

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

Civil Appeal Case No. 760 of 2016

**BETWEEN: UNION ELECTRIQUE DU VANUATU LIMITED T/AS**  
**UNELCO SUEZ**  
*Claimant*

**AND: THE REPUBLIC OF VANUATU**  
*First Defendant*

**AND: VANUATU UTILITIES AND INFRASTRUCTURE LIMITED**  
*Second Defendant*

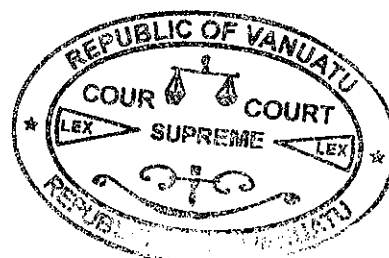
***Date of Hearing:*** ***Wednesday December 14<sup>th</sup> 2016***  
***Date of Judgment:*** ***Friday, March 24<sup>th</sup>, 2017***  
***Before:*** ***Justice JP Geoghegan***  
***Appearances:*** ***Mr North QC, Mr Hoezenroeder and Mr Hurley for the***  
***Claimant***  
***Mr Kent Tari (SLO) for the First Defendant***  
***Mr Dane Thornburgh for the Second Defendant***

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**JUDGMENT**

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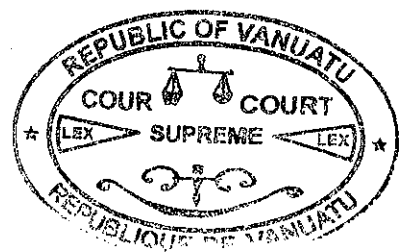
1. The issue for determination in this judgment is whether or not summary judgment should be issued against the first defendant ("*the State*") in favour of the claimant ("*UNELCO*") in respect of the State's granting of an operating and maintenance agreement to the second defendant ("*VUI*") in respect of the supply of electricity in Luganville, Santo. VUI is a wholly owned subsidiary of Pernix Group Inc. however for the sake of convenience I shall refer to VUI only.



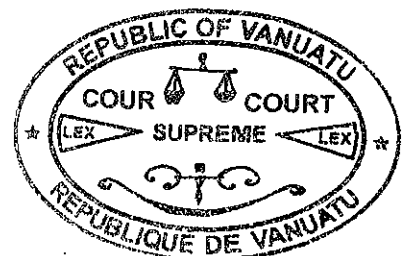
2. The State opposes the granting of summary judgment and while the application is in respect of the State only the Court also heard from Mr Thornburgh for VUI, VUI clearly being an affected party and also clearly supporting the State's opposition to the granting of summary judgment.

### **FACTUAL BACKGROUND**

3. Most of the factual background giving rise to the claim is not in dispute.
4. On January 23<sup>rd</sup> 1990, UNELCO and the Republic entered into a concession to supply electricity in Luganville through to December 31<sup>st</sup>, 2010. UNELCO already had an earlier concession entitling it to supply electricity to Port Vila.
5. The parties agreed to an amendment of the Port Vila concession on September 25<sup>th</sup> 1997 resulting in UNELCO's exclusive rights to supply electricity to Port Vila being extended until 2031. UNELCO contends that that amendment also applied to Luganville, a contention that is disputed by the State. For the purposes of this application the disputed extension is of no significance.
6. In February 2008 UNELCO was informed by the Ministry of Lands that the further management of supply of electricity in Luganville from January 1<sup>st</sup> 2011 would be the subject of an open tendering process.



7. In February 2010 the Acting Directing Director General of the Ministry of Lands initiated steps leading to the tendering process through the Central Tenders Board ("CTB"). That board was established under the Government Contracts and Tenders Act [Cap. 245] ("GCT Act"). That Act applied to the tendering process as the proposed concession would be a "government contract".
8. A two stage tendering process was approved and both UNELCO and VUI became prequalified to participate in that tender.
9. As it turned out only one tender bid was lodged, that bid being from UNELCO. It was determined to be a non-conforming bid, however the CTB advised UNELCO that UNELCO's proposal would be evaluated in detail and the Ministry of Lands would inform UNELCO about its decision in due course.
10. On September 29<sup>th</sup> 2010, the Director General of the Ministry of Lands wrote to UNELCO informing it that no complying bid had been received, that the Government was currently considering its options and that it would inform UNELCO of its decision in due course.
11. In October 2010, the CTB met and gave approval for the Minister of Lands to use what was known as a "selective tender process". UNELCO was not informed at that time that such a process had been approved.



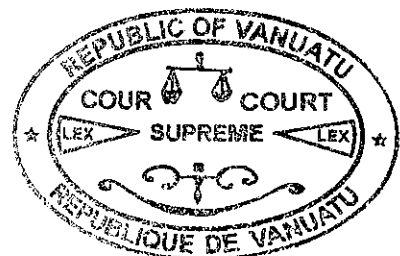
12. On November 1<sup>st</sup> 2010, the CTB met and approved the appointment of VUI to operate and manage the Luganville Electricity Generation and Supply and also approved a draft memorandum of understanding between the Government and VUI. Subsequently UNELCO was advised of by a letter from the Ministry of Lands that VUI had been awarded the Luganville concession for a period of 8 months from January 1<sup>st</sup> 2011. That letter was the first communication received by UNELCO from the Government about the future concession following the previous letter advising that it was considering its options.

13. On November 19<sup>th</sup> 2010, the State entered into a memorandum of understanding with VUI to supply electricity in Luganville. That resulted in UNELCO issuing proceedings in the Supreme Court in Union Electrique Du Vanuatu Ltd v. Republic of Vanuatu<sup>1</sup>. In that case, the parties (which included VUI as a second defendant) agreed on the making of consent orders. As result of that agreement Fatiaki J., after careful consideration of the orders he was being asked to make, made the following orders :

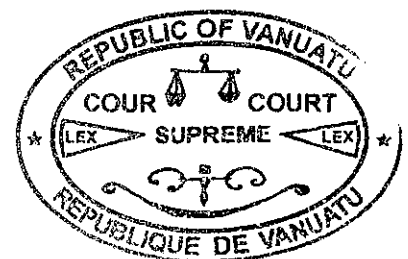
- a) A declaration that the Memorandum of Understanding (“MOU”) dated November 19<sup>th</sup> 2010 between the Republic and VUI was void and of no effect.
- b) A declaration that the letter of the Prime Minister dated December 14<sup>th</sup> 2010 was void and of no effect.

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<sup>1</sup> [2014] VUSC 146



- c) An order quashing the award to VUI of an operating and maintenance agreement with an option for a 20 year concession for the supply of electricity to Luganville.
  - d) An order that there be no order as to costs as between UNELCO and the State.
14. In addition to the consent orders made in the Supreme Court UNELCO and the State entered into a settlement deed dated February 18<sup>th</sup> 2014. The settlement deed attached a copy of the orders proposed to be made by consent. Not all of the orders referred to in the deed were made in the Supreme Court.
15. Clearly His Lordship contemplated the possibility that the orders may have an impact upon the supplier of electricity in Luganville and accordingly he granted a stay of the orders for a period of 30 days subject to VUI filing an appeal to the Court of Appeal within 21 days and seeking an extension of the temporary stay order pending a decision by the Court of Appeal. VUI filed no appeal in respect of the matter.
16. The MOU entered into between the State and VUI contained some significant provisions. In a section headed "*Background*", it refers to the fact that VUI qualified for the tender process and had demonstrated to the State's satisfaction its capacity to operate the relevant plant and obtain the new concession but did not submit a formal bid for the new concession. It records the fact that the tender process did



not result in any compliant bids or the appointment of a new concessionaire as a result of which there was no agreement in place in relation to the public supply of electricity in Luganville after December 31<sup>st</sup> 2010 and that:-

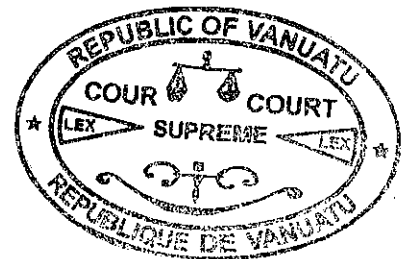
*"d) Gov wishes to award the New Concession and also must ensure the continued generation and public supply of electric power in Luganville while it pursues the grant of the new concession on acceptable terms to a party qualified to provide the required services.*

*e) Pernix [VUI] has informed Gov that it wishes to pursue the opportunity of being granted the new concession and is prepared to provide certain operation and maintenance services to ensure that generation and public supply of electric power in Luganville (O and M Services) on the expiry of the present concession."*

17. At section 2 of the MOU the purpose of the document is described at paragraph 2.1 as being as follows:-

*"The purpose of this memorandum of understanding (MOU) is to set out the key terms and conditions agreed between the parties relating to Pernix taking over from the current concessionaire on the commencement date to provide the O and M services and to ensure a smooth hand over with no disruption to the electricity service, and to provide for the negotiation by the parties of a concession deed (New Concession Deed) based upon the draft concession deed."*

Clause 2.2 of the MOU provides:-



*"2.2 Binding*

*a) This MOU is intended to be legally binding on the parties.*

*b) On signing the MOU:-*

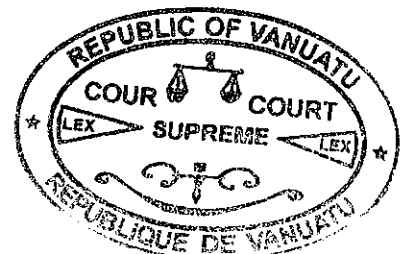
*(i) Subject to paragraph 2.2 (c), Gov shall cease all negotiations with other parties with respect to the tender for the concession."*

18. Paragraph 2.2 (c) provides that:-

*"If Gov at any time, acting in good faith, considers from Pernix's approach to the negotiations (including Pernix's response time to proposals) that it is unlikely that Pernix will agree, or agree in a reasonable time, to the terms of a new concession deed which Gov considers fair and reasonable, Gov may resume or commence negotiations with other parties with respect to awarding a new concession for the concession area and shall give Pernix written notice of its decisions".*

19. Accordingly the MOU purports not only to provide VUI with the opportunity to operate the Luganville Concession for an interim period, but also provides VUI with the opportunity to negotiate a New Concession to the exclusion of all others.

20. On October 16<sup>th</sup> 2014 (the day the consent orders were to be made) Mr Thornburgh, acting for VUI wrote to the Solicitor General regarding the issuing of a judgment and what was to follow from there. The letter contained, inter alia, the following:-



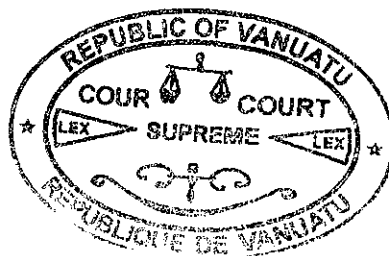
*"We confirm that our client has raised some concerns in relation to the course of events to take place if the judgment comes down, as we expect allowing the consent orders to be made and endorsed by the trial judge, albeit with some amendments.*

*As raised with you previously and today, our client has been the incumbent provider /concessionaire for the provision of electricity services in Luganville, Santo for in excess of three (3) years.*

*If as expected, the orders as handed down by Justice Fatiaki, are that the concession goes back out to re-tender, our client is seeking certain undertakings to protect their interests, pending the ultimate re-tender by the Government and the awarding of a new concession.*

*Our client has provided us with clear instructions, that it is their express intention to re-tender if this is the case, and to be involved in the future provision of electricity and other services in Vanuatu.*

*On that basis, the following written undertaking would be required to avoid any possible ambiguities and/or confusion amongst the parties to these proceedings and any future persons wishing to tender.*



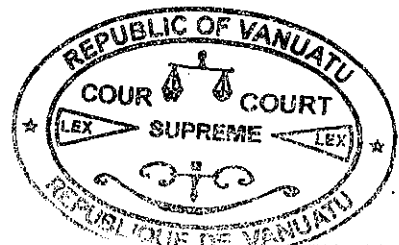


*The Republic of the Government of Vanuatu would need to provide a written undertaking to Vanuatu Utilities and Infrastructure Limited (VUI), as the incumbent provider of electricity services to Luganville, Santo that:-*

- 1) The Government will not be requesting nor expecting VUI to either cease operations and or vacate any premises in relation to the provision of electricity in Santo as discussed above, until a new tender is awarded.*
- 2) Furthermore the Republic of the Government of Vanuatu to expect that a memorandum of understanding entered into between the parties which is being the basis of the relationship between VUI and the Government since 2011, and the terms thereof, or form the basis of the agreement up until the finalization of the new tender and the awarding of an new tender to whoever it may be.*

*We confirm that our client requires the above undertaking no later than 5 pm today 16 October 2014.*

*If our client does not receive the above written undertaking within the timeframe as allowed, our client will be left with no alternative but to bring Supreme Court proceedings seeking injunctive relief, and orders along the lines as sought in the above undertaking”.*



