

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

Civil
Case No. 19/2960 SC/CIVL

BETWEEN: Nicon Limited
Claimant

AND: Kenneth Short
Defendant

Date of Trial: 8 April 2021
Before: Justice V.M. Trief
In Attendance: Claimant – Mr M. Hurley & Mrs C. Hamer
Defendant – Mr J. Malcolm
Date of Decision: 8 July 2021

JUDGMENT

A. Introduction

1. The Claimant Nicon Limited ('Nicon') seeks payment pursuant to an oral contract with the Defendant Kenneth Short for shipyard services provided to Mr Short's vessel the "Trinity Castle" between 20 December 2017 and 31 March 2018.

B. Facts

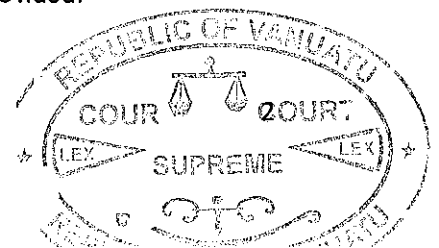
2. Nicon operates a shipyard in Luganville, Santo.
3. Mr Short is the owner of the 55 foot steel motor cruiser vessel "Trinity Castle" (the 'Vessel').
4. The Vessel arrived at Nicon's shipyard in August 2017 under tow by another vessel because it had no method of propulsion as its propeller shaft was broken. It was slipped from 18-31 August 2017 (14 days) during which the broken shaft was removed, and then it was returned to the water.
5. Mr Short used a contractor in Australia to manufacture a new propeller shaft. The new shaft arrived in-country 2 weeks after the Vessel was returned to the water.



6. The Vessel was slipped a second time, from 4-15 December 2017 (12 days), to install the new shaft and then returned to the water.
7. The new shaft did not fit as Mr Short had measured it using imperial measurement but it was made using metric measurement therefore there was a difference. Nikon staff carried out extensive and time consuming modification which has not been charged to Mr Short.
8. Over the period 20 December 2017 to 31 March 2018, at Mr Short's request, Nikon supplied slipping, maintenance services and berthage for the Vessel.
9. Nikon issued invoices dated 20 December 2017 and 6 September 2019 to Mr Short totalling VT11,807,763.
10. There was one other invoice however it was not put into evidence and is not sued upon.
11. Nikon's invoices are generally payable within 7 days and set out the terms of trade on each invoice as follows:
 - 3% interest per month accruing on overdue amounts;
 - If an account exceeds 3 million vatu, a maritime lien will be placed on your vessel; and
 - Any costs associated with establishing liens, replacement plans, recovery of the vessel in the event of non-payment, debit recovery costs, berthage and legal costs will be at the client's costs and will be deducted from the sale of your vessel.
12. Mr Short made cash payments to Nikon totalling VT1,000,000.
13. Mr Short has not made another payment since.
14. Both parties have made offers to settle. Mr Short continues to offer an additional VT1,500,000 in full and final settlement.

C. Pleadings and Issues

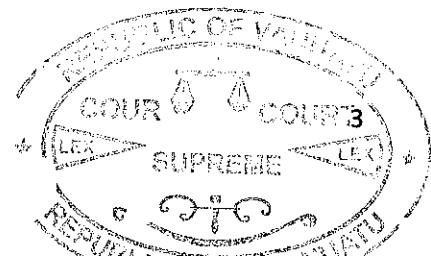
15. Nikon is suing for the balance of payment as invoiced for slipping and maintenance services and berthage provided from 20 December 2017 to 31 March 2018 or in the alternative, payment under quantum meruit less the VT1,000,000 already paid.
16. Mr Short agrees that the parties had an oral contract for use/services in return for payment. In his filed Defence, he denied liability over and above the VT1,000,000 already paid, asserting that the second slipping in December 2017 was done at Nikon's request for which he denied liability.
17. As to the quantum meruit claim, the Defence case is that there is no evidence before the Court on which to assess the reasonable value of the services provided.



18. At trial, Mr Malcolm stated that there was no dispute as to the first 3 items on the invoice dated 20 December 2017 (totalling VT1,107,000) in relation to the first slipping, namely:

Description	Quantity	Unit Price	Tax	Amount VUV
Haul out	18.00	15,000.00	12.5%	270,000.00
Haul In	18.00	15,000.00	12.5%	270,000.00
Slipping (Per Week)	18.00	31,500	12.5%	567,000.00
TOTAL				VT1,107,000

19. Given this concession and the VT1,000,000 already paid, it follows that it is accepted that Mr Short owes Nikon VT107,000 as invoiced in relation to the first slipping.
20. Nikon's charges for hauling in, hauling out and slipping of the Vessel were based on a vessel length of 18 metres. Mr Short answered in cross-examination that the Vessel is 18.75 metres long – he would not argue with Mr Hurley as to 0.75 metres!
21. Mr Malcolm also accepted in closing submissions that Mr Short is liable for the NZD\$102.56 invoice for freighting the broken shaft part from New Zealand to Australia (Nigel Giltrap, Nikon's Managing Director took it to New Zealand) for the manufacture of the new shaft. This was quantified in the December 2017 invoice at VT10,000. This is another VT10,000 owed to Nikon.
22. In closing submissions, Mr Malcolm stated that Mr Short accepts that money, time and chattels were provided by Nikon; his issue is as to quantum.
23. The matters in dispute between the parties include the price, whether or not the second slipping would be free, interest of 3% per month (compounding) and liability for VT250,000 legal fees.
24. The issues arising are:
- i) What did the parties agree as to the price? **[Issue 1]**
 - ii) What did the parties agree as to the second slipping and berthage charges? **[Issue 2]**
 - iii) What did the parties agree as to maintenance services and materials supplied? **[Issue 3]**
 - iv) Did the parties agree to the terms of trade recorded on the invoices prior to the issuance of the invoices? **[Issue 4]**
 - v) In the event that the Court disallows any part of Nikon's fees and/or interest the subject of its invoices, is Nikon entitled to the reasonable value of the services and materials supplied and if so, in what amount? **[Issue 5]**
25. There was some argument as to whether the shipyard works on the Vessel were carried out under Mr Giltrap or Mr Short's supervision. That is not an issue arising from the pleadings therefore I will not decide it.

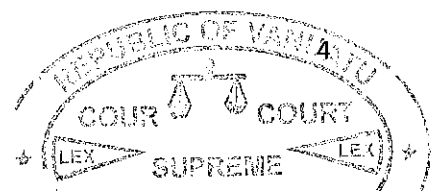


D. Issue 1: What did the parties agree as to the price?

26. Mr Giltrap evidenced that Mr Short was aware of the slipping charges prior to the Vessel being slipped [Mr Giltrap's sworn statement filed on 5 November 2019, "**Exhibit C2**"]. He evidenced that Mr Short was given a price list and copies were readily available from Nicon's office [Mr Giltrap's sworn statement filed on 1 October 2020, "**Exhibit C4**"]. He deposed that it is Nicon's normal business practice to charge for services at the completion of providing those so following the Vessel's return to the water on or about 17 December 2017, an invoice was given to Mr Short on 20 December 2017 [**"Exhibit C4"**]. He deposed that Mr Short remained at Nicon's shipyard and continued to use its services until March 2018.
27. Mr Giltrap evidenced that Nicon's invoices to Mr Short for the services supplied were based on the standard fees applied to all vessels at the time under Nicon's 'Price List and Estimated Price' document dated 1 May 2014 [page 2 of Exhibit NG-2 to "**Exhibit C2**"] (the 'price list'). I accept that the costs charged mirror the related items and prices in the price list:

