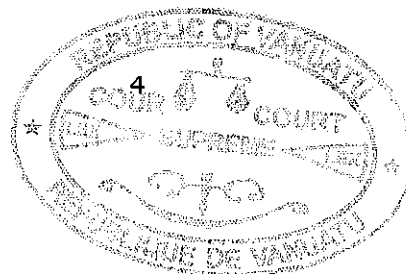
3. *In deciding whether a case falls within one of the limbs ... the Court considers the substance of the matter and not merely whether the case technically falls within the letter of the limb in question. The case must be clearly within both the letter of the rule and the spirit.*

4.

5. *Even if it is established that the case falls within the rule, it is still a matter of discretion for the Courts, whether leave should be given."*

7. In this instance the first claimant who represents all the claimants, seeks to rely on **paragraphs (f); (g); (h) and (i)** in support of the application.

8. The claim (in its amended form) seeks "*reimbursement*" of VT13 million paid to the First Defendants together with liquidated compensation for "*loss of earnings*" and for "*loss of revenues and opportunity*". It also claims various items of wasted expenditure and fees together with interest on the sums claimed. There are four (4) named claimants.

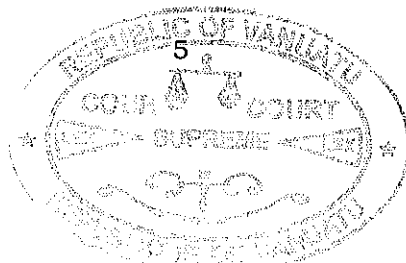


9. By way of preliminary observation, the claim, as drafted, is a somewhat rambling document which improperly contains within it a good deal of irrelevant historical narration, impermissible evidential materials, legal arguendo and paragraphs that are more suited to closing argument or submissions than pleadings. The claim neither properly serves its purpose or is as "*brief as the nature of the case permits*" (see: **Rules 4.1 and 4.2** of the CPR).
10. The first defendants are **Frank and Lucienne Gallo** ("*the Gallos*") whose address is given as: "*BP 30505, Noumea, New Caledonia*". The second defendant is described as: **SAS Baby Blue** represented by "*Thierry Causer BP 71 – Koumac, New Caledonia*".
11. The amended claim identifies Thierry Causer as the vendor of the vessel and general manager and shareholder of the second defendant who appointed and commissioned the first defendants to act on his behalf in the sale of the vessel. Other than an assertion that: "*... the principal causer ... had undoubtedly a complete knowledge of the real and effective technical conditions of F/V Baby Blue ...*", no other allegations or claims are made against the second defendant nor is any particular remedy sought against the second defendant. In short the second defendant is sued as the first defendants disclosed principal with personal knowledge and complicit in the first defendants' misrepresentations and deceit.
12. Against the First Defendants the claimants plead: "*... (they) have acted at all material times as the agent and representative of the second defendant SAS Baby Blue ...*".
13. Against **Frank Gallo** personally, the claim avers:

"On 3 October 2012 (he) visited Guy Benard at his Port Vila office and advised him that a ship situated in New Caledonia was available for sale at the price of VT13 million. The ship was owned by a French company called "SAS Baby Blue" (and) Gallo presented himself as the ship broker/agent of "SAS Baby Blue".

Nothing is similarly alleged against "*Lucienne Gallo*".

14. It is common ground that a sale and purchase agreement was entered into for the purchase of the ship but, between which parties is not as clearly set out in the amended claim as it might have been.



15. In this regard, the Court of Appeal said in Civil Appeal No. 17 of 2013 (op. cit) at (para. 22):

"The clear picture emerging from the material before the Court is that Jerome Brandt was the purchaser and that the second and third respondents (the 3rd and 4th claimants in this claim) were financiers. In that situation the proper party to sue was Jerome Brandt not the second and Third respondents."

16. In any event, the agreement was subsequently rescinded and the claimants now seek the return of the full purchase price. The subject matter of the agreement was the French registered fishing vessel "F/V Baby Blue" located at the Port of Pandop, Koumac in New Caledonia.

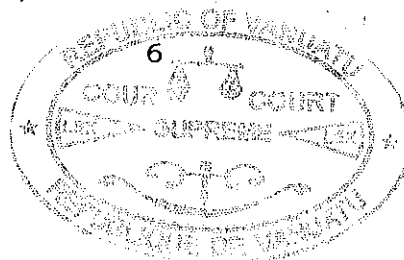
17. More particularly, against the defendants generally, the amended claim alleges:

- *"misrepresentation"* as to the condition of the vessel (para 1.4);
- *"blatant fraud and swindling"* (para 1.5);
- *"... deception and fraudulent misrepresentation"* (para 2.3);
- *"... planned ... swindling of the claimants in the joined (sic) underhand enterprise which was fully premeditated and maliciously organized ..."* (para 5.1).

