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

Judicial Review Cases Nos. 25/14; 4/15; 30/15 & 745/15

BETWEEN: UNION ELECTRIQUE DU VANUATU Ltd (T/A UNELCO Suez)
Claimants

AND: REPUBLIC OF VANUATU
First Defendant

AND: UTILITIES REGULATORY AUTHORITY
Second Defendant

Hearing: ***21st 22nd and 23rd June 2016***
Decision: ***22nd September 2016***
Before: ***Justice Chetwynd***

Counsel: ***Mr North QC, Mr Heuzenroeder and Mr Hurley for the Claimants***
Mr Tari for First Defendant
Mr Blake and Mr Morrison for the Second Defendant

DECISION ON PRELIMINARY ISSUE

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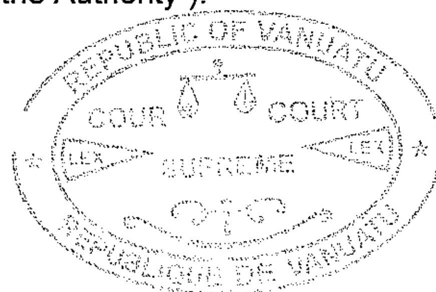
1. This decision involves a number of cases now before the Supreme Court. They have been consolidated, meaning that the several cases are being heard together. The arrangement has the further consequence that evidence in one case is evidence the other consolidated matters. This is a convenient and economic method of dealing with cases where the question or questions to be decided are basically the same. The cases which have been consolidated and the area of "conflict" each involves can be described adopting the words of the Claimant ("UNELCO") as set out in the opening paragraph of the Outline for Interlocutory Argument filed on 10th May 2016:

> Case No. JR 25 of 2014 – Re: the Feed in tariff and Support Rules (together with information demands);
> Case No. JR 4 of 2015 – Re: the Business Development Tariff;
> Case No. JR 30 of 2015 – Re: water rates;
> Case No. JR 745 of 2015 – Re: consumer complaints (and Power Purchase guidelines).

UNELCO is the Claimant in each case and the Defendants in each are The Republic of Vanuatu ("the State") and the Utilities Regulatory Authority ("the Authority").

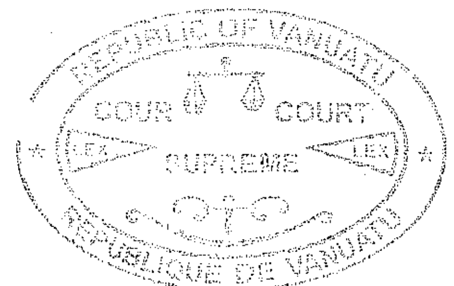


2. UNELCO is a corporation and is (and has been for a number of years) the producer and supplier of electricity in various areas of Vanuatu including, for example, Port Vila and Luganville. UNELCO also supplies water to various areas of the Country. The State needs no description or further introduction. URA is a body corporate created by section 2 of the Utilities Regulatory Authority Act No 11 of 2007 ("the URA Act").

3. The issue in these cases, in a nutshell, is to what extent can the Authority regulate the activities of UNELCO ? When the cases first came before me I asked the parties to consider dealing with this question in two distinct parts. First, did the Authority have the power or authority to do what they have done; in other words to do that which is now challenged by UNELCO? If the answer to that question is no then to all intents and purposes the cases come to an end. If the answer is yes then the next issue, crudely expressed, is did they do what they did properly. The second part of the exercise, given the challenges made by UNELCO, is very likely to involve technical questions and the prospect of a good deal of "expert" evidence. In my view, even bearing in mind all the difficulties that might arise from deciding "preliminary issues" and all the cautions alluded to by UNELCO, this approach in this case does have advantages. This is particularly so when the cases have been consolidated. Each case has resulted in prodigious quantities of paperwork in its own right. This is the main reason why this decision has taken so long to produce. The volume of paperwork cannot easily be measured in page numbers; it is more easily measured in metres and centimetres. My present estimate is a pile of paperwork 1.50 metres high. It has taken a considerable amount of time to look at all that paperwork and it was necessary to look at it to do justice to all the parties.

4. It is also apparent from the way the cases have been pursued that UNELCO is likely as not to apply to amend pleadings and is likely to seek to introduce new arguments. Deciding as a preliminary issue whether the Authority could, as I have put it, do what it did, will limit the arguments that this court will be asked to consider. This is potentially quite beneficial because the parties seem to be so far apart on exactly what are the functions and powers of the Authority. A decision on the preliminary issue should assist the parties in concentrating on any relevant questions if we get to the second stage of the cases. I am reassured in that belief because it is submitted on behalf of the Authority, "...one key issue (is); What powers does the URA Act Prima facie grant the URA, in particular is the URA empowered to make the Decisions ?" Counsel for UNELCO agree, "Taken at face value, this proposition is correct for the preliminary points to be determined."[1]

5. Initially the questions of what is the Authority, what functions does it have and what powers has it been given are questions for the court. It is also essential to bear in mind the function of the Court in Judicial Review matters. It is not for the Court to simply substitute its decision for that being challenged. The question for the Court in these cases is whether the Authority had the legal power and authority to do what it did, whether what the Authority did was *intra-vires*. Because the Authority was created by an Act of Parliament all that it is and all that it can do is set out in the legislation. It is therefore necessary to look at that legislation to see what powers and functions it has been given by Parliament. This is an exercise in statutory interpretation and the starting point must be the URA Act as amended.



[1] See the Claimant's response to URA's written submission at point 2.2

6. In its submissions and authorities UNELCO has pointed me to many references and cases in the common law concerning statutory interpretation. There is, to be sure, a plethora of cases to be found in the Australian and New Zealand law reports, in the UK reports and reports from other parts of the Commonwealth. Whilst some of the cases may assist in dealing with commonly used words and phrases found in decisions involving statutory interpretation there is sufficient guidance on the subject to be found in our own legislation.

7. Section 8 of the Interpretation Act [Cap 132] as amended [2] says:

"8. General principles of interpretation

(1) Every Act must be interpreted in such manner as best corresponds to the intention of Parliament.

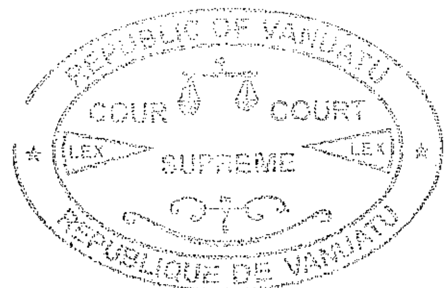
(2) The intention of Parliament is to be derived from the words of the Act, having regard to:
(a) the plain meaning of ordinary words; and
(b) the technical meaning of technical words; and
(c) the whole of the Act and the specific context in which words appear; and
(d) headings and any limitation or expansion of the meaning of words implied by them; and
(e) grammar, rules of language, conventions of legislative drafting and punctuation.

(3) Where the application of subsection (2) would produce:
(a) an ambiguous result; or
(b) a result which cannot reasonably be supposed to correspond with the intention of Parliament, the words are to 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.

(4) In applying subsection (3), the intention of Parliament may be ascertained from:
(a) the legislative history of the Act or provision in question; and
(b) explanatory notes and such other material as was before Parliament; and
(c) Hansard; and
(d) Treaties and International Conventions to which Vanuatu is a party."

8. Section 8 set out above provides all the guidance the Court needs to ascertain what Parliament intended in the URA Act. It should be noted it is the intention of Parliament not the intention of Government that is crucial. It is the will of Parliament that concerns us in this case and of course in particular what the will of Parliament was when it considered and passed into operation the URA Act.

9. There is no mystery or uncertainty as to the purpose of the URA Act. The purpose of the Act is plainly set out in section 2 :



[2] Interpretation (Amendment) Act No. 1 of 2010

*"**Purpose***

The purpose of this Act is to:

(a). ensure the provision of safe, reliable and affordable regulated services; and
(b). maximise access to regulated services throughout Vanuatu.
(c) promote the long term interests of consumers"

10. The URA Act has been amended since it came into force in 2007. The amendments have a bearing on the outcome of this case but to what extent is an issue especially between UNELCO and the Authority. One important amendment was to section 2. It originally read "*The purpose of this Act is to regulate certain utilities to...*". The words "*to regulate certain utilities*" have now been removed [3]. In other words the restrictive effect of the words "certain utilities" is no longer applicable. The amendment can only mean the URA Act has, since the passing of the amendment act in 2010, applied, to ***all*** utilities in Vanuatu not just to certain utilities.

11. That there was a change of approach being introduced by Parliament in 2010 is reinforced by added subsection (c) as set out in paragraph 9 above. The importance of promoting or safeguarding the interests of consumers was introduced by the amendment. As will be seen later there were other amendments to the URA Act and to the Electricity Supply Act [Cap 65] which clearly indicate a change in the mind-set of Parliament towards the supply of utilities.

12. Other definitions in the URA Act assist in resolving the preliminary issue. There appears to be no dispute that UNELCO is a utility. A utility is defined by the URA Act [4]:

> ***"utility** means a person who supplies a regulated service to a consumer for payment and includes a related entity for the purposes of Part 4."*

There is no doubt UNELCO supplies regulated services. They are defined in the URA Act in this way [5]:

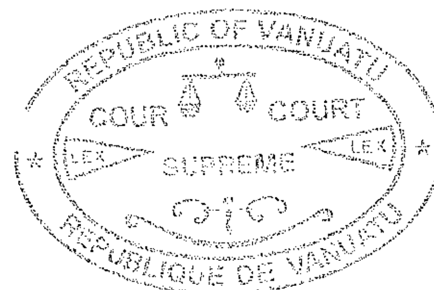
> ***"regulated service** means the supply of electricity or water to a consumer and includes all processes leading up to that supply"*

None of the parties have raised any questions about the definition of consumers. It is in any event a simple task to identify who or what a consumer is. A consumer is defined in the URA Act as:

> ***"consumer** means a person to whom a regulated service is or may be provided in consideration of a payment"*

13. To complete the definitions which may be relevant in ascertaining the effect of the URA Act, the Interpretation Act [Cap 12] provides [6];

[3] Utilities Regulatory Authority (Amendment) Act No 18 of 2010 section 1
[4] Part 1 Section 1(1) of the Utilities Regulatory Authority Act
[5] Ibid



""person" includes any statutory body, company or association or body of persons corporate or unincorporated""

14. Bearing in mind the above definitions there seems to be little doubt the URA Act applies to all regulated services throughout Vanuatu. However there is a proviso set out in section 3 as amended. The proviso makes it clear the URA Act applies to all regulated services in Vanuatu:

> *"...to the extent that it is not inconsistent with a provision in any concession agreement under the Electricity Supply Act [Cap 65] existing on or before the commencement of this Act or a provision of any other Act".* [7]

It is important to note that this proviso in section 3 ***has*** changed. The original section 3 in the 2007 Act said, *"This Act applies to a regulated service to the extent it is not inconsistent with a provision in any **applicable contract** or other Act"*. The words highlighted and underlined only appeared in the original URA Act. They no longer appear anywhere in the body of the Act even though they still appear in the definition section where it is stated:

> ***"applicable contract** means any extant contract relating to a utility made before, on or after the commencement of this Act and to which the Government is a party"*

There is no sensible reason that I can discern why there is now a definition of an "*applicable contract*" in section 1(1) of the URA Act but no other reference in the body of the Act to that particular phrase. Parliament obviously gave the matter some thought in 2010 when passing the amended Act and the amendment to section 3 indicates there was a deliberate change in the law. The deliberate amendment considered and made by Parliament can only mean it intended the URA Act to apply to all regulated services, meaning all services involving *the supply of electricity or water to a consumer"*. It should be added for the sake of completeness that supply includes, "*all processes leading up to that supply*". It applies to all regulated services in Vanuatu, "*"to the extent that it is not inconsistent with a provision in any concession agreement under the Electricity Supply Act [Cap 65] existing on or before the commencement of this Act...".*

15. Of course the URA Act is also subject to provisions in any other acts of Parliament. However, I do not accept the submission by UNELCO that, "the only viable interpretation of the amendment...is to read it as if", the additional words "concession agreement under" were added to the section before the words, "*any other Act*". Parliament deliberately re-wrote section 3 and it makes sense without the re-writing UNELCO say is necessary. There are references to water and the management of water in other Vanuatu legislation and it makes sense to ensure the Authority's activities do not harm the operation of those acts. For example the areas of responsibility set out by the Environmental Management and Conservation Act No. 12 of 2002 and reserved to the post of Director created by that act.

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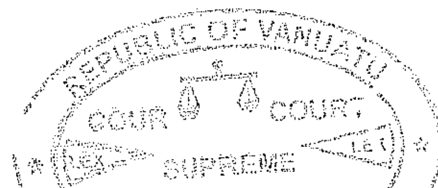
[6] Interpretations Act [Cap 12] Schedule 2

[7] Section 3 of the URA Act as amended by Utilities Regulatory Authority (Amendment) Act No 18 of 2010 section 4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16. The parties also are at odds about the meaning of the phrase *"inconsistent with"*. UNELCO says it is intended to mean merely different from or to. In other words the proviso is effective if there is any difference between the URA Act and concessions under the Electricity Supply Act or the provisions of any other act. The Authority argues that the proviso only operates where there is a contradiction or incompatibility. The issue can be resolved by reference to the rest of the URA Act.

17. Part 2 of the URA Act concerns the establishment of the Authority and its internal mechanisms; for example section 5 deals with the composition of the authority, section 6 with the appointment of a Chairperson, section 9 with remuneration of Commissioners and section 11 with meetings of the Authority. They do not much concern us in the consideration of these cases bar one provision. Section 4(3) states that the Authority, "*is to act independently but must have regard to such policies as may be issued pursuant to section 35*". If we turn to section 35 it says, *"The relevant Minister may issue statements of general policy relevant to the functions and powers of the Authority that are not inconsistent with any provision in this Act"*. I was not told of any statements issued by the relevant Minister which impinge on the matters before the Court. Even if there are such statements it is clear from the plain meaning of the ordinary words used in s.4(3) that Parliament intended the Authority to have a high degree of autonomy in its functions, including independence from Government.

18. Part 3 of the URA Act is headed "Functions and Powers of the Authority". Section 12 (1) details the functions:

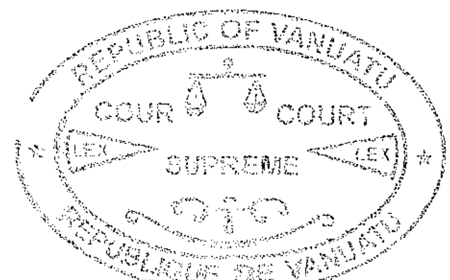
> ***"12. Functions of the Authority***
>
> *(1). The Authority has the following functions:*
>
> *(a). to exercise the functions and powers conferred by this Act or by any other Act in furtherance of the purposes of this Act;*
> *(b). to provide advice, reports and recommendations to the Government relating to utilities;*
> *(c). to inform the public of matters relating to utilities;*
> *(d). to assist consumers to resolve grievances;*
> *(e). to investigate and act upon offences under this Act."*

19. Section 12(2) was added by an amendment in 2013 [8]. It reads :

> "*(2) The Authority must exercise its functions in a way that considers the interests of, and impact on, consumers and utility businesses as well as any Government policy."*

Thus, it is beyond doubt that when exercising any of its functions the Authority must consider any general policy statements issued by the Government under section 35 ***and*** the interests of both consumers and utility businesses and the impact the exercise of any function might have on any of them. It is obvious that whilst the Authority has a high degree of autonomy it cannot act without properly considering those matters set

[8] Utilities Regulatory Authority (Amendment) Act No. 12 of 2013 section 3



out in section 12(2). Whether it did so or not is more properly for argument if these proceedings survive the preliminary issue.

20. Turning to section 13 of the URA Act, the Authority is given:

> *"...... power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions"*

When read in conjunction with section 12 it is clear that the Authority has the power to do all things that are necessary or convenient in carrying out the functions specifically assigned to it ***and*** in furtherance of the purposes of the URA Act.

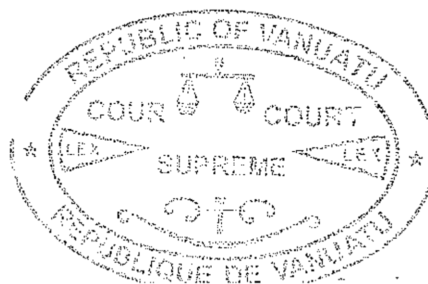
21. In connection with the powers of the Authority and in passing, the provisions set out in section1(3) need to be mentioned:

> "*(3). In this Act, unless the contrary intention appears:*
>
> *(a). where this Act confers any power to make or set any determination, order, price, regulation or other instrument, the power includes the power to revoke, vary or otherwise amend the same; and*
>
> *(b). where the Authority is required by this Act to have regard to any matter, such matter is not exhaustive of the matters to which regard may be had, but is to be afforded priority over any other matters."*

22. It is clear from the whole tenure of the URA Act that the Authority is a statutory body whose purpose is to regulate utilities throughout Vanuatu. It is a body which is independent of Government but one which must carefully balance the interests of all those involved in the supply of electricity and water including those who are involved in any process leading to the supply of water and electricity. It is not, strictly speaking, an arm of government and indeed the Government when issuing general policy statements in relation to functions and powers of the Authority must be mindful of the provisions of the URA Act [9]. The Authority is not a party to the several agreements between the First Defendant (the State) and UNELCO, except where contractual rights are assigned by operation of section 20 of the URA Act. This, to my mind, maybe at the heart of these disputes. UNELCO had been operating in a commercial environment which was largely free from formal regulation, for maybe some 60 years, certainly over 40 years. Now it has not only the Government to contend with but also a regulatory body which, certainly from 2010, has been required to actively promote the long term interests of consumers. It is likely that scenario will give rise to "disputes" because the interests of all three elements, UNELCO, Government and Consumers will not always coincide.

23. Turning now to the decisions challenged, the first considered is that in Judicial Review case 30 of 2015, namely was the Authority's Final Decision and Commission Order (Case No U-0022-14), the Water Tariff decision, *ultra vires* its powers and functions ? The short answer is no because section 18 of the URA Act permits the Authority to determine the maximum price which may be charged to consumers in relation to any aspect of a regulated service. Provided the Authority takes into account the matters referred to in sections 12(2) and 4(3) it is entitled to determine the

[9] Section 35 of the URA Act

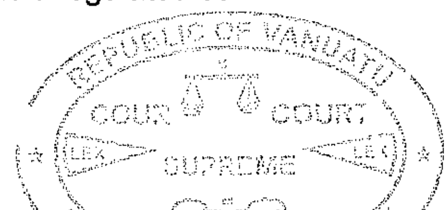


maximum price. I do not accept the submission of UNELCO that setting the tariff is entirely different from setting the maximum price. The capability of the Authority as set out in section 18 is to determine the maximum price in relation to any aspect of a regulated service not just the right to determine a maximum price. The determination of a water tariff is not *inconsistent with a provision in any concession agreement under the Electricity Supply Act [Cap 65]*. Nor have UNELCO been able to establish that setting the tariff is inconsistent with the provision of any other Act and in particular any provision in the Water Acts. For those reasons I find that, in the terms of the preliminary question, the Authority did have the power to make the order it did and set out in its decision in Case No. U-0022-14.

24. Next, the decision challenged in Judicial Review Case 745 of 2015, dealing with Dispute Resolution Rules and consumer complaints (Final Decision and Commission Order in Case No U-0009-14). The main objection to this decision seems to be the Authority has no power to oust the jurisdiction of the courts. It is submitted on behalf of UNELCO that the decision is "simply extraordinary" as it purports to establish outside of the Court system, a type of tribunal. By the same reasoning any arbitration clause in any other commercial contract would be, by UNELCO's measure, simply extraordinary. On the face of it section 12 of the URA Act taken in conjunction with section 13 and given the purpose set out in section 2(c) does allow the Authority to set up a dispute resolution process. If the process promotes the speedy resolution of disputes between utilities and consumers and at a lesser cost than can be achieved through the Court process then it is difficult to see what is objectionable. Of course the Authority cannot oust the jurisdiction of the courts and furthermore any decision of a tribunal would be reviewable by the courts in any event. On the face of it the Authority did have the power to establish a process for resolving consumer complaints together with rules and procedures for doing so.

25. Turning now to another issue raised in JR 745 of 2015, the Power Purchase Agreement (PPA). It is difficult to understand exactly what it is UNELCO finds objectionable about the proposed regulatory guidelines. I do not accept that the proposals must be inconsistent with the provisions *in any concession agreement under the Electricity Supply Act [Cap 65.* The guidelines concern the generation of electricity through solar power by individuals (known as independent power producers or IPPs) and the sale by them of excess power so generated to UNELCO. As I understand the submissions, UNELCO says the whole idea ***must*** be inconsistent with the concession agreements. The Electricity Supply Act [Cap 65] as amended in 2010 provides for a person who is not a concessionaire generating electricity for his or her own use and for supplying electricity to a concessionaire. Apart from the fact that generation of electricity by solar power was probably not even in the minds of Government or UNELCO when the initial agreement was entered into or even when it was amended, as I understand the "guidelines they are an attempt to establish a viable and effective process for dealing with a developing technology and are not a recipe for depriving UNELCO of the sole right in certain areas from supplying electricity to consumers. I do not consider the proposals as being *ultra vires* the purposes set out in section 2 of the URA Act, the functions set out in section 12(1)(a) or the powers set out in section 13(1).

26. In JR 4 of 2015 UNELCO are seeking a review of the Authority's decision in respect of the feed in tariffs, the support rules and the information requests. It is convenient to deal with the information request first. One of the purposes set out in the URA Act deals with the provision of safe reliable and affordable regulated services. The



brief facts not in dispute suggest that UNELCO loaned a commercial concern known as Cofely a sum of money. The Authority wanted full financial disclosure about the loan. They are entitled to that pursuant to section 13 of the URA Act. There is a suggestion that Cofely is a related entity as defined by section 1(1). That is an issue which needs to be explored in the next stage of proceedings. If it is the Authority is entitled to pursue the matter in accordance with section 13(2)(a). Similarly the Authority is not precluded from making rules about disclosure if those rules are reasonably incidental to any of its powers [10].

27. The feed in tariffs decision and the Business Development Incentive (BDI) decision can be conveniently dealt with together. The former is similar to the PPA scheme dealt with at paragraph 25 above. It provides for the sale back to the utility of electricity in excess of the consumers' requirements. BDI involves discounting business consumers, crudely put high voltage users can apply to UNELCO for discounts. UNELCO say these proposals must be a derogation of their rights under the concession agreements and therefore inconsistent with them. These decisions are, say UNELCO, caught by the proviso in section 3 of the Act and *ultra vires* the purposes and functions of the Authority. I find that not to be the case. Not every difference between what the Authority proposes and what is set out in the concession agreements renders a proposal beyond the powers of the Authority to make. Inconsistent means more than different to. To be inconsistent, what is being proposed must be incompatible with what is set out in the concession agreements. The degree to which a proposal is different from what is in any concession agreement is relevant of course but essentially not every minor difference leads to inconsistency.

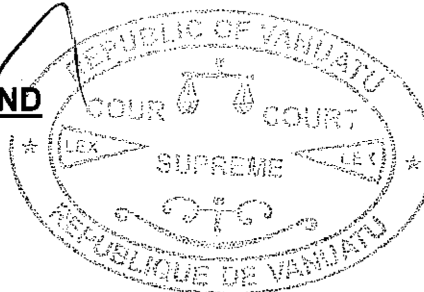
28. The preliminary issues are resolved in favour of the Authority. What is now required is a conference to establish how these matters now proceed. Given that overseas counsel is involved I shall ask the parties to discuss between themselves when the conference should take place and even what orders or directions are needed. In regard to that, I would repeat that it is not the function of the Court to substitute its own decision for that of the Authority.

DATED at Port Vila this 22nd September 2016

BY THE COURT

DAVID CHETWYND

Judge



[10] Section 13(2)(c) of the URA Act