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

Civil Appeal
Case No. 22/387 CoA/CIVA

BETWEEN: SWITI LIMITED
Appellant

AND: ERMA ÉLECTRONIQUE
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John Mansfield*** ***Hon. Justice Mark O'Regan*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Viran M Trief*** ***Hon. Justice Edwin Goldsbrough***
Counsel:	*L. Raikatalau for the Appellant* *No appearance for the Respondent*
Date of Hearing:	*11 August 2022*
Date of Judgment:	*19 August 2022*

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal involves a short but important issue concerning the assessment of damages for breach of contract. It arises in circumstances well described in the judgment of the Supreme Court, as set out below.

2. The appellant Switi Ltd (Switi) is a company registered in Vanuatu. It carries on the business of producing and selling ice cream. ERMA Électronique SARL (ERMA) is a French company domiciled in France. It carries on the business of designing, manufacturing and installing electrical and electric assemblies and developing innovative products in renewable energy which is sold in France and overseas.

3. In 2016, Switi and ERMA began to have communications about the provision by ERMA of renewable energy to support its business in Vanuatu. Switi was interested in securing an

alternative source for its electrical energy needs from a supplier other than its then supplier UNELCO in Vanuatu.

4. Ultimately, after ERMA had assessed the energy needs of Switi, Switi and ERMA entered into a contract for ERMA to provide a Hybrid Power System to Switi which involved the installation of a solar power system, supported by a battery system and a generator to meet Switi's electric energy needs. The contract was formed by Switi accepting the third of three options presented to it by ERMA in a formal proposal and commencing to pay for the installation of the system, with the first payment made on 4 October 2010 and the balance paid by instalments as agreed. The total price was Euros 286,000 (equivalent to about VT37,277,729). The ERMA equipment was duly installed, with completion on 21 July 2017.

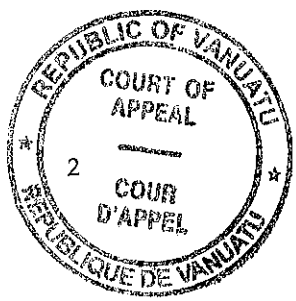
5. The primary judge concluded, as was the case presented by Switi, that the contract included an agreement by ERMA that its system would provide sufficient electrical energy to meet the total demand of Switi (based on its current level of operations) for 20 years.

6. Unfortunately, the ERMA system did not perform to the promised level. Attempts by engineering personnel of ERMA to remedy the situation were unsuccessful. Switi was driven to procuring a large extent of its energy needs from UNELCO. Eventually, in 2019, Switi brought proceedings in the Supreme Court claiming damages for breach of contract against ERMA.

7. Despite having been served with the proceedings, ERMA did not defend the claim. Nor did it challenge the jurisdiction of the Supreme Court of Vanuatu to hear and determine Switi's claim under the law of Vanuatu.

8. It is significant to note that the Supreme Court Claim served on ERMA included a 'Response' form which it could complete and which gave it an opportunity to indicate that it disputed the claim and/or objected to the claim being heard in the Supreme Court. If it disputed the claim, it was required to provide its defence within 28 days. It did not indicate that it disputed the claim, and it also did not object to the Supreme Court hearing the claim. Nor did it file a defence. On 10 March 2021, at a directions hearing attended by its lawyer, it was given a further period of 21 days to file any defence to the claim. It did not file any defence.

9. On 19 April 2021, in default of any defence, judgment was entered against ERMA for damages to be assessed. It did not apply to have the judgment set aside, although it continued to appear through its lawyer at directions hearings on 9 June 2021, 26 July 2021 and 2 August 2021 (on each occasion it was given an opportunity to respond to Switi's submission and material in support of the claim for damages to be assessed. Its lawyer on the Court record gave notice on 10 September 2021 that he was ceasing to act for ERMA. That is of course after the hearing of the assessment of damages. On 3 March 2022 a different lawyer filed a formal notice of acting for ERMA in relation to the appeal.



THE JUDGMENT

10. The basis of the claim for damages was that ERMA had agreed to provide a system which was appropriate and sufficient to generate sufficient electricity to meet the needs of Switi for 20 years from the commencement of its operation, that is from 21 July 2017. The total price of the system would then be annualised by Switi and, by reason of comparison with the known previous expenditure for electricity to Switi by UNELCO, Switi would make substantial savings on its energy costs.

11. ERMA had done a calculation for Switi in its Proposition Technique et Commerciale at page 17 of that extensive proposal, which was the proposal which Switi accepted. It said that, upon the price of Euro 286 080 per year, the system would generate for Switi the required electricity for Euro 26,549 per year, and so would produce a saving of Euro 66,717 per year compared to the current cost incurred to UNELCO for the same amount of electricity. It also said that the savings over 20 years would be Euro 1,252,790, after taking into account replacement costs.

12. Switi's claim was based upon that material, and in the light of the substantial failure of the ERMA generating capacity. It was to compare the proposed cost to Switi from the ERMA system averaged over 240 months (that is, to produce costs of VT80,997,888 or VT337,491 per month), and to compare it to the actual costs incurred by reason of having to secure energy for its operations from UNELCO to a large extent, when it was proposed that no such need would arise. As it transpired, that cost was VT11,168,443 over the same 20 year period.

13. The primary judge accepted that method of assessing the loss to Switi to the date of judgment.

14. He accepted that for the period August 2017 to the date of the hearing in April 2021, Switi had paid to UNELCO for energy (that it should have been able to generate by the ERMA system) VT52,579,923 at an average of VT1,168,443 per month.

15. Consequently, the primary judge awarded damages of VT52,579,923 for that period.

16. There is no issue about the judgment to that point.

17. However, the primary judge declined to make any allowance for any economic losses after April 2021. He said that there was no evidence to support an award of damages for the further period extending to 20years, because that would be to estimate damages on the basis of likelihood of probability. In deciding that aspect, the primary judge referred to *Montgolfier v Nguyen [2016] VUCA 14* and *Wardley Australia Ltd v. Western Australia (1992) 109 ALR 247 (Wardley)*.

THE ISSUE

18. The short point is whether the primary judge was in error in confining the assessment of damages so as to exclude any losses which Switi claimed for the future. As at April 2021 (the time of the

hearing), and on the same basis as the primary judge assessed its losses to that time) Switi calculated that its losses for the further period to the end of 20 years would be VT199,428,432 (based upon ongoing losses of VT1,168,443 per month, that is on the basis that it would continue to have to pay UNELCO VT1,168,443 per month to make up the required generation of electricity to the level required.

19. Counsel for Switi applied for leave to present additional evidence on this appeal, simply to bring up to date the position with respect to its payments to UNELCO from May 2021 to April 2022. The additional evidence was then adduced to cover the period to 31 July 2022. That is entirely appropriate. The judgment was delivered on 24 January 2022 that is some 9 months after the hearing in April 2021. That period to the end of July, in effect to just before the commencement of the Court of Appeal session, on the basis of the approach of the primary judge, would constitute a period of past loss in any event, as does the period to the date of this judgment. An appropriate adjustment for that period is therefore appropriate.

20. As Ms Dufus says in her supporting sworn statement, and as Ms Raikatalau submitted, that material also shows a varying but generally progressive increase in the monthly invoiced amount from UNELCO over the period from June 2021. The average rate of payment to UNELCO over that 15 month period is a little over per month. The accompanying invoices do not demonstrate any overall material increase in the demand for energy from UNELCO, so it is fair to assume that it is simply pricing increases. The total amount paid to UNELCO over that 15 month period, which but for the breach of contract by ERMA, would not have been paid is an additional VT21,262,189.

21. More importantly, that material tends to indicate that the evidence adduced at the hearing was capable of establishing losses of Switi for the future period from the hearing, even though the precision of hindsight may not be available. From the date of this judgment, there is no reason to anticipate that Switi will not continue to incur a significant shortfall in the energy generated by the ERMA system in relation to its energy needs, and that it will continue to have to access UNELCO for the additional energy required.

CONSIDERATION

22. Generally speaking, in circumstances such as the present where Switi has chosen to pursue a claim for damages, the damages are assessed on the basis that Switi is to be put in the same position, so far as money can do it, as if the contract had been performed. That includes the losses sustained to the date of the judgment and, subject to proper proof, damages for losses that will be sustained in the future (sometimes called expectation losses), as long as such losses were foreseeable when the contract was entered into. See generally *McDonald v Dennys Lascelles Ltd (11933) HCA 25; (1933) 48 CLR 457 at 476-477*. That principle has been re-affirmed many times including recently in *Mann v Paterson Constructions Pty Ltd [2019] HCA 32 at [9]*. It was applied in somewhat different circumstances form the present in *Vanuatu Copra and Cocoa Exporters Ltd v Vanuatu Coconut Products Ltd [2011] VUCA 29*. Given the finding of the primary judge at [5] above, there can be no doubt that the losses claimed by Switi meet the foreseeability requirement.

23. The decisions referred to by the trial judge were in quite different circumstances, and in our view do not support the conclusion that Switi is not entitled to any damages for the losses it is likely to incur as a result of the breach of the contract beyond the date of the judgment in the Supreme Court, or beyond the date of this judgment. Neither was a claim involving damages for breach of contract.

24. *Montgolfier v Nguyen* involved a claim for damages by the husband in a bitter matrimonial dispute against a business consultant who had prepared his will in terms that he had specified, but which (he claimed) exposed him to significant costs and delays in resolution of the property dispute between him and his former wife. He said the consultant was negligent. In the action against the consultant, the consultant had unsuccessfully applied for the claim against to be summarily dismissed. Both in the Supreme Court and in the Court of Appeal, that application was refused.

