

IN THE MAGISTRATES COURT  
OF THE REPUBLIC OF VANUATU  
(Civil Jurisdiction)

Civil  
Case No. 18/1256 MC/CIVL

BETWEEN: JAMES KAMIL

Claimant

AND: RECYCLE CORP VANUATU

Defendant

AND NOEL HARRIS

Third Party

*Before: Fsam*

*In Attendance: Mr Rongo\_R for the Claimants*

*Mr Kalmet\_A for the Defendant*

*Mr Livo\_B for the Third Party*

*Copy: Yahwa & Associates, Hurley Lawyers, The Public Solicitors, Claimant, Defendant,  
Third Party.*

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## JUDGMENT

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### Introduction

1. The Claimant brings a claim against the defendant in this matter for loss and damages to his property (bus) registration number 4122 and its useable parts.
2. The Claimant then claims for an order for loss and damages of useable parts and the bus in question at a sum of VT 700,000, general damages and costs.

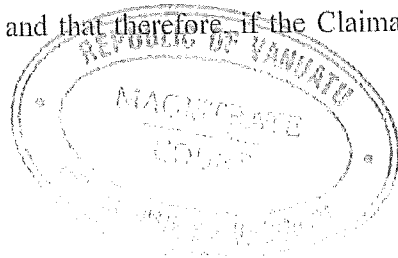
### Facts



3. The Claimant is the owner of an old green bus registration number being 4122.
4. The Claimant had entered into an oral agreement with the Third Party to remove useable parts from his old green bus to be used on another bus he had purchased from the third party.
5. On the 6<sup>th</sup> of February 2018, the defendant's employee Amos Mathias had attended the garage of the Third Party at 21 Jump Street, Tagabe with instruction from the Third Party Mr Noel Harris to inter alia remove scraps from the garage including the claimant's old green bus.
6. However, the Claimant being at the garage on this date, instructed the Defendant's employee not to remove his bus as he was still waiting for Noel Harris to remove useable parts from the old green bus.

### Defence

7. A Third Party Notice was filed by the Defendant wherefrom the Defendant claim it relied on the oral retainer of the Defendant by the Third Party, Mr Noel Harris, to remove scraps, including the claimant's old green bus, from the Third Party's garage location at 21 Jump Street, Tagabe area.
8. The Claim is defended on the basis that the Defendant denies liability to or that it contributed to any loss suffered by the Claimant as alleged.
9. The Defendant says that on the 7<sup>th</sup> of February 2018, the Defendant's employee Mr Mathias was instructed by Mr Harris that it had removed the useable parts from the claimant's old green bus, when the Defendant returned to the garage to collect the scraps including the claimant's old green bus as directed by Mr Harris.
10. The Defendant further says that that he had removed the old green bus following the request of Mr Harris (Third Party) and that therefore, if the Claimant is



successful in his claim, any loss suffered should be borne by the Third Party who indemnifies the Defendant based on the oral retainer

### The Burden and Standard of Proof

11. The Claimant has the onus to prove his case according to Civil Standard of Proof, that is, on the balance of Probabilities.

### The Law/Issues

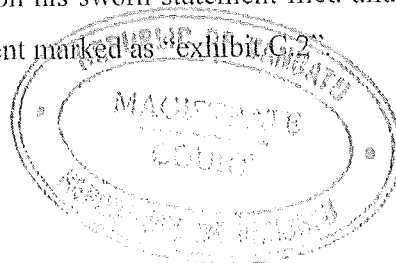
12. The following are the main issues put before this Court by the Claimant and as addressed by all Counsels, for Court's determination:

- 1) Whether or not the Claimant informed the Defendant not to remove the Claimant's vehicle on the 6<sup>th</sup> of February 2018 and the Defendant did remove the Vehicle, it was by the claimant's authorization to do so?
- 2) Whether or not the third party (Noel Harris) informed the claimant before the claimant's vehicle was removed?
- 3) Whether or not there are some useable parts left on the Claimant's vehicle, whether or not the claimant's vehicle was still fit to be used?
- 4) Whether or not the Claimant suffered loss and damages as a result of the defendant's act?

### Evidence

#### Evidence for the Claimant

13. Evidence was adduced by the Claimant, Mr Kamil himself and his witness Shem Lesly as well as the claimant relied on his sworn statement filed and marked as "exhibit C.1" and Mr Lesly's sworn statement marked as "exhibit C.2"



14. Mr Kamil gave evidence that he had initially purchased a bus after securing a loan with Agriculture Development Bank (ADB) for a sum of VT500, 000. The bus ran for a year until his loan was completed and he decided to purchase another bus.

15. He approached the Third Party, Mr Noel Harris where an agreement ensued between them for the claimant to purchase Mr Harris bus at VT70, 000 and that Mr Harris moves all useable parts from the claimant's bus to the purchased bus.

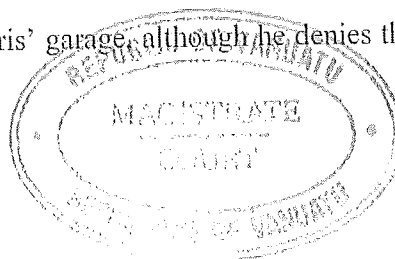
16. On the 6<sup>th</sup> of February, 2018, he was at Mr Harris' garage when the Defendant's employee Mr Amos Mathias, came to pull out his bus, and he informed Mr Mathias that there were some useable parts yet to be removed from the bus before it could be removed from Mr Harris' garage.

17. Two days later, he returned to the garage to find the bus had been removed by the defendant from the garage to the defendant's premises where he says it was without his authorization.

18. Under Cross examination by Mr Kalmet, the claimant had to clear some minor ambiguities as to the colour of the bus in question, where he gave evidence that it was initially a blue bus, as pleaded although after he secured the purchase with the help of the ADB loan, he had the colour changed from blue to green. And that it was from this old green bus that he states there were still useable parts that needed to be removed into the yellow one he purchased from Mr Harris.

19. It was put to the claimant that on the 6<sup>th</sup> of February, when he spoke to Mr Mathias, he never told Mr Mathias that he owned the bus in question, or that he told Mr Mathias not to remove the bus until all useable parts are removed, to which he denied saying he did speak to Mr Mathias.

20. His further evidence under cross was that he was not present on the 7<sup>th</sup> of February when Mr Mathias had gone to pull out his bus from Mr Harris' garage, and that on the following day, he had driven to the Defendant company's premises having found out it had been moved from Mr Harris' garage, although he denies that he drove



through the defendant's compound without stopping or enquiring as to his bus, or that at that point in time the bus was just a shell or a wreck.

21. When put to him as to the damages he seeks, that he does not have any evidence to show he is entitled to the claim for VT500,000, or the claim for loss of business at VT200,000 or the value of the bus itself, Mr Kamil agreed that he did not have any such evidence. Mr Kamil also states he does not have a copy of receipt of the purchase price of VT70, 000 paid to Mr Harris for the yellow bus he bought from him.

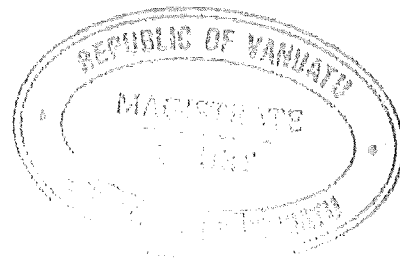
22. Under further cross examination by Mr Livo, Counsel for Mr Harris, there was some contradicting answers given by Mr Kamil himself – for instance when it was first put to him that after the shell of his old bus was removed from Mr Harris' garage and moved to the Defendant's premises, the yellow bus had already been running, to which he denied.

23. On the next line of questioning, when asked if he had come to Mr Harris' garage (obviously on the date he realized his old green bus had been removed by the defendant) by the bus into which the useable parts have been moved, he answered yes.

