

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

Civil
Case No. 19/2702 SC/CIVL

BETWEEN: FR8 Logistics Limited
Claimant

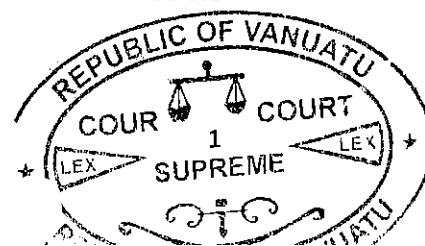
**AND: Ifira Port Development and
Services Company Limited**
Defendant

Date of Trial: 24 September 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mr M. Fleming
Defendant – Mr M. Hurley
Date of Decision: 11 December 2020

JUDGMENT

A. Introduction

1. The Claimant FR8 Logistics Limited ('FR8') and the Defendant Ifira Port Development and Services Company Limited ('IPDS') are locally incorporated companies. FR8 offers freight and logistics services. IPDS is the concessionaire under the Concession Agreement dated 15 June 2018 with the Vanuatu Government (grantor) relating to the Lapetasi Multi-Purpose Wharf Project' (Port Vila Wharf) (the '2018 Concession Agreement'). By that agreement, the Vanuatu Government granted IPDS as concessionaire all stevedore rights to handle the unloading, moving, storage, stowage and transfer of cargo at Port Vila Wharf. The concession period is for a period of 50 years from 15 June 2018.
2. FR8 alleges by its Amended Claim a number of breaches of contract and the tort of business interference. It seeks unpaid money under contract, damages, specific performance, refund of overcharges, interest and costs. This judgment determines the claims made.



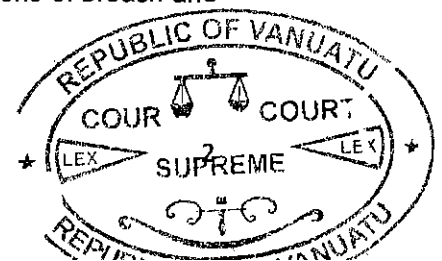
B. Statements of the Case

3. By the Amended Claim, FR8 alleges that:

- a. IPDS retained it under contract to perform services including importing of goods by air and sea consigned to IPDS as shipping agent, and storage at its warehouse while waiting for goods to be cleared (the "services contract"). Further, that despite demand and in breach of the services contract, IPDS has not paid it amounts owed;
- b. It and IPDS entered into an agreement in May 2019 under which FR8 could provide its own transport to unpack and pick up non-containerized cargo consigned to FR8 as agent for a client and deliver it to FR8's client or place it in storage until delivery (the 'May 2019 agreement'). It alleges that in breach of this agreement, IPDS stopped FR8 from being able to use its own transport and staff to unpack, pick up and deliver the cargo consigned to FR8 as agent for a client and that it continues to do so;
- c. IPDS has wrongly committed the tort of business interference by abusing a position of power and interfering with FR8's business activities, resulting in loss and damage to FR8;
- d. IPDS has overcharged it for services rendered in the course of its business activities with FR8; and
- e. It is entitled to 15% interest ('*Hungerford v Walker* interest').

4. In its Defence, IPDS:

- a. Admits that from time to time it retained FR8 to perform services in respect of the importation of goods by air by DHL consignment to IPDS, and it denies that the services contract applied to the importation of goods by sea or to airfreight other than by DHL;
- b. Says that it cannot plead to alleged breaches of the services contract unless and until FR8 discloses the original or true copies of the original relevant documentation in respect of the alleged handling charges, customs duties, VAT and other miscellaneous fees pleaded and in respect of the narrative contained in the computer generated invoices;
- c. In the alternative to the preceding paragraph, there are a number of specific defences pleaded in para. 9 of the Defence;
- d. Says that any outstanding invoices by FR8 prior to 1 June 2018 should be claimed from IWS pursuant to the 2007 Concession Agreement;
- e. Admits that as a result of a 22 May 2019 meeting, it wrote to the Claimant by letter dated 23 May 2019, it disputes the interpretation that FR8 has of the terms of the May 2019 agreement and denies the allegations of breach and loss or damage suffered;

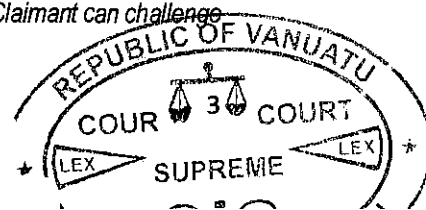


- f. Denies that it has committed the tort of business interference and repeats that it honours the terms of its letter dated 23 May 2019, that it has the exclusive right to provide transport to the Lapetasi International Container terminal ('LICT'), and that FR8 only has an authorised custom bonded warehouse for DHL airfreight and not otherwise;
 - g. In relation to the claimed refund of overcharges, it says that if FR8 discloses the original or true copies of the original relevant documentation in respect of the narrative contained in the computer generated invoices particularised, it will review and reserves the right to amend its pleading; and
 - h. In the premises, FR8 is not entitled to claim 15% interest.
5. The issues arising are:
- a. Is FR8 owed payment pursuant to the "services contract"? **[Issue 1]**
 - b. Should any outstanding invoices by FR8 prior to 1 June 2018 be claimed from Ifira Wharf & Stevedoring (1994) Limited ('IWS') pursuant to the 2007 Concession Agreement and not IPDS? **[Issue 2]**
 - c. Who should refunds of "wharfage fee" or "toll tax" be claimed from? **[Issue 3]**
 - d. Is IPDS liable for damages and specific performance incidental to the May 2019 agreement? **[Issue 4]**
 - e. Is IPDS liable for the tort of business interference? **[Issue 5]**
 - f. Is FR8 owed refunds in relation to overcharges? **[Issue 6]**
 - g. Is IPDS liable for *Hungerford v Walker* interest? **[Issue 7]**

