IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (Civil Jurisdiction)	Civil Case No. 18/3473 SC/CIVIL

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Case No. 18/3473 SC/CIVIL

BETWEEN: **Christelle Kouame and Ulrich Festa**
Claimants

AND: **Municipality of Port Vila**
Defendant

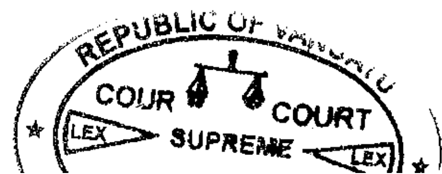
Date of Hearing:	11 October 2019
By:	Justice G.A. Andrée Wiltens
Counsel:	Ms M-N Ferrieux Patterson for the Claimants
	Mr L. Napuati for the Defendant
Date of Judgment:	26 January 2021

Judgment

A. Introduction

1. This judgment concerns the claims by Christelle Kouame and Ulrich Festa (the Claimants) against the Municipality of Port Vila (the Defendant) arising out of the failure of a food and beverage outlet (the Business) operated by the Claimants in Port Vila from about March 2016 to July 2018. It involved a substantial investment of funds and time on the part of the Defendants.

2. It is common ground that, at the time the Business started to operate, the Vanuatu Tourism and Infrastructure Project (VTIP) was underway. It involved substantial works being carried out along the seashore at Port Vila, from the Market to the hotel known as Chantilly's on the Bay. Consequently, the Business operated from the start at the Centrepoint Carpark, rather than directly on the seashore, on what was expected to be a temporary basis. It is also common ground that that site was an inferior site, so that the earnings for the Business from that site would be less than they would have been had the Business been able to operate at the seashore. It also seems to be accepted that, by September 2018, the Claimants had



exhausted their available funds, and had suffered very significant losses in operating the Business.

3. In the events which happened, the Business never did operate from the seashore. They claim their very significant losses from the Defendant. The Claimants say that they were promised by the Defendant that they would be able to operate the Business from a suitable site on the seashore at a much earlier date than September 2018, and that it would have been a profitable business in such a location.

4. The precise foundation for the claims will be referred to later in these reasons for judgment.

B. The Hearing

5. Christelle Kouame provided two written statements which were adopted as part of her evidence. They included reference to a number of documents. She gave evidence on 6 March 2019, before the formal commencement of the hearing, as she was to be unavailable at the proposed hearing time. She also gave oral evidence, including cross-examination.

6. The hearing took place on 11 October 2019.

7. Ulrich Festa adopted his two written statements, which also included reference to a number of documents. He was not cross-examined.

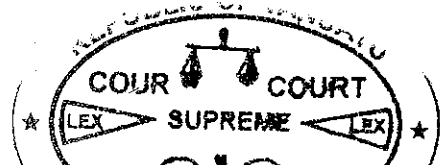
8. The Defendant introduced evidence through the written statement of Peter Sakita, Clerk to the defendant from 2019. He has not directly involved in any of the relevant events. His statement also referred to a number of documents, including correspondence between the Claimants and the Defendant. He gave brief oral evidence. It also called Mandes Kilman Kandaras, Acting Town Planner of the Defendant, whose written statement also included reference to a number of documents. He also gave brief oral evidence.

9. The parties had also provided helpful and extensive written submissions to the Court.

10. The hearing was then adjourned for the provision of final written submissions, which were duly provided. It was intended that, in due course, the judge hearing the matter would then give his judgment.

11. Unfortunately, that did not occur. The judge retired before the judgment was given. With the agreement of the parties, I have considered all the relevant material and the submissions, and on the basis of that consideration I am in a position to give judgment of the claims.

12. It is important to note that there is no challenge to the credibility of any of the witnesses. Moreover, there is really no significant factual dispute between the parties on the primary factual issues. The course of correspondence between them is not in issue. The significance of certain oral communications is, of course, a disputed matter. But that has to be seen in the



context of the more or less contemporaneous written communications. The oral interpretation of the significance of certain communications must be seen in that context. Similarly, from the Claimants' perspective, there are assertions about the progress of, and the time for completion of the VTIP, which must be measured against the formal records put into evidence, as such oral evidence was not based upon a direct knowledge of the relevant primary documents. As I have noted, the evidence called by the Defendant did not directly contravene the evidence about the terms of the relevant oral communications. It was largely confined to producing contemporary business records. There was no suggestion that the business records were not genuine, or that they were not reliable records of the events they recorded.

