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

CIVIL APPEAL CASE No.7 OF 2012

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

AND: **THE REPUBLIC OF VANUATU**
First Respondent

AND: **VANUATU INFRASTRUCTURE AND UTILITIES**
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru

Counsel: *Mr. Tim North SC and Mr Mark Hurley for the appellant*
Mr. Justin Ngwele for the First Respondent
Mr. Dane Thornburgh for the Second Respondent

Date of hearing: *25th & 26th April 2012*
Date of judgment: *4 May 2012*

JUDGMENT

1. This is an appeal against an order of a Judge of the Supreme Court refusing to grant the appellant (Unelco) an extension of time for making a claim for judicial review. The order was made pursuant to the Civil Procedure Rules No.49 of 2002 (CPR), Rule 17.5. In his reasons the Judge said that if an extension of time had been granted he would in any event have then dismissed the substantive application for judicial review pursuant to Rule 17.8.

2. Civil Procedure Rules 17.5 and 17.8 provide:

"Time for filing claim

17.5 (1) The claim must be made within 6 months of the enactment or the decision.

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(2) However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.

17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in subrule (3).

(3) The judge will not hear the claim unless he or she is satisfied that:
a) the claimant has an arguable case; and
b) the claimant is directly affected by the enactment or decision; and
c) there has been no undue delay in making the claim; and
d) there is no other remedy that resolves the matter fully and directly.

(4) To be satisfied, the judge may at the conference:
a) consider the papers filed in the proceeding; and
b) hear argument from the parties.

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."

3. In its initial application to the Supreme Court the decision which Unelco sought to challenge was one said to have been made by the Council of Ministers on 17 November 2010 to award a concession to provide electricity for Luganville to Pernix Group Inc. (Pernix). The appellant did not make application to review this decision within six months as required by CPR rule 17.5(1). Late in the afternoon on Friday 24th May 2011, Unelco sought to file in the Supreme Court an application for an extension of time to make its claim. The Court did not accept the application until the following Monday. However, for the purposes of considering the application for an extension of time, the Judge treated the application as having been made on 24 May 2011 when the Court Registry should have accepted the papers. The Judge was correct to do so: see: "**Limitation Periods**" 4th Edit., A. McGee, at [2.009]. The application was therefore treated as made 7 days after the expiry of the 6 months time limit. This appeal should be approached on the same basis.

4. In the Supreme Court both respondents opposed the grant of an extension of time. Notwithstanding the relatively short time beyond the six months limit

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when the application was made, the Judge did not consider that substantial justice required an extension of time.

BACKGROUND TO THE IMPUGNED DECISION OF 17th NOVEMBER 2010 AND THE CESSATION OF THE UNELCO'S CONCESSION

5. As we understand the arguments of counsel before this Court, the following background is not contentious and was before the Supreme Court.

6. Unelco had held the Luganville Concessions to supply electricity for the past 20 years. Its Concession was due to expire on 31st December 2010.

7. In February 2008, Unelco was informed by the Ministry of Lands that the further management of supply of electricity in Luganville from 1st January 2011 would be the subject of an open tendering process.

8. In February 2010, the Acting Director General of the Ministry of Lands initiated steps leading to the tendering process through the Central Tenders Board (CTB) established under Part 4 of the Government Contracts and Tenders Act [CAP.245] (the GCT Act). Undoubtedly the proposed concession would be a Government Contract so as to attract the application of that Act.

9. The CTB approved a two stage tendering process. A number of entities including Unelco and Pernix became pre-qualified to participate in the tender under the first stage.

10. This appeal has been argued on the basis that in the pre-qualification process the pre-qualified bidders agreed to be bound by Tender Rules which form part of the Final Procurement Plan prepared by consultants for the Government of Vanuatu.

11. On 28th May 2010 the CTB approved the Request For Proposal Document: Concession for the Supply of Electricity to Luganville (the RPF) which was then issued to the pre-qualified bidders.

12. Tenders in the form prescribed in the Tender Rules were to be lodged with the CTB by "bid due date", being on 31st August 2010. At that time the CTB

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met to open Tender Bids. Only one Tender submission had been received, that being from Unelco. It was determined to be a non conforming bid. However the CTB advised the representative of Unelco then present that the Unelco proposal would be evaluated in detail and the Ministry of Lands would inform Unelco about its submission in due course.

13. On 29th September 2011 the Director-General of the Ministry of Lands wrote to Unelco informing it that no complying bid had been received. The Government was currently considering its options and would inform Unelco of its decision in due course.

14. On 4th October 2010 the CTB met and gave approval for the Minister of Lands to use a selective tender process. Regulations made under the GCT Act require every Minister concerned with or responsible for arranging or calling tenders for Government Contracts to follow the procedures laid down in the Regulations. Regulation 3 relates to Tenders; it relevantly provides:

> *"**3. Tenders***
> *(1) Tenders must be called for all Government Contracts.*
> *(2) All tenders must be called by open and competitive bidding except where another process is approved by the Tenders Board under subregulation (3).*
> *(3) The Tenders Board may approve another tender process for projects where a straight open and competitive tender process may not provide the best result in the opinion of the Tenders Board.*
> *(4) Any other tender processes may include:*
> *(a) two stage tendering (e.g. request for information followed by selected request for proposals); and*
> *(b) selective tendering (e.g. where it is known that limited skills are available to perform the work required; and*
> *(c) period contracts for repetitive purchases."*

15. Selective tendering is a process provided for in paragraphs 3 and 4(b) of Regulation 3. It will be necessary later to consider the terms of the actual decision of the CTB made on 4th October 2010.