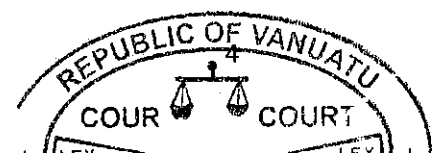
C. Preliminary matter - No challenge to lawfulness of Concession Agreements

- 6. The 2018 Concession Agreement was preceded by the 'Port Vila Wharf and Stevedoring Concession' dated 24 November 2007 between the Vanuatu Government (grantor), Ifira Wharf & Stevedoring (1994) Ltd ('IWS') (concessionaire – incumbent stevedore), and IPDS (concessionaire – successive stevedore) who pursuant to cl. 3 had "all rights to this concession..." (the '2007 Concession Agreement').
- 7. The Amended Claim does not plead that any of the Concession Agreements between the Vanuatu Government and IWS and IPDS is unlawful.
- 8. Accordingly, I must proceed on the basis that the terms of the Concession Agreements are lawful because they are not impugned in the present proceeding and nor have they been declared unlawful by any court of law.
- 9. In addition, I held at para. 14 of my judgment as to the Claimant's Urgent Interim Application dated 10 December 2019 that:

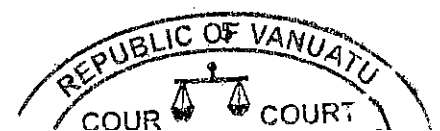
I also agree with Mr Blake that there is no privity of contract such that the Claimant can challenge the 2007 Concession agreement or indeed the 2018 agreement.



10. I agree with Mr Hurley's submission that there was no appeal from that judgment therefore FR8 is bound by that finding of the Court.
 11. Notwithstanding the lack of any pleading in the Amended Claim that one or other Concession Agreement was unlawful and the Court's finding that the Claimant could not challenge those Agreements, Mr Fleming saw fit to make submissions at paras 9 and 13-27 of the Claimant's Submissions that the concessions were illegal. He invited the Court to make a finding to that effect as a matter of public policy.
 12. With respect, those submissions are utterly misconceived. They are not relevant to any issue for my determination. I reject the submissions at paras 9 and 13-27 of the Claimant's Submissions and do not have any further regard to them.
- D. Issue 1: Is FR8 owed payment pursuant to the "services contract"?
13. FR8 is seeking payment of monies in relation to 22 invoices particularized at para. 22 of the Amended Claim. These total VT1,845,354 (and with interest, VT4,467,594).
 14. IPDS admits that that from time to time it retained FR8 to perform services in respect of the importation of goods by air by DHL consignment to IPDS; it denies that the services contract applied to the importation of goods by sea or to airfreight other than by DHL. Russell Mitchell, IPDS General Manager attests to this in his sworn statement, ["**Exhibit D3**"]. Christopher Joseph Kernot, FR8 Company Director disputes this in his 3rd sworn statement, filed on 22 September 2020 ["**Exhibit C3**"] and says that FR8 provided IPDS services for regular air shipments, the importation of goods by air by DHL, and regular sea shipments. Mr Kernot's answers in cross-examination were consistent with the account in his sworn statements. In my view, Mr Kernot was a witness of truth and I accept his evidence.
 15. Further, IPDS pleaded in its Defence that it cannot plead to the alleged breaches of the services contract unless and until FR8 discloses the original or true copies of the original relevant documentation in respect of the alleged handling charges, customs duties, VAT and other miscellaneous fees pleaded and in respect of the narrative contained in the computer generated invoices.
 16. In the alternative to the preceding paragraph, there are a number of specific defences pleaded in para. 9 of the Defence.
 17. Mr Kernot, FR8 Company Director evidenced that it did not see why FR8 had to provide the supporting documentation to IPDS when FR8 carried out the work at the request of and for IPDS. He was also unimpressed that prior to this proceeding, FR8 was not given a reason for IPDS' lack of payment.
 18. Mr Fleming extracted from cross-examination of Jacklyn Ishmael, IPDS Finance Manager that the reason given that supporting documentation must be provided was only given in the course of this proceeding. Ms Ishmael also confirmed in cross-examination that in her experience, it is FR8's standard practice to provide the invoice and its supporting documentation. Ms Ishmael answered the questions put to her without hesitation. I consider that she sought to assist the Court with the truth and accept her evidence.



19. Notwithstanding the concessions made by Ms Ishmael in cross-examination, no such concession was made by Mr Mitchell. Ms Ishmael's concessions cannot bind IPDS, whereas Mr Mitchell's can.
20. I accept Mr Hurley's submission that it is apparent from looking at the narrative description of each of the 22 computer generated tax invoices that they seek to recover payments purportedly paid by FR8 to third parties or disbursements including airline handling fees, import airway bill fees, customs clearance fees, Vanuatu Terminal Services handling fees, duty on CIF price of goods, VAT on duty disbursements and Customs EDI fee disbursements. In the circumstances, it is a reasonable and understandable position for any defendant to adopt in its defence when third party disbursements are sought to be recovered to require the production of the original or copy documentation to support those third party disbursements.
21. I acknowledge that it is frustrating for FR8 that its invoices have remained unpaid and that IPDS only required the original or true copies of the original relevant documentation to be provided during this proceeding. However, even if FR8 did not provide that requested documentation to IPDS, it still needed to put it into evidence to prove its case on the balance of probabilities or that it is more likely than not that all of the third party disbursements claimed were properly incurred.
22. I accept IPDS' submission that FR8 has not provided the supporting documentation for the invoices particularised at para. 22 of the Amended Claim nor adduced these into evidence. FR8 having failed to prove this aspect of its case, its claim for payment pursuant to the "services contract" fails.
- E. Issue 2: Should any outstanding invoices by FR8 prior to 1 June 2018 be claimed from Ifira Wharf & Stevedoring (1994) Limited ('IWS') pursuant to the 2007 Concession Agreement and not IPDS?
23. I accept and find that all of the copy invoices produced at pages 14-51 of Exhibit J11 to the Sworn statement of Ms Ishmael [**"Exhibit D4"**] (with the exception of p. 47) show that invoices prior to 1 June 2018 were rendered by IWS to its customers. Other IWS invoices pre-1 June 2018 are attached to Mr Kernot's 3rd sworn statement [**"Exhibit C3"**] at pages 55,56,57,58,59,60,127, 130, 131, 140 and 149. In contrast, there are examples of post-1 June 2018 invoices rendered by IPDS at pages 61-69 of Exhibit J11 [**"Exhibit D4"**].
24. In relation to p. 47 of Exhibit J11 [**"Exhibit D4"**], Ms Ishmael clarified in re-examination that that invoice had been reprinted recently and the original of that invoice would have been on IWS' letterhead and referred to IWS' details for payment methods at the foot of it. I accept this evidence of Ms Ishmael.
25. I accept and find that FR8 through the evidence of Mr Kernot has not produced a single invoice pre-1 June 2018 which was rendered by IPDS.
26. Mr Kernot adduced at pages 3-5 of his 3rd sworn statement [**"Exhibit C3"**] pre-1 June 2018 statements of accounts rendered by IPDS and listing unpaid invoices. Mr Hurley