C. Findings

13. The Claimants were based in New Caledonia. In about November 2015, they came to Port Vila with a view to starting the Business, using a container as the principal structure, and with the objective of running the Business from a suitable site on the seashore. They had significant personal funds available to them, from their previous employment, including in the French Army.

14. At that time, they understandably sought a meeting with the relevant officials of the Defendant. They met with the Mayor Ulrich Sumtoh, and with Willie Saksak and the Town Clerk Ronald Sandy. I accept that, at the meeting, the Claimants' proposal to start the business was generally well received and encouraged. It is also plain that it was common ground that, by reason of the VTIP, the Business could not commence at a seashore site.

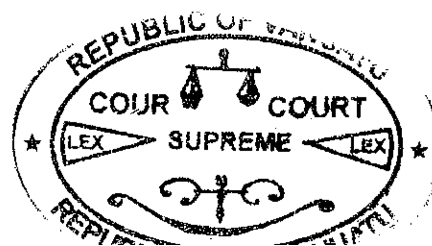
15. The Claimants then took steps to fulfil their proposed Business by acquiring the container to operate from.

16. On 1 December 2015, the Defendant wrote to the Claimants (through the Town Clerk), including the following:

> *This is to inform you that our Council is interested to assist your interest in operating an F & B Outlet within the Seafront Area. We may only continue our commitment with you after the VTIP is completed. We look forward to working with you in this regard. Thank you.*

17. In circumstances which are not clear as there is no evidence of any specific communication preceding it, that letter was followed by a further letter from the Defendant dated 12 January 2016 to the Claimants (also through the Town Clerk) in the following terms:

> *Please acknowledge here our support to the above investment) the Business) to be hosted within our City of Port Vila under the trading name, K Food Vila. May you also take not that the business investment will be located at Center (sic) Point, however, future alternatives on venue will be supported by the Council, in future. A permit has been granted to the above investment.*



18. The Claimants went about establishing their business at Centre Point. That involved securing the business name, shipping the container to Port Vila and securing the necessary facilities and licences. They commenced operating on 9 April 2016.

19. In the events which happened, they continued to operate from that location until June 2018.

20. The first statement of Christelle Kouame says that the Claimants were told 'originally' that the VTIP would be completed within 6 months, and then later that it would be completed by the end of 2017. She then says that, after the VTIP was completed on 1 September 2017, the Claimants were 'again encouraged' to wait at the Centre Point site 'until the final authorisation by their commissions could be finalised'.

21. There is no evidence that, in fact, the control of the seafront where the VTIP was being carried out, was under the control of the Defendant at that time or was handed back to the Defendant around September 2017. The documentation provided by Mr. Sakita shows that the 'handover' did not take place until 17 May 2019.

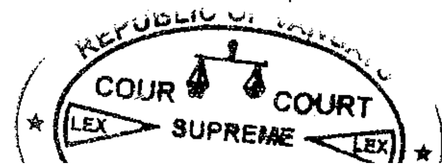
22. In her oral evidence, M. Kouame said that she understood that the VTIP was under the management of the Defendant, and that the letter of 1 December 2015 did not give the Claimants any reason to go beyond that understanding.

23. I do not accept that, in fact, the letter of 1 December 2015 provides any basis for concluding that the VTIP was under the management and control of the Defendant. Its terms do not say that. It indicates that the Defendant could only 'continue' its commitment to them (that is, its support) after the VTIP is completed. It is correct to say that it did not spell out the administrative structure under which the VTIP was proceeding, but it did make clear that the Defendant could not take its support for the Business on the seafront until after the VTIP was completed. The actions of the Defendant seem to have accepted that, by taking the Centre Point site and then awaiting the completion of the VTIP before pressing for a seashore relocation.

24. There is no evidence of the Claimants having relied specifically on any promised date for the completion of the VTIP. It is to the contrary. Ms Kouame refers to 'many reminders' to the Defendant, but without detail of specific promises, or of any actions based on any specific promises, until a meeting with the Defendant on about 27 September 2017 when the Mayor is said to have asked the Claimants to put their proposal for potential seafront locations for submission to the Defendant for 'final approval'.

25. There is no evidence that, at about that time, the Defendant re-iterated that it was still not in control of the seafront or that the VTIP was still ongoing so that it had no power to allocate access to particular sites on the seafront.

26. The communications after that date with the Defendant confirm the likelihood of such a conversation on about 27 September 2017. The Claimants then on 3 October 2017 put their



proposals to the Defendant, and it appears the Defendant proceeded to try to assist them in securing a suitable seafront site.

