

**BETWEEN:** FRANK FRANCONIERI T/AS FRANCONIERI & SON  
CONSTRUCTION  
Claimant

**AND:** E. T. P LIMITED  
Defendant

**Date of Hearing:** 7 October 2021

**Before:** Hon. Chief Justice Vincent Lunabek

**Counsel:** Mr John C. Malcolm for the Claimant  
Mr Andrew E. Bal for the Defendant – not present

**Date of Decision:** 12 June 2024

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## JUDGMENT

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### A. Introduction

1. This claim is for loss of VT7,419,225, interests and costs.

### B. Background

2. The claimant is a business owned and operated by the claimant.
3. The defendant is a Limited Liability Company in Port Vila, Vanuatu and is able to sue and be sued in its own name.
4. On or about the 2<sup>nd</sup> of November 2017, the claimant and the defendant entered a contract ("*the contract*") for the rental of a 20 tonne excavator to be used on Futuna Island by the defendant.
5. The particulars of the agreement are that:
  - (a) 250 hours to a total of VT3,750,000;
  - (b) Any hours over and above 250 hours at an agreement rate of VT15,000/hour.

### C. The Claim



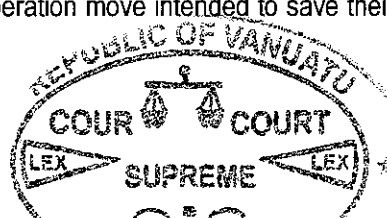
6. The claimant said the 20 tonne excavator was used by the defendant in Futuna Island to a total of 680 hours.
7. The claimant said the additional 430 hours above the 250 hour agreement at VT15,000/hour being VT7,419,225.
8. The claimant has made demand on 5<sup>th</sup> July 2018 in the sum of VT7,419,225 (*"the demand"*).
9. It is said despite such demand the defendant has refused, neglected or failed to pay the debt.
10. The claimant filed his claim for breach of contract on the refusal to neglect to pay the additional hours the machine was used in a breach of the agreement as between the parties. And the claimant has suffered loss in the sum of VT7,419,225.

**D. The defence to the claim**

11. The defendant denies the claim in paragraph 4 and said the defendant only used the 20 tonne excavator for 250 hours as agreed in the contract.
12. The defendant denied the use of the machine for an additional 430 hours.
13. The defendant denied any debt the defendant owed to the claimant as alleged.
14. The defendant denied there was a breach of contract by the defendant. The defendant said it complied with the contract. The defendant denied the claimant suffered loss of VT7,419,225.

**E. Counterclaim**

15. The defendant counter-claimed that it is actually the claimant who owed the defendant money and caused the defendant loss.
16. That due to the mental anguish, sleepless nights and humiliation suffered by the defendant because of the filing of this unfounded claim, claimant should be ordered to pay the defendant the amount of VT500,000 for moral damages.
17. The claimant knew all along that the defendant was contesting the allegations that the defendant owe the claimant money, yet the claimant still proceeded with the case for Liquidation under Companies Act (Insolvency and Receivership) Act No. 3 of 2013 which was later withdrawn by the claimant before the filing of the present case.
18. The present case only came into existence after that the claimant's lawyer realized that they filed an inappropriate and faulty case. A desperation move intended to save their own faces at the expenses of the defendant.



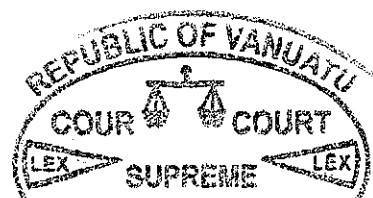
19. They claimed for damages in the amount of VT500,000 for destroying the good name of the defendant company which was built and nurtured over time.
20. And they claimed for exemplary damages in the amount of VT350,000, to discourage other likeminded from filing such false law suits and to restrain conmen actions in Vanuatu.
21. Counter-claim as follows:
  - (a) VT500,000 – moral damages;
  - (b) VT500,000 – damages;
  - (c) VT350,000 – Exemplary damages;
  - (d) Other reliefs as just and equitable under the foregoing.

**F. Defence to counter-claim**

22. The claimant as cross-defendant says in reply to the cross-claim as follow.
23. It disputes any entitlement in contract law for claims for mental anguish, sleepless nights and humiliation and in any event denies each and every allegations contained in the paragraph 10 of the counter-claim.
24. It denies paragraph 10 of the counter-claim in its entirety.
25. In respect to paragraph 11 of the counter-claim it disputes the assertions in the same and denies the entirety of paragraph 11 of the counter-claim.
26. In respect to paragraph 12 of the counter-claim it denies any destruction of the good name of the defendant company and denied paragraph 12 of the counter-claim.
27. It disputes any entitlement for exemplary damages in such a situation and denies paragraph 13 of the claim.
28. In respect to paragraph 14 of the counter-claim, it denies any liability in respect to the same.

