IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 21/78 CoA/CIVA

BETWEEN: FR8 LOGISTICS LIMITED
Appellant

AND: IFIRA PORT DEVELOPMENT AND SERVICES COMPANY LIMITED
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Richard White*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andreé Wiltens***
Counsel:	*Mr Fleming for the Appellant* *Mr Hurley for the Respondent*
Date of Hearing:	*10 May 2021*
Date of Judgment:	*17 May 2021*

JUDGMENT

Introduction

1. The appellant FR8 Logistics Limited (FR8) is a freight and logistics company, based in Vanuatu. The respondent, Ifira Port Developments and Services Company Limited (IPDS), is the Concessionaire of the Lapetasi multi-purpose wharf project under a Concession Agreement dated 15 June 2018 (the 2018 Concession Agreement). Under 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 50 years from 15 June 2018.

2. In its amended statement of claim in the Supreme Court, FR8 alleged a number of breaches of contract and the "tort of business interference", or as it was called later in the judgment "acting by unlawful means". Before Justice Trief, FR8's claims based on contract or unjust enrichment, together with its claim based on an alleged contract of May 2019, failed. So did a claim based on an allegation that IPDS had "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-containerised cargo) on Efate", based on an earlier 2007 Concession Agreement (the 2007 Concession Agreement). However, the Judge held that IPDS was liable to FR8 for acting by unlawful means in relation to the 2018 Concession Agreement. The quantum of damages for that tort was to be determined at a later hearing.

3. The appellant has challenged the decision where it was not upheld in relation to the causes of action in the amended statement of claim. The respondent has cross-appealed in relation to the cause of action on which it was held to be liable, relating to the tort of acting by unlawful means arising from the 2018 Concession Agreement.

4. We will now go through the various grounds of appeal and the cross appeal.

Ground 1 – tort of unlawful interference

Preliminary issue –interpretation of the Concession Agreements

5. Before we can consider the tort causes of action, which are based on IPDS going beyond its powers in the 2007 and 2018 Concession Agreements, it is necessary to interpret those Agreements.

6. It is to be noted that the 2007 Concession Agreement was with Ifira Wharf & Stevedoring (1994) Limited, described as the "Incumbent Stevedore", and IPDS as the "successor stevedore". The evidence indicated that IWS was for all purposes the concessionaire until the 2018 Concession Agreement came into force on 15 June 2018. This was the Judge's finding. IWS is not a party to these proceedings.

7. The appellant's claim is based on an interpretation of those Agreements which limits the concession granted to activities within the "Port Facility". IPDS interprets the Concession Agreements as going beyond transport in the Port, giving it the exclusive right to transport containers and goods unloaded within the wharf facility throughout the island of Efate. This means that FR8 has not been able to and is not permitted to transport those containers and goods for consignees who have sought their services, and must accept that only IPDS can do that. Mr Kernot, the principal of FR8, deposed that when he and his staff go to the wharf to pick up such goods, they are told that they cannot collect them.

The 2007 Agreement

8. The Judge appeared to primarily base her interpretation of the 2007 Concession Agreement on Article 1(6) of that agreement:

> 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.*

9. She also referred to Article 4 which provided:

> 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.*

10. She considered that Article 4 imposed a duty on IPDS, and its predecessor IWS, to transport cargo at Port Vila "irrespective of whether or not that Stevedore handled such cargo".[1] She considered that Article 4 made transportation a duty on IPDS and IWS that they had to carry out. She appears to have concluded that the 2007 Concession agreement gave IWS the exclusive right to transport containers and cargo on the roads of Efate.

11. There are a number of other relevant provisions in the 2007 Concession Agreement. It was noted in the first recital to that Agreement:

> The government and the incumbent Stevedore are desirous of extending their agreement in respect of all Stevedoring, wharfage and transportation of international cargoes *at Port Vila, Vanuatu, and such areas as may from time to time be agreed.*
> [Emphasis added]

12. This recital is consistent with the 2007 Concession Agreement relating to activities within the port area, and any other areas that might be later agreed between the parties, but not the roads around Efate. We note at this stage that there was no evidence of any later agreements as to other areas.