27. Then there was a period when the Claimants sought and obtained the necessary approvals, including that obtained from the Defendant on 26 January 2018. By that time, the possibility of the move to the site next to the Anchor Inn was known to the Claimants, but they had not fully progressed the establishment of the necessary support facilities for that site.

28. In the meantime, it appears from a letter dated 4 January 2018 from the Defendant to Mr Rene HA Pow that the Defendant was proposing to Mr Pow that he allow the Claimants to use portion of his land adjacent to the Anchor Inn for a period of time, as the Centre Point site was not to be available due to improvements proposed at Centre Point. It notes that more permanent arrangements will be made for the Claimants, when the land the subject of the VTIP is handed back to the Defendant. It does not appear that that a copy of that letter was sent to the Claimants.

29. The exchanges between the Claimants and Caillard & Kaddour, Real Estate Agents in the period February to May 208 seem to confirm that need for the Claimants to move the Business from the Centre Point site.

30. By letter to the Claimants of 5 July 2018, the Defendant (through the Acting Clerk) notified the Claimants that their option 2 (proposed by them in their proposal of 3 October 2017) was available to them, provided other formalities were satisfied. Steps were taken to move the container to that site, but other facilities had not been fully established there.

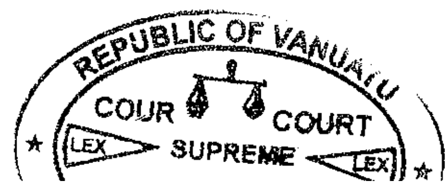
31. It appears that such an indication was premature in fact, as the Defendant at its meeting on 4 September 2018 noted that it did not have the power to hand over the site and the VTIP was still in place, and the seashore was not within the power of the Defendant to allocate. In fact, the seafront was not officially handed back to the Defendant until 17 May 2019. That is confirmed by the statement of Mr Tangaras.

32. The Claimants were notified of that position, namely that the Defendant had no power to authorise their move to the seafront because the VTIP area had not by then been handed back to the control of the Defendant, by letter of 12 September 2018. There was a flurry of communications around that time, when alternative options were aired without success.

33. Hence, there followed the current claim in the Supreme Court.

D. Consideration

34. The Defendant's position is a clear and specific one. It is that, from the letter of 1 December 2015, it made clear that its assistance was dependent on the completion of the VTIP. That did not occur until 17 May 2019, well after the Claimants' Business had failed. In the meantime, it had done what it reasonably could to assist the Claimants.



35. The Claimants in their final submissions at the trial and in their closing submissions identified 4 issues.

36. The first is whether the Defendant had the 'authority to deal with the Claimants' at all material times, including the approval to locate to the seafront.

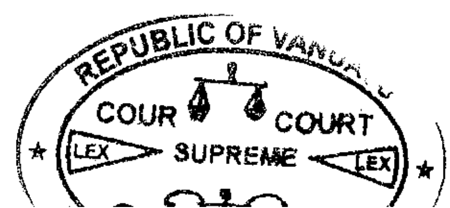
37. It is clear that the authority of the Defendant generally in relation to the seafront area, and Port Vila more broadly, is established by the Municipalities Act (CAP 126) and the Port Vila Municipality (Delineation of Boundaries) Order 19 of 1980. Counsel for the Claimants correctly made specific reference to sections 25 and 26 of that Act, and paras 3 and 4 of its Schedule where the powers of such municipal corporations are set out.

38. As noted above, the Claim (para 6) recognised that the Claimants were told by the Defendant that the Defendant could not permit the Claimant's Business to operate on the seafront while the VTIP was in progress, and in its Amended Statement of Defence the Defendant says that in the relevant period and until 17 May 2019, when the Defendant says the control of the seafront passed back to it, the seafront was 'under the authority of' the VTIP under the 'Vanuatu Government and the Core Founders one of which being the New Zealand Government'.

39. The Defendant did not, however, adduce evidence of the instruments under which it says that control of the seafront passed to some other entity or entities for the purpose of, and for the period of, the VTIP. There is a letter of 18 June 2019 (Annexure PS 5 to the statement of Mr Sakita) from the Deputy Director of the Department of Local Authorities of the Government of the Republic to counsel for the Defendant which confirms that the seafront area 'only transitioned' to the Defendant at a ceremony on 17 May 2019. The letter explains that the public opening of the seafront area which the Claimants observed (1 September 2017) was not a handover 'from the Core funders to the Ministry of Internal Affairs' due to ongoing contractual issues and disputes about full completion. That public opening is the basis for the Claimants' claim that the Defendant was from that date able to deal with them directly in re-allocating to them a seafront location). In fact, according to the letter referred to, there was a handover of the area known as Mama's Handicraft Market by agreement between the Ministry of Trade and Industry and the Defendant, but no other handover until 17 May 2019.

40. The relationship between the three Departments is not explained. And, as I have noted, the legal process by which the Defendant gave control of the seafront to another entity or entities is also not explained adequately.

41. Nevertheless, the Defendant made it clear by its letter of I December 2015 that until the completion of the VTIP it was not in a position to authorise the Claimants to have access to the seafront area for their Business. That was, on the Claimants' own evidence accepted by them. The evidence of Ms Kouame was that she understood that, from the time of the public opening in September 2017, the Defendant was in a position to do so. The Defendant by its record of the meeting on 4 September 2018 is shown to have understood itself that it could not authorise



the Claimants to relocate to a seafront site at that time. There is secondary evidence from the letter of 18 June 2019 to confirm that.

42. In the circumstances, it is necessary to carefully consider the conduct of the Defendant from September 2017. At least up to that date, in my view, there was an understanding by the Claimants that they could not, to that time, have dealt with the Defendant to secure a seafront location for the Business. That is simply because the letter of I December 2015 says as much, and the Claimants are shown to have acted on that basis to that time.

43. Although the evidence is not very satisfactory for the reasons given, I also accept that the Defendant was not able to grant to the Claimants for their Business a seafront location until on or after 17 May 2019.

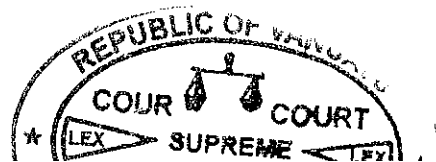
44. I have not accepted that the Claimants were misled by any explicit representation or any conduct of the Defendant from 1 December 2015 and until the public opening of the seafront in September 2017. The consequence so far is that the claim based on the asserted representations or promises or conduct from 1 December 2015 until the public opening of the seafront is not made out.

45. That conclusion means that the decision of the Claimants to move to Port Vila, and to start the Business in what they regarded as an inferior position in Centrepoint, including the acquisition of the container and its shipping, and the set up costs, and the detriment suffered by them by any losses incurred while they were operating the Business at Centrepoint up to September 2017 is not compensable.

46. The Claimants, as I have found, were prepared to start the business in the knowledge that they could not get access to a seafront site while the VTIP was being undertaken. They were not given any specific promise or representation as to when that would occur. Had that time extended until September 2018 or May 2019 with no further conduct on the part of the Defendant, it is difficult to see how they could have complained. On my findings, that is a chance they took.

47. However, that does not necessarily mean that the claim in its entirety must fail.

48. In September 2017, or shortly thereafter, the Claimants came to believe that the Defendant had become in a position to allocate the Business a seafront site from about the public opening of the seafront area in September 2017. The occasion received considerable publicity. Then, in late September 2017, the Defendant invited the Claimants to develop a proposal for moving to the seafront. I have referred to that evidence above. The Defendant at no time during that 12 month period until its letter of 18 September 2018 gave any clear indication that the VTIP had not come to an end or that it was not in a position to consider and to approve a transfer of the Business to a suitable seafront site. Their belief that the Defendant was from that time in a position to approve a transfer to a seafront site was a reasonable belief. That is confirmed by the steps the Claimants took in the following months. The Defendant in cross-examination of



Ms Kouame explored why she had not checked the status of the Defendant either from 2015 or during the latter part of 2017. Given the quality of the evidence of the Defendant on the issue, and the Defendant's conduct in relation to the Claimants after September 2017 and up to 12 September 2018, I am not prepared to be critical of the Claimants for taking the effect of the public opening at face value.

49. I have recorded above my findings about the dealings between the Claimants and the Defendant during that 12 month period. That period included the letter to the Claimants of 5 July 2018 in which the Defendant said it had approved the movement of the Business to the seafront.

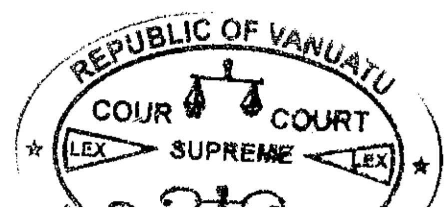
50. The remaining issues identified by counsel of the Claimants focus on the consequences of that conduct: was it 'an actionable promise in equity' and/or in breach of a duty to take care owed to the Claimants, and in substance is there any redress to which the Claimants are entitled as a result of that conduct.

51. In my view, the conduct of the Defendant during that 12 month period amounted to a representation to the Claimants that it was in a position to authorise the Claimants to move their business to the seafront. In effect, having regard to the terms of the letter of 1 December 2015, it was continuing 'its commitment...after the VTIP is completed'. It invited the Claimants to put forward a proposal for the new site. It knew the Claimants would incur significant expense (as they did) in the planning and to secure the licences and facilities to support the new site.

52. There is no evidence from the Defendant to explain that conduct, or to suggest that the Claimants were told at any time during that period that the defendant was still awaiting the transfer back to itself of the powers to authorise the relocation of the Business to the seafront. I note the evidence that, at around that time, there was apparently a proposal for the development of Centrepoint, so that in any event the temporary location of the Business may have had to have been changed.

53. The helpful submissions of counsel for both parties mean that I can deal fairly briefly with the consequences of my findings. I have found that the Defendant, by its conduct after September 2017 encouraged the Claimants in their belief that, from the public opening of the seafront, the Defendant was in a position to accommodate the transfer of the business to the seafront, and then by its letter of 5 July 2018 specifically represented that it could authorise (and had in principle approved) the relocation of the Business to a seafront site. And I have found that the Claimants acted on that represented state of affairs to their detriment.

54. Those findings reflect the elements of the claimed cause of action for promissory estoppel: see *Mariango v Nalau* [2007] VUCA 15. That decision adopted the approach explained in *Gillies v Keogh* [1989] NZLR 327. It is also consistent with the approach in *Legione v Hately* [1983] HCA 11; (1983) 152 CLR 406.



55. The Defendant's submission was that there was no clear conduct representing a state of affairs which did not exist, and that no reasonable person would have been misled by the Defendant's conduct during that period. I have considered each of the matters raised to support those contentions. I have made findings to the contrary of them. The Claimants, in the circumstances, had reason to believe that the VTIP had been completed. There was no cross-examination which drew out observations on the part of wither of the Claimants which might have put them on notice to the contrary. The Defendant's communications with them from late September 2017 did not suggest that, but rather the contrary. It was not incumbent on them to check the formal resolutions of the Defendant, in the face of what its officers said and wrote during that period, or to chase up other formal records of the Defendant.

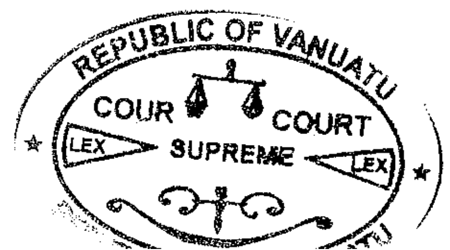
56. Despite the contention that the VTIP was still 'fully operational' at the seafront until 18 June 2019, the Defendant did not adduce evidence of what were the ongoing works. Nor was it unreasonable for the Claimants to reach their belief, and act upon it having regard to the Defendant's communications, without themselves checking with 'VTIP or the Vanuatu Government', including after receipt of the letter of 5 July 2018. The quoted words in this paragraph are from paras 22 and 23 of the Defendant's closing submissions.

57. In the light of those conclusions, it is not necessary to consider the claim based upon the asserted duty to take care, and its allegedly negligent breach. It is not submitted that the measure of damages if such a case were made out would be any different from that to be assessed for the claim based up promissory estoppel or misrepresentation by conduct.

E. Damages

58. The parties' submissions do not focus on the assessment of damages being made for loss following reliance on the promissory conduct during the period September 2017 to September 2018.

59. Having regard to the evidence of Ms Kouame, I am not prepared to find that, had the Business continued to be conducted from a non-seafront site (whether at Centre Point or some other location) after September 2017 and until the Defendant again became able to approve a transfer of the Business to a seafront site from May 2019, it would have survived to that time and then become a profitable business. There is simply not enough evidence to make such a finding. The suggestion that the revenue at a suitable seafront site would have been up to 10 times that at Centre Point is not based on any particular identified foundation or experience. The picture presented is not complete. There are no statements of assets and liabilities, or of profit and loss usually kept as the financial statements provided for any of the period that the Business was trading. There are no budgets provided. There is no clear presentation of income and expenditure at all. All that material must have been in the knowledge of the Claimants. The general description of the financial state of affairs of the Business in 2018 is not good.



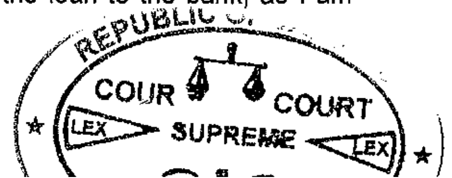
60. As I have rejected the claim based upon the letter of 1 December 2019, it follows that I will not allow the claims based upon transferring to Port Vila, and related to the acquisition and transport of the container, and the initial set up and securing facilities for the trading at Centre Point. Nor will I allow for the claim for money that the Claimants say that they would have saved had they not come to Port Vila. That accounts for items (i) – (iii) and (v) - (vii) as expressed in para 127 of the Claimants' submissions, except item (iii) may include some costs involved in endeavouring to secure the seashore location in the middle of 2018. That is not clear. I cannot reconcile the amount claimed in item (iii) with the list in para 8 of the second statement of Ms Kouame.

61. That leaves the claim expressed as 'Relocation costs (including loan), plus some relocation costs or permits licences and services and facilities.

62. The item (iv) is shown in the submissions as: Relocation costs (including loan). In the second statement of Ms Kouame it is called: Banking expenses. The loan was for VT 1,300,000 with an establishment fee of VT 200,000. It was clearly taken out in 2018. The Bank's confirmation of the loan is an annexure to the first statement of M. Kouame. In the absence of any suggestion to the contrary, I am prepared to conclude that it was expended on relocation, and that the Claimants had to repay it from the personal resources. It is therefore a consequence of the attempted relocation cost brought about in the circumstances I have found, and part of the Claimants' loss. There are 2 invoices supporting 2 items of expenditure included in that claim, shown to have been incurred during the relevant period. I am prepared to accept the other items of expenditure based upon her second statement. That includes some architects fees. Their drawings are annexed to the material. That also includes the claim under this heading for VT 357,000. There was no cross-examination suggesting that was an incorrect amount. The only significant cross-examination of this topic was to have Ms Kouame confirm that the assets of the business were sold to repay the loan to the bank. It is not clear whether the sale of assets was enough to fully repay the bank. No credit for the realisation of assets is given by the Claimants. I assume some of the sold assets were those acquired in the course of the attempted relocation, so those items, although expended, should not be allowed if there is double counting.

63. Obviously, the proof of the claim lay upon the Claimants. It is obvious that the conduct of the Defendant induced the Claimants to keep trading until the latter part of 2018. They were induced to attempt to move the Business to a seaside location, with considerable associated expenses. Part of that included the need for funding from the bank.

64. In all the circumstances, I award the sum of VT 1,600,000 damages. That includes the bank's charge fee, the architect's fees, the expenditure to secure permits licences and utilities supply and services to a proposed new site, and the additional costs incurred in the proposed removal of the Business. I have reduced the claim called: Relocation costs, as I must allow for the uncertainty that the full amount for the closing of the business is attributable to the relevant conduct of the Defendant. There a few other items which, as I have said, might include some double counting. I have not significantly reduced the claim for the loan to the bank, as I am

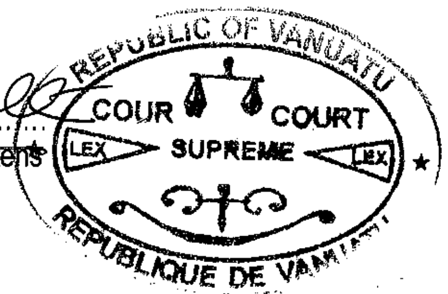


satisfied that, had the Defendant not engaged in the conduct for which it is accountable, the bank loan would not have been procured. It represents part of the expenditure to continue to trade with the (false) prospect of being able to move to a suitable seafront site in mid-2018.

F. Order

65. There is judgment for the Claimants against the Respondent for VT 1,600,000. Interest will be payable on that sum from the commencement of the claim to the date of judgment. Interest will then be payable pursuant to the Civil Procedure Rules. The Respondent is to pay to the Applicants their costs of the action to be taxed or agreed, unless there is an application for some different order for costs (in the event of there having been a relevant offer of settlement by the Defendant) made within 14 days of the date of judgment.

Dated at Port Vila this 26th day of January 2021
BY THE COURT



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Justice G.A. Andrée Wiltens