24. And further, when asked that he drove the yellow bus that day, he answered yes.

25. It was further put to him that by then, the Yellow bus was already running, to which Mr Kamil denies saying he drove by the garage on a different bus. He seemed to contradict himself further when asked by his Counsel under re-examination as to which bus he was in when he drove passed Mr Harris' garage, when he answered he drove the yellow bus.

26. Mr Kamil then gave evidence that he did involve two mechanics to remove the engine from his old green bus to place it in the yellow bus, and that Mr Harris was not present at that time, and that Mr Harris was not responsible for any useable parts of the bus.



27. It was further put to the Claimant that there is no evidence as to the useable parts he is claiming for that is worth VT500, 000, to which he agrees.

28. Evidence from Mr Lesly was that he was only involved with another boy to place the engine of the claimant's green bus into the yellow bus. He further stated that he did not remove any other parts of the old green bus, only the engine. That the parts from the green bus that could still be needed from the green bus are the steering rack, side glasses, which they had not removed.

#### Evidence for the Defendant

29. The Defendant relied on oral testimonies of Mr Andrew Hibgame, Mr Shaun Hibgame and Mr Amos Mathias to support the Defendant's case.

30. Mr Andrew Hibgame, Director of the Defendant Company under direct examination by Mr Kalmet, gave evidence giving a brief background into their work processes and particularly that they collect scrap metals from requests of owners to remove same for their business.

31. He further agrees when it was put to him that before he removes any bus for his recycle business, he must know who owns the property.

32. That his employee Mr Amos Mathias collects the scraps following a list prepared for him to work with.

33. His evidence was also that parts of the green bus were already removed including the glasses when taken to the defendant's premises.

34. Mr Shaun Hibgame, Manager of the Defendant Company also gave evidence under direct examination by Mr Kalmet that their employee Mr Amos Mathias attended to the request by Mr Harris to remove scraps (including claimant's old green bus) from his premises at 21 Jump Street.



35. He further stated he remembered Mr Amos brought in a an old green bus (claimant's bus), and he remembered because it was a lime green colour and not so often do they see this kind of colour within their premises, and that he was the one who cut up the wreck (the old green bus). That up to that time, there was no issue regarding the bus, until after the bus was cut up a day or two after it was brought into the defendant's premises.

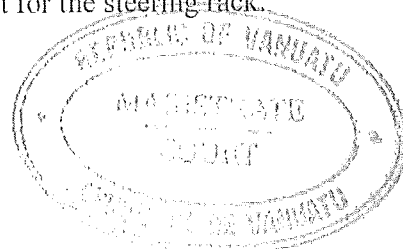
36. He further stated that while the bus was in the Defendant's possession, Mr Kamil had driven into the compound but not stopped and only made a detour of the premises for about 2-3 minutes and left. That he was in an excavator at that time and blew its horn to get the claimant's attention to stop, and threw out his hands to enquire as to why he was in the premises, but the Claimant did not stop. The next day after the bus shell had already been cut the claimant went back to the defendant company saying the bus was his.

37. Mr Shaun further stated that he had apologized to the claimant saying they had acted on instruction of Mr Harris, and that it was a mistake to cut his bus, and that he was later approached by the claimant who told the Defendant that they must pay for the parts of his bus.

38. Mr Shaun in his evidence further says as to the condition of the bus before it was cut up, that the bus was only a shell ('body' *nomo* ), with no window, no chairs, no engine, no gear box, only parts remaining were the steering rack.

39. When put to him that if the claimant had approached him on the first day the bus was in their premises and told him not to cut his bus, he would not have cut it, to which he agreed he would not cut it. And that when he cut the bus he did not know it was the claimant's bus.

40. Under further cross examination by Mr Livo, Mr Shaun was asked to confirm if Mr Kamil's old green bus could be used again, to which he replied there was nothing in the bus, no wheel, no glass, no engine, except for the steering rack.



41. And when further asked if similar bus shells as that of the claimant's green bus had been cut by the company before, the witness answered in the affirmative and also stating that he had not had bus owners coming to the company premises before asking for empty bus shells.

42. Under re-examination, Mr Shaun gave evidence to clarify the *mistake (paragraph 37 above)* he stated in evidence under cross on whether the mistake was on his part or the claimant's, to which he answered there was a mistake in communication between the claimant and Mr Amos, where if the claimant had informed the defendant through Mr Amos of his concerns for his bus shell, he would not have cut it up.

43. Mr Amos Mathias gave evidence that he is the defendant company's driver and is responsible for picking up scrap metals upon requests.

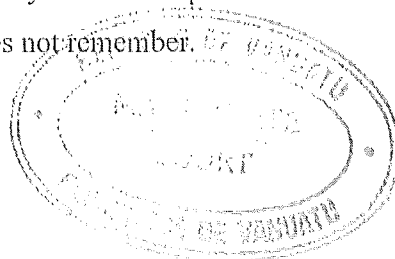
44. He gave evidence that on the 6<sup>th</sup> of February, 2018, he went to Mr Harris' garage upon his request to remove scraps from his yard, and upon arriving, he was informed by the Claimant in the presence of Mr Harris not to move his bus because it had parts yet to be removed. That he did not remove the bus and only removed other scraps from Mr Harris' garage that day.

45. On the next day the 7<sup>th</sup> of February, Mr Harris again asked them to return to pick up more scraps including the claimant's bus which at that time was only an empty shell (body) with no wheels, gear box, or engine.

46. The witness was further asked based on his experience as a mechanic as well, if he noticed any parts in the bus that were still useable to which he answered that there was none, and that the main parts to drive the bus is missing so it could not run.

47. His further evidence was that the second time he returned to Mr Harris' garage was upon the instruction of Mr Harris to remove the claimant's old bus.

48. When further asked if he received any direct complaint after this from Mr Kamil, he said there was none, and that he does not remember.





49. When put to the witness that he removed the bus from Mr Harris' garage upon Mr Harris' instruction while he knew the bus belonged to Mr Kamil, he agreed to this.

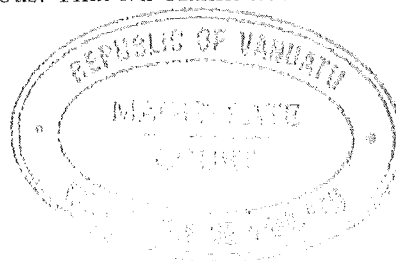
50. Under re-examination, the witness stated that he has been removing scraps from Mr Harris' garage before and he understands that he cannot remove the bus until after Mr Harris removes all necessary parts and instructs them when it is ready to collect. That Mr Harris did remove all parts when he went to collect the bus shell.

#### Evidence for the Third Party

51. The Third Party Mr Harris himself relies on his own evidence under oath in defending his case that while there was an agreement between himself and Mr Kamil to remove useable parts from the old green bus to the yellow bus, there was a misunderstanding by the claimant concerning the arrangement regarding works to be done on the bus.

52. Mr Harris gave evidence that he owns a garage at 21 Jump Street which he had been operating since 1997 and that sometime in February 2018, the claimant had approached him about his bus that was rotten and could not pass for road worthiness at the Public Works Department, so they had an agreement that Mr Harris sells Mr Kamil his bus at VT70, 000 and Mr Harris transfers parts of Mr Kamil's old bus to the yellow one he purchased. This transaction was effected between them. That the claimant's bus was in Mr Harris' garage for about a week and that all parts of the green bus had been removed before it was moved to the road side to be picked up by the Defendant.

53. Mr Harris further gave evidence that once all parts had been removed, the green bus was an empty shell with no engine, glass or gear box, except the steering that was worn out and of no value. He further says once the shell of the old green bus was placed at the road side, the shell is no longer his concern, and the shell itself is of no value to be sold. He says the shell was by the road for 2 or 3 days during which period the claimant did not say anything to him about any useable parts or that he was returning for useable parts from the green bus. That Mr Kamil never made a complaint to him.



54. Under cross by Mr Rongo, Mr Harris confirmed he did not receipt the claimant the purchase amount of the yellow bus at VT70, 000. He further says that he did authorize the defendant to remove the shell of the green bus although he was aware Mr Kamil was the owner but had authorized the defendant anyway because Mr Kamil had already informed the defendant of the green bus.

55. Under further cross by Mr Kalmet, Mr Harris confirms he was with Mr Amos and Mr Kamil on the first date 6<sup>th</sup> of February, where Mr Kamil informed them of his intention to remove useable parts first from the green bus before it can be removed by the Defendant. That's why he called Mr Mathias the next day because by then the claimant's bus was only a shell.

56. He further says on the second day, when Mr Kamil returned to the garage, he never complaint about the bus to him, but only told Mr Harris that he is pursuing a claim against the Defendant in court and that Mr Harris should not sign any papers, or to appear in court to testify.

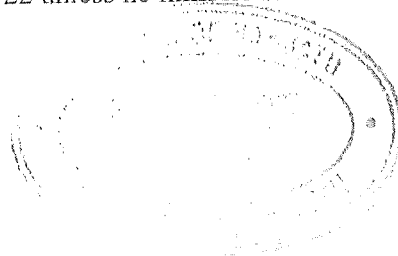
57. Further as to value of the bus, he again confirms his earlier evidence that the green bus has no value to it and its condition is not good compared to the yellow bus.

58. Under further re-examination, Mr Harris gave evidence confirming his earlier evidence that the green bus if sold would have no value to it. And he further confirms his earlier evidence that Mr Kamil did talk with Mr Mathias about removing his bus from Mr Harris' garage before Mr Harris authorized its removal by the Defendant.

## Submissions

### Claimant's Submission

59. The Claimant through his counsel relied on his submission filed on the 7<sup>th</sup> of November, 2018, that he did, on the 6<sup>th</sup> of February, 2018, inform Mr Mathias not to remove his vehicle registration number 4122 unless he himself authorizes the defendant to do so.



60. He further submitted that he was informed by Mr Mathias that Mr Harris had directed the Defendant to remove his bus without his authorization and in the event, causing him to suffer loss and damages. That Mr Harris knew the claimant had ownership of the bus, and yet it went ahead to authorize the defendant to remove it without his (Claimant's) authorization.

61. The claimant in their submission stated that because there were still useable parts in the old green bus in question, when it was removed by the defendant accordingly, the defendant's act did cause the claimant to suffer loss and damages as sought.

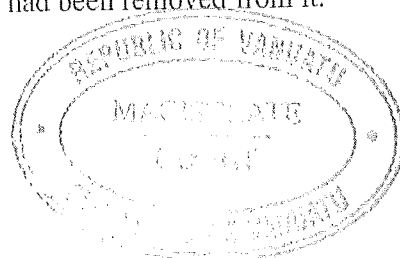
62. The Claimant further through their counsel interestingly made reference to section 133 of the Penal Code in respect of malicious damage to property, citing the provision to support his claim of ownership of the old bus in question and that damages to it by the defendant entitles him to the damages and losses at a sum of VT700, 000 that he accordingly seeks.

#### Defendant's Submission

63. The Defendant through his counsel also relied on his written submission filed on the 22<sup>nd</sup> of November 2018 that the defendant is not liable to the claimant for any loss or damage suffered by the claimant.

64. That on the 7<sup>th</sup> of February 2018, the claimant no longer had property rights to his old bus ("the wreck") because the Third party had removed all useable parts from it.

65. That the Defendant had removed an empty shell or the wreck from Mr Harris' garage upon the request of Mr Harris himself, along with other scrap metals, and therefore should the court hold the defendant liable, and/contributed to any loss suffered by the claimant, this must be borne by the Third party who indemnifies the Defendant based on the oral retainer that the defendant removes the wreck from Mr Harris' garage after all useable parts had been removed from it.



66. The Defendant through his Counsel further submitted on the legal test that although the claimant did not specifically plead trespass to goods, this is what is the heart of the claim, and wherefrom counsel cited *ANZ Bank (Vanuatu) Ltd v Marchand [2001] VUCA 2*. It is further submitted that in order for the claimant to succeed, he must accordingly establish in evidence that he is the owner of the wreck, or that he gave his express or implied consent regarding the removal of the wreck or that as a result of the removal of the wreck, he sustained loss and damages.

