

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

**AND:** Republic of Vanuatu  
Defendant

*Date of Hearing:* 16<sup>th</sup> August 2022  
*Before:* Justice C.N. Tuohy  
*Counsel:* Mr. M. Hurley for the Claimant  
Mr L. Huri for the Defendant  
*Date of Judgment:* 22<sup>nd</sup> August 2022

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## Judgment

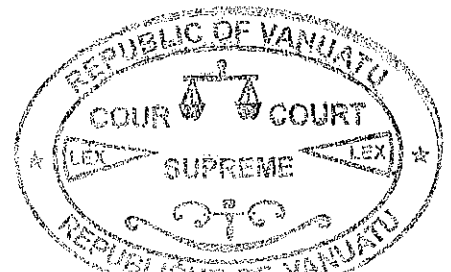
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### Introduction

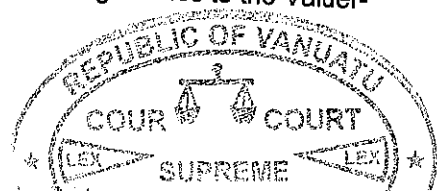
1. This is an appeal by UNELCO, the lessee of land near Devil's Point on which it has constructed a wind and solar energy farm, against a determination made by the Valuer-General of the rent payable on a rent review. UNELCO claims that the amount of the new rent fixed by the determination was much too high because the Valuer-General failed to disregard the value of improvements on the leased land as he was required to do under s 39(2)(b) of the Land Leases Act [Cap 163].

### Factual Background

2. UNELCO holds the land as lessee under title number 12/0814/062. The term of the lease is 75 years commencing on 20 February 2004. The lessor is Family Malasikoto. The area of the lease is 162,012 m<sup>2</sup> (16.2012 ha). The contour of the land is undulating. The land has been mostly cleared of dark bush cover. It has been levelled and fenced. The cover is mainly mown natural grass on which wind turbines and solar energy panels have been placed.



3. The land is on the inland side of Devil's Point Road towards the far end. It is roughly in the shape of an oblong rectangle with the long sides running more or less parallel to Devil's Point Road. There is a strip of land of about the same width separating it from Devil's Point Road. The Court was advised that this strip of land is controlled by UNELCO. The road which is used by UNELCO to provide access from Devil's Point Road to the leased land runs across this strip of land. There is no legal right of way for this road attached to the leased land. The legal access to the leased land is much less practicable. Its entrance is at a point much further along Devil's Point Road from which it takes a long and winding path through bush to reach the far end of the leased land. There is no evidence of the state of the legal access road but the aerial photographs produced in evidence suggest that it is marginal at best.
4. UNELCO acquired the lease in 2013 at a transfer price of VT 10,369,901. At that time and since, the annual rent was still the original rent of VT 121,500. The lessors had not sought a review of the rent until 10 March 2020 when they sent a notice in terms of s 39 of the Act to UNELCO proposing an increase to VT 1,500,000 per annum. On 27 May 2020, UNELCO replied refusing the proposed increase and advising that it would undertake its own valuation and would revert with its proposal in due course. The lessors responded by letter dated 8 June 2020 giving UNELCO 14 days to deliver its valuation or the lessors would refer the matter to the Valuer-General to determine. There was no response within that time so on 25 June 2020 the lessors referred the matter to the Valuer-General to determine the rent. In other words, the process provided in s 39 was followed by the lessors.
5. After giving notice to UNELCO, the leased land was inspected on 7 July 2020 by the Valuer-General, Jimmy Sano, and an assistant valuation officer, Erick Jimmy.
6. The Valuer-General's determination was issued in Land Rent Review Case No 02 of 2020 dated 20 August 2020. It consists of nine pages divided into a number of sections. The Valuer-General assessed the unimproved value of the leased land at VT 56,704,200. After applying a rental rate of 2% of the unimproved value, he determined the annual rent on the review would increase from VT 121,502 to VT 1,135,084 rounded to VT 1,140,000.
7. The first few sections of the determination outline the various characteristics of the land and its location. In section 7, the Valuer-General noted that rents are based on unimproved value and recorded that unimproved value "assumes that the land is notionally in its natural or virgin condition but it possesses whatever advantages that exist as a result of extrinsic circumstances, such as roads, public services, amenities, land settlement in the neighbourhood, potential utility, and any other benefits that are not due to the operations on the land itself by its past or its present occupiers."
8. Section 8 of the determination sets out the valuation approach adopted. It contains two tables of specific leases taken from land registry records. The table records in respect of each lease the date of sale, the area, the sale price recorded on a total and per square metre basis and very brief remarks such as 'improved, road and water frontage'.
9. Table 1 is a list of 18 properties, most at Devils Point, a few at Mele and one or two others in the vicinity. This is the first group of properties looked at by the signatories to the Valuer-



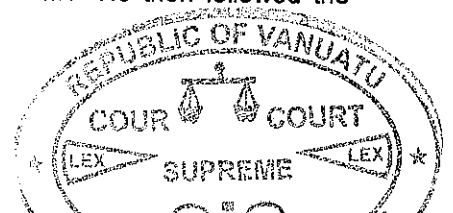
General's determination. Five of these properties had an area of 8 ha or more, one being 72 ha but most were less than a hectare in size. The determination analysed these sales to extract a price per square metre for each. This showed that there was a great variation in the square metre price. The conclusion drawn was that lots with bigger land areas had sold at a very low rate and lots with smaller land areas had sold at high rates. In his sworn statement, the Valuer-General confirmed the impression conveyed in the determination that the comparable sales in Table 1 were not used as the land rents as those properties were too low and stagnant and did not reflect current market values.

10. It was then decided to compare sales further away from the subject property. A further table, Table 2, categorised in the same way, listed 12 properties, eight of which were in the Pango Paradise Cove area, the others being at Snake Hill, Mangaliliu, Lelepa Landing and Abattoir Inland. This analysis showed that properties with land areas relative to the UNELCO land were sold at low rates of VT42 to VT800 per square metre and that properties with smaller land areas ranging from 3000 m<sup>2</sup> up to 28,000 m<sup>2</sup> sold at rates of VT1,631 to VT13,638 per square metre. The Valuer-General confirmed in his sworn statement that this Table 2 was used as comparable sales.
11. The last two paragraphs of section 8 contain the essence of the determination in terms of the market value of the leased land. They are reproduced in full below:

*"Considering the market sales shown above, the location, accessibility, services, topography, gradient, aspects, frontage, contour, risk exposes to wind, shape and size of the subject we are of the view that the value of the subject is somewhat relative to the sales compared above. However, the subject has a larger lot compared to the some sales we have used and its elevation is a major factor to its value. Accordingly, we have considered to apply an overall fair value to the subject based on its location, land area, accessibility and its market.*

*We are of the view that at this current market trend a fair market rent at would be Vt500 per square meter or Vt81,006,000. We have also made a few adjustments on the value due to the steepness and cost on the construction of the road to the subject and to have its own private access road to the site. We used 30% or 150 of the Vt500 per square meters which will be Vt350 per square meters to arrive at a fair market value of the subject. Therefore, the unimproved market value of the land with adjustments made is Vt56,704,200, or Vt350 per square meters."*

12. In the meantime, UNELCO received a report dated 1 July 2020 from the registered valuer it had instructed, Jeremy Dick. This report was also divided into several sections and was detailed. The approach to valuation is described in the report as a 'market approach' which determines the value of a property, based on the selling price of similar properties. This approach involves researching recent sales of similar properties, making adjustments for differences in size, quantity or quality.
13. Mr Dick chose four specific properties for comparison, one in Old American Road, one at Devil's Point and two on Clem's Hill. They consisted of land areas of 91 ha, 8.27 ha, 3.6 ha and 14.06 ha respectively. After analysing and adjusting the sales data for these properties (transactional adjustments) and comparing a range of their characteristics to those of the UNELCO land (property adjustments), Mr Dick assessed the present market value of the leased land inclusive of improvements at VT 17,600,000 in total. He then followed the



method for assessing the unimproved market value by following the method described in Para 6 of Note 4 of the Valuation Guidance Notes issued by the Valuer-General on 3 June 2019 to reach a net value of VT 14,457,727. This involves allowing for a number of deductions as shown in the Tables set out in the Note. He then deducted the assessed value of improvements together with financial and purchase costs to reach an unimproved land value rounded to VT 6,810,000. He applied a rental rate of 2.8% to calculate an annual rent on the review of VT 190,680.

14. It is to be noted that although UNELCO received Mr Dick's report while the Valuer-General was considering his determination, it did not provide the report to the Valuer-General until after the determination had been made. It should also be noted that the Valuer-General did not seek submissions from either UNELCO or the lessors before he made his determination. For that matter neither UNELCO nor the lessors sought to provide him with submissions.
15. Following the determination, through its lawyer, UNELCO wrote to the Valuer-General objecting to the way in which data had been used in the determination and seeking a review. The Valuer-General refused to review the determination for reasons which he provided to UNELCO's lawyer. This appeal was then filed.

#### The Relevant Law

16. Pursuant to s 5 (a) of the Valuation of Land Act [Cap 288], the Valuer-General in his role as a land referee has jurisdiction to determine the amount of rent payable for a lease of land whether originally or on periodic reassessment. His role as a referee is set out in s 6:

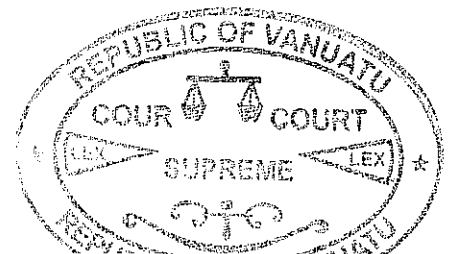
*6. Referee to act as expert and not as arbitrator*

- (1) *In exercising jurisdiction under section 5(a) and (b), the Valuer-General is to act as an expert and not as an arbitrator. The Valuer-General must consider any valuation and reasons submitted to him or her by the parties to an application but is not in any way limited or fettered by that valuation and is to reach his or her decision in accordance with his or her own judgement.*
- (2) *In exercising jurisdiction under section 5(c) and (d), the Valuer-General may act as arbitrator.*

17. The manner in which the Valuer-General is required to exercise his jurisdiction is more specifically prescribed in s 39(2) of the Land Leases Act which is set out below.

*"Section 39*

*(2) In reviewing the rent, the Valuer-General shall have regard to the fair open market rental value of the land at the relevant review date as if the full term of the lease had yet to run and shall also have regard to all the terms, conditions and agreements of the lease (other than those relating to the rent) on the assumption that the environment of the leased land is in all respects as it is or may reasonably be expected to be as at the date from which the new rent is to become payable, but disregarding -*



*(a) any effect on rent of the fact that the lessee or any person claiming through or under him is in occupation of the leased land; and*

*(b) the value of any improvements on or to the leased land made or carried out, or in respect of which valuable consideration was provided, by the lessee or his predecessors in title.”*

18. The right of appeal in respect of a Valuer-General's determination and the powers of the Supreme Court on appeal are set out in sections 27 and 28 of the Valuation of Land Act.

*“27. Right of appeal*

*(1) A person may appeal to the Supreme Court if the person believes the Valuer-General's determination of the person's objection was wrong on a point of law.*

*(2) An appeal must be made not later than 60 days after the date of issue of the notice of the Valuer-General's determination of the objection.*

*28. Powers of Supreme Court on appeal*

*(1) On an appeal, the Supreme Court may do any one or more of the following:*

*(a) confirm or revoke the decision to which the appeal relates*

*(b) make a decision in place of the decision to which the appeal relates;*

*(c) remit the matter to the Valuer-General for determination in accordance with the Court's finding or decision.*

*(2) On an appeal, the appellant has the onus of proving the appellant's case.”*

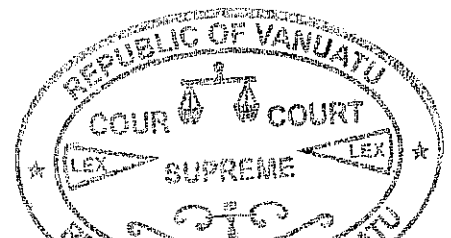
The Issue

19. It will be seen that the only ground for an appeal against the Valuer-General's determination is that it was wrong on a point of law. On behalf of UNELCO, Mr Hurley concentrated on one point in respect of which he asserted there was an error of law in the determination, namely, that in making his assessment of the fair market value of the leased land, on which the rental was based, the Director-General had failed to disregard the value of the improvements on the leased land.

20. Mr Huri, representing the Republic of Vanuatu, that is, the Government of which the Director-General is an officer, asserted that the determination clearly showed that the Director-General in making his determination was well aware that the rental must be based on the unimproved value of the land and he ascribed no value in the determination to the improvements.

Discussion

21. This appeal is not about whether Mr Dick's valuation is to be preferred to the Director-General's. The appellant, UNELCO, must persuade the Court that there is an error of law in the determination. There is no doubt that if the Director-General failed to disregard the value

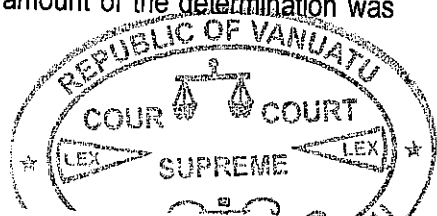


of improvements on the leased land then that would be an error of law because that would be in breach of s 39(2).

22. Although the Valuer-General was extensively questioned about his determination at the trials during which he naturally amplified and explained what is contained in it, on reflection I consider that the determination, much like a Court judgment, must stand or fall on its own terms.
23. While the Director-General specifically directed himself in terms of s 39(2), the method by which he arrived at the square metre value of the UNELCO land, as described in the determination, which ultimately translated into the determination of the rental per square metre, intrinsically imported an amount for improvements although that amount cannot be precisely calculated. This is because he made no discernible allowance for the value of improvements on the properties listed in Table 2 which he used for comparison purposes when arriving directly at a value per square metre for the UNELCO land.
24. A fair reading of the determination indicates the Valuer-General did not take into account those properties in Table 2, mostly in Pango Paradise Cove, which had very high square metre sale prices and which therefore almost certainly contained expensive residential buildings. However, he clearly did take into account the lesser per metre sale prices of between VT42 and VT800 per square metre for some of the Table 2 properties in reaching his assessment of the fair market value of the UNELCO land. But the determination records that he did so simply on the basis that their lesser square metre price was the result of their larger size. Given the very wide definition of improvements, it seems clear from the remarks recorded against them ("developed", "partly developed", "improved") that all the comparison properties had improvements of some sort albeit not necessarily buildings. Yet there is no deduction or allowance for improvements shown in the determination of the market value of the UNELCO land before the application of the rental rate.
25. As Para 6 of Guidance Note 4 states, finding unimproved value based on comparable sales is difficult. While the Guidance Notes do not have the force of law, the Foreword written by the then Minister of Lands and Natural Resources makes it clear that they provide an authoritative source of guidance gained from professional experience in dealing with some of the difficult valuation issues posed by Vanuatu's unique valuation environment. Step 4 in the process set out in Para 6 for clearly removing the value of improvements from market value when using comparable sales was not used in the determination. By using the value of properties likely containing improvements to assess a market value for the UNELCO property without making a specific allowance for improvements on it, in an indirect way the Director-General has failed to disregard improvements in coming to his assessment of rent.

## Result

26. The appeal is allowed and the determination is revoked. I would not contemplate making a decision in place of the determination. Although the Court has found that the determination was wrong on a point of law, I have not found that the amount of the determination was

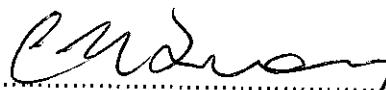


necessarily as far astray as Mr Dick's valuation suggests. I noted, for example, that neither of the two valuations in evidence on this appeal appears to have factored in the potential utility of this land in its unimproved state as a wind farm.

27. However, I heard enough evidence at the trial to recognise that the assessment of a fair market rental of leased land pursuant to s 39(2) of the Leased Land Act is not a task for amateurs. I am sure the correct outcome is to remit the matter to the Valuer-General for a further determination in accordance with this decision.
28. In doing that I draw the parties' attention to s 6 of the Valuation of Land Act set out above. Although acting as an expert and not as an arbitrator, and thus not automatically bound by all the rules of natural justice, the section specifically requires the Valuer-General to consider any valuation and reasons submitted to him by either party to the application. Nor does the section prevent him from asking for them if they are not volunteered to him. Just as Courts are often greatly assisted by submissions from the parties so may the Valuer-General find assistance from them in coming to a decision which ultimately must rest on his own judgment.
29. Related to that point is the position of the lessors. In my view, they should have been named as an interested party on this appeal so they had a right to be heard on it. That is another reason the Court should not make its own decision. However, if there is another appeal both lessors and lessee should be parties to it.
30. I direct that this judgment is to be served not only on the parties to the appeal but also by the Sheriff on the lessors. I remind the parties to the lease that they remain at liberty to settle the issue between themselves at any time.
31. UNELCO as the successful party is entitled to costs on the appeal. If the parties cannot agree on the amount, the process under rule 15.7 is to be followed.

**Dated at Port Vila this 22<sup>nd</sup> day of August 2022**

**BY THE COURT**

  
Justice C.N. Tuohy

