IN THE SUPREME COURT **Civil Case No. 101 /2011**

OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

BETWEEN:	**UNELCO ELECTRIQUE DU VANUATU LIMITED** *Claimant*
AND:	**THE REPUBLIC OF VANUATU** *First Defendant*
AND:	**VANUATU UTILITIES AND INFRASTRUCTURE LIMITED** *Second Defendant*

Hearing: *6 & 7 December 2011*
Before: ***Justice Robert Spear***

Appearances:

Claimant:	***Timothy North and Mark Hurley***
1st Defendant:	***Justine Ngwele***
2nd Defendant:	***Dane Thornburgh***

JUDGMENT OF THE COURT

Application by Claimant to Extend Time
Other related matters

Delivered 15 February 2012

Introduction

1. On 17 November 2010, the Council of Ministers of the Government of the Republic of Vanuatu decided to enter into a Memorandum of Understanding (MOU) with (effectively) the Second Defendant (VUI) in relation to the operation and supply of electricity to the community of Luganville on Santo. On 30 May 2011, UNELCO commenced this proceeding for the judicial review of that decision of the Council of Ministers principally seeking to have it quashed as being unlawful and invalid.

2. This proceeding was commenced just over 6 months after the subject decision was made and accordingly it was outside the time prescribed for making a claim for judicial review – R 17.5 (1) Civil Procedure Rules. UNELCO applies for the court to extend the time for making the claim which extension may be granted if the court is satisfied that "substantial justice" requires it.

> ***17.5 Time for filing claim***
> *(1) The claim must be made within 6 months of the enactment or the decision.*
>
> *(2) However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.*

3. The application to extend time is opposed by both the Republic and VUI.

4. UNELCO and VUI also sought orders and directions in relation to other matters including the amendment of the claim and for specific discovery by the Republic. It was agreed, however, that those additional matters could conveniently await the outcome of the opposed application to extend time.

5. However, it is timely to note a point raised by Mr North. That is, that the MOU was apparently "*ratified*" by the Prime Minister on 14 December 2010. UNELCO sought to amend its claim to include the apparent decision of the Prime Minister to "*ratify*" the MOU on 14 December 2010 on the basis that it was arguable that this "*ratification*" amounted to novation and that this should be the decision that is subject to review. If that is so then, of course,

this proceeding was commenced within time. I will return to this issue in due course.

Background

6. At the heart of this matter is the concession for the supply of electricity to the Luganville community. It is one of four separate electricity supply concessions in Vanuatu: Luganville (Santo); Norsup (Malekula), Port Vila (Efate); and Lenakel (Tanna). Prior to 31 December 2010, UNELCO held all four concessions and continues to do so with the exception of Luganville.

7. UNELCO held the Luganville Concession on certain terms from about 1990 with a term expiry date of 31 December 2010. In February 2008, UNELCO was informed by the Ministry of Lands that the future of the management and supply of electricity for Luganville from 1 January 2011 would be the subject of an open tendering process.

8. What followed is the subject of the challenge by UNELCO. While Mr North dealt extensively with these events, it is unnecessary to provide more than a relatively brief summary of those events. The reason for that is that it is certainly arguable that there were some irregularities in respect of the process which eventually saw the Council of Ministers decide to enter into the MOU with VUI and, indeed, that was acknowledged by Mr Thornburgh on behalf of VUI in so far as this hearing was concerned. Mr Ngwele for the Republic did not make that concession.

9. On or about 27 April 2010, UNELCO, Pernix Group Inc (the parent company of VUI) and another company were confirmed as being qualified to participate in the tender process for the new Luganville Concession. However, the only company that submitted a tender was UNELCO with Pernix (and the third company) deciding not to participate. As it happened, UNELCO's tender was declared to be non-compliant with the Tender Rules relating to this process. No challenge is made to the determination that UNELCO's tender was non-compliant.