13. The recitals then refer to the problems at the Port Vila wharf and the need to develop that wharf. It is stated in those recitals that the extension of the Agreement is seen as necessary for facilitating the construction of a new port, to make it a leading container terminal operator in the South West Pacific. It is further stated in the recitals that the Agreement is in respect of "Port Vila harbour being all waters between two points in that harbour, and other areas as are mutually agreed". Again there was no evidence of any other areas being mutually agreed under this clause.

14. Furthermore, Article 6 provided:

> *The appropriate Stevedore shall be permitted the use of the port facilities at the Port Vila wharf as required for the carrying out of Stevedore operations as provided for in this contract.*
> *[Emphasis added]*

This is a further indication that the rights only relate to the wharf area, and not to Efate generally.

15. The 2007 Concession Agreement contained requirements as to the working hours to be observed by IWS. This is more naturally consistent with it being a wharf only operation, rather than an

[1] At [99].

operation delivering goods anywhere in Efate. Article 33 contained obligations to deliver refrigerated cargo and ships' tackle within a certain timeframe and in a certain way. Deliveries were referred to as being within two hours to the consignee. This seems to be more consistent with delivery to the consignee at the boundary of the port, rather than anywhere in Efate, where there could be a considerable amount of driving time.

16. Article 40(1) of the 2007 Concession Agreement refers to Annex 3 containing stevedoring charges for cargo. Article 41(1) refers to Schedule 4 relating to storage charges for cargo "which have not been removed by the consignee within the specified time limits laid down by the government". This concept of removal of the cargo by the consignee is entirely inconsistent with IWS and IPDS having an exclusive right to deliver the goods to consignees throughout Efate. It is consistent with them having the right through their agents to receive their goods at the Port entrance or thereabouts.

17. Annex 3 of the 2007 Concession Agreement sets out the scale of charges. The charges all appear to relate to the removal of cargo from, and the putting of cargo on, a ship rather than road delivery around Efate. There are no charges specified for such out-of-port deliveries. This indicates that such deliveries are not contemplated in the Agreement.

18. There is reference in relation to full containers being stowed in the port area "from where it must be taken and charged by the consignee". There was reference to special cases of refrigerated cargo being either "available to the consignee within two hours after discharge, or be put into application that will guarantee the state of the product". This language is all consistent with availability being provided to the consignee at the gate, and not anywhere in Efate.

19. All these clauses, with the exception of some ambiguity in relation to Article 1(6), indicate that the duties imposed by the 2007 Concession Agreement on IWS and IPDS relate to their activities in the Port Vila wharf area. The Port Vila wharf area is actually shown in a plan annexed to the Agreement.

20. Not only do the words indicate that this is the correct interpretation, so do the background circumstances. It seems highly improbable that the government, intent on establishing a greatly improved wharf facility in Port Vila, would have given the concessionaires an extra monopoly over road transport of containers and cargo throughout the island of Efate and all its roads. There would seem to be no logical reason why this would be done, and it would mean that there would be no competition in relation to this area of road transport, a development that would not be in the public interest.

21. Seen in the context of these recitals, Article 1(6) of the 2007 Concession Agreement set out at paragraph [6] of this judgment, can be seen as having quite a narrow meaning contrary to the view of the learned Judge. It gives IWS and IPDS duties to transport all cargo from the wharf to the respective customer and receive the delivery of empty containers from those customers to the wharf, the transportation ceasing at the port boundary. When it was stated at Article 1(6) that the duty was to transport the cargo "from the wharf" this must be interpreted to mean from the wharf to the port boundary, rather than an exclusive right to deliver anywhere in the island of Efate. Similarly, Article 4, relied on by the Judge, can be seen as applying only to Port Vila and the wharves. Indeed, that is what it says.

22. Therefore, we disagree with the learned Trial Judge. In our view, IWS and IPDS had no right or duty under the 2007 Concession Agreement not to allow cargo to be collected and transported by third parties from the port area as defined in the plan attached to the Agreement.

The 2018 Concession Agreement

23. This Agreement contained many similar provisions to those in the 2007 Concession Agreement. At the outset in the recitals it refers back to the 2007 Concession Agreement. It provides at recital A:

> *Pursuant to a Concession Agreement entered into between the grantor and the concessionaire dated 24 November 2007, the grantor grants a concession to the concessionaire to develop a "main port" commercial shipping terminal and operate the Port Vila wharf".*
> *[Emphasis added]*

24. Importantly, in Article 1.1 in the interpretation section, the Port Facility is defined as being the international wharf at Port Vila and comprising the container and general cargo port and those areas closely related to that port. The definition of "services" is as follows:

> *"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.*
> *[Emphasis added]*

25. This is very clear. It is only the services carried out at the port facility that are services when referred to in the Agreement.

26. Under the concession rights and obligations at paragraph 2.1 it is provided that the concessionaire shall:

> (b) manage operate and maintain the port facility (and perform the services during the operation period).

27. There was no reference to transporting goods throughout Efate.

28. At article 2.2.1, it is provided that the concessionaire gets "exclusivity for the delivery of the services to the users "in accordance with article 4 below". Article 4 .1 provides that there shall be no container and general cargo handling operations in the main wharf port except for passenger and tourist ferries only.

29. Counsel for the Respondent, Mr Hurley, relied on clause 8.3 which records that the concessionaire needs access to the port facility in connecting to the Vanuatu trunk road network, this being necessary for the free flow of vehicular traffic to and from the port facility. This does indicate some

rights in relation to roads beyond the port facility itself, but this is only a very limited right relating to roads within Port Vila harbour. This is entirely different from a reference to all the roads in Efate, and might be expected as those roads are inextricably linked to the Port.

30. The cargo handling services are referred to in Article 12 of the 2018 Concession Agreement. There is no indication that those services extend to delivering goods and containers on all the roads of Efate. The right to cleaning and transporting containers is stated at clause 12.2.3 to be "in respect of the port facility".

31. In Article 20.1.1 there is reference to the levy and the recovery of the concessionaire tariff. That is to be in accordance with the provisions of Appendix 4. It is stated that the concessionaire tariff "is subject to tariff regulations set by the regulator, in accordance with the MSR Act". The MSR Act is defined in the Agreement as being the Maritime Sector Regulatory Act No 26 of 2016. This Act was not in force at the time of the 2007 Concession Agreement. Again, there is a map showing the port area as being the relevant area at the end of the Agreement. Similarly to the 2007 Concession Agreement, there is no provision for tariffs for delivery on the roads of Efate.

32. In our view the words of this Agreement give rise to an inevitable interpretation that it is not contemplated that IPDS (at this stage under this 2018 Concession Agreement, the sole concessionaire) would have the sole right to carry freight in Efate. To the contrary, the words indicate that its rights are limited to the port facility.

33. This view is reinforced by the background fact that at the time this Agreement was entered into, it was specifically acknowledged that the provisions of the Maritime Sector Regulatory Act No. 26 applied to ports. That Act contained express anti-monopoly pro-competition provisions. These included s 33 relating to the regulation of ports. Section 33 (f)(g) and (h) provided that among other things the objectives were to:

> *(f) protect the rights of consumers and port users, and to minimise adverse effects of monopolistic practices, and other possible abuses; and*
>
> *(g) promote competition in the delivery of port services; and*
>
> *(h) prevent discriminatory practices relating to pricing or access to port services; ...*

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 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.

35. Thus, we agree with the conclusion reached by the learned Trial Judge, that the 2018 Concession Agreement did not give IPDS the exclusive right to provide transport of containers, and that this right was limited to the boundaries of the port facility. In particular we agree with her statement at paragraph [92](b):

However, I do not see how it could of its own accord reserve the sole right to [provide transport] and to extend that beyond the port facility to the whole island of Efate.

