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

Civil Case No. 205 of 2005

BETWEEN: TELECOM VANUATU LIMITED
Claimant

AND: THE MINISTER FOR INFRASTRUCTURE AND PUBLIC UTILITIES
First Defendant

AND: HAM LINI VANUAROROA, MOANA CARCASSES KALOSIL, WILLY JIMMY TAPAGARARUA, BARAK TAME SOPE, EDWARD NATAPEI, JOSHUA KALSAKAU, ISABELLE DONALD, ARNOLD PRASAD, MORKING STEVEN IATIKA, GEORGE WILLS, JOE NATUMAN & JAMES BULE
Second Defendants

AND: THE ATTORNEY GENERAL
Third Defendant

AND: PACIFIC DATA SOLUTIONS LIMITED
Interested Party

Coram: Justice C. N. Tuohy

Mr. Rosewarne & Mr. Kalmet for Claimant
Mr. Botleng & Mr. Stevens for 1st, 2nd & 3rd Defendants
Mr. Malcolm for Interested Party

Dates of Hearing: 16 August 2006

Date of Decision: 16 August 2006

Interlocutory Ruling (No.1) & Reasons

1. This application for judicial review was set down for trial for two days starting today. The trial date was fixed by Judge Treston on 26 June 2006.

2. At that time his Lordship made orders that the Claimant file and serve sworn statements in reply to the Defendants' sworn statements by 10 July 2006 and he also made provision by order for preparation and filing of the agreed bundle of documents. Also on that date Judge Treston, after argument, continued an undertaking and certain injunctive orders that had been previously made. The Claimant did file the sworn statement in response on 17 July 2006, a few days late, but that is neither here or there.

3. However on about 21 July 2006, the Claimant purported to file, without leave initially, a further amended claim for judicial review. The effect of this proposed amendment was to abandon the Claimant's claim against the Second Defendant and there is no issue with that aspect and indeed it is not necessary to file an amended claim in order to abandon the claim against one of the Defendants.

4. However, what the further amended claim did do substantively was to add a ground in paragraph 5 which is as follows: -

> ***"Further in the alternative, the First Defendant failed to observe conditions 2.6 and 2.7 of the Franchise Agreement of 1992 or to give the Claimant a proper opportunity to be heard before the grant of the purported licence to the Interested Party."***

5. Objection was immediately raised on behalf of the Defendants and the Interested Party to the proposed amendment and that led the Claimant on the 1 August 2006 to file a formal application for leave. That itself prompted the Defendants to file sworn statements by Mr. Natapei and Mr. Barrett and the Interested Party to file a further sworn statement by Mr. Fletcher.

6. Some parts of those sworn statements address the issue of whether or not the Claimant was given the opportunity to be heard before the relevant decision was made. Some parts of them, however, are seemingly quite unrelated to the new paragraph 5 and amount simply to additional evidence relative to issues which were raised in the existing pleadings.

7. Mr. Rosewarne seeks leave to amend the claim. He argues that this is a mere particularisation of the existing ground of ultra vires.

8. While it is true that there are academic arguments about the classification of grounds for judicial review of administrative action and whether they can all be put under the general heading of ultra vires, in a pleading sense, his argument is without merit. Indeed his own pleading is "further in the alternative" in paragraph 5.

9. The purpose of pleadings is to fully and fairly inform the opposing parties of the nature of the Claimant's case. The pleadings as they stand do not in any way allege a failure to allow the opportunity to be heard. No one reading the existing pleadings could think that that was an issue in the case. That however, is a well-known and discrete ground of judicial review which, as I say, has not been mentioned to date despite the fact that the proceeding has been on

foot for nearly a year. Nor is the broader and classic ground of breach of natural justice mentioned up until now and failure to give an opportunity to be heard, of course, is an aspect of the broader ground of judicial review for breach of natural justice.

10. Breach of Conditions 2.6 and 2.7 are a separate issue, quite distinct from failure to give an opportunity to be heard, even though, they are included in the same paragraph 5 and indeed in the same sentence. As far as Conditions 2.6 and 2.7 are concerned, it is plain from the papers filed to date that the Claimant has always been complaining of the breach of Condition 2.6 and 2.7 of the Franchise Agreement and of course the opposing parties are aware of that.

11. The rule of Court in relation to amendment of a party's case is Rule 4.11 of the Civil Procedure Rules No. 49 of 2002 which says relevantly:

> ***"Amendment of statement of the case***
>
> ***4.11 (1) A party may amend a statement of the case to:***
>
> ***(a) better identify the issues between the parties; or***
>
> ***(b) correct a mistake or defect; or***
>
> ***(c) provide better facts about each issue.***
>
> ***(2) The amendment may be made:***
>
> ***(a) with the leave of the court; and***
>
> ***(b) at any stage of the proceeding.***
>
> ***(3) In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:***

(a) awarding costs; or

(b) extending the time for anything to be done; or

(c) adjourning the proceedings".

12. Obviously, the Rule directs the Court to consider the issue of prejudice to other parties by allowing an amendment. In this case the result of allowing the amendment relating to breach of natural justice, (if I can call it that), would inevitably be an adjournment of the trial. That adjournment would have to be for a minimum of two months because there is simply no time available to the Court to hear this case any time within the next two months because of the pressure of other business already set down.

13. The reason why an adjournment would be necessary, is because the Claimant requires time to answer the new sworn statements filed on behalf of the Defendants and Interested Party which themselves were necessary only in relation to the proposed additional ground. So I conclude that it would not be fair to allow an amendment and not to permit the Defendants and Interested Parties to file their additional sworn statements and the Claimant of course then wishes on that basis to itself be allowed to respond to them.

14. Any adjournment would require further consideration or reconsideration of the existing undertakings and interim injunctive orders. On the one hand it could be argued that the prejudice that an adjournment would result in to the Interested Party (because the licence would remain suspended and the Interested Party would remain bound by the existing injunctions) could be avoided simply by lifting the orders which effectively suspend the licence. But then the

ultimate result of that could be that at the full hearing, the Claimant might be successful. There would then be greater loss to the Interested Party in having to stop an operation which had already commenced.

15. I have read Judge Treston's decision of 26 June 2006 regarding the continuation of the interim orders and I have read the pleadings which were filed preliminary to that and I am conscious of the importance of the issues in this case to the parties involved, the Claimant, the Interested Party and also the Government of Vanuatu. I am also aware of the considerable financial issues involved in this proceeding.

16. I do not think that granting the amendment and thus having to adjourn the trial for at least two months can be cured by costs or by some adjustment of the interim orders and undertaking.

17. There is also the issue of fairness between the parties. The fact is that this amendment is required simply because the Claimant has decided, very late in the piece and after the proceeding was set down following a judicial conference and very shortly before trial, to add a substantive and distinct new ground to its claim. I accept the submissions made that the material which has led the Claimant to add this ground was available to the Claimant well before this proceeding was set down and in fact for some weeks or months now.

18. However, as I have mentioned there are in effect two parts to the proposed paragraph 5. In my view allowing the first part relating to

Clauses 2.6 and 2.7 would not involved any prejudice to the Defendants or the Interested Party.

19. The particularisation or articulation of that argument, whether it is a good argument or not, does not require any further evidence nor does it require any adjournment. The Claimant has been complaining of breaches of the Franchise Agreement from the very start and that is something that must have been known to the Defendants and the Interested Party.

20. The only real effect of allowing that amendment is that some adjustment might have to be made by the Defendants and the Interested Party in the way in which they meet or answer any legal argument. I intend to allow the claim to be amended so that the first part of the paragraph 5 relating to a failure to observe provisions 2.6 and 2.7 of the Franchise Agreement of 1992 is open to be argued by the Defendant.

21. However, I do not propose to permit an amendment by the Claimant at this stage to allege a failure to give the Claimant an opportunity to be heard.

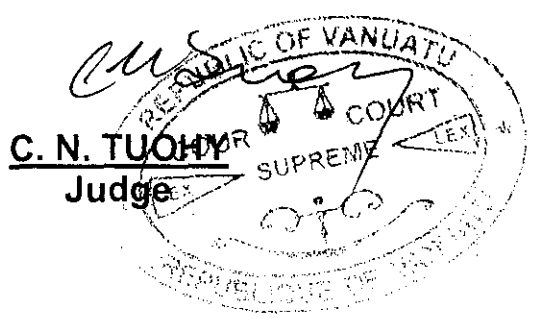
22. The reasons for that in summary are that allowing such an amendment will involve prejudice to the Defendants and the Interested Party which cannot be cured by an adjournment and/or by costs or otherwise; that in the circumstances and particularly in regard to its lateness, it is unfair to those parties to allow that amendment now. In saying that I accept Mr. Rosewarne's submissions that when considering amendment, this is not an issue of the Court imposing any procedural discipline, it is a question of

fairness between the parties. So the application for amendment is refused to that extent.

23. On that basis the Defendants and the Interested Party accept that there is no basis for the Court to read the sworn statements filed by them on or about 11 August 2006 which it is accepted should have been confined only to issues raised by the effort to file a further amended claim. Insofar as they raise issues outside of that, and they do, it is just as unfair to the Claimant to allow those matters to come before the Court at the last minute and without the opportunity for response or alternatively to force an adjournment in that way. So we will commence the hearing of the proceeding at 1.30pm today.

Dated AT PORT VILA on 16 August 2006

BY THE COURT



C. N. TUOHY
Judge