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

Civil Appeal Case No. 17/976 CoA/CIVA

BETWEEN: **VANUATU UTILITIES AND INFRASTRUCTURE LIMITED** a wholly owned subsidiary of PERNIX GROUP INC.

Appellant

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

First Respondent

AND: **THE REPUBLIC OF VANUATU**

Second Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John William von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon Justice David Chetwynd***
Counsel:	*Dane Thornburgh for the Appellant* *Mark Hurley for the First Respondent* *Sakiusa Kalsakau for the Second Respondent*
Date of Hearing:	*12th and 14th July 2017*
Date of Judgment:	*21st July 2017*

JUDGMENT

1. The appeal and a proposed cross-appeal against the judgment of Geoghegan J. delivered on the 24th of March 2017 have arisen in the course of ongoing litigation in which Union Electrique du Vanuatu Limited (Unelco) challenges the granting by the Republic of Vanuatu (ROV) to Vanuatu Utilities and Infrastructure Limited (VUI) of a Memorandum of Understanding (MOU) which incorporated an Operations and Maintenance Agreement and an option for a 20 years concession to supply electricity in Luganville.

2. It will be necessary shortly to outline the course of the ongoing litigation, but we record at the outset that the appeal and the proposed cross appeal now before the court have been resolved by the Court following discussion with counsel in the manner recorded later in this judgment. The Court has not heard argument on the issues raised by either the appeal or the cross-appeal, save only as to an incidental aspect as to costs awarded against VUI at trial. That aspect of the

appeal is dependent on the substantive challenge to the judgment being unsuccessful. As there has been no argument on the substantive issues in the appeal and cross-appeal the orders now to be made by the Court of Appeal should not be taken as an endorsement of the reasons for judgment in the court below or of the reasons for judgment in the closely related proceedings in the Supreme Court decided by Fatiaki J. in UNELCO v. Republic of Vanuatu [2014] VUSC 146 on 16 October 2014.

3. We will return to the appeal against the order for costs in the court below, but we indicate now that we have decided that aspect of the appeal having regard only to the outcome of the proceedings in the Supreme Court, not on the reasons for judgment delivered on the substantive issues.

4. The ongoing litigation between the parties commenced with judicial review proceedings taken by Unelco against both ROV and VUI challenging the legality of the decisions on which the MOU was founded. In UNELCO v. Republic of Vanuatu [2012] VUCA 2 the Court of Appeal held that there were arguable questions to be decided about the legality of those decisions, and the judicial review proceedings were returned to the Supreme Court to be tried. The outcome of those proceedings is to be found in the judgment of Fatiaki J. delivered on 16th October 2014. Those proceedings were settled between Unelco and ROV under a Deed of Settlement. VUI was not a party to the settlement. Pursuant to the Deed of Settlement, Unelco and ROV invited Fatiaki J. to make an extensive series of orders which declared the MOU and the decisions on which it rested void and of no effect and consequential orders intended to bring about and facilitate a re-tendering process for the Luganville concession. One of the proposed consent orders was: "*Order 5 ... a mandatory order that the Minister of Climate Change Adaption, Geo-Hazards, Meteorology and Energy, Commence, and take all steps to pursue in a timely manner and to effect, a re-tender in accordance with the Governments Contracts and Tenders Act, of the grant of a 20 years concession for the supply of electricity to Luganville and related areas on the island of Espiritu Santo (hereinafter Luganville Concession)*".

5. Fatiaki J. declined to make orders in terms of the proposed consent orders. He made orders that only to an extent covered by the substance of some of the consent orders proposed, and did not include Order 5. The orders he made were:

> "*(1) Declare that the Memorandum of Understanding (MOU) dated 19th November 2010 between the Republic and VUI is void and of no effect;*
>
> *(2) Declare the letter of the Prime Minister dated 14th December 2010 is void and of no effect;*
>
> *(3) Quash 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;*
>
> *(4) I make no orders as to costs between Unelco and the Republic.*"

6. Following the judgment it seems that the parties accepted that a full re-tendering process was required, and ROV has since implemented steps for that to occur. We are informed that the re-tendering process is now in its final stages.

7. The proceedings before Geoghegan J. that have led to the present appeal alleged that the ROV by allowing VUI to remain as operator of the Luganville concession whilst the re-tendering process takes place had broken the terms of the Deed of Settlement by awarding a new MOU to VUI. After a trial Geoghegan J. made orders which appear in paragraphs 102 and 103 of his judgment:

> "*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 18th 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 18th 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 18th 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*".

8. It will be noted that the paragraph 102(c) order for specific performance is directed to bringing about an "*interim operation of the Luganville concession pending a full re-tender*". This was not the proposed Order (5) sought by consent before Fatiaki J.

9. The present appeal by VUI seeks an order setting aside the whole of the judgment of Geoghegan J. and returning the proceedings to the Supreme Court for re-trial.

10. The proposed cross-appeal by ROV seeks the variation of the paragraph 102(c) order, in effect to remove the two step process that would put in place interim operation until the full re-tender was completed, and then a new operating regime granted to the successful bidder on the full re-tender. The ROV in support of the cross-appeal proposed to contend that:

"3. *The Order (c) fails to fully appreciate the Republic's position in respect of the running and operation of the Luganville concession in the interim.*

4. *Order (c) carries with it huge financial implication to the limited resources and capabilities of the Republic to carry out what his Lordship may have innocently deemed it (second respondent) capable of doing.*

5. *The Order (c) is impracticable in that the second respondent is now at the advanced stage of the full re-tender process. As such to halt the full re-tender process and divert its time, effort and costs would be another costly and time consuming exercise.*

6. *Further, Order (c) carries with it legitimate public interest touching the lives of residents of Luganville.*"

11. These expressed concerns are enlarged upon by a sworn statement filed in support of the submissions by ROV which confirms that the re-tender is in its final stage, and now to implement the two stage process envisaged by the paragraph 102(c) order would involve both tender processes running in parallel, a process that would make no sense given that it would take 18 to 24 months to complete a tender process for an interim operation.

12. When the appeal and cross-appeal were called, the Court raised with counsel a number of issues including the practical utility of the paragraph 102(c) order, and enquired as to the attitude of the parties to simply amend that order to exclude the proposed interim operation so that the parties would be free should they wish to proceed with the full re-tender that is now underway. The possibility of adding more detailed terms by which the re-tender was to progress was suggested, but not embraced by the parties.

13. VUI indicated that the proposal to remove the requirement of an interim operation from the judgment under appeal was acceptable to it, and if acceptable to the other parties, VUI would not proceed with its appeal, save on the incidental question of the costs of the trial.

14. The proposal was in accordance with the orders sought by ROV on the cross-appeal, and ROV supported it.

15. Unelco however had a number of concerns about the simple variation to the paragraph 102(c) order removing the requirement of an interim operation. Unelco sought to add to the order. The additions proposed were not acceptable to the other parties.

16. Apart from the obvious potential for additional costs and delay inherent in implementing the two stage process envisaged by the paragraph 102(c) order, the Court was concerned with the form of the order for specific performance. The

Court considered that the generality of the order made it incapable of enforcement. An order for specific performance should give precise direction as to the obligations of the party subject to the order. The paragraph 102(c) order does not indicate what precise steps had to be taken and by when such that an alleged failure to comply could be meaningfully identified. In these circumstances the Court enquired as to the attitude of the parties if the paragraph 102(c) order was simply deleted, leaving it to the parties to get on with a full re-tender process if they so wished.

17. Both VUI and ROV said that that would be acceptable to them Counsel for Unelco, said that Unelco did not consent to the removal of paragraph 102(c). However Unelco appreciated the concerns expressed by the Court, and no further argument was addressed against the deletion of paragraph 102(c) order. In our view, quite apart from the merits of the grounds of appeal raised by VUI (which have not been argued), the paragraph 102(c) order is in an irregular form, and we consider it should be deleted. To do so incidentally meets the very serious public interest considerations raised by ROV.

18. On the question of the costs order in paragraph 103 of the judgment under appeal, the order in our opinion fairly reflects the outcome of the trial and no error has been shown in the exercise of the trial judge's discretion to award costs against both the defendants. Unelco was successful in the application before the Court, and both the defendants had strenuously opposed the declarations made in paragraph 102(a) and (b) of the judgment.

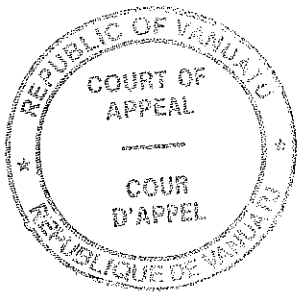
19. As to the costs of this appeal, we consider there should be no orders as to costs as between VUI and Unelco. However on the cross-appeal we consider ROV should recover costs against Unelco.

20. As between VUI and Unelco, whilst VUI has not obtained an order overturning the judgment below as sought in its notice of appeal it has succeeded in achieving the removal of the paragraph 102(c) order which is the only order in that paragraph that affects VUI. On the other hand VUI has failed in its appeal against the costs order. In these circumstances we think no order as to costs between those parties is appropriate.

21. In the case of the cross-appeal, ROV has effectively achieved the purpose of its cross-appeal. Unelco initially opposed the relief sought by ROV and must suffer the consequence of a cost order against it.

22. The orders of this Court are therefore:

    (1) Leave is granted to ROV to file its cross-appeal;



(2) The judgment in the court below is amended by deleting the order for specific performance contained in paragraph 102(c) of the judgment;

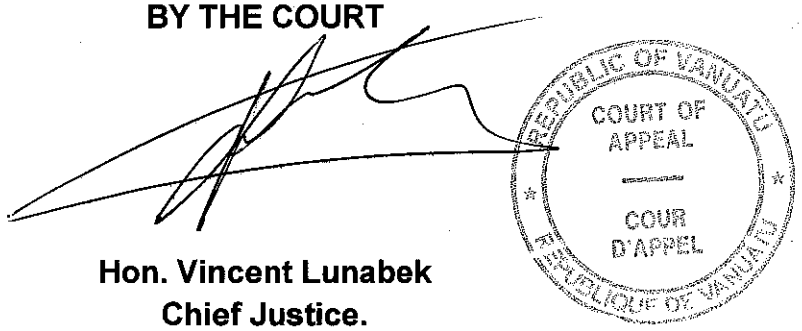
(3) To the extent necessary for the making of the preceding order, the appeal and cross-appeal are allowed but are otherwise dismissed;

(4) The first respondent, Unelco, is ordered to pay the costs of the cross-appeal of the second respondent, ROV on the standard basis;

(5) There is no order as to costs of this appeal as between the appellant VUI and the first respondent Unelco.

DATED at Port Vila this 21st day of July, 2017

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.