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

Civil Case No. 205 of 2005

BETWEEN: TELECOM VANUATU LIMITED
Claimant

AND: THE MINISTER FOR INFRASTRUCTURE AND PUBLIC UTILITIES
First Defendant

AND: HAM LINI VANUAROROA, MOANA CARCASSES KALOSIL, WILLY JIMMY TAPAGARARUA, BARAK TAME SOPE, EDWARD NATAPEI, JOSHUA KALSAKAU, ISABELLE DONALD, ARNOLD PRASAD, MORKING STEVEN IATIKA, GEORGE WILLS, JOE NATUMAN & JAMES BULE
Second Defendants

AND: THE ATTORNEY GENERAL
Third Defendant

AND: PACIFIC DATA SOLUTIONS LIMITED
Interested Party

Coram: Justice C. N. Tuohy

Mr. Rosewarne & Mr. Kalmet for Claimant
Mr. Botleng & Mr. Stevens for 1st, 2nd & 3rd Defendants
Mr. Malcolm for Interested Party

Dates of Hearing: 16 & 17 August 2006

Date of Decision: 12 September 2006

RESERVED JUDGMENT

Introduction

1. The Claimant ("TVL") seeks a declaration (and consequential orders) that the decision of the First Defendant ("the Minister") to grant a licence to the Interested party ("PDS") under section 16 of the Telecommunications Act No. 10 of 1989 ("the Act") is ultra vires, the licence void and of no lawful force or effect.

Facts

2. On 20 November 1992, the Government of the Republic of Vanuatu entered into a Franchise Agreement with TVL. Condition 2.1 of that Agreement provided:

> ***"2. LICENCE***
> ***2.1 Grant***
>
> ***Subject to the terms and conditions of this licence, the Minister hereby grants to the Company the sole rights for the term specified in Condition 13.3 and 13.4 to provide, operate and develop, and the Company shall provide, operate and develop, the Public Telecommunication System of Vanuatu and further to be the exclusive provider of Public Telecommunication Services in Vanuatu or to or from any destination outside the Republic or passing in transit through the Republic and further to exclusively provide, operate and develop such additional telecommunication services with the Republic which the company may with the approval of the Authority from time to time consider necessary or desirable or which the Company agrees to provide at the request of the Authority. The Company shall provide the Authorised Telecommunication Services with such Telecommunication***

Apparatus which it shall, in its sole discretion, determine and provide"

The term specified was for an initial period of 20 years.

3. On 21 October 2005, the Minister granted PDS a licence under section 16 of the Act to operate a telecommunications system in Vanuatu for a period of 15 years subject to the following conditions:

> ***"a) The licensee may install and operate all necessary Telecommunications Devices (including a Satellite Earth Station and associated equipment) as it considers necessary or appropriate;***
>
> ***b) The Licensee must not provide Telecommunications Services that are for use by the General Public or available publicly but may provide Telecommunication Services to:***
>
> ***i) Its holding company, subsidiary or subsidiaries of its holding company (as determined under the Vanuatu Companies Act (Cap 191); and***
>
> ***ii) Any customer that holds a Licence under the Interactive Gaming Act 2000."***

4. The Companies Act [CAP.191] contains complex provisions defining subsidiary and holding companies in Section 158. It is unnecessary to reproduce them here. Essentially a subsidiary company is one which is controlled by another company (its holding company) and a holding company is one which controls another (its subsidiary).

5. At the present time PDS has one subsidiary and no holding company. The subsidiary is called Mansion (Vanuatu) Limited. It is the holder of a licence under the Interactive Gaming Act.

6. At the present time, there are six (6) holders of licences under the Interactive Gaming Act. Pursuant to the Act and regulations made under it, in order to obtain such a licence, an applicant:

   (a) must be a company registered under the Vanuatu Companies Act: (s. 4 (1) Interactive Gaming Act);

   (b) must satisfy the responsible Minister that it is a suitable person to hold a licence having regard to the character, business reputation and financial background of its close associates, its own financial position and whether it has the financial technical and other resources to conduct interactive games, the legality of its financial resources, the nature of its corporate structure and the experience and business ability of the persons to be involved in its management or operations (s. 5 Interactive Gaming Act);

   (c) must pay an application fee of US$75,000 and a fee of US$50,000 on the grant of a licence and on each anniversary of the grant in order to review the licence. (Interactive Gaming (Fees) Regulations 2003);

   (d) must meet detailed compliance obligations during the currency of the licence: (Part 3 Interactive Gaming Act).

The Relevant Statutory Provisions

7. The provision which is at the heart of this case is s.16 of the Act, the relevant parts of which are set out below:

"NO PERSON TO RUN TELECOMMUNICATION SYSTEM WITHOUT LICENCE

16 (1) Subject to section 19, no person shall operate a telecommunication system in Vanuatu except under the authority of a licence granted in accordance with subsection (2) of this section by the Minister.

(2) The Minister may, subject to the provision of subsection (6), grant the licence referred to in subsection (1).

.....

(6) Subject to the other provisions of this section, in the case of an application for a licence to operate a telecommunication system to provide Public International Telecommunication Service or in the case of an application for a licence to operate a telecommunication system to provide Public National Telecommunication Service, the Minster shall grant such licence with the prior approval of the Council of Minsters, subject to such terms and conditions as may be determined by the Council of Ministers and published in the Gazette.

Provided that at one time in Vanuatu there shall be no more than one telecommunication system in operation to provide Public International Telecommunication Service and no more than one telecommunication system in operation to

provide public national telecommunication service".

8. A "Public National Telecommunication Service" and a "Public International Telecommunication Service" are both defined in s.2 :

> ***"Public International Telecommunication Service" means international telecommunication services, other than a broadcasting service or a broadcasting satellite service, for use by the general public and may include telephone, telegrams, telex, data, facsimile and any other telecommunication service established internationally which is available publicly, and also includes dedicated leased point-to-point services provided over the international net work for the exclusive use of leasees;***
>
> ***"Public National Telecommunication Service" means national telecommunication services, other than a broadcasting service or a broadcasting satellite service, for use by the general public and may include telephone, telegrams, telex, data facsimile or any other telecommunication service established nationally which is available publicly; and also includes dedicated leased point-to-point services provided over the national net work for the exclusive use of lessees but does not include any international telecommunications which are reserved to Vanitel pursuant to the Vanitel Franchise."***

9. It was not suggested by any party that the service to be provided under the PDS licence is a dedicated leased point to point service.

10. The preamble to the Shareholders Agreement made between TVL's shareholders in November 1992 explains the reference in the 1989 Act to Vanitel. Vanitel was the company which had been

granted the exclusive right to operate public international telecommunication services for Vanuatu. The new company TVL was formed to acquire its business.

The Claimant's case

11. TVL contends that the licence is void and of no effect because:

    (a) it is in breach of the statutory monopoly enjoyed by TVL under The Telecommunications Act;

    (b) it is impermissibly inconsistent with the licence granted to TVL under its Franchise Agreement with the Government;

    (c) it was granted in breach of the procedure which the Minister is required to observe by Conditions 2.6 and 2.7 of the Franchise Agreement.

12. Although the definitions in the Franchise Agreement of the telecommunications services which TVL was licensed by it to provide were not tied to the definitions used in the Act and did not follow exactly the wording of the definitions used in the Act, Mr. Rosewarne submitted that the services licensed by the Franchise Agreement were the same as the services referred to in s.16 (6). None of the other counsel argued to the contrary.

13. It was submitted that the combined effect of Conditions 2.6 and 2.7 is that only after following a process which includes giving TVL the opportunity of itself providing a service, may the Minister permit a third party to provide telecommunication services covered by the licence. I mention that this submission (and those provisions of the Franchise Agreement) appear to assume that

any such third party licence, even if it is for services covered by the proviso to s. 16 (6), can be granted by agreement between the Minister and TVL without the need for Parliament to amend s.16 (6).

14. It was further submitted, by analogy with cases on copyright law that the classes of persons named in PDS' licence were merely sections of the general public and that therefore the service to be provided was one caught by s.16 (6).

15. For the same reason it was submitted that the licence was for services of a type which were covered by TVL's licence and that in issuing the licence the Minister was in breach of the Franchise Agreement because he did not follow the process set out in Conditions 2.6 and 2.7.

16. It was submitted in reliance on authorities from the United Kingdom, Australia and New Zealand that where a statutory power is validly exercised so as to create a right extending for a term of years, the existence of that right excludes the exercise of other statutory powers in respect of the same subject matter. It was also submitted that the grant of the PDS licence amounted to an unjust deprivation of TVL's property contrary to Article 5 (1) (j) of the Constitution.

The Defendants' case

17. The core submission for the defendants is that PDS has not been granted a licence to operate a telecommunications system to provide Public International Telecommunication Services or Public National Telecommunication Services because the PDS licence does not permit PDS to provide:

(a) an international (or national) telecommunications service for use by the general public ; or

(b) a telecommunication service established internationally (or nationally) which is available publicly.

18. Detailed submissions were made with extensive reference to and discussion of relevant case law to support that core submission.

19. I express my appreciation to counsel for all parties for the high standard of their submissions.

Discussion

20. Rather curiously, the proviso to s.16 (6) does not expressly prohibit the granting of more than one licence at any one time to operate a telecommunication system to provide a Public International Telecommunication Service or Public National Telecommunication Service. Rather, it provides that at one time there shall be no more than one of each such systems "in operation". Nevertheless, I am satisfied that the intention of the proviso is that no more than one of each of such systems shall be licensed at any one time. This follows from s. 16 (1) which prohibits the operation of a telecommunication system without a licence. This conclusion is supported by the wording of s.32 (1) which refers to "*the* operator licensed to provide Public National Telecommunication Service".

21. In essence then, this case turns upon a narrow question of statutory interpretation: does the licence granted to PDS authorise it to provide a telecommunication service "for use by

the general public"? If it does, then it would have been granted in breach of the proviso to s.16 (6) (and therefore unlawfully) because TVL already holds a licence to operate telecommunication systems to provide both Public International and Public National Telecommunication Services during the time period covered by the PDS licence.

22. If it does not authorise such services, there is no other basis upon which the grant of the licence could be said to be unlawful or ultra vires the powers of the Minister.

23. It is TVL's case that the exclusive licence granted to it in the Franchise Agreement authorises it to provide the telecommunication services referred to in s.16 (6). So if the PDS licence does not authorise services covered by the proviso to s. 16 (6), it will also not authorise the services covered by the exclusive licence in the Franchise Agreement. So the foundation for all the claimant's submissions based on alleged breaches of the Franchise Agreement would be removed.

24. In any question of statutory interpretation the Court must keep in mind the general principles of interpretation enshrined in s. 8 of the Interpretation Act No. 9 of 1981 [CAP. 132]:

> ***"An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".***

25. The preamble to the Act is short and general. It throws no useful light on the meaning of the phrase "the use of the general

public". Nor did any counsel suggest that there are any extrinsic aids to interpretation available in this case.

26. However, originally the Act did contain a section which indicates what the objects of Parliament were at the time it was passed. This was s.14 which set out the general objects of the Telecommunications Authority. The Authority was abolished by the Telecommunications (Amendment) Act No.18 of 1993 which removed all references to the Authority including the entire Part of the principal Act which contained s.14.

27. Section 14 directed the Authority to exercise its functions in a manner best calculated to promote the national interest and particularly

> ***"(a) To ensure a reliable and efficient national and international telecommunication service in Vanuatu...;***
>
> .....;
>
> ***(c) to protect and promote the interests of consumers, purchasers and other users and the public interest in general in respect of the prices charged for, and the quality and variety of telecommunication services provided and telecommunication apparatus supplied;***
>
> ***(d) to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunication and promote efficiency and economy on the part of such persons;***
>
> ***(e) to promote the rapid and sustained development of telecommunication facilities both domestic and international;***
>
> .....;

(h) to encourage the major users of telecommunication services whose places of business are outside Vanuatu to establish places of business in Vanuatu;

(i) to promote the use of Vanuatu for international transit services;

.....;

28. Although these objects may be very useful in guiding the Minister in the exercise of his functions under the Act, they give no real assistance to the Court in its task of deciding the narrow issue of statutory interpretation in this case.

29. Section 16 (6) is the only place in the Act where the defined terms "Public International Telecommunication System" and "Public National Telecommunication System" are used apart from the incidental reference in s.32 (1) referred to in para 20 above. Thus they have no purpose other than their function in s.16.

30. It is presumed that words in a statute are not used unnecessarily; that every word has a meaning and is not superfluous or tautological: ***Quebec Railway Light Heat and Power Co*** v ***Vandry*** [1920] AC 622, 676 per Lord Summer. Thus it is not any or all telecommunication services which are caught by the proviso to s. 16 (6). If that was the legislative intent, there would be no need to use the words "for use by the general public".

31. That phrase must also be read in context with the words following it which emphasise that the telecommunication services

intended to be covered are those which are established internationally or nationally and which are available publicly.

