

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

Civil Case No. 24/3363 SC/CIVL

BETWEEN: FR8 LOGISTICS LIMITED

C/- PO Box 240
Port Vila, Efate
Vanuatu

Applicant

**AND: IFIRA PORT DEVELOPMENT AND SERVICES
COMPANY LIMITED**

Ifira Wharf
PO Box 68
Port Vila, Efate
Vanuatu

Respondent

Date of Hearing: 16 December 2024
Date of Decision: 25 February 2025
Before: Justice B. Kanas Joshua
Counsel: Ms Corrine Hamer for the Applicant
Mr Mark Hurley for the Respondent

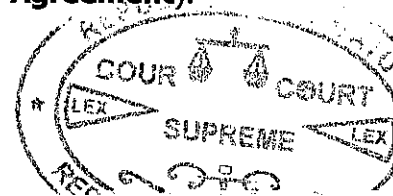
DECISION ON THE APPLICATION FOR DISCLOSURE

Introduction

1. This is an application for disclosure of the following documents, pursuant to Rule 8.13 of the Civil Procedure Rules No. 49 of 2002,
 1. A copy of the Variation Order to the Concession Agreement, dated 15 June 2018, between the Ministry of Infrastructure and Public Utilities (**the Grantor**) and Ifira Port Development Services Company Limited (**the Concessionaire**), pursuant to Article 24 of the Concession Agreement;
 2. The written memorandum setting out full details of the proposed Variation submitted to the Grantor on or about July 2022; and
 3. Any and all correspondence, emails, diary notes and memorandums regarding the Variation Order between the Respondent, the Grantor and the Contracts and Tenders Board.
2. At the hearing, the Applicant acknowledged that the Variation Order had been disclosed to them on 6 December 2024.

Relevant background

3. The applicant and the respondent have a long history of business dealings. The applicant is a leading freight company. The respondent is the Concessionaire for the port, by virtue of a Concession Agreement, dated 15 June 2018, between the Vanuatu Government represented by the Ministry of Infrastructure and Public Utilities and Ifira Port Development Services Company Limited, (**the 2018 Concession Agreement**).



4. In May 2019, the applicant and the respondent entered into an agreement that the applicant will use its own transport to pick up non-containerized cargo from LICT CFS, performing strictly to the respondent's procedure. In *FR8 Logistics Limited v. Ifira Port Development and Services Company Limited*¹ the Court of Appeal held that this was a binding contract.

5. Relevantly, the Court of Appeal said:

75. We construe this exchange as creating an agreement that FR8 could provide its own transport and staff to pick up non-containerized cargo consigned to FR8 as agent for a client from the LICT CFS, and thereafter deliver the cargo to a client of FR8 or place it into storage until delivery.

76. The Judge held:

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.

77. However, she accepted Mr Kernot's evidence that no limitation on the removing of cargo belonging to customers based on Efate was agreed to as a condition of the May Agreement.

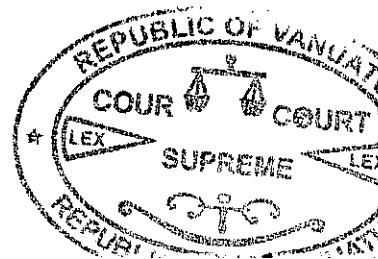
78. This was an agreement that FR8 might use its own transport to pick up non-containerized cargo from LICT CFS, performing strictly to IPDS procedures. We do not regard the later emails as qualifying this agreement in any way. While the May Agreement does not make any provision for the packing of cargo, it makes explicit provision for FR8 using its own transport to collect non-containerized cargo. It would seem that after a few instances when this occurred, IPDS ceased to cooperate in allowing FR8 using its own transport to pick non-containerized cargo.

79. Therefore, we respectfully disagree with the Judge's conclusion that no agreement was established in May 2019. We see the letter of 23 May 2019 as being an offer, and the email of 26 May 2019 as being an acceptance. At that point there was a binding contract.

6. A key finding made by the Court of Appeal was that the 2018 Concession Agreement did not give the respondent the exclusive right to provide transport of containers, and that the right was limited to the boundaries of the Port facility. The Court of Appeal observed (at 34):

34. It was a relevant background factor that the government had, shortly before the signing of the 2018 Concession Agreement, passed legislation that was specifically anti-monopoly and pro-competition in relation to ports. It is hard to conceive that at the same general time it would have given a monopolistic and exclusive right to transport goods from the wharf through

¹ [2021] VUCA 37, Civil Appeal Case No. 21/78 CoA/CIVA, at 79.