36. The Judge went further and found that IPDS had "acted by unlawful means in preventing FR8 from providing and performing transportation services in connection with the break bulk operation ... on Efate".

37. We now turn to the claim that this interpretation of the Agreements must mean that IPDS has committed the actionable tort of acting by "unlawful means".

Is there a claim in tort?

38. It was pleaded by the appellant that at all material times for a period of six years (or the balance of time before the 'agreement') the defendant had wrongly committed the tort of business interference by "abusing a position of power, and in interfering with the business activities of the claimant...". Certain particulars were given including not allowing the claimant onto the wharf to uplift transport cleared goods, refusing the appellant the right to deliver mixed cargo containers, and forcing the claimant's clients to store cargo at the LICT.

39. We have analysed the contents of the Concession Agreements and found that the 2007 and 2018 Concession Agreements gave IWS and IPDS control of all aspects of stevedoring in the port area as defined, but not as they claim throughout Efate. IWS and IPDS have relied on this exclusivity. They have reacted to requests to uplift containers and freight as if the exclusive right they have to provide transportation in the port area extends beyond the port area.

40. FR8 says that in exercising this exclusivity, the tort was committed. It is necessary to analyse the elements of the tort, to see if they are established by the facts as we have found them.

41. The area of economic torts has long been a matter of academic debate, and different approaches have been taken. In New Zealand the leading text divides the tort into three. The first is inducing or procuring a breach of contract, the second is causing loss by unlawful means, and the third is conspiracy.[2] In Australia, it is suggested that there are three recognised individual economic torts of procuring a breach of contract, intimidation, and conspiracy. It is said they can be brought by a plaintiff suffering intentionally inflicted economic loss at the hands of a defendant.[3] This tort has been accepted in various formulations in England, Canada and New Zealand.[4] The leading case, relied on in these texts and recent authorities, is the 2007 House of Lords decision of *OBG Limited v Allan.*[5]

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[2] *Todd on Torts* 8th ed, at Ch 13.
[3] *The Law of Torts in Australia* 5th Ed Barker, Cane, Lunney & Trindade, at [6.1].
[4] At [6.10.1].
[5] [2007] UK HL 21.

42. In that case the tort of inducing breach of contract was recognised.[6] That tort does not apply on these facts because, as the leading decision of *Lumley v Guy*[7] indicates, it involves a party maliciously procuring a third party to breach a contract. There has been no pleading in this case of such an action, and no evidence of it. No such third party was referred to in the Amended Statement of Claim, or identified in the evidence.

43. A different tort, the tort of causing loss by unlawful means was also recognised in *OBG Limited v Allan*, referring back to the case of *Allan v Flood*[8] and those cases that followed it. There was an analysis of the confusion that has arisen as to the boundaries of the torts. Lord Hoffman in the majority judgment, which we follow, discussed the tort under the heading of inducing breach of contract.[9] He noted that "...the most important question concerning the tort is what should count as unlawful means".[10]

44. Of the three formulations of the tort discussed above, it would appear that the cause of action relied on is the second of the three. The first, inducing or procuring a breach of contract, does not arise, because as stated above, no specific contracts breached as a consequence of unlawful conduct, were proven. In relation to the third, no conspiracy is alleged. It is the second, "causing loss by unlawful means", which we will assume was pleaded, and with which we are concerned.

45. As mentioned, the tort of inducing breach of contract was recognised in *OBG Limited v Allan.*[11] We agree with the analysis in *The Law of Torts in Australia*[12] where the authors observe that Lord Hoffman over a number of paragraphs identified three main components:

    1. The defendant must have applied unlawful means to a third party – there must be "wrongful interference with the actions of a third party in which the plaintiff has an economic interest."

    2. The defendant must have intended thereby to cause loss to the claimant.

    3. The claimant must have suffered economic loss as a consequence of the defendant's actions.

46. In relation to "unlawful means", Lord Hoffman in his judgment in *OBG* limited the concept to acts amounting to civil wrongs which are independently actionable by the third party, or threats of such acts[13]. This can include torts and breaches of contract as well as civil wrongs created by statute. He considered that it covered all acts that a defendant was not permitted to do.