32. Counsel referred the Court to numerous decisions from the United Kingdom, Australia and New Zealand concerning the meaning of the words in a range of statutory contexts including "public place" for the purposes of transport legislation, "in public" in copyright legislation and "public benefit" in charitable trusts legislation. All these decisions were helpful to varying degrees but of course the statutory context in this case is unique.

33. The starting point is the natural and ordinary meaning of the words. In relation to the "general public", the New Shorter Oxford English Dictionary refers to one of the meanings given in it for the "public", namely, "people collectively, the members of the community". The use of the adjective "general" emphasises the breadth of the phrase. The expression "for the use of the general public" has the sense of being available to all and sundry.

34. Many of the decided cases involve the task of defining whether a particular group of persons constitutes merely a section of the public or whether the members of the group are defined by sufficient specific characteristics to take them outside "the public". Essentially, this is a matter of degree. As Lord MacDermott LCJ said in ***Russell*** v ***Thompson*** [1953] N.I. 51, 56:

> ***"It cannot, in my opinion, be said that the common, natural meaning of the expression "the public" is restricted to signifying nothing more and nothing less than the ordinary run of humanity, taken as it comes and without special attribute or qualification of any kind. No doubt the requirement of particular attributes or qualifications may***

reach a point when one can say that a process of discrimination has produced a class which is not "the public".

35. He went on to say that payment alone is not decisive and other decided cases, particularly in the copyright field, have confirmed that e.g. ***Jennings*** v ***Stephens*** [1936] 1 Ch 469, ***Panama (Piccadilly) Ltd*** v ***Newberry*** [1962] 1 All E. R. 769. So in this case, if the class was defined as the customers of PDS who had paid a fee, that class would constitute merely a section of the general public.

36. Nor is it sufficient that the class consists of inhabitants a particular geographic location or members of a particular community within a country: ***Thompson*** v ***Federal Commissioner of Taxation*** (1959) 102 C.L.R. 315, 323 per Dixon C. J. So in this case, if the class was defined as the inhabitants of a particular island, that class would still constitute merely a section of the general public.

37. Nor is the size of the group decisive. Membership may be very small yet the group remains a section of the general public while, on the other hand, a very large group may constitute a class with sufficient special characteristics to take them outside the general public.

38. In ***DPP*** v ***Vivier*** [1991] 4 All E.R. Simon Brown J. squarely posed the question of what is the touchstone by which to recognise a special class of people from the general public in the context of deciding whether a place was one to which the public had access. He identified 2 types of cases. The first was where the members of the group were defined by some characteristic personal to themselves relating to the occupier of the place e.g.

his guests or postmen or meter readers. The second involved a screening process where a distinction was drawn between those persons who were screened into the group for a reason, personal to themselves, and those who were in truth merely members of the public who were being admitted as such and processed simply so as to make them subject to payment and whatever other conditions the occupier chooses to impose.

39. This analysis provides a principled approach to the issue and can be applied by analogy to the 2 groups defined in the PDS licence. In relation to the first class, the members are defined by a characteristic specific to them which involves their relationship with PDS, that is, the element of common control.

40. In relation to the second group, the members are screened into it for reasons personal to themselves, that is, the holding of a licence under the Interactive Gaming Act. They cannot be properly described as a group whose membership is chosen by PDS. This group is also defined, not by some general characteristic such as place of residence which every member of the public has, but by some very specific onerous characteristics connected with their tenure of interactive gaming licences.

Conclusion

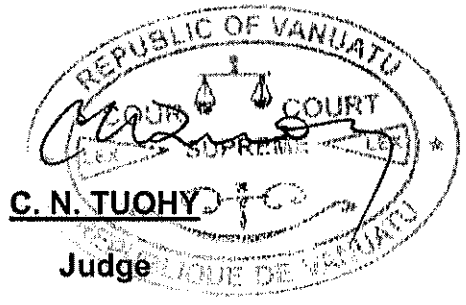
41. I conclude that both classes are outside the description of the general public and that accordingly the PDS licence does not permit the operation of a public national or international telecommunications service in terms of the Telecommunications Act.

42. It was not, therefore, issued in breach of the proviso to s. 16 (6) and thus not issued unlawfully or ultra vires the power of the Minister. The Court declines to make the declaration and orders sought by TVL.

43. The defendants and the interested party are entitled to costs. If they cannot be agreed, counsel are to advise the Court which will then determine costs in accordance with Rule 15.7.

Dated AT PORT VILA on 12 September 2006

BY THE COURT



C. N. TUOHY
Judge