

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

Civil
Case No. 21/1991 SC/CIVL

BETWEEN: Filma Bebe & Allan Awa
Claimants

AND: Barnabas Tabi
First Defendant

AND: Apma Financial Investment Centre
Second Defendant

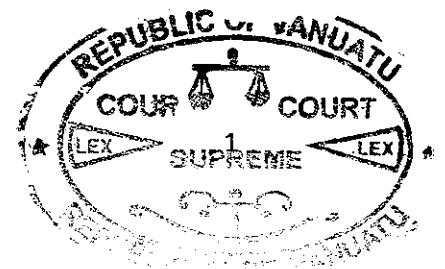
AND: Republic of Vanuatu
Interested Party

Date of Trial: 19 June 2023
Before: Justice V.M. Trief
In Attendance: Claimants – Mr J. Ngwele & Mr J. Mesao
First Defendant – Mr J. Kilu
Second Defendant – Mr A. Godden
Interested Party – Mr J. Wells, then excused from further attendance
Date of Decision: 21 May 2024

JUDGMENT

A. Introduction

1. The Claimants Filma Bebe and Allan Awa are seeking the refund of their expenses to make the maritime vessel LC Blessing (the 'Vessel') seaworthy and damages arising from the alleged breach of a charter agreement. The Claim is disputed.
2. No orders are sought against the Interested Party the State, and it will abide the Order of the Court. I excused State counsel.



3. The parties filed closing submissions. This is the judgment.

B. Background

4. The Claimants Mr Bebe and Mr Awa are Ni-Vanuatu citizens.

5. The First Defendant Barnabas Tabi was at one time the sole Director of the Second Defendant the APMA Financial Investment Centre ('AFIC').

6. AFIC is a registered co-operative which was previously managed by Mr Tabi. Currently, its affairs are managed by an Administrator appointed by the State.

7. On 26 February 2018, the Claimants and Mr Tabi orally agreed that the Claimants would operate the Vessel.

8. At the time, Mr Tabi was the owner of Sal Lin Shipping Services.

9. It was a term of the oral agreement that the Claimants would use the Vessel free-of-charge (they did not pay any rental fee to Mr Tabi) to operate and undertake any repairs necessary, and recover the costs of any repairs from their operation of the Vessel.

10. On 20 December 2019, Mr Bebe and AFIC signed a Charter Agreement for the lease of the Vessel for the period 20 December 2019 to 30 April 2020 (the 'Charter Agreement').

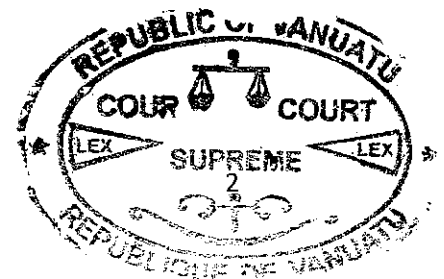
C. The Pleadings

11. By the Further Amended Claim filed on 9 November 2021, the Claimants seek the refund of expenses incurred and damages arising from the alleged breach of the Charter Agreement.

Claim for refund of expenses incurred

12. It is alleged by the Claimants that with the help of AFIC Trade Commissioner Michael Kalmet, Mr Tabi falsely represented that he owned the Vessel and by reason of that misrepresentation, induced the Claimants to enter into the agreement with him.

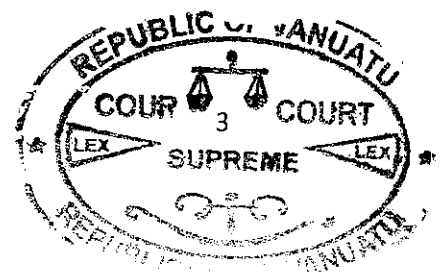
13. It is contested whether Mr Tabi or Sal Lin Shipping owned the Vessel. Both Defendants alleged in their Defences that Mr Tabi owned the Vessel and that the Vessel was registered in his name.



14. It is also contested whether AFIC held a lien over the Vessel as Mr Tabi used its funds to pay for the Vessel. Both Defendants denied in their Defences that AFIC held a lien over the Vessel.
15. The Claimants also alleged that it was a term of the oral agreement that they would hold and operate the Vessel until they had recouped all of their repair expenses, and if the Vessel was removed from them, then the Defendants would refund their expenses. Mr Tabi denied in his Defence that the parties agreed that if the Vessel were removed from the Claimants, that he would refund their expenses.
16. The Claimants also alleged that AFIC would also be liable to refund their expenses because Mr Tabi negotiated with them on AFIC's behalf. Both Defendants denied that Mr Tabi negotiated on AFIC's behalf or that AFIC is liable in any way for refund of repair expenses.
17. It was also alleged that the Claimants and Mr Tabi signed a written agreement dated 26 February 2018 for the Claimants to lease the Vessel and operate it as an inter-island shipping vessel. Mr Tabi denied in his Defence that they had a written agreement for the lease of the Vessel.
18. The Claimants alleged that they paid for repairs to the Vessel including dry docking and purchasing life rafts to the value of VT1,000,000.
19. They also alleged that from June-November 2018, they paid AFIC monthly rent of VT500,000 to use and operate the Vessel, totalling VT1,800,000. AFIC alleged in its Defence that this arrangement was put in place because it became the owner of the Vessel on 14 May 2019 and the arrangement was for the Claimants' benefit to recover their repair expenses.

Alleged breach of the Charter Agreement

20. Clause 17 of the Charter Agreement provided for the Claimants to pay Charter Fees of VT1,500,000 non-refundable deposit and VT1,000,000 per month during the period 20 December 2019 to 30 April 2020 being the duration of the Agreement.
21. AFIC alleged in its Defence that the Claimants failed to pay the Charter Fee for March 2020 (VT1,000,000) and April 2020 (VT1,000,000) hence the Charter Agreement was terminated without notice pursuant to clause 17(f) of the Charter Agreement.
22. The Claimants alleged that on or about 4 April 2020, Tropical Cyclone Harold ('TC Harold') devastated the island of Santo and the Vessel was run aground and severely damaged. The Claimants continued to maintain the Vessel. AFIC alleged in its Defence that on 4 May 2020, its Administrator informed the Claimants that Charter Fees had not been paid and that the Agreement had been frustrated by TC Harold.



It is, therefore, contested whether or not the Charter Agreement had terminated without notice, or was otherwise frustrated by TC Harold.

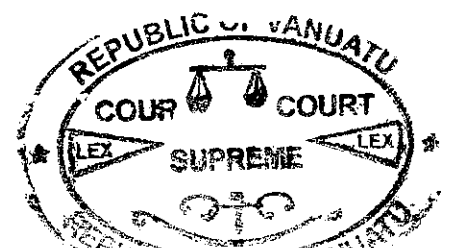
23. It is also alleged by the Claimants that in 2021, AFIC sold the Vessel to Tauraken Shipping in breach of clause 11(c) of the Charter Agreement. AFIC denied this in its Defence, alleging that the Charter Agreement had expired prior to the sale of the Vessel.
24. It was also alleged that when the Vessel was removed from the Claimants, that they were not given the opportunity to remove vessel parts and equipment that they paid for at their own expense, nor did AFIC reimburse them for those parts. Further, that they incurred wages for employees and a boat to conduct regular checks on the Vessel after it was run aground by TC Harold, therefore the removal of the Vessel has caused them to suffer loss. AFIC alleged in its Defence that clause 17(i) of the Charter Agreement provided that the Claimants were to meet all the repair costs and operation costs of the Vessel, and that they failed to comply with clause 17(m) of the Charter Agreement to safely moor the Vessel resulting in the damage by TC Harold. Further, that the Claimants incurred expenses after the expiry of the Charter Agreement (for which AFIC is not liable).
25. In the Interested Party's Defence, the State alleged that on 5 January 2018, the Registrar of Cooperatives (the 'Registrar') dissolved AFIC's managing committee, effectively removing Mr Tabi from administering AFIC's affairs. Then on 14 February 2020, the Registrar appointed Mrs Hillary Waqanitoga as the Administrator of AFIC, which appointment he extended on 28 July 2021. The State will abide the Order of the Court.

D. Evidence

26. The Interested Party filed the Sworn statement of Ridley Joseph, Director of the Department of Cooperatives and the Registrar of Cooperatives on 18 May 2022 ["Exhibit I.P.1"]. It contained AFIC's Certificate of Registration as a Cooperative Society dated 2 October 2013 [**Annexure "RJ1"**] and his letter dated 5 January 2018 to Mr Tabi informing him of the dissolution of AFIC's committee and appointment of an Interim Administrator Mrs Hillary Waqanitoga [**Annexure "RJ2"**]. On 14 February 2020, he appointed Mrs Waqanitoga as Administrator of AFIC [**Annexure "RJ3"**] On 28 July 2021, he extended her appointment [**Annexure "RJ4"**]. He deposed that the Administrator has all the powers and functions to administer AFIC's affairs and that she is remunerated by AFIC.

27. The following were tendered into evidence without objection:

- a) Vanuatu Financial Services Commission ('VFSC') Company Extract for AFIC generated as at 17 June 2023 showing that it was registered as a company from 20 January 2017 to 21 May 2018, and its Company Status



as "Removed" for failure to file annual return. Its sole director and sole shareholder was Mr Tabi [Exhibit C1]; and

- b) VFSC Business Name Extract for "Salin Shipping Services" generated as at 17 June 2023 showing that it was a registered business name from 23 May 2016 to 5 August 2018, and its Entity Status as "Removed" for failure to file annual renewal. Its sole owner was Mr Tabi [Exhibit C2].
28. The Claimant **Allan Awa** relied on his Sworn statement filed on 17 August 2021 [Exhibit C3]. He deposed that the other Claimant Filma Bebe employed him as First Captain of the Vessel. At present, Mr Awa is the Mayor of Luganville.
29. He deposed that on 26 February 2018, he negotiated on Mr Bebe's behalf to lease the Vessel from Mr Tabi, and the three of them signed a Letter of Agreement on Sal Lin Shipping Services letterhead dated 26 February 2018 which stated as follows [Annexure "AA1"]:

LETTER OF AGREEMENT

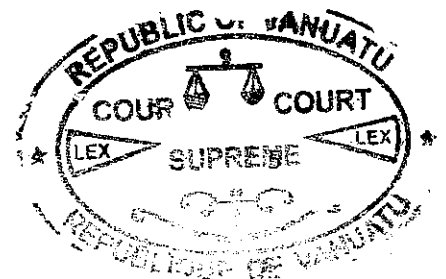
*This note serves to inform you that I give my agreement to captain Alan Awa and Felma Bebe to overtake a maintenance work to repair one of my vessel **LC Blessing** in Santo. They will also, be responsible for the financial cost of labor and maintenance work.*

As we agreed, due to my financial situation, after the reparation work, they will operate the maritime routine for LC Blessing for a certain period while waiting for my company to recover.

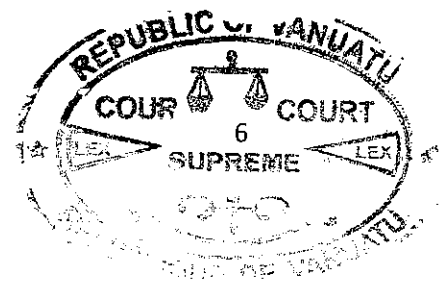
After my recovery, my company, will repossess the vessel with our normal operations. We will accordingly refund them in a compromise understanding within the three of us, if there is a left over outstanding bill.

Thank you for your understanding.

30. Mr Awa also deposed that the Vessel was not seaworthy. The Claimants and Mr Tabi orally agreed that the Claimants would repair the Vessel at their own expense to make it seaworthy, and that they would hold and operate the Vessel until all their expenses were settled. If the Vessel was removed, then the expenses would be refunded. He attached expenditure reports and receipts for repairs above the water line from February-May 2018 totalling VT6,098,750 [Annexures "AA2"- "AA5"]. They also paid AFIC's Trade Commissioner Michael Kalmet VT635,762, welding costs of VT321,000 in August 2018 [Annexure "AA7"], legal fees to Lent Tevi & Associates of VT364,000, VT402,000 to Mr Tabi, purchased life rafts to the value of VT1,000,000 [Annexure "AA10"] and dry docking at Nikon Shipyard of VT9,031,442 [Annexure "AA11"].

