IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No. 34 of 2015

BETWEEN: UNION ELECTRIQUE DU VANUATU LIMITED T/AS UNELCO GDF SUEZ
Appellant

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: UTILITIES REGULATORY AUTHORITY
Second Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice David Chetwynd***
Counsel:	*Messrs. T. North SC, H. Heutzenroder & M. Hurley for the Appellant* *Mr. K. Tari for the First Respondent* *Mr. G. Blake for the Second Respondent*
Date of Hearing:	*9 November 2015*
Date of Judgment:	*20 November 2015*

MEMORANDUM

1. When this appeal came on for hearing the Bench and counsel discussed at some length the issues proposed to be raised in the appeal, and urged the parties to further consider the way forward. In the result the parties agreed that the appeal should be allowed by consent on the terms set out in the minutes of order which are recorded at the end of this memorandum.

2. The orders under appeal were made in the Supreme Court on an application for judicial review. The orders are summarised in paragraph (2) of the minutes of order below. The orders had been made on the hearing of a rule 17.8 conference. As the parties have reached agreement to resolve the appeal, and as the issues in the claim for judicial review will proceed to trial, we say nothing about them. However, we take this opportunity to stress the observations made by this Court in Union Electrique du Vanuatu Limited v. Republic of Vanuatu and Vanuatu Infrastructure and Utilities [2012] VUCA 7, Civil Appeal Case No. 7 of 2012 about the approach which a judge should take to the application of Rule 17.5 to 17.8 in a particular case. These observations are to be found at paragraphs [63] to [75] of the judgment. The Court of Appeal went on later in the judgment to consider how those rules as construed by the Court of Appeal

should be applied to the circumstances of that case. The court concluded that the claim in that case should not have been struck out under Rule 17.8. The discussion of the Court demonstrates how in cases raising complicated issues of law and fact an attempt to summarily end the proceedings with a strike out order under Rule 17.8 has high potential to backfire on the party who succeeds in the first instance in getting the strike out order.

3. The instant case seems to us to be another such example. The Court was asked to closely consider three large folders of documents and lengthy submissions on legal issues – the appellant arguing that the matters it identified at the Rule 17.8 conference should have advanced to a full trial, and the respondents seeking to uphold the orders that had been made. The volume of materials that the court was asked to consider along with the intensity of their submissions were in themselves an indication that a trial would be the quickest and most sufficient way of resolving all the issues between the parties.

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. In particular applications of those kinds will succeed only in the plainest cases, and an application for a decision on a separate (or preliminary) issue will usually only be made where the decision will finally conclude the proceedings one way or the other.

5. Where a defendant contemplates submitting that a judge should decline to hear a claim under Rule 17.8 (5) the court will only do so where it is appropriate to "*strike it out*": 17.8(5). Thus if there are other issues in the proceedings that will go to trial in any event it will be a rare case where it is appropriate to strike out only one or some of the issues raised in the pleadings. This would be appropriate only when the particular issue or issues proposed to be struck out are demonstrably ones that are quite separate from the issues that must go ahead.

6. This appeal has been resolved by the following minute of order made by consent:

Minutes of Order

Upon hearing from Mr T J North QC with Messrs H M Heuzenroeder and M J Hurley for the Appellant, and upon hearing from Mr G M Blake for the Second Respondent, and upon hearing from Mr K T Tari for the First Respondent, the Court of Appeal orders by consent:

1 That the appeal be allowed.

2 That the judgment of his Lordship Judge Fatiaki on 29 July 2015, by which he:

a. Stayed the within proceedings;
b. Struck out the Appellant's challenge to the validity of the letter from the Second Respondent dated 23 May 2014; and
c. Disallowed an extension of time to amend the proceeding dated 23 April 2015;

be set aside.

3 That the Appellants be granted an extension of time and leave to file the Further Amended Claim, Annexure A to the application of 23 April 2015, which may be filed forthwith.

4 That the Respondents if so advised, file and serve an Amended Defence and the Second Respondent an Amended Counterclaim on or before 13 November 2015.

5 That the Appellant file and serve its Reply or Replies and Defence to the Second Respondent's Counterclaim on or before 20 November 2015.

6 That this matter and Action JR 4 of 2015, between the same parties be consolidated pursuant to Rule 3.4 of the Civil Procedure Rules.

7 That the matter be remitted to his Lordship Judge Harrop for further directions in the week commencing 9 November 2015.

8 That the costs of the appeal be reserved to the trial judge.

DATED at Port Vila, this 20th day of November, 2015.

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent LUNABEK
Chief Justice.