Description	Quantity	Unit Price	Tax	Amount VUV
<i>Haulout – Slipping of Vessel – 15000 vt per meter</i>	20.00	15,000.00	12.5%	0,000.00
<i>Launching – Slipping of Vessel – 15000 vt per meter</i>	20.00	15,000.00	12.5%	300,000.00
<i>Daily Slipping Rate (1 @ 4500vt per meter / per day)</i>	20.00	5,250	12.5%	105,000.00

28. In cross-examination, Mr Giltrap stated that he had not personally given the price list to Mr Short. He said that Mr Short was at the slipway a few months and commented on the prices. Mr Giltrap stated that the invoiced prices are the same as in the price list shown to Mr Short in the beginning. He repeated that Mr Short's was always a cash job. However, he took off without paying cash so his account became a credit account that attracted interest.
29. On the other hand, Mr Short evidenced that he paid VT1,000,000 requested in advance and as the total estimate of the charges. He stated that when he started discussion with Mr Giltrap, Mr Giltrap demanded VT1,000,000 up front for haul out – to take on the work as he had planned to bring up his own vessel. He deposed that it was for all the work done [Mr Short's sworn statement, "**Exhibit D1**"].
30. Mr Short deposed that his request for rates and charges and a slipping agreement were dismissed by Mr Giltrap as being not applicable as he would charge out as he saw fit otherwise he (Mr Short) could stay in the water and rot [**"Exhibit D1"**].
31. In cross-examination, Mr Short said that he had no recollection of being given a copy of Nicon's price list by a lady working in the Nicon office. Nor did he recall seeing a copy of the price list at Nicon's office which he had been in but only rarely. He stated that he had



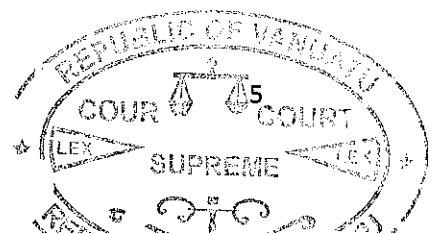
checked and there was no record that the price list was supplied in the ship's notes or in the log.

32. Mr Short said that Mr Giltrap was reluctant to accept the vessel at Nikon's premises. He said that by way of an "incentive" he paid the sum of VT1,000,000. He accepted in cross-examination that that sum would not be the final sum he would need to pay to Nikon for the services provided to the Vessel.
33. I accept Mr Hurley's submission that it is highly unlikely that Mr Short did not ask about prices; it was a natural enquiry to make. Indeed, Mr Short deposed that his request for rates and charges (and a slipping agreement) was dismissed as being not applicable. He did not recall being given Nikon's price list or seeing it at the Nikon office.
34. However, Nikon has not adduced into evidence any documentation showing that it provided its price list to Mr Short. Nor has it filed a sworn statement from the lady at its office or other person that they gave Mr Short the price list and/or discussed the price list with him.
35. Nikon has failed to prove that the parties agreed what the price would be for the services and materials provided to the Vessel.

E. Issue 2: What did the parties agree as to the second slipping and berthage charges?

36. Mr Giltrap evidenced that when Nikon arranged on or about 16 August 2017 to clear the slip for Mr Short, it did so on the understanding that after completion of the remedial work, the Vessel would be returned to the water until the items ordered by Mr Short arrived in the country ["**Exhibit C4**"].
37. In cross-examination, Mr Giltrap said that there were vessels coming in and out of the slipway. Therefore there was no reason for Mr Short to consider that the Vessel would be given any priority given its unexpected arrival at the shipyard.
38. On the other hand, Mr Short evidenced that ["**Exhibit D1**"]:

9. *... On the haul out the hull was blasted and preparation for painting, an under coat and bond coat was applied and then 2 coats of anti-fouling under Giltrap's direction, this was the requested schedule of works undertaken by him and for which we paid the money.*
10. *The rudder was removed and the prop and broken shaft removed to the workshop to be separated, the hydraulic pump on the gear box were removed and protected. Next the ceramic shaft seal and collar and gear box drive were removed. I measured the shaft and ordered a new one from P&W Brisbane.*
11. *Giltrap approached me with the proposal that he would put me back in the water and pull me up again, with berthing and slip costs at no cost as before. This was so he could bring up his Chinese construction barge for hull survey. Giltrap said it would be for 2/3 weeks and the delay fitted in with the shaft arrival. I was sceptical of him to keep his word to this agreement but there was a threatening tone and manner in his request. The stem tube was plugged and the vessel returned to the water and manhandled to the Second Canal to be tied up outside MV Killian again, the old rusting Vietnamese coastal trader where I was placed on arrival.*



39. Mr Short then set out a descriptive account of what happened when Mr Giltrap moved his large barge around to the slip. It did not fit on the trollies and the barge was too wide for the slip entrance. Mr Giltrap brought down his large excavator and demolished the Eastern concrete retaining wall of the slip leading arm then:

12. ... Regardless 2 weeks later it was time to attempt to put the barge up again. The tide was not right and it ignored our agreement to re-slip my boat. The barge was precariously placed on the trolley. It was off set to port and dangerously overhanging on the stem. The barge was hauled out dangerously overloading the equipment and under Mr Giltrap's direction.

13. The new shaft for my vessel then arrived in Santo. Mr Giltrap proceeded to sand blast and paint the hull. On completing the hull he then started on the upper hull and superstructure and lift boom all contrary to our agreement to re-slip my boat. On completion of the work Giltrap then attempted to relaunch the barge to no avail due to the overloaded trollies and only succeeding in breaking the winch cable. When the cable was repaired, a second attempt was undertaken now using a crawler crane and articulated 6x6 dump truck as tow vehicles. Alas the crawler walked off its tracks and the hydraulics failed. The dump truck's tow hitch was pulled off and the barge was moved sideways now even more precariously. In doing this the rear trolley and 20 mts of rail track was left in a mangled mess.

14. Giltrap now had to jack up the barge, removed the damaged trolley and rail line and replace, the barge was repositioned, and after 2 months the barge was back in the water.

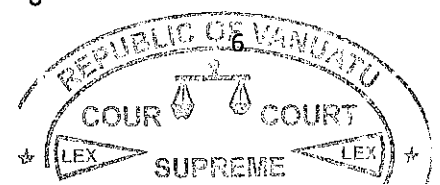
15. For over 2 months I was berthed next to Killian. I was running my generator 24/7 to run the refrigerators, water maker and lights. To get ashore I had to lower myself over the side of MV Killian by rope. When pulled up for the second time, it was revealed that large areas of the new anti-fouling paint work had fallen off. When I questioned Giltrap as to what he was going to do about it, he replied there was no warranty and I would be charged for the repaint...

40. Mr Short then gave evidence about work that Nicon did on the boat, in his view, unprofessionally and/or poorly including the removal of the old cutlass bearing and cleaning the housing for the new one that was sent from Australia, the fitting in of the drive collar and hydraulic pump, and the fitting in of the propeller. After that, the boat was re-floated.

41. Mr Giltrap then came to the boat to present his bill (invoice dated 20 December 2017 for VT5,459,321). Mr Short said that after inspecting it, he refused it as it was false, contained overcharges for materials and services, inflated labour costs and work times, the materials supplied were substandard and labour unskilled. He requested a breakdown in bulk hours against the individual services and he requested credit for the 2 months that he was denied the slip contrary to their agreement. He related that:

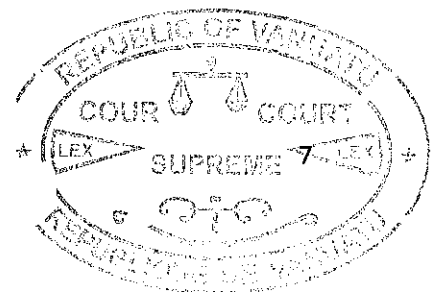
20. ... This was denied. Mr Giltrap's reply was, "what are you worried about the cost. It is an insurance claim, they will pay it." I informed him that it was not an insurance claim and I did not know where he got that info from. I suspect it came from the tug company as my Insurer initially did the work to obtain details of tug services for me. Mr Giltrap returned with a reduced offer. I said I would consider it. He was not very happy, quite threatening both verbally and physically. Mr Giltrap informed me he was leaving to go to New Zealand for Christmas and I should reconsider his offer.

42. Mr Short's evidence is that Mr Giltrap approached me with the proposal that he would put me back in the water and pull me up again, effectively with no charge for the second

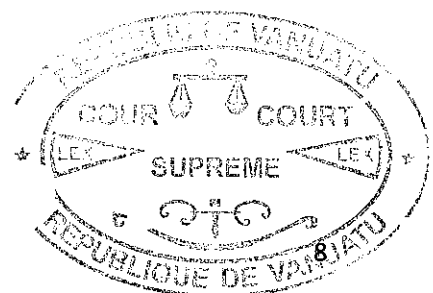


slipping and berthing costs so that he could bring up his Chinese construction barge for hull survey. Further, that Mr Giltrap said it would be for 2/3 weeks and the delay fitted in with the shaft arrival. However, it took 2 weeks to haul the barge up onto the slipway. The shaft then arrived but work continued on the barge for over 2 months. The Vessel finally had its second slipping in December 2017 for the new shaft to be fitted on.

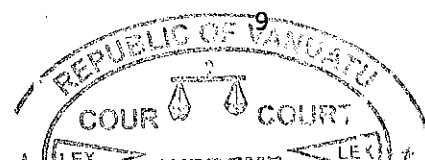
43. In cross-examination, Mr Short stated that he disputed the second "Haul in" item in the December 2017 invoice based on his verbal conversation with Mr Giltrap that because he had another job, he (Mr Short) would not be financially penalised for berthage and slipping. When put to him that Mr Giltrap's evidence was to the contrary, he responded, "We are in dispute on that point."
44. I accept Mr Hurley's submission that it was unrealistic (as Mr Short must be aware) to have expected that the Vessel remain on the slipway whilst nothing could be achieved as the new shaft had not yet arrived. Indeed Nikon had another job lined up – on the large Chinese construction barge.
45. In the circumstances, I consider it is more likely than not that what happened was as follows:
 - 45.1 Nikon already had the Chinese construction barge job lined up which it had to commence therefore Mr Giltrap told Mr Short that he would return the Vessel to the water and pull her up again 2/3 weeks later once the new shaft arrived with no charge for the second slipping and berthing;
 - 45.2 As events unfolded, it took 2 weeks to haul up the barge. The new shaft arrived in-country 2 weeks after the Vessel had been returned to the water however ignoring his and Mr Short's agreement, Mr Giltrap proceeded to pull up the barge on the slipway rather than the Vessel;
 - 45.3 The Vessel could not be slipped the second time until December 2017 which was when the new shaft was installed; and
 - 45.4 Due to Nikon choosing to prioritise its work on the barge, the Vessel (which had no method of propulsion) was necessarily berthed at its premises.
46. The new shaft was expected to arrive in Vanuatu within the next 2-3 weeks therefore I consider it more likely than not that the parties agreed to return the Vessel to the water and pull her up again once the new shaft arrived with no charge for the second slipping and berthage. As it was, the new shaft arrived within 2 weeks as expected.
47. I consider that because the delay before the second slipping of the Vessel was not caused or contributed to by Mr Short, he was entitled to rely on Mr Giltrap's word that the second slipping and berthage would be free. Further, the Vessel had no method of propulsion therefore it had to and was berthed at Nikon's premises throughout.
48. I find therefore that the parties agreed that the second slipping and berthage up to then would be free.



49. In cross-examination, Mr Short stated that he had made a mistake in his sworn statement [**“Exhibit D1”**] that he requested Nikon to perform work on the Vessel up to 31 March 2018 because on 31 March 2018, he was in Australia. He told Mr Hurley that he was speculating that he was already in Port Vila in mid-January 2018 and it could have been later. There is no independent evidence confirming that Mr Short was still at Luganville on 31 March 2018 therefore I accept his evidence that he had already left Luganville before 31 March 2018.
50. There is no explanation from Mr Short as to why he should not pay berthage after 15 December 2017 other than he was in dispute with Mr Giltrap. He admitted in cross-examination that he has paid berthage, for example, at Melcoffee wharf, Luganville and at the Waterfront, Port Vila.
51. Without an actual departure date provided, I consider it fair that Mr Short pay berthage charges for the period 16 December 2017 to 28 February 2018 (44 days).
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52. Nikon’s price list charges berthage at VT13,500 per day. The total owed for 44 days is VT594,000.
- F. Issue 3: What did the parties agree as to maintenance services and materials supplied?
53. It is accepted that money, time and chattels were provided by Nikon; Mr Short’s issue is as to quantum.
54. Mr Short said in cross-examination that he does not dispute the materials described in the December 2017 invoice although he does not necessarily accept that all those materials were used on the Vessel. He did not agree with the quantities and prices invoiced. He deposed [in **“Exhibit D1”**] that from the outset of the dispute he requested time sheets or similar proof of times worked, charges imposed reasonably and professionally but had not received the same. He stated that he still had not seen evidence as to quantum including timesheets despite the same.
55. Arvin Jordan, Nikon’s Shipyard Manager’s sworn statement was tendered by consent [**“Exhibit C1”**]. He evidenced that on 6 April 2021, Tropical Cyclone Harold caused widespread destruction over northern Vanuatu including to the Nikon shipyard. Its office was damaged. The original time sheets and other manually written documents in relation to this matter were held at the office and either destroyed or lost as a result of the roof being lifted during the cyclone. Mr Giltrap said the same in cross-examination.
56. As there is no evidence from Nikon to substantiate the quantities and prices invoiced, it has failed to prove its claim for payment for maintenance services and materials supplied as invoiced.
57. I deal with the claim for quantum meruit below.



- G. Issue 4: Did the parties agree to the terms of trade recorded on the invoices prior to the issuance of the invoices?
58. Nikon's 6 September 2019 invoice was for VT5,348,441 being the total for legal fees VT250,000 and interest at 3% per month totalling VT4,400,819.
59. The compounding interest of 3% per month accruing on overdue accounts is specified as a "Terms of Trade" on Nikon's invoices.
60. Mr Malcolm vigorously cross-examined Mr Giltrap as to whether such term of trade was disclosed to Mr Short at the time of the agreement. Mr Giltrap explained more than once that Mr Short's job was always a cash job (and therefore the issue of 3% monthly interest accruing did not arise) but when he left without paying, it became a credit account.
61. There is no evidence that Mr Short was told of the terms of trade other than by way of the invoices issued to him.
62. It follows that the parties did not agree to the terms of trade recorded on the invoices prior to the issuance of the invoices. This aspect of the Claim fails.
- H. Issue 5: In the event that the Court disallows any part of Nikon's fees and/or interest the subject of its invoices, is Nikon entitled to the reasonable value of the services and materials supplied and if so, in what amount?
63. Mr Short agrees that the parties had an oral contract for use/services in return for payment. He disputes quantum. In cross-examination, Mr Short accepted that the VT1,000,000 that he had paid would not be the final sum he would need to pay to Nikon for the services provided to the Vessel.
64. Accordingly, Nikon is entitled to the reasonable value of the services provided, that is, to payment under the restitutionary remedy of quantum meruit.
65. The remaining items in dispute relate to the materials supplied and labour cost.
66. Mr Hurley submitted that there is no difference in quantum, in that one values the *quantum meruit* by reference to a contract that otherwise would have applied: Goff & Jones: Law of Restitution, 7th Ed., 2007 at [1-036]. In this case, that would be Nikon's price list. However, besides water blasting, none of the materials on the December 2017 invoice or labour cost appear on Nikon's price list.
67. Mrs Hamer submitted that due to the size of the Vessel (18.75 metres long), the quantities claimed in the December 2017 invoice are reasonable.
68. Considering the price list and Mr Short's concessions in cross-examination, I therefore award Nikon the VT72,000 claimed for water blasting and two thirds of the amount claimed for the other materials supplied (commencing at 'Zinc (Materials)' and ending with 'No. 10 Antifouling Copper based Semi Abrasive C/enable Dark blue x 4 Litre' in the December 2017 invoice, totalling VT538,119) of which two thirds is VT355,746.



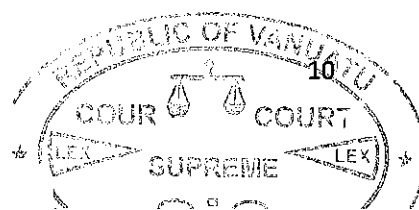
69. As to labour cost, Nikon charged 128 hours at VT3,500 per hour in respect of each of the first and second slipping of the Vessel.
70. Mr Hurley submitted that on each occasion, that represents less than the actual time that the Vessel was on the slipway. Mr Giltrap adduced a photograph into evidence showing three men working on the Vessel on the slipway [page 1 of Exhibit NG-2 to "Exhibit C2"]. Mr Short admitted in cross-examination that up to five men worked on the Vessel from time to time although at other times he said that the number was less. Mr Hurley submitted that based on one man working 8 hours a day at VT3,500 per hour equals VT28,000 per day. Even allowing for the exclusions of weekend, on each occasion that the Vessel was on the slipway would be approximately 11 days. One man working at VT28,000 per day x 11 days equals VT308,000. However, there was more than one man working. He therefore submitted that on any view, the labour costs of 128 hours in the December 2017 invoice were under-charged.
71. Mr Short deposed that Nikon's Ni-Vanuatu workers were unskilled therefore none of them would have been paid VT3,500 an hour.
72. I accept Mr Hurley's submission that excluding weekends, on each occasion that the Vessel was on the slipway would be 11 days, which totals 22 days for both occasions.
73. The current minimum wage is VT220 an hour. One man working 8 hours a day at VT220 per hour equals VT1,760 per day. Allowing for 3 men working at VT1,760 per day for 22 days totals VT116,160. That is the sum I settle on for Nikon's labour cost.

I. Result and Decision

74. Judgment is entered for the Claimant against the Defendant in the sum of VT1,182,906 (the 'judgment sum') which is the total of the following:

Balance for first slipping	VT107,000
Freight cost New Zealand/Australia	VT10,000
Berthage, 16 December 2017-28 February 2018	VT594,000
Materials supplied	VT355,746
Labour cost	VT116,160

75. The Defendant is to pay the Claimant interest on the judgment sum until fully paid, at the Supreme Court rate of 5% per annum.
76. This was a claim for VT10,807,763 plus 36% per annum interest and costs. I accept Mr Malcolm's submission that it was grossly over-pleaded therefore precluding any possibility of settlement. The judgment sum is roughly one tenth of the amount claimed. Further, the judgment sum is less than the amount offered by the Defendant in full and final settlement. Accordingly, the Claimant is to pay the Defendant's costs on an indemnity




basis as agreed or taxed by the Master; the costs are to be off-set against the judgment sum.

J. Enforcement

77. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference at **2.30pm on 6 August 2021** to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt.

78. For that purpose, this judgment must be served on the Defendant.

**DATED at Port Vila this 8th day of July 2021
BY THE COURT**

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Justice Viran Molisa Tref