47. It is on this point that the claim of tort in relation to the conduct of IPDS fails. The element of a civil wrong committed against a third party is missing in this case. No detailed evidence was given concerning any of the third-party customers of FR8. The case was pleaded in the amended

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[6] At [3]-[5]
[7] (1853) 2 E & B 216.
[8] [1898] AC 1.
[9] At [39].
[10] At [45].
[11] [2007] UKHL 21.
[12] *The Law of Torts in Australia* 5th Ed Barker, Cane, Lunney & Trindade, at [6.10.1].
[13] At [47] and [49].

statement of claim solely on the basis that the wrong was to the claimant FR8, and not to any third party.

48. On the facts on this point, Mr Fleming for FR8 argued that the unnamed consignees were the relevant third parties. Their economic expectations were disappointed. However, we can see no basis upon which those third-party consignees would have had any claim against IPDS or indeed IWS. They were not parties to the Concession Agreements and they were not parties to any contracts with IPDS. There is nothing to indicate they had any relationship or contact at all with IPDS. They were going to have to pay for the stevedoring and delivery in any event. There is no evidence that they were detrimentally affected by having to pay IPDS or IWS rather than FR8.

49. Therefore, a crucial element of the tort, a third party which is subjected to unlawful interference, is missing. There is no evidence that any third party was treated unlawfully by IWS or IPDS. We are not prepared to find, as Mr Fleming urged us to, that the tort is proven by showing that IPDS erroneously interpreted the 2007 and 2018 Concession Agreements in refusing to allow FR8 to uplift containers and cargo for delivery to consignees in Efate. FR8 was not a party to those agreements, and had no claim for breach of contract. We do not think that this stance towards FR8 is enough to prove the tort pleaded.

50. We also have doubts as to whether IPDS had a sufficient intention to cause loss to FR8. Such an intention must be proven.[14] Plainly, as will become evident later in this judgment, IWS worked with FR8 from 2007, and before. IWS and its successor IPDS were driven by a desire to maximise the concession as they thought it could be interpreted, and extend their profit making activities to the road transport of containers and cargo throughout Efate. This evinced itself in a refusal to make available containers and cargo to FR8 staff who sought to uplift them for delivery. There is no evidence of a direct or even indirect intention to cause harm to FR8. However, we do not need to determine the case on this basis, and do not do so.

51. We record that Mr Fleming invited us to follow the minority judgment in *OBG Limited v Allan* of Lord Nicholls, where a more expansive analysis of the range of conduct that could be considered to be unlawful means was adopted.[15] We decline to do so. The development of anti-competition laws is best left to Parliament. As Lord Hoffman observed in *OBG Limited v Allan,* the common law has traditionally been reluctant to become involved in devising rules of fair competition[16]. We do not consider that this case provides the appropriate forum for such an exercise.

52. Thus, despite our finding that IPDS misconstrued the Concession Agreements, we do not find the tort of cause of loss or interference by unlawful means to be established, even putting the FR8 case at its highest.

Ground 2 – the Services Contract Claim

The claim for disbursements

[14] See *OBG Limited v Allan* at [62].
[15] At [160].
[16] At [56].

53. The second ground of appeal arose from the long history of business dealings between the two parties. FR8 is a leading freight company. IPDS is the Concessionaire for the port. They are constantly interacting. It is alleged that they both use the ASYCUDA system in which IPDS sends FR8 a bill of lading setting out the airline details, weight and goods description, and FR8 then puts them into a portfolio for customers. This is simultaneously given to both FR8 and IPDS and the Custom. VAT and taxes are automatically calculated based on the imputed date from IPDS given to FR8.

54. In particular FR8 sought the payment of monies relating to invoices for services that it had particularised. The total amount claimed was VT$ 5,079,139, (including interest at 4% per month compounding).