submits that FR8 has not produced any of the underlying invoices shown on those statements of account. If FR8 had done so it would have shown the Court that each of those invoices was rendered by IWS and not by IPDS. I am unable to find either way without having seen the underlying invoices.

27. In any event, IWS and IPDS are two separate corporate entities. Under the 2007 Concession Agreement, IWS was the concessionaire – incumbent stevedore. The 2018 Concession Agreement applied from 15 June 2018. Under the latter, IPDS is the concessionaire.
 28. I have not been pointed to a provision of the 2018 Concession Agreement or some other document or agreement that makes IPDS liable for IWS' debts. In the absence of this, I accept and find that invoices rendered by FR8 prior to 1 June 2018 should be claimed from IWS pursuant to the terms of the 2007 Concession Agreement.
- F. Issue 3: Who should refunds of "wharfage fee" or "toll tax" be claimed from?
29. Mr Kernot evidenced at para. 34 of his sworn statement [**"Exhibit C3"**] that up until 2015, FR8 didn't pay this tax for exempt goods. Then suddenly invoices started appearing claiming "toll tax" – an example is at p. 232 of Exhibit J12 of Ms Ishmael's sworn statement [**"Exhibit D4"**], an IWS invoice dated 4 September 2017.
 30. Mr Kernot further evidenced that to call it a "wharfage fee" when they invoice it as "toll tax" is misleading to him.
 31. Mr Mitchell evidenced in [**"Exhibit D3"**] that in so far as the invoices seek to claim back "wharf tax on tax free services", to qualify for tax free services, an approval for exemption on duty and tax granted by the Department of Customs and Inland Revenue ('DCIR') under the relevant legislative provisions would need to be presented by FR8 to qualify for tax free services and IPDS has not received any such evidence.
 32. Further, that wharfage fee (commonly known as "toll tax") is not a tax, rather it is a fee for services provided by the Department of Ports and Harbours and effective 1 March 2015 the Department of Ports and Harbours has been required to charge VAT on the wharfage fee to all stevedoring businesses operating in Vanuatu, as set out in the letter dated 17 December 2014 from Acting Manager VAT Compliance and Revenue, DCIR, to Acting Director, Ports and Harbours. That is indeed what that letter states. I accept and find that wharfage fee is commonly known as "toll tax" and is a fee for services provided by the Department of Ports and Harbours.
 33. I also accept and find that prior to that determination in the letter dated 17 December 2014, wharfage fee was previously collected by the stevedore on behalf of the Government without the payment of VAT.
 34. Mr Mitchell's evidence as to wharfage fee was not challenged in cross-examination. Nor is there any evidence to the contrary.
 35. Mr Fleming submitted that toll tax appears to have been applied sometimes and at other times not. However, FR8 is simply seeking payment of toll tax back from IPDS but IPDS



has lost the exemption documents. Further, that IPDS' reasons for not paying are not bona fide. Whatever IPDS' reasons and even if it has lost the exemption documents, FR8 bears the onus of proving its Claim. The supporting documents, including exemption documents, should have been adduced into evidence.

36. In the circumstances, I accept IPDS' evidence that it collects the wharfage fee on behalf of the Government. Accordingly, refunds of "wharfage fee" or "toll tax" should be claimed from the Government, not from IPDS.

G. Issue 4: Is IPDS liable for damages and specific performance incidental to the May 2019 agreement?

37. FR8 alleges that in May 2019, it and IPDS entered into an agreement under which FR8 could provide its own transport to unpack and pick up non-containerized cargo consigned to FR8 as agent for a client and deliver it to FR8's client or place it in storage until delivery (the 'May 2019 agreement'). It alleges that in breach of this agreement, IPDS stopped FR8 from being able to use its own transport and staff to unpack, pick up and deliver the cargo consigned to FR8 as agent for a client and that it continues to do so.

38. IPDS admits in its Defence that as a result of a 22 May 2019 meeting, it wrote to the Claimant by letter dated 23 May 2019 however it disputes the interpretation that FR8 has as to what the agreement entailed. IPDS denies the allegations of breach and loss or damage suffered.

39. Is there a May 2019 agreement as alleged?

40. Mr Kernot evidenced that he has long had issues with IPDS, and previously IWS, in relation to their monopoly on stevedoring services under the Concession Agreements. He evidenced that in an effort to resolve FR8's issues with IPDS, Mr Kernot, Mr Mitchell, Mr Fleming and Mr Hurley met on 22 May 2019.

41. Following the meeting, IPDS sent its letter dated 23 May 2019 to FR8 which reads:

At this time IPDS has under the concession agreement the exclusive right to provide transport, but also has the right to enter into separate agreements.

As such commencing at this date, IPDS agrees that FR8 may provide their own transport to pick up non-containerised cargo from LICT CFS. Conforming strictly to IPDS procedures to pick up and deliver cargo at LICT.

This agreement will be reviewed on an annual basis.

Please advise in writing you concur with this agreement.

42. By email dated 26 May 2019, Mr Kernot accepted the agreement set out in the 23 May 2019 letter, stating:

Thanks Russell, while we may disagree for what the Concession allows or not as exclusive rights to IPDS, I am thankful for this change and we will do our own transport when it suits us as well as utilize your own services when that makes sense too.



43. On 28 May 2019, Mr Kemot emailed Mr Mitchell the letter on which he had hand-written that:

To confirm my email, I hereon confirm that we will be pleased to recommence doing our own transport while at the same time having the option to use IPDS as suitable to our or our clients needs.

44. Both Mr Kemot and Mr Mitchell evidenced at trial what "non-containerized cargo" was. I accept their evidence that it includes:

- Less than container load ('LCL') cargo – goods shipped in a container mixed with the goods of another person, done to minimize costs;
- Roll on roll off cargo (motor vehicles);
- Break bulk cargo (say timber packs or goods that would not go in a container); and
- Freight all kinds ('FAK') cargo.

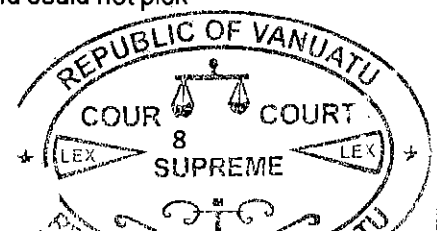
45. FR8 alleges that the May 2019 agreement was to the effect that as of 23 May 2019, FR8 could provide its own transport (and staff) to unpack and pick up non-containerized cargo consigned to FR8 as agent for a client, from the LICT CFS and thereafter deliver the said cargo to a client of FR8 or place it in storage until delivery.

46. Mr Hurley on the other hand submits that the terms of the May 2019 agreement are evidenced by IPDS' letter dated 23 May 2019, as accepted by FR8 on 28 May 2019, and they speak for themselves.

47. IPDS alleges that the 23 May 2019 letter did not make any reference to an agreement for IPDS to unpack non-containerized cargo, nor did it make any reference to the words, "and thereafter deliver the said cargo to a client of FR8 or place it in storage until delivery". I agree that the 23 May 2019 letter does not contain any such references.

48. In the circumstances, FR8 has not proved that it and IPDS entered into an agreement that as of 23 May 2019, FR8 could provide its own transport (and staff) to unpack and pick up non-containerized cargo consigned to FR8 as agent for a client. There is no reference in the letter to FR8 unpacking cargo.

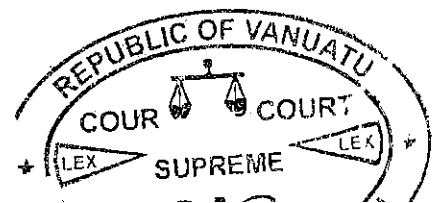
49. As to whose cargo FR8 is permitted to pick up from the LICT CFS, Mr Mitchell evidenced that the May 2019 agreement permitted FR8 to pick up its own freight. However, the terms do not permit FR8 to remove cargo belonging to its customers based on Efate. That is, that FR8 was only permitted to collect cargo belonging to its clients for delivery to other islands. I accept Mr Kernot's evidence that this was never communicated to him at the time the May 2019 agreement was made (offer contained in the 23 May 2019 letter, and accepted by FR8 email on 26 May 2019). In the circumstances, I decline to make any findings that FR8 was constrained to pick up its own freight and could not pick up non-containerized cargo that it collects as agent for a client of FR8.



50. I note that the 23 May 2019 letter states that, "IPDS agrees that FR8 may provide their own transport to pick up non-containerized cargo from LICT CFS". The letter does not qualify whether that non-containerized cargo must be FR8's own freight or can be non-containerized cargo that it collects as agent for a client of FR8.
51. Finally, the letter also makes no reference as alleged that FR8, "[and] thereafter deliver the said cargo to a client of FR8 or place it in storage until delivery".
52. In the circumstances, FR8 has not proved the existence of a May 2019 agreement as alleged.
53. IPDS also relied on a letter dated 11 May 2020 to Mr Mitchell from Harold Tarosa, Director of DCIR for the proposition that the May 2019 agreement does not permit FR8 to remove cargo belonging to its customers. Mr Tarosa's letter post-dated the 23 May 2019 letter by nearly a year. It was therefore outside the parties' knowledge and intention in May 2019.
54. FR8 not having proved the existence of the May 2019 agreement as alleged, no question as to its breach arises for my determination. Accordingly, IPDS is not liable for damages and FR8 is not entitled to specific performance incidental to the May 2019 agreement.

H. Issue 5: Is IPDS liable for the tort of business interference?

55. FR8 alleges that IPDS has wrongly committed the tort of business interference by abusing a position of power and interfering with FR8's business activities, resulting in loss and damage to FR8. Specifically, FR8 alleges that the tort has been committed by:
 - a. Not allowing FR8 onto the wharf to uplift and transport either cleared goods for its clients or customs bonded cargo for transfer to its Customs Bonded Warehouse;
 - b. IPDS refusing to deliver mixed cargo containers which contain Freight All Kinds ('FAK', often referred to as Less than Container Load ('LCL' cargo) consigned as full container loads (FCL) on the Master Bills of Lading containing FR8's assigned goods to its warehouse for unpacking and delivering to its clients;
 - c. Forcing FR8's clients to store cargo at the LICT, CFS and receiving money when FR8 had the warehouse facilities that would be suitable; and
 - d. IPDS telling FR8's customers and others that using FR8's services will slow shipments down.
56. IPDS denies that it has committed the tort of business interference and repeats that it honours the terms of its letter dated 23 May 2019, that it has the exclusive right to provide transport to the Lapetasi International Container terminal ('LICT'), and that FR8 only has an authorised custom bonded warehouse for DHL airfreight and not otherwise.



