

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 15/202 SC/CIVL

**BETWEEN: Felix Laumae and Ben Mahana representing
the Shareholders and Directors of Qanaku
Development Company Limited (QDCL)**

Claimant

AND: The Republic of Vanuatu

Defendant

Dates of HEARING: 30-31st October 2017 and 2-3rd November 2017
Date of Judgment: 27th April 2018
Before: Justice Oliver Saksak
In Attendance: Felix Laumae for the Claimant
Sammy Aron for the Defendant

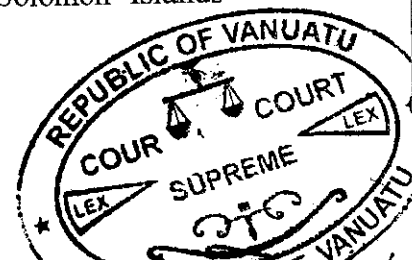
JUDGMENT

Introduction

1. The Claimants Felix Laumae and Ben Mahana filed this proceeding against the Republic of Vanuatu in a representative capacity for the Shareholders and Directors of Qanaku Development Company Limited (QDCL).
2. The Claimants filed their claims on 11th September 2015. They seek damages for negligence against the defendant in respect of the damage and loss of their motor vessel the MV Kaona. (the Kaona).

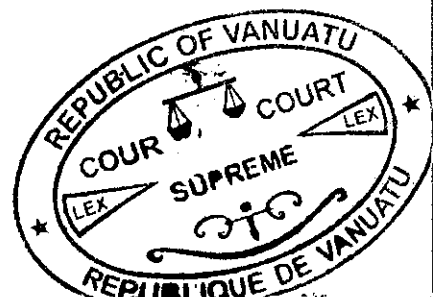
Facts

3. The Kaona is a timber cargo/passenger vessel. It was built in 1991 at Makira, Solomon Islands by Joseph Kekefaga. It was registered at the Solomon Islands

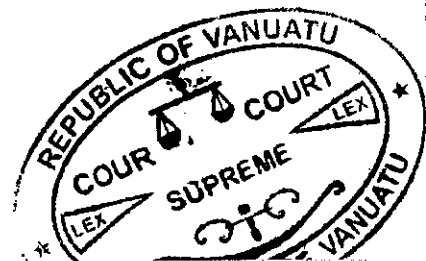


Registry on 14th May 1994 in the name of Qanaku Development Company Limited (QDCL) duly incorporated under the Solomon Islands Companies Law on 19th August 1998. QDCL has 12 shareholders who are also directors of the company. Ben Mahana is the seventh shareholder and director of QDCL. The Kaona sailed from Honiara on 14th January 2011 under the command of Captain Billy Mamaloni. She came into Vanuatu as a foreign vessel pursuant to a Lease Agreement signed on 13th January 2011 between the purported owner and Captain Jenneck Patunvanu of Marine Safety Vanuatu as lessee. The Kaona arrived in Port Vila at about midnight of 20th January 2011.

4. The Kaona left the Solomon Islands without (a) any vessel export permit, (b) marine departure clearance (c) customs departure clearance (d) immigration departure clearance and (e) quarantine departure clearance. And she arrived in Vanuatu without any (a) vessel import permit, (b) marine arrival clearance, (c) customs arrival clearance and (d) quarantine arrival clearance.
5. On 8th February 2011 Carl Beldon executed another Lease Agreement with Dreamtime Shipping as owner and Abel Kone as lessee. As a result of the Agreement Abel Kone operated the vessel Kaona domestically and commercially in Vanuatu Waters. The vessel sailed out of Port Vila on 3rd April 2011.
6. But the ownership of the Kaona was in doubt. And she had no maritime certificates issued in accordance with the Vanuatu Shipping Act. So the Principal Licensing Officer, Henry Worek (as he then was) issued a formal complaint in April 2011.



7. This was made subsequent to the then Minister of Infrastructure and Public Utilities who gave instructions to impose a fine of Vt 350.000 on the Master of the Kaona for failure to comply with the requirements of the Shipping Act and to proceed with the registration of the vessel to allow her to operate in Vanuatu.
8. Following the complaint the Kaona was arrested in port on an outer island and sailed back to Port Vila where she was detained by the Department of Ports and Harbour at Paray Bay.
9. On 13th April 2011 QDCL filed a Judicial Review claim against the Minister of Infrastructure and Public Utilities. The Claimants sought two quashing orders against the Minister's decision to deregister the Kaona from the Solomon Islands Registry and have her registered in the Vanuatu Registry to allow her to be operated domestically in Vanuatu, and to impose fines of VT 350.000. They also sought a prohibition order restraining the Minister from interfering with the Solomon Islands vessel in any manner. And finally they sought a mandatory order to require the Department of Ports and Harbour, Customs and the Police Maritime Wing to release and remove the Kaona out of the territorial waters of Vanuatu.
10. Judicial Review Case No. 15 of 2011 was by Consent settled in July 2011. It was discontinued because the parties had agreed that-
 - a) Ports and Harbour Department would discharge the Kaona and the Christie Leigh to the Claimant's custody, and



- b) Ports and Harbour Department and Customs Department would sanction the Claimants to transit the vessels out of Vanuatu waters forthwith.

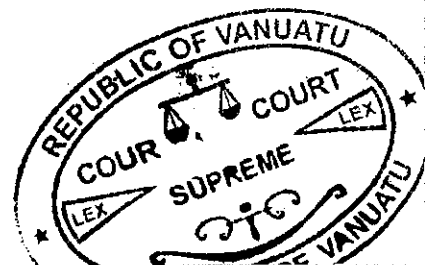
The MV Christie Leigh was not the subject matter of this current proceeding.

11. The Court did not endorse the consent order. The Judge recorded in the Conference Notes/Orders in paragraph 3 that as the Parties were "*comfortable proceeding on their understanding of the surrounding issues and there is nothing left for the Court to determine*", the judicial review was withdrawn and the proceeding was closed.

12. Before the Claimants filing Judicial Review Case No.15 of 2011 the Public Prosecutor decided not to press for the seizure of the Kaona but advised and urged the Directors of Ports and Harbour and of Customs Departments to release the vessels to its owners, the QDCL and to facilitate their travel back to the Solomon Islands. This advice was contained in the letter dated 27th April 2011.

