

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

Civil
Case No. 19/1669 SC/CIVIL

**BETWEEN: Trevor Housby t/a Nambas
Fishing Charters**

Claimant

**AND: Julien Lenglet t/a Vanuatu
Refuelling Services**

First Defendant

**Societe De Services Petroliers
SNC t/s Pacific Petroleum Co**

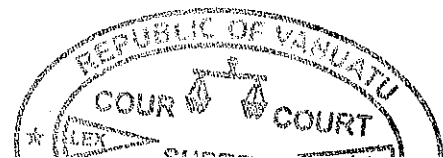
Second Defendant

Date of Hearing: 15 – 18 March 2021
By: Justice G.A. Andrée Wiltens
Counsel: Mr N. Morrison for the Claimant
Ms S. Mahuk for the First Defendant
Mr M. Hurley for the Second Defendant
Date of Decision: 27 May 2021

Judgment

A. Introduction

1. This decision considers which party is responsible for the supply of contaminated diesel fuel, which badly affected the engines of a charter fishing vessel and put Nambas Fishing Charters



("NFC") out of business for several months in 2018. It also considers whether damages are appropriate on the basis of breach of contract and/or negligence.

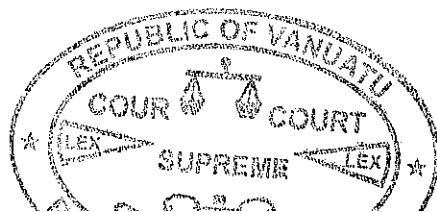
2. Damages were sought to recompense the owners of the vessel in respect of the costs of the repairs that were required to be undertaken and for loss of profits while the boat was unable to be used for charters.

B. Background Facts

3. On Sunday, 29 April 2018, Mr Housby and his partner Ms MacLucas set out fishing on their boat the MV Nambas. They only gone a short distance before encountering significant engine problems which caused them to return to the boat's usual mooring at Havannah Harbour. Once docked, Mr Housby did a full inspection of the engines to see if he could ascertain the problem.
4. It was immediately obvious that the fuel being used was contaminated. Mr Housby took several samples of the contaminated fuel and numerous photographs.
5. The boat had previously been last used for charters on 26 April 2018, and again in the morning of 27 April 2018, without any such issues.
6. In the early afternoon of 27 April 2018, a delivery of 1500 litres of diesel was made directly to the boat by Vanuatu Refuelling Services ("VRS"). There is no suggestion of contamination occurring in the supply of diesel from the VRS delivery vehicle to MV Nambas, an operation supervised by Mr Housby and a VRS employee Mr Bule Larry in the usual manner, such similar supply having previously been made on numerous occasions.

(i) Mr Housby's Perspective

7. Putting those bare facts together, Mr Housby promptly advised Mr Lenglet, the owner of VRS, that his company had supplied contaminated fuel to his boat. At the time Mr Lenglet needed to make his own enquiries, which he did the next day and following. He too took samples, photographs and arranged for chemical analysis of the fuel.
8. Mr Lenglet and Mr Housby co-operated closely to attempt to rectify the problem in the days following the initial complaint, but the issue involved much more than simply removing and replacing the contaminated fuel. After professional advice was taken from an engineer flown in from Fiji, the engines were ultimately repaired by an expert from Australia of the particular engine-type at significant cost. In the meantime, Mr Housby's business of NFC was unable to operate until those repairs had been completed. The charter operation was only able to fully resume business after 16 January 2019, and was therefore out of action for just under 8 months.



9. There is no challenge to the fact that the engines needed to be repaired, or to the costs involved. It is also accepted that the charter business was unable to operate for the duration of the repairs, as a result of which numerous future bookings had to be given away.

10. Further, while the boat was out of action, new charter bookings could not be accepted. Ms MacLucas, who looks after the financial side of the charter operation has given evidence setting out in detail the particulars of the loss of profits incurred. That evidence is largely unchallenged.

(ii) VRS' Perspective

11. Mr Lenglet now admits that VRS supplied contaminated fuel to MV Nambas.

12. Although agreeing that VRS supplied contaminated fuel to MV Nambas, Mr Lenglet does not accept responsibility for that. He points to the supplier of the diesel fuel to VRS, namely Societe De Services Petroliers SNC t/a Pacific Petroleum Co ("SSP") as being responsible. Accordingly he filed a counterclaim against the supplier of the fuel to be indemnified against the Claimant's losses. He claims a number of VRS vehicles were also affected by the contaminated fuel and he seeks recompense for the necessary repairs. He also sought to claim back the original cost of the fuel delivered which was largely returned to SSP.

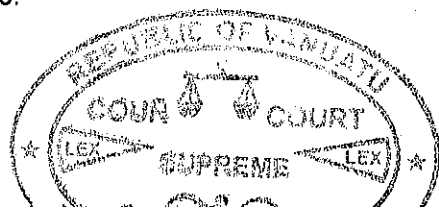
13. He blames SSP for the contamination on the basis that he carries very little stock, and when running low on fuel he orders more from SSP. As a result of such an order, SSP delivered 3,000 litres ("L") of diesel to VRS on 3 March 2018.

14. Following the 3 March 2018 supply by SSP, there was only one customer delivery made by VRS prior to the MV Nambas delivery on 27 April 2018. That was on 19 April 2018 to Mr Christophe Dinh of some 280L of diesel - most likely from old stock retained in the aluminium tank on VRS' delivery vehicle. There is no evidence that this delivery was contaminated. Indeed, Mr Lenglet subsequently asked Mr Dinh about this and was advised that there was no problem with the fuel supplied.

15. Following the report from Mr Housby, Mr Lenglet inspected the fuel in VRS' stainless steel tank, PVC tank and aluminium tank. He found the same contamination in all 3 tanks as had been evident at MV Nambas. He therefore says the fuel was contaminated prior to being delivered to VRS.

(iii) SSP's Perspective

16. The SSP delivery to VRS was made by Mr Henry Vuti. He delivered the 3,000 litres of diesel fuel to all 3 of VRS's storage tanks - firstly, to the stainless steel tank until told to stop when it was full, then some 800 litres to the PVC tank and the remaining 1,000 litres or so to the aluminium tank that rests on the back of VRS's delivery vehicle.



17. The fuel supplied to MV Nambas came from VRS's stainless steel tank and VRS's aluminium storage tank on the back of the delivery truck. The truck was topped up out of the stainless steel tank to make up the 1500L MV Nambas order.
18. SSP, for its part, does not challenge the validity of Mr Housby's Claim, but denies all responsibility for any contaminated fuel and points to VRS as being likely to be solely responsible for that. It points to the unlikelihood of the 6 million litres of diesel received from Singapore via the ship Bougainville and stored in SSP's extremely large storage tank, Tank 7, being contaminated. That is challenged by VRS as will be later discussed. SSP further points to the VRS supply to Mr Dinh, as evidencing a lack of contamination in the fuel supplied to VRS's aluminium tank on the back of the delivery truck.
19. Further, there is evidence from Mr Vuti, supported by documentary evidence, of other deliveries by him using the same SSP delivery truck on 27 April 2019 to make deliveries to MV Young Blood, Ah Pow Bakery, Happy Castle Service Station, Switi and Vanuatu Aviation Limited. The fuel supplied to all those parties by SSP was uncontaminated. One of these deliveries was made prior to the VRS delivery; the remainder were made subsequent to the VRS delivery. Significantly, the same compartment in the delivery truck, namely compartment 1, was used twice. This is unchallenged and there is clear documentary evidence to support it.
20. SSP's case is that it is very experienced in dealing with fuel supply and further that it takes significant care to ensure the safe storage and transportation of its fuel from source to client. It has numerous procedures developed over the years to ensure it only provides clean fuel to its customers.

C. Preliminary Issues

21. What is immediately obvious, despite the many factual conundrums to be resolved, is that Mr Housby must be entitled to judgment for his losses – there being no challenge to that proposition.
22. The quantum of that judgment needs to be adjusted to take into account (i) some doubling-up of the claimed costs and (ii) a close assessment of certain outgoings claimed. Those outgoings are a "best-guess" by Ms MacLucas as to a percentage.

Sale of Goods

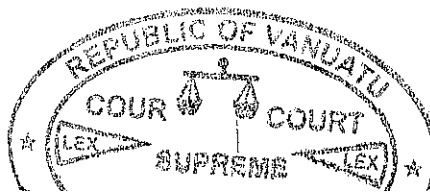
23. There was clearly a contract of supply between SSP and VRS, and a subsequent similar contract between VRS and NFC.
24. SSP relies on the provisions of the sale of Goods Act 1893 (UK) ("The Act"). It submits there is Court of Appeal authority to the effect that the provisions of this Act apply in Vanuatu: see *ANZ Bank (Vanuatu) Limited v Marchand* [2001] VUCA 2.



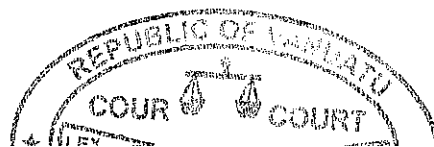
25. SSP submits that VRS accepted the fuel delivered on 3 March 2018 as there was clear intention for the property or title to pass – this is in reliance of section 17 of the Act. Similarly, SSP submits the risk involved in the purchase also passed at that time by virtue of section 20 of the Act.
26. While SSP accepts the implied conditions in its contract with VRS as to fitness and merchantable quality, it further submits VRS is caught by section 14(2) of the Act. That provides that if the purchaser of goods has examined or had good opportunity to examine the goods, then there will no longer be an implied condition as regards to defects which such examination ought to have revealed. SSP relies on the authority of *Thornett & Fehrs v Beers & Sons* [1921] 1KB 219 as illustrative of that proposition.
27. It is submitted that Mr Jose Ramwel, a VRS employee, had ample opportunity to inspect the fuel at delivery, and that accordingly VRS is bound by his signature on the Bulk Delivery Docket.
28. I accept Mr Hurley's submissions as to this. Indeed, his submissions went unanswered. It follows that SSP cannot be held in breach of its contract with VRS.
29. Exactly the same legal position exists between VRS and NFC, although it was not the subject of submissions by counsel for VRS. I took that to be due to the express instructions of Mr Lenglet. However, the legal position must be that Mr Housby accepted the fuel delivered by VRS on 27 April 2018 as he was not only present but actively involved in the transfer from VRS' delivery truck to MV Nambas. In those circumstances, it is clear that it was intended by all that title to the fuel pass to NFC and that Mr Housby had ample opportunity to inspect the product prior to it being pumped into the MV Nambas tank.
30. Accordingly, I find that VRS is not liable to NFC for breach of contract.
31. Mr Morrison conceded that there was no privity of contract between SSP and NFC.
32. By a process of elimination, what is left therefore is to ascertain whether there is any liability under the head of negligence in respect of either VRS and/or SSP. The counter-claim by VRS also needs to be determined.
33. However, the real crux of this litigation is to determine responsibility for the contaminated fuel being delivered. That issue lies between VRS and SSP.

