

- (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.

4. It should be noted that the Judge must be satisfied on all the issues in Rule 3(a) to (d) and if the Judge is not satisfied about any one issue then he must decline to hear the case and strike it out.

5. The first issue for consideration is does OPL have an arguable case ? It is not necessary at this stage to minutely examine the evidence or the arguments for and against. The function of the judge is rather like that when considering whether there is a prima facie case in a criminal matter. It is not necessary to consider the strength or otherwise of the arguments for and against, just whether there are sustainable arguments. I have no doubt in this case that OPL has an arguable case.

6. Next the issue is whether OPL is directly affected by the decision being challenged. This question was considered by the Solomon Islands Court of Appeal Court which held ¹ :-

"In the Court's view it is plain from the foregoing provisions and jurisprudence in the common law world that an interest capable of protection in judicial review is not necessarily confined to "legal or equitable rights", but may also apply to other personal interests deserving protection by the courts in their exercise of public law jurisdiction. These may, depending on the circumstances, include statutory rights or legitimate expectations or matters of customary law, especially where, as in the Solomon Islands, they are given constitutional recognition, and, of course, other interests such those of a private injury flowing from a public wrong."

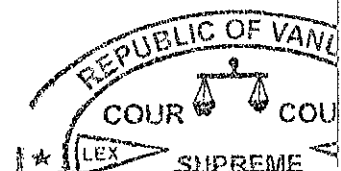
Bearing those comments in mind it seems clear to me that OPL is directly affected by the decision being challenged.

7. Turning now to the question of whether there has been delay, with regard to Rule 17.5 which requires a claim to be made within 6 months, the answer is of course yes. OPL had to apply for leave to file their claim late. However the matter to be addressed in Rule 17.8 is whether there has been undue delay. As has been made clear by the Court of Appeal ² :

"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

¹ *Axiom KB Ltd v SMM Solomon Ltd* [2012] SBCA 22; CA-CAC 28 of 2011 (24 March 2012)

² *Union Electrique Du Vanuatu Ltd v Republic of Vanuatu* [2012] VUCA 2; Civil Appeal 07-12 (4 May 2012)



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.”

8. In considering whether there has been undue delay it is not simply a question of how long the delay has been. The Court does not simply examine delay in itself it is required to consider whether any delay has been undue. That entails more than just calculating the passage of time because even a short delay can be an undue delay.

9. In this case the decision under challenge was contained in the Director's letter dated 6th October 2016. There is no suggestion the letter did not come to OPL's attention almost immediately. Indeed, OPL replied to the Director the next day 7th October 2016. It was a detailed 7 page response. There were also Emails passing back and forth between OPL, the Director and the (then) Minister. Those Emails appear to have been copied to many other people. The upshot was direction by the Minister to delay implementation of the decision to allow further discussion.

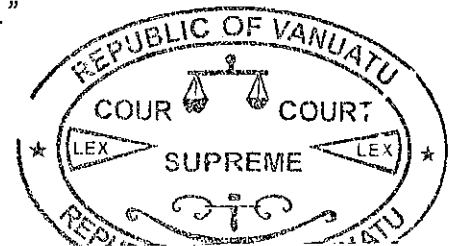
10. There was further correspondence and contact between the Minister and OPL. This seems to have been accepted as comprising an appeal to the Minister to cancel or suspend the decision by the Director. The Email from OPL to the Minister dated 17th March 2017 refers to an appeal. The one from the Minister to OPL dated 12th May 2017 also refers to an appeal. There clearly was an appeal underway. My understanding of the evidence and submissions is that there has been no decision on that appeal.

11. Basically what OPL says is that any delay was due to it waiting for the Minister's decision. I can understand an initial delay (see paragraph 9 above) in filing the claim after the 6 month period set out in Rule 17.5 but it must have been obvious to OPL by June 2017 at the latest that nothing was happening. The Emails and the letter from OPL's legal advisers in May/June 2017 make that clear. The claim should have been made and pursued at that time. There is no explanation why OPL waited well beyond that time to make its claim. I find that in terms of Rule 17.8 there has been undue delay.

12. In arriving at the finding I also take into account the fact that the licences (the subject of the Director's decision) had expired by then. They appear to have expired in late 2016. The Court is faced with a similar situation as that in *Kalsakau v Wells*³ :-

“As well as that the Minister's powers in s.26 are predicated on the existence of the threat of a serious disruption of, or interference with the maintenance or management of an essential service. While such may have existed in late August 2005, there is nothing to indicate that that sort of situation exists now. So there is something unreal in litigating now to require the Minister to exercise a power given to him to exercise in relation to a threat of disruption to an essential service which existed over a year ago, but which has long since passed. For this reason, even if the claimants made out their case, it is quite likely that in its discretion, the Court would decline to grant the mandatory order sought.”

³ *Kalsakau v Wells* [2006] VUSC 79; CC 097 2006 (19 October 2006)



To delay making the claim until some 10 months after the expiry of the licences is to unduly delay making the claim.

13. Even if I am wrong in coming to that view, OPL have problems in satisfying the test at Rule 17.8(3)(d). This is because they clearly have lodged an appeal with the Minister against the Director's decision, the decision they are asking this Court to review. The Fisheries Act No.10 of 2014 contains an appeal provision at section 87:

Appeals

(1) If the Director has decided to:

- (a) refuse to issue a licence or authorisation; or
- (b) suspend or cancel a licence or authorisation,

the applicant, or the holder of, a licence or authorisation may, within 30 days of being notified, by written notice, appeal the decision.

(2) *An appeal against a decision made by the Director in relation to a matter specified in subsection (1) is to be by way of a request to the Minister for a re-consideration of the decision.*


14. It is clear from OPL's reply to the Director dated 7th October 2016 that it had asked the Minister to re-consider the decision by the Director. An appeal was under way and, according to the evidence before me, is still underway. The decision to cancel or not is out of the hands of the Director. Whilst there is no set procedure for dealing with an appeal that does not negate the fact an appeal is on foot. OPL has taken advantage of the appeal process set out in the legislation.

15. The relief claimed in the Judicial Review concerns the Director only. OPL ask that the decision dated 16th October 2016 by the Director is quashed. That must be a typographical error and OPL are asking for the 6th October 2016 decision to be quashed. OPL also seeks a mandatory order against the Director requiring him to re-instate the licences. In the terms of Rule 17.8(3)(d) there is another *remedy that resolves the matter fully and directly*, i.e. a decision by the Minister in respect of the appeal before him.

16. I therefore decline to hear the claim and I strike it out in accordance with Rule 17.8(5). The Claimant will pay the costs of the defendants, such costs to be taxed on a standard basis if not agreed.

Dated this 23rd August 2018 at Port Vila

BY THE COURT


David Chetwynd *
Judge