16. Unelco was not informed at that stage that the CTB had resolved to approve a selective tendering process.

17. On 1st November 2010 CTB met again and approved the appointment of Pernix to operate and manage the Luganville electricity generation and supply and also approved a draft Memorandum of Understanding (MOU)

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between the Government and Pernix. That draft MOU was marked Draft 1. The CTB was to prepare a paper for the Council of Ministers. Again, it will be necessary later to refer in more detail to this CTB decision.

18. On 18 November 2010, Unelco was advised by a letter from the Ministry of Lands that on 17th November 2010 the Council of Ministers had awarded the Luganville Concession to Pernix for a period of 8 months from 1st January 2011. The letter went on to say arrangements as to the transfer of responsibilities would be organised in accordance with the Unelco Concession Contract. That letter was the first communication received by Unelco from the Government about the future concession following the letter of 27th September 2010 saying that the Government was considering its options. In the meantime, by letter dated 13th October 2010 the Director-General of the Ministry of Lands had requested access to the Luganville facilities, but the letter did not indicate that a purpose of access was to allow representatives of Pernix to inspect the facilities. During that access Pernix representatives attended as part of their own due diligence.

19. The decision of the CTB and the Council of Ministers so far identified in this background were the decisions of which Unelco had knowledge when it lodged its application for an extension of time with the Court on 24th May 2011. The letter from the Ministry of Lands to Unelco on 18th November 2010 did not identify that a MOU was the basis of the arrangement between the Government and Pernix. We were told from the bar table that Unelco did not ascertain the terms of the MOU until about late April 2011. Documents before the Court do not indicate when or in what circumstances Unelco received that information. The MOU then received by Unelco was marked Draft 3 – Final.

20. After Unelco had filed its application at Court it learned that there had been an event on 14th December 2010 which Unelco now characterises as another relevant decision by the Government which introduced the second respondent, Vanuatu Infrastructure and Utilities Limited (VIU) as the named concession holder. Unelco gained this knowledge on 16th September 2011: see below.

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21. To complete the background, in December 2010 Unelco as it was obliged to by its contractual arrangements with Government arranged to hand-over possession of the electricity infrastructure relating to the Luganville Concession including expending substantial time corresponding with arms of Government concerning issues such as the valuation of assets and compensation and other hand-over issues.

22. On 1st January 2011 VIU, a wholly owned local subsidiary of Pernix commenced to operate and manage the Luganville Concession. (The Tender Rules required that the Concession be operated by a single legal entity registered in Vanuatu.)

THE PROCEEDINGS

23. On 24th May 2010 Unelco's initiating proceeding were lodged at Court to seek judicial review of the decision of the Council of Ministers made on 17th November 2010. In the proceedings VIU was named as the second respondent. By this time it seems Unelco had ascertained by its own endeavours that VIU was the company exercising the Concession.

24. The Supreme Court conducted preliminary conferences preparing the application for an extension of time for hearing. Orders were made for pleadings and for sworn statements to be filed. A defence was filed by VIU on 16th September 2011.

25. Paragraph 5(b) of the Defence admitted that VIU was a wholly owned subsidiary of Pernix. Paragraph 5(g) and (h) read:

    "(g) Until 'completion' as defined under the Bid Rules [the Tender Rules] Pernix has the right pursuant to 4.2 of same to appoint a SPV [Special Purpose Vehicle] and have done so accordingly and within time.

    (h) Such nomination of VIU as the SPV was confirmed by the First Defendant [the Government] in writing on 14th December 2010 executed by the Honourable Sato Kilman as Prime Minister and acts as ratification of the pre-incorporation contract entered into by Pernix as parent of wholly owned subsidiary VIU. "

26. This pleading is the first knowledge gained by Unelco that there had been a second Government decision relating to the grant of the Concession, it being

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a decision which introduced VIU as a contracting party. This disclosure led to Unelco seeking leave by written application dated 28 October 2011 to file and serve an amended claim to include judicial review and quashing of the Government's decision on 14th December 2010.

27. General directions for disclosure of documents by all parties was ordered, and a hearing of Unelco's application for leave to extend time was listed on 6th and 7th December 2011. We are told from the bar table that very extensive lists of documents were filed very close to the hearing date, and that inspection commenced on the day before the hearing. Plainly the parties were handicapped by the shortness of time in placing before the Court complete documentary accounts of many of the steps taken by the Government in the tendering process, and by Unelco in its response to the decisions leading up to the lodgement of papers with the Court on 24th May 2011.

REASONS FOR JUDGMENT IN THE SUPREME COURT

28. ***(a) THE 14th DECEMBER 2010 – A NEW DECISION***

The Application to amend to raise this decision was put to one side. At the outset of his Reasons the Judge noted:

"4. UNELCO and VUI also sought orders and directions in relation to other matters including the amendment of the claim and for specific discovery by the Republic. It was agreed, however, that those additional matters could conveniently await the outcome of the opposed application to extend time.