57. In *Torquay Hotel v Cousins* (1968) 3 All ER 43, Denning MR, at p. 530 said:

I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.

58. The elements, then, of the tort of business interference are:

- i. Trade or business interest;
- ii. Interference;
- iii. Defendant has acted by unlawful means, or an act he is not at liberty to commit;
- iv. Directed at the claimant business person; and
- v. Causes damage to that interest.

59. Mr Fleming submitted at para. 77 of the Claimant's Submissions that in order for FR8 to succeed with this issue it needs to "establish the defendant has acted by unlawful means or an act it was not permitted to do..." Mr Hurley's submissions at para. 56 of the Defendant's Final Submissions agreed that this was what FR8 needed to establish to succeed on this issue.

60. The parties' statements of the case on this aspect of the claim distil to 2 sub-issues which for the first one, if proved, would establish that IPDS has acted by unlawful means or an act it was not permitted to do and hence FR8 succeed on the issue of tortious business interference. The second one, if proved, would mean that IPDS has not acted by unlawful means in terms of refusing to deliver mixed cargo containers containing FR8's assigned goods to the FR8 warehouse and making FR8's client store cargo at the LICT CFS:

- i. Does IPDS have the exclusive right to provide transport to the LICT? **[Issue 5(i)]**; and
- ii. Does FR8 only have an authorised custom bonded warehouse for DHL airfreight and not otherwise? **[Issue 5(ii)]**

61. I have dealt in Issue 4 above with the alleged existence and breach of a May 2019 agreement. No finding as to IPDS acting by 'unlawful means' arises from that aspect of the claim.

I. Issue 5(i): Does IPDS have the exclusive right to provide transport to the LICT?

2018 Concession Agreement

62. Mr Kernot is quite clear that he does not agree that IPDS has the exclusive right to provide transport for cargo off the wharf apart from full container load ('FCL') cargo – see email dated 26 June 2020, **["Exhibit D1"]**. He and Mr Mitchell do not agree as to



what the Concession Agreement allows or not as exclusive rights to IPDS – see Mr Kernot's email dated 26 May 2019 to Mr Mitchell.

63. Mr Kernot evidenced at paras 5, 6 and 7 of his sworn statement filed on 8 October 2019, ["Exhibit C1"]:

5. *I have personally emailed, called, met with various persons of the second defendant and made known my complaints and concerns.*
6. *I have also voiced my complaints and concerns to the Maritime Regulator.*
7. *In reply I am told that as the concessions give a monopoly to the second defendant, I have to just accept that.*

64. At paras 21-24 of Mr Kernot's sworn statement filed on 15 June 2020 ["Exhibit C2"], he stated:

21. *Instead I have had my staff such as David Tangarisi (Import Supervisor) going to the wharf on a number of occasions to pick up goods only to report back to me saying words to the effect I went down to the wharf and was told we cannot collect goods.*
22. *I have had similar reports back from Leitawa Chilia the former operations manager who went down and to the wharf on a number of occasions and came back saying the same as David.*
23. *This is in addition to my personal experiences, which are well documented and known to IPDS that we have discussed many and countless times. I am happy to provide the court with the massive amount of emails I have kept, but they will all say the same thing essentially, FR8 is being unfairly interfered with and stopped.*

65. Mr Kernot further evidenced that what he has said about FR8's business being unfairly interfered with and stopped did happen and continues to happen. He stated that IPDS does not deny these events occur – IDPS' position is that they have the right to stop FR8 under the monopoly they hold. He stated that FR8 says they don't and that it has cost FR8 money. I accept Mr Kernot' evidence.

66. Article 2.1(b) of the 2018 Concession Agreement provides as follows:

2.1 *Concessionaire General Obligations*

The Concessionaire shall:

...

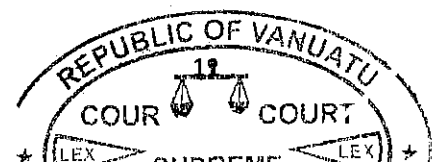
(b) *manage, operate and maintain the Port Facility (and perform the Services during the Operation Period);*

...

(e) *do all things incidental or related thereto or which the Concessionaire considers desirable and appropriate, in accordance with Good Industry Practice, to be carried on in connection therewith during the Concession Period;*

Subject to and in accordance with the terms and conditions of the Agreement, Applicable Law, Permits and Good Industry Practice.

(my emphasis)



67. "Port Facility" and "Services" are defined in art. 1.1 of the 2018 Concession Agreement as follows:

"Port Facility" means the Lapetasi Multi-Purpose International Wharf, located in Port Vila, Vanuatu, which comprises the Container and general cargo port including without limitation the access channel and harbour basin, the quay wall, all infrastructure, buildings and other structures and any and all additions, alterations or extensions to that port, to be financed, operated, maintained and managed by the Concessionaire within the Concession Area during the Concession Period in accordance with the terms and conditions of this Agreement.

...

"Services" means the Cargo Handling Services and the Auxiliary Services to be carried out at the Port Facility in accordance with the provisions of this Agreement.

...

68. "Cargo Handling Services" and "Auxiliary Services" are defined in art. 1.1 as follows:

"Auxiliary Services" has the meaning specified in Article 12.2.

...