D. Evidential Matters

34. The standard of proof required is on the balance of probabilities. The onus to establish the Claim to that standard was on Mr Housby.

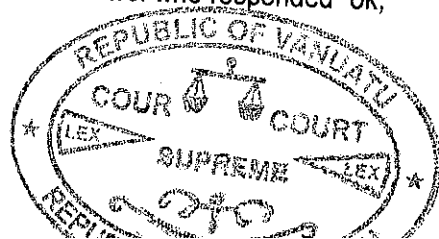


35. The credibility and accuracy of witnesses' evidence is not to be assessed solely by how the witness appears in Court. The clues that might be relied on to gauge such matters are not obvious simply based on appearance or conduct. Of course those observations are a part of the process of evaluation, but they play only a small part.
36. What is of more significant is to look for consistency of accounts. I looked for consistency within a witness' account. I looked for consistency also when firstly, comparing that account with the accounts of other witnesses, and secondly when comparing the account of a witness with the relevant documentary exhibits.
37. On that basis I formed certain views as to the reliability and veracity of the witnesses.
38. I also had regard to the inherent likelihoods of the situation then prevailing. I had due regard to the passage of time, bearing in mind that these events were 2½ years old, and the effect of that on memory.
39. I will now set out the evidence given, my views on to the witnesses, and certain findings. I do not set this out in the order the witnesses testified. Instead, I am taking a largely chronological approach as that has assisted in my evaluations.
40. I record that there were a number of objections to the admissibility of parts of the evidence of a number of the witnesses on the basis of hearsay and/or comment. Those challenges to evidence were largely dealt with by consent between the counsel, and resulted in the excising of part of the sworn statements produced. I took care to only consider the remaining parts of the sworn statements.
41. Mr Marango George is a former SSP employee who retired in 2016, after 31 years service in numerous capacities. He has not returned to the SSP premises following his retirement. He was called by the Claimant to add weight to the suggestion that SSP's process of re-cycling waste fuel may well have been the cause of the fuel contamination. The way this was put to the Court made it plausible. SSP's premises are exposed to the elements. Spillage occurs in any transfer of fuel, and collects by means of drains that criss-cross the site. Rainwater and dust/dirt/mud is part of what collects together with the fuel spillage. Terms such as "sludge", and "slop" give colour to the theory. SSP attempts to minimise wastage by putting this material through this process to "clean" the fuel and add it back into their tanks for sale to customers.
42. Mr George drew a sketch plan of SSP's site. It was at odds with a plan produced by Mr Niowenmal. Mr George would not budge when cross-examined about the sketch. I consider the fact that he did not concede, even when photographs demonstrated errors on his sketch, reduced his credibility.
43. Mr George was very critical of SSP's recycling practices. However it seemed to me that the process described later by Mr Niowenmal was a better and more accurate detailing of the process in 2018. When cross-examined about his criticisms of SSP processes, Mr George would not concede to any other possibilities and seemed oblivious to the fact that the

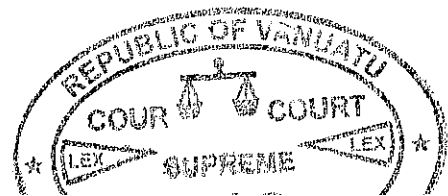


processes in place at SSP were accepted internationally. It seemed to me that he also exaggerated the amounts of re-cycling regularly occurring.

44. Mr George maintained that SSP used salt water to raise the level of diesel in its tanks. When it was put to him that SSP had ceased to do that for over a decade he maintained that SSP was still using that method post his retirement. As he had not been back to his former place of employment since 2016 that statement was simply not credible.
45. I determined Mr George to be neither credible nor reliable as a witness. I put his contested evidence to one side, save for where there was credible independent support for his evidence.
46. Mr Henry Vuti is a driver for SSP. He delivered 3000L of diesel from SSP's Tank 7 to VRS on 3 March 2018. He received the order and took delivery truck Registration No.18452 to undertake the job. He stated that he went on top of the truck and visually inspected each of the 5 compartments and found all empty. Despite that, he said that he then descended and opened the valve to each compartment to "...drain some residual fuel." He went on to say that he saw no water in any of that drained fuel. I found it hard to accept the need to drain empty tanks. I also did not accept that empty tanks had residual fuel. If so, then they would not be empty.
47. Later evidence indicated that all SSP trucks were drained prior to each delivery order being loaded. If that was a company requirement, there was no need for Mr Vuti to climb on to the top of his vehicle and look inside – he would have simply gone ahead and drained what was inside. I concluded Mr Vuti was embellishing his evidence.
48. Mr Vuti then filled compartment no.1 with 1500L of diesel. That was to fill an order for MV Young Blood. Once that had been delivered, he returned to SSP and again filled compartment no.1 this time with 3000L of diesel for delivery to VRS. He stated that Mr Lenglet was not at VRS to receive the fuel. He was met instead by a Ni-Van, whose name he did not know. The Court now knows that person to be Mr Ramwel.
49. Mr Vuti stated that the stainless steel tank at VRS did not have a dipping stick. He had seen it previously, but on 3 March 2018 it was absent. The other two storage receptacles, a PVC storage compartment, and the VRS delivery truck with the aluminium tank, also had no dipping stick. The absence of such device apparently precluded a water paste check being done on the fuel to be delivered.
50. Mr Vuti stated that he stood on a ladder and looked into VRS' stainless steel tank to see if it had sufficient capacity to receive his delivery. He said he saw a small amount of fluid inside. There is a rubber seal on top of this tank, and Mr Vuti considered it was not in good condition and should be replaced. He said as much to Mr Ramwel.
51. Mr Vuti stated that he then took a glass jar from inside his truck, and took a half-litre sample of the diesel being delivered which was clean and of a yellow colour. He considered the fuel to be of good quality and said that he showed the sample to Mr Ramwel who responded "ok, set, pump", or words to that effect.



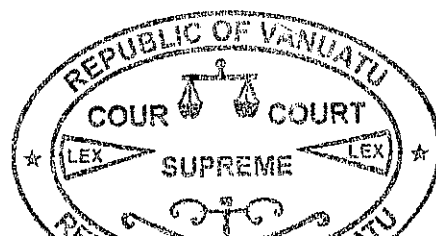
52. Mr Vuti sent Mr Ramwel to the top of the VRS stainless steel tank so that he could let him know when the receiving tank was full. Mr Vuti was told when to stop, and he continued to deliver the required diesel into the PVC storage tank next, before completing the delivery into VRS' delivery truck's aluminium tank. He thought that he had put about 1,200L into the stainless steel tank, 800L into the PVC storage tank, and the remaining 1,000L into VRS' delivery truck.
53. Mr Vuti produced written records: of the order, the bulk delivery report which he had completed, and other documents relating to the delivery.
54. Later the same day, Mr Vuti made other deliveries from SSP to:
- Ah Pow Bakery ("APB")
- Airports Vanuatu Limited ("AVL")
- Switi Limited ("Switi") and
- Happy Castle Service Station ("HCSS").
55. Mr Vuti also produced written records relating to those deliveries. He stated that he carried out water paste tests in relation to the deliveries to APB, AVL and HCSS, all of which were negative for the presence of water in the fuel delivered. In relation to the Switi delivery, there was no dipping stick. Instead, Mr Vuti visually observed the delivery as the connecting hose was clear and the small amount of spillage occasioned at that time was collected in a bucket, and that fuel too was clear on visual observation.
56. Lastly, Mr Vuti stated that of the various deliveries he had made that day, only Mr Lenglet had made a complaint.
57. In cross-examination it became evident that SSP's actual practices were not ideal. The docket numbers on the "Bulletin de Chargement" were not issued in sequence. The number for the MV Young Blood delivery was 24485. The number for the VRS delivery was 24481. Yet all the evidence points to the MV Young Blood order and delivery occurring before the VRS delivery. Why this occurs was not explained.
58. Further, Mr Vuti stated that there were other deliveries made on 3 March 2018, but although searching for the file containing the records, it could not be found.
59. This was concerning, because Mr Vuti was heavily reliant on SSP records to assist his recollection. After 2½ years, it must be an extremely unusual event to be able to fix a particular day's deliveries in the memory. This was well illustrated when Mr Morrison asked Mr Vuti when he had commenced work on 3 March 2018. He replied that he had started work at 7.30am. This was immediately shown to be inaccurate, as the delivery to MV Young Blood is recorded to have been made at 7am. I concluded that Mr Vuti's recollection of the events of 3 March 2018 was poor and that he was reliant on such records as he could find to assist him. I did not consider that surprising.



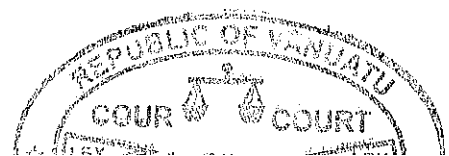
60. The SSP drivers are required to record the totalisator details on the Bulletin de Chargement. If Mr Vuti's recordings of that detail was accurate, then the following picture emerges in terms of the order of his loadings prior to delivery:

MV Young Blood	1,500L	1860500 - 1862000
AVL	2,000L	1862000 - 1864000
VRS	3,000L	1897600 - 1900600
Switi	900L	1900600 - 1901500
APB	3,000L	1901500 - 1904500

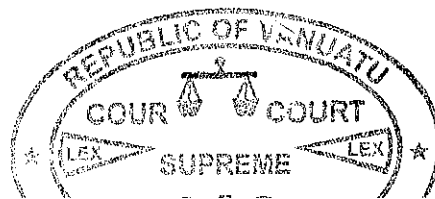
61. The totalisator number in respect of HCSS is not in sequence, for reasons unknown and unexplained. The recordings in relation to that reads: 13929190 - 13934190 with 5,000L delivered.
62. Mr Vuti's evidence is that he delivered first to MV Young Blood. He stated that he then returned to SSP's premises and loaded VRS' fuel. That accords with the times recorded on the Bill Delivery Reports, which show delivery at MV Young Blood at 7am, at VRS at 10.06am and at AVL at 12 noon. Unfortunately the other copy documents provided are indecipherable as to delivery times. As previously stated, I have no doubt Mr Vuti's evidence was reliant on these records.
63. So, while Mr Vuti's evidence as to sequence fits with some of the records adduced, it does not fit with the totalisator records. Mr Vuti loaded the fuel required for MV Young Blood, followed sequentially by the fuel for AVL. Because the totalisator records for those deliveries are sequential, they were either loaded one immediately after the other, or there was no other driver loading fuel before Mr Vuti returned and loaded the AVL delivery. It is not possible from the evidence to be certain which occurred.
64. However, there was a gap in time between AVL's load and that of VRS, Switi and APB, all the latter 3 loadings being sequential. It is further apparent that VRS' delivery occurred at 10.06am. At that time the SSP delivery vehicle also had fuel on board for deliveries to AVL, Switi and APB. It is possible, indeed more likely than not, that AVL's fuel was in the SSP delivery truck for no particular purpose from around 7am to 12 noon. That is not the evidence of Mr Vuti. However, I find the records more compelling.
65. There remains one other point in relation to the Bulk Delivery Reports. There is space set out for "Check List" entries to be recorded by the driver and the receiver of deliveries. In each instance, there are no recordings at all in relation to the deliveries of interest – there are simply lines deleting the possibility of recording any detail. It would have been in SSP's best interests to compel completion of the details identified by both their drivers and receiving clients. As it was, Mr Vuti was criticised for not recording his comments regarding the rubber seal. He merely said that he had not done that, which was obvious. However, more pertinently he was unable to say why. Had there been such a record made that would have substantially supported his evidence on the point.



66. While it is apparent that the fuel delivered by SSP's truck driven by Mr Vuti all came from SSP's Tank 7, only the fuel delivered to MV Young Blood and VRS was held in compartment no.1 of the delivery truck. The other deliveries on 3 March 2018 were placed in different compartments. By a process of elimination, if SSP is responsible for the fuel contamination, the contamination can only have affected fuel supplied to VRS and MV Young Blood. The evidence relating to the other deliveries that day is otherwise of little determinative value.
67. Mr Vuti stated that SSP's processes include the sealing of fuel deliveries in the delivery truck compartments at source, which seals are broken only in the presence of the customer at the point of delivery. Although there is a place for the seal numbers to be recorded on SSP's documents, these details were also not recorded. This is another area where SSP could have tightened their procedures. The lack of such recording leaves it open for the submission that in fact SSP did not use seals at all.
68. Mr Vuti's evidence was challenged. He acknowledged that he was relying on his memory after 2½ years, but he was adamant that he went to the top of the VRS stainless steel tank and looked inside. He was also adamant that there were problems with the rubber seal. He maintained that he had followed standard procedures when he could. He did not make any concessions in cross-examination.
69. His evidence was a "counsel of perfection", and in my view was unreliable. The records assisted him to a degree, but I was not convinced he was a reliable reporter of the facts. I determined that it was not safe to accept his contested evidence where it was not supported by other independent credible evidence. As will shortly be related, there is a large body of contrary evidence which I preferred.
70. The way I see Mr Vuti's evidence is that he constructed an account that amounted to the steps he should have taken but most likely did not. In order to be able to say that VRS' stainless steel tank had some fuel in it at the time of delivery, he had to have visually inspected it. Accordingly, he made up the evidence about the rubber seal, something he would only know about if he had gone to the top of the tank. However I do not accept that he did what he said.
71. Further, in order to explain why no water paste test was done, Mr Vuti's concocted the fact that VRS' dipping stick was gone. He also added for a good measure that he therefore drew a sample of his delivery fuel and showed it to Mr Ramwel. I prefer Mr Ramwel's evidence to the contrary as to these points. Too many other witnesses also dispute Mr Vuti's "unusual practices," for them to be accepted.
72. I do not accept Mr Vuti's evidence that he scaled the stainless steel tank, that he visually inspected and found some diesel in the tank, that there was something wrong with the rubber seal or that the dipping stick was missing. I do not accept that he drew a sample of the delivery fuel and showed it to Mr Ramwel. This evidence was carefully put together by Mr Vuti, 2½ years after the event, with a view to ensuring SSP would not be held responsible for the contaminated fuel eventually supplied to NFC. I consider it is fabricated evidence, and as a result, I gave it no weight.

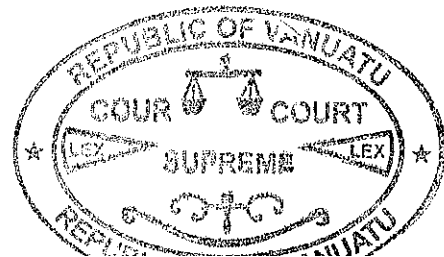


73. Mr Jose Ramwel is the VRS employee present when Mr Vuti delivered the 3000L of fuel on 3 March 2018. He challenged the evidence given by Mr Vuti.
74. In particular he was adamant that Mr Vuti had not taken a sample of the fuel being delivered to show it to Mr Ramwel. He went further and stated that such had never occurred in his experience of being present at up to 10 such deliveries being received.
75. He further stated that the VRS stainless steel tank did have a dipping stick at the time of Mr Vuti's delivery.
76. He stated that he had never seen any SSP staff use a water paste test at delivery. He admitted further that he had no knowledge, prior to this case surfacing, that this was a requirement or even a beneficial thing to do. I considered that favourable to his credibility.
77. Mr Ramwel maintained Mr Vuti did not comment on the rubber seal of the stainless steel tank. He was sure that Mr Vuti had not gone to the top of the tank to visually inspect inside the tank prior to delivery. Mr Ramwel told the Court that he had checked the seal again after reading Mr Vuti's sworn statement in October 2020, and that the seal was in excellent condition at that time.
78. In cross-examination, the point was made that Mr Ramwel was also relying heavily on his memory when recalling the 3 March 2018 delivery. However, it is a different matter to say something never happened over a period of time than to recall a specific event of little of no intrinsic interest.
79. Mr Ramwel confirmed that Mr Vuti first filled the stainless steel tank, then the PVC storage container and finally that the balance of the delivery was pumped into the VRS delivery truck's aluminium tank. He denied telling Mr Vuti: "ok, set, pump."
80. Mr Ramwel did not look into the stainless steel tank before the delivery commenced, nor later into the PVC storage container before it was filled. He was accordingly not able to say whether there was already some fuel in either tank prior to delivery. To his credit though, he accepted there could have been. The relevance of this for SSP is that a small amount of fuel stagnating in a tank has greater chance of becoming contaminated.
81. At one point Mr Ramwel became confused about the use or otherwise of the dipping stick. However, he ended up being sure that the dipping stick was present at the time of Mr Vuti's delivery. His brief wavering on the point did not reduce his credibility in my eyes.
82. I considered Mr Ramwel to be an honest witness. I accepted his evidence as accurate and reliable, recognising that he was working solely from memory. Where his evidence differed to that of Mr Vuti, I accepted Mr Ramwel's account. I noted there was consistency between his account and that of other witnesses.
83. Mr Nicolas Dufus is the Production Manager for Switi Limited. He was giving evidence at the request of Mr Lenglet, and he stood to gain nothing by doing so. He was present when Mr

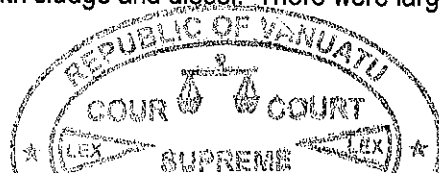


Vuti delivered fuel for Switi Limited on 3 March 2018. He disputed Mr Vuti's evidence to the effect that Mr Vuti had shown him a sample of the fuel being delivered.

84. He went further and stated that such had never happened previously; and added that no SSP driver had ever tested the fuel that was being delivered in his presence. By testing, I took him to be referring to water paste testing.
85. In cross-examination, Mr Dufus conceded that he had not remained on 3 March 2018 during the entire delivery process. He agreed also that the hose used to pump fuel into Switi Limited's tank was clear so that the fuel could be seen through it. He also accepted that there was no dipping stick.
86. Mr Dufus made appropriate concessions and did not embellish his evidence. He appeared to me to be a credible and reliable witness. I accepted his evidence and preferred his account to the evidence of Mr Vuti.
87. Mr Bule Larry is a VRS employee. He delivered the 1500L to MV Nambas on 27 April 2018. He stated that he followed the usual processes, as he had been taught by Mr Lenglet. There was nothing abnormal during the delivery.
88. Mr Larry was informed on 30 April 2018 of the issue with contamination. Accordingly he was able, after only several days, to re-construct the steps he had taken.
89. He confirmed that MV Nambas placed the order for diesel fuel on 2 April 2018. He delivered the fuel at around mid-day on 27 April 2018. In order to make the delivery, Mr Larry took VRS' delivery truck from Nambatri to VRS' storage depot at Top Signs. With the forklift he then raised the stainless steel tank above the delivery vehicle, opened the fill plug of the aluminium tank on the back of the delivery vehicle and pushed the hose from the stainless steel tank into the truck's inlet, letting gravity drain the stainless steel tank.
90. Mr Larry stated in cross-examination that he did not know if there was any fuel in the VRS delivery truck's aluminium tank prior to starting to fill it from the stainless steel storage tank. His evidence in chief was to the effect that the truck's tank was the last storage used by VRS – the stainless steel tank was used first, then the PVC tank and finally the aluminium tank on the back of the delivery truck. He was not challenged as to that.
91. Mr Larry was asked again, in conjunction with his sworn statement, whether the aluminium tank on the delivery truck had any fuel in it when he commenced to load the MV Nambas delivery. He replied there was not; that the truck's tank was empty. However, he accepted that he had not looked into the tank before proceeding to fill it. That was a credible response.
92. Mr Larry told the Court he could not recall making a delivery to Mr Christophe Dinh before 27 April 2018. Other evidence suggested there was such a delivery, but it may not have been made by him.



93. Mr Larry stated that he had not done a water paste test before he commenced loading the fuel. Nor did he show Mr Housby a sample of the fuel being delivered.
94. Given that Mr Larry had not done a water paste test, nor looked into the delivery vehicle's aluminium tank prior to loading the MV Nambas delivery, I could not accept his statement that there was no fuel in the tank on the morning of 27 April 2018. In fact, other evidence made it clear that there could well have been, as was later admitted by Mr Lenglet.
95. On the whole, Mr Larry was an unremarkable witness. I determined to accept his evidence where it was challenged only where it was supported by other reliable evidence.
96. Mr Trevor Housby has operated the NFC business since 2016, initially with a rented boat. He purchased MV Nambas in 2017.
97. He appended to his sworn statement a spread sheet schedule which set out the charters that been booked, but which were turned down or cancelled due to MV Nambas not being able to be used due to contamination immobilising the engines. The charters were spread from 30 April 2018 to 12 January 2019. The bookings were charged out to the customers at VT 24,280,000. There was no challenge to this evidence.
98. Mr Housby estimated that over that period he would have been able to catch VT 1,800,000 worth of fish for sale had these charters proceeded. That was not challenged. In addition, he further claimed an amount for VAT at VT 3,912,000. I do not understand how this is a valid claim. Mr Housby would have had to collect the VAT from customers but account for it to the Government. There can be no loss to him in relation to this.
99. Mr Housby gave extensive evidence, all unchallenged, about his expertise as a boat skipper; and as well regarding his knowledge of the fuel system operating on MV Nambas. He detailed his maintenance and monitoring regimes.
100. He explained undertaking a successful 6 hour charter on 27 April 2018 and an earlier charter the day before. There had been no issues with the boat on either occasion. On the afternoon of 27 April 2018, he received 1500L of diesel from VRS. There was nothing unusual about this particular delivery. He had been dealing with VRS for several years prior to that without any issues.
101. Mr Housby did not again use the MV Nambas until Sunday 29 April 2018, when he and Ms MacLucas (and another) went out for a casual fishing trip. They had only gone a short distance when Mr Housby noticed extreme vibration and abnormal noise coming from the boat's engines. He immediately shut down the starboard engine. He returned to Havanna using only the port engine at low revolutions.
102. At the marina, Mr Housby investigated further. He saw both bowls of the Racor water separator filters were full of filthy brown water mixed with sludge and diesel. There were large

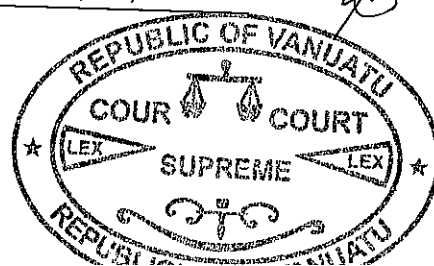


brown particles of debris. He took a photograph to record what he found. He opened the filters and found the unit to be full of heavily water contaminated diesel, and he took a photo of that also as a record. He next drained and stowed the fuel from the Racor units.

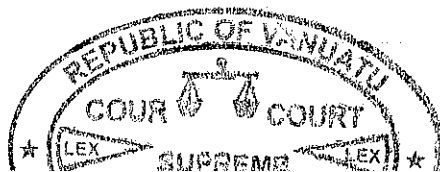
103. Mr Housby then telephoned Mr Lenglet and advised him what had occurred. He sent copies of the photos taken to Mr Lenglet. Mr Lenglet responded that he was away from his office, and could not check until the next day; but that he would then revert to Mr Housby.
104. Mr Housby next drained the main engine filters. He took more photos and stowed that fuel. He replaced the filters with new filters.
105. The next day 30 April 2011, Mr Lenglet messaged Mr Housby. He told Mr Housby that he had also found contaminated fuel in all the VRS storage tanks, which he would report to SSP. Mr Lenglet sent him a photo of a sample he had taken from the stainless steel tank. It looked the same as what Mr Housby had found on MV Nambas.
106. Arrangements were made for Mr Lenglet to attend the MV Nambas and drain the entire fuel tank. This occurred on 1 May 2018. The contaminated fuel was removed and taken away. Mr Housby explained that every effort was made to remove all contaminants from MV Nambas. He understood also that Mr Lenglet took every measure possible to clean his delivery vehicle after taking away the contaminated fuel. Mr Housby was aware of this as Mr Lenglet sent him CCTV footage showing the vehicle being thoroughly cleaned.
107. Mr Housby had also contacted the Service and Operations Manager from a company with a Caterpillar dealership in regard to the appropriate measures to take in the case of water contaminated fuel. The manager, Mr McCoster, sent instructions as to what Mr Housby should do.
108. On 3 May 2018, VRS delivered further diesel to MV Nambas. After the boat's tank was filled, a water paste test was conducted of the fuel with no indication of water being found. Mr Housby was satisfied the fuel was clean.
109. Mr Housby then followed Mr McCoster's advice and instructions, and set about testing the MV Nambas engines. It was immediately obvious that the engines had been damaged and were not operating as they should. Mr Housby advised Mr Lenglet of this and also told him that he would have to cancel his future bookings. He agreed with Mr Lenglet that a certified Caterpillar mechanic in Fiji should be located and instructed to come to Vanuatu.
110. The mechanic completed his assessment of MV Nambas on 6 June 2018. He made a number of recommendations. Unfortunately, these could not be effected immediately due to a lack of the relevant parts in Vanuatu. The mechanic therefore had to return to Vanuatu a second time to make the required repairs using the by-then purchased engine parts. On 12 June 2018, the mechanic certified MV Nambas as again being fit to operate.

111. Mr Housby re-commenced charters on 16 June 2018.
112. However in July 2018, Mr Housby noticed that the MV Nambas engines were under-performing. He reported this to both the Caterpillar mechanic and Mr Lenglet. On 28 July 2018, Mr Housby again closed down NFC, and a number of future bookings had to again be cancelled.
113. Arrangements were then made for the Caterpillar mechanic to return and make further repairs under warranty. The necessary parts were not available until 9 September 2018, by which time that mechanic had resigned and been replaced. Mr Housby made, and paid, for the new mechanic's arrangements while in Vanuatu. Unfortunately, the repairs undertaken were not successful in addressing the problem.
114. On 24 September 2018, Mr Lenglet told Mr Housby about a Caterpillar technician who was by chance in Vanuatu in respect of another engine. This mechanic was contacted and he conducted an inspection of MV Nambas' engines. He prepared a detailed report. This report led to Mr Housby contacting and engaging Hastings Deering ("HD") in Australia to assess the MV Nambas' engines and make a report. Mr Housby paid for this.
115. There were serious issues with the engines. Parts had to be obtained from around the world, which took time. Eventually HD were able to do the required repairs between 2 - 12 January 2019. Mr Housby made all the payments relating to this. These repairs proved successful.
116. Mr Housby was forced to take out an overdraft at his bank due to his lack of income. He sought recompense for the funds expended in repaying that. There was no challenge to this.
117. NFC resumed operations as from 16 January 2019. There have been no further engine problems. VRS continue to supply fuel to Mr Housby.
118. Mr Housby has provided documentary evidence of the losses he and his business sustained as a direct consequences of the contaminated fuel affecting MV Namba's engines. I set these out below, but do not include those parts of the claim abandoned in the course of the trial:

Cancelled charters/sale of fish	VT 26,080,000	
Costs of repairs	VT 5,506,340	
Bank overdraft costs	VT 757,485	
Restart costs/Goodwill	VT 2,000,000	
Loss of use of MV Nambas (VT 29,922,000 less 15% for operational expenses)	VT 24,433,700	VT 25,493,200
	VT 58,777,525	VT 33,757,025

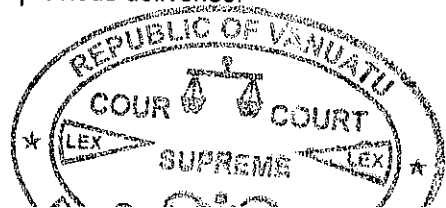


119. Mr Housby made a second sworn statement in which he sought to refute some of the evidence of other witnesses. In particular, in relation to Mr Niowenmal, Mr Housby stipulated that in his years of experience he had never received or been shown a sample of the SSP fuel about to be delivered. He also disputed that SSP delivery trucks used seals when delivering fuel to customers.
120. Mr Housby challenged Mr Vuti's sworn statement, wondering how, if the compartments of his delivery vehicle were empty on 3 March 2018, Mr Vuti could then draw samples and verify them to be water free. He stated that in his experience no SSP delivery driver had ever given, or shown him, a sample of the fuel about to be supplied.
121. He did not accept the validity of Mr Tagar's report.
122. Mr Housby was challenged only to the extent that he accepted some matters in Mr Lenglet's evidence which he was not in any position to confirm. He properly conceded that he had overstated a number of matters. It was notable that his veracity was not challenged.
123. I accepted Mr Housby as a truthful and reliable witness. I took care to only consider the evidence he had personal knowledge of.
124. Ms Laura MacLucas is Mr Housby's partner. They operate the NFC business together, he being the skipper; and she dealing with management and administration matters, in particular the financial side of the business. She is also on board as a deckhand or first mate.
125. Ms MacLucas confirmed that MV Nambas had operated charters on both 26 and 27 April 2018 without any issues. The diesel delivery occurred at around mid-day on 27 April 2018. The next time the vessel was used was on Sunday, 29 April 2018. Ms MacLucas confirmed that the boat had not gone far before the problems were discovered and they promptly returned to dock. She was then shown the contaminated fuel in the water separator filters and confirmed that the fuel was murky brown, quite unlike the colour of clean diesel.
126. The boat was usable again, after initial repairs, from 16 June 2018, but that proved to be a false start. Further repairs were required, which again put them out of business. The boat was finally back to being fully functional in January 2019.
127. Ms MacLucas gave evidence of the charters that had been booked but which had to be cancelled. This confirmed the evidence of Mr Housby and was not challenged.
128. Ms MacLucas was the witness best able to deal with the extent of the losses suffered. She prepared the material that supported the loss of the charter business while MV Nambas was out of action and set out the previous annual earnings of the charter business. The raw data supporting those matters as well as the various charges incurred in fixing the boat engines was all appended to the sworn statement of Mr Housby. However, when questioned about

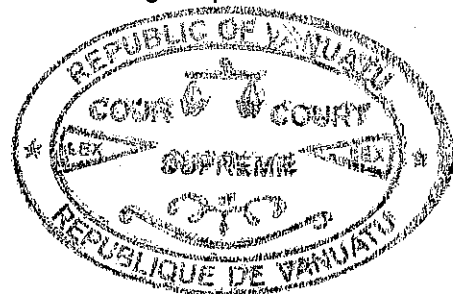


financial matters he immediately made it clear that he left those matters to Ms MacLucas, and that she would be the better person to ask about such matters.

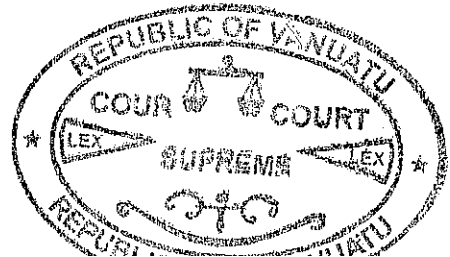
129. The end claim comprised the costs involved in repairing the MV Nambas' engines, and the loss of a large amount of charter business while the boat was unable to operate, as well as the loss of good will while the business languished.
130. There was challenge to only a small part of the claim with regards to quantum. Firstly, there were two bank loans entered into for the purchase of the boat and for the purchase of a business vehicle. The costs associated with those loans was an on-going cost unrelated to the engine problems. This could therefore not be attributed to the contaminated fuel issue. These parts of the claim were accordingly not pursued.
131. Ms MacLucas had set out the charter operations annual income and expenditure and profit and loss. There were some differences between the 2017 and 2018 figures which required explanation. She explained that the business evolved, moving towards the "higher end" of charter operations and offering more expensive over-night charters with clients remaining on board for longer periods. This greatly improved profitability. As well, as their chartering experience grew, it was possible to trim their operating costs.
132. In 2017, the operating costs of running the charter business proved to be 41.7% of gross income. The Amended Claim sought to set off the 2018 operating costs at 25% of gross income. Then in her second sworn statement, Ms MacLucas sought to further reduce that to an estimate of 15% of gross income "...on reflection". When challenged as to this further reduced amount, she did not budge.
133. Ms MacLucas was an intelligent witness who well understood the effect of her evidence. I considered her to be honest and accurate. I accept her evidence that the operating costs were actually lower than what claimed in the Amended claim. She explained that she had ventured a lower figure, but then-acting counsel had advised her to make it 25%. I accept her evidence that 15% is a more accurate assessment.
134. Mr Julian Lenglet is the beneficial owner of VRS, among other businesses. He has years of experience as a fuel retailer. He purchases fuel from SSP and on-sells it for profit.
135. On 3 March 2018, SSP delivered 3,000L of diesel to VRS. He produced the fuel report and tax invoice for VT 383, 985 which is what he claims in the counter-claim. On 27 April 2018, VRS delivered 1,500L to MV Nambas. The fuel came from the diesel supplied by SSP on 3 March 2018 to the stainless steel tank and the aluminium tank.
136. Mr Lenglet confirmed SSP put the 3,000L firstly into VRS' stainless steel tank, then the PVC tank and finally into the aluminium tank on the back of VRS' delivery truck. He considered that the aluminium tank had approximately 100L left in it from the previous deliveries.



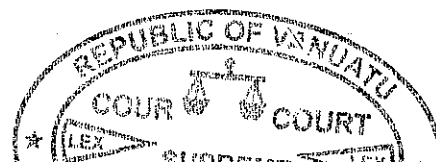
137. Mr Lenglet explained that the VRS stainless steel tank has its outlet pipe in the very base of the tank, thereby not ever collecting sludge and/or water in the base of the tank. He further stated that his tanks were all properly sealed at the top to prevent the entry of water. It was his evidence that as the VRS tanks are constantly full, there is no possibility of condensation forming. I doubted that. For example, when the 3 March 2018 delivery was made, the aluminium tank had only 100L in it, and therefore ample space/air for condensation to form. Mr Lenglet's evidence as to this was more aspirational than actual.
138. Mr Lenglet confirmed the evidence of other witnesses with information from the internet to the effect that water sinks below diesel in a tank, and sludge settles even lower than that in a tank. It was his evidence that bacteria, if present, sit just above the water level in a tank and immediately below the fuel. There was no challenge to this evidence.
139. Mr Lenglet confirmed being advised by Mr Housby of the events on MV Nambas, on 27 April 2017. He was then away from his office and unable to check the remainder of the fuel at VRS. Mr Lenglet promised he would check it and revert on the following day. He did so. He took a sample from the stainless steel tank and found it contaminated to the same degree as Mr Housby's photos illustrated. Mr Lenglet also took a sample from the aluminium tank on VRS' delivery truck. He considered it was half sludge and half clearer in appearance.
140. Mr Lenglet confirmed receiving further photos from Mr Housby showing the fuel taken from MV Nambas' Racor filters.
141. Mr Lenglet stated that he took a sample from the PVC tank also. He stated it also had contaminants in it. He confirmed that all 3 VRS tanks contained similar contaminated fuel. Although questioned about this, he was not challenged that this was untrue. I accepted his evidence as to this.
142. Mr Lenglet attempted to contact SSP, but he could not connect by telephone. So he went there in person and reported what had occurred. He was eventually directed to speak with Mr Wilson Tagar. There was an agreement reached between them that VRS would return the fuel supplied by SSP on 3 March 2018. There was 2,696L, which was returned in 2x1,000L PVC tanks and 4x200L steel drums. Mr Lenglet kept his samples and some of the fuel had been put into VRS vehicles. The fuel return occurred on 4 May 2018. Mr Lenglet has not been repaid his purchase expenditure – that is part of his counter claim.
143. Mr Lenglet appended some 18 pages of e-mail correspondence between himself and Mr Leflon of SSP. It can be seen that Mr Lenglet kept SSP abreast of what was being done in relation to the MV Nambas engines. On the other hand SSP, from the start, advised Mr Lenglet that the contamination was likely to be his sole problem, with no responsibility resting with SSP. Mr Lenglet did his best to fight back. The correspondence ended with SSP insisting the problem was Mr Lenglet's; and ceasing all deliveries to VRS.



144. In the course of the correspondence, on 12 July 2018, Mr Lenglet advised SSP for the first time that some of the fuel delivered on 3 March 2018 had been used to fuel 3 VRS' vehicles. The fuel had caused damage to those vehicles, which engines require repair. This was also part of Mr Lenglet's counterclaim.
145. Mr Lenglet gave evidence about co-operating with Mr Housby immediately and throughout the period of time MV Nambas was affected by the contaminated fuel. This was confirmed by Mr Housby. Mr Lenglet offered to pay Mr Housby's ongoing costs and seek to recover the same subsequently from PPS.
146. Mr Lenglet confirmed Mr Housby's evidence as to the attempts to rectify MV Nambas' engines. Mr Lenglet made the arrangements for the Caterpillar mechanic from Fiji to come to Vanuatu and assess the engines. Mr Lenglet paid for that. He produced the report prepared by the mechanic. Subsequently he arranged for the parts to be obtained and installed by the Australian mechanic.
147. Mr Leglet produced a list of the matters he paid for arising from the steps taken to rectify the MV Nambas' engines. That amounted to VT 2,910,805. Mr Leglet seeks to recover that in his counter-claim and appended all the relevant documentary exhibits to prove his outlay. There was no challenge to this evidence.
148. Mr Lenglet gave evidence about the damage caused by the contaminated fuel to 3 of VRS' vehicles. He produced a photo of some fuel taken from one of the vehicle's engines, and also a quotation for just over VT 5 million to make good those vehicles.
149. Mr Lenglet next gave evidence about the various fuel tests conducted. Part of the sample he first took from the VRS stainless steel tank was tested by Vanuatu Services Engie. The 30 May 2018 report from that organisation's Mr Petit reveals the sample to be contaminated by salt water and other contaminants.
150. Mr Lenglet appended the report prepared by Mr Tagar to his sworn statement and proceeded to critique it. Mr Lenglet refuted the suggestion that because VRS' tanks were out in the open that exposed them to fuel contamination. He pointed to the full seals with safety caps and plugs. He also maintained that due to VRS' tanks emptying completely there is no need to clean the tanks in the way SSP cleaned their tanks.
151. He alleged that Mr Tagar took his sample from VRS' PVC tank on 5 May 2018 from the top of the fuel, not at the base of the tank where the contaminants would accumulate. He accordingly dismissed the sample as being of no use.
152. Mr Lenglet was adamant VRS' vehicles had incurred damage. He refuted the implication that he had invented that.

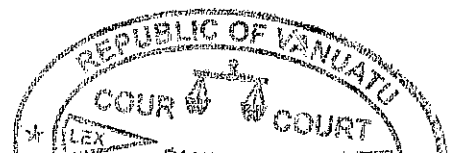


153. Mr Lenglet also disparaged the other tests done (by SSP) as being of no value due to the lapse of time and uncertainty as to provenance. There was little evidence to counter this point of view.
154. Mr Lenglet gave evidence that the diesel available in Vanuatu contains certain amounts of sulphur that posed no difficulties to customers as the vehicles in Vanuatu are generally older and used to running on what he called "dirty diesel." That was his explanation for the fact that contaminated diesel may have been supplied, but not have led to other clients complaining about the quality of fuel supplied.
155. Mr Lenglet's second sworn statement critiqued the evidence of Mr Niowenmal. Mr Lenglet disputed Mr Niowenmal's belief that SSP's quality control procedures and training, as opposed to the lack of the same at VRS, meant the contamination could only have come from VRS. In the 10 years VRS had purchased client from SSP, Mr Lenglet had had no quality issues in on-selling the fuel. He also pointed to a special project VRS had undertaken for SSP in 2015, and emphasised that SSP were happy for VRS to undertake that - there were no requirements imposed as to procedure or to otherwise take steps to avoid contamination. This evidence was unchallenged and carries weight.
156. Further, he pointed to SSP's lack of instructions to VRS, regarding fuel quality protection over the 10 years of their business relationship. The inference Mr Lenglet invited the Court to draw was that the issues now raised regarding VRS' facilities and procedures were only raised in order to point to VRS as being the likely source of the contamination. It was his view that as VRS was on-selling SSP fuel, had there been process issues, SSP ought to have raised with them prior to this matter occurring. I consider that a fair point.
157. Mr Lenglet joined with other witnesses to formally state that never once, on the many occasions that he was present, did any SSP driver do a water paste test at delivery to VRS. He too has inspected the rubber seal on the top of VRS' stainless steel tanks and found it in excellent condition, contrary to the evidence of Mr Vuti. He produced a photograph of the dipping stick which he stated was kept permanently with the stainless steel tank.
158. Mr Lenglet was subjected to exacting cross-examination. He expressed surprise at receiving Mr Housby's phone call on 27 April 2018. As promised, he did check all 3 VRS tanks first thing the next day. He found all 3 tanks to contain the same type of contamination.
159. He explained carefully the steps he took with Mr Housby and Ms MacLucas on 1 May 2018 to deal with the problem. He was obviously very empathetic toward VRS's predicament. His attitude was demonstrably very different to that of SSP, which simply wanted to push all blame away.
160. He accepted that all 3 VRS tanks were open to the environment, not covered. He agreed that all 3 tanks did not have drainage outlets. He considered such were unnecessary as VRS' tanks outlets were at the very base of each tank. They were, in his words, self-draining. He



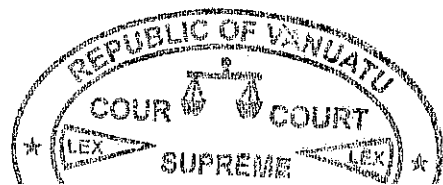
accepted VRS kept no records as to when its tanks were cleared or maintained. I considered his response to these matters credible and plausible. There was no attempt to evade the questions.

161. He agreed that different processes have now been adopted at VRS since the contamination came to light. He was very sure the rubber seal on the stainless steel tank has not deteriorated. It has never been replaced and was still in good condition as of the date of the trial.
162. He was asked how frequently SSP delivered fuel to VRS, and he thought it was every 6-8 weeks depending on how the on-sales progressed. He accepted the previous delivery prior to 3 March 2008 could have been on 25 January 2018. He did not accept that the stainless steel tank had any fuel in it on 3 March 2018. Although he had no records to evidence that, he explained he would only order more fuel when the stainless steel tank was empty. He was sure it was completely empty due to the sequential emptying of his tanks prior to ordering more fuel. In the end, I determined that it did not matter whether there was residual fuel in VRS' stainless steel tank on 3 March 2018.
163. Mr Lenglet was less sure about the PVC tank. Although unable to say how much fuel there may have been in it on 3rd March 2018, he accepted it was possible there was some. He accepted there may also have been a small amount of fuel in the aluminium tank then, appropriately 100L.
164. He accepted that between 3 March 2018 and 27 April 2018, VRS had made deliveries only to Mr Dinh prior to the MV Nambas delivery. The delivery to Mr Dinh could well have been from old stock delivered by SSP to VRS prior to 3 March 2018. Mr Lenglet had subsequently asked Mr Dinh about the fuel quality and Mr Dinh reported no issues.
165. Mr Lenglet freely admitted to previously having no idea that water sludge and algae could build up in storage tanks. He accepted that good maintenance practices were required to ensure fuel quality, but admitted that he was unaware of that in 2018.
166. He accepted VRS had delivered contaminated fuel to MV Nambas. Since then VRS had adopted a number of new fuel monitoring and maintenance practice. VRS did not have that in April 2018. At that time Mr Lenglet had not adopted the practice of taking a sample of fuel being delivered to show to the customer. He did not instruct any of his staff to do so either.
167. Mr Lenglet was adamant the sample Mr Tagar took from the PVC tank was not taken from the bottom of the tank. He told Mr Tagar that he should do that at the time. Again, although questioned about this, it was not put that this evidence was incorrect. I accepted Mr Lenglet had accurately observed Mr Tagar's acts and had challenged him at the time.
168. He agreed he did not mention VRS' vehicles being affected by the contaminated fuel when Mr Tagar and Mr Teflon were at VRS on 3 May 2018. He explained that was because he only

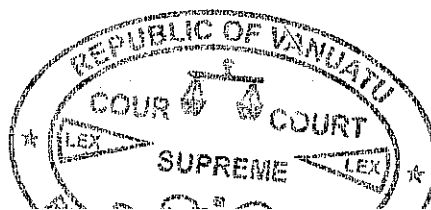


became aware of the issue the next day. He agreed the vehicles had not yet been repaired, and that the amount claimed in the counter-claim was based on the quotation he had obtained.

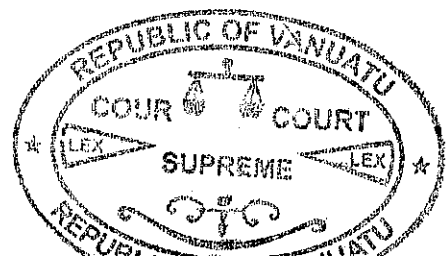
169. Lastly, Mr Lenglet was questioned about his statements to the effect that poor quality fuel has been in Vanuatu for numerous years without affecting the vehicles that use it. He could not agree with certain information supplied by Mr Hurley that Vanuatu had only been getting high quality fuel, but quite reasonably accepted that if it was the true position he would need to re-think the matter. I consider Mr Lenglet was a little out of his depth as to this, and I gave his views no weight.
170. I found Mr Lenglet to be refreshingly open and honest. He made countless concessions against his interests. It was very obvious that he was really only telling the Court what he actually knew in as fulsome a manner as possible. Where he went further in his statements that appeared to me to have been influenced by previous counsel. I accepted his oral evidence as entirely reliable. The only evidence of his I did not place weight on is referred to earlier.
171. Mr Wilson Tagar is the Fleet officer of SSP. He has held that position from 17 June 2017, so for some 9½ months prior to this fuel contamination incident. He holds a University Diploma in Chemistry/Physics, and has completed the first year of a Master's degree in Environmental Science.
172. As a result of Mr Lenglet's complaint of 30 April 2018, Mr Tagar carried out an investigation on behalf of SSP which he completed on 14 June 2018. He appended a copy of his report to his sworn statement.
173. Mr Tagar, accompanied by SSP's General Manager Mr Nicolas Leflon, went to VRS' premises on 3 May 2018. He commented on the fact that the entire operation was open to the elements, with resultant exposure to contamination. While there he took a sample from VRS' PVC Tank. He stated the product was absolutely transparent and clean with no water. He said "there was look of possible contamination in the plastic tank". He did not elaborate on what that was. In cross-examination he stated that he took the sample from the middle of the PVC tank. He accepted that if there were contaminants at the bottom of the tank, the fuel at the middle section could well appear clean. In my view, for a test to have been taken and be of assistance, it should have taken at several different levels within the tank so that there was evidential value available. Further, the fact that the test was taken only at the mid-level might well be indicative of a pre-determined desire to achieve a certain result.
174. Mr Tagar further stated that Mr Lenglet did not say: "Why aren't you taking the sample from the bottom?" or words to that effect when the fuel in the PVC tank was inspected. I do not accept this evidence. I prefer Mr Lenglet's version. Mr Tagar also commented on Mr Lenglet's failure to mention on that occasion that VRS vehicles had also been affected by contaminated fuel. Mr Lenglet gave an entirely credible retort to this supposed inconsistency on his part. He advised that at that time he was unaware of the additional consequences to his vehicles of the fuel contamination. I accepted his evidence as to that.



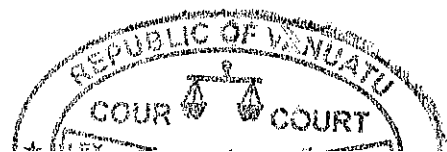
175. On 4 May 2018, VRS returned what it had left of the SSP 3000L delivery of 3 March 2018. It was contained in 2 flow bins and 4 drums.
176. Mr Tagar stated: "At the meantime...", which makes it difficult to understand when this event occurred. He went on to say that at that unspecified time SSP did "...a microbe test on the contaminated fuel recuperated from the stainless steel tank". He explained that it took 4 days to get the results. He produced photos of this which were taken on 8 May 2018, and commented that "...the test of batteries in the bottle test was positive and significantly high." Given that the contamination fuel had been taken partly from this tank, this result was of little assistance to me.
177. On 7 May 2018, the entire product (fuel) returned by VRS to SSP was put into a cubitainer. On 9 May 2018, Mr Tagar tested this product for water. He produced photos to show that there was no water detected in the container, or in flow bins 1 and 2. No reasons were provided as to why such testing was not done immediately or why the mixing of fuels was done in the absence of Mr Lenglet. I noted that Mr Leflon at one stage in his correspondence with Mr Lenglet insisted that someone from VRS be present when the fuel returned by VRS was removed from the tanks/drums and put into SSP storage. His concerns were not matched by Mr Tagar's actions.
178. On 9 May 2018, Mr Tagar sent a 4L sample to the independent Petroleum Laboratory Limited in New Zealand for analysis. The 4L was made up of fuel from VRS' stainless steel tank (a ½ full 1.5L plastic bottle, which sample was taken by Mr Lenglet) and diesel from one VRS flow bin. In cross-examination, Mr Tagar explained that the additional fuel to make up the 4L required for such analysis was taken from VRS' flow bins. Mr Tagar seemed oblivious to the effect of combining the sample taken by Mr Lenglet with other fuel from another source. Incredibly, he appeared to consider that such practice was acceptable and that any testing of the combined product would provide reliable results as to the composition of the fuel sample taken by Mr Lenglet. He also seemed to have no concept of the passage of time impacting on such testing. I did not consider this evidence to be capable of being given any weight.
179. In any event, a comprehensive report from New Zealand followed. Given the length of time that had elapsed, plus the wholly inadequate evidence as to the provenance of the sample, the court cannot place weight on those results. I placed this evidence to one side. The only point I take from it is that the test found that some months later there was more water in the sample than would be acceptable in New Zealand.
180. On 22 May 2018, Mr Tagar went to see AVL, Switi and APB to water paste test the fuel that they had received from SSP. Mr Tagar reported the tests were negative for water at all 3 sites. He produced photographs of what was found. It is of interest that the caption to the photos of both the AVL and Switi fuel notes that the samples were taken from the bottom of those tanks.



181. Mr Tagar appears to have drawn the conclusion that because the deliveries to these 3 entities were made subsequently, namely 21 April, 2 May and 17 May, nevertheless the quality of the fuel was the same as that supplied to VRS on 3 March 2018. In cross-examination, he accepted that the clear fuel could well have come from another source than the 3 March 2018 delivery.
182. Mr Tagar confirmed that SSP's records do not show a complaint of contaminated fuel from the other entities who received fuel from SSP on 3 March 2018.
183. Mr Tagar concluded in his report that the contamination was due to VRS not SSP.
184. Mr Tagar also confirmed that SSP did not receive any complaint from MV Young Blood in relation to the fuel it received from SSP on 3 March 2018. In cross-examination he confirmed, rather reluctantly, that SSP did not follow up with MV Young Blood to check on this. The lack of complaint is not the same as there being no contamination. Mr Tagar's lack of follow up is a further indication of the SSP attitude to complaints regarding fuel supplied, and that in my view such matters are not given the care and attention they should. It also undermines the evidential value of his report.
185. Mr Tagar carried out an anti-bacteria test on SSP's Tank 7 on 4 October 2018. The result of the test was that at 3 different levels within Tank 7 the bacteriological tests were negative. This evidence did not advance the issues requiring determination, but demonstrates that at times SSP do test at various levels within a tank.
186. Mr Tagar explained that SSP clears its bulk tanks every 10 years. Tank 7 was built in 2010. He appended a copy of Tank 7's datasheet of 8 May 2018, which sets out the tank's characteristics. He explained that SSP also drains its tanks at the end of each month. That was done in respect of Tank 7 on 28 February 2018. One of the measurements taken at that time was "hollow water height", which was recorded as "nil".
187. SSP received its latest large batch of fuel on 22 February 2018 from the tanker Bougainville. Mr Tagar produced documentation in relation to this fuel supply. He also produced a test of Tank 7's fuel on 1 March 2018. In the remarks section of the form is recorded: "Clear, bright. Visually free from solid matter. Undissolved water. Fuel ambient TX."
188. Mr Tagar stated that SSP does not pump salt water or fresh water into any of its storage tanks.
189. Mr Tagar appended a copy of a complaint by a SSP customer Hideaway Island Resort ("HIR") of 9 February 2016, headed "Dirty Fuel". The complaint related to fuel water in one drum, and particulates in another. There were photos of the fuel provided. SSP made an action plan to deal with the matter. In cross-examination, Mr Tagar explained that SSP had taken back the dirty fuel, cleaned the drums and re-supplied the fuel required.

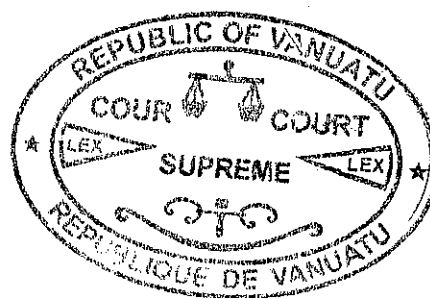


190. Mr Tagar also appended a second complaint, this from Mr James Robert on 27 May 2017. Mr Robert had apparently collected 2 sealed drums of dirty fuel which had been confirmed to be contaminated by water. Again SSP dealt with the matter by way of an action plan.
191. I do not consider myself bound in any way by the findings in Mr Tagar's report. I consider he used material to support his conclusions that he should not have. I further consider his report was driven from a particular perspective. I found his defensive attitude towards criticisms of the report to be unhelpful and further indicative of a closed mind. Not only was he not independent, but there appears to have been little/no consideration of what SSP did which could have caused/contributed to the contamination. For example, it does not appear that Mr Vuti was even interviewed.
192. I was invited to have no regard to Mr Tagar's evidence of the complaints made by HIR and Mr Robert. They involved drums of fuel and were from a different period. However, even having regard to those correct observations, the evidence was relevant to show SSP's poor response to complaints regarding the product supplied by it to customers. This was supportive of the evidence of Mr Boudier. I also considered it significant that although the fuel was replaced, there was no explanation given as to what steps SSP had taken to ensure that whatever had caused the issue could not re-occur.
193. I did not find Mr Tagar a convincing witness. As stated earlier, I do not accept his version of events in relation to the sample taken from the PVC tank. I accept the evidence of Mr Lenglet as to that. It is telling that the sample taken by Mr Tagar came from the middle level of the tank. Had he taken the sample from the bottom, I have little doubt that Mr Tagar would have seen the same contamination Mr Lenglet found.
194. I accepted Mr Tagar's contested evidence only where it was supported by documentary evidence. I consider his investigation to be unprofessional and indicative of carelessness. I consider his evidence in relation to other complaints regarding SSP, which were supported by documentation, also undermined the evidence of Mr Niowenmal.
195. Mr Glenn Niowenmal is the SSP Operations Manager.
196. He commenced working with Mobil in March 1999 as the Health, Safety, Security and Environment Officer. In 2007, SSP bought out Mobil and Mr Niowenmal became SSP's Terminal Manager. In around 2010, SSP purchased BP's operation and he was promoted to be SSP's Operations Manager for Vanuatu.
197. Mr Niowenmal received training to assist him to draft Mobil's operation and administration procedures from scratch. SSP took them over subsequently. He oversees the receipt of fuel by SSP, its storage and handling when it leaves SSP's terminal. He is responsible to train SSP staff as to SSP's procedures.
198. He explained the procedure SSP adopted when receiving fuel from overseas. He explained that staff board the delivery tanker and take a sample of the fuel about to be delivered. If the



sample is satisfactory, then the fuel is discharged, to SSP's depot by pipeline. Further, once discharged, the fuel is again tested prior to being released for commercial purposes.

199. Mr Niowenmal further stated that SSP carries out weekly dipping chests on the fuel stored at its depot, to ensure that no water or other contamination is present. As well, the SSP storage tanks are drained on a monthly basis. He gave no evidence as to where the fuel was stored while such drainage occurred, and it occurs to me to be a logistical problem of some significance.
200. Mr Niowenmal critiqued Mr Marango's evidence. He stressed that SSP's management of slops is a common practice to minimize waste at all petroleum facilities.
201. He produced a stretch of SSP's drainage layout at the Port Vila terminal, to demonstrate that Mr Marango's sketch was incorrect. I accepted this evidence, which was supported by photographs.
202. Mr Niowenmal set out the common causes of fuel spillage, which are numerous, despite every effort being made to minimize them. He explained that all such spillage was stored in a slops tank. There is a very particular process followed approximately fortnightly to treat such collected product and render it suitable for sale to customers.
203. There was considerable detail relating to these procedures. Mr Niowenmal went through them extensively in order to demonstrate that what was followed by SSP was "best practice"; while the cross-examination was designed to show that by adopting such processing SSP was exposing itself to fuel contamination of the type encountered by MV Nambas. As explained earlier, I consider that what SSP did in relation to this category of fuel was internationally accepted and in my view unlikely to be the cause of the contamination in question. If this was the case SSP would have been subjected to many more complaints about fuel contamination.
204. I see little point in detailing the evidence in relation to this, which I considered repetitive and not determinative. Mr Niowenmal produced a number of exhibits relating to the processes involved, and relating to the equipment involved, which confirmed my views of his evidence on this.
205. Mr Niowenmal challenged Mr Marango assessment of the volume of likely spillage. I preferred his evidence on this rather than Mr Marango's, which I considered was an exaggeration.
206. Mr Niowenmal further evidenced that SSP had not injected water into its fuel pipes for over 10 years. He disputed Mr Marango's statement to the opposite effect. I accepted Mr Niowenmal's evidence as to this.
207. Mr Niowenmal next went on to critique the evidence of Mr Lenglet. He pointed out that SSP's tanks are drained before and after every tanker discharge, and also at the end of each month. Previously, the tanks were drained weekly and water was pumped into the tanks at each tanker discharge. That practice ceased in 2007.

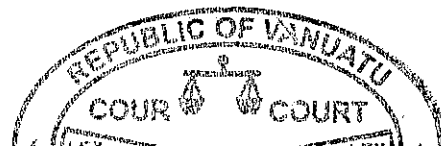


208. Mr Niowenmal was sure that SSP's tanks could not grow bacteria due to being constantly in use and regularly drained. He stated bacteria can grow if fuel remains stagnant for a significant period - up to 6 months was required in his view. That evidence was not challenged.
209. He gave evidence that between 3 March 2018 and 27 April 2018, SSP received no other complaints relating to the quality of fuel delivered to customers; the only complaint received came from VRS.
210. Mr Niowenmal pointed to the fact that SSP's storage tanks had last been drained on 28 February 2018. He produced a SSP record to that effect in relation to tank 7, which reported that no water was detected in the fuel at that time. That was not challenged.
211. Mr Niowenmal further produced documents relating to the design of tank 7. He pointed to the fact that the fuel outlet was 440 ml above the base of the tank - making it unlikely that any sludge or water would be pumped out in the course of preparing to make a delivery, as any sludge accumulated at the very bottom of the tank. Next in altitude is a layer of accumulated water (by means of condensation), and finally on the top of that is the fuel (diesel). He produced a photo of such layering as well as related supporting scientific literature. This evidence was not challenged.
212. Because of the drainage of tank 7 on 28 February 2018, Mr Niowenmal considered it impossible for any consideration to have accumulated prior to 3 March 2018. He also commented in cross-examination that tank 7 was never entirely full, but nevertheless in his view the chances of condensation occurring were slim. Mr Niowenmal fairly confirmed but SSP's tanks always contained some sludge in the bottom of the tank.
213. Further Niowenmal testified that not only did the positioning of the fuel outlet on tank 7 make it unlikely that water would be drawn off for a delivery, but as well, all SSP's trucks were drained prior to each loading. He supported Mr Vuti's description of the steps Mr Vuti had taken as being standard SSP procedure in conformance with the company's training.
214. Mr Niowenmal dealt with the issue of sea water. He considered contamination from that source could only have occurred if there was tanker discharge using salt water between 2 products, salt water injection into tanks using the fire pump, or deliberate sabotage. He explained that SSP's processes precluded those as possibilities in respect of any fuel SSP supplied. While SSP had in the past use salt water for specific purposes, that had ceased since 2007.
215. He similarly sought to exclude the possibility of fresh water contamination at SSP. He explained that the constant use of drainage meant there was little or no opportunity for condensations to occur. He stated that SSP has not injected water into their tanks to raise the fuel levels since 2007. Other external measures, such as conical rooves over SSP's tanks were designed to prevent the stagnation of water on top of SSP's tanks.
216. Mr Niowenmal further gave evidence that all SSP's tanks are locked overnight, ensuring thereby that deliberate sabotage was unlikely. This was not challenged.
217. He ventured further that had VRS employed proper quality controls, mechanisms and procedures the contaminated fuel delivery to MV Nambas could have been avoided. He



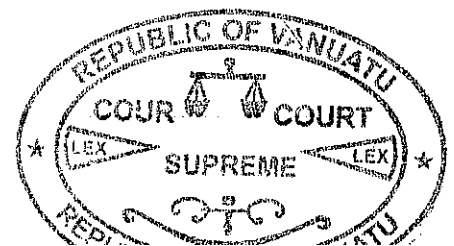
implied that the steps taken by SSP were appropriate and that made it more likely that VRS was responsible for the contamination rather than SSP.

218. Mr Niowenmal stated that all SSP trucks loaded of the terminal are sealed before departure, with the seal only being broken in the presence of the customer. This was done to prevent mishandling of the product by SSP's drivers en route. He was asked in cross-examination how this worked when more than one delivery was on board, and he explained it in a logical and acceptable way.
219. Lastly, Mr Niowenmal critiqued the evidence of Mr Boudier. In Mr Niowenmal's view, the salt referred to as coming with certain fuel supplied by SSP on 8 February 2019 could not have come from SSP's terminal. In relation to Mr Boudier's delivery of 6 July 2019, Mr Niowenmal stated that he had caused the sample taken to be sent for testing in New Zealand but, when he questioned Mr Bihu about what he had done to effect that, Mr Bihu advised Mr Niowenmal that he had lost the sample. Since then Mr Bihu had left SSP's employ.
220. Irrespective of this, Mr Niowenmal considered both contaminations were caused by sabotage. He pointed to a lack of similar complaints from other clients at those times to support this contention.
221. Mr Niowenmal was cross-examined about the lack of recording of the SSP seal numbers on the bulk delivery forms. His response was that even though the relevant numbers were not recorded that did not mean that there had been no seal. I considered his answer to miss the point. Had there been such a record, the more likely the evidence as to seals would have been unchallenged. However, as there were no seal numbers recorded, the evidence of those witnesses who testified to the fact that SSP did not use such seals was bolstered. It was in my view another example of SSP's very sound procedures just not being followed.
222. He was further asked about SSP's process being regulated/checked by Customs and he confirmed that occurred monthly. He considered that SSP set the industry standards as to what was acceptable in terms of maintaining the high quality of its product fuel Vanuatu.
223. Mr Niowenmal confirmed that the delivery documents also have a place where the result of a water paste test can be recorded. He advised the Court that SSP expected such test to always be done. In the material provided to the Court it is clear that such records were not entered, despite SSP's expectations. This again demonstrates SSP's ideals are not carried out in practice. Numerous witnesses stated that such tests were not done in relation to the deliveries made by Mr Vuti. I accepted Mr Niowenmal's evidence that water paste tests are necessary as visual inspection is insufficient unless the quantity of fuel observed is large.
224. In cross-examination Mr Niowenmal, contrary to his earlier evidence, stated that because SSP was required to report the fuel it had in stock at the end of each month, SSP eliminated the water from tank 7 get an exact reading. This meant SSP removed approximately 200L of water monthly from that tank. I found this to undermine Mr Niowenmal's evidence to the effect that it was unlikely that there would be any condensation in tank 7.
225. Mr Niowenmal was very experienced and obviously knowledgeable about the industry. His evidence regarding SSP's procedure was eminently sensible, but in my view, the training offered to staff as to correct procedure was not followed to the letter. What should have

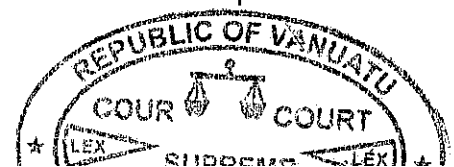


occurred, as not doubt taught by Mr Niowenmal, was simply not done with the exactitude warranted.

226. Further, I considered Mr Niowenmal to mirror SSP's attitude to complaints about fuel quality as being regarded as something impertinent by those complaining. SSP was certain that it had not been the cause of such issues because it was the industry leader in Vanuatu, and the true cause would in time be found to be another's problem. Complaints were simply not treated with the attention deserved. However, overall I largely accepted his evidence.
227. Mr Frederic Petit has produced a sworn statement. He was not called as a witness, as his statement was not challenged.
228. His evidence was that he is the General Manager of Vanuatu Services Engie, and he is a technician with a Masters degree in Maintenance Management. He has expertise as an engineer and is specialised in water supply and quality control. He has considerable experience in the field.
229. Mr Petit was asked to test a sample provided by Mr Lenglet which he described as a "water solution". His 21 May 2018 report indicates the sample was taken from the bottom of a tank of diesel, and was decanted for several days before being given to Mr Petit. The sample was described as coming from a tank containing diphasic liquid gas oil and water and was it was said to contain many solids and colloidal elements. The sample was also said to be taken "at the lower part" of the tank, and the test requested was to ascertain the presence of sea water/salt.
230. The result of the test is that the sample showed significant saline water content. There was a high chloride content, well above that of fresh water and well below that of seawater. The respective comparative readings were 7 for tap water, 49 for the sample, and 177 for sea water.
231. The test also compared conductivity, with similar comparative results of 513 for tap water, 3900 for the sample and 32,125 for sea water.
232. The third measure tested for the presence of bacteria. This test showed the sample had "significant microbiological developments".
233. The overall conclusion that Mr Petit arrived at was that the sample had a high chloride content and significant conductivity, incompatible with fresh water. I accepted that.
234. Mr John Teterin provided a sworn statement of his evidence. He was not required for cross-examination. He has expertise in diesel engines and is a fitter and machinist by trade, with considerable experience in engine re-conditioning.



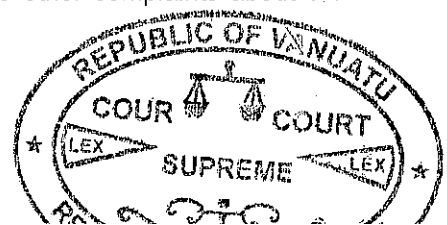
235. His evidence related to the MV Nambas' engines. He explained that diesel engines work by delivering high pressure diesel fuel through an injector nozzle with numerous tiny holes that allow the fuel to atomise and combust.
236. Mr Teterin had read Mr Housby's sworn statement and other material. It was his opinion that no diesel fuel system would be able to cope with the contamination evident from the photos and the statements. He considered further that there were no suitable resources in Vanuatu to deal with the damage to the MV Nambas engines and that it was appropriate to deal with authorised overseas repair experts.
237. He considered the report by Mr Irwin, who repaired the engines, to be thorough in its detail, and the findings consistent with water ingress of the fuel system.
238. I accepted this evidence.
239. Mr Antoine Boudier is the owner of Vate Electrics ("Vate"). His company has had issues with fuel received from SSP on 7 February 2019, and 6 July 2019.
240. In the first incident, fuel was delivered mixed with salt water. This was discovered when Vate's cherry picker truck went out on a job and ceased to operate. The engine could not be re-started, and the vehicle had to be towed back to Vate's workshop.
241. In the workshop the engine was cleaned using an air compressor. On emptying the tank, seawater mixed with the fuel was found. A photograph of the mix was taken and produced.
242. Mr Niowenmal was called to the workshop and shown the salt on the floor as a residue.
243. In the second incident some Vate machinery had ceased to work following the supply of fuel by SSP. The fuel was found to have large amounts of salt and contaminants in it. Photos were also taken of this, and Mr Boudier estimated there was 5 litres of salt in the fuel taken from the machinery filters.
244. Mr Niowenmal was again called out to witness this. Mr Boudier insisted that Mr Niowenmal take a sample of the fuel and the salt, which he did.
245. Strangely, Mr Boudier has not been told of the results of any testing done. He subsequently asked Mr Niowenmal about this in late April 2020 and was told that Mr Niowenmal "was following up with SSP." However, as at trial, he was still unaware of the results of the test, if it has been completed. The delay inherent in the lack of follow-up lies with SSP. There was no explanation given for this state of affairs at trial.
246. Mr Boudier admitted in cross-examination that Vate's cherry picker had not been used for some 11 months prior to the February 2019 event. He stated there was fuel in the vehicle's tank throughout that time. He considered the tank to have been about $\frac{3}{4}$ full over that period.



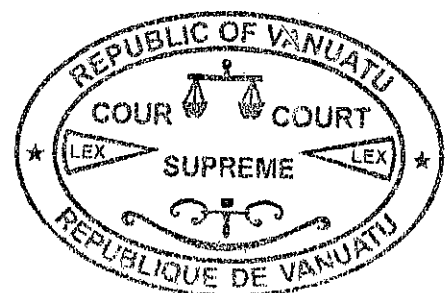
247. In relation to the second incident, Mr Boudier agreed that Mr Niowenmal had said that he had never seen that amount of salt in a fuel tank in his 20 years in the industry in Vanuatu. Despite that, Mr Boudier did not consider that sabotage had occurred. He also dispelled the possibility that the fuel had come from another supplier.
248. Mr Boudier's evidence obviously dealt with 2 events well after March 2019. The Court was invited to not place weight on the evidence because of this fact. However the evidence was of value in that it showed Mr Niowenmal in a different light to the impression he made in Court. Further, it demonstrated, if accepted, that SSP's pride in their safety processes was perhaps misplaced.
249. I had no difficulty in accepting Mr Boudier's evidence as reliable, and I accepted him as being an honest witness. His frustration in not receiving advice of the testing, if it was done, was clearly genuine.

E. Discussion

250. It is possible to restrict the Court's enquiry to only a small part of the potential areas at which contamination could have occurred. This is due to my assessment that, apart from being inherently unlikely, there is simply insufficient evidence to support the contention that it is more likely than not that the contamination occurred either on the tanker Bougainville delivery of 22 February 2018 or in SSP's Tank 7 subsequently.
251. No allegation is made that it could have occurred on the MV Nambas.
252. Accordingly, the contamination can have occurred only in the transportation of fuel from SSP to VRS, at VRS, or in the transportation of fuel from VRS to MV Nambas.
253. Mr Lenglet's evidence that all 3 VRS tanks had similar contamination on 28 April 2018, which I accepted, eliminates the possibility of the cause occurring in the transportation of fuel from VRS to MV Nambas. That is because only the fuel in the aluminium tank plus the required top-up from the stainless steel tank was delivered to MV Nambas. Contamination in either of these two tanks could not have impacted on the PVC tank. The fact that the PVC tank held contaminated fuel means the contamination occurred prior to MV Nambas delivery.
254. Further, Mr Lenglet's evidence that all 3 tanks were similarly affected on 28 April 2018 is crucial. SSP delivered fuel to all 3 tanks on 3 March 2018. If the fuel that was delivered was unaffected by any contamination, then the chances of all 3 VRS tanks becoming similarly contaminated in the period between 3 March 2018 and 27 April 2018 are remote. It follows logically that the delivery by SSP must be suspect. How that came to be is unclear. However, I am convinced that SSP's attempts to avoid all blame did not assist in any reconstruction of the events, which is consistent with SSP's initial responses to other complaints about the quality of fuel it delivered.



255. As previously canvassed, although SSP considers itself the industry leader in Vanuatu, the "best practice" processes and procedures it has established to ensure good quality fuel is supplied to its customers were simply not followed. In respect of each delivery, a seal should have been placed on the container of the delivery truck, and that number recorded on the relevant delivery documentation. A water paste test should have been done on arrival at the customer's premises to demonstrate to the customer that the fuel was clean, and there should have been a record made of that. If that test was unable to be performed, a sample should have been taken and shown to the customer prior to the delivery occurring, and a record made of that. These simple elementary steps, had they been taken, would have avoided all the uncertainty.
256. Accordingly, I find that the source of the contamination is more likely than not to lie at SSP's feet. I find that despite the other SSP delivery to MV Young Blood on the same day apparently not being similarly affected, the only conclusion I can come to is that that prior delivery was made and any contamination went unnoticed. I also find that despite VRS's other delivery to Mr Dinh which apparently involved only clean fuel. My conclusion as to that is the fuel delivered could well have been from old stock and therefore unaffected by the SSP 3 March 2018 delivery.
257. However, that is not the end of the matter. SSP's negligence in not following its own procedures and thereby delivering contaminated fuel to VRS was compounded by VRS' failure to ensure it did not deliver contaminated fuel.
258. VRS could have prevented the supply of the contaminated diesel too, had it taken suitable steps. It matters not that Mr Lenglet and his staff were unaware of the steps they should have been taking and supplied contaminated fuel. It was their obligation to have discovered and taken those steps. The fact that they did not was negligent.
259. Accordingly I find that NFC has made out its claim of negligence on the part of both SSP and VRS. Rather than finding them equally negligent, I attribute their respective share of liability at 60/40. I do so as SSP were well aware of the dangers, yet were knowingly negligent. Their responsibility is accordingly greater than that of VRS who should have known and done better, but acted in ignorance at the time. I further consider that to be fair given the vastly different approaches taken by SSP of immediately attributing the cause to VRS, and VRS who instantly set about attempting to alleviate the effects of the contamination on NFC.
260. VRS' counterclaim, apart from seeking a contribution or indemnity in respect of damages awarded against it, seeks recovery of the cost of the fuel initially supplied by SSP, reimbursement of the sums expended by Mr Lenglet to assist NFC, and damages for damage done to VRS' tanks and vehicles.



261. By apportioning the liability, the first aspect is dealt with. PPS does need to reimburse VRS for the cost of the fuel supplied, which was later largely returned, but although there was some discussion regarding credit notes, I am satisfied SSP has not reimbursed VRS.

262. The sums expended by Mr Lenglet will be taken into account at the 60/40 ratio earlier explained. There is no evidence of any long-lasting damage to VRS' tanks. The damage claimed to VRS vehicles is unclear. Not only is a quote insufficient to evidence the actual costs which might be involved, but there is a further concern that the quotation was prepared by another of Mr Lenglet's companies. Further, as the repairs have still not been undertaken since May 2018 to date, the alleged damage can be seen as less than significant. I decline to make any award in respect of this.

F. Result

263. Mr Housby's claim is allowed in the sum of ~~VT 58,777,525~~ VT 33,757,025 and judgment is entered for that amount. Interest on that sum at the Supreme Court rate of 5% pa is payable as from the date of the Claim, namely 28 June 2019, until payment is made in full.

264. SSP is to pay NFC 60% of that sum, plus 60% of Mr Lenglet's expenditure of VT 2,910,805, namely VT 1,746,483.

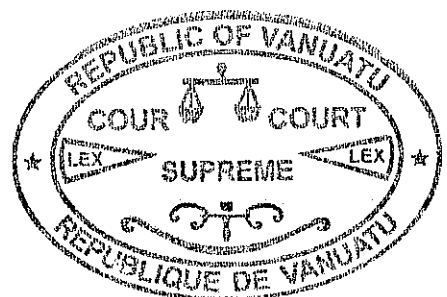
265. VRS is to pay 40% of the judgment sum.

266. SSP is to reimburse VRS 383,985, together with interest on that sum at 5% pa from 1 May 2018 until paid in full. SSP is to also pay interest to VRS on VT 1,746,483 at 5% pa from 12 September 2018 until paid in full.

267. Mr Housby is entitled to his standard costs of this matter. If they cannot be agreed, they are to be taxed by the Master. Once set, they are to be paid within 21 days. They are apportioned 60/40 between SSP and VRS.

268. VRS is also entitled to standard costs on its counter-claim. If they cannot be agreed they are to be taxed by the Master. Once set they are to be paid by SSP within 21 days.

269. A further conference is scheduled for 3.30pm on 24 June 2021 before Justice Trief for SSP and VRS to advise the Court: (i) that they have paid the judgment sums awarded, or (ii) to explain how they intend to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for immediate enforcement action to be pursued.



270. In order for this to occur, a copy of this judgment must be served on SSP and VRS, with a proof of service provided.

Dated at Port Vila this 27th day of May 2021

For and on
behalf of

BY THE COURT

Justice G.A. Andrée Wiltens

