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

Civil
Case No. 19/1331 SC/CIVL

BETWEEN: Switi Limited
Claimant

AND: Erma Electronique
Defendant

Coram: ***Justice Aru***

Counsel: ***Ms. L. Raikatalau for the Claimant***
Defendant (no-appearance)

JUDGMENT
(Assesment of Damages)

Background

1. This is a claim for damages for breach of contract.

2. The claimant (Switi) is a local company registered in Vanuatu and carries on the business of producing and selling ice cream. The defendant (ERMA) is a French company domiciled in France. It carries on the business of designing, manufacturing and installing electrical and electrical assemblies and developing innovative products in renewable energy which they sell in France and overseas.

The Contract

3. The parties entered into a contract for ERMA to provide a solar powered system that would supply the energy needs of Switi's business for the next 20 years and in turn replace the power supplied by UNELCO. After several studies of the claimant's energy needs based on peak electricity demand, average annual electricity consumption and average daily electricity consumption, the defendant recommended the installation of the Green station GS 50k (the Solar System) for a total price of Euros 286,080.00 (VT 37,227,729).

4. The Solar System was to provide the claimant with it's electricity needs for a period of 20 years. For this period that the claimant's total electricity costs would be around VT 80,997,888. On a monthly basis it was calculated to be 240 months at VT337, 491 in electricity cost per month.

5. The offer was accepted by Mr Dufus as a director of Switi on 18 October 2016. Payment was to be made in five (5) instalments namely; 34% upon acceptance of the offer and the balance by 4 letters of credit each at 16.5% of the balance to be paid at intervals of 6 months 18 months and 24 months after shipment.

6. The first (1st) payment (34%) was made on 4 October 2016 via swift transfer. The rest of the payments were made on the following dates:-

   - 27/6/17 - 2nd payment – 47.203.25 Euro
   - 18/6/18 – 3rd payment – 47.203.25 Euro
   - 27/12/18 – 4th payment - 47.203.25 Euro
   - 13/3/20 – 5th and final payment – 47.203.25 Euro

7. Following receipt of these payments the equipment was installed on 21 July 2017. The claimant alleges that the equipment did not function as advised by ERMA and its engineers.

8. The claimant alleges that the Solar System supplied and installed was defective and did not meet its requirements as agreed. Despite several attempts to get the defendant to remedy the situation nothing happened. Emails and correspondences were exchanged between the parties for the defendant to rectify the fault. The claimant retained counsel in Noumea, New Caledonia for that purpose.

9. On 18 January 2019 the claimant informed the defendant to find a solution to the problem within 15 days or face legal proceedings. Nothing happened and as a result these proceedings were filed.

Discussions

10. No defence was ever filed by ERMA although it was served with a copy of the claim and response form. On 19 April 2021 default judgment was entered for damages to be assessed. Directions were issued for the filing of written submissions and sworn statements in support. On 15 June 2021 Switi filed a sworn statement of Nicola Dufus in support of the assessment with their written submissions. The assessment hearing was adjourned a number of times as the parties failed to comply with the directions issued. On 10 September Mr Molbaleh filed a notice of ceasing to act for the ERMA. Prior to that no submissions or sworn statements were filed on behalf of ERMA.

11. On 1 October 2021 Ms Raikatalau informed the Court that judgment be given on the papers filed.

12. The only issue for the assessment of damages is whether Switi is entitled to damages for economic loss for the period of 20 years. The claimant does not seek restitution.

13. Although the claimant makes submissions on the application of the UK Sales of Goods Act 1893, this was not pleaded in their statement of the case as required by the Civil Procedure Rules.

14. The claimant relies on **Vanuatu Copra and Cocoa Exporters (VCCE) Ltd v Vanuatu Coconut Products Ltd (VCPL)** [2011] VUCA 29 and **Anglia Television Ltd v Reed** [1972] 1 QB 60 to submit that in view of the defendant's breach, Switi is entitled to damages.

15. The claimant submitted that the main reason for purchasing the system was that there would be savings on the cost of electricity for the next 20 years. It submitted that there was an implied term of the sale and purchase that the system would ran efficiently at a low cost of electricity to the claimant. The savings on electricity cost were a factor which led the claimant to purchase the system.

16. It was also submitted that since the installation the system, the promised reduction in the cost of electricity never eventuated therefore Switi was entitled to be compensated for the loss it has already incurred and the losses it will continue to suffer for the remaining term of the contract. It was submitted that those damages must be assessed by reference to the sum of money it has already taken and those yet to be taken for the remainder of the contract for the claimant to purchase an alternative source what the defendant was supposed to provide.

17. It was further submitted that the promise of savings was expected from the beginning of the contract as presented by the defendant when it represented to the claimant that the costs of electricity for 20 years would only be VT80, 997,888. It was submitted the claimant was entitled to seek this loss of expectation for the life of the system pegged at 20 years.

18. It was submitted that the defendant calculated the savings on the cost of electricity with the system in place over 20 years should be VT80, 997 888 for 240 months. If the system worked the claimant would spend an average amount of VT 337,491 per month.

19. The claimant submitted that this was not the case. From the installation of the system in August 2017 to April 2021 the total cost of electricity paid to UNELCO by the claimant was VT 52,579,923 at an average of VT1, 168,443 per month. For the 20 year period it was submitted the claimant will have to pay to UNELCO a total of VT280,

426,320 at VT 1, 168,43 per month for 240 months. It was submitted that the claimant would suffer an economic loss in the amount of VT 199,428,432 for the 20 year period.

20. It was finally submitted that the Claimant should be awarded damages for economic loss in the sum of VT 199,428, 432.

21. Since installation of the Solar System in August 2017 to April 2021, a period of 4 years, the claimant paid VT 52,579,923 to UNELCO for its electricity bills at an average of VT 1,168,443 per month . Evidence of these payments and invoices were annexed to the Mr Dufus Sworn statement as *Annexures "ND1" and "ND2"* filed on 9 June 2021. These are actual losses incurred by Switi as a result of the defendant's failure to install a system that would provide electricity at a minimum cost of VT337 491 per month. The issue is whether economic loss could be recovered for the period of 20 years.

22. In **Montgolfier v Nguyen** [2016] VUCA14 the issue of claims for economic loss suffered through reliance on professional advice was raised. For reasons of policy, the Court of Appeal noted and followed the decision in **Wardley Australia Limited v Western Australia** (1992) 109 ALR 247. In that case the majority of the Court said:-

> *"When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of "loss or damage". And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of under compensation or overcompensation, the risk of the former being the greater."*
>
> *(emphasis added)*

23. The Court of Appeal in following ***Wardley*** said at paragraph 19 that:-

> *"The judgments of all members of the Court in that case establish that the disadvantageous character or effect of an agreement entered into on negligent advice cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent. It is only then that*

damage happens to complete the cause of action. The question when loss is suffered or can reasonably be ascertained is a question of fact to be judged objectively on the evidence led before the Court: see also: Karedis Enterprises v. Antoniou (1995) 137 ALR 544 and "Limitation of Actions" by Peter Haniford, 3rd Edition, 2011."

(emphasis added)

24. At the time of the filing of the claim, the evidence of Mr Dufus filed in support showed that an amount of VT52, 579,923 was paid for a period of 4 years from the date of installation instead of VT16, 199,568 for the same period as advised by the defendant at VT 337, 491 per month. There is no evidence to support an award of VT199, 428,432 as claimed for the 20 year period. To assess damages for economic loss without such evidence would be to estimate damages on the basis of likelihood or probability.

Result

25. I enter judgment in favour of the claimant in the sum of VT 52, 579,923 with interest at 5%. The claimant is also entitled to costs to be agreed or taxed by the Master.

26. An enforcement conference is listed for 11.00 am on 24 February 2022.

DATED at Port Vila this 24 day of January, 2022

BY THE COURT

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D. Aru
Judge

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU