

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

**Judicial Review Case No. 04 of 2015
Judicial Review Case No. 15/4 SC/JUDR**

BETWEEN: UNELCO (VANUATU) LTD
Claimant

AND: THE REPUBLIC OF VANUATU
First Defendant

AND: UTILITIES REGULATORY AUTHORITY
Second Defendant

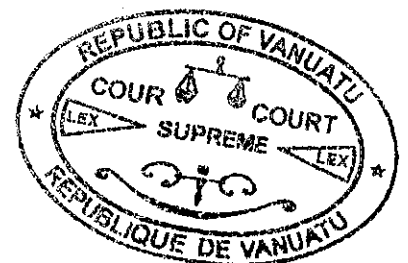
Date of Hearing: *Wednesday 11 November 2015 at 9 am*
Before: *Justice Stephen Harrop*
Appearances: *Tim North QC, Henry Heuzenroeder and Mark Hurley for the Claimant*
Kent Tari (SLO) for the First Defendant
Garry Blake for the Second Defendant

Date of Judgment: *Wednesday 16 December 2015*

**RESERVED JUDGMENT OF JUSTICE SM HARROP AS TO CLAIMANT'S
APPLICATION FOR ORDERS FOR DISCLOSURE**

Introduction

1. In this judicial review claim UNELCO challenges as being ultra vires and a nullity the URA's purported Final Decision and Commission Order (Case U-0013-14) in the matter of "investigating and implementing a Business Development Incentive electricity tariff for UNELCO in Efate" dated 5 December 2014 ("the BDI Final Order"). The URA denies any invalidity.
2. On 31 August 2015, Mr Hurley filed a memorandum seeking directions by way of orders for disclosure by the URA of certain documents UNELCO considers relevant to the determination of issues arising in this proceeding. The application is opposed by the URA.

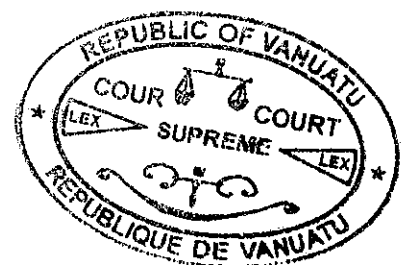


The essential arguments are contained in Mr Hurley's submissions of 22 September and Mr Blake's of 29 September.

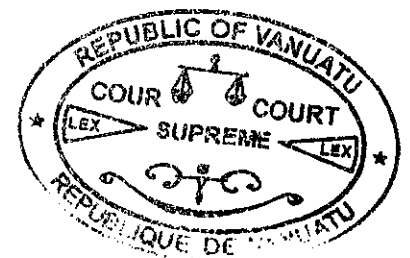
3. In a Minute on 2 October 2015 I said that I remained to be persuaded that the disclosure which was sought was necessary to a determination of the issues. However I reserved the opportunity for further submissions to be made. Subsequently a conference was arranged, on 11 November 2015, where such submissions were made by Mr North QC and a bundle of helpful authorities provided. Mr Blake filed submissions in reply on 20 November 2015.
4. Although some of the focus of the conference on 11 November was on the earlier suggestion made by Mr Blake of isolating a threshold issue for preliminary consideration, that is no longer pursued by him.
5. In this judgment I will determine the opposed application by UNELCO for disclosure.

The Disclosure Sought by UNELCO

6. The categories of documents sought are set out in the sworn statement of Katherine Michelle Lowe dated 21 September 2015. She is an expert economist who has been engaged by UNELCO to assist in this litigation. In isolating those categories she has noted that in paragraphs 34 and 35 of his sworn statement of 9 March 2015, the Chief Economist of the URA James Ryan has described the way in which his investigations were carried out but has not provided any detail on the modelling or other analysis that would have been required to reach those conclusions or the explicit or implicit assumptions underlying this analysis. Ms Lowe says that access to this information is in her opinion "critical to understanding how the conclusions in these two paragraphs have been drawn and to test their veracity".
7. The categories of documents which she, and in turn UNELCO, seek are as follows:
 - "a) *The modelling and other analysis that the Second Defendant carried out as part of the BDI Final Order to estimate:*
 - i) *the level of excess generation capacity that is expected to be available, including the assumptions made about forecast demand;*



- ii) *the marginal fuel costs and marketing costs of incremental generation capacity;*
 - iii) *the indexation to be applied to the energy and fixed charge components of the BDI Final Order.*
- b) *Any documents or other material that the Second Defendant relied upon when determining what categories of costs should be included in the marginal costs estimates and what costs should be excluded.*
- c) *Any modelling or other analysis that the Second Defendant carried out to:*
- i) *satisfy itself that its marginal costs estimates would not give rise to any cross-subsidisation of BDI customers by existing customers;*
 - ii) *determine whether the BDI Tariff was consistent with the Port Vila Concession Agreement and, in particular;*
 - 1) *the tariff structure, base price and price adjustment formula; and*
 - 2) *the revenue and profit implied by the application of the tariff structure, base price and price adjustment formula in the Concession Agreement.*
 - iii) *Determine the effect that the BDI Tariff was likely to have in the short, medium and/or longer-term on:*
 - 1) *the Claimant's revenue and profits;*
 - 2) *the Claimant's customers as a whole and any defined categories of the Claimant's customers;*
 - 3) *the operation of the generation and network assets in Efate;*
 - 4) *the demand for electricity by customers that can access the BDI Tariff and how this may change at the end of the incentive period when the discounted tariff is no longer available.*
 - iv) *determine what effect the BDI Tariff was likely to have on the long-term interests of consumers, including and any assumptions that were made about demand growth in this analysis.*
- d) *Any documents that were relied upon in conducting the modelling and other analysis referred to in sub-paragraph (c), or that explain the basis for the assumptions, forecasts or estimates that were applied when carrying out this modelling and analysis.*



- e) *Any sensitivity or scenario analysis that was carried out as part of the modelling and other analysis referred to in sub-paragraph (c).*
- f) *Any documents referring to, recording or evidencing, the results of any modelling of the validity of claims by the Second Defendant as to the effects of the implementation of the BDI Final Order."*

The approach to an application for disclosure

8. Although no separate application has been made, I am happy to treat Mr Hurley's memorandum of 31 August and the subsequent submissions as an application pursuant to rule 8.9 of the Civil Procedure Rules. This provides (my emphasis):

"8.9 (1) A party may apply for an order to disclose the documents described in the application.

(2) The documents may be identified specifically or by class.

(3) The court may order disclosure of the documents if the court is satisfied that disclosure is necessary to:

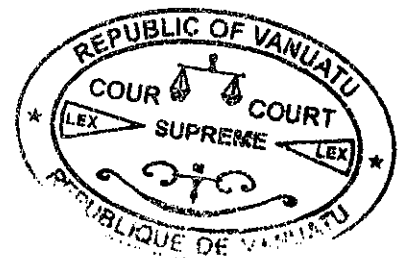
- (a) decide the matter fairly; or*
- (b) save costs.*

(4) The court must consider:

- (a) the likely benefit of disclosure; and*
- (b) the likely disadvantages of disclosure; and*
- (c) whether the party who would have to disclose the documents has sufficient financial resources to do so.*

(5) The court may order that the documents be disclosed in stages."

9. I proceed on the basis that being satisfied that disclosure is necessary to decide a matter fairly means simply that disclosure should be ordered of documents relating to any matter in question in the proceedings. As Lindgren J said in *Trade Practices Commission v. CC (New South Wales) Pty Ltd and Others* (1995) 131 ALR 581 at 590: "The 'matters in question' in the proceedings are the issues as revealed by the pleadings."



10. As will become apparent in discussing the present application, this is important to keep in mind. Sworn statements do not reveal "*matters in question*", pleadings do. It is the pleadings which not only determine whether documents sought to be disclosed are relevant but also whether the contents of sworn statements are admissible (relevant) or not.

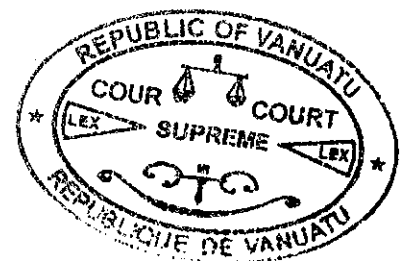
11. In order to determine this application and to assess the submissions made on it, it is therefore necessary carefully to identify what is in issue as revealed by the pleadings.

The issues arising on the pleadings

12. In summary (the details are in paragraphs 21, 23, 25, 27, 29, 30, 32 and 33 of the claim) UNELCO says that the BDI Final Order is ultra vires because:

- a) It purports to be an order of compulsion directed at UNELCO as to the manner in which it conducts its business, something which the Utilities Regulatory Authority Act and its amendments ("*the Act*") does not authorise.
- b) It purports to amend the tariffs that were to be invoiced by UNELCO to certain customers notwithstanding that the Port Vila Concession ("*PVC*") which UNELCO was granted by the Republic in 1986 precludes this (in its express and/or implied terms);
- c) It purports to define a new tariff to be charged to certain categories of customers notwithstanding the PVC;
- d) It purports to determine new maximum prices which may be charged by UNELCO to certain categories of customers notwithstanding the PVC
- e) It amounts to depriving UNELCO of its property rights as bestowed by the PVC, and interfering in its contractual relations with the Republic, in breach of both the section 5 (1) (j) of the Constitution of Vanuatu and the provisions of the Act
- f) It is inconsistent with the final price award determined on 28 April 2011 by a panel of arbitrators appointed pursuant to section 17 of the PVC, which provides that any such arbitrator's decision shall be final.

13. In simple terms then, the judicial review claim may be described as a two-pronged attack on the BDI Final Order alleging (a) that the Act does not provide the URA with the power to



make the decisions contained in it and (b), alternatively, even if it does , numerous aspects of the BDI Final Order are inconsistent with the PVC.

14. On the face of it then, before considering the pleaded response of the URA, this case, while dealing with a complex subject, is not an attack on how the URA reached or formulated the BDI Final Order but rather an attack on *the statutory authority for and effect* of it. The fundamental questions posed by the claim therefore are: Is it an order which the URA had statutory power to make and, if so, is the effect of the BDI Final Order inconsistent with the express or implied terms of the PVC?

15. Looked at in this light, I can see no basis on which this application for disclosure is justified. What is sought by Ms Lowe is information which would allow her properly to consider and give expert evidence on the matters referred to in paragraph 34 and 35 of Mr Ryan's sworn statement. However, on the face of it, those paragraphs are not relevant to the above issues, except perhaps to provide context or background.

16. Consistent with this, I note that the application does not refer to any pleading in the *claim* as the basis for it, but rather it relies on paragraphs 9, 15, 16, 17 and 19 of the response. I think it may be that Mr Hurley meant to refer to paragraph 8 rather than paragraph 9 but for completeness I set out here in full paragraphs 8, 9, 15, 16, 17 and 19 of the response:

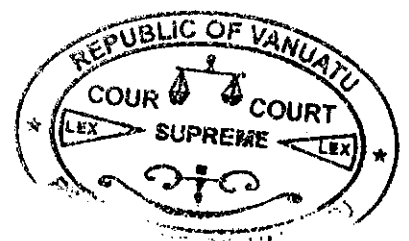
"8. *As to paragraph 9, the 2nd Defendant denies the provision has the meaning and effect contended by the Claimant and otherwise relies on the actual wording of Section 3 of the URA Act.*

9. *As to paragraph 10, the Convention dated 15 August 1986 and Amendment No. 1, Amendment No. 2, Amendment No. 3 and Amendment No. 4 are the only applicable amendments for the purposes of determining the issues raised in this judicial review.*

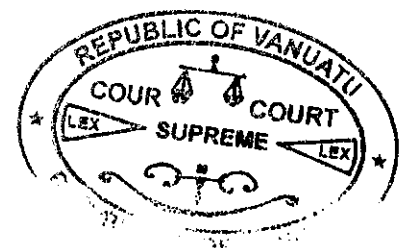
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15. *As to paragraph 17, the 2nd Defendant denies the matters pleaded in paragraph 17 and further says that the BDI Final Order is not inconsistent with Section 4 of Amendment No. 3:*

a) *The charges defined in the BDI Final Order are a two component rate made up of a fixed fee and a charge proportionate to the quantity of*

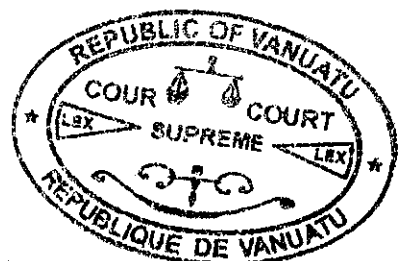


- electricity used, and so is not inconsistent with the provision referred to in paragraph 7.3 by the Claimant;*
- b) the provision referred to in paragraph 7.4 by the Claimant restricts the Claimant from charging a price that exceeds the base selling prices for 6 supply categories set out therein and the BDI tariff is not inconsistent with that.*
 - c) the provision referred to in paragraph 7.5 requires that selling prices of electricity listed therein which are calculated by reference to the price P are required to be rounded off to the nearest 2 decimal (sic) for all uses.*
 - d) the provision referred to in paragraph 7.5 gives both parties to the Port Vila Concession the right to request for revision of price P°, quarterly price adjustment formula and tariff structure upon the occurrences of certain events. It does not limit the powers of the 2nd Defendant under the URA Act.*
16. *The 2nd Defendant further states that none of the provisions referred to in paragraph 15 above nor rights or obligations of the Claimant under these provisions are altered or made in-operable by the BDI Final Order. The BDI Final Order does not in any way alter the current tariff structure. The value of P°, the formula, and the coefficients for calculating the charges for the power provided by UNELCO to existing customers are unchanged. All of the existing conditions for customers to purchase electricity from UNELCO remain in place for all current subscriptions. The BDI tariff shall only apply to incremental subscriptions (either from existing or new customers) who agree to a minimum of 9.9 kVA and accept certain curtailment provisions and available for 5 years, after which BDI tariff will cease. The subject matter dealt with in the BDI Final Order is not prohibited nor inconsistent with the Port Vila Concession.*
17. *In further answer to paragraph 17 and the claims generally attacking the validity of the BDI Final Order, the 2nd Defendant says that:*
- a) pursuant to Section 12 (1) (a) of the URA Act the 2nd Defendant is mandated to exercise the functions and powers conferred upon by the URA Act in furtherance of the purposes of the URA Act which*



purposes are to ensure the provision of safe, reliable and affordable regulated services; maximize access to the regulated services throughout Vanuatu; ensure least costs generation and promote the long term interests of consumers.

- b) pursuant to Sections 13 (1) and 13 (2) (c) of the URA Act the 2nd Defendant has the power to do all things that are necessary to be done for or in connection with the performance of its functions and do anything reasonably incidental to any of its powers.*
- c) Section 18 (1) of the URA Act empowers the 2nd Defendant to set the maximum price which may be charged to consumers in relation to any aspect of a regulated service. As required under Section 18 (2), the BDI Final Order was gazetted on 17th December 2014.*
- d) The BDI program, the subject of the BDI Final Order, promotes the long term interests of the consumers as mandated in the URA Act. By offering reduced price to new or increased subscriptions with conditions, the programme encourages consumption growth. This clears the excess generation capacity and improves the utilization of the network, and creates economies of scale, which lowers the base price and benefits all customers in the long-run while strengthening the Claimant's financial position.*
- e) Pricing BDI tariff above the incremental costs ensures that Claimant's financial position is protected. Further the Final Order ensures that the Claimant's future financial interests or the safety and system reliability will not be adversely impacted by implementation of the BDI Final Order.*
- f) The 2nd Defendant has acted in accordance with Sections 37 and 27 of the URA Act and conducted public consultations and granted the Claimant the opportunity to comment prior to the Final decision. Claimant's concerns were noted and program parameters adjusted to address the concerns. Claimant was granted and has utilized the opportunity to file a notice of grievance. The 2nd Defendant reviewed the notice of grievance, took all Claimant's concerns and objections*



into consideration and set out its reasoning for affirming the Final Order in its Response.

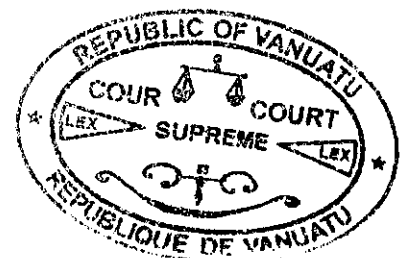
- g) The BDI Final Order is not inconsistent with the Port Vila Concession or any of its provisions for the reasons set out in paragraphs 15, 16 and this paragraph 17, and the order so made is valid and enforceable.*

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19. *As to paragraph 19, the 2nd Defendant denies the matters alleged. The arbitrator's scope of review was limited to determine parameters which lead to the base price P^o namely, CAPM formula, treatment of Luganville concession, treatment of windfarm benefits and treatment of coconut oil for cost calculation. Matters such as tariff structure, categories of service were not within the scope of the arbitration. The 2nd Defendant further says that the arbitration award of 28th April 2011 therefore only set an average base price derived from the above four parameters. The fixing by the 2nd Defendant of a lower price under specified conditions for customers within certain categories or sub-categories, does not vary the base price or the adjustment formula set out in the arbitration award. Further the 2nd Defendant contends that the arbitration award does not limit the authority of the 2nd Defendant to set base price or any other price in future."*

17. As I read these pleadings, they contain reasons why the URA says that it had jurisdiction to do what it did and why the order is not inconsistent with the PVC. Nowhere does it appear to me to go behind the fact and terms of the BDI Final Order seeking to justify its response with reference to the methodology adopted. Rather, as befits the response to a judicial review application, the defendant is not seeking to justify the correctness of its decision but to rebut the assertions that it acted unlawfully in making its decision.

Submissions

18. Mr North QC made a number of submissions highlighting, with reference to respected authority, the point that in a case of this kind the Court must itself determine jurisdictional facts before it can determine whether the power of the decision maker to exercise a discretion

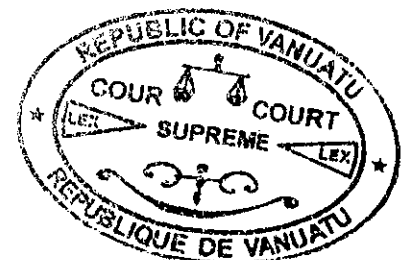


was enlivened. I take no issue with that principle, nor indeed does Mr Blake, and accordingly I will not recite the arguments and authorities, but the real question is what are the relevant “jurisdictional facts” here? I accept Mr Blake’s essential submission that the alleged unlawfulness and inconsistency arises here from the exercise or purported exercise by the URA of its (undoubted) statutory jurisdiction, rather than to the enlivening of it.

19. To put it another way, this case requires the Court to make an assessment of the meaning and effect of the BDI Final Order and then (a) to measure that against the statutory powers given to the URA by the Act and then, but only if it is found the URA did have power to do what it did, (b) to measure the meaning and effect of the BDI Final Order against the meaning and effect of the PVC.
20. The “*jurisdictional facts*” relevant to the alternative (inconsistency with the PVC) claim, as pleaded, are the respective contents of the BDI Final Order and the PVC, neither of which are in themselves disputed, and whether there is practical or factual inconsistency between them. Whether it is a correct decision or not, the BDI Final Order has been made, or purports to have been made, and the only appropriate challenges by way of judicial review are as to its lawfulness, not its correctness. The methodology by which it was reached relates to the latter, not the former.
21. In my view none of the documents which are sought, which go to the methodology adopted by the URA in reaching BDI Final Order, has any relevance to these issues. Except by way of background and context neither party should be adducing evidence on an issue which is not raised on the pleadings, namely the “*veracity*” or otherwise (to use Ms Lowe’s word) of the economic methodology adopted by the URA in formulating the BDI Final Order.

Conclusion

22. I dismiss the application for disclosure because I am not satisfied in terms of rule 8.9 that disclosure of the documents sought by UNELCO and Ms Lowe is necessary to decide this matter fairly.



23. The irony is that if any disclosure as to business practices is required it would arguably be by UNELCO, not the URA. That is because it may well be relevant to UNELCO's claim of inconsistency with the PVC to put in evidence documents which support its contentions that there is a "*practical and factual inconsistency*" between the BDI Final Order and the PVC. There is no current application by the URA for disclosure, although Mr Blake did make the point that if this application were successful a reciprocal order ought to be made. I respectfully draw the attention of UNELCO to Rule 8.2 (1) (a). In context that effectively means, without any application being made by the URA, that if UNELCO wants to rely on a document in support of its contentions of factual inconsistency between the BDI Final Order and the PVC, then it must be disclosed.

24. I reserve the costs of this opposed disclosure application in the cause, pending the outcome of the proceeding as a whole.

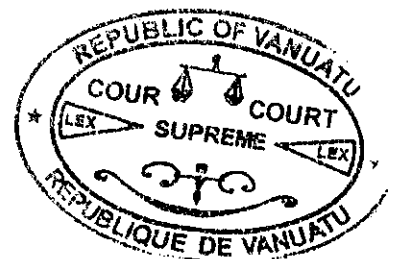
Directions

25. I understood from the draft Minutes of Order supplied by Mr North QC that UNELCO intends to file an amended reply and defence to the crossclaim. It will have leave to do so **by 5 February 2016**.

26. A pre-trial conference relating to this, and the case with which it has been consolidated (JRC 25 of 2014), should be held in February. The Chief Justice has directed that Justice Chetwynd manage these two cases from now on, given that Justice Fatiaki is disqualified and that my term in Vanuatu concludes at Easter. His Lordship has set aside time for the conference at **9.00am on Tuesday 9 February 2016**. If that is unsuitable counsel should contact his Associate Anita Vinabit as soon as possible with a request for an alternative, and suggested date(s).

27. Counsel for UNELCO are to file and serve a memorandum with suggested directions and any other comments **by 29 January 2016**, with counsel for the URA to respond **by 5 February 2016**.

28. Counsel should among other matters consider whether consolidation of two other apparently similar cases (and any others that may be "*in the pipeline*") with the above two is



appropriate; JRC 30/15, filed on 6 November is currently on Justice Saksak's docket and JRC 745/15 filed on 20 November has been allocated to me.

BY THE COURT

S. Saksak

