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

**Judicial Review**
**Case No. 24/31 SC/JUDR**

**BETWEEN: INTERNATIONAL FINANCE TRUST COMPANY LIMITED**
Claimant

**AND: VANUATU FINANCIAL SERVICES COMMISSION**
Respondent

***Date of Hearing:*** ***4th day of March, 2024***
***Before:*** ***Justice W. K. Hastings***
***Distribution:*** ***Mr. M. Hurley for the Claimant***
***Mr. S. Kalsakau for the Defendant***

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## DECISION

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### Introduction

1. This is the outcome of a Rule 17.8 (Civil Procedure Rules 2002) conference.

2. In this claim for judicial review, the Claimant seeks an order quashing the Defendant's decision conveyed in its letter of 12 October 2023 to appoint an inspector under s 33 of the Company and Trust Services Providers Act 2010 (the Act). The Claimant also seeks an order that the Defendant issue a letter to the Vanuatu Financial Intelligence Unit advising that the Claimant is fully compliant with the terms of its licence issued under s 6(a) of the Act. The Claimant submits the Defendant has no reasonable grounds to believe the Claimant licensee has failed to comply with the Act or Regulations, a condition precedent to the appointment of an inspector. The claim is supported by the sworn statement dated 22 December 2023 of Daniel Agius, an authorized representative of Astrolabe Limited which is a Corporate Director of the Claimant.

3. The Defendant in its Defence states the decision to appoint an inspector was conveyed in its letter of 12 March 2020 following an onsite inspection in 2018 and a review in 2019 that identified 15 issues of concern. Those 15 issues have since been reduced to two: the provision of consolidated accounts and whether or not the Claimant is insolvent. The Defendant states that even though 15 issues have been reduced to two, the two that remain give the Defendant reasonable grounds to believe the Claimant has failed to comply with the Act. The Defendant submits the decision to appoint an inspector therefore cannot be challenged on *Wednesbury* reasonableness grounds. The

defence is supported by the sworn statement dated 29 February 2024 of Branan Karae, the Commissioner of the Vanuatu Financial Services.

4. In its reply, the Claimant pleads that the Defendant is estopped from alleging the claim is either out of time or premature. The Claimant states notwithstanding the letter of 12 March 2020, the Defendant has never appointed an inspector, instead electing to consider material provided by the Claimant which reduced the issues of concern to two, and engaging in correspondence that repeatedly stated the Defendant was "*reviewing*" the file. The Claimant states that these actions led it to believe that the Defendant would take into account documents the Claimant provided to the Defendant before deciding to appoint an inspector. The Claimant states that it cannot produce consolidated financial statements because it is not in a holding company-subsidiary relationship and therefore does not hold any consolidated statements, and that it has provided documents that show there is no evidence that the Claimant is insolvent. The Claimant states that based on the information it has provided the Defendant since 12 March 2020, the decision recorded in the letter of 12 October 2023 is ultra vires s 33(2)(a) and is unreasonable the *Wednesbury* sense.

**Rule 17.5**

5. This is a r.17.8 conference. In it, the Defendant raised r.17.5(1), which states that a claim must be made within 6 months of the decision the Claimant seeks to judicially review. The Court may extend the time for making a claim if it is satisfied that "*substantial justice requires it.*"

6. The Defendant submitted that the relevant decision is found in the letter of 12 March 2020, and any claim to review it is therefore time-barred by r.17.5. The words in the 2020 letter alleged to convey a decision to appoint are "*we intend to appoint an internationally recognized independent auditor to carry out an independent review of the above mentioned matters and verify the facts. The appointment will be made pursuant to Section 33(20(a) of the CTSP Act.*"

7. The Claimant submitted, and pleaded, that the relevant decision is found in the letter of 12 October 2023, and therefore this claim is within time. The words in the 2023 letter alleged to convey a decision to appoint are "*However, VFSC still maintains its position to appoint an inspector to verify the solvency position of IFTC on a consolidated basis.*" The Claimant submitted this letter must be read in the context of the preceding three years in which no inspector had been appointed because the parties were engaging in correspondence that over time reduced the grounds on which the Defendant could form a belief that the Claimant failed to comply with the Act, thereby reducing the basis upon which the Defendant could exercise its discretion to appoint an inspector.

8. Neither of the letters reveals in plain words a decision to appoint. The 2020 letter refers to an intention to appoint, which could be construed as reflecting a prior decision to appoint or which could be construed as notice that a decision to appoint is in the future. The 2023 letter refers to the

maintenance of a position, which could be construed as referring to a decision taken prior to the 2020 letter, or which could in fact be a fresh "*decision to maintain*" a position or intention notwithstanding the material the Defendant had received from the Claimant.

9. The relationship between rr.17.5 and 17.8 was explained by the Court of Appeal in *Union Electrique du Vanuatu Limited t/as Unelco Suez v The Republic of Vanuatu* [2012] VUCA 2. At para 64, the Court of Appeal said:

> *The sequential structure of the Rules indicate that at the Rule 17.5(2) stage the interests of the defendant are not the concern of the Court and the time for considering the Rule 17.8 (3) matters is yet to arise. If the claim is not brought in time, the primary question for consideration under Rule 17.5(2) is why the claimant has not met the time limit. The question of substantial justice is to be assessed from the claimant's stand point.*

10. Time only needs to be extended if I assess the matter from the Defendant's standpoint. Rule 17.5 is irrelevant from the Claimant's standpoint because it has sought a review of the Defendant's 2023 decision to "*maintain its position to appoint an inspector*" in time. There is therefore no need for me to extend time under r.17.5(2).