21. On November 5<sup>th</sup> 2014, the Attorney General for the State replied to Mr Thornburgh's letter. That letter stated, inter alia, that:-

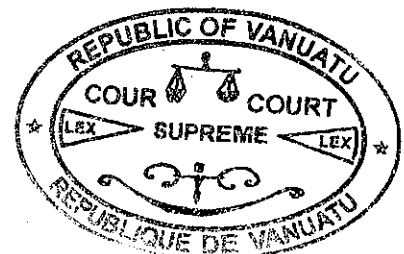
*"We are instructed to provide the following undertakings to VUI that:-*

- 1) *The Government will not be requesting nor expecting VUI to either cease operations and or vacate any premises in relation to the provision of electricity in Santo, until a new tender is awarded;*
- 2) *Furthermore, the Government agrees that the memorandum of understanding entered into between the parties which is being the basis of the relationship between VUI and the Government since 2011, and the terms thereof, will form the basis of the agreement up until the finalization of the new tender and the awarding of a new tender to whoever it may be".*

22. On November 21<sup>st</sup> 2014, the National Trade Development Committee *"endorsed the continuation of Electricity Supply in Luganville by VUI until completion of the re-tender process".*

23. On December 3<sup>rd</sup> 2014, the Attorney General wrote to UNELCO Solicitors advising that the State Law Office was instructed that *"the Government has decided that the temporary arrangement of the power plant facilities and group networks in Luganville shall remain with VUI until completion of the re-tendering process".*

24. On June 23<sup>rd</sup> 2015 the Utilities Regulatory Authority published a notice in the Government Gazette which stated, inter alia, that *"following the Supreme Court's*



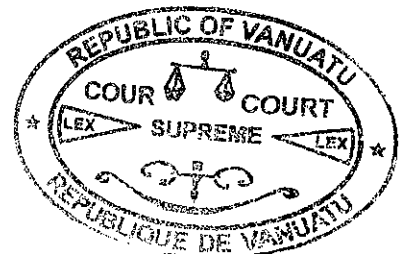
*verdict vacating the 2010 Government's grant of concession to VUI and pending the re-tendering process, .... VUI has been extended the right to operate the Luganville electricity system on the terms of the earlier MOU".*

25. On August 17<sup>th</sup> 2015, the URA then published a purported preliminary decision and notice of request for comments in public consultation which stated that *"the electricity services [at Luganville] continued to be provided by Vanuatu Utilities and Infrastructure (VUI) pursuant to the Memorandum of Understanding dated 18<sup>th</sup> November 2010."*

26. An additional matter which needs to be referred to is the fact that UNELCO also claims that it had obtained an extension to the Luganville Concession which provided that with the exclusive right to provide electricity within the Luganville Concession to December 31<sup>st</sup> 2031.

27. On August 15<sup>th</sup> 1986 UNELCO and the State entered into the Port Vila Concession Agreement pursuant to which UNELCO was granted the right to generate and supply electricity to the Public for all purposes within the city of Port Vila.

28. On September 25<sup>th</sup> 1997 UNELCO and the State entered into an agreement varying the Port Vila Concession. That had the effect of extending the exclusive right to supply electricity to the city of Port Vila for a further 20 years to December 31<sup>st</sup> 2031. Within the variation agreement there is also reference to Luganville and



accordingly UNELCO claim that there has been a breach of that agreement by the State also.

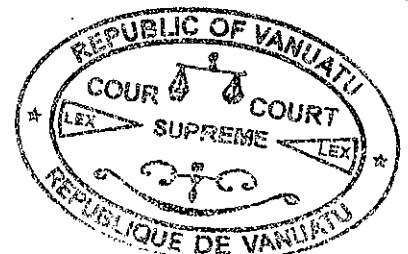
## THE PLEADINGS

29. In its statement of claim UNELCO relies upon the factual background which I have just referred to. UNELCO pleads that an incumbent operator accrues various economic advantages in relation to bidding for a long term concession such as savings on mobilization costs and accumulation of a working knowledge of the plants and systems. UNELCO argues that an open, competitive tender requires bidding in circumstances where no tenderer had an economic advantage.

30. Given the reality of the likely bidders for any concession in Luganville being either UNELCO or VUI a question arises as to whether there could ever be an optimally competitive tender process given that it is highly likely, even if the State operated the premises, that it would be relying on the expertise of staff recruited and seconded from either UNELCO or VUI.

31. UNELCO contends that:-

*"a) The "identical MOU" entered into between the State and VUI amounted to a "new tender" as referred to in the settlement agreement between UNELCO and the State.*

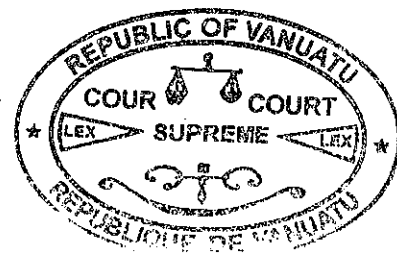


- b) *That the State was required to obtain a validly executed deed of release from VUI pursuant to the terms of the settlement agreement.*
- c) *That the State was required to do all things reasonably necessary to enable UNELCO to have the full benefits of the State's obligations which included that the State abstain from rendering the Supreme Court's orders partly inutile by entering into an identical memorandum of understanding.*
- d) *The State has not set about conducting an open, competitive and transparent tender process. That is also in breach of the settlement agreement."*

32. UNELCO also alleges that the State has acted in breach of the Port Vila concession agreement by allowing VUI to manufacture and supply electrical current within Luganville prior to December 31<sup>st</sup> 2031.

33. In its statement of claim UNELCO seeks the following declarations:-

- a) That by failing to obtain a validly executed deed of release the State has breached the settlement agreement between the parties.
- b) By awarding an identical MOU to VUI the State is in breach of the Settlement Agreement.
- c) That by failing to commence a tender process the State is in breach of the settlement agreement.

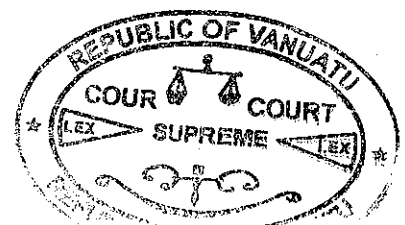


34. UNELCO also seeks specific performance of the settlement agreement to the effect that:-

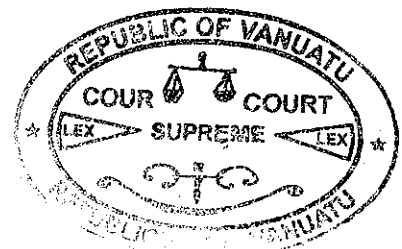
- a) The State take over operation of the generating facilities until completion of the tender process; or
- b) The State awards an operating and maintenance agreement to the most competitive bidder;
- c) The State forthwith hold a competitive and transparent tender for a 20 year concession.
- d) That members of the Tenders Board receive, assess and make a recommendation in pursuance of the GCT Act, of the tenders received for the 20 year concession free from any influence as required by section 15 of the GCT Act.

35. As to the summary judgment application, UNELCO seeks the declarations set out in paragraphs 33 (a) to (c) and specific performance of the deed of settlement through orders as per paragraph 34 (a) to (d).

36. In addition, it seeks summary judgment for an interlocutory determination as to liability in respect of what it claims to be a breach of the Port Vila concession granting exclusive concession rights to UNELCO to supply electricity to Luganville until December 31<sup>st</sup>, 2031.



37. The summary judgment application was prompted by the disclosure by VUI during the discovery process of the correspondence between VUI's lawyers and the Attorney-General in 2004. It was suggested to the State Law Office by UNELCO's lawyers that the correspondence was incontrovertible confirmation of breach of the settlement deed by granting an operating and maintenance agreement to VUI without complying with any of the requirements of the GCT Act and without obtaining a validly executed Deed of Release.
38. The State, as it must do, acknowledges the terms of the settlement deed between the parties. It denies however that it has breached the deed as claimed by UNELCO.
39. In its statement of defence the State pleads the following matters which I take to be at the core of its defence:-
- a) The extension of the Port Vila Concession agreement on September 25<sup>th</sup> 1997 was an extension of the concession in Port Vila only and not Luganville.
  - b) The Government has started the initial stages of the re-tender process. It is committed to the re-tender process in accordance with the GCT Act but has been hampered by Cyclone Pam and the "*instability of the Government*".
  - c) That under the Concession Agreement between UNELCO and the State clause 10 of the agreement entitled the State, subject to 3 years notice, to take over the rights and obligations of the Concessionaire and to take possession of the land and facilities. It impliedly did this through its

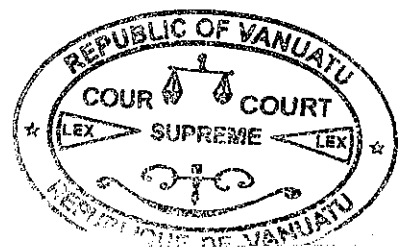


agreement with VUI. It is not required as is suggested by UNELCO to second appropriately qualified staff.

- d) There was no memorandum of understanding as alleged by UNELCO with “*relevantly identical terms*” to that which was first made between the State and VUI (see paragraph 9 (d) of amended statement of defence to amended statement of claim).
- e) The State is not required to obtain a deed of release from VUI as the re-tendering process has not yet got to the stage where such a deed is required to be executed.
- f) UNELCO’s claim for a declaration is an abuse of process as it seeks relief which should be sought by way of Judicial Review.

40. I would make the following observations in respect of some of the matters pleaded by the State.

41. Firstly, the pleading that there is no MOU with relevantly identical terms to that which was first entered into between the State and VUI flies in the face of the clear evidence provided by way of the letter from the Attorney General to Mr Thornburgh dated November 5<sup>th</sup> 2014 and as referred to in paragraph 15 herein. The letter stated that “*the terms [of the memorandum of understanding] all form the basis of the agreement up until the finalization of the new tender and the awarding of a new tender to whoever it may be*”. While both Mr Tari and Mr Thornburgh referred to “new” arrangements there was no explanation as to how they were new or in





some way different. The arguments on behalf of the Defendants in this regard were unconvincing.

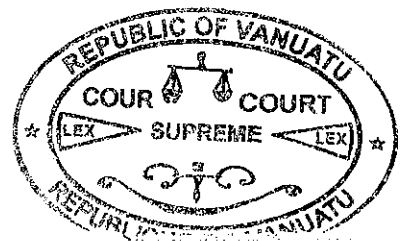
42. Secondly, Cyclone Pam occurred on March 13<sup>th</sup> 2015, just over four years after the State had entered into the first MOU with VUI. Quite what is meant by the *"instability of the Government"* is not covered by the evidence filed on behalf of the State but by any measure the State has had a very significant amount of time to get the re-tendering process underway. It is obvious that, from UNELCO's perspective this provides VUI with an unfair economic advantage in terms of applying for a 20 year concession in any re-tendering process.

43. Thirdly, I do not consider that UNELCO's claim for a declaration is an abuse of process. The basis upon which UNELCO claims relief is the State's obligations as set out in the settlement deed. It is entitled to take action on the basis of that deed.

#### **THE SETTLEMENT DEED**

44. The settlement deed provides the basis for the claimant's claim. It contained the following relevant provisions:-

- a) Clauses 3.1 to 3.3 of the deed recorded that UNELCO released and discharged the Republic from any claim for damages losses expenses and lost revenue together with legal costs arising from the conduct of the original tender. In addition, UNELCO indemnified the Republic in respect



of irrecoverable legal costs incurred in the event that VUI brought legal proceedings against the Republic for damages as a result of the orders the parties had agreed to.

45. Clause 4 of the deed provided as follows:-

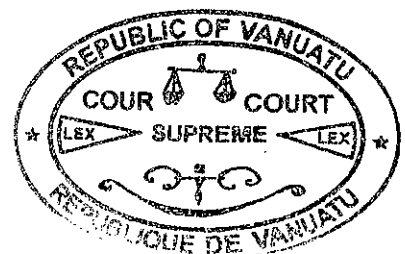
*"4. Conduct of the new tender*

*The Government and the Republic of Vanuatu agrees that they shall each obtain from every bidder or party expressing any interest or who makes any proposal concerning or in relation to the new tender a validly executed deed of release in favour of the Government and the Republic of Vanuatu effectively releasing and indemnifying the Government and the Republic of Vanuatu from and against all claims, suits, actions and proceedings arising out of or related to:-*

- a) The original tender; and or*
  - b) The generation of electricity in relation to or on Luganville;*
- that have accrued prior to that time.*

46. The term "new tender" is defined in Clause 1.1 of the settlement deed as meaning:-

*".....any tender process or other process to be undertaken after the date of this deed for the award of any contract concerning the generation of electricity on Luganville and including the operation of the Luganville Electricity Concession".*



47. Pursuant to the deed the State agreed to the making of the orders that were subsequently made.

## REQUIREMENTS FOR OBTAINING SUMMARY JUDGMENT

48. The relevant rules referring to the granting of summary judgment is set out in Rule 9.6 of the Civil Procedure Rules.