5. However, it is timely to note a point raised by Mr North. That is, that the MOU was apparently "ratified" by the Prime Minister on 14 December 2010. UNELCO sought to amend its claim to include the apparent decision of the Prime Minister to "ratify" the MOU on 14 December 2010 on the basis that it was arguable that this "ratification" amounted to novation and that this should be the decision that is subject to review. If that is so then, of course, this proceeding was commenced within time. I will return to this issue in due course."

29. Later, when the Judge returned to this issue, he said:

"16. I mentioned earlier that UNELCO asserted that there may have been novation by the ratification of the Prime Minister of the MOU on 14 December 2010 – that is, 28 days after the Council of Ministers had

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agreed for the Government to enter in the MOU and 26 days after the Prime Minister of the day had executed that MOU. The obvious and only plausible explanation for that rectification (sic) of a contract already executed by the Prime Minister is there had been a change of Prime Minister in that intervening period. I am unable to understand what legal effect this (so called) "ratification" could possibly have had on either the contract (the MOU) or the decision under review. It may have been helpful for the contracting parties to know that the new Prime Minister supported the MOU but I fail to see that this could amount to novation given that essentially this contract had been in place for some 26 days by that time."

30. ***(b) THE VALIDITY OF RULES 17.5 and 17.8***

The Judge noted that the possible invalidity of Rule 17.5 had been faintly raised by Unelco but not pursued beyond a brief reference to a text book which said, without reasons, that it was doubtful if the rule making power permitted such a rule. The validity of the rule was not further discussed nor was the possible invalidity of Rule 17.8 raised.

31. ***(c) SUBSTANTIAL JUSTICE AND EXTENSION OF TIME***

Dealing with the CPR provisions the Judge said:

"30. Part 17 of the Civil Procedure Rules deals with judicial review. It is immediately apparent from a consideration of Part 17 that the jurisdiction for judicial review is of a special nature. Not only must a claim for judicial review be made within 6 months of the decision (Rule 17.5) but there are also prescribed time limits imposed for service of the defendant (28 days from filing – Rule 17.6) and the filing of the response (14 days – Rule 17.7). However, of far greater significance to any consideration of the special nature of the judicial review jurisdiction is to be found in Rule 17.8.

.....

31. While, strictly speaking, such a conference has not been convened, the initial focus being on the application to extend time, all matters required to be canvassed at the conference by Rule 17.8 were addressed extensively in the course of the hearing of this application to extend time. It is of significance that the Judge considering those matters under 17.8(3) <u>is directed not to hear the claim</u> unless he is satisfied as to all those considerations and not just some of them. By 17.8(5), if the Judge at the conference (not even at the hearing) after considering the papers and hearing argument from the parties is not satisfied about the matters set out in 17.8(3), the Judge is directed to decline the claim and to strike it out. Of course, this is an extraordinary approach in comparison with the manner in which other claims before the Court are required to be addressed. It highlights and emphasises the special nature of the judicial review jurisdiction which clearly requires a robust approach to be taken by the Judge or the Court.

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32. *The principal reason for this special approach is obvious. What is being attacked is a decision usually of a Government official relating to matters involving the governance and administration of the country."*

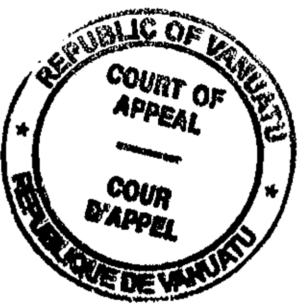
32. Various decisions were discussed concerning the relevance of delay in judicial review claims and which identified factors relevant to deciding whether delay should disqualify a litigant, or be excused. The judge considered all the various factors were relevant considerations in determining the "substantial justice" of the matter including the explanation for delay, the absence of prejudice, the merits of the substantial application, fairness and the requirement of the business of the Government for certainty and finality. The Judge added as an additional consideration the nature of the actual decision under review and the circumstances in which the Court had been asked to consider a review. These considerations, however, he said, "must all be secondary to the consideration of the actual decision and the need for Government to be able to govern with certainty".

33. The Judge noted a concession made by VIU that it was at least arguable that the Government may not have followed all the requirements of the GCT Act. (Before this Court it was agreed that the Government had made a similar concession, although the judgment notes otherwise). Notwithstanding that concession, the Judge considered Unelco had consciously delayed instituting proceedings after it obtained in-house legal advice on 17 March 2011 which questioned the legality of the concession granted to VIU. The Judge concluded:

"49. I do not consider, as a matter of substantial justice, that time should be extended. I consider that Unelco has sat on its rights. A decision has been taken at the highest level of government (by the Council of Ministers) to deal directly and privately with VUI in what can only be described as exceptional and urgent circumstances.That decision should be permitted to stand.

50. Indeed, if the claim had been made within time and this matter had been argued before me at a Rule 17.8 conference, I would have declined to hear the claim and I would have accordingly struck it out. It is unnecessary to take that step as the claim fails from the outset."

CONTENTION ON APPEAL



34. Unelco contended that CPR 17.5 in so far as it purports to impose a time limit is beyond the rule making power said to support it, and is invalid. For similar reasons it was suggested that Rule 17.8 might be invalid if it supports what Unelco describes as the draconian dismissal of its application for an extension of time. If Rules 17.5 and 17.8 are valid Unelco contends that the Supreme Court erred in its application of Rule 17.5 by taking into account issues that fell for consideration at a later stage under Rule 17.8, and moreover exercised its discretion to refuse leave on a misunderstanding of certain factual matters.

35. Further, if it were relevant to consider Rule 17.8 on the application for an extension of time, Unelco argued that it clearly met the requirements of paragraphs 17.8(a), (b) and (d), and that there had not been undue delay in making the claim for review.

36. Although concessions had been made by the respondents that allegations of irregularity in the Tender process were arguable, much time was spent before this Court canvassing the nature and seriousness of the alleged irregularities to demonstrate that the merits of the substantive claim were not merely arguable, but very strong.

37. Both respondents sought to uphold the judgment under appeal. Both respondents contended that Rules 17.5 and 17.8 are valid. Both respondents contended that the essential steps taken by the Government in the tendering process were authorised in accordance with law, and while certain irregularities were possibly arguable, an assessment of the likely merits points strongly to validity of the process. The Supreme Court came to the correct decision.

CONCLUSIONS

38. For ease of understanding this judgment, we propose first to set out our ultimate conclusions, and then set out the reasons for them.

39. ***(a) THE DECISION OF 14th DECEMBER 2010***

We consider the application before the Supreme Court could not be properly determined without first considering the proposed amendment to challenge the decision of 14th December 2010. The application to add that decision to

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the review was one that should have been granted, and when granted it would have been a decision challenged in time under Rule 17.5. The decision of 14th December 2010 was intimately associated with the decision of 4th October 2010 and with the Tender process generally. Once both decisions were challenged, there would have been overwhelming reason to grant an extension of time to review the decision of 17th November 2010.

40. ***(b) RULES 17.5 and 17.8***

We consider these Rules were validly made under the rule making power as it existed under the now repealed Courts Act [CAP.122], and as it exists under the Judicial Services and Courts Act [CAP.270].

41. ***(c) RULES 17.5 AND SUBSTANTIAL JUSTICE***

We consider that under Rule 17.5 substantial justice requires that an extension of time should in any event have been granted without embarking on a detailed consideration of the matters for consideration under Rule 17.8.

42. ***(d) RULE 17.8 MATTERS***

Strictly speaking the issue before the Court of Appeal is the decision to refuse an extension of time under Rule 17.5(2). However, as the parties both before the Supreme Court and this Court have entered into a detailed consideration of Rule 17.8 matters, and as the Supreme Court has held that under Rule 17.8 the case should be struck out, we identify prominent issues that indicate that a full review on the merits should take place both of the decision of 17th November 2010 and the decision of 14th December 2010. It is not for this Court, on this appeal, but for the Supreme Court on hearing the full review, to decide the merits of the review including the issue of delay and other contentious issues we identify.

REASONS FOR CONCLUSION

43. ***(a) THE DECISION OF 14th DECEMBER 2010***

Where the institution of a substantive claim requires prior leave of the Court, the date of commencement of the substantive claim is taken as the date when the application for leave is filed. That date is when the claim is effectively submitted to the Court for determination according to law. As we have already noted, the substantive claim for judicial review of the decision

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of 17th November 2010 is to be treated as having been made on 24th May 2011.

44. When an amendment is made to proceedings which introduces a new cause of action the claim in respect of that cause of action is generally treated as relating back to the date on which the proceedings were first commenced: **Sneade v. Wotherton Barytes & Lead Mining Co Limited** [1904] 1 KB 295–297 (the "relation back" theory). An exception to this general principle was long recognised by another rule of procedure that an amendment would not be allowed if it were to introduce a new claim that would otherwise be statute barred: **Weldon v. Neal** (1887) 19 QBD 394.

45. The strictness of the rule in **Weldon v. Neal** has been much modified over time. In the United Kingdom, the Rules of the Supreme Court were amended in 1964 by the introduction of Order 25 rule 5 which relevantly allowed the introduction or substitution of a new cause of action which would otherwise have been out of time if it arose out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. See RSC O.25 r.5(5) and Halsbury's Laws of England, 4th Edit., Vol.37 at para. 277.

46. At the time when RSC O.25, r.5(5) came into force, the practice and procedure in Vanuatu was primary governed by the High Court (Civil Procedure) Rules 1964 promulgated by the Western Pacific High Commission. These Rules were sub-delegated legislation made under the authority of the Western Pacific (Court) Order in Council 1961 which in turn was made under the authority of the Foreign Jurisdictions Act 1890 of the United Kingdom: see "Civil Procedure and Courts in the South Pacific", 2004 by Jennifer Corrin Care. Where the High Court Rules were silent on a matter the practice and procedure laid down in the English Rules of the Supreme Court were applied in Vanuatu: See Order 71 of the High Court (Civil Procedure) Rules 1964.