11. However, even if I accept the Defendant's submission that the Claimant ought to have pleaded the 2020 decision, I would have extended time under r.17.5 because substantial justice requires it. Since the 2019 review, the Claimant has succeeded in whittling down 15 issues of concern to two. It has engaged with the Defendant to meet the Defendant's concerns up to the present day. From the Claimant's standpoint, the reason why it has not met what the Defendant submits is the time limit, is that it was engaging successfully with the Defendant. In my view, it would be substantially unjust if now, having successfully resolved 13 of the 15 issues over the past four years through engagement with the Defendant, the Claimant was not allowed to pursue as a last resort this judicial review claim to resolve the remaining two issues.

12. It is also somewhat illogical for the Defendant to plead on the one hand the claim is premature and should be struck out, but on the other hand to submit the claim is time barred by r.17.5(1) and should have been brought within 6 months of 12 March 2020. The Claimant could not be expected to negotiate with the Defendant in good faith and at the same time file a claim for judicial review by 12 September 2020. Not only would that have demonstrated a lack of good faith, it would have made resolution of the issues much less successful.

13. I am of the view that the words and actions of both parties up to the letter of 12 October 2023 provide the context in which the decision to "maintain its position" expressed in that letter is to be read.

14. I turn now to r.17.8.

**Rule 17.8**

15. In terms of the criteria in r.17.8(3), both parties agreed that the Claimant is directly affected by the decision, and there is now no remedy other than judicial review that resolves the matter fully and directly. For the claim to be heard, that leaves the Court to be satisfied of two matters: whether or not the Claimant has an arguable case; and whether or not there has been undue delay in making the claim. I will consider whether or not the Claimant has an arguable case first.

16. Mr Kalsakau submitted the Claimant does not have an arguable case because the Defendant has a broad power in s 32(2) to require the Claimant to produce a range of documents, and the Claimant has not done so with respect to the remaining two concerns. He submitted that as long as even one concern remains unresolved, the Defendant has a reasonable ground on which to appoint an inspector. Mr Kalsakau submitted that the failure to comply with the Act is the failure to provide documents required under s 32(2).

17. Mr Hurley submitted the Claimant has an arguable case that the Defendant no longer has reasonable grounds to believe the Claimant has failed to comply with the Act, and therefore could not properly exercise its discretion to appoint an inspector. He submitted there is evidence in the audited accounts that resolves the last two issues. He submitted the evidence shows the Claimant is not a holding company for a subsidiary and therefore consolidated financial statements are not in its possession and do not need to be created. He submitted there is evidence the Claimant is not insolvent because of the auditor's view that it can pay its debts. Mr Hurley submitted that it is unreasonable for the Defendant to maintain its position that an inspector should be appointed, in light of the documents the Claimant has provided to the Defendant that should resolve the remaining two issues.

18. In its memorandum in *Union Electrique du Vanuatu Limited v Republic of Vanuatu* [2015] VUCA 37, the Court of Appeal said at para 4:

> *Rule 17.8 is not intended to provide an alternative means of applying for summary judgment on the claim, or judgment on a separate issue arising in the course of a claim, which bypasses the well-established rules that govern applications of those kinds.*

The Court of Appeal also commented that *Union Electrique du Vanuatu Limited t/as Unelco Suez v The Republic of Vanuatu* [2012] VUCA 2 (at para 70) was a "*good illustration why in complex matters a Court should be very wary about embarking on a merits assessment of disputed facts and difficult questions of law at the interlocutory stage.*"

19. It would not be in the interests of justice to strike out this claim when there are live issues about the reasonableness of the Defendant's decision to maintain its position to appoint an inspector notwithstanding documents received from the Claimant that the Claimant submits show the remaining issues can be resolved without appointing an inspector. There may be argument about the scope of *Wednesbury* reasonableness in these circumstances, but this also goes to whether or not the Claimant has an arguable case. I am satisfied it has.

20. Turning to whether there has been undue delay in making the claim, I take into account the standpoint of both parties. Mr Kalsakau submitted there was undue delay if it is measured from 2020 and that the Claimant should have made its claim earlier. He did not directly address Mr Hurley's submission about estoppel. Mr Hurley submitted the Defendant was estopped from measuring time from 2020 given its active engagement with Claimant to resolve the issues after the inspection, and its non-appointment of an inspector over those four years after signalling it would do so.

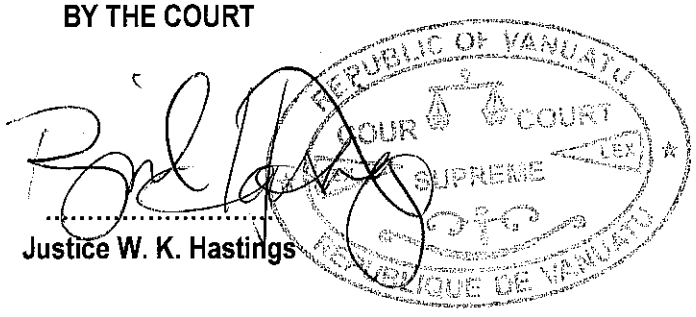
21. I do not consider there has been undue delay. As discussed above in the context of r.17.5, the Claimant could not be said to have sat on its rights. For four years, it did what it could to resolve the outstanding issues. Faced with the Defendant's decision on 12 October 2023 to maintain its position to appoint an inspector after the Claimant felt it had given the Defendant sufficient information to resolve the outstanding issues without appointing an inspector, the Claimant brought this claim. I am satisfied there has been no undue delay in making this claim.

22. Having been satisfied of the matters in r.17.8(3), this matter may now proceed to trial.

23. There will be a conference on **13 March 2024 at 8.30am** to establish a timetable if needed and a trial date.

**DATED at Port Vila this 6th day of March, 2024**

**BY THE COURT**

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**Justice W. K. Hastings**