49. The real issue in this case is whether it could be said that the claimant is satisfied the requirements of rule 9.6 (7) and 9.6 (9) which provide:-

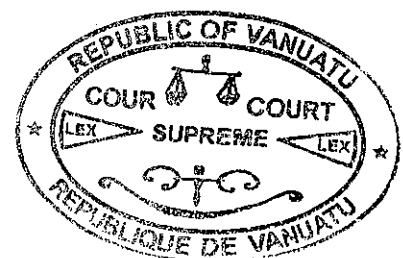
*"(7) If a Court is satisfied:-*

- (a) The defendant has not real prospect of defending the claimant's claim or part of the claim; and*
- (b) There is no need for a trial of the claim or that part of the claim, the Court may:*
- (c) Give judgment of the claim or part of the claim; and*
- (d) Make any other orders the Court thinks appropriate.*

.....

*(9) The Court must not give judgment against the defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."*

50. There is no dispute between counsel as to the test to be applied.



51. In Bokissa v. Race<sup>2</sup> , the Court of Appeal accepted that the test is whether the prospect of defending the claimant's claim is realistic rather than fanciful.

52. The need for caution was also emphasized in the Supreme Court decision in ANZ Bank (Vanuatu) Ltd v. Traverso<sup>3</sup> where Sey J stated:

*"It is now judicially settled that the summary judgment procedure is designed to enable a claimant to obtain swift judgment in respect of his claim against the defendant who has no real prospect of defending the claimant's claim or part of it. By its characteristic features, summary judgment as generally viewed is literally shutting the door of justice in the face of a defendant and that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice".*

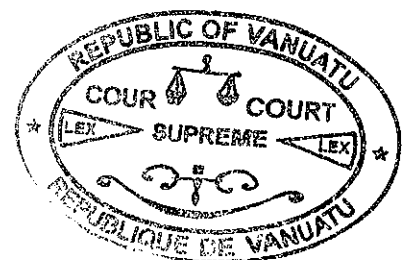
53. Her Ladyship further added that:-

*"Consequently summary judgment should be resorted to and accorded only where the claimant can establish his claim clearly and the defendant fails to set up a bona fide defence. It is my considered view that, whilst on the one hand the Court wishes to assist the claimants whose right to relief has been stalled by the delaying tactics of a defendant who has no defence, on the*

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<sup>2</sup> [2003] VUCA 22

<sup>3</sup> [2012] VUSC 222

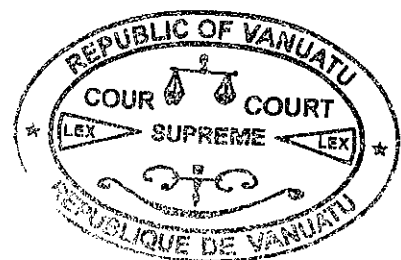


*other hand, the Court is reluctant to deprive the defendant of his normal right to defend except in a clear case”.*

54. The remedy of summary judgment is a discretionary one, so even in the event of the court being satisfied that the defendant has no real prospect of success the court is not required or compelled to grant judgment although there would, I suggest, have to be good reason for not doing so.

## DISCUSSION

55. It is clear from the pleadings that the State entered into the second MOU with VUI on the basis of what it regarded as a cost effective measure for the continuation of supply of electricity to the Luganville area.
56. UNELCO therefore claims in these proceedings that almost immediately upon entering into orders which declared a contract between the State and VUI void, the State then entered into an identical contract with VUI which contravenes the GCT Act and is accordingly void. It is the claimant’s position that having admitted that its agreement with VUI was void as contrary to the GCT Act it must follow that the identical agreement must itself be in breach of the Act.



57. Put another way, why would a Court, after careful consideration of the matter, go to the trouble of declaring a contract to be void if the parties to the avoided contract were free to enter into an identical contract immediately thereafter?

58. The GCT Act is as described in section 1, an Act to:

*"... Establish the rules and procedures that must be followed with Government contracts and tenders".*

59. A "Government Contract" is defined in section 2A as:-

***"2A. Government Contracts defined***

*(1) Subject to subsections (3) and (4), each of the following is a Government Contract:*

*(a) a contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment out of public moneys;*

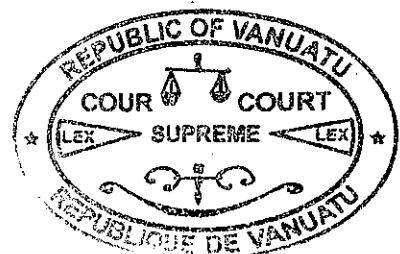
*(b) a contract or arrangement for the disposal of an asset of the Government;*

*(c) a concession or franchise granted by the Government.*

*(2) Any subcontract made in relation to any contract or arrangement mentioned in subsection (1) (a) or (1) (b) is also a Government Contract.*

*(3) The consideration in relation to any contract, arrangement, franchise or concession must exceed VT 5,000,000.*

*(4) A contract or arrangement for raising loans for the Government is not a Government Contract.*



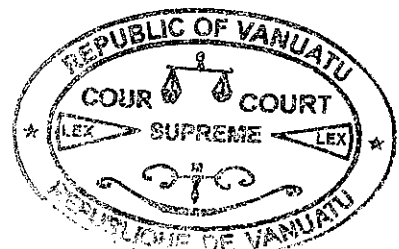
*(5) Nothing in subsection (1) (c) is to be taken to affect the requirement for a licence, permit, approval, authority or permission required under or by any other Act."*

60. Section 8 of the Act requires a Minister, the Director General of a Ministry or any other person authorized by the Minister or the Director General, when entering into a Government contract, to comply with the quotation proposal or tendering process set out in the Act.

61. Section 7 of the Act provides that a Government contract entered into in breach of the provisions of the Act will be *"void, or no effect, and will not be binding on the State or the Government"*.

62. It is submitted on behalf of UNELCO that during the course of the re-tendering process the facility at Luganville should not be operated by UNELCO, VUI or any other prospective tenderer. What should occur is that the State be responsible for operation of the facilities and should engage appropriately qualified individuals for that purpose. This view was expressed to the State by letter dated November 12<sup>th</sup> 2014 when in a letter to the Solicitor General from UNELCO's solicitors UNELCO advised that:-

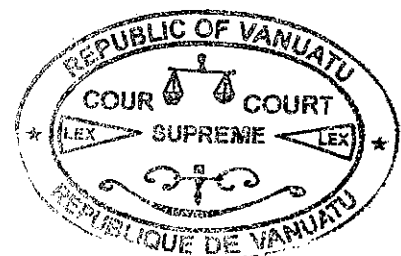
*"Where a further tender is to be made for the concession the fairest basis to proceed in our respectful submission, is for the Republic to operate the facilities pending the completion of the retenders. In order to facilitate this,*



*UNELCO would be prepared to second appropriately qualified staff to the Government.....during the retender process”.*

63. Instead what has happened, UNELCO argued is that the State had completely disregarded the Supreme Court orders declaring its agreement with VUI void and has simply carried on as if nothing has happened. In that regard I do not understand UNELCO to be suggesting that it should be given the right to run the facility pending completion of the re-tendering process but that the State needs to exercise that responsibility in a careful and considered manner consistent with the relevant legislation.

64. For UNELCO, Mr North QC submitted that the second MOU was within the definition of a “*new tender*” as set out in the settlement deed. That is, it was another process to be undertaken after the date of the settlement deed for the award of any contract concerning the generation of electricity on Luganville. As submitted by Mr North QC the very *raison d’etre* of the MOU concerned the operation of the Luganville Electricity Concession pending the re-tender. He also pointed to the fact that while UNELCO specifically pleaded that no deed of release was first obtained by the Republic from VUI there was no specific plead back to this on behalf of the State and thus by virtue of rule 4.5 (5) of the Civil Procedure Rules the Republic is taken to admit the allegation.





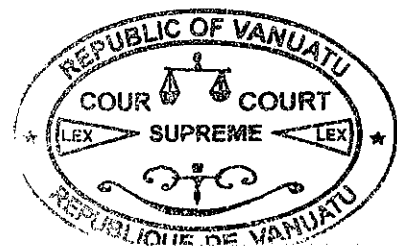
65. As to the allegation that the State had breached the requirement to recommence an open, competitive and transparent tender for a 20 year concession in a timely manner, Mr North QC points to the orders in schedule 1 of the Deed and the Residuals which proceed those orders recording the parties' agreement that there be a recommencement as stated. The schedule then goes on to record the orders that are to be made by consent including an order referred to at paragraph 5 namely, a mandatory order with the Minister of Climate Change Adaption, Geohazards, Meteorology and Energy, "*commence, and take all steps to pursue in a timely manner and to effect, a re-tender in accordance with the Government Contracts and Tenders Act.*"

66. That order was not made by Fatiaki J. Mr North QC referred to the fact that the only reason why the agreement expressly recited in clause 4 of the recitals of the proposed orders was not included in the body of the deed was that the contingency that the orders would not be made was not foreseen.

67. On this point, Mr North QC referred to the Privy Council decision in *A-G (Belize) v. Belize Telecom Ltd*<sup>4</sup>. That case dealt with two possible interpretations of Articles of Association relating to shareholding and the position of directors. In determining the issue the Privy Council concluded that an interpretation that there was an implied term which required directors to vacate from their positions should be applied. In coming to this decision, it was held that when an instrument does not

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<sup>4</sup>[2009] 1 WLR 1988



provide for what is to occur when a specific contingency eventuates, a common inference is that nothing is to occur. However, in some cases the reasonable and properly informed addressee would understand it to require something else, where this is the only meaning consistent with other provisions in the relevant background; the instrument may not expressly have said so, but that is what it must mean. In such a case the Court implies a term as to what is to happen if the event in question occurs, as this is required to spell out what the instrument means.

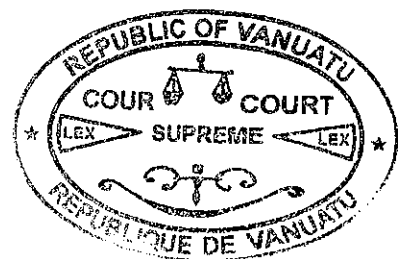
68. In applying that approach, Mr North QC submitted that the recitals of schedule 1 leave no doubt as to what was agreed and evidenced in the settlement deed in circumstances where not all orders were made. Namely, that there would be a recommencement of an open, transparent and competitive tender in accordance with the GCT Act.

69. It was submitted by Mr North QC that it was implied term of all contracts that required the performance of a thing, that it be done within a reasonable period of time. He referred to Reid v. Moreland Timber Co. Pty Ltd<sup>5</sup> where Dixon J said at 13:-

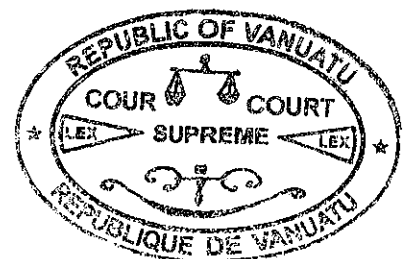
*"An implication of a reasonable time where none is expressly limited is, in general, to be made unless there are indications to the contrary: see Alice v. Thompson; Picturesque Atless Co Ltd v. Bradbury, Picturesque Atless Co. Ltd v. Searle; Lynn v. Creati".*

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<sup>5</sup> (1946) 73 CLR 1

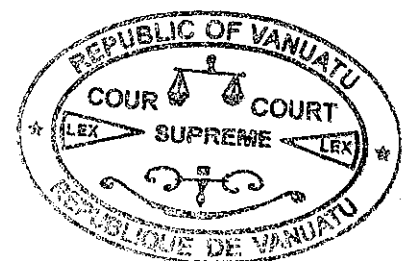


70. It is submitted on behalf of UNELCO that on any view of the matter a reasonable period has passed.
71. For the State, in his brief submissions Mr Tari simply emphasized the pleaded position that the State has not breached the settlement deed. He points to the sworn statements filed in support of the State's case which support, in Mr Tari's submission the contention that the re-tendering process has not got to a stage where the obtaining of a validly executed deed of release from "*every bidder or party expressing any interest*" is required.
72. In addition the State relies on its position that the second MOU is a new contractual agreement entered into between the Government, the Republic and VUI on the basis of the relationship the parties had through the MOU entered into between them in 2011 and that that new engagement constitutes a valid agreement between them as it would not be "*an available exercise*" to direct the reinstatement of UNELCO as the Luganville Concessionaire pending the re-tender process to be finalized and the awarding of the new tender for reason that VUI was already engaged to do so.
73. The position of VUI could be summarized by saying that it was submitted by Mr Thornburgh that while UNELCO claims that it is seeking an application for summary judgment against the State only the reality of the position is that granting the

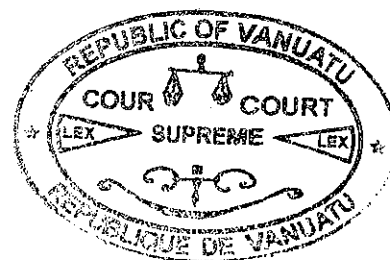


requested relief against the State would also be granting relief against VUI which is not a party to the summary judgment application and such a course should be avoided