13. The Minister of Infrastructure and Public Utilities wrote to the Acting Solicitor General on 1st July 2011 advising that he had revoked his letters the subject of challenge in Judicial Review Case No. 15 of 2011 and gave very clear instructions that-

- a) The vessels Kaona and Christie Leigh be released to sail back to the Solomon Islands immediately, and
- b) Police assist the owners to re-board the vessels and to return to the Solomon Islands.

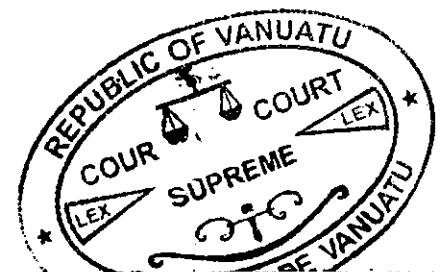


The Minister instructed in no unequivocal term that his instructions were to be executed urgently and the matter be resolved as soon as possible.

14. On 2nd August 2011 Mr Laumae wrote an urgent letter to the Acting Solicitor General requesting assistance to liaise with the Police to assist officers of Ports and Harbour to remove unauthorised persons on the Kaona and to clear the vessel to be refurbished to sail back to the Solomon Islands.
15. On 22nd August 2011 the Attorney General wrote to the Police Commissioner and Acting Director General of the Ministry of Infrastructure and Public Utilities advising them that the vessels were under their care and that they should maintain custody and ensure the vessels were kept safe and secure from damage.
16. Mr Laumae wrote follow-up letters on 8th November and 6th December 2011 but there appears to be no responses to those letters.
17. On 24th December 2012 Mr Laumae personally paid a survey fee of VT 32.000 to the Office of the Principal Licencing Officer for the annual survey of the Kaona. That survey was never done.

Claims

18. The Claimants filed this proceeding claiming damages for negligence in the sums of –
 - a) VT 30.000.000 as the value of the Kaona, and
 - b) SBD \$ 200.000.000 as special damages comprising of return airfares and subsistence allowances for the crew of the vessel.
 - c) Interests (not specified), and



d) Costs of the action.

Defence

19. The defendant denies any liability for the value of the vessel and for damages on grounds that-

- a) Felix Laumae and Ben Mahana are not the registered owners of the vessel and as such they have no locus standi.
- b) The Department of Ports and Harbour were not negligent.
- c) Felix Laumae contributed to the sinking and loss of the vessel.

The Issues

20. The defendant raised the following issues-

- a) Whether the Claimants have standing?
- b) Whether the defendant through the Department of Ports and Harbour was negligent and caused the Kaona to sink and sustain damage?
- c) Whether the Claimant Felix Laumae contributed negligently to causing the Kaona to sink and sustain damage?

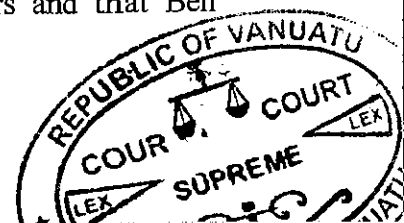
Mr Laumae raised the same three issues and the fourth issue of whether the Kaona was lawfully detained?

The Evidence

A. For the Claimants

21. First I summarise the evidence by the Claimant's witnesses as follows:-

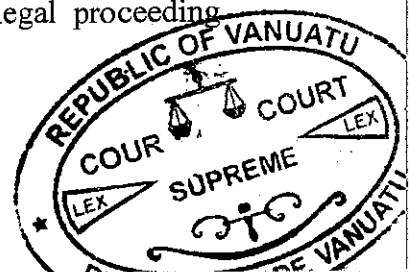
- a) **Thomas Bea**. He is the secretary of QDLC whose Head office is at Kirakira, Makira Province, Solomon Islands. QDLC has 12 shareholders and that Ben



Mahana is one of them, a major shareholder. QDLC is a legal entity whose only asset is the Kaona. Ben Mahana was mandated by QDLC resolution to institute this lawsuit against the defendant for the sinking of their vessel, the Kaona. Felix Laumae has a solicitor's lien over the vessel and is mandated by QDLC resolution to be the company's lawyer in Vanuatu, and that he be a joint claimant in the case. The resolution is annexed as "TB1" to his sworn statement- Exhibit C1.

- b) **Ben Mahana**. A major shareholder of QDCL of Kaona village, Central Makira. QDCL owns the Kaona. He disclosed the company's registration as "BM1" and the certificate of registration as "BM2". The Kaona was built by the local people of 2 neighbouring villages Kaonasugu and "Na" is short for Namuga. Putting the two together resulting in the name "Kaona". The vessel was built for the community. Funding was arranged with the Development Bank of Solomon Islands at SBD \$ 800.000 and took 12 years to build.

The Kaona sailed to Vanuatu without their permission and authorisation and without their prior knowledge. He was sent to Vanuatu by QDCL to find out. The shareholders of QDCL resolved in 2012 to appoint Felix Laumae as the company's lawyer in Vanuatu. He disclosed the resolution as "BM3". He hired Solomon Island crew and instructed Mr Laumae to secure the release of the Kaona so they could sail her back to the Solomons. He attended numerous meetings with Mr Laumae with the Vanuatu Government authorities in an effort to secure the release of their vessel. Substantial work was done by Mr Laumae for 3 years from 2011 to 2013. Mr Laumae wrote numerous letters but no replies were received. The vessel was never released. Therefore Mr Laumae filed legal proceeding

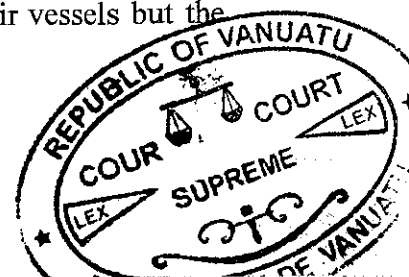


against the company in the Solomon Islands for outstanding legal fees in Civil Case No. 30 of 2013. The claim was not disputed and they settled the claim through a consent order dated 5th June 2013. He confirmed the transfer of the Kaona to Mr Laumae in accordance with the consent order never happened because the Kaona had sunk in Port Vila harbour whilst under arrest and detention by the Marine Authorities in Vanuatu. They lost the pride of their people and the weekly shipping services she was providing at the time. They have incurred substantial financial costs in the vicinity of SBD \$ 200.000.00 (VT 4, 500.000). They did not employ anyone to look after their vessel in Vanuatu. The crew they hired came over but were prevented from entering the vessel.

His sworn statement was tendered into evidence as Exhibit C2.

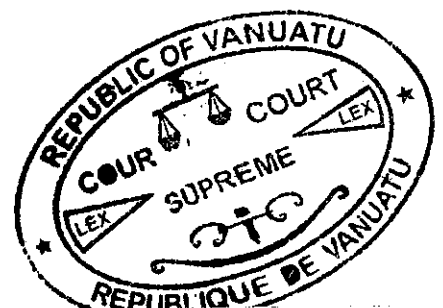
- c) **Jenneck Patunvanu**. A qualified captain and ship surveyor. He signed a lease agreement in respect of the Kaona and the Christie Leigh with Carl Beldon in Honiara on 13th January 2011. Then on 14th January 2011 he skippered the Christie Leigh and sailed to Vanuatu. He disclosed the agreement as "CJP2". He valued the vessel on 24th and 25th January 2011 after an inspection. The vessel's open market value is VT 38.000.000 and disclosed the valuation as "CJP3".

He later learned in Port Vila that Carl Beldon was not the owner of the vessels but QDCL and that Mr Laumae had contacted him to request that their vessels be returned to the Solomon Islands. The Kaona was operated by Abel Kone under another lease agreement. Both agreements have never been terminated or challenged to date and they remain in existence. He tried to assist the crew and officers sent to Vanuatu by QDCL to negotiate the release of their vessels but the

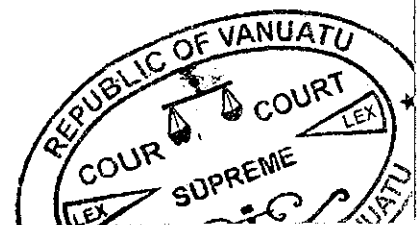


Attorney General advised against the release of the vessels and advised that the Ports and Harbour Department were to keep the vessels safe and in their custody until further advice. A warrant was issued for the arrest of the Kaona on the instruction of the Department of Ports and Harbour. His statement was tendered into evidence as Exhibit C3.

- d) **Glen Takau:** He formally held the position of Deputy Director of Ports and Harbour Department and resigned on 23rd December 2015. He confirmed Henry Worek was the Principal Licensing officer at the time of the arrest and detention of the Kaona in 2011 and that it was he who made a formal complaint to the police resulting in the vessel's arrest and detention. It was the Attorney General who advised the vessel was to be kept in the custody and control of Ports and Harbour and to care and keep her safe. However the Department failed to deploy its marine officers to look after and monitor the vessel. He remembered seeing Mr Laumae as the company's lawyer raising concerns about the security and safety of the vessel. He attended meetings with the representative of the owner of the vessel with the hired crew in an effort to have their vessel released but Henry Worek was never in those meetings. He confirmed the vessel was removed from anchorage at Paray Bay and beached at Iririki. In early February 2013 he met Mr Laumae who complained to him about the VT 32.000 he had paid to Mr Worek for the annual survey of the vessel but no receipt was issued and no survey was done.
- In his estimate the Kaona has a value of between VT 38.000.000 to VT 40.000.000. His statement was tendered into evidence as Exhibit C4.

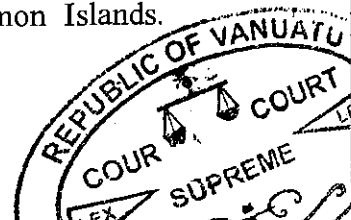


- e) **James Poilapa**: Driver of Trans-Melanesian Lawyers. On 22nd December 2012 at 4:30pm he drove Mr Laumae and Kenneth Loloa to the wharf and met Mr Worek at the entrance gate. Mr Laumae met Mr Worek and gave him VT 32,000 in cash. They spoke for a little while and then Mr Laumae returned to the car and they drove back to office. His statement was tendered as Exhibit C5.
- f) **Felix Laumae**: Mr Gregory Takau took over the examination of Mr Laumae at this point. He deposed to three sworn statements tendered into evidence as Exhibits 6, 7 and 8 without objections. He confirmed QDCL owns the Kaona and disclosed the certificate of registration as "FLTK4". He also confirmed he owns the Kaona pursuant to the order of the High Court of the Solomon Islands and disclosed the order as "FLTK5". He confirmed the vessel was sea-worthy when she sailed into Vanuatu in January 2011 and disclosed the survey report as "FLTK 6". He confirmed the vessel was brought into Vanuatu pursuant to a lease agreement entered into by Jenneck Patunvanu. He confirmed it was Henry Worek as Principal Licencing Officer at the time who complaint about the entry of the vessel. As a result she was arrested and detained pursuant to a Search Warrant disclosed as "FLTK7". The vessel was removed from Paray Bay by Ports and Harbour and beached at Iririki. He wrote numerous letters raising his concerns about the vessel's safety to the State Law Office and the Ports and Harbour. He confirmed Ben Mahana, representative of QDCL came to Vanuatu with hired crew to sail their vessel back with financial assistance from a member of Parliament of the Solomon Islands. A customary reconciliation ceremony was performed. The Public Prosecutor wrote a letter to the Police and Ports and Harbour. The letter was disclosed as "FLTK8". Another letter disclosed as



“ FLTK 9” by the Public Prosecutor informing the Police and Ports and Harbour of her decision not to prosecute and directed the release of the vessel to return to the Solomon Islands. The letter was not complied with. The then Minister of Infrastructure and Public Utilities wrote a letter to the Solicitor General on 1st July 2011 advising them of his revocation and instructing that they facilitate the release and return of the vessel. But there was no compliance. The letter was disclosed as “FLTK 10”. He wrote to the Attorney General on 2nd August 2011 disclosing the letter as “ FLTK 12”. The Attorney General wrote a letter to the Police Commissioner and Acting Director General of the Ministry. The letter was disclosed as FLTK 13. He wrote again to the Attorney General on 6th and 8th December 2011. The Kaona was removed from Paray Bay and beached at Iririki unmanned and without security. As a result, navigation equipment, fuel, engine parts, generator, bilge pump and spare parts were stolen from the vessel. He wrote on 8th November 2011 to the Attorney General about those concerns. He made telephone calls and arranged personal meetings with officers of the State Law Office and of the Ports and Harbour raising those concerns but no action was taken. He personally attended and paid VT 32.000 to Mr Worek on 22nd December 2012 to carry out the survey of the vessel. No receipt was issued and no survey was done. In early January 2013 he received a phone call informing him that the Kaona was sinking. Although assurance of a tug boat was given, it did not materialise.

- g) On 10th March 2013 at about 10:30am the Kaona sank as a result of taking in rain and sea water. In his Exhibit C7 statement, Mr Laumae disclosed the Consent Order dated 5th June 2013 issued by the High Court of the Solomon Islands.

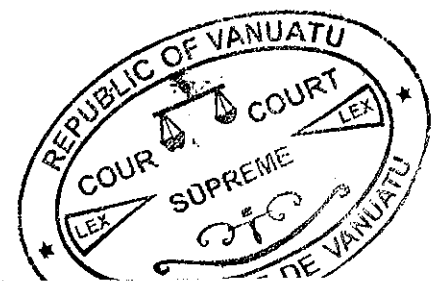


Finally in his Exhibit C7, Mr Laumae deposes to his responses to the defence statements of Henry Worek filed on 6th July 2016, 13 September 2016, and 11th May 2017, Abel Kone's statement of 22nd July 2016, Nicky Samuel statement of 22nd July 2016 and of Jimmy Kasso Rodoph filed on 30th June 2017. He confirmed he never employed Nicky Samuel, Jimmy Rodoph, John Nama, Isac Andrew and Morris Niava or anyone else on or around June 2013.

B. For the Defence

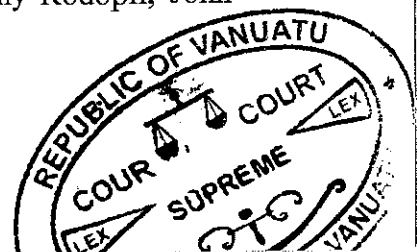
22. I now summarise the relevant evidence for the defence as follows:-

- a) **Henry Worek**, He was formerly the Principal Licensing Officer in 2011. His evidence are contained in three sworn statements dated 22nd July 2016 (Exhibit D1), 13th September 2016 (Exhibit D2) and 11th May 2017 (Exhibit D3). The vessels Kaona and Christie Leigh were registered in the Solomon Islands. They arrived in Vanuatu on or about 21st January 2011. They came into Vanuatu as a result of the Lease Agreement signed between Carl Beldon and Captain Jenneck Patunvanu. The Agreement is disclosed as 'CJP2" to the statement of Jenneck Patunvanu. There were no maritime certificates issued to Carl Beldon or Jenneck Patunvanu for the Kaona as required by the Shipping Act. He investigated and found that ownership of the Kaona was unknown. He found another lease agreement in respect of the operation of the Kaona between Carl Beldon and Abel Kone. It is disclosed as " HW1". He was instructed by the Minister of Infrastructure to impose a penalty fine of VT 350.000 and to register the vessels and allow their operations in Vanuatu.



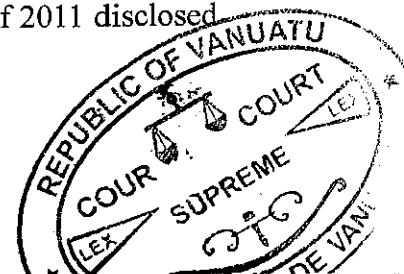
Pursuant to the agreement with Abel Kone, the Kaona commenced operation as a commercial vessel to the outer Islands of Vanuatu. In April 2011 he lodged an official complaint to the Police and Public Prosecutor. The complaint is disclosed as “HW 3”. As a result of his complaint the Kaona was arrested on another Island and brought back and detained at Paray Bay. On 22nd August 2011 he confirms the Attorney General advised the Director of Ports and Harbour regarding the Kaona and Christie Leigh. The letter is disclosed as “HW 4”. Whilst under detention Abel Kone made an undertaking with the Director and himself to look after the safety of the Kaona. The undertaking was made verbally. Pursuant to the lease agreement the Kaona was under the care of Abel Kone. During her detention the employees on the vessel were the employees of Abel Kone. It was they who removed the vessel from Paray Bay where she was anchored and beached her at Iririki Island for safety during a depression. On 12th June 2012 the Attorney General advised the Director of Ports and Harbour of Civil Case No. 15 of 2011 in which the Court ordered the State to release the Christie while the Kaona was to continue to remain under detention by the Department until her ownership was determined by the Court. The letter was disclosed as “HW 5”. The employees of Abel Kone continued to look after the safety of the Kaona until Mr Laumae handed them a copy of a Court order and instructed them to leave the vessel. The order referred is disclosed as “FLTK 5” by Mr Laumae’s evidence by sworn statement dated 18th February 2016.

Subsequent to the instruction and the Court order Abel Kone and his employees left the vessel and the claimant employed Jimmy Rodoph, John



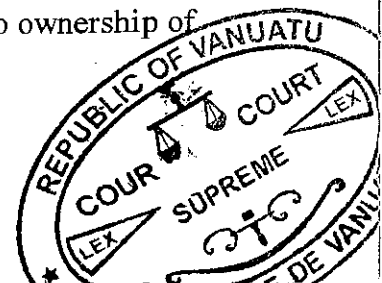
Namua, Isac Andrew, Morris Niava and Nicky Samuel to look after the vessel. The vessel sank at Iririki under the care of these men. As a result the claimant contributed to the damage and loss of the vessel.

He went to the Solomon Islands on 21st August 2016 with Mr Aron and carried out an investigation on the issue of the ownership of the Kaona. They met with the Registrar of the High Court Mrs Myonnie Samani on 24th August 2016. They discovered Civil Case No. 30 of 2013 between Felix Laumae and QDCL and Civil Case No. 20 of 2012 between Carl Beldon and QDCL. Copies of the cases were disclosed as “MS1” and “MS 2” in the statement of Mrs Samani dated 29th August 2016. They contacted a search at the Solomon Island Registry Service and found the Kaona was registered to QDCL. The extract is disclosed by Mr Laumae as “FLTK 3”. They contacted a search also at the Company Haus as to the registration of QDCL and found out that the company has been removed. The company extract was disclosed as “HW1”. One reason for Kaona’s arrest and detention was that she was unseaworthy with seawater leaking into the vessel. On 12th April 2011 Mr Laumae acting on behalf of QDCL filed Judicial Review Case No. 15 of 2011. Billy Mamaloni filed a sworn statement disclosed as “HW3” saying there were ownership issues about the Kaona and that she was to sail back to the Solomon Islands. He made reference to the Public Prosecutor’s letter of 27th April 2011 disclosed as “HW 4”. Despite those clear instructions it was Abel Kone who purported to keep the Kaona and look after her pursuant to his agreement with Carl Beldon. He did not intervene as he believed the agreement was legally binding. He referred to the Consent Order reached in JR 15 of 2011 disclosed



as “ HW5”. He referred to the Court order disclosed as “HW6”. After 22nd July 2011 the Kaona was no longer under the care of Ports and Harbour but with Abel Kone and his crew.

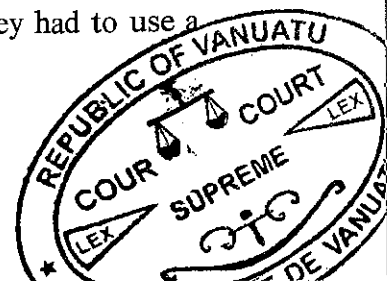
- b) **Myonnie Samani**, Registrar of the High Court of the Solomon Islands. Her evidence in chief is contained in her sworn statement tendered as Exhibit D4. She confirmed meeting Mr Aron and Mr Worek on 24th August 2016. She confirmed Civil Case No. 30 of 2013 and Civil Case No. 20 of 2012 disclosing copies of them as “MS1” and “MS2”. She confirmed Civil Case No. 20 of 2012 pending in the Court until 16 October 2017 when it was struck out for want of prosecution. Civil Case No. 30 of 2013 was never listed for a hearing, instead the Parties settled a consent order dated 5th June 2016 disclosed by Mr Laumae as “ FLTK 1”. The High Court has never issued any judgment determining the ownership of the Kaona and that there are still live issues between the shareholders as to re-registration of QDCL and ownership of the Kaona.
- c) **Abel Kone**, a sea captain by profession whose evidence in chief is contained in his sworn statement tendered as Exhibit D5. He entered into a lease agreement on 8th February 2011 with Carl Beldon of Dreamtime Shipping to operate the Kaona in Vanuatu waters. He employed some Ni-Vanuatu crew and commenced voyage to the outer islands. Whilst on Malekula, the Kaona was arrested by Police Officers who used the RVS Tukoro. The vessel sailed back to Port Vila and anchored at Paray Bay. He learned that Henry Worek had lodged a complaint and was aware there was a dispute as to ownership of



the Kaona. He confirmed the Kaona was detained by the Department of Ports and Harbour and that according to the agreement, his crew were to look after the vessel. He confirmed making an undertaking to the Director of the Ports and Harbour that his crew would look after the vessel. He confirmed his crew were looking after the Kaona since her arrest and during her detention whilst anchored at Paray Bay and that due to a tropical depression his crew removed the vessel and beached her at Iririki.

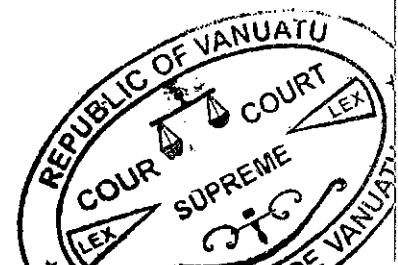
He confirmed his crew looked after the Kaona until June 2013 when Mr Laumae served them with the Court Order disclosed by Mr Laumae as "FLTK5" and instructed them to vacate the vessel. He confirmed that he and his crew vacated the vessel and that the Claimant employed Jimmy Rodoph, John Namua, Isac Andrew, Morris Niava and Nicky Samuel as security guards to look after the vessel. He said these employees abandoned their posts when the claimant failed to pay their wages. As a result the vessel sank.

- d) **Jimmy Rodoph**: He applied to work as a crew member to Abel Kone in January 2011 when he learned the vessel was in Abel Kone's possession. He commenced work around April 2011. Other crew members were hired on board and the vessel sailed to Malekula and Santo. While in Santo the RVS Tukoro arrested the vessel and she sailed back to Vila and was detained at the Government wharf for about 2 months. He confirmed Abel Kone, Terry, Johnas Arrono and himself were living on the vessel to look after her during her period of detention. Subsequently they anchored the vessel at the Mooring graveyard. The vessel was leaking and was not seaworthy. They had to use a



generator to pump seawater out of her to keep her afloat. During a tropical depression the vessel drifted and the tug boat the MV Nakato towed her to Paray Bay. There other crew members left the vessel and he was on board alone in the employ of Abel Kone who provided food and water. In 2012 there was another tropical depression requiring the Nakato to tow the vessel and beaching her at Iririki. In June 2013 he received a telephone call from Mr Laumae inviting him to his office. Mr Laumae asked him to find other boys to look after the vessel. Mr Laumae and his son Philip drove off with the witness to find Nicky Samuel, Isac Andrew, and Niava Morris at the Airport area. All of them worked as security guards looking after the vessel in June 2013. He disclosed a duty list roster marked "NS1". Mr Laumae did not pay their wages therefore the boys removed some parts of the vessel to make up. They had to vacate the vessel and the vessel sank because there was no one to pump out the water. His sworn statement was tendered as Exhibit D6.

- e) **Nicky Samuel**. He is currently the Lineman Officer at the Ports and Harbour Department since February 2014. In June 2013 he was employed by Mr Laumae as security guard on the Kaona when she was beached at Iririki. He confirmed that Jimmy Rodoph, John Namua, Isac Andrew and Morris Niava were also employed as security guards. He worked only on Fridays. He disclosed a duty list roster marked "NS1". They abandoned ship because the claimant did not pay their wages. They removed parts of the vessel to make up for their wages. His sworn statement was tendered as Exhibit D7.



Discussions and Considerations of Issues

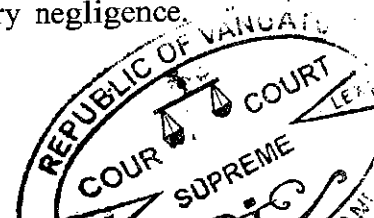
23. The first issue is whether or not the claimants have standing to institute this proceeding.

24. The evidence of Thomas Bea, Ben Mahana and Felix Laumae are relevant to this issue. From the defence, the evidence of Henry Worek and Myonnie Samani bear some relevance to answering this issue.

25. The defence acknowledged it is common ground that QDCL is the registered owner of the Kaona and not Felix Laumae and Ben Mahana. They submitted the claimants cannot rely on the resolution endorsed by the shareholders because the company is not liquidated. They submitted Mr Laumae could not rely on the Consent Order in Civil Case No. 30 of 2013 because he failed to return the vessel to the Solomon Islands and also that he contributed to its sinking and damage. They say Mr Laumae has no interest in the claim. They rely on the case of Winkfiled [1902] p.42 as applied in Steve Tinning Tete.v. Republic [2017] VUCA.

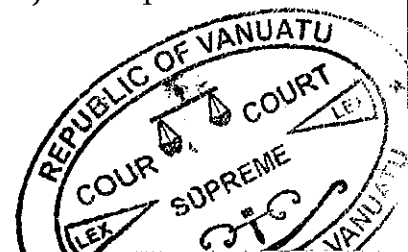
26. Copies of these cases were not made available to the Court for assistance. It is the duty of Counsel for the State and for the Parties in all cases, as officers of the Court to do this.

27. In any event, I do not accept the defence arguments and submissions. I find the defence arguments absurd when they deny the claimants have standing and then later in their third issue allege that Mr Laumae was guilty of contributory negligence.



Having raised that as an issue, the State in effect is conceding that the claimants have standing to bring this claim.

28. Mr Laumae and Mr Mahana do not have to show that they are owners of the Kaona in order to have standing. All they need to show is that they have an interest in the vessel and/or its ownership. And their evidence clearly shows that they have direct interests in the Kaona. For instance first for Mr Mahana, he is a shareholder and director. (BM1 and BM3 and BM5 Exhibit C2). There is no evidence by the defence to the contrary.
29. Further, the resolution of QDCL's extraordinary shareholders meeting held on 18th July 2016 (TB1-Exhibit C1) shows Ben Mahana was mandated by QDCL to act on behalf of the Company (Resolution 1) and for Mr Laumae to be the Company Lawyer in Vanuatu and as **“ joint plaintiff in the lawsuit against Marine Authority in Vanuatu pursuant to the order made by the Solomon Islands High Court.”**
30. Furthermore, Mr Laumae has a maritime lien over the Kaona pursuant to the Consent Order endorsed on 5th June 2013 by the High Court of the Solomon Islands. (“FLTK 5”- Exhibit C6 and “ FLTK1-Exhibit C7”).
31. Finally Felix Laumae and Ben Mahana filed this proceeding in a representative capacity. See the original claim filed on 11th September, 2015.
32. Myonnie Samani, Registrar of the High Court of the Solomon Islands gave evidence for the defendant. In paragraph 5 of her sworn statement (Exhibit D4) she deposed



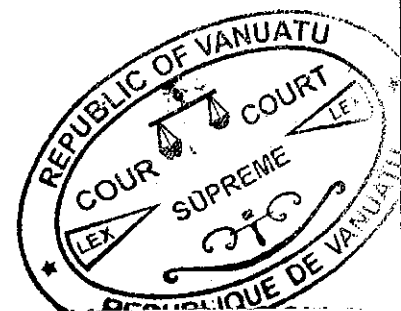
that Civil Case No. 20 of 2012 is pending before the Court. In paragraph 7 and 8 she deposed that the Court is yet to determine the issue of ownership and that there are yet issues about the re-registration of the company. However in the evidence in chief this witness confirmed Civil Case No. 20 of 2012 was struck out on 16th October 2017 for want of prosecution.

33. That being the position and there is no evidence of any appeals on foot, ownership and re-registration of the Company QDCL are no longer in issue. And the only documentary evidence before this Court indicates clearly that-

- a) QDCL are the registered owners of the Kaona.
- b) Ben Mahana is a major shareholder and Director of QDCL.
- c) By Resolution of QDCL Ben Mahana is mandated to act on behalf of QDCL,
- d) Felix Laumae was appointed Company Lawyer in Vanuatu and a joint plaintiff in the case, and
- e) Felix Laumae in that capacity and by Consent of QDCL has direct interest in the ownership of the Kaona pursuant to the Consent order dated 5th June 2013.

34. From those evidence and the documents referred, I am satisfied that Felix Laumae and Ben Mahana both have direct interests in the vessel Kaona whose registered owner as acknowledged by the defence is QDCL. And as such I am also satisfied that both Mr Laumae and Mr Mahana have standing to bring this action on behalf of themselves and the company QDCL.

35. I therefore answer this first issue in the affirmative.



36. I now consider and discuss the issue of whether the Kaona was detained unlawfully?

This issue was raised by Mr Laumae. The evidence of Felix Laumae, Ben Mahana and Henry Worek are the most relevant in considering this issue.

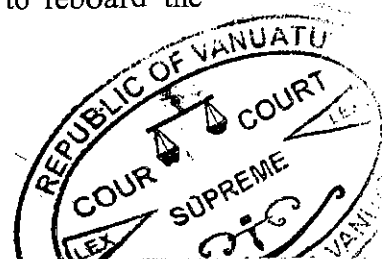
37. The arrest of the Kaona is not an issue. It is her detention by the Ports and Harbour after 27th April 2011 when the then Public Prosecutor wrote a letter to the Directors of Ports and Harbour and of Customs Departments (“HW 5”- Exhibit D3) informing them of her decision not to press for the seizure of the vessels and directing them to release the vessels back to their owners, the QDCL and to facilitate the boarding of their Captain and crew to sail the vessels home to the Solomon Islands.

38. The parties to Judicial Review Case No. 15 of 2011 had by consent settled their proceeding on the basis of Public Prosecutor’s letter of 27th April 2011 and the Minister’s letter of 1st July 2011 (see Annexures “HW 5” and “HW 6”- Exhibit D3).

39. In the Court’s Conference Notes/ Orders dated 22nd July 2011 (“HW 6”) the Court said this at paragraph 2b-

“..... As the ships are effectively in their control, it is a matter for them to act as they see fit.....”

With respect that in my view does not reflect the correct position in the light of the evidence before me. If that was the correct position there would have been no need for subsequent letters written after that date. For instance on 2nd August 2011 Mr Laumae wrote to the Solicitor General (“ FLTK 12” – Exhibit C6) demanding specifically the release of the vessels. The letter indicates the claimants had tried to reboard the



vessels with the help of the Harbour Master but were prevented from doing so by another group of people.