47. As at the date of Independence, the rule in **Weldon v. Neal** did not apply in Vanuatu where a new cause of action sought to be introduced by amendment arose out of the same or substantially the same facts as the

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cause of action already pleaded. That was the state of British Law applied in Vanuatu at Independence and which continued to apply after Independence by virtue of Article 95(2) of the Constitution.

48. The CPR came into force on 31 January 2003. They applied to all civil proceedings in the Supreme Court (r.1.6). Where the CPR do not deal with a proceeding or a step in a proceeding the old rule – the High Court (Civil Procedure) Rules 1964 – do not apply and the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice (r.1.7). The CPR permits the courts to order the joinder of several claims in one proceeding if a common question of law or fact is involved in all claim (r.3.3), and the Court may give leave to amend a statement of the case (r.4.11(1) and (2)). 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 awarding costs, extending the time for anything to be done or adjourning the proceedings (r.4.11(3)). These provisions of the CPR allow for joinder of causes of action which in substance arise out of the same or substantially the same facts, but do not go as far as RSC O.25 r.5(5) which additionally provides that joinder of a new cause of action may occur even where the new cause of action would be out of time if a fresh proceeding were commenced. However, as that additional power was an established rule of procedure in Vanuatu when the CPR came into force we consider it continues to be part of the procedural law of Vanuatu which applies to Unelco's application to amend.

49. We consider that by application of the theory of "relation back" the application for leave to add the decision of 14th December 2010 to the review would, if granted, have meant that the claim for review of that decision was within time under Rule 17.5.

50. We consider that the claim for review of the 14th December 2010 decision plainly arises out of the same or substantially the same facts as the claim for review of the decision on 17th November 2010. In both cases the central issue is whether the tendering process required by law has been followed. The tendering process if validly conducted was the process that gave lawful authority to the Council of Ministers to in turn authorise the Prime Minister to

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execute the MOU granting the Concession. The tendering process did not conclude until the Concession was finally granted to VIU by the decision of 14th December 2010. That being so the two decisions should be viewed as part of a single administrative process that culminated in the grant of a Concession to VIU. To undertake and determine a review of that process it was necessary for the Court to review the whole process including both decisions. This provides an overwhelming reason why the application for leave to amend should have been dealt with, and granted, before the Supreme Court turned to consider the application under Rule 17.5(2) in relation to the decision of 14th November 2010. Had it done so, for the same reasons there would have been overwhelming reason to grant the extension of time.

THE VALIDITY OF RULES 17.5 and 17.8

51. Essentially this question turns on whether these provisions of the CPR are rules concerning the practice and procedure of the Supreme Court, the civil jurisdiction of the Supreme Court or are incidental to such matters. These descriptive subject matters are the relevant heads of rule making power prescribed in s.30 of the former Courts Acts [CAP.122] and in s.66 of the Judicial Services and Courts Act [CAP.270].

52. Unelco contended that because Rule 17.5(2) (and Rule 17.8, depending on its application in a particular case) has the effect of barring a remedy for unlawful administrative action the rule is substantive in nature and not procedural, and therefore not a rule relating to practice or procedure.

53. The distinction between laws that are substantive and those which are procedural is a difficult one to apply, particularly in a case concerning laws which deal with time limits. As the majority of the High Court of Australia observed in **John Pfieffer Pty Ltd v. Rogerson** (2000) 200 CLR 503 at [97]: *"There is much history that lies behind the distinction, but search as one may, it is very hard, if not impossible, to identify some unifying principles which would assist in making a distinction in a particular case".*

54. To illustrate the difficulty, the highest Courts in the United Kingdom and in Australia have described statutes of limitation which impose absolute time

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limits beyond which a plaintiff cannot bring a claim as adjectival (procedural) in nature, although once the time expires and a bar to further action vests in the defendant, the defendant obtains a substantive right. See **Yew Bon Tew v. Kenderaan Bas Mara** [1983] 1 AC 553 at 563, and **Maxwell v. Murphy** [1957] 96 CLR 261.

55. In the present case, unlike many that have discussed the dichotomy, the time restraint appears in a rule of court, not in an Act of Parliament dealing mainly with substantive rights. Rules of court are in their very nature rules generally relating to practice and procedure of the Court to which they apply. In **McKain v. R W Miller & Co.[SA] Pty Ltd** [1991] 174 CLR 1 at 48-49, Mason CJ characterised as procedural those rules which are directed to governing or regulating the mode and conduct of court proceedings. Rules of this type stand in contrast with rules, such as statutory time limits governing personal injury damages claim, which Deane J in **McKain** at 359 said are not directed to regulating court proceedings in any real sense.

56. In **John Pfieffer** at [192] Callinan J posed a test which we think is apt and useful in the present case:

"In my opinion what should be regarded as procedural are the laws and regulations which are reasonable and necessary in the lex fori for the conduct of the action only; that is to say the laws and rules relating to procedures such as the initiation, preparation and prosecution of the case, the recovery process following any judgment and the rules of evidence."

57. That test based on reasonable necessity accords with the rule making power under which Rule 17.5 is made. That power extends to rules "incidental to" the primary power to make rules concerning the practice and procedure of the Supreme Court.

58. A similar test was suggested long ago in **Poyser v. Minors** [1881] 7 QBD 329 at 333 where Lush L J said the rules of procedure are rules that aid the court to "administer [its] machinery as distinguished from its product".

59. Rule 17.5 is a rule regulating the initiation of a case. As to the reasonable necessity for it, the rule is reflective of rules of court common in English law countries. For example, a time limit of three months governs the commencement of judicial review proceedings in the United Kingdom, and a

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short time limit has traditionally been applied in the past to proceedings by way of prerogative writ. The special nature of judicial review proceedings, which put at risk the finality and certainty of government and public authority decisions, reasonably requires that decisions be challenged promptly.

60. In the present case there is a further matter that persuades us that Rule 17.5 is a valid rule concerning practice and procedure. The time limit in Rule 17.5 is a rule similar in purpose to Rule 17.6 that requires the proceedings, once issued, to be served within 28 days. Moreover, the time limit in Rule 17.5 is not absolute. It imposes a timeframe for the institution of a claim, but it is then subject to a discretion to extend. We consider this is strongly indicative of a rule governing procedure, not one vesting a substantive right in a defendant.

61. The challenge to the validity of Rule 17.5 (and inferentially to 17.8) fails.

RULE 17.5 AND SUBSTANTIAL JUSTICE

62. Had the decision of 14th December 2010 not become an issue bearing on the outcome, we consider that an extension of time should in any event have been granted under Rule 17.5(2) to make the claim in relation to the earlier decision.

63. When Rules 17.5 through to 17.8 are read together we think the steps anticipated by them indicate that the matters for consideration by the Court under Rule 17.5(2) are quite different from those arising under Rule 17.8. Rules 17.5 deals with the commencement of a claim, an event entirely in the hands of the claimant. Rule 17.6 requires service of the claim. Service introduces the defendant to the claim. Rule 17.7 requires the defendant to file a defence which details grounds for disputing or supporting a claim together with a sworn statement. These procedures are intended to put the interest of the defendant before the Court. Then follows, as soon as practicable, a conference called by the Judge under Rule 17.8. It is at that point that the matters listed in Rule 17.8(3) arise for consideration.

64. The sequential structure of the Rules indicate that at the Rule 17.5(2) stage the interests of the defendant are not the concern of the Court and the time for considering the Rule 17.8(3) matters is yet to arise. If the claim is not

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brought in time, the primary question for consideration under Rule 17.5(2) is why the claimant has not met the time limit. The question of substantial justice is to be assessed from the claimant's stand point. A similar construction was placed on the rules under consideration by the House of Lords in **Reg. v. Criminal Injuries Board**, **Ex parte A** [1999] 2 AC 330. That case concerned an application for judicial review governed by the English Rules of the Supreme Court. RSC, O.53, r.4 required an application to be made promptly and in any event within three months *"unless the Court considers there is good reason for extending the period..."*. The House of Lords said at 341 that when considering the power to extend time the "good reason" is to be seen from the standpoint of the Claimant. Rule 17.5(2) envisages an ex parte application by the claimant (see **Reg. v. Criminal Injuries Board** at 341). This emphasises that the r.17.5 application was to be considered from the claimant's perspective.

65. The Rule 17.8(3) matters arise when, and not before, the defendant is before the Court after the claim is filed and served. The host of considerations enumerated by the Judge in this case as relevant to granting leave under Rule 17.5 were for the most part irrelevant as they concerned the defendants and broader questions relating to the need for finality and certainty in good governance. These were matters for later consideration.

66. In the present case we consider the short time between the elapse of the six months limit and the filing of the papers at Court was a strong reason in favour of an extension of time. Notwithstanding the well recognised importance of finality and certainty in government decision-making, the Rules allow that a public authority may not be appraised of an attack on the validity of a decision for up to seven months – six months under Rule 17.5 and a further 28 days under Rule 17.6 until the proceedings are served. Here the claim was notified to the defendants within that timeframe. Coupled with the claimant's explanation that definitive legal advice had not been received until the day the application was lodged at Court this should have led to an extension of time.

67. In this instance the defendants were at Court and were heard on the application to extend time. Even so, the issue at that point was confined to

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that arising under Rule 17.5(2). Wider considerations of possible merits, undue delay and possible prejudice from the defendants' view point were not at that point relevant. They were for the later conference stage.

CONSIDERATIONS OF RULE 17.8(3) MATTERS

68. On the hearing of this appeal this Court was presented with many arch-lever folders of papers going both to the facts of the case and the legal principles involved. The material demonstrates the complexity of issues raised in the substantive claim for judicial review, especially concerning the many steps in the tendering process.

69. In the course of argument, counsel for each of the parties complained that late disclosure and inspection hampered the presentation of evidence on which the merits should ultimately be judged.

70. This case provides a good illustration why in complex matters a Court should be very wary about embarking on a merits assessment of disputed facts and difficult questions of law at the interlocutory stage.

71. In this case the judge expressed conclusions about important contentious issues that may ultimately be crucial to the outcome, for example that the Prime Minister's *"ratification"* of the grant of the concession to VIU was, in effect, an irrelevant formality, and that the decision to grant the concession to VIU *"had been taken at the highest level of Government (by the Council of Ministers)"*, by implication validly so. These were issues upon which a full trial was necessary after the parties had sufficient time to digest the sufficiency and content of the disclosed documents, and pursue others that were not disclosed in the first round of disclosure. For example, even now it seems the minutes of meetings of the Council of Ministers concerning the grant of the concession to VIU have not been located.