Efate to IPDS. To the contrary, we are satisfied that this was not the intention of the parties when the 2018 Concession Agreement was signed.

7. On 3 August 2022, the respondent advised the applicant that a Variation Order was made to the 2018 Concession Agreement that gave the respondent the exclusive right to transport containers and non-containerized cargo on Efate. This variation order had the effect of extinguishing the contract made between the applicant and respondent in 2019.
8. In essence, the applicant submits that the variation is unlawful because it is monopolistic. One of the issues that the claimant will have to consider is that its contract was with the Concessionaire, for the cartage of freight. It is not a party to the 2018 Concession Agreement between the Vanuatu Government and the respondent.

Consideration

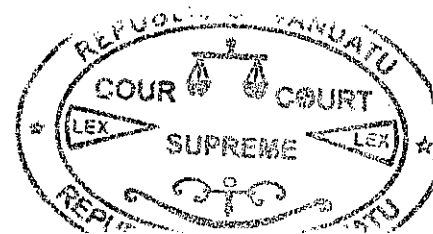
9. Rule 8.13 states that:

- (1) *A party may apply for an order for disclosure of documents before proceedings have started.*
- (2) *The application must have with it a sworn statement setting out the reasons why the documents should be disclosed.*
- (3) *The court must consider:*
 - a) *The likely benefits of disclosure; and*
 - b) *The likely disadvantages of disclosure; and*
 - c) *Whether the party who would have to disclose the documents has sufficient financial resources to do so.*
- (4) *The court must not order documents be disclosed unless the court is satisfied that:*
 - a) *The person in possession and control of the document has had an opportunity to be heard; and*
 - b) *The applicant and person in possession and control of the document are likely to be parties to the proceedings; and*
 - c) *The documents are relevant to an issue that is likely to arise in the proceedings; and*
 - d) *Disclosure is necessary to decide the proceedings fairly or to save costs.*

10. As to Rule 8.13(3), I now consider the likely benefits of disclosure. In their argument, the Applicant submitted disclosure of the documents would benefit them by determining the legality of the variation and what cause(s) of action may be available to them. By legality of the variation, the Applicant was referring to whether the variation complied with Article 24 of the 2018 Concession Agreement, the Maritime Sector Regulatory Act² (**the MSR Act**), the Government Contracts and Tenders Act and the Court of Appeal judgment in 2022.

11. The Applicant pointed out that each party under the 2018 Concession Agreement had different obligations to fulfil should they propose variations. A Variation Order would reflect the proposed variations which must firstly be described in a written memorandum. From the Applicant's perspective, the Variation Order does not show which party proposed the variations and due to this it cannot be ascertained if the

² No. 26 of 2016.



proper steps were taken, thus the Applicant submitted that disclosure of the written memorandum and other documents would assist him in the framing of the claim.

12. The Respondent submitted that the rationale for Rule 8.13 is designed to enable a party to ascertain whether it has a case against another, but not to

"[s]ecure all the benefits of disclosure to which the Applicant would be entitled to during proceedings and the width of the order will be tailored accordingly."

13. Two cases were submitted by the Respondent to support their argument. In the first case, *SmithKline Beecham v. Alphapharm*³, Finkelstein J stated that,

*"Order 15A⁴ is designed to enable a person to determine whether he has a good cause of action against a prospective defendant. It is not designed to secure for a prospective plaintiff all the documents and other information that would be discoverable if a proceeding were commenced against the defendant."*⁵

14. Finkelstein J further stated that

*"There is a limit to the discovery to which an applicant is entitled under Order 15A... Order 15A is not a substitute for general discovery. The object is to disclose what is sufficient to permit the applicants to establish whether the elements of a cause of action are made out and to plead sufficient particulars to support a claim."*⁶

15. In applying for disclosure, the Respondent submitted that documents must be specified clearly, as Master Sanderson stated in the second case, *Jovista Pty Ltd v. FAI General Insurance Co Ltd*⁷,

*"... if an application to the court is required, the chamber summons ought specify with a high degree of precision what documents are sought by way of discovery."*⁸

16. In this matter, the limit to disclosure for the applicant is the Variation Order, as it affects them directly. Any other document between the parties of the 2018 Concession Agreement cannot be disclosed to the applicant due to the privity of contract. These documents are part of the procedure between the Grantor and the Concessionaire which the applicant has no part in.

