

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Civil
Case No. 16/760 SC/CIVL**

BETWEEN:

**Union Electrique Du Vanuatu Limited
T/As Unelco Suez**

Claimant

AND:

The Republic of Vanuatu

First Defendant

AND:

**Vanuatu Utilities and Infrastructure
Limited**

Second Defendant

Date of Hearing: February 26th 2018.

Date of Judgment: February 26th 2018.

Before: JP Geoghegan

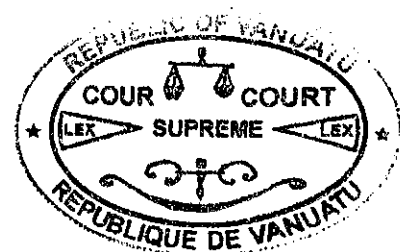
Appearances: Counsel - Mark Hurley for the Claimant

Counsel - Kent Ture (SLO) for the First Defendant

Counsel - Dane Thornburgh for the Second Defendant

JUDGMENT

1. The issue for determination in this judgment is an opposed application by UNELCO for leave to further amend its Supreme Court Claim. The application was filed on December 8th 2017, and seeks the inclusion of two paragraphs which effectively seek to amend the claim in a way which would enable UNELCO to claim for damages



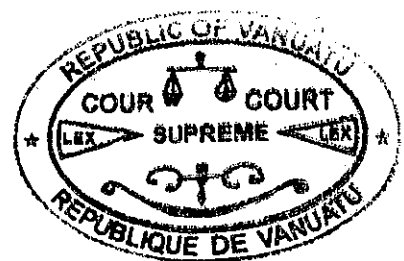
arising out of the breach of a settlement agreement between UNELCO and the State. The amendments sought are as follows:-

"32AA The breach of the settlement agreement has caused loss and damage to UNELCO being a loss of opportunity to bid in an open, competitive and transparent tender for a 20 year concession to generate electricity for the town for Luganville and related areas on the island of Espiritu Santo.

2B Damages for breach of the settlement agreement".

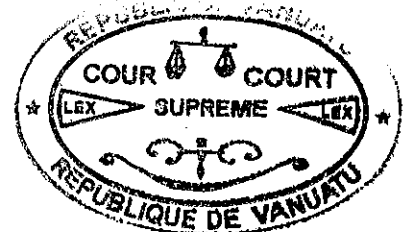
2. The State does not oppose the amendment of the claim sought by the claimant however, the second defendant VUI opposes the application. In a notice of opposition dated December 15th 2017, there was reference to submissions to be filed, the Vanuatu Civil Procedure Rules, sworn statements previously filed in these proceedings and the Limitation Act [Cap. 212] 2006.
3. Submissions were not filed and in an earlier conference I acknowledged that the matter would be dealt with on the basis of oral submissions and this hearing has proceeded on that basis.
4. The Civil Procedure Rules ("the Rules") govern the filing of an amendment of the statement of a claimants case. There has been no specific reference to any sworn statement and Mr Thornburgh acknowledged that VUI was no longer relying on the Limitation Act for the purposes of this application.
5. Mr Thornburgh's submissions really focus on the original statement of claim filed by UNELCO and what he submits is a contravention of the rule laid down in Henderson v Henderson¹, that rule being that the parties should normally not be allowed to advance in a second proceeding, matters that that party could have advanced in a

¹(1843) 3HARE 100



first. That broad rule has been applied on a number of occasions in various civil proceedings in both the Supreme Court and the Court of Appeal of Vanuatu.