"Cargo Handling Services" has the meaning given in Article 12.1.

69. Articles 12.1 and 12.2 of the 2018 Concession Agreement relevantly provide:

12. SCOPE AND LEVEL OF SERVICES

12.1 Cargo Handling Services

12.1.1 During the Operation Period, the Concessionaire shall provide the following cargo handling services (the "Cargo Handling Services"):

- (a) Container handling; and*
- (b) Other cargo handling;*

all in accordance with Technical Specifications, Minimum Service and Equipment Investment Requirements, Applicable Law, Permits and Good Industry Practice.

...

12.2 Auxiliary Services

12.2.1 During the Operation Period, the Concessionaire may provide auxiliary services commonly offered in comparable sea ports in support of the Cargo Handling Services so as to achieve optimal utilization of the Port Facility (the "Auxiliary Services").

12.2.2 Auxiliary services can comprise without limitation supply of fresh water and electricity to vessels, bunkering services, maintenance and repairs services for Containers, electricity supply and monitoring of reefer Containers, cleaning of Containers, and warehousing and logistic services, all in accordance with Technical Specifications, Minimum Service and Equipment Investment Requirements, Applicable Law, Permits and Good Industry Practice.

12.2.3 The cleaning of Containers and transportation of Containers, in respect of the Port Facility, shall be exclusively performed by the Concessionaire.

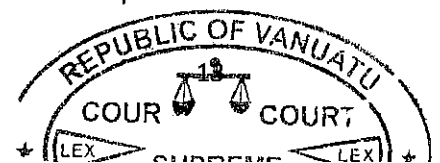
(my emphasis)

70. "Container" is defined in art. 1.1 of the 2018 Concession Agreement as follows:



“Container” means a standardized re-sealable transportation box for unitized freight handling with standardized equipment as commonly used in sea transportation.

71. “Port Facility” is defined in art. 1.1 of the Concession Agreement to mean the Lapetasi Multi-Purpose International Wharf which comprises the Container and general cargo port.
72. The wording of art. 12.2.3 is that the transportation of containers, “in respect of the Port Facility”, shall be exclusively performed by IPDS. I infer from the construction of the sentence that IPDS’s exclusive right to perform the function of transportation of containers operates only “in respect of the Port Facility”. This means that with respect to the Port Facility, IPDS has the exclusive right to transport containers.
73. However, the 2018 Concession Agreement does not contain a similar express provision in relation to the transportation of non-containerized cargo.
74. Mr Mitchell evidenced that IPDS relies on bullet point 6 of Annex 4 (*Tariff*) of the 2018 Concession Agreement for its exclusive right to provide transportation of all cargo on Efate – see his email in **["Exhibit D1"]**. Mr Kernot on behalf of FR8 disputes that IPDS has such exclusive right. This is the main point of contention between the parties.
75. I consider then what services IPDS is to provide under the 2018 Concession Agreement.
76. Article 12 of the 2018 Concession Agreement sets out the scope and level of services to be provided by the Concessionaire. Under art. 12.1, IPDS shall provide Container handling and other cargo handling, collectively defined as “Cargo Handling Services”. This covers all cargo at the Port Facility.
77. I accept Mr Mitchell’s evidence at para. 21 of **["Exhibit D3"]** that:
 21. *The correct procedure outside the terms of the FR8 Transportation Agreement [IPDS letter dated 23 May 2019 as endorsed by Mr Kernot on 28 May 2019] is that all cargo has to be stripped and put into the container freight storage area (CFS) at the Lapetasi International Container Terminal (LICT) and delivered by IPDS in accordance with IPDS’ procedures and consistent with the 2018 Concession Agreement. Those procedures were previously undertaken by IWS pursuant to the 2007 Concession Agreement.*
78. I accept and find that IPDS is the only one to unpack containers and non-containerized cargo and put it into the LICT CFS under the terms of the 2018 Concession Agreement.
79. Article 12.2.1 then provides that the Concessionaire may provide auxiliary services commonly offered in comparable sea ports in support of the Cargo Handling Services “so as to achieve optimal utilization of the Port Facility”. This is defined as “Auxiliary Services”.
80. I note that art. 12.2.2 sets out what Auxiliary Services can comprise but states at the outset that this is “without limitation”. One of the items listed is “logistic services”. “Logistic services” is not defined, however I will assume it includes the transportation function.



81. The list of services listed in art. 12.2.2. comprising "Auxiliary Services" is stated to be "without limitation".

82. I then note art. 20 of the 2018 Concession Agreement:

20. TARIFFS

20.1.1 Levy and Recovery of Concessionaire Tariff

During the Operation Period, the Concessionaire shall be entitled to levy and recover the Concessionaire Tariff from the Users using the Port Facility and/or Services in accordance with the provisions of Appendix 4 (Tariff). The Concessionaire Tariff is subject to tariff regulation by the Regulator, in accordance with the MSR Act.

(my emphasis)

83. The Lapetasi International Container Terminal Tariff at Appendix 4 of the 2018 Concession Agreement is dated February 2018. It includes a letter dated 24 May 2018 from the Office of the Maritime Regulator (the 'Regulator') approving the tariff as applicable to stevedoring and ancillary services to be provided by IPDS in respect of the Lapetasi International Multi-Purpose Wharf.

84. The Notes immediately following the Tariff cover page state:

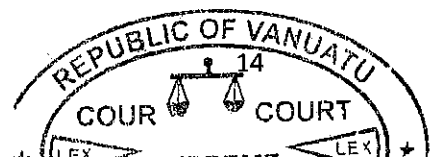
- *This Tariff states the rates and criteria for the services provided by Lapetasi International Container Terminal (LICT).*
- *The Currency of the tariff is in Vatu.*
- *The tariff applies to services provided by LICT in Port Vila primarily at the container terminal, and satellite yards within the island of Efate.*
- *The use of the Container Terminal shall constitute consent to the container service charges and LICT Terms of Business on the part of vessels and their owners and agents as well as the cargo owners and their agents.*
- *This tariff is notice to the public that the rates and charges contained in the tariff apply to all users of LICT. In addition to the charges contained herein, vessels and cargo will be subject to dues and taxes as published from time to time and payable to the Government Authorities of Vanuatu.*
- *LICT reserves the sole right to furnish all equipment, supplies and materials, and to perform all services in connection with the container/break bulk operation on the island of Efate.*

...

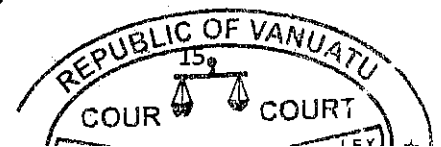
(my emphasis)

85. In summary:

- a. The 2018 Concession Agreement provides that the Concessionaire may provide auxiliary services in support of the Cargo Handling Services, being container handling and other cargo handling;
- b. The Concession Agreement purposefully did not set out an exhaustive list of what Auxiliary Services could comprise of; and



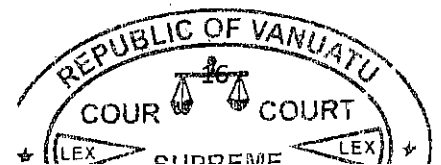
- c. IPDS is obliged under art. 20 of the Concession Agreement to levy and recover the concessionaire tariff from Users using its Services, in accordance with the provisions of Appendix 4 (Tariff) of the Concession Agreement.
86. Within Appendix 4, the 6th bullet point of its Notes provides that IPDS (through LICT) reserves the sole right to perform all services in connection with both the container and break bulk operation on Efate. The charges for Transport services are set out in a table between the charges for Special Services Charges and those for Labor Charges. The Transport charges include for:
- Break-bulk (per freight tonne)
 - Transport M/T container house to house in Port Vila area...;
 - Transport Full Container house to house in Port Vila area...; and
 - Zone charges (outside Port Vila area).
87. I conclude that by Appendix 4, IPDS has reserved the sole right to provide transportation in connection with both the container and break bulk operation on Efate. I interpret the use of "container/break bulk operation" to denote all cargo, both containerized and non-containerized.
88. I accept and find that IPDS providing transport in relation to both containerized and non-containerized cargo is within the scope of Auxiliary Services which IPDS may provide (art. 12.2.1, 2018 Concession Agreement) in support of the Cargo Handling Services that it is obliged to provide (art 12.1.1). "Services" is defined to mean the Cargo Handling and Auxiliary Services to be carried out at the Port Facility (art. 1.1).
89. However, in the Appendix 4 Notes, IPDS stated, "LICT reserves the sole right to furnish all equipment, supplies and materials, and to perform all services in connection with the container/break bulk operation on the island of Efate."
90. I further interpret the wording used to include the sole right to furnish the means of transportation, as well as the sole right to perform all transportation services in connection with the container and break bulk operation on Efate. This purports to be for the whole island of Efate whereas the concession granted is only to manage, operate and maintain the Port Facility (and perform the "Services" during the Operation Period (art. 2.1(b)).
91. Without a provision in the Concession Agreement by which the Government and IPDS agreed that IPDS would have such exclusive right to furnish all equipment, supplies and materials, and to perform all services in connection with the container/break bulk operation on the island of Efate, I do not see how IPDS could reserve such right of its own accord.
92. In the circumstances, my answer to the sub-issue posed is, "No, IPDS does not have the exclusive right to provide transport to the LICT". Further, it is not a question of providing transport to the LICT. It is a question as to what kind of cargo. That is:



- a. IPDS has the exclusive right to provide transportation of containers in respect of the Port Facility, including the LICT, but also may provide transportation in connection with both the container and break bulk operation on Efate as this falls within the scope of Auxiliary Services pursuant to the 2018 Concession Agreement.
 - b. However, I do not see how it could of its own accord reserve the sole right to do the latter and to extend that beyond the Port Facility to the whole island of Efate.
93. I conclude therefore that FR8 could also provide transportation in connection with the break bulk operation (including in relation to non-containerized cargo) on Efate, however has been stopped from doing so by IPDS.
94. I am satisfied that FR8 has proved that IPDS has acted by unlawful means in preventing FR8 from providing and performing transportation services in connection with the break bulk operation (including in relation to non-containerized cargo) on Efate.

2007 Concession Agreement

95. At para. 90 of the Claimant's Submissions, it seeks to rely on s. 13(5) of the *Ports (Dues, Fees and Charges) Regulations*. However, an alleged breach of that section is not pleaded or particularised in the Amended Claim. There is no merit to the submission that a breach of this provision makes the 2007 Concession Agreement unlawful.
96. Likewise, at para. 112(e) of the Claimant's Submissions, it seeks to rely on s. 33 of the *Maritime Sector Regulatory Act No. 26 of 2016*. Again, it is not pleaded or particularized in the Amended Claim. This submission too is rejected.
97. I note art. 1(6) of the 2007 Concession Agreement provides as follows:
1. *The Government extends its exclusive grant to the incumbent Stevedore and the incumbent Stevedore accepts to carry out the following duties under this Agreement:*
...
 - (6) *All transportation of cargo load of containers from the wharf to their respective customer and the delivery of empty containers from such customer to the wharf.*
98. Article 4 of the 2007 Concession Agreement provides as follows:
4. *The Provisions of this Agreement apply to those Concessions for the appropriate Stevedore and handling or transportation of cargo at Port Vila to such operation on their wharves as approved by the Customs Department and the Department of Ports and Marine and agreed to by the Stevedore and all relevant charges shall apply whether or not such cargoes are being handled by the Stevedore.*
99. Article 4 imposed a duty on IWS and IPDS to transport cargo at Port Vila irrespective of whether or not that stevedore handled such cargo. Transportation being expressly provided as a duty that IWS and IPDS were obliged to carry out, stopping FR8 from



doing so during the period that the 2007 Concession Agreement applied does not constitute acting by unlawful means in relation to the tort of business interference.

J. Issue 5(ii): Does FR8 only have an authorised custom bonded warehouse for DHL airfreight and not otherwise?

100. At para. 17(c) of the Defence, IPDS pleads:

the Claimant only has an authorised custom bonded warehouse for DHL airfreight and not otherwise;

101. The words of para. 17(c) of the Defence were put to Mr Kernot in cross-examination and he agreed.

102. I therefore accept and find that FR8 only has an authorised custom bonded warehouse for DHL airfreight and not otherwise. In the circumstances, IPDS has not acted by unlawful means in terms of refusing to deliver mixed cargo containers containing FR8's assigned goods to the FR8 warehouse and making FR8's clients store cargo at the LICF CFS.

103. In conclusion, having found that IPDS has acted by unlawful means in preventing FR8 from providing and performing transportation services in connection with the break bulk operation (including in relation to non-containerized cargo) on Efate, FR8 succeeds on this issue. IPDS is liable to FR8 for the tort of business interference. The quantum of damages will have to be assessed.

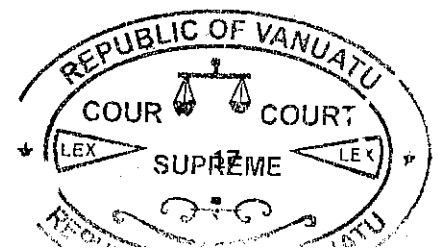
K. Issue 6: Is FR8 owed refunds in relation to overcharges?

104. It is undisputed that Ms Ishmael carried out an initial review and then subsequent reviews of the para. 22J invoices and the "source documents" and other materials provided by FR8, including in ["Exhibit C3"]. Consequently, by the trial, IPDS had accepted that the claim for 8 invoices, dated 22/4/16, 29/6/16, 8/9/17, 27/11/17, 21/8/18, 10/10/18, 5/7/19 and 30/9/19, was valid. It had issued credit notes to FR8 in relation to each of those 8 invoices.

105. In relation to the balance of the invoices, IPDS maintained that it is not obliged to pay as FR8 has not provided the original or true copies of the relevant documentation in respect of the narrative contained in the computer general invoices particularised in para. 22J of the Amended Claim. I agree. FR8 having failed to adduce into evidence the relevant documentation in respect of each of the remaining invoices, its claim for refund of overcharges fails.

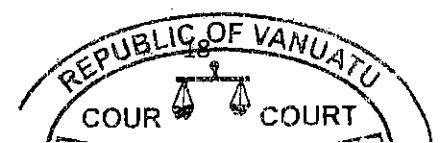
L. Issue 7: Is IPDS liable for *Hungerford v Walker* interest?

106. I will consider whether or not IPDS is liable for *Hungerford v Walker* interest when I assess the damages relating to the tort of business interference.



M. Result and Decision

107. The onus is on FR8 to prove its case that all of the third party disbursements claimed were properly incurred. FR8 having failed to provide the supporting documentation for the invoices particularised at para. 22 of the Amended Claim nor adduced these into evidence, its claim for payment pursuant to the "services contract" fails [Issue 1].
108. Invoices rendered by FR8 prior to 1 June 2018 should be claimed from IWS pursuant to the terms of the 2007 Concession Agreement and not from IPDS [Issue 2].
109. Refunds of "wharfage fee" or "toll tax" should be claimed from the Government, not from IPDS [Issue 3].
110. FR8 not having proved the existence of the May 2019 agreement as alleged, no question as to its breach arises for my determination. Accordingly, IPDS is not liable for damages and FR8 is not entitled to specific performance incidental to the May 2019 agreement. [Issue 4].
111. IPDS has the exclusive right to provide transportation of containers in respect of the Port Facility, including the LICT, but also may provide transportation in connection with both the container and break bulk operation on Efate as this falls within the scope of Auxiliary Services pursuant to the 2018 Concession Agreement. However, I do not see how it could of its own accord reserve the sole right to do the latter. Therefore FR8 or any other person could also provide transportation in connection with the break bulk operation on Efate. [Issue 5(i)]
112. FR8 only has an authorised custom bonded warehouse for DHL airfreight and not otherwise. In the circumstances, IPDS has not acted by unlawful means in terms of refusing to deliver mixed cargo containers containing FR8's assigned goods to the FR8 warehouse and making FR8's clients store cargo at the LICT CFS. [Issue 5(ii)]
113. Having found that IPDS has acted by unlawful means in preventing FR8 from providing and performing transportation services in connection with the break bulk operation (including in relation to non-containerized cargo) on Efate, FR8 succeeds on this issue. IPDS is liable to FR8 for the tort of business interference. The quantum of damages will need to be assessed. **[Issue 5]**.
114. Transportation being expressly provided as a duty that IWS and IPDS were obliged to carry out, stopping FR8 from doing so during the period that the 2007 Concession Agreement applied does not constitute acting by unlawful means in relation to the tort of business interference.
115. FR8 having failed to adduce into evidence the relevant documentation in respect of each of the remaining invoices, its claim for refund of overcharges fails. [Issue 6].
116. I will consider whether or not IPDS is liable for *Hungerford v Walker* interest when I assess the damages relating to the tort of business interference **[Issue 7]**.



117. Judgment is entered for the Claimant.

118. I will hear counsel as to costs and in relation to the assessment of damages at 11am on 21 January **2021**.

**DATED at Port Vila this 11th day of December 2020
BY THE COURT**


.....
Viran Molisa Trief
Judge