17. I note that the applicant filed their application on 10 October 2024. In the application they stated that disclosure of the Variation Order was necessary to prove the lawfulness of it in regards to Article 24 of the Concession Agreement, the provisions of the MSR Act, the Government Contracts and Tenders Act⁹, and the finding of the

³ [2001] FCA 271.

⁴ Federal Court Rules of Australia.

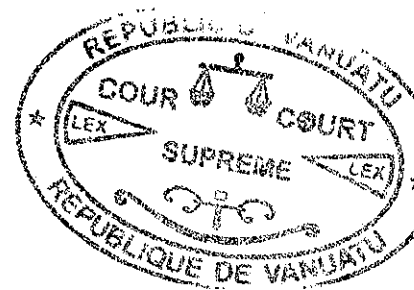
⁵ Ibid, at paragraph 19.

⁶ Ibid, at paragraph 26.

⁷ [1999] WASC 44

⁸ Ibid, at paragraph 7.

⁹ Act No. 10 of 1998 (CAP 245).



Court of Appeal at paragraphs 70 – 81.¹⁰ This shows that the applicant has had some idea of a cause of action. The disclosure of the Variation Order on 6 December 2024 should enable the applicant to establish the elements of the cause of action. Without the written memorandum and other documents, the applicant can file a claim on the basis that the Variation Order is unlawful.¹¹

18. The Court must now consider the likely disadvantages of disclosure. The disadvantage to the applicant is that,

- i. Without knowing the reasons as to why the variations were made the Applicant is uncertain if the Variation Order was done lawfully. This point has been addressed.
- ii. The proceedings will not be dealt with fairly. It was discussed above that the Rule 8.13 is designed to assist the applicant to establish whether the elements of a cause of action is made out. The disclosure of the Variation Order will assist the applicant in the proceedings.

19. For the respondent, the likely disadvantages of the disclosure of a written memorandum would be that the applicant is not a party to the 2018 Concession Agreement, together with the confidentiality of the documents. The confidentiality point was not raised by the Respondent, nor did they raise any other points in their submission.

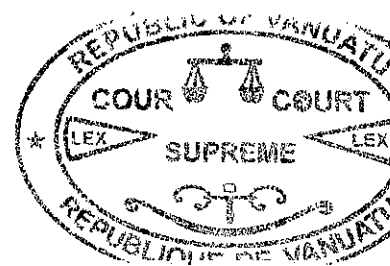
20. In considering whether the respondent has sufficient financial resources to disclose, the court is satisfied that the Respondent is a well-established company that has been operating since 2018 as the Concessionaire and has the financial resources to disclose.

21. The Court must not order disclosure unless it is satisfied with the following:

- a) The person in possession and control of the document has had an opportunity to be heard; While the court is satisfied that the respondent has had an opportunity to be heard, the Vanuatu Government is the other party to the 2018 Concession Agreement, and is also therefore in possession and control of the written memorandum. It has not had an opportunity to be heard.
- b) The applicant and the person in possession and control of the document are likely to be parties to the proceeding; The court is satisfied that the applicant and the respondent are likely to be parties to the proceedings. It is uncertain that the Vanuatu Government, who is the other party to the 2018 Concession Agreement, will be a party to the proceeding.
- c) The documents are relevant to an issue that is likely to arise in the proceedings; The written memorandum is part of the 2018 Concession Agreement between the respondent and the Vanuatu Government. As the Vanuatu Government is not a party in this proceeding, the Variation Order, which is the result of the written memorandum, is sufficient for the applicant, if their claim is only against the respondent.

¹⁰ Application for Disclosure of Documents, at Paragraph 11.

¹¹ Paragraphs 21 – 26 of Application for Disclosure.




d) Disclosure is necessary to decide the proceedings fairly or to save costs;
The court is not satisfied that disclosure of the written memorandum is necessary. Without the written memorandum and other documents, the applicant sought to have disclosed, they can still establish the elements of a cause of action.

22. For these reasons, the court declines the application for disclosure of the written memorandum and other documents such as correspondences, diary notes and memorandums regarding the Variation Order.

23. In addition, in the event that the applicant wants to file a claim, they must do so within 30 days of this decision.

Dated in Port Vila on the 25th day of February, 2025

BY THE COURT


Justice B. Kanas Joshua

