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

Civil Appeal
Case No. 22/1918 COA/CIVA

BETWEEN: PAUL HOCTEN and JANET HOCTEN TRADING AS JPO INVESTMENT LIMITED
Appellants

AND: ANTHONY SORIS SAGAYA JUDE VILLAVARAYEN TRADING AS JN AQUA MARINE
First Respondent

AND: THE MOTOR VESSEL "PACIFIC STAR"
Second Respondent

Date of Hearing:	*9th May 2023*
Before:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice OA Saksak*** ***Hon. Justice J Mansfield*** ***Hon. Justice R Young*** ***Hon. Justice VM Trief*** ***Hon. Justice EP Goldsbrough***
Counsel:	*L Malantugun for the Appellants* *MB Makward for the Respondents*
Date of Decision:	*19 May 2023*

JUDGMENT OF THE COURT

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1. This appeal arises from what appears to have been an unsuccessful venture by Paul Hocten and Janet Hocten (the "*Hoctens*") into the shipping industry. They carry on business in Vanuatu, including through a company JPO Investment Limited ("JPOL") and another company Semiawiljoo Shipping Limited ("SSL"). Their investment appears sometimes in the name of the Hoctens, sometimes in the name of JPOL and sometimes in the name of SSL, and at one point SSL was called the operator of the shipping business. As there is no dispute that all transactions were on behalf of the Hoctens, so that they are the principal claimants, it is not necessary to separately record where relevant transactions or events involve one or other of the companies rather than the Hoctens directly.

2. On 22 March 2014 the Hoctens agreed to buy the motor vessel "*Pacific Star*" from Anthony Soris Sagaya Jude Villavarayen trading as J N Aqua Marine (Sagaya) for VT30,000,000.

3. That transaction was duly completed by payment and registration of the vessel in the name of the Hoctens. The vessel was ready to start operating in August 2016.

4. The Hoctens appreciated that they did not have the necessary skills and experience to ensure the proper manning and operations of the vessel. For that purpose they engaged Sagaya to perform that role. It is common ground that he was engaged under the terms of a Manning Agreement, but at trial there was a dispute as to whether the Manning Agreement was oral or in writing, and a dispute about some of its terms. That is a matter addressed by the primary judge.

5. The vessel continued to operate until about December 2017, effectively by Sagaya procuring the crew and managing the operations of the vessel. It ceased operations about that time, and by February 2018 it was clear that the Hoctens could no longer maintain its operations in any economically beneficial way. In February 2018, the vessel required some maintenance and repairs, and it was intended to be dry-docked for that purpose. It appears that the repairs and maintenance were not carried out at that time because the Hoctens could not afford to do so.

6. During the period of its operations, and pursuant to the terms of the Manning Agreement (whether written or oral) it is common ground that the Hoctens were to pay Sagaya a monthly fee of VT500,000, and that he was to secure the crew and manage the crew and the operations of the vessel until it ceased its operations in December 2017.

7. On 29 January 2019, Sagaya provided to the Hoctens an invoice for the then proposed dry-docking and repairs and maintenance of the vessel to be carried out in the following month at a price of VT14,485,000. The Hoctens through JPOL provided a cheque to him in that amount on the same day, but it was not met on presentation.

8. Shortly thereafter (it is not clear precisely when) Sagaya provided to the Hoctens an invoice for the total expenses incurred by him in his role as managing the operations of the vessel up to 31 December 2018 for VT22,455,000. That document acknowledged the payment by the Hoctens to that date for those expenses of VT5,970,000 leaving an outstanding balance of VT16,485,000. Credit for the VT14,485,000 cheque was given on that invoice (leaving a net balance owing of VT2,000,000), so it obviously was issued after that cheque and before it had been rejected by the bank.

9. Between 28 and 30 May 2019 there were negotiations between the Hoctens and Sagaya about the terms upon which Sagaya would repurchase the vessel. He agreed to repurchase the vessel for VT10,000,000. The Hoctens had previously advertised the vessel for sale many months earlier for VT18,000,000 but they had not been able to sell it for that amount. Before the Supreme Court there was significant evidence concerning the circumstances in which that agreement for re-sale and re-transfer of the vessel came to be reached, as the Hoctens alleged that they were

subject to undue influence, coercion and fraud and misleading conduct in the process of negotiations.

10. Sagaya paid for the purchase of the vessel by two cheques each of VT5,000,000, each of which was dated 30 June 2019. It was Sagaya's evidence that he post-dated those cheques on purpose, so as to give the Hoctens the opportunity to meet the cheque which had been drawn on 29 January 2019 for VT14,485,000 prior to that date and which had previously been dishonoured by the bank.

The Supreme Court Claim

11. As was remarked at the start of these reasons for judgment, the investment of the Hoctens into the shipping industry through the purchase and operations of the vessels obviously proved unsuccessful.

12. In broad terms, they claimed against Sagaya in the Supreme Court proceedings for damages for breach of contract, for fraudulent misappropriation of funds, and for related causes of action arising from two categories of loss:

    (i) Losses sustained in the period of operation of the vessel between August 2016 and December 2017 because (they alleged) Sagaya had failed to account properly to them for the revenue earned by the vessel in its own operations and had also inflated in his claims to them the amount that he had incurred in securing and managing the crew and the operations of the vessel. In the Claim, that allegation is made but is not particularised. It is only as the proposed evidence unfolded that a more detailed picture of the claim emerged. It was at no time precisely expressed, either in relation to the revenue or in relation to the expenses incurred.

    (ii) Losses arising from the circumstances in which the re-sale and re-transfer of the vessel took place in late May 2019. As noted, it was alleged in the claim that Sagaya had in various ways mis-represented the real position, applied undue influence on them, or otherwise coerced or defrauded them into entering into that agreement. It was also said that he had cheated them by post-dating the two cheques comprising the purchase price of VT10,000,000, whilst being able to secure the re-transfer and registration of the vessel in his name during June 2019.

13. The claim, at its highest, is expressed to be in the order of VT339,656,000. It is obvious that that does not represent a realistic claim. It is a rough arithmetical calculation from the gross revenue received by the Hoctens from Sagaya for the first three journeys of the vessel in April 2016. No allowance was made for operating costs or for the payments to Sagaya of his management fees. It is clear enough that after those first few operations, Sagaya did not return gross revenue for each journey directly to the Hoctens. His evidence is that the revenue was absorbed by the ongoing expenses and costs incurred in relation to the crew and other expenses.

14. Sagaya denied any liability. He also counterclaimed for damages of VT16,485,000 for outstanding costs owing to him for costs in manning and operating the vessel during its operations (as specified in an invoice issued to the Hoctens for the period to 29 January 2018) plus VT2,460,000 for repairs done to the vessel between 30 May 2019 and 31 October 2020 and damages for stress and trauma.

The Trial Judgment

15. The Trial Judge, after recording the background and the issues in some detail, addressed the issues.

16. First, he found that there was a written Manning Agreement, commencing on 1 June 2016 and for a period of 5 years. It was presented in evidence, and signed by Mr Hocten and Sagaya.

17. The Judge did not accept Mr Hocten's evidence that the agreement was oral only, and that he did not sign the written document. He did so in the light of all the evidence including that Sagaya was not challenged in cross-examination about the document. It also represented what had taken place in the period the vessel was operating to December 2017. The Hoctens acknowledged that they had accepted Sagaya as the person responsible for crew and operations of the vessel to that date, even though the Hoctens said the engagement was only until December 2016.

18. The trial Judge also accepted that, under the Manning Agreement, Sagaya was to arrange the crew and the operations of the vessel, and to be paid VT500,000 per month plus reimbursement of the expenses he had incurred.

19. As noted, Sagaya then acted on that basis and there is no evidence to suggest that the Hoctens also did not proceed on that basis. In the invoice of Sagaya to the Hoctens on the position at 29 January 2019 and showing expenses incurred to 31 December 2018 (as claimed in the counter-claim), the expenses outstanding VT22,455,000 were a balance after Sagaya had applied the revenue from time to time. He gave credit for payments secured from the Hoctens of VT5,970,000 so the balance then owing was VT16,485,000.

20. The trial Judge specifically rejected the evidence of the Hoctens that additional payments by "*cash cheques*" totalling in all VT9,650,000 had been paid by them to Sagaya. Sagaya denied receiving them. The cheque butts presented to support their payment were not confirmed (as they would easily have done) by presenting their bank statements showing the debits of those amounts.

21. The trial Judge also specifically rejected the Hoctens' evidence that they had paid Sagaya a further VT17,000,000 by cash said to be confirmed by three letters allegedly written by Sagaya (under the heading JN Fishing Export) dated 20 December 2016, 15 March 2017 and 3 January 2018. The letters were produced. They were not signed by Sagaya. He said he did not use that

trading name in Vanuatu. He denied receipt of those cash payments. There were no bank statements produced to show any withdrawals of cash related to such payments.

22. Finally, the trial judge found that the circumstances of the resale and retransfer of the vessel to Sagaya in late May 2019 were not effected by any illegal, improper or deceptive conduct on the part of Sagaya. The allegations of fraud and illegal coercion were not made out. So that transaction was enforceable.

23. The counter-claim was allowed in part. The outstanding amount claimed of VT16,485,000 in accordance with the invoice to 29 January 2019 was accepted. The claims for costs of repairs to the vessel after 30 May 2019 was rejected, as that related so a period when Sagaya had been re-registered as the owner of the vessel. The claim for damages for stress and trauma was not proved.

24. Accordingly, the claims of the Hoctens were dismissed. Judgment on the counterclaim was given for VT6,485.000 (the amount outstanding less the VT10,000,000 resale price of the vessel) with interest at 5% per annum. Costs of the trial were to be paid to Sagaya.

Consideration

25. The appeal did not raise any real question of law. It was an appeal on findings of fact, including those based on the credibility of the Hoctens on the one hand, and Sagaya on the other.

26. Counsel for the Hoctens did not present any material to persuade this Court that the findings of fact by the trial judge were not reasonably available to him. It is not sufficient for that purpose to point to evidence which is different from the findings, or to rely on documents which have been found to be unreliable, or to refer to marginally relevant material which the judge may not have specifically referred to.

27. In fact, upon questioning, counsel for the Hoctens, accepted that there had been no evidence to demonstrate the full extent of the revenue earning by operations of the vessel until December 2018. It could not therefore be shown that Sagaya had failed to account to the Hoctens for the full revenue received. There had been no evidence to show the real costs incurred by Sagaya in crewing and operating the vessel, so it could not be shown that there had been a misappropriation of funds by overcharging or by allocating funds to expenses that had not been incurred. In a case where such serious allegations were made against Sagaya, such evidence would have been expected.

28. In relation to the particular invoice of Sagaya about the position as at 29 January 2019, the evidence of Sagaya was accepted in preference to that of the Hoctens. No grounds to go behind the conclusion by the trial judge have been shown. Counsel for the Hoctens accepted that each of the individual items of expense in that invoice making up the outstanding expenses were

proper items of expenses. He also accepted that there was no evidence to show that any of those particular items was not incurred, or that the amount specified was not the correct amount.

29. The only two items on the invoice he sought to challenge were the fees payable to Sagaya. Mr Hocten had accepted in his evidence that they were payable. The evidence of Mr Hocten that they had been paid was not accepted.

30. Counsel for the Hoctens submitted that the case of *Kong v Kong* [2000] VUCA 8 prescribed that corroboration of the existence of disputed facts – in this appeal, whether there was a signed Manning Agreement – was necessary. The case does not support that proposition. It emphasises that there are cases where corroboration is desirable as a matter of practice. That is a matter of common sense.

31. An example is in relation to the trial judge's findings that the payments allegedly made to Sagaya were in fact not made. The Court said in that case that:

> *"as a matter of practice courts will look for corroboration if, on the facts of the complainants own evidence, it is available".*

32. The relevant bank statements (if produced by the Hoctens) may have cleared up those disputed payments. See e.g. *Nutley v Kam* [2003] VUCA 29. The existence of the written Manning Agreement was readily supported by surrounding facts and circumstances.

33. As noted, the Hoctens' evidence on a number of disputed matters was rejected. No realistic argument was presented to show that the judge, who had the benefit of seeing and hearing the witnesses, was not entitled to that conclusion. The findings of the trial judge are not shown to be in error.

34. The alleged conduct of Sagaya wrongly procuring the resale of the vessel for VT10,000,000 on 30 May 2019 was non-existent. It may be that Sagaya drove a hard bargain. But no particulars of fraud or coercion were given, and no evidence was given which could have supported such a finding. The Hoctens chose to label normal commercial dealing with those tags, but that does not take their claims forward.

35. Counsel for the Hoctens relied heavily on the sworn statement of the Hoctens of 31 March 2021 and its annexures to show error. It deals with various alleged payments to Sagaya which the trial judge concluded were not made, and included some of the "*examples*" of alleged deception.

36. No cogent agreement has been made why the Judge fell into error. The cheque for VT14,485,000 of 29 January 2019 was to meet the projected expenditure on repairs and maintenance of the vessel in and from February 2019. Sagaya had issued an invoice detailing the proposed work on 29 January 2019. That cheque was not met by the bank, and it appears that the proposed work was not carried out at that time. Nevertheless, as noted Sagaya, credited that cheque, in anticipation of receipt of those funds, against the invoice to 29 January 2019. He was prepared

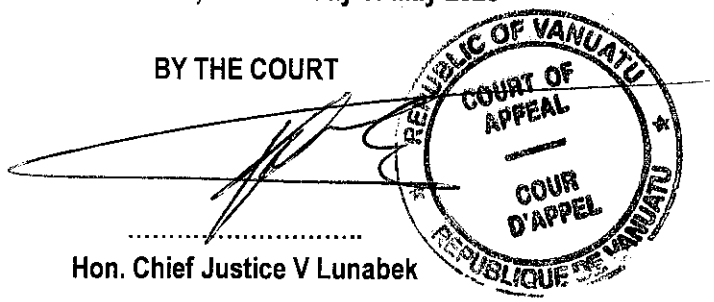
to maintain this position provided the cheque was cleared before the price for the vessel was paid. As the reasons of the judge shows, that cheque has therefore not been taken into account in dismissing the judgment sum on the counterclaim but Sagaya has been required to give credit for her purchase price.

Conclusion

37. Accordingly no ground of appeal has been made out. The appeal is dismissed with costs, fixed at VT150,000. The orders of the trial judge, including the orders on the counterclaim, stand.

Dated at Port Vila, this 19th day of May 2023

BY THE COURT



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Hon. Chief Justice V Lunabek