IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil
Case No. 16/760 SC/CIVIL

BETWEEN: **Union Electrique Du Vanuatu Limited t/a Unelco Suez**
Claimant

AND: **The Republic of Vanuatu**
First Defendant
Vanuatu Utilities and Infrastructure Limited
Second Defendant

Date of Hearing:	17 and 18 December 2018
By:	Justice G.A. Andrée Wiltens
In Attendance:	Mr M. Hurley for the Claimant
	Mr S. Kalsakau for the First Defendant
	Mr D. Thornburgh for the Second Defendant at the hearing; Mr J. Malcolm subsequently
Date of Decision:	19 March 2019

DECISION

A. Introduction

1. Union Electrique Du Vanuatu Limited t/a Unelco Suez ("Unelco") currently supplies electricity in the Port Vila area by virtue of a concession given to Unelco by the Republic of Vanuatu ("RoV") as to exclusivity of supply for a period of 20 years from 1 January 2010.

2. Unelco submitted that it held a similar exclusive concession to supply electricity to the greater Luganville area on Espiritu Santo, from 1990 to initially 2010, but that was later protected through to 1 January 2031. The protection extending the concession was said to be flouted by RoV firstly by not complying with its own promised protection, and secondly by an invalid and overly-lengthy tendering process in 2010 purportedly undertaken in accordance with the requirements set out in the Government Contracts and Tenders Act ("GCT"), which resulted finally in the concession being awarded to Vanuatu Utilities and Infrastructure Limited ("VUI"). The resulting litigation ended after a Settlement Deed was entered into between RoV and Unelco – although VUI was not part of that settlement.

3. It is now alleged that RoV subsequently breached the settlement agreement in a number of ways, for which damages are sought. Further, Unelco seeks damages for losses occasioned to it by RoV's alleged derogation of the protection said to extend its Luganville concession.

4. Importantly, in the trial before me, Mr Hurley for Unelco advised there was no challenge to the outcome of the re-tender process or the awarding of the Luganville concession to VUI in 2018. That altered position resulted in a wholly changed complexion to the case – VUI was now present as an observing party only, to protect it's interests, although it continues to have a claim for costs once the final outcome has been determined.

5. The other significant fact which affected the trial was that no witnesses were called at the hearing. All the evidence was presented in the form of sworn statements, and no counsel felt a need to cross-examine. Once all the evidence had been admitted, I heard both oral and written submissions from counsel prior to reserving my decision.

6. I now provide the reasons for my decision.

B. Background

7. In 1986, RoV awarded Unelco a 15 year concession to exclusively supply Port Vila's electricity requirements. In 1990, that was extended for a further 10 years through until 1 January 2011.

8. RoV had also, in early 1990, awarded Unelco a 20-year concession to exclusively supply Luganville's electricity requirements until 1 January 2011.

9. In 1997, the Port Vila concession was amended by extending that concession for a further 20 years to 1 January 2031. In that amending document, the following provision is to be found:

> "8.9 NOT TO APPOINT A THIRD PARTY (New Condition).
>
> The Grantor and/or the Government shall not issue to any person other than the Concessionaire any authority or permission to provide, at any time during the term of this Concession, the right to manufacture and supply electric current for lighting and power within the supply area of Port Vila and Luganville held by the Concessionaire."

10. Unelco accordingly submitted that it's concession as to exclusivity of supply in Luganville was thereby protected until 1 January 2031. RoV does not accept Unelco's interpretation.

11. There were in addition further developments. On 21 September 1998 the GCT Act came into force. It was amended, with some additions, on 11 March 2002. The significance of this legislation to this case is that all future Government contracts, including those already awarded but not yet properly documented, were now required to pass through a transparent tendering process prior to being finally awarded. It was RoV's position that the renewal of the Luganville concession after expiry on 31 December 2010 was caught by this legislation.

12. In October 2007, RoV advised Unelco that the further management of supply of electricity in Luganville, as from 1 January 2011, was to be the subject of an open tendering process.

13. In February 2010, RoV issued to interested parties a Request for Qualification to tender for the Luganville concession. A total of 6 interested parties responded, seeking qualification, including both Unelco and VUI.

14. In April 2010, RoV sought Expressions of Interest, from those suitably qualified, to tender for the Luganville concession for 20 years. Unelco was among those who indicated their interest.

15. In July 2010, RoV provided a Draft Concession Deed to all qualified bidders for comment. Unelco commented on that document, as requested, on 14 July 2010.

16. In August 2010, the tender period expired. Unelco had submitted a tender within the required time, but it was determined to be a non-conforming bid.

17. On 27 September 2010, RoV advised Unelco that it was still considering all options and would inform Unelco of their ultimate decision.

18. On 1 November 2010, RoV entered into the following with VUI, in relation to the Luganville concession: (i) a Memorandum of Understanding ("MOU"), and (ii) an Operating and Management Agreement ("O&M Agreement") due to commence on 1 January 2011. Unelco was not informed of this until 18 November 2010.

19. Unelco challenged, by way of Judicial Review, the validity of the MOU, the O&M Agreement and the Prime Minister's purported ratification of the same on 14 December 2010. In the course of the Court hearing scheduled to consider that application, counsel for Unelco and RoV came to an accommodation which was recorded in a Settlement Deed of 18 February 2014. This was later partly endorsed by this Court in the decision of Justice Fatiaki of 16 October 2014. VUI did not participate in the settlement, but sought to maintain their position as the Luganville concessionaire.

20. On 16 October 2014, Justice Fatiaki quashed the O&M Agreement, and declared both the MOU and the Prime Minister's purported ratification to be null and void. The Settlement Deed entered into by the parties required the tender process to be re-done. RoV agreed in the Settlement Deed "...to commence and take all steps to pursue in a timely manner and to effect..." the re-tender process in accordance with the GCT.

21. RoV subsequently, but prior to 3 December 2014, issued an identical MOU with VUI to that which Justice Fatiaki had declared null and void, ostensibly on the basis that there needed to be certainty of the continuation of supply.

22. On 6 September 2018, VUI won the Luganville concession as a result of the re-tendering process. Only on 11 October 2018, Unelco was advised by RoV that VUI was the successful tenderer.

23. The end result of these events was that VUI has supplied all Luganville's electricity from 1 January 2011.

C. The Claims

24. On 24 March 2017, Justice Geoghegan released a decision in which he declared that RoV had breached the Settlement Deed of 18 February 2014 in relation to two aspects. Firstly, prior to commencing the re-tendering process agreed to be required pursuant to the GCT Act, RoV had failed to first obtain a validly executed deed of release from VUI. Secondly, by subsequently awarding an identical MOU with VUI, RoV was in breach of procedural fairness to Unelco. Unelco claims damages in respect of both those breaches.

25. Mr Hurley maintained before me that a third breach of the Settlement Deed ought to declared, namely that RoV did not "...commence and take all steps to pursue in a timely manner and effect a retender..." in accordance with the GCT Act as required by the terms of the Settlement Deed. Justice Geoghegan had made some obiter comments relating to this aspect of Unelco's allegations, but did not finally determine the issue.

26. Unelco sought damages for the 2 breaches of the Settlement Deed as found by Justice Geoghegan, and the further breach alleged, in the global amount of VT 100 million.

27. Further, Unelco sought damages for what it alleges was a breach of condition 8.9 of the Port Vila concession extension document for loss of profits and reliance damages in relation to Unelco's loss arising from the unilateral and unlawful taking away of the Luganville concession protection. Unelco claims VT 1.69 billion under this head.

28. RoV opposed the granting of a third declaration. Mr Tari submitted that RoV, in accordance with the Settlement Deed, had engaged in and had completed the re-tendering process in a sufficiently timely fashion. RoV relied on the alleged 18 – 24 month usual period for such matters to be completed, and pointed to the effects of Cyclone Pam on Vanuatu affairs from 13 March 2015 onwards. As well RoV relied on the confused state of politics in Vanuatu from March 2014 to February 2016, with numerous changes of Government and personnel in key portfolios. RoV submitted that the time taken was reasonable in the circumstances.

29. Mr Tari further contended that the mention of Luganville in clause 8.9 of the 1997 Port Vila extension should not be held to be binding as against RoV, relying on numerous obiter statements by Justice Geoghegan. He further submitted, if his first argument was not accepted, that Unelco was out of time pursuant to the Limitation Act in filing its Claim on 17 March 2016. Lastly he resorted to the principles of estoppel and waiver – Unelco ought to be estopped from its claim as it joined in the tendering process between 2008 and 2010 and again the re-tendering process from 2014 on, freely and without complaint; and by so doing, it had impliedly waived its rights under the protection.

30. Finally Mr Tari submitted that Unelco was not entitled to damages for any breaches of the Settlement Deed. He submitted that the Settlement Deed was entered into solely for the purpose of arranging for the re-tendering of the Luganville concession; and, as that process was now complete, any breaches of the Deed were not actionable.

D. Discussion

(i) Delay in Re-tendering

31. There appears to me to be no specific provision in the GCT Act for the need for timeliness. This aspect of the claim therefore relies solely on what is recorded in the Settlement Deed. Justice Fatiaki was of the view that even though he did not fully endorse the consent orders set out in the Settlement Deed, the admissions and concessions by RoV were nevertheless binding on it. With respect, I agree with that proposition. Once freely entered into, it should not be open to RoV to adopt a different approach without leave of the Court. In any event, there was no submission by Mr Tari suggesting that the Deed could not be relied upon in full by Unelco.

32. .The Settlement Deed came into being on 18 February 2014. In it, RoV agreed "...to commence and take all steps to pursue in a timely manner and to effect..." the re-tender process in accordance with the GCT. That is the measure by which RoV's conduct is to be measured in this regard.

33. Antony Garae, in his sworn statement of 15 September 2016, stated that RoV initiated the Luganville re-tender in or around November 2014. There is simply no explanation by him, or any other witness, for this 9 months lapse prior to the process commencing.

34. Mr Garae's further explanation for delay makes it plain that RoV had categorised the re-tender process into 3 phases. The first phase involved the preparation and submission of the Inception Report and Matrix Requirements – which was apparently completed by 15 September 2016. The second phase catered for the preparation of tender documents and bidding. Phase 3 provided for signing of the Concession Deed and close out report. This descriptive narrative goes nowhere near to explaining any of the delay.

35. There is some "evidence" that a re-tender can take in the order of 18 – 20 months as set out in Antony Garae's sworn statement of 15 September 2016. It is a bald assertion unaccompanied by example or explanation. It is hard to place weight on this opinion. Mr Tari's subsequent submission before me that ordinarily tenders can take 18 – 24 months is at odds with the "evidence", and it is logically weak.

36. In contrast, the evidence of Jacques White is compelling. In his sworn statement of 12 December 2016, he points out that RoV's Request for Qualification, which was sent to all interested parties in February 2010, included an indicative time-table. That document evidences that RoV, at that time, estimated the entire re-tender process to take less than 5 months.

37. It is correct that Cyclone Pam had a devastating impact on Vanuatu; and that emergency steps were required in the operations of Government. This included some departments having to move to temporary office space.

38. It may also be an accurate depiction to describe the state of Vanuatu politics in 2014 – 2016 as "disrupted. However, Governments are not single entities in the sense that only one thing can be attended to at a time. Government is a multi-faceted machine with Ministers expected to pick up new portfolios and perform their duties at short notice. The provision and supply of electricity is a hugely important matter, especially in times of extremis such as during a natural disaster. The need to prioritise a continued supply of electricity must not have escaped those responsible, despite the effects of the devastating cyclone in 2015.

39. It is to be noted that had the Request for Qualification indicative time-table been adhered to, the re-tender would have been completed well prior to the advent of Cyclone Pam.

40. The intervening factors adverted to by Mr Tari, were they to be accepted, cannot possibly be used to justify such a lengthy process – especially taking into account that this was a re-tender, and the original process had taken less than a year. That factor cannot be ignored and is of overwhelming importance.

41. The re-tender was completed on 6 September 2018, some four and a half years after RoV agreed to deal with the issue in a timely manner. It strikes at the heart of logic to seek to defend this as a timely process.

42. For the reasons set out earlier, I am satisfied that there is clear evidence of undue delay in the re-tendering process, and therefore RoV is in breach of the Settlement Deed in this regard as well as the 2 aspects already determined by Justice Geoghegan.

(ii) Breach of the 1997 Protection

43. The 1997 Port Vila concession extension is dated 25 September 1997. It is a legal and binding contract. It is the construction of the terms of the contract that is all important.

44. Mr Hurley submitted that, in construing the contract, a grant of this nature ought not to be derogated from: *British Leyland Motor Co v Armstrong Patents* [1986] AC 577. The protection that is contained in paragraph 8.9 was submitted to mean what it plainly says in writing, and that the words "...and Luganville" cannot be ignored.

45. Mr Hurley went on to submit that when RoV entered the first MOU with VUI this was plainly in breach of the protection afforded by paragraph 8.9, and that it was done in derogation of that clause. He relied on the authority of *Secured Income Real Estate (Australia) Pty Ltd v. St Martin's Investments* (1979) 144 CLR 596.

46. Mr Hurley went further to submit that the provisions of the GCT Act do not assist RoV in defending this allegation. He submitted the contract was outside the provisions of that Act. Mr Hurley further asserted this was not a *res judicata* situation.

47. Mr Hurley dismissed RoV's submissions as to estoppel and waiver, pointing out that these defences were not pleaded by Mr Tari, and that they therefore cannot be relied on. The same submission was made regarding Mr Tari's assertion that the claim is time-barred under the Limitation Act; and he also contended that in any event the claim was filed in time and the conduct complained of is a continuing breach.

48. As referred to earlier, Mr Tari relied on the *obiter* comments of Justice Geoghegan whereby he questioned whether the correct construction of clause 8.9 necessarily meant that the protection afforded also extended to the Luganville concession. I consider this aspect of the case is determinative of the main part of the Claimant's case.

49. The question to be considered is whether the inclusion of the Luganville concession in the protection afforded in clause 8.9 was intended to be a part of the new agreement between RoV and Unelco, or whether the inclusion is a simple error or mistake? In my judgment the latter is the case.

50. The contract is dealing with the Port Vila concession. It is headed as such, and specifically repeats that by alluding to the relevant documents in the Schedule attached to the contract, in which the Schedule makes no mention of the Luganville concession.

51. While it is true that the term Luganville does appear within some of the clauses of the contract, in every instance, that is in relation to the pricing of electricity Vanuatu-wide. The Luganville concession is not referred to. The inclusion of the term Luganville in some clauses does not alter the true nature of the document, nor does it seek to convert the contract to also extending (through the mechanism of the protection) the Luganville concession.

52. Justice Geoghegan commented that he was unsurprised by the lack of evidence with respect to the manner in which negotiations were conducted which resulted in the contract. However, at a substantive hearing seeking VT 1.69 billion by way of damages, I consider it imperative the Claimant establish by way of evidence that it was the clear intention of the parties that the Luganville Concession also be extended as contended by Unelco. There is no evidence before the Court as to how it was that the words "...and Unelco" came to be included in clause 8.9. The Claimant simply submits that because the words appear there, that is sufficient for the Court to be satisfied on the point.

53. However, two significant factors suggest otherwise. Firstly, at no stage prior to this Claim being filed, did Unelco point out to RoV that there was no legal basis for a tendering process for the Luganville concession, as the protection afforded by clause 8.9 meant that only Unelco could be given the concession. As recorded earlier in the chronology, Unelco was first made aware of the intended tender process by RoV in October 2007. Effectively Unelco did nothing to enforce its "rights" as protected under clause 8.9 for a number of years; and what it now seeks is VT 1.69 billion for a breach of a right that Unelco itself ignored for a considerable period of time.

54. Mr Hurley, when asked why this was so, frankly conceded it was because the Unelco directors were unaware of the "right". That is a telling remark, given the significance of the provision.

55. Had the contract negotiations involved the Luganville Concession also being extended (by dint of the protection) then it is extremely unlikely, in my view, that RoV would have embarked on the open tender process; and equally unlikely that Unelco would have made no reference to their rights being breached by that process. The conduct of both parties in this regard is clear evidence, to my mind, that no agreement was ever reached between the parties that Unelco's Luganville Concession should run thorough to 31 December 2031; and that the inclusion of "...and Luganville" was simply an unnoticed inclusion in the text of the document.

56. Secondly, Mr Hurley pointed to the significance of what was being negotiated. Port Vila required a new site and a new enlarged electricity producing station. The cost of this was to be borne by Unelco, as RoV was unable to fund that amount. In return for the required capital outlay, Unelco's concession over the exclusive supply of electricity to Port Vila was to be extended by 20 years. That was the *quid pro quo*. It is inconceivable to my mind that, if Unelco's Luganville Concession was also to be extended, it would be done in such a clumsy and uncertain manner by an experienced and well-instructed legal counsel.

57. Section 1 of the contract deals with Variation of the Concession – the Port Vila Concession according to the recitals; and according to the documents described in the Schedule. There is no mention here of the Luganville Concession. Section 2 of the contract deals with the Duration of the Concession – again, only the Port Vila Concession. Tellingly, there is again no mention of the Luganville Concession. It is inconsistent with what is contained in the contract to attempt to read it as if the Luganville Concession was also to be extended by 20 years.

58. Such a significant advantage to Unelco as an effective extension over the Luganville Concession, if indeed contemplated and agreed to between the parties, would simply not have been recorded in the contract in such an off-hand manner as set out in clause 8.9. I am satisfied it was unintentionally inserted in error.

59. For the various reasons set out above, I am not satisfied the Claimant has established it is more likely than not that RoV has breached the provisions of clause 8.9 of the Agreement Varying Concession by entering into an open tendering process for the Luganville Concession between 2008 and 2010 or subsequently.

60. Accordingly, there is no further breach by RoV granting the Luganville concession to VUI; and accordingly there is no actionable loss to Unelco. This finding also has the consequence of removing all considerations of the GCT Act in relation to the Claim.

(iii) Damages

61. Prior to proceeding to consideration of what loss, if any, has been caused to Unelco by virtue of the 3 breaches of the Settlement Deed by RoV, I would like to comment on the evidence presented to the Court in support of the alleged breach of clause 8.9. I consider it to be insufficient, despite Mr Hurley's correct submission that there is no evidence to the contrary.

62. Marc Perraud has set out in his sworn statement of 29 August 2018 a basis for calculating Unelco's loss. It is premised on publicly available documents produced by VUI as to the profits VUI made in 2012 to 2015. He then states: "I expect that if UNELCO had been awarded the contract to supply electricity to Luganville in November 2014, there is no reason why it would have been entitled to less profit than generated by VUI."

63. In a subsequent sworn statement of 13 November 2018, Mr Perraud calculated Unelco's loss by extrapolating out 45 months of VUI profits, as publicly divulged, to cover the 20 year period of 1 January 2011 to 31 December 2031 taking inflation into account. The calculation was submitted to be conservative.

64. As previously outlined, Unelco is not entitled to these claimed losses. However, if I were to attempt to calculate what would be required to make good Unelco's alleged loss of profits, I would need to examine Unelco's figures from the date it held the Luganville Concession - with an up-dated calculation based on the likely profits taking into account any altered terms and conditions of operating the Luganville Concession from RoV. Mr Perraud admitted he has no information as to VUI's actual remuneration from RoV.

65. The information in fact provided would not have satisfied me such that a proper quantification could be made.

66. VUI ultimately opted out of this present litigation, save for holding a watching brief, due to Unelco's acceptance of RoV's 2018 confirmation, post the re-tender, of the grant of the Luganville Concession to VUI in 2015. As a result, Unelco's claim for damages was necessarily altered.

67. What Mr Hurley now sought was VT 100 million in damages on the basis that Unelco has lost the opportunity to operate the Luganville Concession for the 4 year period, from 2032 to 2035. That loss arose due to RoV's conduct in granting the Concession to VUI, subsequently quashed by the Supreme Court, but then re-granted on identical terms; and the delay thereafter in completing the re-tender process.

68. He submitted that had RoV acted in accordance with the Settlement Deed it was highly likely that Unelco would have won the re-tender. Mr Hurley further submitted that Unelco has in addition lost the advantage of making bids beyond 2035 with the benefit of incumbency.

69. However, it must be noted that Unelco was the incumbent operator of the Luganville Concession from 1990 to 2011. The benefit of that incumbency was apparently minor, if anything at all – to both Unelco, and to RoV. Even with that advantage Unelco did not win the tender. It is not logical to assume that Unelco would have won the re-tender with its advantage still intact. The delays involved in completing the re-tender exercise, while extremely frustrating to Unelco, cannot be properly said to have had any impact on the final outcome.

70. Further, Unelco's previous 20 years' experience in operating the Luganville Concession means it is not in the same position as a new player – which VUI was when it won the concession. Unelco's opportunity will actually be better than VUI's was in 2011; and although that experience may be a little more removed in 2035, both companies will be in a position to advance any bids on the basis of 20 years of on-site experience.

71. I am satisfied that the impact of both incumbency and experience on RoV has not been demonstrated to be significant in the tendering process.

72. The circumstances of this case mean that I am therefore not prepared to compensate Unelco for this loss of opportunity.

73. Mr Hurley submitted that had RoV complied with the terms of the Settlement Deed, it would have conducted a re-tender in short order. Unelco would not have been held in limbo, and would not have had to be "at the ready" to take over the production and supply of electricity at short notice, were it to have won the re-tender. In my view, that is the real and actual loss occasioned to Unelco as a result of RoV's breaches of the Settlement Deed.

74. Mr Hurley has relied on the authority of *Chaplin v Hicks* [1911] 2KB 786 for the proposition that, just because damages cannot be ascertained with absolute certainty, that is no reason for damages to not be awarded where they are due. He therefore submitted a global sum of VT 100 million was appropriate.

75. In opposition to this submission, Mr Tari made no attempt to assist the Court in assessing appropriate damages – he simply submitted that no damages should be ordered.

76. I have no evidence, or submission, in relation to what impact there was, if any, to Unelco due to RoV having failed to first obtain a validly executed deed of release from VUI. I am not in a position to accept that damages are due to Unelco by virtue of this breach of the Settlement Deed.

77. The awarding by RoV of an identical MOU with VUI to that quashed by the Supreme Court is astonishing – especially as it occurred, if not the same day, then very shortly after the Supreme Court decision was released. That was a very clear breach of procedural fairness to Unelco. However, I am unconvinced that

any financial loss has resulted from this to Unelco. As accepted by Mr Hurley, had RoV taken over the operation of the Luganville Concession instead of allowing VUI to continue on, that would have satisfactorily protected Unelco's position pending the re-tender.

78. The delay in the re-tendering must have had a financial impact on Unelco. Having lost the Luganville Concession, Unelco would have had plant, machinery and a workforce that was suddenly surplus to requirements. However, if Unelco had succeeded in winning the re-tender, then Unelco would again have had a use for these assets. The fact that the process took 4 and a half years to complete meant that Unelco was in a position of constant flux. Unelco needed to be ready to resume operations in Luganville at short notice if it had won the re-tender.

79. The additional factor that I have taken into account is that RoV has breached, in significant ways, a contract it entered into voluntarily and willingly. The breaches range from relatively minor to significant. RoV, as a model litigant, has no business to so conduct itself. When a Sovereign State enters into an agreement, every involved party should be confident to rely on the content of that agreement. Accordingly, in my view, a punitive element is necessary, when considering the appropriate quantum of damages RoV should need to pay to rectify such misconduct.

80. The amount I settle on is VT 27.5million. That is sufficient to not only compensate Unelco for its losses over the four and a half years at VT 5million a year, and also to mark the Court's condemnation for RoV's disregard towards its legal obligations.

E. Decision

81. There will be a declaration that in not commencing, taking all steps to pursue and to effect the retender of the Luganville concession in a timely manner RoV has breached the Settlement Deed on 18 February 2014. There are therefore 3 specific breaches.

82. The protection to Unelco of the Luganville Concession through until 2031, as alleged to result from the inclusion of "...and Luganville" in clause 8.9 of the Agreement Varying Concession was recorded by unintentional error and is not actionable as against RoV.

83. Damages are awarded to Unelco for the 3 breaches of the Settlement Deed in the global sum of VT 27.5 million, which includes a punitive element. This amount is to be paid within 28 days.

F. Costs

84. Counsel have previously indicated they wish to be heard in respect of costs. Accordingly, there will be a hearing in Chambers at 8am on 18 April 2019 to deal with that issue.

85. If counsel wish written submissions may be filed in advance of the hearing. That would be of assistance to the Court.

Dated at Port Vila this 19th day of March 2019
BY THE COURT

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Justice G.A. Andrée Wiltens