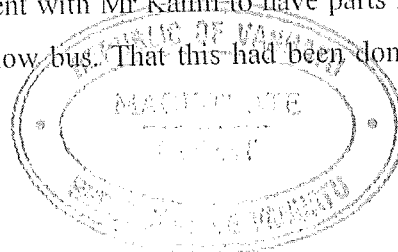
67. Further on damages sought by the claimant, the defendant submits that there is no evidence put forward by the claimant as to the value of the useable parts in the wreck in question totaling to a sum of VT500,000 to substantiate his claim for damages.

68. And on the claim for loss of business by the claimant at an amount of VT200,000 the Defendant further submitted the claimant again did not produce sufficient evidence to prove this claim. Mr Kalmet cited *Remy v Kyong Sik Jung [2018] VUCA 5* where relying on this authority, they submit that the claimant did not discharge the onus of proving his loss and damages accordingly, and accordingly the claimant's claim be dismissed with costs awarded to the defendant.

69. In response to reference made by the claimant on the penal code provision, of section 133, the Defendant submits that Mr Kamil the claimant has not overcome the burden and onus of proving his claim against the Defendant to cite this statutory authority. Counsel then cited *COPV v Terry [2007] VUCA 17* that the Defendant and the Third Party are both neither subjects of a criminal complaint or a conviction over the wreck in question, and that the Claimant counsel's reference to the penal code provision is misconceived.

#### Third Party's Submission

70. The Third party, Mr Harris through his counsel Mr Livo, did not file written submissions, but gave oral submission in court instead. He confirms in his submission that Mr Harris did enter into an agreement with Mr Kamil to have parts removed from the claimant's old green bus to the yellow bus. That this had been done and the bus



being a wreck was moved to the roadside because it had not useable parts left. That after parts were moved to the yellow bus, the yellow bus had bene running and as per normal procedures, Mr Harris engages the Defendant in picking up scraps from his garage, which included the claimant's old green bus which was considered scrap then and of no value when it was picked up by the defendant.

71. The third party further submitted that there was never a term in the agreement between himself and Mr Kamil that after parts have been removed from the old green bus, for Mr Harris to get the claimant's authorization to have it removed by the defendant.

72. It is further submitted that once the parts were removed, the bus has no value and is considered only a scrap. He further added that the only thing of value in the old bus was the steering rack which according to his estimation, is worth VT2000 or VT5000.

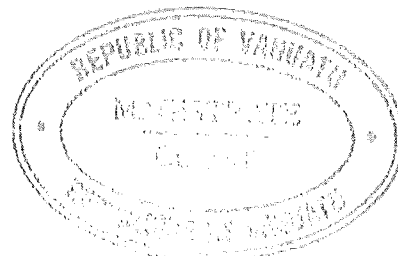
73. Mr Harris through his counsel further in supporting the defence's submission, that the claimant had not given any evidence as to the value of useable parts to substantiate his claim of VT500, 000 – that the claimant has not established which parts he is claiming as still useable, or its value if any, and therefore submit that the claimant's claim be dismissed.

74. In respect to loss of business claim at VT200, 000 the third party again supports the defendant's submission by citing *Remy* case, where the claimant had failed to prove the loss he is claiming and so submit that this claim also be dismissed.

75. Mr Livo further made reference to Rule 4.10(1)(2) in respect of damages, that damages sought must be specified accordingly, and the claimant has not given evidence to substantiate his claim for damages.

76. Mr Livo further submitted that the claimant's claim be dismissed and sought costs for the Third party.

### Findings



77. I make the following findings in respect of the four issues outlined as aforementioned:

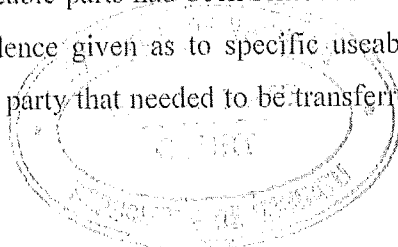
**Issue 1:**

a) There is evidence from Mr Mathias, the Defendant's employee, that the claimant did inform him not to remove his old green bus on the 6<sup>th</sup> February because he had parts that needed to be removed to the yellow bus. And according to the oral evidences, the only part mentioned was the bus engine. No further evidence was given as to any *other parts* available that is of any worth and yet to be removed from the old bus to the yellow one.

b) While the claimant's evidence was that he did spoke to Mr Mathias that he still had ownership of the wreck or the old green bus in question, or that he informed Mr Mathias not to remove the wreck without his authorization, there is no corroboration of this evidence because evidence by both Mr Mathias and Mr Harris state otherwise that Mr Kamil never directly informed them that he still owns the old bus and expects them to get his authorization before removing same. Therefore I find for this issue that the claimant had failed to satisfy the onus of proving that he did had ownership of the old wreck on the 6<sup>th</sup> of February 2018, or that there is a need for any authorization given by him to the Defendant before the old wreck be removed. And I answer this issue in the negative.

**Issue 2:**

a) While the Third Party's evidence under cross confirmed he knew Mr Kamil was the owner of the wreck or old green bus, there is no evidence that the claimant did assert his ownership to the Third Party or to Mr Mathias before the wreck was being removed by the Defendant. There is evidence from the Third Party that useable parts had been removed according to their agreement. There is no evidence given as to specific useable parts by the claimant himself or the third party that needed to be transferred from the old



bus to the yellow one. The only useable part mentioned in evidence was the engine that had been removed by Mr Harris. Obviously Mr Harris having dealt with a lot of wreck of this nature in his 21 years of experience would know when a vehicle is considered scrap or a wreck before it gets moved by the Defendant company. And Mr Kamil had instructed Mr Mathias that once work was done on the old bus, he can return to remove it from the defendant's garage. Work was done accordingly, and Mr Mathias was instructed by Mr Harris to remove the wreck from his garage. I don't see any need for the Third party to have to inform the claimant again before the wreck was removed, because transfer work had been done on it and it is considered ready to be removed as scrap by the Third Party.

b) While there was evidence of a steering rack present in the wreck, no evidence is given as to its worth and the only evidence I am satisfied with is that the steering rack itself was old and of no value. And so I answer this issue also in the negative.

**Issue 3:**

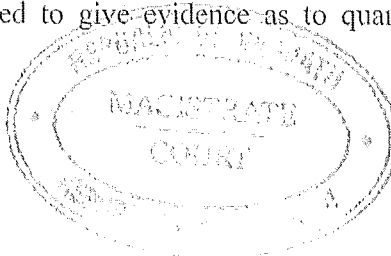
a) I repeat paragraph (a) of Issue 1 and (b) of Issue 2.

b) There is no evidence given as to specific parts claimed by the claimant as still useable or if they are of any value. In the absence of such evidence, I refuse to accept Mr Lesly's evidence that there were useable parts on the old green bus after he did work on it.

c) I find that the bus was only a shell and considered a scrap for collection by the defendant. That it was of no value when it was picked up by Mr Mathias. And so I answer this issue also in the negative.

**Issue 4:**

a) The claimant had failed to give evidence as to quantum of loss or damages he is seeking.



b) I therefore answer this issue in the negative.

**Reference to the Penal Code Section 133 Malicious Damage to Property**

a) the Defendant submits that Mr Kamil the claimant has not overcome the burden and onus of proving his claim against the Defendant to cite this statutory authority and I agree with Defence counsel in citing *COPV v Terry [2007] YUCA 17* that the Defendant and the Third Party are both neither subjects of a criminal complaint or a conviction over the wreck in question, and that the Claimant counsel's reference to the penal code provision is misconceived.

**Conclusion:**

78. The Claimant accordingly has been unsuccessful in this claim.

79. The Defendant and Third Party are both entitled to costs on a standard basis to be agreed or taxed failing agreement.

**DATED at Port Vila this 27th day of November, 2018.**

**BY THE COURT**



**Magistrate**

