

BETWEEN: **Nicon Limited**
Claimant

AND: **Light Ship Limited**
First Defendant

AND: **Stephen Quinto and Nicola Quinto**
Second Defendants

Dates of Trial: 14, 16 and 17 March 2022
Before: Justice V.M. Trief
In Attendance: Claimant – Mr M. Hurley, by video link
Defendants – Ms L. Raikatalau and Ms V. Muluane, by video link
Date of Decision: 1 December 2022

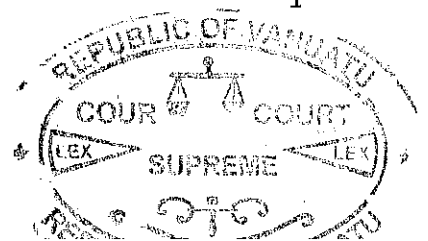
JUDGMENT

A. Introduction

1. The Claimant Nicon Limited ('Nicon') seeks judgment in respect to its revised invoice dated 9 February 2015 rendered to Stephen Quinto on behalf of the Defendants, for VT886,042 plus interest. Alternatively, judgment is sought on a *quantum meruit* basis. That is, for the reasonable value of its services in reliance upon the express or implied term that the Defendants would compensate it for the services provided.
2. The parties filed closing submissions. This is the judgment.

B. Background

3. Nicon is a registered company in Vanuatu with a shipyard in Luganville, Santo.
4. The First Defendant Light Ship Limited is a New Zealand registered company ('Light Ship'). At all material times, it was the owner of a Leopard 46 catamaran vessel, Lightship (the 'Vessel'). The Second Defendants Stephen Quinto and Nicola Quinto are two of Light Ship's three directors.
5. Mr and Mrs Quinto are also the equal shareholders of Light Ship.
6. In or about January 2015, Nicon and Mr Quinto (on his own behalf or jointly and severally on behalf of the Defendants) entered into an oral agreement that Nicon would allow the

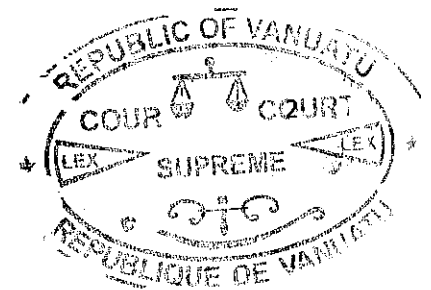


Vessel to be slipped at Nikon's premises for its facilities to be used for maintenance work on the Vessel in return for payment (the 'agreement').

7. Between 3 February and 9 February 2015, the Vessel underwent maintenance work at Nikon's shipyard.
8. The Defendants did not request a quote prior to the works commencing. No quote was provided.
9. Nikon rendered invoices to the Defendants. Aside from the two initial invoices presented dated 9 February 2015, the later invoices included amounts for compounding interest of 3% interest per month accruing on overdue amounts.
10. The second of the initial invoices dated 9 February 2015 included an early payment discount of VT180,000 (equivalent to the hauling charge) [page 88 of the trial book; annexure "SQ6" of Exhibit D3]. However, when no payment was made, that discount was removed as shown by the revised invoice, also dated 9 February 2015, which was issued and on which judgment is now sought [at page 86 of the trial book; annexure "SQ5" of Exhibit D3].
11. Nikon is now suing for payment on the invoices or for the reasonable value of its services. The judgment amount sought on its revised invoice is VT886,042 (excluding compound interest). With interest, the judgment amount sought is VT4,580,744.

C. Pleadings

12. By the Amended Claim filed on 29 June 2020, Nikon sought judgment against Light Ship and/or Mr and Mrs Quinto jointly and severally in respect of unpaid invoices totalling VT4,580,744 for shipping and attendant services for the Vessel provided by Nikon between 3-9 February 2015 along with default interest for late payment.
13. It is alleged that the applicable terms of trade are set out on each invoice including 3% interest per month accruing on overdue amounts.
14. In the alternative, Nikon seeks the reasonable value of the services in reliance upon the express or implied term that the Defendants would compensate Nikon for its services.
15. In the Amended Defence filed on 26 January 2022, the Defendants pleaded that as shareholders of Light Ship, they cannot be a party to this claim and that Stephen Quinto acted as an agent of Light Ship. It was also alleged that all the maintenance work on the Vessel was done by outside contractors and not by Nikon.
16. In October 2013, a similar course of dealing was undertaken at the same shipyard for VT205,000; in 2015, no new terms had been communicated nor a quotation remitted to the Defendants however the invoice remitted represented a 430% increase from the 2013 invoice. Further, the Defendants were unaware of any change in ownership of the Shipyard between 2013 and 2015.



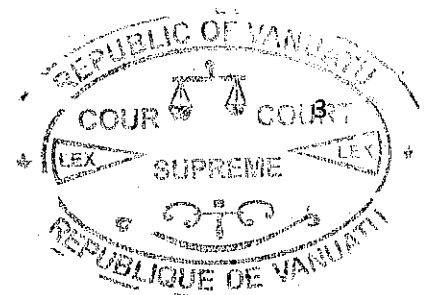
17. The Defendants denied that the alleged terms that Nicon's standard fees applied to all vessels at the time and that Nicon's invoices were generally payable within 7 days were part of the oral agreement between Nicon and Mr Quinto. They alleged that those terms were not known to the Defendants. The Defendants also denied that the terms of trade set out on each invoice were made known to them prior to receipt of the invoice dated 9 February 2015 nor before the work was done therefore do not bind the Defendants over and above any costs that are for the reasonable and fair value of the services provided. They disputed the charges for legal/debt collection fees and the compound interest charged for late payment and collection fees.
18. Finally, the Defendants alleged that a cheque for VT221,000 no. 3822 dated 29 February 2016 was drawn on the ANZ Bank account of Edenhope Limited being the amount charged for the Shipyard facilities in 2013 of VT205,000 plus 10% as being fair value for the services rendered.
19. By the Reply to Amended Defence filed on 4 March 2022, Nicon referred to para. 6 of the Sworn statement of Mr Quinto filed on 10 November 2021 [Exhibit D3] in which he deposed that in February 2015, the business ownership of the slipway had changed and been transferred from Mr Dinh Van Than (Dinh Shipping) to Nigel Giltrap (Nicon).
20. Nicon also alleged that it had provided 14 hours labour to the Defendants at their request.
21. Further, it denied that it ever received ANZ Bank cheque no. 3844.
22. Finally, Nicon alleged that no changes were made to its price list between 1 May 2014 and 31 December 2019, that the former dealing referred to occurred in 2013 between the Defendants and Dinh Shipping, that Mr Quinto was given a price list by Nicon's Accounts Manager, Shelley Giltrap, in or about late 2014 and early 2015 at the time of his enquiry and while being aware of a change of ownership, did not request a quote and that the Estimate Costing sheet received by Mr Quinto prior to the haul-out of the Vessel shows the same prices as those charged in Nicon's original invoice rendered to the Defendants dated 9 February 2015.

D. Discussion

23. It is accepted that the Vessel is owned by Light Ship.

Did Mr Quinto act as an agent of Light Ship?

24. The Defendants' case is that Mr Quinto acted as an agent of Light Ship and that as shareholders of Light Ship, Mr and Mrs Quinto should not be held liable.
25. However, as Mr Hurley submitted, the evidence does not show that Mr Quinto ever made it clear to Serge Laloyer (Nicon employee from 2014-2018) or to anyone else on Nicon's behalf that Light Ship was engaging Nicon's services.



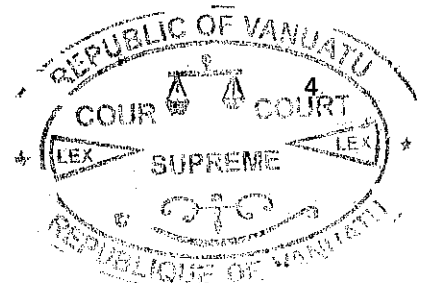
26. It is also telling that although Nikon's invoices [at pages 7-39 of "NG-1", **Exhibit C2**] were addressed to Mr Quinto, there is no evidence that he ever challenged that and/or stated that the invoices should be rendered to Light Ship.
27. In the absence of evidence that Mr Quinto acted as an agent of Light Ship, any judgment against the Defendants will be entered jointly and severally.

When did ownership of the Shipyard change?

28. In Mr Hurley's submission, the dispute between the parties from the outset was a result of Nikon insisting that its invoice be paid referable to the charges in its price list and the Defendants wanting to pay a similar sum to what they say they paid during the previous dealing.
29. The previous dealing occurred in or about October 2013 when the Shipyard was owned by Mr Dinh Van Than (Dinh Shipping).
30. Mr Dinh deposed that he owned the Shipyard till on or about the end of April 2014 [**Exhibit D1**]. There being no evidence to the contrary, I find that the Shipyard changed ownership in April 2014.

In February 2015, were the Defendants aware that the Shipyard ownership had changed?

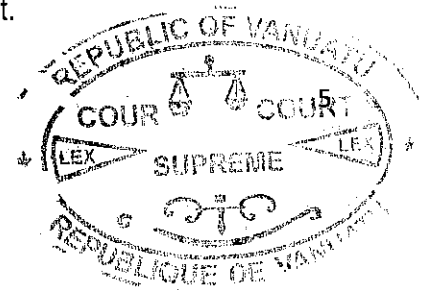
31. At para. 6 of his Sworn statement filed on 10 November 2021 [**Exhibit D3**], Mr Quinto deposed that in February 2015, the business ownership of the slipway had changed and been transferred from Mr Dinh Van Than (Dinh Shipping) to Nigel Giltrap (Nicon).
32. In cross-examination, Mr Quinto stated that his para. 6 was not correct – that he didn't know about the change in the ownership of the shipyard until sometime after the February 2015 works.
33. An exchange between counsel suggested that para. 6 was drafted the way it was by previous counsel on record for the Defendants. Counsel pointed to the sworn statement being sworn in June 2020 (when the Defendants were represented by previous counsel) but then not filed till November 2021. However, an explanation from counsel cannot be taken as evidence. Further, no matter that Mr Quinto's sworn statement was drafted by the Defendants' previous counsel, it was filed by his current counsel.
34. Mr Quinto made his statement having sworn an oath to tell the truth. He took a similar oath before giving evidence at trial. Both his para. 6 and what he said at trial cannot be true therefore whichever of his versions was correct, he lied on the other occasion notwithstanding his oath to tell the truth.
35. I consider that Mr Quinto included para. 6 in his sworn statement, but by the time it came to trial, he appreciated that it would be against his interest to concede that he knew of the ownership change, therefore he elected to say that his para. 6 was incorrect.



36. In the last question in cross-examination, the proposition was put to Mr Quinto to the effect that if he knew that there had been a change in management at a store where he had bought a television the year before he would not expect to pay the same price for it a year later. He said no. I consider that that was another example where Mr Quinto considered that it would be against his interest to do so hence, he was not prepared to accept the reasonable proposition put to him.
37. It was also put to Mr Quinto in cross-examination that there are less expatriate businesses in Luganville than in Port Vila. Mr Quinto said that he did not know. I reject that denial as being evasive. It is obvious to anyone with even the most basic knowledge of both places (Mr Quinto was resident in Luganville in 2015) that there are far less expatriate businesses in Luganville than in Port Vila.
38. In any event, Luganville is a "small" town. Even though Mr Quinto wished to highlight during cross-examination that from April 2014 to February 2015 he was mainly located on the west coast of Santo and even if that evidence is entirely correct, I consider that it must have come to Mr Quinto's attention that Mr Dinh's company was no longer the owner/manager of the shipyard and there was new management.
39. I find therefore that it is more likely than not that by February 2015, Mr Quinto knew that the Shipyard ownership had changed from Dinh Shipping to Nikon.
40. I also infer that by February 2015, all of the Defendants knew that the Shipyard ownership had changed from Dinh Shipping to Nikon.

Was payment made to Nikon via ANZ Bank cheque no. 3822?

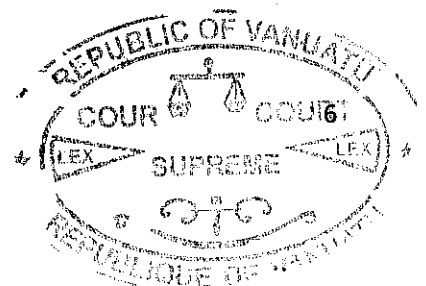
41. Was payment made to Nikon by way of ANZ Bank cheque no. 3822 dated 29 February 2016 for VT221,000 drawn on the account of Edenhope Limited (a company related to Mr and Mrs Quinto)?
42. Nikon's case was that it has not received any payment from the Defendants. It denied ever receiving ANZ Bank cheque no. 3822.
43. The Defendants' case is that that cheque was drawn and presented to Nikon. Mr Quinto deposed that the cheque along with a cover letter were sent by hand with the taxi driver Sylvestre on 29 February 2016 at 6.20pm [Exhibit D3].
44. Mrs Giltrap, Nikon's Accounts Manager deposed that Nikon never received that cheque nor has it ever banked that cheque. She attached as proof a copy of the bank deposits to Nikon's Bred Bank account between 1 March 2016 and 31 August 2016 [pages 3-21 of "SG-21", Exhibit C1].
45. Defendants' counsel submitted that the Schedule of payments attached to Mrs Giltrap's statement was not conclusive evidence as Mrs Giltrap could have 'doctored' the evidence to remove any reference to the Edenhope Limited cheque. If the Defendants considered that there was anything untoward about the veracity of that Schedule, they could have sought a summons for production to Bred Bank. They did not.



46. More tellingly, the Defendants did not adduce any evidence that the cheque amount was actually withdrawn from Edenhope Limited's account. The Defendants could have sought a summons for production to obtain such evidence from the ANZ Bank. They did not.
47. In his reply sworn statement, Mr Giltrap deposed that even after Mr Quinto was made aware that Sylvestre did not deliver the cheque to Nikon, he has not tendered another cheque [**Exhibit C3**].
48. Mr Hurley submitted that the dispute between the parties was from the outset a result of Nikon insisting that its invoice be paid referable to the charges in its price list and the Defendants wanting to pay a similar sum to what they say they paid during the previous dealing (in October 2013 with Dinh Shipping). The parties' dispute over non-payment of Nikon's invoices was the genesis of the verbal exchange at the Chinese restaurant in Santo on 20 March 2018 culminating in Mr Giltrap, Nikon's Managing Director's assault conviction. I accept Mr Hurley's submission that it beggars belief that Mr Giltrap would be asking Mr Quinto on 20 March 2018 when the invoice was going to be paid if Nikon had already received the Edenhope Limited cheque for VT221,000.
49. Nikon's numerous invoices dated from 9 February 2015 to 20 September 2019 did not show any credit for payment already received [pages 7-39 of "**NG-1**", **Exhibit C2**].
50. On the evidence, therefore, I consider it more likely than not that no payment was made to Nikon by way of ANZ Bank cheque no. 3822.

The claim for payment on the unpaid invoices

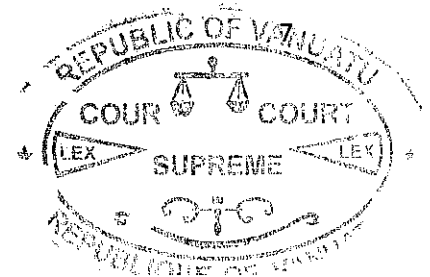
51. No quote was requested or provided prior to the February 2015 works. Nikon will succeed on its claim for payment on the unpaid invoices if it can prove that it was entitled to charge in accordance with the charges on the face of its invoice.
52. Nikon's case is that the prices in its invoices are referable to its Estimate Costing (the 'price list') and that this was provided to the Defendants prior to 3 February 2015. The Defendants denied that the price list was ever given to them prior to February 2015.
53. A copy of Nikon's Estimate Costing (the price list) was attached to Mrs Giltrap's sworn statement [page 1 of "**SG-1**", **Exhibit C1**].
54. The price list was titled "ESTIMATE COSTING" then "Pricelist 2014/2015". Mrs Giltrap was challenged about the 20 June 2014 expiry date on the price list. In re-examination, she explained that the only reason that it has an expiry date is that it defaults to an expiry date on the Xero system after about six weeks. I accept that explanation for the expiry date on the price list and that that price list applied in 2014 and 2015.
55. Mrs Giltrap deposed that sometime between late 2014 and early 2015, she was visited at the slipway by a man she later knew to be Mr Quinto. She believes she gave him a copy of Nikon's price list and her husband's business card. She had not had any contact with Mr Quinto since [**Exhibit C1**].



56. In cross-examination, Mrs Giltrap was clear that she gave Mr Quinto the price list, not a quote. She was also clear that she gave Mr Quinto the pricelist and that Mr Serge Laloyer gave Mr Quinto the invoice. It was put to her that she never gave Mr Quinto the price list. She answered, "Incorrect".
57. During cross-examination, Mr Quinto was equally adamant that he had never seen the price list. His evidence was that he never met Mrs Giltrap before the work on the Vessel commenced in February 2015. He said that he only met her once when he said she gave him the invoice.
58. In cross-examination, Mr Laloyer stated that he did not remember delivering or taking Nikon's invoice to Mr Quinto.
59. Mrs Giltrap's evidence in her sworn statement was that she believed she gave Mr Quinto the price list prior to February 2015. At trial, she sounded more certain that she had. However, there is no documentary evidence to corroborate Mrs Giltrap's version of events. Accordingly, I consider it more likely than not that the price list was not given to Mr Quinto prior to the February 2015 works.
60. Nothing turns on who gave Nikon's invoice to the Defendants so I make no finding as to that.
61. Accordingly, Nikon has not proved that it was entitled to charge in accordance with the charges on the face of its invoice. The claim for payment on the invoices must fail.

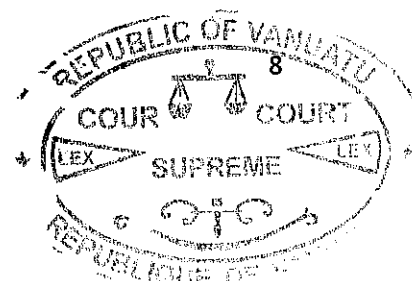
The quantum meruit claim

62. The Court must now consider Nikon's alternative claim and determine what was the reasonable value of Nikon's services provided in relation to the Vessel.
63. It is accepted Nikon is entitled to the reasonable value of the services provided. That is, to payment under the restitutionary remedy of *quantum meruit*.
64. The Defendants pleaded in the Amended Defence that the sum to be paid to Nikon as fair value for the services rendered is VT221,000 being the sum paid to Dinh Shipping for similar work over a year earlier, plus 10%.
65. However, there was no evidence that it was the same work on both occasions (October 2013 and February 2015). The Defendants did not produce an invoice in respect of the 2013 works nor any document evidencing how long the Vessel spent at the shipyard in 2013, what work was done at that time and who carried out that work.
66. For the reasons given, Dinh Shipping's charges cannot be a measure for the reasonable value of Nikon's services.
67. The Port Vila Boatyard was the other shipyard pointed to as having provided services in relation to the Vessel. However, there is no merit comparing Port Vila Boatyard's operations given the different systems used (in Mr Quinto's evidence, a hardstand system as opposed to Nikon's trolley system). Even if they provided services of a very similar



nature to Nikon, it does not mean that its charges should be applied in the present case as Nikon is not bound to charge the same as other shipyards. Accordingly, the Port Vila Boatyard's charges also cannot be a measure for the reasonable value of Nikon's services.

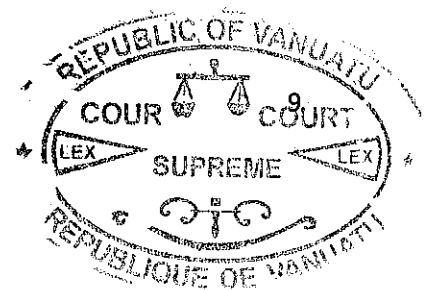
68. Nikon alleges that the services it provided were:
- a. Hauling;
 - b. Launching;
 - c. Daily charge VT4,500 pr metre;
 - d. Waterblasting;
 - e. Sundries 188603/Roller kits; and
 - f. Labour – Marcel 8 hours Friday and 6 hours Saturday.
69. The first two items on Nikon's revised invoice, being charges for hauling and launching, were charged on the basis of the Vessel being 12 metres even though both Mr Laloyer and Mr Quinto admitted during cross-examination that the Vessel was about 14 metres long. On that basis Nikon under-charged. However, its charges of VT15,000 per metre of the length of the Vessel was the same unit price (charge per metre) shown on the price list for 2014/2015. It was also the same rate charged to another Nikon customer, Kenneth Short, in December 2017: *Nikon Ltd v Short* [2021] VUSC 160 at [18].
70. In the circumstances, I allow Nikon's charges for hauling and launching set out in its revised invoice, each for VT180,000 plus VAT (12.5%); a total of VT405,000.
71. The third item on Nikon's invoice is its daily charge of VT4,500 pr metre. That is the same rate as shown on its price list. The calculations on Nikon's invoice in respect of that item are obvious: VT4,500 per metre x 12 metres = a unit price of VT54,000. That unit price of VT54,000 x 7 days (3 February-9 February 2015) = VT378,000 plus VAT. That sum is allowed.
72. The next item charged on the invoice is for waterblasting. Mr Laloyer said that Marcel was an employee of Nikon's and that it was likely that he undertook the waterblasting. Mr Quinto acknowledged at para. 7 of **Exhibit D1** that waterblasting may have been needed. In cross-examination, he accepted that some waterblasting was undertaken to the Vessel but denied that it was for 20 metres. Given Mr Quinto's acceptance that the overall length of the Vessel was 14 metres and his acceptance that there would have been at least 2 metres depth, the charge of 20 metres x a unit price of VT1,000 totalling VT20,000, and having regard to the two hulls, is reasonable. It is allowed.
73. The second last item on the invoice were the sundries of roller kits of VT1,593. From his earliest correspondence to Nikon in evidence in 2015 (page 85 of the trial book), this item has not been specially challenged. It is allowed.
74. Finally, there was the labour time charged for the Nikon employee, Marcel. He was specifically identified on both invoices dated 9 February 2015.



75. Mr Quinto suggested that in all his years of business, being rendered more than 1 invoice of the same date begged the question of the invoice's veracity. He stated that he had done business in multiple countries and had never seen invoices being altered. With respect, I disagree. There is nothing untoward about a business issuing a revised invoice when the difference in amount is the removal of the "Early payment discount" of VT180,000 when it became clear that there would not be any early payment.
76. Mr Laloyer agreed in cross-examination that Marcel was a Nikon employee likely to have carried out the waterblasting. Mr Quinto agreed in cross-examination that he was aware that a Nikon employee carried out waterblasting on the Vessel for a short period of time. In the Port Vila Boatyard's email to Mr Quinto dated 18 December 2015 [page 80 of the trial book; annexure "SQ2" of Exhibit D3], labour rates for general work were being charged at VT1,200 per hour and skilled labour at VT3,000 in December 2015. Therefore, Nikon's charge out rate for Marcel's work at VT2,000 per hour was within the market range in 2015. Accordingly, I accept the labour charge of VT28,000 calculated at the charge out rate of VT2,000 x 14 hours.
77. For the reasons given, judgment will be entered for Nikon against the Defendants jointly and severally for VT886,042 plus interest of 5% per annum for the period from 10 February 2015 until the judgment sum is paid in full.

The claim for compounding interest

78. By the time the Amended Claim was filed, the compounding interest sought in Nikon's invoices totalled VT4,580,744.
79. The compounding interest of 3% per month accruing on overdue accounts is specified as a "Terms of Trade" on Nikon's invoices as are charges for legal/debt collection fees.
80. The Defendants denied that the terms of trade set out on each invoice were made known to them prior to receipt of the invoice dated 9 February 2015 or before the work was done therefore those terms do not bind the Defendants over and above any costs that are for the reasonable and fair value of the services provided. They disputed the charges for legal/debt collection fees and the compound interest charged for late payment and collection fees.
81. Did the parties agree to the terms of trade recorded on the invoices prior to the issuance of the invoices?
82. In cross-examination, Mrs Giltrap agreed that Nikon's terms of trade do not appear on the price list and that clients are not aware of the terms of trade until they get their invoice.
83. In cross-examination, Mr Giltrap stated that Nikon's terms of trade were advertised in the newspaper. It was put to Mr Giltrap that Light Ship was not notified of the terms of trade. Mr Giltrap responded that he did not know 'if he reads the newspaper or not. We put an advert in the paper.' Mr Giltrap stated that the 3% interest per month was charged when the invoice was not paid.



84. There is no evidence that the Defendants were told of the terms of trade other than by way of the invoices issued to Mr Quinto.
85. It follows that the parties did not agree to the terms of trade recorded on the invoices prior to the issuance of the invoices. This aspect of the claim fails.

E. Result and Decision

86. The Claimant succeeded on its claim in *quantum meruit*.
87. Judgment is **entered** for the Claimant against the Defendants jointly and severally for VT886,042 plus interest of 5% per annum for the period from 10 February 2015 until the judgment sum is paid in full.
88. The Claimant is to file and serve submissions as to costs **by 4pm on 20 December 2022**.
89. The Defendants are to file and serve submissions in response as to costs **by 4pm on 20 January 2023**.
90. I will decide the question of costs on the papers after that.

F. Enforcement

91. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference **at 8am on 28 February 2023** to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Defendants.

**DATED at Port Vila this 1st day of December 2022
BY THE COURT**


Justice Viran Molisa Trief