**G. Application under Rule 12.9(1)(c) of the Civil Procedure Rules (CPC)**

29. This Civil Case No. 3182/2018 was listed twice for trial. The defendant and his solicitor failed to attend the trial. There was no formal or informal communication from the defendant and his lawyer to the Court or to the Claimant about their non-attendance.
30. The second time this matter was listed for trial, there have been two (2) conference conducted. The defendant did not attend. Mr Bal attended to one of the conferences without his client.



31. The court was informed that Mr Bal's client (the defendant) was escaping to New Caledonia. The defendant is said to have sold his assets in Vanuatu and that he has no asset in Vanuatu.
32. The Court granted the application of the claimant giving leave for the claimant, Mr Frank Franconieri, to call evidence to establish that he is entitled to judgment against the defendant pursuant to Rule 12.9(1)(c) of the Civil Procedure Rule (CPR).
33. Mr Frank Franconieri filed a sworn statement on 11 February 2019 in support of his claim.
34. On 7 October 2021, Frank Franconieri gave oral evidence. He confirmed that he is the manager of the Franconieri & Son Construction. He entered a contract with the defendant ETP Limited for the rental of a 20 tonne Volvo excavator to be used in Futuna by the defendant. This contract was entered between the parties on 2<sup>nd</sup> November 2017 – see Annexure A is the contract with the security deposit of the machine.
35. He confirmed that the terms for rental were:
  - (a) 250 hours at 3,750,000;
  - (b) Any hours over and above 250 hours at VT15,000 per hour.
36. He confirmed his statement that the machine was used by the defendant to a total of 680 hours – being 430 hours in excess of the contract.
37. He confirmed he made a demand for payment (see Annexure B1).
38. He said the defendant denied the additional hours citing a faulty hour meter on the machine.
39. He confirmed that because of the denial, he arranged the hour meter tested by Marine & Aerospace Survival Systems Vanuatu Ltd. (MASSV). He said the meter was in good working order and correct. He relied on Annexure C which attached the report from MASSV, the Demand and the MASSV report provided by his lawyer to the defendant together with a Section 19 Demand (see Annexure B, B2).
40. He said there has been no reply, payment, compound or compromise and no resolution of the due sum.

## H. Discussions

### H1. On the claim

41. The facts on evidence which are not disputed show the following:



- (a) On or about the 2<sup>nd</sup> November 2017, the claimant and the defendant entered into a contract for the rental of a 20 tonne excavator to be used on Futuna Island by the defendant;
  - (b) The terms for rental of the machine were:
    - (i) 250 hours at VT3,750,000;
    - (ii) any hours over and above 250 hours will be at VT15,000 per hour (Annexure A).
  - (c) The time recorder of the machine at the claimant's dock before it was shipped to Futuna Island was 11136,4.
  - (d) The machine was shipped to Futuna Island by the defendant. The machine was used there by the defendant. The time recorder of the machine indicated the use of the machine by the defendant was to a total of 680 hours – being 430 hours in excess of the contract (Annexures B1 and C);
  - (e) The photos of the time recorder of the machine after the work on Futuna Island was 11816,5. These photographs were posted by the defendant to the claimant.
  - (f) On 10 March 2018, the claimant sent an invoice to the defendant demanding payment of the amount of VT7,419,225 being for 430 hours in excess of the contract (at VT15,000 per hour) (Annexure B1);
  - (g) The defendant refused payment of VT7,419,225 for the 430 hours excess and the defendant asserted a faulty of the hour meter on the machine (Annexure A to defendant's sworn statement filed 20 February 2019).
42. Because of the dispute, the claimant arranged for the hour meter of the machine to be tested by MASSV.
43. The hour meter of the machine was tested by MASSV. The meter was in good working order and correct (see Annexures C and C1).
44. There was no evidence of the faulty of the hour meter of the machine shown by the defendant in his sworn statement.
45. This explained the Demand of the claimant based on the MASSV report in support of the claim together with a Section 19 Demand pursuant to the Companies (Insolvency and Receivership) Act No. 3 of 2013.
46. There was no reply, payment, compound or compromise and no resolution of the due sum.



47. The claimant, Mr Frank Franconieri, was a credit worthy witness. I accept his evidence.

**H2. On the Counter-claim**

48. I have read and peruse the counter-claim of the defendant. I have also read and perused the defence to the counter-claim of the claimant.

49. I have read and perused the sworn statement of the defendant filed on 20 February 2019 in support of the defence and counter-claim.

50. There is no evidence or fact found in support of the allegations or assertions made by the defendant in their counter-claim. The counter-claim must be dismissed.

51. Overall, the claimant proves his case against the defendant. I give judgment for the claimant.


**I. ORDERS**

52. The court makes the following orders:

- (a) The claimant is entitled to loss in the sum of VT7,419,225;
- (b) The claimant is entitled to interest at 5% per annum from the date of filing this claim (i.e., 13 November 2018) to the date of the payment of the due sum;
- (c) The claimant is entitled to costs against the defendant to be agreed or determined.

**Dated at Port Vila, this 12<sup>th</sup> day of June, 2024.**

**BY THE COURT**

  
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**Hon. Chief Justice Vincent Lunabek**