72. It is important on this appeal that this Court not express conclusions on matters going to the ultimate decision on the merits. It is for the trial judge in due course to make findings on the evidence then available. We simply do no more than identify several issues that indicate to us that attacks made on the validity of the tendering process and the decisions in questions, as well as the question of *"undue delay"*, are serious ones that justify the Court

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hearing them. Many other issues were raised by counsel for each of the parties in argument, but this is not the occasion to attempt to resolve them.

73. The Government and VIU contend that the tendering processes which were followed were valid in essential respects at all stages and irregularities, if any, along the way are not matters of any real consequence, that are to be excused under s.13 of GCT Act which deals with breaches of the tender process which are of a minor, trivial or technical nature.

74. Unelco makes many challenges to the process, and stresses s.7 of the GCT Act which provides that a Government Contract entered into in breach of the provisions of the Act will be void, of no effect and will not be binding on the State.

75. When the CTB met on 4th October 2010 and approved a selective tender process Unelco contends that in reality the CTB cancelled the tender process which had been underway until then because it had not enabled the CTB to make a recommendation to the Council of Ministers. Section 12 (1) of the GCT Act says:

    "The Board must recommence the tender process when it cannot make a recommendation or its recommendation is declined by the Council".

    Unelco contends that the CTB was required by this provision to recommence the tendering process, not resort directly to a selective tender. This is a contentious issue of importance.

76. Moreover, the CTB's decision on 4th October was to approve the use of a selective tender process for the purpose of appointing an operating and management operator for a period of 6 to 12 months with options to retender when market conditions improved in 2011 and 2012.

77. At its meeting on 1st November 2010 the CTB approved the appointment of Pernix to operate and manage the Luganville electric generation with an option to negotiate as provided for in a draft MOU. The material before the Supreme Court identifies a draft MOU dated 27th October 2010, the document entitled Draft 1. On 29th October 2010 the Government's Principal Energy Officer wrote to the CTB requesting that the CTB meet urgently *"to*

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consider the option of giving Pernix the O and M responsibilities. This means that the Government needs to sign a MOU with Pernix for this arrangement. This is not a concession but a MOU for 6 to 12 months but with the option for a longer term contract." Unelco argues that it was Draft 1 that was provided to the CTB at its meeting on 1st November 2010, and that it was Draft 1 that the CTB approved. Draft 1, clause 3 (a) relevantly provided:-

*"3 . **Key Terms***

(a) New Concession Deed:

i. The parties will use their best endeavours to finalise the negotiation and execution of the New Concession Deed prior to the Commencement Date, and in that event, the New Concession Deed will apply from that date.

ii. If the New Concession Deed is not finalized and executed by that date, then until the finalization and execution of the New Concession Deed, the Draft Concession Deed will apply except for:.............."

Clause 3 (c) went to provide:-

"(c) Initial Operating Period:

i. Pernix agrees that it will provide the O&M Services during the Initial Operating Period...".

78. The Commencement Date was 1st January 2011 and the Initial Operating Period ended on 31st August 2011 – a period of 8 months. It will be remembered that by letter dated 18th November 2010 Unelco was advised that the Council of Ministers had awarded a Luganville Concession to Pernix for a period of 8 months from 1st January 2011.

79. The effect of the above provisions of clause 3 of the MOU Draft 1 was not only to give Pernix O&M responsibilities for the 8 month period, but a right to negotiate and finalise a New Concession Deed. As we understand the argument before us the Draft Concession Deed, the subject of negotiation, is not identified in the material presently disclosed to Unelco.

80. When a copy of a MOU was made available to Unelco (we are told from the bar table in about late April 2011) the document provided was one entitled Draft 3 – FINAL 18th November 2010". That document is in its terms radically different from Draft 1 in many respects. For present purposes it is sufficient to refer to the terms of clause 3 which had changed to read:-

*"3. **Key Terms***

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(a) *Option:*
   (i) *Pernix may, on or before the end of the Initial Operating Period, Elect to take the new Concession on the terms contained in the New Concession Deed.*
   (ii) *Pernix may, on or before the end of the initial Operating Period, negotiate with GoV to take the New Concession on such other terms as may be agreed by the Parties."*

81. Its new form clause 3 (a) (i) granted Pernix an unqualified option to take the New Concession Deed if it could not negotiate more favourable terms, and whilst the identification of the New Concession Deed amongst the disclosed papers is, we are informed, still uncertain it is common ground that the deed provides for a 20 year concession. The MOU Draft 3 also provides for a US$150,000 upfront mobilization fee. A new clause 9 (a) of MOU Draft 3 had no equivalent in Draft 1. That clause includes a provision which reads:

*"**9. General***
(a) *A party must not assign or novate this MOU .....The parties however acknowledge that Pernix intends to do business in Vanuatu through a wholly-owned subsidiary and approval by Gov to the assignment of this agreement to such a subsidiary will not be unreasonably withheld provided the obligations of the subsidiary are guaranteed by Pernix in a form reasonably satisfactory to Gov."*

82. By letter dated 18th November 2010 the Secretary of the Council of Ministers advised the Prime Minister that at their meeting No. 16 they approved MOU Draft 3 and agreed that it be signed by the Prime Minister. The MOU Draft 3 before this Court is signed by the then Prime Minister, Edward Nipake Natapei.