55. IPDS admitted that from time to time it retained FR8 to perform services in respect of the importation of goods by air, limited to consignments by the freight company DHL. It denied that the services contract applied to the importation of goods by sea or airfreight other than by DHL.

56. Mr Kernot who was accepted by the Judge as a witness of truth, set out some details of this claim for services. However, the various claims go right back in time, and were plainly a reconstruction prepared for the purposes of these proceedings. The claims appear to be for various disbursements incurred in the carrying out of services.

57. The Judge found that despite some concessions made by an accountant for IPDS, Ms J Ishmael, there were 22 computer generated tax invoices. She held that IPDS was entitled to take the position that it had to be shown the original or copy documentation relevant to the claims. FR8 needed to provide evidence to prove its claims on the balance of probabilities. She found that FR8 had not met that test.

58. We can see no flaw in the Judge's assessment. What FR8 was trying to do in this part of the claim was most unusual. It was going right back in history and, it would seem realising a long-term grievance, making a claim for various disbursements that it felt it had not been paid for. However, each such claim required proof. That proof would have involved a proof of the initial contract engagement to perform the service, an original account for the disbursement, and a statement as to what happened when payment was sought.

59. Computer generated invoices summarising disbursements do not come down to this level of detail. The only witness to discuss these was FR8's principal Mr Kernot, who is not an accountant. Despite some generous concessions by Ms Ishmael an accountant working for IPDS in cross-examination, in our view it has not been shown that the Judge's assessment that she needed to see more originals before she could find the claims proved, was wrong.

60. This aspect of the appeal therefore does not succeed. Given this finding we do not have to consider the interest claim.

All claims in any event against IWS?

61. Given our dismissal of this aspect of the appeal it is not necessary to consider whether any debt for the services disbursements was owed by IWS. However, it was dealt with by the Judge and therefore we deal with it briefly.

62. The 2007 Concession Agreement to which we referred earlier, was between both the company related to IPDS, Ifira Wharf and Stevedoring (1994) Limited (IWS) and IPDS. IPDS was to be the successor stevedore. The incumbent stevedore was IWS. The Judge found that any service debts were owed by IWS and not by IPDS. She noted there had been no provision in the 2018 Concession Agreement whereby IPDS would be liable for IWS' debts. Most of the earlier invoices appear to have been directed to IWS. IWS had de facto control up to June 2018. We certainly have not been satisfied that IPDS would have had any contractual liability for these FR8 claims. This aspect of the appeal could not succeed, insofar as it related to the period up to the 2018 Concession Agreement coming into force.

63. Mr Fleming pointed to certain concessions by Ms Ishmael that the debt or liabilities were those of IPDS.

64. We accept that IPDS had been a party to the original 2007 Concession Agreement. However, we are unable to disagree with the Judge that on an overall assessment the dealings were with IWS.

Ground 3 - Claim for invoices

65. This is an appeal point that only arises if the tort claim succeeds. Accordingly, we put it to one side. We note that it is submitted that in any event IWS, which is not a party, would have been the relevant party.

Ground 4 - Wharfage fee and toll tax

66. FR8 was required by IPDS to pay certain "wharfage fees" and "toll taxes. It seeks repayment from IPDS on the basis that it did not have to pay them. Whether these are called taxes or fees, they are amounts paid to a third party.

67. Again, these payments go back considerably in time. There is a scarcity of documentation and no particular pattern to it.

68. It was not alleged that IPDS had misappropriated the fee or tax. FR8 failed to establish any cause of action in relation to these payments. We respectfully agree with the Judge that refunds of the wharfage fees or toll taxes should be claimed from the Government and not from IPDS or IWS.

69. The onus was on FR8 to prove that these payments were wrongly made, or that there was some sort of claim for money had and received. We do not consider that this claim was made out in any of these ways, and we support the Judge's finding.

Ground 5 - Claim based on the May 2019 Agreement

70. In 2019 there had long been issues between Mr Kernot of FR8 and IPDS. Mr Kernot claimed that IPDS were running an illegitimate monopoly on Stevedoring services. Matters appear to have come somewhat to a head in May 2019 and Mr Kernot met with his counterpart in IPDS, Mr Mitchell, together with their lawyers, on 22 May 2019.

71. Resulting from this meeting IPDS sent a letter dated 23 May 2019 to FR8 which read:

> *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 advice in writing you concur with this agreement.*
> *[emphasis added]*

72. By an email of 26 May 2019 Mr Kernot accepted the agreement stating:

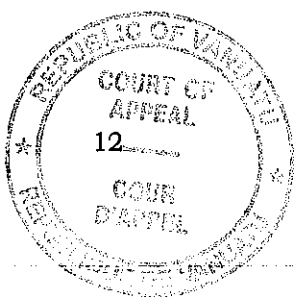
> *Thanks Russell, while we may disagree for what the Concession allows or not as exclusive rights to IPDS, I am thankful for this change and we will do our own transport when it suits us as well as utilize your own services when that makes sense too.*

73. On 28 May 2019 Mr Kernot emailed Mr Mitchell a handwritten note on the letter that stated:

> *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 client needs.*

74. The Judge accepted that non-containerised cargo meant:

- 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.



75. We construe this exchange as creating an agreement that FR8 could provide its own transport and staff to pick up non-containerised cargo consigned to FR8 as agent for a client from the LICT CFS, and thereafter deliver that 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-containerised 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-containerised 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 up non-containerised 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.

80. The damages for breach of this contract must be remitted back to the learned Trial Judge for assessment. The claim for damages may be complicated by Mr Kernot's assertion that the 23 May letter also permitted FR8 to unpack cargo on the wharf, which it plainly did not. However, he was entitled to pick up non-containerised cargo.

81. For the avoidance of doubt, we record that there was certainly no limitation implied or otherwise in the letter that FR8 could pick up containers or cargo only for the outer islands. It was entitled to pick up the non-containerised goods and deliver them to anywhere outside of the Port.

Ground 6 - Claim for refusing to deliver cargo to the appellant's warehouse

82. The learned Judge found that the respondent had not acted unlawfully by refusing to deliver the appellant's assigned cargo for its clients to the appellant's custom bonded warehouse. We received detailed submissions on this point from Mr Fleming. However, it seems to us to arise only if cause of action is established for the tort of business interference.

83. Given there was no underlying cause of action established, then this damages claim does not arise.

Ground 7 – Refund for alleged overcharges

84. The difficulty with this claim is the same as that which arises in relation to Ground 2. While there were some general concessions by IPDS's witnesses under cross examination, in the end, as the Judge found, these claims were not proven. Original documents were not provided, the documentation being created long after the event. Computerised general records are not enough. The concessions that were obtained were late in the day and under cross examination, and the Judge was not bound to accept them.

85. In any event it would seem that the contracting party at the time was IWS.

Conclusion

86. Therefore, we dismiss the appeal save for Ground 5 which we allow. We allow the cross appeal. However, we have found that the Judge was correct in her interpretation of the 2018 Concession Agreement. Both that Agreement and the 2007 Concession Agreement did not give IWS or IPDS the exclusive right to transport cargo and containers around the island of Efate. IWS and IPDS had misconstrued it.

87. The respondent has been largely successful on the appeal and successful on its cross appeal, and is entitled to costs. Costs will be awarded on the standard rate. However that rate is reduced by one third, to reflect our acceptance of aspects of the appellant's case, as we have set out.

Summary

88. The appeal is dismissed save for the appeal based on Ground 5 which is allowed.

89. The cross appeal is allowed.

90. The Ground 5 cause of action relating to the May 2019 Agreement is remitted back to the Supreme Court for the assessment of damages.

91. The respondent is to be paid costs in this Court by the appellant at the standard rate, reduced by one third.

DATED at Port Vila, Vanuatu, this 17th day of May, 2021

BY THE COURT

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Hon. Chief Justice, V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU