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

Judicial Review Case No.25 of 2014

BETWEEN: UNION ELECTRIC DU VANUATU LIMITED ("*UNELCO*")
Claimant

AND: THE REPUBLIC OF VANUATU
First Defendant

AND: UTILITIES REGULATORY AUTHORITY ("*URA*")
Second Defendant

Coram: *Justice D. V. Fatiaki*

Counsels: *Mr. M. Hurley for the Claimant*
Mr. G. Blake for the First Defendant
Ms. F. Willliams for the Second Defendant

Date of Decision: *29 July 2015*

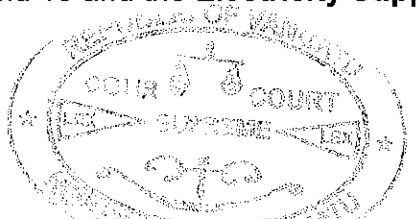
RULING

1. There is before me a claim for judicial review, an application for an extension of time to file a judicial review claim and an application for leave to amend the existing claim filed by UNELCO. All claims and applications are opposed by the URA which has also filed a cross claim.

2. At the outset I make some observations about the suggested consolidation of the present claim with that in **Judicial Review No. 4 of 2015** between the same parties in the absence of an application to consolidate.

3. The existence of a prior judicial review application involving the same parties does not mean access by this court to the materials in the prior judicial review without an appropriate application or court order consolidating both claims under **Rule 3.4** of the **Civil Procedure Rules** ("*CPR*").

4. In instituting separate claims UNELCO accepts that the various URA decisions being challenged in the claims are separate and distinct as to the factual circumstances, timing and substance, and, whilst it may be that URA's decisions in both claims raises the same statutory provisions under the **Utilities Regulatory Authority Act** No. 11 of 2007 ("*the URA Act*"), in the present claim, sections 12 and 13 and the **Electricity Supply Act** [CAP.



65] sections 1B(2) and 14(68), for consideration and construction, that alone does not necessarily mean that the "... *same question* (as opposed to the same legislative provision) *is involved in each proceeding*" or that "... *the decision in one proceeding will affect the other*" in so far as the factual basis, the actual decision, and the grounds for challenging the URA's decision is likely to be different. In this regard I note that UNELCO's challenge in Judicial Review 4 of 2015 is directed at the URA's decision to issue the BDI Final Order on 5 December 2014.

5. Even if the parties and their counsels are the same and the statutory provisions being construed are the same (which is doubtful), still, that would not be a good enough reason to consolidate the claims, instead, in my view, the preferable course would be to determine the judicial review that has proceeded beyond the "*Rule 17.8*" hearing and the later judicial review before this Court should abide the result and determination without consolidation.

6. Furthermore when one considers that time is of the essence in a judicial review claim [***see:*** Rules 17.5 and 17.8(3)(c)], consolidation of proceedings after one proceeding has gone beyond the "*Rule 17.8*" hearing and whilst a later proceeding is still under consideration, raises the real possibility of an inconsistency of approach occurring at that early stage. Also consolidation after the "*Rule 17.8*" hearing could well thwart the appeal rights of a dissatisfied party. So much then for the suggested consolidation.

7. To better understand the context within which the present claim and applications are made, the following is a brief chronology:

   - By a letter dated 23 May 2014, the URA sought information from UNELCO ("*the request letter*");

   - By a follow-up letter dated 5 June 2014 URA sought further information from UNELCO concerning its contractual and financial relationship with Cofely Vanuatu Limited;

   - 22 July 2014 – the URA issued a decision entitled: Final Decision and Commission Order ("*The Final Order*") which deals with the investigation and implementation of feed-in tariffs for renewable energy in particular the harnessing of solar power and feeding it into the UNELCO power grid;

   - 22 July 2014 – URA issued the Utilities (Restriction on Provision of Financial Support) Rules 2014 ("*the Financial Support Rules*");

- 4 November 2014 – UNELCO filed a Claim for Judicial Review challenging "*the Final Order*"; the "*Financial Support Rules*" and "*the request letter*". Various grounds are advanced in the challenge including "*jurisdiction error*", "*ultra vires*"; and unlawful deprivation of property contrary to Article 5(1)(j) of the Constitution;

- 13 November 2014 – URA filed a formal response disputing all of UNELCO's claims;

- 19 December 2014 - claimant's counsel indicated that "*paras. 56 to 59*" of the claim relating to "*the request*" letter needed amending and leave was granted;

- 22 December 2014 – an amended claim for judicial review was filed;

- 2 February 2015 – URA filed its response opposing the amended claim and included a cross-claim of its own seeking declarations of validity and mandatory orders against UNELCO;

- 6 February 2015 – the First Defendant filed its defence;

- 3 March 2015 - UNELCO's counsel filed his submissions for the "*Rule 17.8*" of Civil Procedure Rules hearing;

- 23 April 2015 – the Republic filed its "*Rule 17.8*" submissions identifying the URA as the decision maker and highlighting its independence from the Republic as a statutory Regulatory Authority;

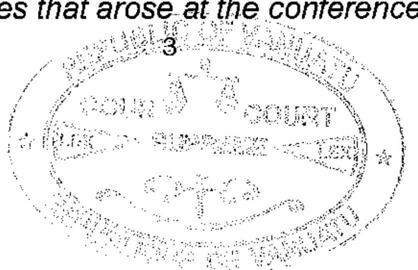
- 6 March 2015 – the court commenced the "*Rule 17.8*" hearing and after hearing all counsels the matter was adjourned for continuation on 27 April 2015 to allow UNELCO's counsel to seek instructions on several issues that had arisen in the course of the hearing;

8. Unfortunately the continuation hearing had to be adjourned because it coincided with the Court of Appeal session which commenced on 24 April 2015. The continuation hearing was then fixed for 19 June 2015, as the earliest available date after the Court of Appeal Session.

- 30 April 2015 – UNELCO filed application for leave and extension of time to file a further amended claim for judicial review supported by a sworn statement of Jacques White a legal officer of UNELCO;

- 4 June 2015 – URA filed its response opposing UNELCO's applications;

- 6 June 2015 – UNELCO filed a supplementary submission "*... to address four issues that arose at the conference on 6 March 2015*";



9. The amended and Rule 17.8 conference "*issues*" are identified in the supplementary submission as follows:

    (1) Whether UNELCO challenged the ability of a person to harness solar power regardless of whether it is intended to supply such electricity to the power grid?

    (2) Whether UNELCO should be challenging URA's letter of 5 June 2014?

    (3) Whether the "*Financial Support Rules*" could be used to support retrospectively the request letter?

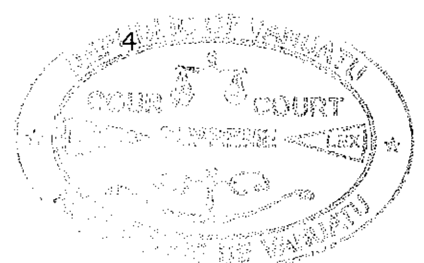
    (4) Whether Section 13(2)(a) of the URA Act would support the issuance of "*the request letter*"?

10. As to issue (1) – which arose from discussions with UNELCO's counsel about the meaning and ambit of paras. 9 to 12 of UNELCO's original judicial review claim, the supplementary submission supplies the following answer: UNELCO has "*... no problem with such generation. That issue is outside the scope of the litigation*".

11. As to issue (3) – the courts' indication of not being assisted was directed at para. 62 of the original submission which concerns "*the request letter*" of 23 May 2014 that predates "*the Financial Support Rules*" which was issued two (2) months after the letter. Para. 62 reads:

    > ***"Claim, paras 55 to 59:*** *The pleaded letter of Ms Taura is Tab 30 of MSS, PM1, and subsequent documents are sequalae correspondence. While this predates the purported Financial Support Rules, cl 3.1 however, purports to be retrospective in its operation. Based upon the principle that administrative action can obtain support from any power as is available (whether named or not) the matter is to be considered whether as bolstered by the Financial Support Rules or otherwise. The parties appear to have treated the Financial Support Rules as superseding the original letter, and the Rules on their face would appear to do so. Note in particular at page 3, "the Commission must take an immediate action to address and monitor this practice ..." which is inconsistent with a reliance solely upon the 23 May 2014 letter. (It would be an absurdity that there be two requests for the same information – one ad hoc and the other pursuant to a purported "Rule")."*

12. The "*clarification*" of para. 62 in UNELCO's supplementary submission of 3 March 2015 by its own admission states:



"*... the submission and the plea it relates to is shadow boxing, because it was formulated in advance of the URA's submissions, which does not appear to rely upon such a principle.* (ie: administrative action can obtain support from any power available whether named or not). *But were the URA to rely upon it, the position is clear ... the URA's position cannot be improved by asserting that the letter* (of 23 May 2013) *plus the retrospective operation of the Financial Support Rules, is a valid co-ercive request*". (**see:** para. 7)

13. Defence counsel's submission and written response to para. 56 of the amended claim, reads:

"*... (URA) admits that by letter dated 23 May 2014, Miss Lizzie Taura, Manager Regulation of (URA) in exercise of the power provided in Section 13 (2) (a) of the URA Act, requested the information set out in the letter ...*" (**see:** para. 54)

Whatsmore the "*Final Order*" by its terms "*comes into effect immediately*" **ie:** at the earliest on 22 July 2014 the date of execution or 6 August 2014 when it was published in the Official Gazette. Nowhere in the "*Final Order*" is there the slightest indication that it is intended to be retrospective in its operation. With all due regard to UNELCO's supplementary submissions its so-called "*clarification*" has not achieved its purpose. Issue (3) is accordingly dismissed as not having been raised by URA.

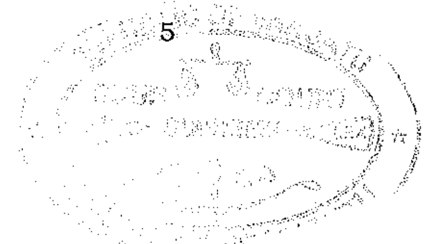
14. I turn next to issue (4) which directly raises the provisions of Section 13 (2) (a) of the URA Act .

15. In this regard in its original and amended claims UNELCO asserts that URA's powers in Section 13:

"*did not extend to the making of orders of compulsion directed to a utility, as to the manner in which it conducted its business, which were matters dealt with separately in the URA Act in relation to safety in Section 15 of the URA Act*". (**see:** para 21)

16. This is elaborated further in UNELCO's "*arguability*" attachment to its original submissions (at paras. 13 to 17) as follows:

"*13. **Claim, para 21**: this requires some elaboration. The functions in section 12 set out the activities that parliament has entrusted to the URA (Hazell v. Hammersmith and Fulham LBC [1992] 2 AC 1 at 29 (citing with approval the Court of Appeal at [1990] 2 QB*



697 at 785C). They are like the objects of a company in its Memorandum of Association, and control from an internal perspective what it can do. They do not empower the URA in its dealings with outsiders, and that is dealt with by other provisions in the URA Act.

14. *Further, where general words are used in vesting such functions, they are (as in other contexts) construed as being subject to general common law rights (R (Ex rel Roberts) v. Parole board & Anor [2005] 2 AC 738 at [23-25] and [90]). This is especially so, when parliament has turned its mind to coercive orders, and provided specifically for them in section 15 of the URA Act.*

15. *Given the nature of "functions" as identified in authorities such as Hazell (supra), the powers can only be exercised in furtherance of the functions. Thus the powers are circumscribed by purpose of engaging in activities described by the functions, in particular those as conferred by the URA Act, the provision of advice, reports and recommendations to Government, the provision of information to the public, the resolution of grievances, and the investigation and prosecution of offences under the URA Act.*

16. *For the same reasons, the 'powers' do not give coercive power when dealing with outsiders. By analogy, if the Commissioner of Police is granted functions and powers to investigate crime, it does not follow that they have the power to conduct an inquisition, or torture. Rather, powers of search and seizure are given by specific legislative provisions.*

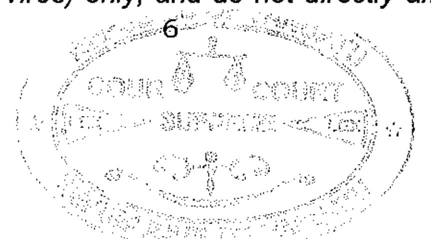
17. *In any event, these are contestable matters, and should go to a final hearing."*

17. In brief, UNELCO draws a distinction between the URA's "*functions*" and "*powers*" and says that the powers are necessarily limited to implementing or furthering its functions. Furthermore URA's "*powers*" are <u>not</u> directed to "*outsiders*" and give no coercive power to URA when dealing with outsiders.

18. In para. 10 of its supplementary submissions on <u>issue (4)</u>, UNELCO submits contrary to the court's preliminary view, and introducing an "*internal*" and "*external*" perspective as follows:

   (a) *Sections 12 and 13 of the URA Act are a very orthodox type of legislative provision, that exist in many Acts around the common law world, and have an orthodox manner of construction;*

   (b) *The orthodox manner of construction is that they define the authority of the body or entity from an* ***<u>internal perspective</u>*** *(narrow ultra vires) only, and do not directly affect the rights of*



third parties – the principle established in Baroness Wenlock v. River Dee Co.;

(c) This orthodox manner of construction derives from a history of such administrative bodies, and the history of the law of associations (both public and private);

*(d) The necessary consequence of these matters, is that section13(2)(a) of the URA Act did **not** of itself authorize the letter of 23 May 2014 to require UNELCO to produce information which UNELCO did not wish to produce;*

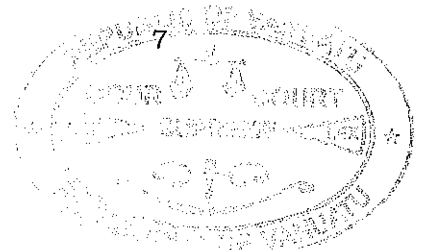
*(e) In order for such a power to exist, specific further legislation (which if valid could be in the form of Regulations) is required authorizing the URA from an **external perspective** to gather (coercively) such information."*

By way of further elaboration in paras. 21, 22 and 23 and this time comparing sections 12 and 13 of the URA Act to an incorporated company's Memorandum and Articles of Association UNELCO states as follows:

"In the area of company law, there is a distinction between an "object" (ie. the object to which the activities of the corporation are directed) and an ancillary "power" (ie. what, from an internal perspective, a company is permitted to do, to achieve that objective). In more concrete terms, it may be the object of a corporation (say a hospital) to provide health care to patients; and it will have powers (eg. The power to borrow to purchase medical equipment) to achieve those objects. See Re Introductions Ltd [1968] 2 All ER 1221 at 1227 (Buckley who was upheld by the Court of Appeal [1970] Ch 199); Peregrine Sands Pty Ltd v. Wentworth Shire Council [2014] NSWCA 429 at [20]).

This analysis is directly applicable to section 12 "functions" (ie. objects) and section 13 "power" in the URA Act. hence the submission in paragraph 13 of UNELCO's main submission that "They are like the objects of a company in its Memorandum of Association, and control from an internal perspective what it can do. They do not empower the URA in its dealings with outsiders, and that is dealt with by other provisions in the URA Act".

Once this is accepted, it is clear that section 13 of the URA Act has nothing to say about whether in its relationship with the outside world the URA can engage in coercive (and in fact tortious) activities vis a vis UNELCO. To suggest otherwise, would be like asserting that because a corporation has in is Memorandum of Association an object or function of building and running a railroad, and powers necessary to achieve this end, it can thereby expropriate a person's land to execute its purpose. That would be absurd. Rather it would have to purchase the land it wishes to build the railway upon, first. Similarly, just because a public authority has power to borrow money, does not mean it can force a bank to lent to it."



And lastly at para. 27:

> *"But what is clear, is that section 13 governs the scope from an internal perspective of how the URA may operate. If the URA acts outside its functions and powers, it may adventitiously affect outsiders, because its actions would be ultra vires. But that is a different issue of whether it may exert a coercive entitlement against outsiders. It is not the realm of sections dealing with "functions" and "powers" of a statutory body, to deal with such matters. Hence, the reliance by the URA upon section 13 to justify the letter of 23 May 2014 is clearly flawed and entirely unorthodox."*

19. Both UNECLO submissions also places considerable reliance on the persuasive decision of the House of Lords in Hazell v. Hammersmith and Fulham London Borough Council [1992] 2AC. But the decision is readily distinguished on the basis that the court was there dealing with the parameters of a limited borrowing power and not with a specific substantive provision such as Sections 12 and 13 of the URA Act which is what the court will be construing in this claim.

20. Notable by its absence in UNELCO's interesting submissions, is any real attempt to closely examine and construe the actual wordings of Section 13 (2) (a) of the URA Act which was the (sole) provision and authority referred to in URA's request letter of 23 May 2014.

21. Notwithstanding UNELCO's submissions there are two widely recognized approaches to the interpretation of legislation – the literal approach and the purposive approach.

22. The literal approach was defined and explained by Higgins J. in Amalgamated Society of Engineers v The Adelaide Steamship Co. Ltd [1920] HCA 54; [1920] 28 CLR 129 at 161-2 as follows:

> *"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or improbable."*

23. In Grey v Pearson [1857] 6 HLC 61 at 106 Lord Wensleydale recognised a limitation in the literal approach when he said:

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnant or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the word may be modified, so as to avoid that absurdity and inconsistency, but no farther."

24. The purposive approach has its origins in the *"mischief rule"* set out in Heydon's case [1584] 3 Co. Rep 7a at 7b and is applied by determining the purpose of the Act, or the particular provision in question *("mischief"* with which it was intended to deal), and by adopting an interpretation of the words that is consistent with that purpose. It was generally accepted that the purposive approach applied only when an attempt to apply the literal approach produced an ambiguity or inconsistency.

25. Additionally, Section 8 of the Interpretation Act [CAP. 132] provides a general principle of interpretation that an Act shall be considered to be remedial and shall 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.

26. In this latter regard Section 2 of the URA Act enumerates the following purposes or objects of the Act, namely:

 "*(a) ensure the provision of safe, reliable and affordable regulated services; and*

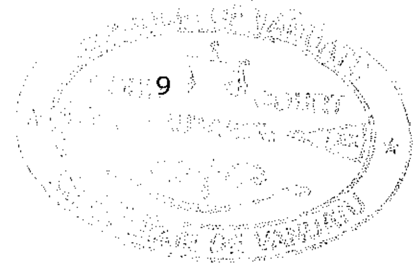
 (b) maximum access to regulated services throughout Vanuatu; and

 (c) promote the long term interests of consumers."

27. Additionally, the interpretation provisions of the URA Act expressly provides at Section 1(3):

"*In this Act, unless the contrary intention appears:*

 (a) Where this Act confers a 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 matter to which regard may be had, but is to be afforded priority over any other matters."*

28. URA's short written submission (of 9 paras) is confined only to the URA request letter of 23 May 2014 and, simply put, relies on and asserts that the URA "*... in exercise of the power provided in Section 13 (2) (a) of the URA Act, requested the information set out in the letter and relies on the terms of the letter ...*" which is as follows:

"23rd May 2014

Philippe Mehrenberger
General Manager
UNELCO
Rue de Paris
Po Box 26
Port Vila.

Obj: Request for Financial Information under Art 13(2)(a)

Dear Mr. Mehrenberger,

Following our meeting with your finance team yesterday, please find below a list of information requested by the URA under Art. 13(2)(a) of the URA Act Amendment No. 12 of 2013:

- *The statutory accounting for UNELCO's electricity concessions in Port Vila Tanna and Malekula and consolidated statement;*
- *The statutory accounting for COFELY Vanuatu for the period 2010-2013;*
- *A description of the Copra Oil supply chain and costing associated to the process;*
- *A description of the group structure detailing the shareholding and participation from the mother company and other shareholders in UNELCO and any affiliated company in Vanuatu.*

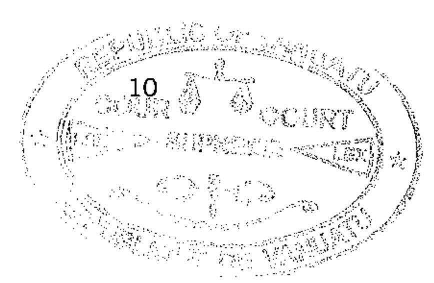
We are looking forward to receive these reports in printed formats, addressed to:

Dr. Hasso Bathia
Ref: UNELCO/URA/14/1505/001
Utilities Regulatory Authority
PMB 9093
Port Vila

If you have any further questions on this request, please don't hesitate to contact me.

Yours sincerely,

Lizzie Marguerite Taura



Manager Regulation – Utilities Regulatory Authority

CC: Johnson Naviti, Chairman, URA
Hasso Bhatia, PhD, CEO URA".

29. **Section 13** of the **URA Act** (as amended) clearly provides:

*"**13. Powers of the Authority***

(1) The Authority has power to do all things that are necessary or convenient to be done for in connection with the performance of its functions.

(1A) Subject to paragraph 2(1), the Authority may require a utility to do those things expressly required by the provisions of this Act.

(2) Without limiting subsection (1), the Authority may:

(a) require a utility within a specified period, which must not be less than 21 days to furnish the Authority with specified information or documents, or information or documents of a specified kind, in the possession or control of the utility or any of its related entities relating to a regulated service or to corporate structure, accounts or finances of the utility; or

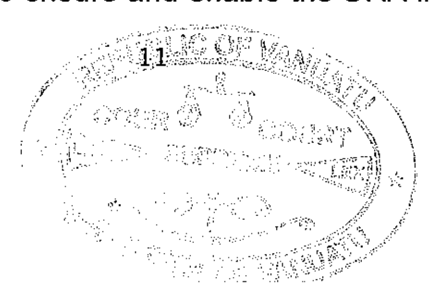
(b) Require a utility to confer with the Authority as to the manner in which it carries on any specified activity in relation to a regulated service; or

(c) Do anything reasonably incidental to any of its powers.

(3) The powers conferred by this Act may be exercised on behalf of the Authority by any employee, officer or delegate of the Authority authorized by the Authority or this Act to exercise those powers."

30. Subsection 13(2)(a) clearly empowers the URA to "*require a utility*" in this instance, UNELCO to furnish information and documents in its possession or within its control. In the face of such clear language, I reject the submission that suggests that the provision is inapplicable to "*outsiders*" or UNELCO in particular. In this latter regard it is unarguable that UNELCO is, by definition, a "*utility*" engaged in a "*regulated service*", namely, "*the supply of electricity ... to a consumer*" in consideration of a payment. Plainly, UNELCO is not an "*outsider*" for the purposes of the URA Act.

31. The section is widely drafted but targeted in that the power although wide in its ambit and capture is not so wide as to include members of the public, the private sector, or government departments and agencies. Its intention and purpose is also clear – to ensure and enable the URA in the discharge of its



statutory functions including the fixing of tariffs <u>and</u> in furthering the purposes of the Act which includes promoting the long term interests of consumers, to have access to as much information as possible.

32. The power to require information from a utility may be viewed also as being in the interests of the utility itself in so far as the determinations of the URA in regulating the service, is more likely to be better-informed as to any impact such determinations may (<u>or</u> may not) have on the affordability and profitability of the affected "*utility*" or service provider. In this regard too, Section 12(2) requires URA in the exercise of its functions to consider the interests of, and impact on "*utility businesses*" such as UNELCO. If I may say so this latter requirement would be seriously hindered if the URA's access to information from a "*utility business*" was to be curtailed or denied.

33. In light of the foregoing and in the words of Rule 17.8(3)(a) of the CPR, I am <u>not</u> satisfied that UNELCO "*has an arguable case*" in its challenge to URA's request letter of 23 May 2014. Accordingly and pursuant to Rule 17.8(5), this ground of UNELCO's claim challenging "*the request letter*" is struck out.

34. Finally I turn to <u>Issue (2)</u> and the ancilliary applications for leave to amend and for an extension of time to file a claim to judicially review URA's letter of 5 June 2014 requesting UNELCO to provide "*Financial Information under Section 13(2)(a)*".

35. The application to amend the judicial review is brought pursuant to Rule 4.11 of the CPR in the interests of justice for the purpose of determining the real questions in controversy and to better identify the issues before the Court. In addition to the three (3) limbs in Rule 4.11(1) and the element of prejudice in subrule (3), the Court would consider the following factors in the exercise of its discretion to allow an amendment, namely:

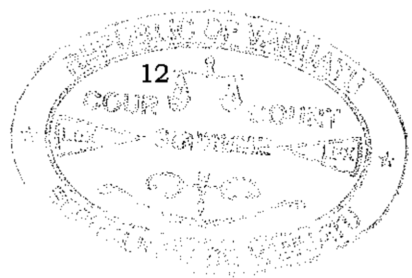
    (1) The nature of the amendment sought;

    (2) Whether or not the amendment would or should have been obvious to the applicant or his professional advisors at the time of commencing the proceedings;

    (3) The grounds upon which the amendment is sought and the explanation for its earlier omission;

    (4) Whether the amendment will entail the filing of additional or supplementary sworn statements;

    (5) Whether or not the application is opposed.



36. Although Rule 4.11(2) provides that an amendment may be made "*at any stage of the proceeding*" it must, in my view, be read subject to Rule 17.5 (1) which provides that a claim for judicial review "*must be made within 6 months of the decision*" sought to be reviewed (***see also:*** Rule 17.3).

37. I turn then to consider the application for an extension of time brought under Rule 17.5(2) which provides: "*... the court may extend the time for making a claim if it is satisfied that substantial justice requires it*".

38. In this regard Ground F of UNELCO's application to amend reads:-

> "(UNELCO) *submits that its proposed challenge to the information requested in the 5 June 2014 letter had its genesis in* (URA's) *letter dated 23 May 2014 ...* (which) *... was filed within the 6 months period prescribed by Rule 17.5 (1) of the CPR*".

39. I note that the sworn statement in support of the application is deposed by UNELCO's "*in-house*" legal officer and, if I may say so, is singularly silent on the reason(s) why UNELCO did not challenge the 5 June 2014 letter within the time allowed by the Rules. Indeed on counsel's own concession, UNELCO did not turn its mind to the 5 June 2014 letter until after the discussions at the "*Rule 17.8*" hearing on 6 March 2015.

40. In its opposing submission URA highlights that the prescribed time period to challenge the 5 June 2014 letter expired on 5 December 2014 and UNELCO's application for leave to extend and amend was only made on 23 April 2015 (<u>ie:</u> 10 months after the issuance of the challenged letter) "*... and* (UNELCO) *has given no reasons for not challenging the decision within the requisite period*". Whatsmore the challenge to the 5 June 2014 letter is unarguable for the same reasons that the challenge to the 23 May 2014 letter is likewise unarguable.

41. In <u>UNELCO v. Republic of Vanuatu</u> [2012] VUCA 2 the Court of Appeal had occasion to consider Rules 17.5 and 17.8 in the context of a similar application to extend time. In extending the time in that case the Court observed:

> "63. *When Rules 17.5 through to 17.8 are read together we think the steps anticipated by them indicate that the matters for consideration by the Court under Rule 17.5(2) are quite different from those arising under Rule 17.8. Rules 17.5 deals with the commencement of a claim, an event entirely in the hands of the claimant. Rule 17.6 requires service of the claim. Service introduces the defendant to the claim. Rule 17.7 requires the defendant to file a defence which details grounds for disputing or supporting a claim together with a sworn*

statement. These procedures are intended to put the interest of the defendant before the Court. Then follows, as soon as practicable, a conference called by the Judge under Rule 17.8. It is at that point that the matters listed in Rule 17.8(3) arise for consideration.

64. 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. ...

65. The Rule 17.8(3) matters arise when, and not before, the defendant is before the Court after the claim is filed and served. The host of considerations enumerated by the Judge in this case as relevant to granting leave under Rule 17.5 were for the most part irrelevant as they concerned the defendants and broader questions relating to the need for finality and certainty in good governance. These were matters for later consideration."

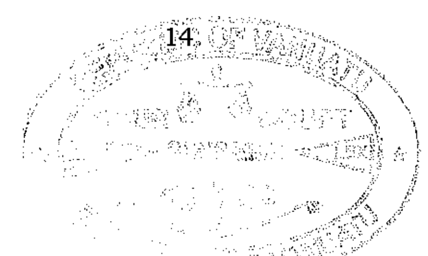
42. And later, in recognizing that delay is still a relevant consideration even after an extension of time has been granted under Rule 17.5(2), the Court of Appeal said:

> *"89. Finally we identify other issues of sufficient importance for a full hearing arising on the question of "undue delay" which might in any event lead to Unelco being denied on discretionary grounds any order interfering with the grant of the concession to VIU."*

43. The present applications to amend and for an extension of time have been brought during the pendency of the Rule 17.8 conference hearing when the relevant question for the court's consideration amongst others, is: Has there been "*undue delay*" in making the claim? and not whether "*substantial justice*" requires an extension of time ("*ex parte*") to file the claim under Rule 17.5(2).

46. The strictness with which the Courts approach time limits in judicial review proceedings was reaffirmed In Avock v. Vanuatu [2002] VUCA 44 when the Court of Appeal in dismissing the appeal against a refusal to extend time in that case relevantly observed (under the former rules which also fixed a 6 month time limit for an application for judicial review):

"When there is an application for leave which is at least 4 months out of time (and may be even longer) there is a heavy onus on the person to explain



why they have not commenced the proceedings in the time provided. Obtaining finality is always an important ingredient in matters which can lead to judicial review".

47. In similar vein in Kalsakau v. Wells [2006] VUSC 79 Tuohy J. in dismissing the application for judicial review that had been brought about 4 months outside the 6 months time limit, observed (at para. 21):

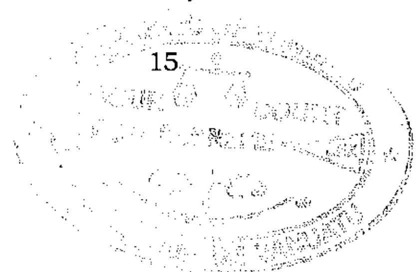
> *"It is plain that under Rule 17.8(3)(c) the Court has to look at the delay since the decision not just since the Rule 17.5 time limit expired. That follows because Rule 17.8 applies to all claims both within and outside the time limit"."*

44. Furthermore in R. v. Stratford-on-Avon DC exparte Jackson [1985] 1 WLR 1319 Ackner LJ said of the meaning of "*undue delay*" in the context of the UK equivalent of Rule 17.8(3), at p. 1325:

> "*... we have concluded that whenever there is a failure to act promptly or within three months there is undue delay ...* (and) *... even though the Court may be satisfied ... that there is good reason for that failure nevertheless, the delay, viewed objectively, remains "undue delay" the Court therefore retains a discretion to refuse to grant leave ...*"

45. More recently in finding that there had been "*undue delay*" in the case of Rhuah v. Republic of Vanuatu [2014] VUSC 54 where the claimant had waited for 2 years and 8 months before serving his judicial review claim, the Chief Justice in dismissing the application for leave to file out of time relevantly observed:

> *"On perusing the sworn statements of the Claimants and the submissions of his Counsel, the Court accepts the Respondent's submissions that the Claimant has not provided reasons for the delay. In such a circumstance, substantial justice does not require the Court to extend the time for making a claim.*
>
> *The court relies on the persuasive authority of the English Court of Appeal decision in R –v- Institute of Chartered Accountant in England and Wales ex-parte Andreau (1996) 8 Adim L.R. 557 where the Court of Appeal [UK] in refusing leave to appeal against a refusal to extend time to begin judicial review proceedings held:*
>
> 1. *The purpose of the procedure governing applications for judicial review is to provide a simplified and expeditious means of resolving disputes in the field of public law.*
>
> 2. *This purpose would be frustrated if the relatively leisurely and casual approach to time – limits which characterised civil litigation in the field of private law were to be adopted in the field of public law.*



3. *Therefore, notwithstanding that the error had been entirely that of the Applicant's lawyers (the judge) had been right to dismiss the application."*

Rules 17.8 (3) (c) of the Civil Procedure Rules provides that the Judge will not hear the Claim unless he or she is satisfied that there has been no undue delay in making the claim.

In the present case, there was undue delay in filing this claim and the Claimant has not proved or shown the reasons for the delay in filing the claim. In such a circumstance, natural justice does not require the Court to extend time for this claim."

46. In light of the foregoing I am not satisfied that there has been "*no undue delay*" on the part of UNELCO in seeking to challenge the URA's 5 June 2014 request letter. Accordingly the application for leave to amend and to extend time to review the said request letter is refused. If I should be wrong in that decision I would still refuse leave on the basis that such a challenge is "*unarguable*" for the same reasons earlier advanced in relation to the 23 May 2014 request letter.

47. Having said that and although I am satisfied that the claimant has an arguable challenge against the "*Final Order*" and against the "*Financial Support Rules*" issued by the URA, nevertheless, as indicated earlier, I stay the present proceedings pending the final determination of Judicial Review 04 of 2015 which has advanced well beyond Rule 17.8.

48. Both parties having partially succeeded, I reserve the question of costs as costs in the cause.

DATED at Port Vila, this 29th day of July, 2015.

BY THE COURT

D. V. FATIAKI
Judge.