10. In late September 2010, the Director General of the Ministry of Lands informed UNELCO that no compliant tender had been received and that the

Government was *"currently considering its options and (would) inform (UNELCO) of its decision in due course.*

11. At this time, there were only 3 months left to run on the Luganville concession held by UNELCO and unquestionably the Government and its agencies felt under some pressure to take steps to ensure the continued supply of electricity to Luganville. It was decided that it would seek a contractor to provide for the operation and management of the electricity supply in Luganville on a relatively short term (6-12 months) basis. It decided further that it would approach Pernix and invite it to enter in to negotiations for a operations and management contract for the short term supply of electricity in Luganville. Pernix agree to this overture and negotiations continued along those lines. UNELCO was not privy to those negotiations nor was it apparently aware that the Government had decided to by-pass it and deal directly with Pernix in this respect.

12. On 18 November 2010, UNELCO was informed by a letter from the Minister of Lands that the Council of Ministers had, on 17 November 2010, decided to enter in to a memorandum of understanding (MOU) with Pernix for the operation and management of the supply of electricity to Luganville for a period of 8 months from 1 January 2011. It can be noted that the MOU was indeed executed by the then Prime Minister on behalf of the Government on 19 November 2010 as well as by Pernix.

13. That MOU not only provided that Pernix would undertake the operations and management services from 1 January 2011 but also:-

    a) the Government would cease all negotiations with other parties with respect to the tender for the concession;

    b) the parties (the Government and Pernix) would enter in to negotiations for a new concession deed based on the draft concession deed that was the central part of the tender process.

14. That meant that UNELCO was removed from further consideration for the Luganville concession. It also placed Pernix in the position of being the only company being considered for (what was likely to be) a 20 year concession.

15. Pernix incorporated VUI (a fully owned subsidiary of Pernix) which it nominated as the corporate vehicle to undertake the O& M contract.

16. I mentioned earlier that UNELCO asserted that there may have been novation by the *ratification* of the Prime Minister of the MOU on 14 December 2010 – that is, 28 days after the Council of Ministers had agreed for the Government to enter in the MOU and 26 days after the Prime Minister of the day had executed that MOU. The obvious and only plausible explanation for that *rectification* of a contract already executed by the Prime Minister is there had been a change of Prime Minister in that intervening period. I am unable to understand what legal effect this (so called) "ratification" could possibly have had on either the contract (the MOU) or the decision under review. It may have been helpful for the contracting parties to know that the new Prime Minister supported the MOU but I fail to see that this could amount to novation given that essentially this contract had been in place for some 26 days by that time.

17. Another matter of a technical nature raised faintly by Mr North was whether the limitation period of 6 months prescribed by Rule 17.5 is valid. In this respect, brief reference was made to the commentary in Jenshel's *Civil Court Practice* at 17.5.1:

> *It is doubtful whether the rule-making power permits such a rule and accordingly, its validity should not be assumed. The public interest in good administration requires, however that claims for judicial review be made promptly so that issues as to the validity of decisions do not linger ...*

18. Mr North raised the point but elected not to pursue it beyond that reference. I have accorded it the same treatment. It was not argued in substance before me.

19. The essential submission by Mr North was to the effect that UNELCO had an arguable case that the decision under review was both unlawful and invalid. In particular, that the Republic had failed to conduct an open and transparent tender process as required by the Government Contracts and Tenders Act No. 10 of 1998 (the *Tenders Act*) and the regulations made thereunder (*Tenders Regulations*). Mr Thornburgh for VUI conceded, solely for the purposes of this hearing, that UNELCO could be taken as having an arguable case that there were at least some irregularities in teh processes adopted. As

mentioned, the Republic does not concede that point even to the extent that the contention is at least arguable. However, for the purposes of the decision as to whether time should be extended, I approach the matter on the basis UNELCO has an arguable case that the decision to contract directly with Pernix may have been reached with some irregularities in the processes leading up to the decision..

20. It was conceded by both defendants that the MOU is a Government contract as defined by s. 2A of the Government's Contracts and Tenders Act [Cap 245]. There is, accordingly, a requirement by section 8 that the relevant Minister or Government Official responsible for the contract must comply with the quotation or tendering process prescribed by the Act or any regulations made under it. This brings into focus the Tenders Board which was required to manage the process.

21. Part 5 of the Act prescribes the tender process. The point emphasised by Mr North was that, pursuant to s. 12 (1) of the Act, the Tender's Board was required to recommence the tender process if it could not make a recommendation or its recommendation was declined by the Council of Ministers. In this case, it was argued, the Tenders Board did not do so but chose instead to proceed with private negotiations with Pernix leading to the decision to enter in to the MOU. Mr Ngwele and Mr Thornburgh argued, however, that it was equally arguable that the Tenders Board was quite within its rights to recommend a move to private negotiation pursuant to Regulations 3 and 9 of the Tender Regulations. Additionally, that this was indeed specifically provided for in the rules that related to the tender process.

22. It should be noted that the Republic and VUI both argue that the Tender's Board was not in a position where it could make a recommendation in relation to tenders received as none (the only one received) was non-compliant. However, it did make a recommendation and that was to proceed by way of private treaty with Pernix for an O&M supply contract. While it is arguable as to whether that was the approach required to be taken, what is clear is that the Tender's Board decided not to proceed further with the tender process and made that recommendation to the Council of Ministers which was accepted.

23. Mr Ngwele argued that the tender process came to an end when no compliant tenders were received and that what then occurred was a determination at a

high government level (the Council of Ministers) and in the face of an extraordinary and pressing situation where the continued supply of electricity to Luganville had to be secured. In this respect, Mr Ngwele relies principally on Regulation 9 (1) relating to urgent situations which, he argued, clearly applied at the time given the fact that the date for the expiry of UNELCO's concession was almost upon them. Additionally, that private and direct negotiations were not just contemplated but expressly provided for by the tender rules in the event that no tender was accepted.

24. Rule 27.2 of the tender rules issued by the Minister of Lands provided,

> *"if no proposals are received, or all proposals received are non compliant proposals and, after consideration by the MOL, as contemplated by article 1.1 above I reject it, the tender will be terminated. In such cases, at the discretion of the MOL, there may be a retender or the MOL may open negotiation to some or all of the bidders in relation to their proposals".*

25. Mr Thornburgh also sought to put the complaints from UNELCO in perspective in so far as they criticised the Government and its agencies from dealing directly and privately with Pernix Group. Mr Thornburgh referred to the letter from the Chairman of UNELCO of 12 October 2010 to the Minister of Lands which was in response to the Minister's letter informing to UNELCO that its tender was *"not successful"*. The UNELCO chairman suggested that one option was for the Government and UNELCO to "*legitimately enter into negotiation to carry on with the concession*".

26. Mr Thornburgh argue that the option contended by UNELCO was what actually occurred with the only change being that the Government chose to deal with VUI rather than UNELCO.

27. It is arguable that the Government (in the wider sense) may have been required to recommence the tendering process. It is equally arguable that the tendering process had come to an end and, in those extraordinary circumstances that prevailed with the expiry date of the UNELCO concession for Luganville fast approaching, select and private negotiations became the available and necessary option. That is, that private negotiation was an appropriate and valid option for the Government to adopt.

28. Mr North also argued that the tender process and the decisions that followed were tainted by the undue influence exerted on the Tenders Board by the Transaction Working Group (TWG). That was a small group led by the Director General of Lands and included overseas consultants. It was formed to proved advice on the highly technical and essential characteristics of an electricity supply concession. Mr North contended that the Tenders Board was essentially acting at the direction of the TWG. There is no evidence that this occurred or, more exactly, that that the Tenders Board had surrendered its independence. Clearly, in such a highly technical area, expert advice would have been required by the Tenders Board so that it could be guided on the technical aspects of the issue. Again, this does not necessarily mean that the Tenders Board failed to act independently.

Extension of Time

29. The Court may extend time for making a claim for judicial review only if it is satisfied that substantial justice requires it. Counsel were unable to assist me with any authorities that dealt specifically with what is meant by *"substantial justice"*. Certainly, time limits in other parts of the rules may be extended or abbreviated in the court's discretion - Rule 18.1. That discretion is exercised having regard to the general interest of justice. The Court is always concerned to ensure that litigants are not denied access to the courts by technical or minor infringements of the rules. The consideration is usually to whether there is prejudice suffered by any of the other parties and, if so, whether that can be addressed by directions or an order for costs. However, *"substantial justice"* must require a different approach and that is clearly mandated by the rules.

30. Part 17 of the Civil Procedure Rules deals with judicial review. It is immediately apparent from a consideration of Part 17 that the jurisdiction for judicial review is of a special nature. Not only must a claim for judicial review be made within 6 months of the decision (Rule 17.5) but there are also prescribed time limits imposed for service of the defendant (28 days from filing – Rule 17.6) and the filing of the response (14 days – Rule 17.7). However, of far greater significance to any consideration of the special nature of the judicial review jurisdiction is to be found in Rule 17.8.

17.8 Court to be satisfied of claimant's case
(1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in sub-rule (3).

(3) The judge will not hear the claim unless he or she is satisfied that:

- *the claimant has an arguable case; and*
- *the claimant is directly affected by the enactment or decision; and*
- *there has been no undue delay in making the claim; and*
- *there is no other remedy that resolves the matter fully and directly.*

(4) To be satisfied, the judge may at the conference:

- *consider the papers filed in the proceeding; and*
- *hear argument from the parties.*

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out.

31. While, strickly speaking, such a conference has not been convened, the initial focus being on the application to extend time, all matters required to be canvassed at the conference by Rule 17.8 were addressed extensively in the course of the hearing of this application to extend time. It is of significance that the Judge considering those matters under 17.8 (3) is directed not to hear the claim unless he is satisfied as to all those considerations and not just some of them. By 17.8 (5), if the Judge at the conference (not even at the hearing) after considering the papers and hearing argument from the parties is not satisfied about the matters set out in 17.8 (3), the Judge is directed to decline the claim and to strike it out. Of course, this is an extraordinary approach in comparison with the manner in which other claims before the Court are required to be addressed. It highlights and emphasises the special nature of the judicial review jurisdiction which clearly requires a robust approach to be taken by the Judge or the Court.

32. The principal reason for this special approach is obvious. What is being attacked is a decision usually of a Government official relating to matters involving the governance and administration of the country. Obviously, there are a broad range of decisions that can be reviewed. Mr Thornburgh refered to the decision of ***Avock v. Government of the Republic of Vanuatu***

[2002] VUSA 44 where the Supreme Court commented on the issue of delay under a similar worded section:-

> *"the question of delay is always important in connection with judicial review of Governmental decisions because the business of Government requires certainty and finality. Here the claim is in the context of an industrial dispute which can often move and metamorphose quickly".*

33. Furthermore in ***Kalsakau v. Wells*** *[2006] VUSC* 79

> *"the question of delay is always important in connection with judicial review of Governmental decisions because the business of Government requires certainty and finality . . . .*
> *in exercising the discretion available to the Court under rules 17.5, the Court must find that substantial justice is required to enlarge time".*

34. Of assistance also is the decision of the Federal Court of Australia: ***Re Hunter Valley Developments Pty Ltd : Anthony Neary Walker : Mende Brown v. The Honourable Perry Cohen, Minister of Home Affairs and Environment*** *[1984] FCA 176.* That case dealt specifically with the applicable principles as to whether time should be extended in the Australian federal legislation relating to judicial review. Mr Thornburgh extracted the following summary of those principle. It was argued that the Hunter Valley case is at least persuasive authority for the following principles to be considered:-

> *1) Special circumstances need to be proven by the applicant or the application will not be granted.*
>
> *2) The prescribed period is not to be ignored.*
>
> *3) Prime facie, proceedings commenced out of time should not be entertained.*
>
> *4) it is a precondition to the exercise of the discretion in their favour that the applicant for an extension shows an acceptable explanation for the delay.*
>
> *5) That is fair and equitable in the circumstances to extent time.*
>
> *6) Any action other than making the application for review in a timely way is relevant such as resting on his rights.*
>
> *7) Any prejudice to the respondent.*

8) *The absence of prejudice is not sufficient to grant an extention*

9) *The merits of the substantial application are to be taken into account in considering an extension.*

10) *Considerations of fairness.*

11) *In considering cases of public administration, public interest may dictate a refusal of an extension even after a short delay.*

35. Mr Hurley (in reply) refered to a decision of the Full Court of the Federal Court of Australia: ***Comcare v. A'Hearn Number Unavailable Fed*** *1983] FCA 498: (1993) 45 FCR 441 (12 October 1983)* which held that while an explanation for the delay in bringing the substantive application will normally be given, such an explanation is not an essential precondition for the granting of the extension.

36. I have no difficult with any of the principles outlined above. They are all valid considerations as to what might assist with an evaluation of the substantial justice of the matter. However, none of them can be considered as providing a hard and fast rule as to how substantial justice should be assessed. Additionally, they do not provide an exhaustive set of criteria for consideration in this respect. They are all matters that can arise and, when they do arise, they might well assist the court as to the substantial justice of the case for extension.

37. It is important also not to overlook here the considerations required by Rule 17.8(3).

38. I consider that an additional consideration must be the nature of the actual decision under review and the circumstances in which the Court has asked to consider a review of it.

39. All the facts of the case become relevant when considering issues relating to substantial justice but, in particular, the special nature of the jurisdiction for judicial review must take account of the importance of the decision under review. Whether there was prejudice to a third party, whether there is a satisfactory explanation for making the claim out of time, whether there is any prejudice to any of the parties or again the absence of prejudice, and such like, must all be secondary to a consideration of the actual decision and the

need for Governments to be able to govern with some certainty. That is, governments and their officials should not have to undertake their constitutional function with the possibility that a decision that does not find favour with a particular entity will necessary be considered for review by the courts with all the delays and expense involved with it. That is surely what Rule 17.8 is directed towards. It also underscores why any relief for judicial review is discretionary (R 17.9) even if it is established that the complaint about the decision has some merit.

40. I have mentioned before the concession by VUI that it is at least arguable that the Government may not have followed the strict requirements of the Tenders Act and clearly there can be no certainty in that respect. That would require a much greater assessment of the merits of UNELCO's case than has occurred so far. Be that as it may, the explanation as to why the claim was not commenced within time is of particular significance.

41. The decision under review was made on 17 November 2010. It was notified to UNELCO on 18 November 2010. At that time, UNELCO was involved with an international arbitration with the Government of Vanuatu from about May 2010 in relation to its electricity tariffs. M. Yves Morault, Chairman of the Board of UNELCO, explained that this dispute included a consideration of the terms and conditions of a number of concession agreements previously granted by the Government to UNELCO including the generation and supply of electricity in Port Vila and Luganville. Mr Morault explained that the final award in relation to the international arbitration was delivered on or about 28 April 2011. M. Morault goes further and says that until the arbitration award was delivered, the focus of UNELCO's attention was in relation to the hearing and determination of that dispute and that UNELCO did not turn its mind effectively to the decision under review here until the international arbitration award was received. UNELCO then sought an opinion from the Australian Law Firm, Minter Ellison and received the opinion from that firm on 26 May 2011. Following receipt of that opinion, UNELCO instructed its Vanuatu lawyers, George Vasaris & Co, to prepare and present a claim for judicial review with those instructions being given on 26 May 2011.

42. The evidence is that the claim for judicial review and an application to extend time for making the claim were brought to the Supreme Court office at Port Vila for filing at approximately 4:45 pm on Friday 27 May 2011 but the Registry refused to accept the documents for filing. They were eventually accepted on Monday 30 May 2011. I say now that nothing turns on whether

the claim should have been accepted for filing on Friday 27 May 2011 as against Monday 30 May 2011. In short, howeer, the Court should have accepted the documents on the Friday but the fact that it did not do so must not be held against UNELCO.

43. The evidence from M. Morault does not, however, provide a completely satisfactory explanation as to the approach adopted by UNELCO in respect of the decision under review. In particular, UNELCO obtained an in-house opinion from its legal department on 17 March 2011 which opinion was produced (Exhibit 3) at this hearing. That opinion concluded that the decision of the Council of Ministers to enter into the MOU *"may be invalid and/or illegal"* for the following reasons:-

    1) *"Copies of tender proposal have been received by some local authorities non authorised to receive those proposals;*

    2) *The proposals may have been directly evaluated by the Minister of Lands;*

    3) *that Government contract may have been awarded directly by the Minister of Lands;*

    4) *The Luganville electricity concession contract may have been awarded to the new concessionaire (Pernix Group) without the calling of new tender by the Government as required under the Act (certainly the strongest argument)"*

44. That opinion concluded that,

> *"An independent legal advice on this issue may be requested to assess the chances of a successful claim for breach of the "Government Contracts and Tender's Act ...by the Government. We are of the view to file the claim before the Supreme Court to verify the validity and legality of the Tender Rules of Luganville Electricity Concession Contract Renewal and to quash the current Luganville Electricity Concession Contract awarded to the Pernix Group by the Government."*

45. A copy of that opinion was provided to Minter Ellison by UNELCO on 21 April 2011 together with a copy of other relevant documents. That notwithstanding, and of course the claimant was within time at that stage, the opinion of Minter Ellison was not received back by UNELCO until 26 May 2011 which was after the expiration of the 6 months' limitation period.

46. It might be thought that a few days (7 or 11 as the case may be) should not be considered of particular significance and that it is a particularly technical objection that has been taken. However, it is clear that UNELCO was well aware that it might have a case for contesting the validity of the decision (by the Government to enter into the MOU with Pernix) as far back as March 2011 yet it did not move on it until late April 2011. UNELCO may not have been aware that a limitation period applied but that turns the question back to the reason for the limitation period in the first place. That is, it enables governments, government officials and such like to make decisions in relation to the governance and administration of the country with some confidence that, after a particular period of time, their best efforts will not be disturbed by judicial process.

47. It is necessary to return again to Rule 17.8 as that provides a clear direction as to the approach required by a judge considering a judicial review proceeding. In particular, the Judge is required to be satisfied that there has been no undue delay in making the claim. Without question, in my view, UNELCO can justifiably be accused of delaying making the claim for no good reason. It was aware by 18 November 2011 of the decision it now seeks to review, it referred the matter to its legal section at least in time for the in-house opinion it received in March 2011, yet it deliberately took no formal steps until after the limitation period had expired. That delay was a result of a conscious decision by UNELCO.

48. Mr Thornburgh raises a number of other issues relating to (what he describes as) the procedural defects in respect of the proceeding. With respect, those are of technical nature and they would not trouble me if I considered that this is a claim that should be considered by the Court. Accordingly, while I consider that the claimant has at least an arguable but not entirely convincing case as to irregularities in the process that led up to the decision of the Council of Ministers under review, it is also clear that UNELCO is only indirectly affected by that decision. Clearly, the Council of Ministers determined, on the advice of the Tenders Board, that it would proceed with an operations and management supply contract with Pernix. It is equally arguable that the Government was perfectly within its rights to do that given the failure of the tendering process. Of course, UNELCO itself sought to negotiate a private arrangement.

Conclusion

49. I do not consider, as a matter of substantial justice, that time should be extended. I consider that UNELCO has sat on its rights. A decision has been taken at the highest level of government (by the Council of Ministers) to deal directly and privately with VUI in what can only be described as exceptional and urgent circumstances. That decision should be permitted to stand.

50. Indeed, if the claim had been made within time and this matter had been argued before me at a Rule 17.8 conference, I would have declined to hear the claim and I would have accordingly struck it out. It is unnecessary to take that step as the claim fails from the outset.

51. The application to extend time for filing of the claim for judicial review is declined. That brings this case to an end.

52. The defendants are entitled to their costs which will be taxed if not agreed.

BY THE COURT

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU