

BETWEEN: Joseph John
Appellant

AND: Reserve Bank of Vanuatu
Respondent

Date of Hearing: 12th November 2021

Before: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran M Trief

Counsel: Mr. C. Leo for the Appellant
Mr. N. Morrison the Respondent

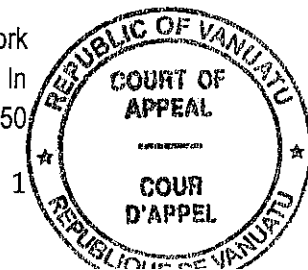
Date of Decision: 19th November 2021

JUDGMENT

1. In the Supreme Court the appellant was awarded 500,000 vatu as damages for the infringement of his copyright in an artistic work. He appeals to this Court contending that the award was too low as the Trial Judge failed to properly assess damage to his economic and moral rights.
2. Relying on its general knowledge of community affairs in Vanuatu, the Court accepts that the appellant is a well-known and respected artist in Vanuatu. Unfortunately, the evidence tendered at trial did not elaborate on his standing and recognition in the art world, nor was there any evidence save from the artist himself from which his standing and reputation could be assessed. The appellant makes his living from selling his paintings. He says that the respondent, the Reserve Bank of Vanuatu, has purchased a number of his paintings, including one painted in about 2000 which is the subject of this claim.

In 2015 the Reserve Bank minted a new 20 vatu coin. It is about 2.4 mm in diameter with a shiny nickel like appearance. It has the coat of arms of Vanuatu on one side and on the reverse side a depiction of a standing paramount chief addressing five people sitting around his feet, an old man, a woman nursing a child, and two younger adult people.

It is apparent that the images of the six human figures have been uplifted from the artwork identified by the appellant as his painting which the Reserve Bank bought from him. In that painting there is a scene depicting a village paramount chief addressing some 50



sitting villagers. The only insight about the subject of the painting given to the Court is from the appellant himself who in a sworn statement says that *I painted a picture which portrays the chief speaking to his people in a community.*

3. In transposing the image of the chief and the five sitting people from the original artwork to the coin the transferred figures have been positioned in similar positions to those in the artwork. None of the images have been distorted or mutilated, save that they have been reduced in size to fit the coin, and the image of the seated woman and child has been reversed so as to face to the right not to the left as in the artwork. In the opinion of the Court the result is a visually attractive coin with an image that is respectful of the village culture that is depicted in the original artwork.
4. The author's name is not acknowledged on the coin.
5. Between 2015 and 2021 the Reserve Bank released 4,633,105 of these 20 vatu coins into circulation.

The Law

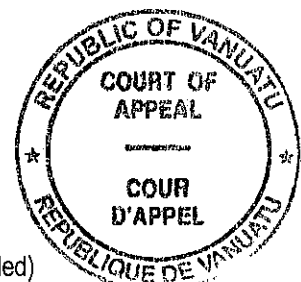
6. Within the meaning in s.1 of the Copyright and Related Rights Act, No 42 of 2000 (as amended) (the Act) the painting from which the coin images are taken is an "artistic work" and the appellant is the "author" thereof. As author, the appellant is the "owner" of the copyright in the artistic work. Copyright in the work comprises the economic and moral rights set out in ss.8 and 9 of the Act respectively. The 20 vatu coin is plainly an infringing copy of those parts of the artistic work which have been reproduced on the coin.
7. Section 8 relevantly provides that the owner of the copyright has exclusive rights in respect of the reproduction of the work in any form; and under s.9 the author of the work has the moral rights set out in sub-s9(2) independently of his economic rights in the work. Relevantly that sub-section provides:

9. (2) *The moral rights are:*

- (a) *to have the author's name indicated prominently on copies of the work and in connection with any public use of the work, as far as practicable; and*
- (b) *to not have the author's name indicated on copies of the work and in connection with any public use of the work; and*
- (c) *to use a pseudonym; and*
- (d) *to object to:*
 - (i) *any distortion, mutilation or other modification of the work; or*
 - (ii) *any other action in relation to the work;*

if it would be prejudicial to the author's honour or reputation.

(Emphasis added)



8. Section 34 of the Act gives the Supreme Court jurisdiction in respect of civil matters under the Act, and sub-s34 (2) provides that an owner of a protected right may bring an action for the infringement of copyright, being for damages for the prejudice and loss suffered as a consequence of the infringement and for expenses caused by the infringement including for reasonable legal costs. In making the assessment the court may take into account the importance of the material and moral prejudice suffered by the owner of the right and the amount of the infringer's profits attributable to the infringement.

The Supreme Court decision

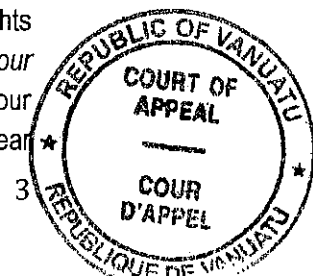
9. Before the Supreme Court the Reserve Bank filed no defence. A default judgement was entered and the matter proceeded as an assessment of damages. The appellant formulated his claim as follows:

4,366,105 coins x 7 years circulation = 32,431,735 vatu.

10. The Trial Judge rejected this formulation as it was not provided for in the Act, nor supported by any case law.
11. The judge said that the appellant was required to prove damages. It was accepted between the parties that the Reserve Bank had made no profit from copying parts of the protected work onto the coins, and the appellant filed no evidence that the value of the artistic work had been diminished. Even though there was no evidence put forward by the appellant to this effect, the Judge accepted that the artistic work was of some significance and that might be the reason the Bank purchased it. The Judge said he could not discount the fact that the appellant's reputation might have been enhanced by the fact that the Bank used some of his work on their national currency. In the absence of evidence of actual damage, or reputational harm, the Judge approached the assessment on a broad basis, and simply awarded the appellant 500,000 vatu.

Discussion

12. Before this Court the appellant emphasised that the use of the images from his painting was without his consent and the use damaged his moral rights. As the Trial Judge noted there was no evidence before the Court of any economic damage suffered by the appellant, and no evidence that the Bank made any profit from the use of the imagery. However counsel for the appellant submitted that the harm to his moral right justified a greater award than he had received in the judgement.
13. The major difficulty with this submission is that the moral rights protected by s.9 are rights which only arise if the purported infringement *would be prejudicial to the author's honour or reputation*. There is no evidence establishing actual prejudice to the appellant's honour or reputation. The way in which the images from the painting were used on the coin appear



to the Court to be respectful to the cultural story told by the original artwork. The fact that the Bank chose images from it to adorn the national currency is likely to be understood by those who became aware of the use as a credit to the appellant and to the cultural value of his imagery.

14. However, the absence of evidence of actual prejudice is not fatal to the claim. First, the appellant is entitled at least to a nominal award of damages to show that the Court acknowledges that there has been an infringement of his rights. Further, in the case of false attribution of authorship, which is an infringement of a moral right, it is sufficient for a claimant to show that the falsehood might affect his credit and reputation and the court will then presume some damage has been caused; see *Carton Illustrator v Coleman & Co* [1911] 1 KB 771 and *Clarke v Associated Newspapers Ltd* [1998] 1 All ER 959. In this case there has been no false attribution, rather there has been no attribution at all; but in the same vein, we consider that the court should presume that to use and rearrange the images from the artwork without consent and without reference to the author might cause damage to his reputation. There is no reason to doubt the appellant's claim that he was distressed to ascertain that his work had been infringed without reference to him, and as he said, in his evidence, without further explanation, that *the rearrangement of my painting has changed the meaning of my artistic work*.
15. In our opinion the Trial Judge was correct to approach the assessment in a broad brush way. On the evidence before him we do not think he fell into error in the assessment he made. If anything, we think it was a generous assessment.
16. We consider the appeal must fail and the appellant as the unsuccessful party should pay the costs in this Court.
17. The formal orders of the Court are:
 - Appeal dismissed; and
 - Appellant to pay the Respondent's costs fixed at 40,000 vatu.

DATED at Port Vila this 19th day of November, 2021

BY THE COURT

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Hon. Vincent Lunabek
Chief Justice