6. Mr Thornburgh's essential submission is that UNELCO should not be permitted to have two bites of the cherry by now being permitted to advance a damages claim which had not previously been advanced by it.
7. To further appreciate the point being made on behalf of VUI one has to have regard to the background of this matter.
8. In the original statement of claim UNELCO made a number of claims against both the State and VUI in respect of alleged breaches of what UNELCO claims to be its right to provide electricity to Port Vila pursuant to a written agreement between UNELCO and the State and also the right of UNELCO to engage in a transparent and open tender process in respect of supply of electricity to Luganville. Part of the pleadings in the claimant's statement of claim referred to a concession granted to it by the State to provide electricity in the area of Luganville on the island of Espiritu Santo in the 20 years preceding January 1st 2011 and the fact that the State in granting, even if only on a temporary basis, the right to VUI to supply electricity to Luganville pending a tender process was in breach of the States own legislation in respect of this matter and was in breach of a settlement agreement between UNELCO and the State.
9. After filing a claim in respect of this matter UNELCO sought summary judgment against the State by way of a number of declarations. What was sought were declarations that the State had breached a deed of settlement between the parties by failing to obtain validly executed deeds of release from VUI, and that by awarding an identical memorandum of understanding to VUI the State was in breach of a settlement agreement between the State and UNELCO dated February 18th 2014. In



addition, UNELCO sought an order for specific performance of the deed of settlement.

10. It is common ground that in the original statement of claim filed UNELCO did not seek or did not plead a claim for damages against the State of VUI.

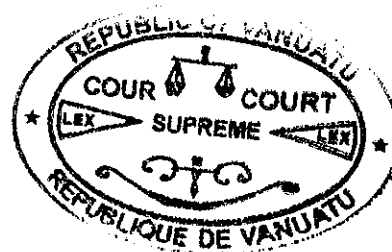
11. In a judgment issued on March 24th 2017 I granted summary judgment in favour of UNELCO. At paragraph 88 of that judgment I stated as follows:-

"Considering all of the evidence and the submissions made by counsel, I agree with counsel for UNELCO that the claim that the settlement had been breached is unassailable. The second MOU entered into was unmistakably a government contract as defined by the CCT Act. I am of the view that it is not open to argument that the second MOU constituted a "new tender" as defined by clause 1.1 of the Settlement Deed. It is clearly a "new tender" and in that regard the contract speaks for itself. Accordingly I am satisfied that the State has breached the settlement deed by failing to obtain from VUI a validly executed deed of release".

12. There are, of course, other aspects to UNELCO's claim which I do not need to specify in this judgment. It is sufficient simply to state that there are a number of issues between the parties relating to alleged breaches of the settlement agreement and breaches relating to the tender process to be undertaken to determine which company would have the right to supply electricity to Luganville.

13. Mr Thornburgh has submitted that UNELCO is simply not in a position now to amend its claim in order to seek damages when it did not earlier do so and in a situation where it sought summary judgment and summary judgment was granted.

14. While Mr Thornburgh concedes that in respect of the other outstanding issues which are raised in the statement of claim UNELCO would be able to amend its claim



and apply for damages, he submits that it cannot do so in respect of the specific matters determined during the course or as a result of the summary judgment which was issued. If the Court were to do so, it is argued by Mr Thornburgh that UNELCO would effectively be litigating matters which it could and should have litigated during the course of the summary judgment application and it is not appropriate now to give UNELCO a second bite of the cherry.

15. In support of his submissions, Mr Thornburgh has referred me to two decisions namely Nokia GMPH & Nokia UK Ltd v IPCOM GMBH & Co KG² and Nikken Kosokusho Works & Nikken Kosokusho UK Ltd v. Pioneer Trading Company & Nikken Heartech (Europe) Machinehandels GMBH³. Both of those cases involved patent matters, however both of those cases also referred to the rule in Henderson v Henderson. In Nikken Kosokusho, the Court referred to the fact that an amendment may result in a second trial causing increased and unnecessary expense to the other party and that an amendment in the circumstances in that case would be contrary to the overriding objectives of the applicable Civil Procedure Rules.

16. In Vanuatu the position is governed by the Civil Procedure Rules No. 49 of 2002, and in particular rule 4.11 which provides as follows:-

"Amendment of statement of the case

4.11 (1) A party may amend a statement of the case to:

(a) better identify the issues between the parties; or

(b) correct a mistake or defect; or

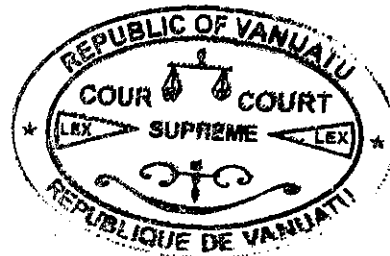
(c) provide better facts about each issue.