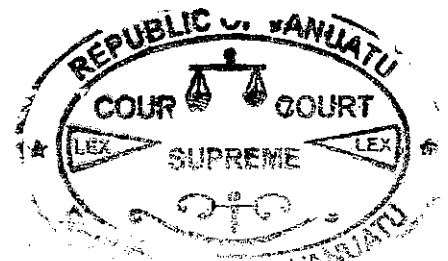


31. Mr Awa deposed that in June 2018, the Claimants made an arrangement with the AFIC Administrator to use and operate the Vessel on condition of paying a monthly rent of VT500,000 to AFIC. They paid the following rent totalling VT1,800,000:
- a) On 2 July 2018, a down payment of VT300,000;
 - b) On 8 October 2018, VT500,000 rent;
 - c) On 26 October 2018, VT500,000 rent; and
 - d) On 13 November 2018, VT500,000 rent.
32. On 3 August 2018, AFIC demanded the return of the Vessel but after negotiations, on 20 December 2019, Mr Bebe ('Charterer') and AFIC ('Owner') signed a Charter Agreement in respect of the Vessel [Annexure "AA15"].
33. Mr Awa deposed that on 4 April 2020, TC Harold devastated the island of Santo and the Vessel was severely damaged by the cyclone causing it to run aground. The Claimants continued to maintain the Vessel.
34. He deposed that sometime in 2021, the Claimants were informed that Mr Tabi had sold the Vessel to Tauraken Shipping, a private local shipping business. They were not told prior to the sale. They were not given the opportunity to remove vessel parts and equipment which they had paid for at their own expense. After TC Harold, they paid crew wages [Annexure "AA16"] and hired a boat to do regular checks on the Vessel which had been run aground [Annexure "AA17"]. The Defendants have not reimbursed them for those parts or the expenses. By reason of the removal of the Vessel, they have suffered loss.
35. In cross-examination by First Defendant's counsel Mr Kilu, Mr Awa agreed that he signed the **Exhibit C3 – Annexure "AA1"** letter of agreement dated 26 February 2018. He agreed that it was stated in the third paragraph of the agreement that when Mr Tabi's company recovered, he would repossess the Vessel. He agreed that the verbal condition of their agreement that the Claimants would hold and operate the Vessel until all their expenses were settled was not in the written agreement. It was put to him that it was not in their agreement that if the Vessel were removed from the Claimants, that their expenses would be refunded. He replied that their agreement was that if Mr Tabi took back the ship, he would refund their expenses.
36. In re-examination, Mr Awa explained that in his understanding, Mr Tabi's company referred to in the third paragraph of the **Annexure "AA1"** agreement was AFIC and Sal Lin Shipping Services as Mr Tabi was the director of both, but the agreement was for Sal Lin Shipping Services.
37. In cross-examination by Second Defendant's counsel Mr Godden, Mr Awa agreed that he deposed that his **Annexure "AA2"** was the February 2018 expenditure report

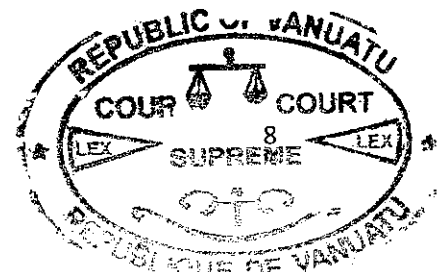


totalling VT79,187 however the report contained expenses for March 2018 and March 2019 therefore it was wrong. He agreed that he put the same March dates and expenses in both **Annexures "AA2"** and **"AA3"**. It was put to him that Mr Kalmet was not employed by Mr Tabi. He maintained that Mr Tabi told him that Mr Kalmet was AFIC's Trade Commissioner.

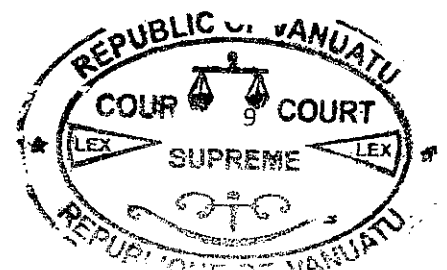
38. Mr Awa stated in cross-examination that he was part of the negotiations of the Charter Agreement [**Annexure "AA15"**] but he did not see the signed agreement. He agreed that a term of the agreement was that on 29 February 2020, they would pay VT1,000,000 to AFIC, as well as another VT1,000,000 on 21 March 2020 and another VT1,000,000 in April 2020. He was not sure if they paid VT1,000,000 on 29 February 2020. He stated that they had paid VT500,000. He stated that in March 2020, they paid another VT500,000 and he was not sure if they made any payment in April 2020.
39. He did not agree that their failure to pay in accordance with clause 1(f) meant that they had breached the agreement. He agreed that because they had not paid VT1,000,000 in February and then March 2020, that under clause 1(f), the agreement was terminated. He also agreed that they had not put into evidence audited accounts or a profit and loss statement, which the Court needed to see to assess their claim.
40. In re-examination, Mr Awa stated that they paid Mr Kalmet because he was part of the negotiations of the 26 February 2018 agreement with Sal Lin Shipping Services. He explained that the two February 2018 expenses set out in **Annexure "AA2"** totalled VT79,187, but that the complete list of expenses for March 2018 totalling VT1,093,203 was in **Annexure "AA3"**. He explained that he had not agreed that they breached the Charter Agreement because AFIC's Administrator Hillary accepted that they would pay only VT500,000 due to the situation that they were in.
41. Mr Awa's evidence is necessarily self-serving. I considered that I could only rely on his evidence where it was consistent with the account of one or more Defendants' witnesses and where it is supported by the documentary evidence.
42. Gideon Rocroc's Sworn statement filed on 24 August 2021 was tendered into evidence [**Exhibit C4**]. The First Defendant did not require him for cross-examination and the Second Defendant had not given notice to cross-examine him. Counsel could submit in their closing submissions what weight, if any, the Court should give his evidence.
43. Mr Rocroc deposed that in early March 2020, Mr Bebe told him that the Vessel was removed from him on 23 February 2020. Mr Rocroc went to the Vessel and asked the people onboard who had directed them to take the Vessel. Willie Naripo told him that the Department of Cooperatives gave Mr Naripo the right to remove the Vessel from Mr Bebe.



44. The only possible matter of assistance in Mr Rocroc's evidence is that the Vessel was removed from the Claimants on 23 February 2020. However, the Claimants alleged in the Claim that after TC Harold struck (in April 2020), they continued to be responsible for the Vessel. I consider, therefore that Mr Rocroc's evidence is unreliable and do not accept his evidence.
45. The First Defendant **Barnabas Tabi** relied on his Sworn statement filed on 24 February 2023 [Exhibit D1]. He deposed that he never signed an agreement with the two Claimants for them to operate the Vessel. They only agreed verbally that the two Claimants would operate the Vessel free-of-charge and he never received rent fees from them. He also deposed that they agreed that the Claimants would pay for repairs to the Vessel and recover their repair costs from operating the Vessel. He deposed that they never agreed, including in their oral agreement, that if the Vessel were removed from them, that he would reimburse their repair costs or expenses.
46. Mr Tabi deposed that the Claimants took and operated the Vessel from 2018 until AFIC seized it from them. He did not cause any loss to the Claimants. TC Harold caused them some loss.
47. In cross-examination by Claimants' counsel Mr Ngwele, Mr Tabi was shown **Exhibit C1** and agreed that in 2017, he registered AFIC with the VFSC as a company but somebody else illegally registered it as a cooperative society. He was shown **Exhibit C2** and confirmed that he owned Sal Lin Shipping Services, and that the latter owned two shipping vessels, the LC Pejida and the Vessel LC Blessing. He agreed that he used AFIC money to buy the two ships, which he operated using Sal Lin Shipping Services, and at the time he owned both AFIC and Sal Lin Shipping Services.
48. It was put to him that in 2017-2018, AFIC started having issues with the Government. He replied that AFIC was operating well but he was surprised when the Department of Cooperatives put him out of office. The Department had run him out of office so he signed an agreement with the Claimants for them to operate the Vessel free-of-charge and make their income from it. If he were to take back the ship, then they would have a look at the expenses.
49. Mr Tabi was shown the **Exhibit C3 – Annexure "AA1"** letter of agreement dated 26 February 2018. He accepted that it was on Sal Lin Shipping Services letterhead but denied that he signed that agreement. He denied that it was his signature on that document. He confirmed that he knew Mr Kalmet but that Mr Kalmet never worked with the Vessel. He stated that by the time the Claimants came to see him about the Vessel, Mr Kalmet had finished working for him. He agreed that he spoke with the Claimants to operate the Vessel and repair it to a seaworthy condition at their expense. It was put to him that they would hold the Vessel until his company AFIC recovered then he would meet some of their expenses. He said that was just talk – he tasked Jonas at Santo to check how much money they made each month.

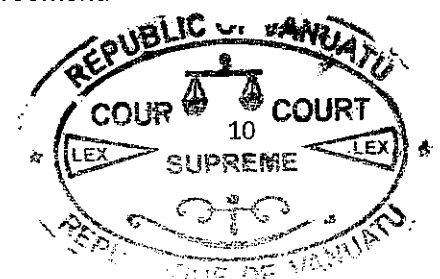


50. He denied receiving VT402,000 cash payment from the Claimants on 24 August 2018 [Annexure "AA9"]. He disagreed that part of his agreement with the Claimants was that he would meet their expenses – the Vessel was with them free-of-charge so that they would operate it and meet its running costs. He agreed that he would meet some of their costs. It was put to him that that answer meant that he lied in para. 8 of his sworn statement in which he deposed that they never agreed that if the Vessel was removed from the Claimants, then he would pay their costs or expenses. He replied that he would not meet *all* costs, but some of the costs.
51. Mr Tabi agreed that by the time he and the Claimants made their agreement, he had already been removed from office with AFIC. He agreed that he was removed from AFIC's office on 5 January 2018. He agreed that AFIC owned the vessel. It was put to him that in February 2018, he did not have authority to enter into agreement with the Claimants. He replied that when he was put out of office, AFIC belonged to him. He agreed that he told the Claimants that he was the director, owner and shareholder of AFIC. He stated that it was not yet clear that he had been put out of AFIC. He agreed that when he was removed from office at AFIC, an Administrator was appointed and she did not report to him. He agreed that he should pay some expenses incurred by the Claimants, but as AFIC, not him personally.
52. In re-examination, Mr Tabi explained his answer that the agreement with the Claimants was to operate the Vessel, pay for its repairs and refund their expenses by saying that it was not in his sworn statement but he had said at their meeting that he had chosen Jonas, a man at Santo, to monitor their operation of the Vessel. Jonas would check how much income the Claimants made and they would also give him the expenses figures so that he would know if they had covered their expenses from their operation of the Vessel or not. If his company (AFIC) recovered, then he would take back the Vessel but he did not know how long it would take before that happened and then he could look at paying some of their expenses. But when Jonas went to check how much they were making from the Vessel, they would not give him any information.
53. Mr Tabi was again shown the **Exhibit C3 – Annexure "AA1"** letter of agreement. He read it then confirmed that that was his name and signature on the document. He stated that the content of the document was what he and the Claimants agreed.
54. In cross-examination by Second Defendant's counsel Mr Godden, Mr Tabi agreed that earlier on in his evidence, he stated that AFIC was registered as a company in 2017, and that someone else had illegally registered AFIC as a cooperative society. He agreed that he started AFIC in 2013. He was shown Mr Joseph's sworn statement [Exhibit I.P. 1] and agreed that **Annexure "RJ1"** showed that AFIC was registered as a cooperative society in 2013. It was put to him that AFIC was registered as a cooperative society first, then later he registered it as a company with the VFSC. He said no, he registered AFIC as a company first, in 2012, and then in 2013, someone

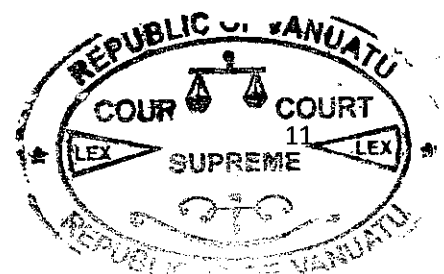


else registered it as a cooperative society. It was put to him that the documents in evidence showed that AFIC was registered as a cooperative society in 2013 and then registered as a company in 2017. He said that in 2017, that was just a renewal of the company but that he had registered it at the VFSC in 2012.

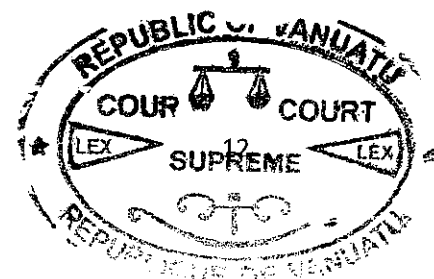
55. Mr Tabi agreed that Sal Lin Shipping Services was his business. He stated that the Vessel was registered to Sal Lin Shipping Services. He could not recall what year Sal Lin Shipping Services became its owner. He did not know when Sal Lin Shipping Services ceased to own the Vessel.
56. There was no re-examination.
57. In Mr Tabi's own evidence, he deposed in his sworn statement [**Exhibit D1**] that he never signed a written agreement with the Claimants on 26 February 2018. In cross-examination, he was shown the letter of agreement dated 26 February 2018 [**Exhibit C3 – Annexure "AA1"**], and denied that he signed it. In re-examination, he was again shown **Annexure "AA1"**, he read it and confirmed that that was his name and signature on the document. He did not explain why he had stated the opposite in his sworn statement and in cross-examination. I consider that Mr Tabi is an unreliable witness and accept his evidence that he and the Claimants signed the written agreement in **Exhibit C3 – Annexure "AA1"**, but otherwise only where his account is consistent with another witness' account or with the documentary evidence.
58. The Second Defendant AFIC's witness **Hillary Tabi** (also known as Hillary Waqanifoga) relied on her Sworn statement filed on 31 May 2023 [**Exhibit D2**]. Miss Tabi deposed that on 5 January 2018, the Registrar of Cooperatives appointed her as Administrator of AFIC. Her role as Administrator was to administer the affairs of AFIC.
59. She deposed that in April 2019, AFIC became the owner of the Vessel. Prior to that, Sal Lin Shipping owned the Vessel. She attached copies of the following [in **Annexure "HT1"**]:
 - a) Republic of Vanuatu Permanent Certificate of Registry issued on 30 April 2019 (Certificate No: OMR-PRC21/2019) certifying that the owner of the Vessel was AFIC; and
 - b) Republic of Vanuatu Permanent Certificate of Registry issued on 29 March 2017 (Certificate No: PCR-2903/17) certifying that the owner of the Vessel was Sal Lin Shipping.
60. Miss Tabi also deposed that in August 2019, she instructed AFIC's lawyer to demand the return of the Vessel. Then in December 2019, Mr Bebe and AFIC entered into the Charter Agreement [copy attached as **Annexure "HT4"**]. Mr Bebe paid the following Charter Fees but failed to pay the fees in full therefore the Agreement was terminated without notice pursuant to clause 17(f)-(h) of the Agreement:



- a) 20 December 2019, VT1,500,000 non-refundable deposit paid;
 - b) 28 February 2020, VT500,000 paid;
 - c) 2 March 2020, VT500,000 paid; and
 - d) 19 April 2020, VT500,000 paid then no further payments made after this date.
61. Miss Tabi also attached a copy of her email dated 19 February 2020 to Mr Bebe reminding him that under clause 17(e)(i) of the Charter Agreement, he needed to pay VT1,000,000 "on or before 29th February 2020" [Annexure "HT6"]. After that she spoke with the Claimants' lawyer Mr Ngwele and agreed to accept VT500,000 before 3pm on 28 February 2020 and further payment of VT500,000 on or before 11am on 2 March 2020.
62. She deposed that by email dated 4 May 2020, she wrote to Mr Bebe and Mr Ngwele informing them that the March 2020 and April 2020 Charter Fees were not paid in full therefore the contract had been frustrated based on clause 17(f) of the Charter Agreement so she requested its immediate return to AFIC [Annexure "HT5"].
63. She deposed that on 6 April 2020, TC Harold struck and the Vessel washed ashore on Aore island. She deposed that Mr Bebe failed to moor the Vessel at a safe anchorage during TC Harold. The Charter Agreement was also frustrated due to TC Harold therefore on 25 January 2021, AFIC ("Owner of the Vessel") and Mr Willie Naripo, Tauraken Shipping ("Purchaser") entered into a Sales & Purchase Agreement in respect of the Vessel [copy attached as Annexure "HT7"]. Clause 6 of that agreement provided that the Purchaser agreed that it was purchasing the Vessel on "as is, where is" basis.
64. In cross-examination by Claimants' counsel Mr Ngwele, Miss Tabi agreed that before she was appointed as AFIC Administrator, she worked in AFIC as a loans officer. Before that, she worked for a long time as a loans officer at the NBV. She agreed that Mr Tabi got a loan from AFIC to buy the Vessel – there was a loan agreement between AFIC and Bujunbana Holdings Limited which was the parent company for Mr Tabi's subsidiary companies. She agreed that that loan agreement provided that if Mr Tabi failed in the loan repayments, AFIC could seize the Vessel.
65. She stated in cross-examination that she did not become aware of the Claimants and Mr Tabi's agreement in respect of the Vessel until March 2018. She did not agree that Mr Tabi entered that agreement on behalf of AFIC. She stated that the Claimants and Mr Tabi's agreement made on 26 February 2018 was not an agreement by or for AFIC. She agreed that on 26 February 2018, Mr Tabi no longer represented AFIC so any agreement entered into then was not an agreement by or for AFIC.



66. Miss Tabi agreed that the emails dated 27 June 2018 from Mr Kalmet and then herself to Mr Awa was in respect of an 'arrangement' that AFIC be paid an immediate down payment of VT300,000 and then from the end of September, VT500,000 per month, which followed on from the Claimants and Mr Tabi's agreement in respect of the Vessel [**Exhibit C3 – Annexure "AA13"**]. She agreed that Mr Bebe paid to AFIC's bank account at the NBV VT300,000 on 2 July 2018, VT500,000 on 8 October 2018, VT500,000 on 26 October 2018 and another VT500,000 on 13 November 2018, totalling VT1,800,000 [**Exhibit C3 – Annexure "AA14"**]. She stated that this arrangement was agreed because AFIC wanted to seize the Vessel due to the failures to repay the loan from AFIC.
67. She agreed that there was no term in the Charter Agreement cancelling the initial agreement between the Claimants and Mr Tabi. She agreed that Mr Tabi was removed from AFIC's office on 5 January 2018. She agreed that the Claimants spent money to make the Vessel seaworthy, in compliance with their agreement with Mr Tabi and that it made sense that they operated the Vessel in order to make money to pay back Bujunbana Holdings' loan from AFIC.
68. It was put to Miss Tabi that AFIC received the Claimants' payments of VT500,000 on 28 February 2020, 2 March 2020 and 19 April 2020 and waived the requirement for full payments because of AFIC's poor financial situation at that time. She disagreed, saying that payments were due in February, March and April 2020 and she sent reminders but the full charter fees were not paid therefore clause 17(f) of the Charter Agreement applied. It was put to her that she told the Claimants to make payment of only VT500,000 each time instead of VT1,000,000. She replied, "No", that the payment which was due was VT1,000,000 at the end of each month. She agreed that when only VT500,000 was paid in each of the 3 months, that the Claimants had breached the agreement however she accepted those 3 separate payments because AFIC's financial situation was poor at the time.
69. In re-examination, Miss Tabi explained that Bujunbana Holdings' loan with AFIC in respect of the Vessel was more than VT40,000,000 but Mr Tabi did not have money to repair the Vessel so he entered his agreement with the Claimants. The Claimants told her that when they entered the agreement with Mr Tabi, they did not know that he had been removed from AFIC's office so they spent money on repairing the Vessel. She as Administrator conducted an audit of AFIC's assets and was looking at repossessing the Vessel – the exact loan for which was around VT46,000,000. The only loan repayment was VT1,500,000 in September or October 2017 but then no payment since hence AFIC wanted to repossess the Vessel which led to the arrangement being agreed with the Claimants and their paying VT1,800,000 starting on 2 July 2018 until 13 November 2018 [**Exhibit C3 – Annexures "AA13" and "AA14"**]. She stated that Mr Kalmet was involved as negotiator on behalf of Bujunbana Holdings.

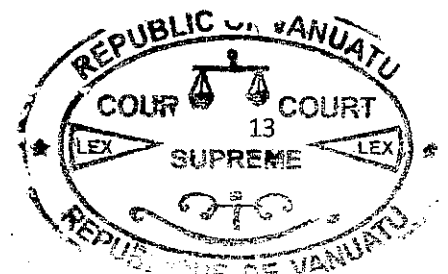


70. Miss Tabi also explained that the Vessel remained with the Claimants from 2018 until it was sold in 2021. When the Charter Agreement was entered into, the Claimants paid VT1,500,000 on the signing of the agreement then VT1,000,000 was due on 29 February 2020. She sent some reminders and they said it would be paid in 2 instalments hence VT500,000 paid on 28 February 2020 and the other VT500,000 paid on 2 March 2020. Those were the charter fees due in February. For the charter fees due in March, they finally paid only VT500,000 on 19 April 2020.
71. She was asked to explain her answer to the question in cross-examination that AFIC waived its right of enforcement under clause 17(f) of the Charter Agreement. Miss Tabi stated that since the Claimants took on the Vessel, they had spent on its repairs. In 2018, they paid VT1,800,000 and then at the end of 2019, VT1,500,000. AFIC accepted these payments whilst the Claimants had excuses like the Vessel's engine so AFIC bore with them for that period of time but then needed to come up with a concrete arrangement by April 2020 or it would need to find another buyer for the Vessel. At AFIC, they felt that the Claimants had had sufficient time since 2018 to recoup their expenses on the slipway and money spend to buy an engine but needed to have something concrete in place by April 2020.
72. There was no cross-examination by the First Defendant's counsel.
73. Miss Tabi's evidence was consistent with the documentary evidence. In cross-examination, the Claimants' counsel put the Claimants' case to her and seemed to get concessions from her. However, in re-examination, she fully explained her answers which she gave in cross-examination. Her account was consistent throughout and supported by the documentary evidence. I consider that she was a witness of truth and accept her evidence.

E. Findings and Consideration

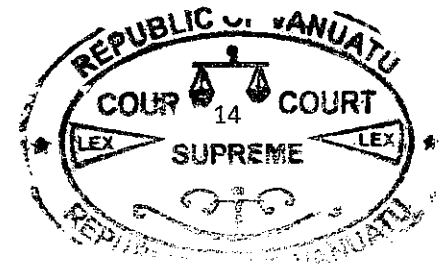
Claim for refund of expenses incurred

74. Who owned the Vessel on 26 February 2018 when the Claimants and Mr Tabi entered their oral agreement?
75. I find on the evidence that from 29 March 2017 to 29 April 2019, the owner of the Vessel was "Salin Shipping Services", also known as Sal Lin Shipping Services [Exhibit D2, Annexure "HT1"].
76. Therefore, when the Claimants and Mr Tabi entered into their oral agreement on 26 February 2018, Sal Lin Shipping Services was the owner of the Vessel.
77. Sal Lin Shipping Services was a registered business name from 23 May 2016 to 5 August 2018, whose sole owner was Mr Tabi [Exhibit C2]. Therefore, Mr Tabi was



trading as Sal Lin Shipping Services. However, the Vessel was registered in the shipping registry as owned by Sal Lin Shipping therefore its legal owner may have been Sal Lin Shipping, but its beneficial owner was Mr Tabi.

78. Was there a misrepresentation by Mr Tabi to the Claimants?
79. As I understand the Claimants' case, they alleged that Mr Tabi misrepresented to them that he was the owner of the Vessel which induced them to enter the 26 February 2018 agreement.
80. Given the finding that Mr Tabi was the beneficial owner of the Vessel, there was no misrepresentation as alleged.
81. Subsequently, on 30 April 2019, AFIC became the owner of the Vessel [**Exhibit D2 – Annexure “HT1”**].
82. AFIC was a registered company from 20 January 2017 to 21 May 2018, whose sole director and sole shareholder was Mr Tabi [**Exhibit C1**]. It was also a registered cooperative society, since 2 October 2013 as a [**Exhibit I.P. 1 – Annexure “RJ1”**].
83. I also find on the evidence that on 5 January 2018, the Registrar of Cooperatives dissolved AFIC's managing committee, effectively removing Mr Tabi from administering AFIC's affairs. On the same date, the Registrar appointed Miss Hillary Tabi (then called Mrs Waqanitoga) as Interim Administrator of AFIC. On 14 February 2020, he appointed her as Administrator of AFIC, which appointment he extended on 28 July 2021 [**Exhibit I.P.1**].
84. Did Mr Tabi negotiate the 26 February 2018 agreement with the Claimants on AFIC's behalf (such that AFIC is liable to refund the Claimants' repair expenses)?
85. The answer is, “No” because first, AFIC was not the owner of the Vessel. At that point in time, the owner was Sal Lin Shipping Services. Secondly, even if AFIC had been the owner, Mr Tabi had already been removed on 5 January 2018 from office at AFIC therefore he had no authority to negotiate any agreement on AFIC's behalf.
86. Did AFIC hold a lien over the Vessel?
87. I also find on the evidence that Mr Tabi obtained a VT46,000,000 loan from AFIC to buy the Vessel – there was a loan agreement between AFIC and Bujunbana Holdings which was the parent company for Mr Tabi's subsidiary companies. That loan agreement provided that if Mr Tabi failed in the loan repayments, AFIC could seize the Vessel.
88. The Claimants' case was that AFIC held a lien over the Vessel. Both Defendants denied that AFIC held such a lien. I accept that possession of the property in which



lien is claimed over is key to retaining the right because once the possessor relinquishes possession of that property, they give up that right to lien: *Pennington v Reliance* [1923] 1 KB 127. From February 2018 to early 2021 when AFIC sold the Vessel to Tauraken Shipping, the Claimants were in possession of the Vessel. AFIC did not have possession of the Vessel at any time during that period and therefore it could not and did not hold a lien over the Vessel. Accordingly, I reject the Claimants' submissions that the loan from AFIC to purchase the Vessel created a lien held by AFIC.

89. Did the Claimants and Mr Tabi sign a written agreement dated 26 February 2018 for the Claimants to lease the Vessel?
90. Yes, the Claimants and Mr Tabi signed a written agreement dated 26 February 2018 on Sal Lin Shipping Services letterhead entitled, "Letter of Agreement" [**Exhibit C3 – Annexure "AA1"**]. Mr Tabi confirmed in re-examination that that was his name and signature on that letter of agreement. By his own evidence, the letter of agreement set out what he and the Claimants agreed. I so find.
91. Was it a term of the Claimants and Mr Tabi's agreement that if the Vessel were removed from them, that the Defendants would refund their repair expenses?
92. The terms of the **Exhibit C3 – Annexure "AA1"** letter of agreement were as follows:

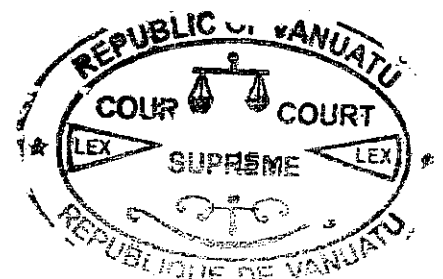
This note serves to inform you that I give my agreement to captain Alan Awa and Felma Bebe to overtake a maintenance work to repair one of my vessel LC Blessing in Santo. They will also, be responsible for the financial cost of labor and maintenance work.

As we agreed, due to my financial situation, after the reparation work, they will operate the maritime routine for LC Blessing for a certain period while waiting for my company to recover.

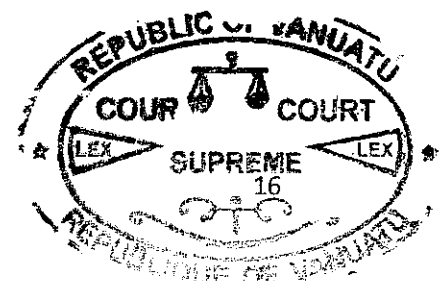
After my recovery, my company, will repossess the vessel with our normal operations. We will accordingly refund them in a compromise understanding within the three of us, if there is a left over outstanding bill.

Thank you for your understanding.

93. I find that the Claimants and Mr Tabi's agreement dated 26 February 2018 contained the following terms:
- a) That the Claimants would hold the Vessel free-of-charge and repair the Vessel at their own expense;
 - b) That after carrying out repairs, the Claimants would operate the Vessel "while waiting for my company to recover";
 - c) That after Mr Tabi's company had recovered, that it would repossess the Vessel ("After my recovery, my company, will repossess the vessel with our normal operations");



- d) That Mr Tabi's company would then refund the Claimants *"in a compromise understanding within the three of us, if there is a left over outstanding bill"*.
94. I find that Mr Tabi's company referred to in the letter of agreement is AFIC. On the evidence, this was the company that Mr Tabi had issues with, to the point that on 5 January 2018, he had been removed from administering its affairs.
95. As to an alleged term of the 26 February 2018 agreement that if the Vessel were removed from the Claimants, that the Defendants would refund the Claimants' repair expenses, AFIC cannot be liable for the reasons set out above. By the terms of the agreement, Mr Tabi would only be liable if his company had recovered and it repossessed the Vessel and the three of them had reached a *"compromise understanding within the three of [them], if there is a left over outstanding bill."*
96. However, AFIC never recovered; it is still under the control of an Administrator. It also never repossessed the Vessel. The Claimants had possession of the Vessel from February 2018 until early 2021 when it was sold to Tauraken Shipping. Finally, Mr Tabi and the Claimants never agreed a compromise amongst the three of them. As those terms of the agreement were never fulfilled, Mr Tabi also cannot be liable for the Claimants' repair expenses.
97. Even if I am wrong on that, in my view, there is a further barrier to the Claimants' claim for refund of expenses. That is, that in June 2018, the Claimants and Miss Tabi on AFIC's behalf reached a new 'arrangement' for the lease of the Vessel. This 'arrangement' was that AFIC be paid a VT300,000 down payment immediately, and then from the end of September, VT500,000 per month [Exhibit C3 – Annexure "AA13"]. On 2 July 2018, Mr Bebe paid VT300,000 to AFIC's bank account at the NBV, then VT500,000 on 8 October 2018, VT500,000 on 26 October 2018 and another VT500,000 on 13 November 2018, totalling VT1,800,000 [Exhibit C3 – Annexure "AA14"].
98. I find that by making the payments under the June-November 2018 arrangement, the Claimants accepted that Miss Tabi on AFIC's behalf was the person whom they had to deal with for the lease of the Vessel, and their payment of fees constituted consideration for that contract.
99. Accordingly, I find that the arrangement which applied between the Claimants and AFIC's Administrator from June to November 2018 ended the Claimants' agreement with Mr Tabi dated 26 February 2018.
100. Significantly, the June-November 2018 arrangement did not contain any term making AFIC liable for the Claimants' repair expenses.



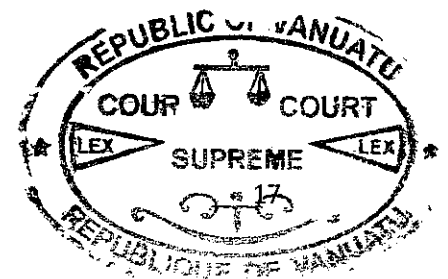
101. Finally, in my view, there is an even more fundamental barrier to the Claimants' claim for refund of expenses. That is, that even if the Claimants proved that they incurred repair expenses, there is no evidence before the Court as to how much income they made operating the Vessel so that the Court can assess whether or not they have recouped their repair expenses, and if there is any outstanding repair expense that they have not yet recouped.
102. In Mr Awa's own evidence, he agreed that the Claimants had not put into evidence audited accounts or a profit and loss statement, which the Court needed to see to assess their claim.
103. In the circumstances, it is unnecessary to make findings as to what repair expenses the Claimants incurred.
104. For the reasons given, the Claimants have failed to prove on the balance of probabilities their claim for refund of expenses.

Alleged breach of the Charter Agreement

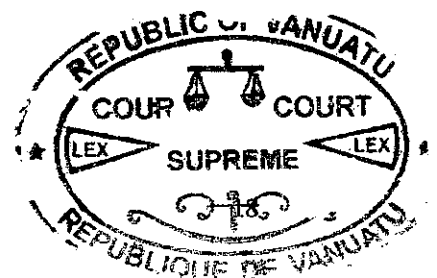
105. On 20 December 2019, Mr Bebe ('Charterer') and AFIC ('Owner') signed the Charter Agreement in respect of the Vessel [Exhibit C3 – Annexure "AA15"]. The terms and conditions of the Charter Agreement included the following:

GENERAL CONDITIONS

CLAUSE 1	AGREEMENT TO LET AND HIRE
	<p>The OWNER agrees to let the Vessel to the CHARTERER and to enter into a Charter Agreement for the Charter of the Vessel as set out hereunder.</p> <p>The CHARTERER agrees to let the Vessel and shall pay the Charter Hire as set out in Clause 11(e) and any other agreed matters, conditions, and terms, on or before the dates and in the amounts specified in this Agreement.</p>
...	
CLAUSE 11	SALE OF THE VESSEL
	<p>...</p> <p>(c) Should the OWNER agree to sell the Vessel after the expiry of this Charter Agreement but before delivery to the CHARTERER, the OWNER shall immediately give notice of such sale in writing to the CHARTERER. This information shall be kept in strict confidence by all parties to the Agreement.</p>

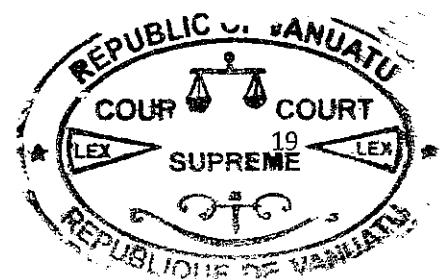


	Should the Vessel be sold one of the following provisions will apply: i) The OWNER shall warrant to the Buyer to perform the Charter on the same terms and conditions as assignments of this Charter Agreement. When the Charter is taken over by the Buyer on the same terms and conditions there shall be no penalty against the OWNER.
...	
CLAUSE 17	SPECIFIC CONDITIONS
	a) The CHARTERER is to pay to the OWNER a non-refundable deposit of VT1,500,000 (cash) immediately after execution of this Charter Agreement.
	b) The charter period is from 20 th December 2019 to 30 th of April 2020.
	...
	i) The charter fee - worth VT10 to be paid in the following manner: i) VT1,000,000 to be paid on or before 29 th of February 2020. ii) VT1,000,000 to be paid on or before 31 st of March 2020.
	iii) VT1,000,000 to be paid on or before 30 th April 2020.
	j) The CHARTERER agrees, warrants and covenants that he shall comply with paragraph 17(e) and (f) as stated herein and shall indemnify and hold the OWNER harmless.
	g) The CHARTERER agrees that he will comply with sub clause 17(e) without the OWNER making any attempts to recover the charter fee on time, the CHARTERER agrees to pay by direct deposit in cash to the OWNER'S ACCOUNT style as: Account name: Apma Financial Investment Center - Administrator; Account no: XXX001; Bank: National Bank of Vanuatu
	h) If the CHARTERER cannot or anyway fulfil paragraph e) f) and g) then this agreement is terminated and the vessel is to be delivered to the OWNER.

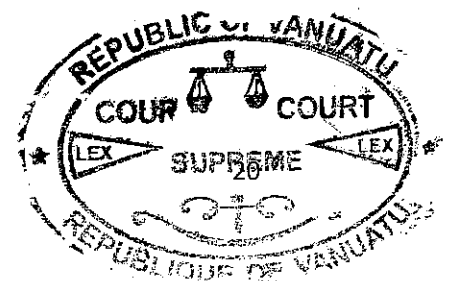


	<i>i) The CHARTERER agrees that all operation costs and outstanding payables incurred and will incur not limited to but including slip way, parts, equipment's [sic], tools, hiring of crews and their wages, food, fuel etc will be met by him;</i>
	<i>m) Subject to clause 16, the CHARTERER must ensure that the vessel is at all material times moored at a safe anchorage during times of cyclone or any natural disasters or man made disasters and or disputes of which it is foreseeable that such occurrence would cause damage to the vessel.</i>

106. I find on the evidence that on the signing of the Charter Agreement on 20 December 2019, Mr Bebe paid a VT1,500,000 non-refundable deposit to AFIC then VT500,000 on 28 February 2020, VT500,000 on 2 March 2020 and a final VT500,000 on 19 April 2020.
107. Then VT1,000,000 charter fees were due to be paid on or before 29 February 2020: clause 17(e)(i) of the Charter Agreement. Miss Tabi had to send some reminders and the Claimants said that it would be paid in two instalments. On 28 February 2020, Mr Bebe paid VT500,000 and on 2 March 2020, the other VT500,000. I find that these were the charter fees due in February.
108. A further VT1,000,000 charter fees were due to be paid on or before 31 March 2020: clause 17(e)(ii) of the Charter Agreement. Only VT500,000 of this was paid, on 19 April 2020. There were no further payments after this.
109. I find, therefore, that Mr Bebe failed to pay the full charter fee of VT1,000,000 due to be paid on or before on 31 March 2020 and also failed to pay the charter fee of VT1,000,000 due to be paid on or before 30 April 2020.
110. Given the failures to pay the charter fees on or before 31 March 2020 and 30 April 2020, I find that the Charter Agreement terminated without notice on 30 April 2020 pursuant to clause 17(f) of the Charter Agreement.
111. It is accepted that on 6 April 2020, TC Harold struck the island of Santo and its offshore islands. I find that the Vessel was severely damaged by the cyclone causing it to run aground on Aore.
112. I find that the Vessel could not be operated from that point on hence the performance of the Charter Agreement was frustrated from 6 April 2020 onwards as a result of the damage caused by TC Harold. This was followed by the Agreement terminating



- without notice on 30 April 2020 pursuant to its clause 17(f) due to the failure to pay charter fees.
113. I also find that by email dated 4 May 2020, Miss Tabi wrote to Mr Bebe and Claimants' counsel Mr Ngwele informing them that the March 2020 and April 2020 Charter Fees were not paid in full therefore the contract had been frustrated based on clause 17(f) of the Charter Agreement so she requested its immediate return to AFIC [Exhibit D2 – Annexure “HT5”].
 114. The Claimants did not return the Vessel to AFIC. It remained in their possession until its sale in 2021 to Tauraken Shipping.
 115. Is AFIC liable to reimburse the Claimants for expenses that they incurred after TC Harold caused damage to the Vessel?
 116. The Claimants' case is that they continued to be responsible for the Vessel, sending a boat to conduct regular checks on the Vessel after it was run aground and that they incurred wages for employees. However, the performance of the Charter Agreement had been frustrated. There is no evidence of a new agreement between the Claimants and AFIC for the Claimants to take responsibility for the Vessel, and that AFIC would refund their expenses. I find, therefore, that AFIC is not liable to reimburse the Claimants for expenses that they incurred after TC Harold caused damage to the Vessel.
 117. On what date did AFIC sell the Vessel to Willie Naripo, Tauraken Shipping?
 118. I find on the evidence that it did so by Sales and Purchase Agreement dated 25 January 2021 [Exhibit D2 – Annexure “HT7”].
 119. Was this in breach of clause 11(c) of the Charter Agreement?
 120. Clause 11(c) of the Charter Agreement provided that if AFIC agreed to sell the Vessel after the signing of the Charter Agreement, it would immediately give written notice of such sale to Mr Bebe. Further, that if the Vessel were sold, AFIC would assign the Charter Agreement to the buyer of the Vessel.
 121. However, the Charter Agreement had already been terminated without notice (on 30 April 2020) and with notice (on 4 May 2020) and/or its performance frustrated by the damage caused by TC Harold (on 6 April 2020) therefore clause 11(c) did not apply and there was no breach as alleged.
 122. When the Vessel was removed from the Claimants in 2021, was AFIC obliged to give them the opportunity to remove vessel parts and equipment that they had paid for or to reimburse them for those parts?



123. I answer, "No" as there was no agreement between them that AFIC had to give them the opportunity to remove parts and equipment that they had paid for, or to reimburse them for those parts. On the contrary, clause 17(i) of the Charter Agreement provided that Mr Bebe was to meet all the operation costs and repair costs of the Vessel. Accordingly, there was no obligation on AFIC's part to give the Claimants the opportunity to remove vessel parts and equipment, nor to reimburse them for vessel parts.
124. For the reasons given, the Claimants have failed to prove their claim for damages arising from alleged breach of the Charter Agreement.
125. The Claimants have failed to prove the Claim on the balance of probabilities; it must be dismissed.

F. Result and Decision

126. The Claim is **dismissed**.
127. Costs must follow the event. The Claimants are to pay the Defendants' costs as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.

DATED at Port Vila this 21st day of May 2024
BY THE COURT


.....
Justice Viran Molisa Trief