83. The Minutes of the Council of Minister's meeting No.16 we are told have not been located.

84. The materials presently before the Court suggest that the CTB approved MOU Draft 1. There is no evidence that the CTB approved the terms of Draft 3.

85. When Unelco was advised on 18th November 2010 that the CTB had decided to grant Pernix an operating Concession for 8 months there was no suggestion that rights beyond 8 months were being granted to Pernix. However, in what circumstances and under what authority the terms of the MOU Draft 1 moved to those of MOU Draft 3 is not presently disclosed.

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Whether the Prime Minister on 19th November 2010 was lawfully authorized to sign MOU Draft 3 with Pernix is contentious and poses important issues for review and determination. The documents presently before the Court do not establish the validity of a decision to enter into MOU Draft 3 with Pernix *"at the highest level"* as the judge concluded.

86. Another contentious issue arises having regard to clause 9 of the MOU Draft 3. That clause suggest that there was a decision of Government on 14th December 2010 to novate or separately to assign the MOU to VIU, and that the execution of further documents by the Prime Minister that day was not merely a ratification of no real significance to rights and obligations already vested in the parties by the earlier MOU with Pernix. Again the chain of approvals leading to the authority of the Prime Minister to enter into a Government Contract with VIU is contentious and raises a serious question for review.

87. VIU contends that the process which led to private negotiations by the Government with Pernix was permitted under the Tender Rules. These were the rules that formed part of the Final Procurement Plan: see paragraph 10 of this judgment. These rules appear not to be a legislative instrument, but at best are contractual rules. VIU relies on clause 27.2 of section C which reads:-

> "27.2 *If no Proposals are received, or all Proposals received are Non-Compliant Proposals and, after consideration by MoL as contemplated by Article 1.1 above, are rejected, the Tender will be terminated. In such cases, at the discretion of the MoL, there may be a re-Tender or the MoL may open negotiations with some or all Bidders in relation to their Proposals."*

88. The effect of clause 27.2 in the manner contented for by VIU is for several reasons contentious. There is a question whether the Tender Rules survived the decision of the CTB on 4th October 2010 which Unelco contends terminated the tender process and under s. 12 of the GCT Act required the CTB to recommence the tender process. If clause 27.2 continued to operate after 4th October 2010 Unelco contends that Pernix was not a *"Bidder"* who made a *"Proposal"* within the meaning of the clause. Again these are important contentious issues justifying review. For similar reasons Unelco argues that clause 4.2 of section B of the Tender Rules which VIU relies on

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to authorize the *"ratification"* of a concession to VIU would have no application.

89. Finally we identify other issues of sufficient importance for a full hearing arising on the question of *"undue delay"* which might in any event lead to Unelco being denied on discretionary grounds any order interfering with the grant of the concession to VIU.

90. Whether delay by Unelco in making the claim for judicial review was "undue" is likely to depend in part on when it became aware that the Government was negotiating with another party and that it was at serious risk of losing the concession. Unelco realized Pernix representatives were present at the site inspection which occurred in October 2010. Unelco was advised of the grant of the concession to Pernix in November 2010, although the advice was in respect of an 8 month concession. Unelco is a large multinational company with an in-house legal department. It will be a contentious issue why the company did not seek to challenge the November decision in late 2010, perhaps by seeking an interlocutory injunction to hold the position so that Unelco did not have to vacate the Luganville infrastructure until judicial review could take place. It is known that Unelco received in-house legal advice on 17th March 2011 which raised questions about the legality of the 17th November 2010 decision. Whether the reasons advanced by Unelco for deferring further action on this advice until 21st April 2010 when it sought further legal advice from Melbourne lawyers provides a reasonable excuse for delay raises another serious question. (Unelco says its attention was focused in that time on other arbitration proceedings).

91. The fact that Unelco did not receive the MOU Draft 3 and learn of the VIU's option to take a 20 year concession until late April 2011 may be of importance in deciding whether delay whilst they obtained further legal advice from Melbourne before making a claim for judicial review was "undue". It will also be relevant that from 1st January 2011 VIU had moved into the Luganville infrastructure and that review proceedings were unlikely to be concluded before the expiration of an 8 month concession, so there was no immediate urgency in the early part of 2011 about securing an ongoing supply of electricity.

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92. The issues we have identified above require that there be a hearing of the claim for judicial review.

93. The appeal will therefore be allowed. The orders of the Supreme Court made on 15th February 2012 are set aside. The matter will be returned to a judge of the Supreme Court to manage the case to trial. Lest there be any doubt, we consider the steps which have already occurred fulfil the requirements of a rule 17.8 conference. The matter has moved beyond that stage. The appellant is entitled to its costs of the appeal. We consider that those costs should be equally borne between the respondents, and we so order.

DATED at Port-Vila this 4th day of May 2012

ON BEHALF OF THE COURT

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....
Vincent LUNABEK
Chief Justice