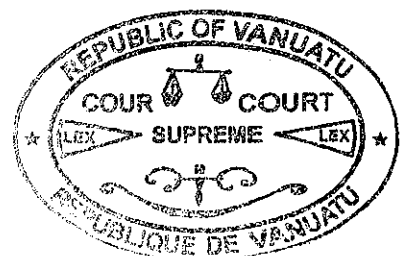
74. For VUI Mr Thornburgh submitted that it was *"beyond dispute"* that VUI is the incumbent provider of electricity to Luganville. While it is beyond dispute that VUI is the de facto incumbent provider of electricity that submission rather misses the point as to the legitimacy of that position particularly when one considers that the State had already conceded that its original MOU with VUI was void and of no effect.
75. Mr Thornburgh submitted that there is a *"new agreement between"* the State and VUI dated November 4<sup>th</sup> 2014 *"as pleaded by all parties the terms identical to the MOU for the certainty thereof. It is not the old MOU in any manner and remains entirely undisturbed between VUI and ROV and preclude this misguided application for summary judgment entirely"*.
76. With respect to that submission I consider it to be inherently contradictory. It is difficult to see how the *"new agreement"* can be identical in terms to the former MOU and yet is not *"the old MOU in any manner"*. The evidence clearly establishes beyond any doubt that there is absolutely no difference between what is referred to as *"old"* and *"new"* arrangements between the State and VUI. They are absolutely identical.
77. Merely changing the collar on a dog does not make it a different dog.



78. Not surprisingly, Mr Thornburgh refers to the fact that VUI has issued a counter claim against UNELCO and that that counter claim will be affected by any relief granted by the Court in respect of this summary judgment application.
79. While that may be so, VUI is not prevented from proceeding with a claim against UNELCO. The fundamental point made by Mr North QC however, is that a void agreement is a void agreement for all purposes. The fact that the granting of a summary judgment in these proceedings may have an impact upon VUI's counter claim is, in that context, of no significance.
80. I wish to make an observation as to the submissions filed by Mr Thornburgh. They regrettably contained a number of personal remarks which I consider have no proper place in submissions to be filed in this or any other Court. Mr Thornburgh referred to the relief sought by VUI against UNELCO and in his submissions stated:-
- "On the basis of the above, one must confess as to the level of dismay that counsel is experiencing to the application against the first defendant (not the second defendant) seeking orders that will effect (sic) the second defendant and of which are disputed in the counter claim before the Court".*
81. The Court is not remotely interested in the level of dismay that counsel may be experiencing and such an observation should not be recorded in a submission.



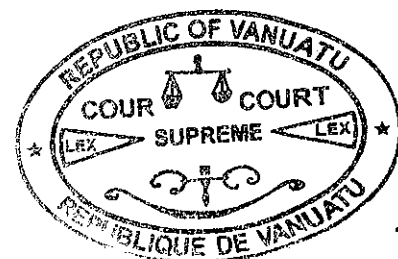
82. Elsewhere Mr Thornburgh referred to the claimant's counsel's pleadings or submissions as being "*embarrassing*", "*increasingly embarrassing*" and as "*scurrilous, premature and embarrassing*".
83. Such references are unnecessary and inappropriate. They should not have been made and it is disappointing to see such remarks included in counsel's submissions.
84. In these proceedings context is everything. The background facts giving rise to these proceedings are exactly the same as those presented in the earlier Supreme Court and Court of Appeal decisions referred to. The very reason the proceedings exist is because of UNELCO's complaint that the State has not complied with its own legislation in the retendering process thereby placing UNELCO at a considerable disadvantage. While Mr Thornburgh submits on behalf of VUI that VUI has been supplying electricity for the last three years, it is been doing so on the basis of an agreement which one of the parties to it, namely the State, accepted was void. The State acknowledged that when it agreed to the making of consent orders. As a matter of logic, having conceded that the agreement was void it cannot be permissible for the State to now argue that its agreement with VUI, identical in all respects, is somehow valid to serve exactly the same purpose.
85. It has been repeated throughout the evidence given on behalf of the State and counsel for the State's submissions that the State took the course which it did in granting the second MOU in order to limit costs. This has been repeated to the



point where one could be forgiven for thinking that it is presented as a viable defence to the claim. It most certainly is not. While the saving of costs and use of public money is entirely laudable that does not give the State the right to ignore its own legal obligations either pursuant to a private contract or pursuant to the applicable legislation. In this case I have come to the view that the State has ignored its legal obligations in respect of both matters.

86. I am of the view that the State's position exhibits an essential misunderstanding of its obligations under the settlement deed and also under the legislation.

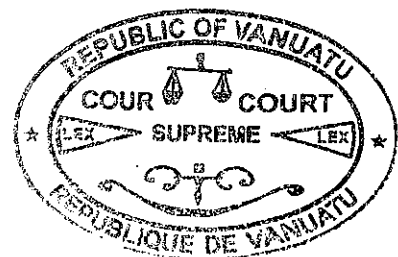
87. The view taken by the State, and for that matter, VUI, that it could effectively go back to the original position which had been challenged by UNELCO in the Supreme Court and which the State had agreed by its submissions and concessions was fatally flawed was, itself, fatally flawed. The very purpose of the previous Supreme Court proceedings was that UNELCO took the view that the process adopted by the Government was in breach of its own legislation. The concessions and agreements contained in the settlement deed together with the consent orders made by the Court confirmed that UNELCO's position was correct. It was not open for the State in view of the settlement deed which had been entered into, to do exactly what it had previously done. To do so flew in the face of the very agreement which the parties had reached.



88. Considering all of the evidence and the submissions made by counsel, I agree with counsel for UNELCO that the claim that the settlement deed had been breached is unassailable. The second MOU entered into was unmistakably a Government contract as defined by the GCT Act. I am of the view that it is not open to argument that the second MOU constituted a "new tender" as defined by clause 1.1 of the settlement deed. It is clearly a "new tender" and in that regard the contract speaks for itself. Accordingly I am satisfied that the State has breached the settlement deed by failing to obtain from VUI a validly executed deed of release.

89. I accept also that the awarding of the second MOU to VUI involved a breach of the settlement agreement that included an obligation on the part of the State to recommence an open, competitive and transparent tender for a 20 year concession to generate electricity for Luganville. The clear intent and purpose of the settlement deed between the parties was to create an even playing field in respect of anyone who was proposing to obtain a concession or contract for the supply of electricity to Luganville. It was not an agreement which contemplated retaining the status quo with the State eventually getting to the point of a re-tender process. In view of the contractual provisions of the settlement deed I consider that it is unarguable that the State has breached the settlement deed in the way which is alleged by UNELCO.