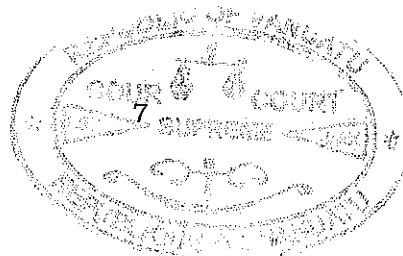
The claimants also seek "exemplary damages" having regard to the particular circumstances surrounding "... the misrepresentation and fraud committed by the defendants ...", in the ultimate paragraph of the claim. Nowhere in the pleadings are any particular "representations" pleaded or particularized, as there should have been, and the amended claim leaves much to be desired.

18. I am mindful that in order to establish a tort of fraudulent misrepresentation it will be necessary for the claimant to plead and prove the following:

- (a) That a representation(s) was made by the defendant to the claimant;
- (b) That the representation(s) was material and induced the claimant to enter into a contract;




- (c) That the representation(s) was false;
 - (d) That the representation was made by the defendant fraudulently; and
 - (e) By reason of acting upon the representation the claimant suffered damage.
19. Despite the short comings in the amended claim, I am satisfied for present purposes that it is capable of being understood "*in substance*", as including a claim seeking damages for fraudulent misrepresentation sufficient to support **paras. (h) and (i) of Rule 5.14 (2)** (*ibid*).
20. Mr. Gary Blake who appeared in response to a conference notice served on his office, despite having no instructions to accept service of the claim was able to assist the Court as counsel who represented the defendants in the earlier proceedings in Civil Case No. 224 of 2012 and before the Court of Appeal in Civil Appeal Case No. 17 of 2013.
21. Mr. Blake pointed out that the claim is factually more closely associated with Noumea, New Caledonia and with French law and should therefore have been instituted in New Caledonia. In particular, the following factors should weigh heavily with the Court in exercising its discretion in the matter:
- (a) The original Sale and Purchase Agreement ("*S & P Agreement*") in French, is between Jerome Brandt as purchaser and SAS Baby Blue a French company with a registered office in Noumea, New Caledonia as vendor;
 - (b) The subject matter of the S & P agreement is a French registered fishing vessel: "*F/V Baby Blue*" located at Koumac, Noumea, New Caledonia;
 - (c) The S & P Agreement is governed by French law and the defendants are all French nationals resident in Noumea, New Caledonia and finally;
 - (d) Delivery and possession of the vessel was to take place in Noumea, New Caledonia;



22. There can be no doubting the close linkage(s) of the S & P Agreement with Noumea, New Caledonia and with French law, but, this claim is not one for specific performance of the S & P Agreement (which the claimant have already cancelled and rescinded), rather, this is a claim for the return of the purchase price fully paid in Vatu into the Second Defendant bank account in Port Vila, Vanuatu and for consequential loss and damages suffered by the claimants who are all residents of Port Vila, Vanuatu.
23. Furthermore, a good deal of the misrepresentations alleged against the defendants occurred or was received in Port Vila, Vanuatu and proceedings were issued in the Supreme Court of Vanuatu without any challenge to the Court's jurisdiction. Certainly there was none in the previous proceeding between the parties in Civil Case No. 224 of 2013.
24. I am accordingly satisfied that the claimants have established a good case for the exercise of the Court's discretion under Rule 5.14.
25. For completeness some reference needs to be made to the claimants' evidence of service of the amended claim on the defendants by the Sheriff's Office in Noumea, New Caledonia on 25 February 2014 which is two (2) weeks before the present application for service outside Vanuatu was filed. Given the absence of a Court order permitting it, that service was both premature and ineffective and therefore the initiating documents must be re-served with a copy of this Order [see: **Rule 5.14 (5)**].
26. In accordance with the Civil Procedure Rules the amended claim is formally renewed and the defendants are granted 42 days to file a defence to the amended claim from the date of re-service of the amended claim on them.
27. The claimants are also required to file in court a sworn statement annexing evidence of the re-service within 14 days of receiving such evidence.
28. Costs in the cause.

DATED at Port Vila, this 16th day of April, 2014.

BY THE COURT


D. V. FATIAKI
Judge.