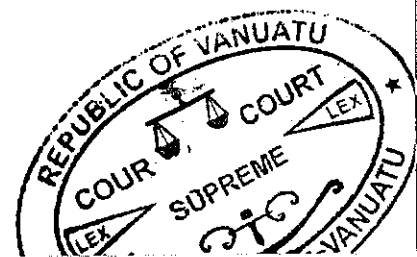
40. The letter dated 27th April 2011 by the Public Prosecutor made clear her position when she said:

“..... I have decided not to press for seizure of the vessels but release them to Solomon Islands Owners Qanaku Development Company Limited and Captain Billy Mamaloni and the crews of Solomon Islands who have a lawful Court of Appeal Judgment and have been acting in good faith to travel over. From Solomon Islands to demand release of their vessels and to sail them back to Solomon Islands.

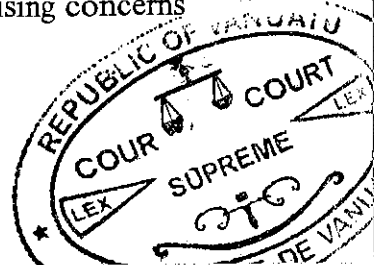
I now direct that you provide all necessary assistance to facilitate boarding of the vessels by Captain Billy Mamaloni and Chief Officer Captain Lawrence Samani with Solomon islands crews to prepare to sail the vessels back to Solomon Islands.” (emphasis added)

41. The letter was sent to the Director of Ports and Harbour and to the Director of Customs. There is no evidence of any response or replies. The letter indicates the vessels were in the custody of the Ports and Harbour Department.

42. By 22nd August 2011 the vessels had still not been released and the Attorney General wrote a letter to the Police Commissioner copied to the Acting Director-General of the Ministry of Infrastructure. (See “FLTK 13”). The clear advice was that *“the vessels are under the care of the Department and that it is important that they are kept safe and secure from damage.....”*.



43. The Search Warrant (FLTK 7, Exhibit 6) issued on 8th April 2011 among others, also authorised the Police to detain the vessels or other things “ *until the conclusion of the legal proceedings.*”
44. By the Court’s Conference Notes/orders dated 22nd July 2011 (“HW6”- Exhibit D3) in Civil Case No. 15 of 2011 records at paragraph 4 that “*the application for judicial review is accordingly withdrawn and the proceeding is closed.*”
45. In my considered view since the date of the arrest of the Kaona and her detention by the Ports and Harbour, her detention was lawful only until 22nd July 2011. From 23rd July 2011 to her sinking on 10th March 2013, her continued detention by the Ports and Harbour Department was done without any lawful warrant of arrest or by any lawful order of the Court. Therefore in my opinion, that period of detention was unlawful. This answers the issue raised by Mr Laumae.
46. I now consider the issue of whether the defendant through the Ports and Harbour was negligent and had caused the Kaona to sink and suffer loss?
47. The starting point in answering this issue is the letter by the Attorney General dated 22nd August 2011. (See FLTK 13). That advice established a clear duty on the Ports and Harbour Department to keep the vessel safe and secure from damage.
48. Further the evidence of Mr Laumae shows he wrote to the Attorney General on 8th November 2011 (FLTK 17) and on 6th December 2011 (FLTK 17) raising concerns

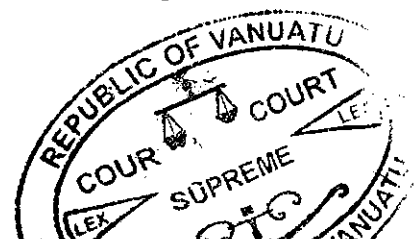


about the safety of the vessel but received no responses. He made numerous telephone calls and had personal meetings with the relevant authorities but with no positive action taken. His evidence shows that on 12th October 2012 (FLTK 19) the Principal Surveyor of the Solomon Islands Maritime Safety Administration Mr Jonah Mitau wrote to Henry Worek requesting him to inspect the Kaona on their behalf. A fee of VT 32.000 was paid and received by Mr Worek for the inspection on 22nd December 2012. However no such inspection was done. Mr Worek admitted receiving the cash money but issuing no receipt for it and further, that no inspection was done.

49. Those evidence adequately establish there was a duty of care by the Ports and Harbour. Further it establishes there was a serious neglect of duty on their part when no responses were made to Mr Laumae's letters and telephone calls and no actions done by Mr Worek after he had received a payment of VT 32.000 as survey fees.

50. I am therefore satisfied the defendant through the Ports and Harbour Department had a duty of care owed to the claimants to care and keep their vessel safe from damage and loss and they failed to observe that duty. They were and are negligent.

51. The defendant argued that Abel Kone was in possession and operating the Kaona at the time pursuant to a lease agreement and therefore that they were responsible. Abel Kone's evidence confirms that. However it was his evidence that the Ports and Harbour had agreed to that arrangement. Mr Worek said in evidence the agreement was binding but that is only an opinion. He was not entitled to make that conclusion except a Court of law. The lease agreement has never been challenged but its legality is in my view questionable. This is because of the fact that Carl Beldon's suit against



QDCL was struck out in the High Court of the Solomon Islands in October 2017 for want of prosecution. It was open for the Principal Licensing officer to challenge the two Lease Agreements as to their legality. Instead by his evidence, he accepted them as binding and allowed the vessels to operate in Vanuatu. That conduct is inconsistent with their allegations in first place that the vessels had entered Vanuatu contrary to the Shipping Act. Further that the Kaona was unseaworthy. How could he have made that conclusion when he did not carry out any survey when he was specifically asked to do so and had received the money to do so?

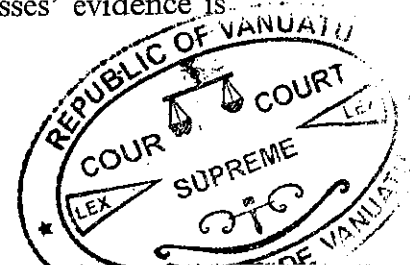
52. The arguments by the defendant trying to shift responsibility are untenable and are therefore rejected.

53. The final issue raised was whether the Claimant Felix Laumae contributed negligently to the sinking, damage and loss of the Kaona?

54. For the defendant to succeed on this issue they had to show evidence of Mr Laumae's physical possession and control of some sort over the Kaona.

55. The defendant relied on the evidence of Jimmy Kasso Rodoph and Nicky Samuel. These two persons gave evidence of other men namely John Namua, Isac Andrew and Morris Niavia being employed along with them. These other men did not give any evidence to confirm what they said.