(2) The amendment may be made:

(a) with the leave of the court; and

² [2011] EWCA Civ 6

³ [2005] EWCA Civ 906



(b) at any stage of the proceeding.

(3) 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:

- (a) awarding costs; or*
- (b) extending the time for anything to be done; or*
- (c) adjourning the proceedings.”*

17. In addition the Court must have regard to the overriding objectives of the Rules which is set out in Rule 1.2 as follows:-

“Overriding objective

1.2 (1) The overriding objective of these Rules is to enable the courts to deal with cases justly.

(2) Dealing with cases justly includes, so far as is practicable:

- (a) ensuring that all parties are on an equal footing; and*
- (b) saving expense; and*
- (c) dealing with the case in ways that are proportionate:*

(i) to the importance of the case; and

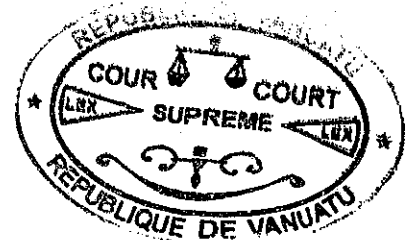
(ii) to the complexity of the issues; and

(iii) to the amount of money involved; and

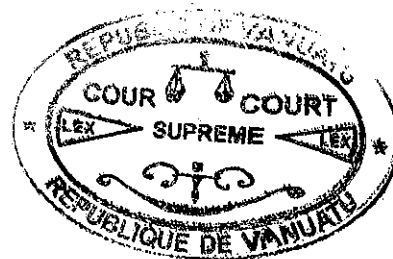
(iv) to the financial position of each party; and

(d) ensuring that the case is dealt with speedily and fairly;
and

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”



18. Having considered the authorities referred to by Mr Thornburgh, while the principle in Henderson v Henderson clearly has application in Vanuatu, I do not consider the two authorities referred to me to be particularly applicable in this case. This case involves what I had referred to in submissions with counsel as a rolling maul of litigation. The statement of claim involves a number of matters and allegations by UNELCO against both defendants. The summary judgment application sought to determine the discrete issues referred to in that application.
19. While Mr Thornburgh is perfectly correct when he submits that no application for damages was made in that summary judgment application nor in the preceding statement of claim upon which the application was based, a claim for damages would not and could not have been determined by the Court in the context of a summary judgment.
20. This is a case where it is inevitable that the Court may have to deal with the issue of an assessment of damages if other claims made by UNELCO are upheld against either or both defendants. It is not a matter where the Court has finally resolved the litigation before it. In such circumstances, I consider that the amendment sought does not offend the rule in Henderson v Henderson and does not prejudice the defendants in any way. Rather, I consider that looking at the proceedings it is inevitable that the claim, if successful, would result in a need for the Court to assess damages and it is appropriate that all relevant matters are dealt with in the context of the same litigation.
21. Accordingly I consider that the application for amendment is appropriate and will enable the Court to deal with all outstanding matters as contemplated by the rules.
22. For these reasons the application to amend the statement of claim is granted.
23. Further to that determination I make the following directions and orders:-



- a) Costs shall be costs in the cause.
- b) The claimant is to file and serve the amended statement of claim upon the defendants by 4 pm on Monday February 26th.
- c) The defendants are to file the statement of defence to the amended claim no later than 4 pm on Monday March 12th.
- d) Mr Thornburgh is advised that there are some delays in obtaining the sworn statements in support of the counter claim by VUI and accordingly I extend the time for the filing of those sworn statements to 4 pm on Monday March 26th.

24. I adjourn these proceedings to a further directions conference on Monday May 7th at 11 am.

DATED at Port Vila this 26th February 2018

BY THE COURT

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JP GEOGHEGAN

JUDGE