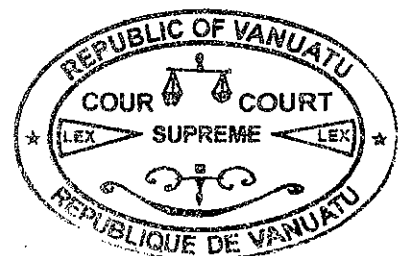
90. As to the claim that the State has breached the settlement deed by failing within a reasonable period of time to commence a tender process, it is at least arguable that





the State may have a defence although this is by very fine margin. The evidence of Mr Yannick Hughes, the Secretary of the Central Tenders Board was that in 2015 (the precise date being unspecified) the Government through the Ministry of Climate Change and Adaptation under the Department of Energy put forward to the CTB a tender package for the provision of consultancy services for the transaction advisory service or the tendering of the Luganville concession. There is no evidence tendered as to the events which led up to the placing of that tender package before the CBT, however it would appear that there may have been prior events leading up to that which make it arguable that the tender process may have been initiated as soon as practicable.

91. As to the issue of UNELCO's claim that there has been a breach of the amended Port Vila Concession Deed, little reference was made to that issue during the course of submissions and apart from the document being produced, no evidence was given on the issue. In the circumstances that is not surprising. The document itself is, in my view, somewhat unclear as to whether it actually does apply to Luganville.
92. The recitals in the agreement refer to increased consumption of electricity in Port Vila resulting in the need to increase the generating capacity by the construction of a new power station. It records that the Government had requested that UNELCO finance the purchase of the necessary land for the construction and operation by UNELCO of the new power station and that in view of the major investment required to be made for the new power station the price of electricity would need



to be increased, presumably to pay for it. As the Government did not wish to increase electricity tariffs it was agreed that the Port Vila Concession would be varied.

93. The document appears to be a document which applies to Port Vila. However Luganville is also referred to in a number of places. Section 12 of the Agreement redefines the area of Port Vila by defining the area of the Port Vila area as being the boundaries of the Port Vila Municipality.

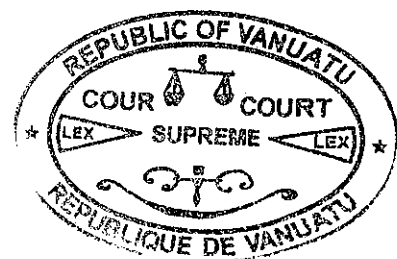
94. The Schedule to the variation states:-

*"In this agreement, the expression "concession" refers to and includes the following documents, which documents are varied or modified to the extent set out in this agreement;-"*

95. The Schedule then refers specifically to the convention dated August 15<sup>th</sup> 1986 relating to the concession for the supply of electricity to Port Vila together with various other documents all of which relate to the supply of electricity in Port Vila. The concession for supply of electricity to Luganville is not referred to.

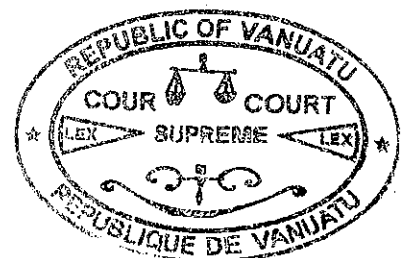
96. Given that the variation of the "concession" appears to relate to the documents referred to in the Schedule it is at least arguable that the document is not one which extends the Luganville Concession to December 31<sup>st</sup> 2001.

97. As against that, clause 8.9 of the Agreement states:-



*"The grantor and/or the Government shall not issue to any person other than the concessionaire any authority or permission to provide at any time during the term of this concession, the right to manufacture and supply electric current for lighting and power within the supply areas of Port Vila and Luganville held by the concessionaire".*

98. A question which arises is why, if there is a contract granting exclusive rights to UNELCO for the supply of electricity in Luganville to December 31<sup>st</sup> 2031, it was necessary for a re-tendering process to be entered into in respect of the Luganville Concession ? And why, if there is a contract as contended by UNELCO, did UNELCO not seek to enforce that contract back in 2010 ?
99. In all of the circumstances there is a sufficient lack of certainty regarding the variation to raise doubts concerning the true construction and meaning of the contract sufficient to prevent the entry of summary judgment.
100. UNELCO seeks specific performance of the settlement deed consequent upon these determinations. It says that the deed should be honoured by an order removing VUI from occupation of the concession or alternatively, by the requirement of a competitive, transparent process to grant the interim operation of the Luganville concession, pending a full re-tender.
101. Given the complexities involved in the forced removal of VUI from the Luganville concession, the potential difficulties that might arise in respect of the continuing

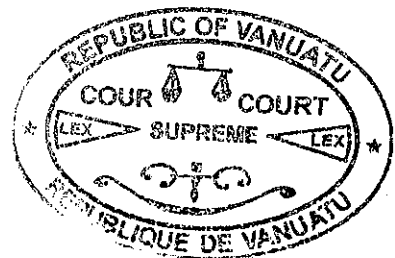


supply of electricity to the people of Luganville and the fact that UNELCO may be compensated in damages I consider that it is more appropriate to make an order requiring the State to immediately commence a competitive, transparent process for the granting of the Luganville concession pending the full re-tender.

## CONCLUSION

102. For the reasons referred to in this judgment I am satisfied that I should grant summary judgment to UNELCO in the form of the following orders and declarations:-

- a) A declaration that by failing to first obtain from VUI a validly executed deed of release, the Republic has breached the deed of settlement dated February 18<sup>th</sup> 2014.
- b) A declaration that by awarding an identical memorandum of understanding to VUI the Republic is in breach of the settlement agreement dated February 18<sup>th</sup> 2014 including that UNELCO was neither accorded procedural fairness, nor given an opportunity to bid for it.
- c) An order for specific performance of the deed of settlement dated February 18<sup>th</sup> 2014, that the Republic award an operating and maintenance agreement to the most competitive bidder by a competitive and transparent process in respect of the interim operation of the Luganville Concession pending a full re-tender.



103. Given that UNELCO has been largely successful in respect of its summary judgment application it is entitled to costs against both the first and second defendant with costs to be agreed between the parties within 28 days failing which costs are to be taxed.

**Dated at Port Vila, this 24<sup>th</sup> day of March 2017**

**BY THE COURT**