56. Mr Laumae denied employing these persons. It was Abel Kone who confirmed employing Jimmy Rodoph. The difficulty I have with these witnesses' evidence is



that they said they were employed in June 2013 as security guards. This could not be possible when the Kaona had sunk on 10th March 2013. The Court accepts 10th March 2013 to be the correct date of the vessel's sinking and loss. Under the circumstances, the evidence of Jimmy Rodoph and Nicky Samuel lack credibility and therefore the Court is cautious to accept them without the evidence of the others. As security officers it is possible to assume they could be employed by a security service but there is simply no evidence for so assuming. It is clear from their evidence that they have some grievances about unpaid wage but the appropriate course was to have sued Mr Laumae or other persons so that the whole issue could come to light. As it is it has not, and it is unsafe for the Court to rely on their evidence in the circumstances of the case.

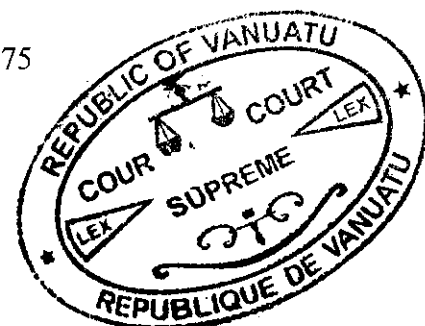
57. In the final analysis, I do not find any evidence showing that Mr Laumae or his agents had any physical possession and control over the vessel the Kaona at the time of or immediately prior to her sinking in March 2013.

58. Accordingly I answer this issue in the negative.

Case Authorities

59. The defendant relied on the following cases in support of their submissions-

- a) Tinning.v.Republic Civil Appeal Case No. 2429 of 2017
- b) Manubhai Industries Ltd.v. Lautoka Land Development (Fiji) Ltd [2002] FJCA 96.
- c) Cyclamen Ltd.v.Port Vila Municipal Council [2014] VUSC 173
- d) Hill.v. Chief Constable for West Yorkshire [1988] A.C 175
- e) Ephraim.v. Newharm L.B.C (1992)



f) Fleming's Law of Torts 8th Edition page 105.

60. All those cases are distinguished on their facts. And in my view none of these cases are of any assistance to the defendant's position. Indeed they are against the defendant. I am satisfied there existed a close or special relationship created or existed between the Claimants and the defendant by operation of Article 6 of the International Convention on the Arrest of Ships and pursuant to the Attorney General's letter dated 22nd August 2011. No condition was imposed by the Court on 8th April 2011 on the issuing of the search warrant which extended to include detention, however the letter of 22nd August 2011 amounted to an assurance of care, safety and security which created the special relationship. I therefore reject the defendant's submission as untenable.

The Result

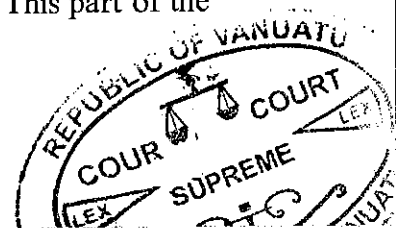
61. The end result is therefore that the Claimants are successful in their claims against the defendant and accordingly I enter judgment in their favour.

Damages

62. I now deal with damages and the amount.

63. The value of the vessel Kaona as given in evidence of Captain Jenneck Patunvanu is VT 38,000,000. There is no evidence to the contrary by the defendant. Therefore the claimants are entitled to judgment for this amount of VT 38,000,000.

64. The Claimants Claim VT 3,500,000 being for costs incurred for some eleven months waiting for the release of the vessel to return to the Solomon Islands. This part of the



claim is unchallenged by the defendant and is therefore accordingly allowed.
Judgment is entered in favour of the Claimants for this amount.

65. The Claimants claim a refund of VT 32,000 paid as survey fees in December 2012.

This amount was clearly admitted and is therefore allowed.

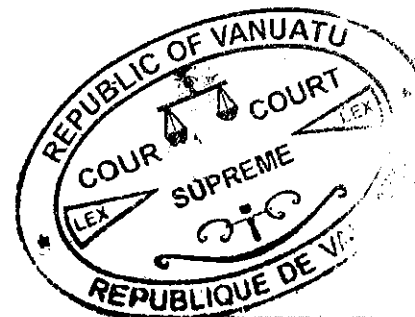
66. The Claimants claim a 5% interests. In the circumstances of the case this is allowed.

67. The Claimants claim for exemplary damages. This claim is declined. Civil Case No. 20 of 2012 was filed by Martha and Carl Beldon in 2012 but was only struck out in October 2017 for want of prosecution. QDCL and Ben Mahana and all the shareholders were the defendants in that case. The defendants could have taken appropriate steps in 2012 to progress the case or have it struck out early to claim an earlier order to secure their vessel. There is no evidence from them showing they did. For that reason it is my view the claim for exemplary damages cannot be justified under those circumstances.

Costs

68. It is however my view that the Claimants are entitled to their costs of this proceeding.

Costs are awarded on the standard basis as agreed or be taxed.



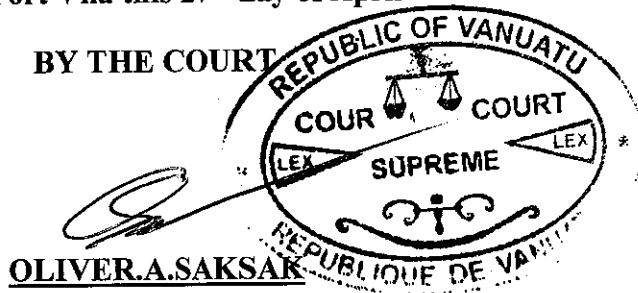
Summary

69. In summary, the claimants are entitled to judgment against the defendant for the following sums-

- | | |
|---|----------------------|
| (a) Value of the Vessel- | VT 38.000.000 |
| (b) Costs incurred- | VT 3.500.000 |
| (c) Reimbursement- | VT 32.000 |
| (d) Interests of 5% per annum from 22 nd July 2011 to date of Judgment - | VT 2.491.920 |
| | VT 44.023.920 |
| (e) Costs on the standard basis. | |

DATED at Port Vila this 27th day of April 2018

BY THE COURT



OLIVER.A.SAKSAK

Judge