25. The relevant issue for present purposes was whether it was arguable that the claim against him was statute barred, as it was brought some 7 years after the allegedly negligent conduct in drawing the will. The issue was when the cause of action arose: the date of the allegedly negligent act, even though the consequent loss then was insubstantial but suffered in a general sense, or when the additional expenses were incurred and the quality and effect of the will became a real issue. If it were the latter, then the action was brought within time. It was held that the cause of action accrued only when actual damage is suffered or is reasonably capable of being ascertained: see in the Court of Appeal at [19]. The decision of the High Court of Australia in *Wardley* was to the same effect.

26. *Wardley* also involved the issue as to when a cause of action arose. It concerned a claim by Western Australia against *Wardley* Australia Ltd and other for very significant financial losses alleged to have been incurred by misleading and deceptive conduct by the *Wardley* parties which in 1987 induced Western Australia to indemnify a bank for a financial facility it issued to another entity. The claim was made under the Trade Practices Act 1974 (Cth) which prescribed a 3 year time limitation. The proposed claim (to be added to an existing proceeding in 1991 – outside the 3 year time limit) was allowed because the cause of action accrued only when Western Australia was called upon to honour its indemnity, and not at the time of the grant of the indemnity.

27. Clearly here, the cause of action for breach of contract had arisen when Switi suffered loss as soon as the commissioned system provided by ERMA ceased to meet the specified and agreed energy output, that is, sometime in the latter part of 2017. Once the cause of action has accrued, then the assessment of the damages for breach of contract can and should include an allowance for foreseeable losses to be suffered in the future, provided there is appropriate evidence to prove those losses.

28. It remains to decide whether the matter should be remitted to the Supreme Court to complete the assessment of Switi's damages by assessing damages for future loss, or whether (as we were invited to do by counsel for Switi) the assessment of the future losses should be made by this Court.

29. The adjustment for past losses, simply to bring them up to date, is clear enough. On the same basis as the primary judge made the assessment to April 2021, on the information in the fresh evidence Switi has incurred an additional loss to July 2022 of VT21,262,189. So the past losses should increase to that figure plus an allowance for the period up to 19 August 2022, the date of this judgment.

30. It would be appropriate, if this Court were to substitute a figure for past losses brought up to date to substitute the total sum of VT 73 842 112 plus an allowance for a further 3 weeks.

31. It is clear that the primary judge generally accepted the evidentiary material presented by Switi, including that in the sworn statements of Ms Dufus of 31 May 2019 and 9 June 2021.

32. It can therefore be stated with confidence that the primary judge, in addition to the findings already made, would accept that the ERMA system will not become more productive over time. That is confirmed by the experience of the last almost 5 years. Similarly, it can be accepted that Switi has adopted a realistic position of making the most it can from the ERMA system. It is still motivated to do so, as the power generation from that system enables it to avoid procuring power from UNELCO to the extent of the ERMA generation capacity. Ms Dufus has explained that Switi has considered whether it could be appropriate to discard and dismantle the ERMA system and to substitute a new and different system, but that the costs of discarding the ERMA system are extensive, and there is no evidence that another better option is available to Switi. Again, Switi is clearly motivated to secure as cheap a supply of electricity as practicable, so it is clearly acting reasonably in adopting the present alternative of using the ERMA system to the extent possible and 'topping up' with supply of energy from UNELCO.

33. We have no real doubt that the primary judge would therefore assess the damages for the future (from 20 August 2022) to the completion of the 20 year period, that is now a period of 15 years or 180 months, on the same basis as he has assessed past losses. That is, subject to allowance for contingencies, it is appropriate to determine the present value of a monthly loss of (say) VT1,300,000 for that further period. That is a matter of calculation allowing for the benefit to Switi of having the use of that money at the present time, rather than progressively over the next 15 years. There must also be an allowance for contingencies. Such contingencies may include a possible detriment in the market or external events affecting the market for ice-cream or of the extent of Switi's share of that market, personal exigencies which may affect the operations of Switi, some further variation in the cost of electricity provided by UNELCO – it is not realistic to expect a reduction in its current prices – and the prospect of further technology developments which may affect the manner of power generation in the future. They are necessarily uncertain, but in our view overall should result in a reduction of about 10 -15% of the present value of the monthly loss of VT1,400,000 being suffered by Switi until 2037.

34. There is no evidence of the present capital value of that monthly loss. It will depend upon the anticipated earnings rate of the capital sum if it is received in a lump sum, rather than paying monthly, and upon the assumption that the earned interest on the capital sum is compounded (as

is generally assumed) until it is notionally withdrawn to represent the monthly future payments. At present, the assumed earnings rate would be quite low. That is a matter which Switi might secure further evidence about, and to then adduce to the primary judge.

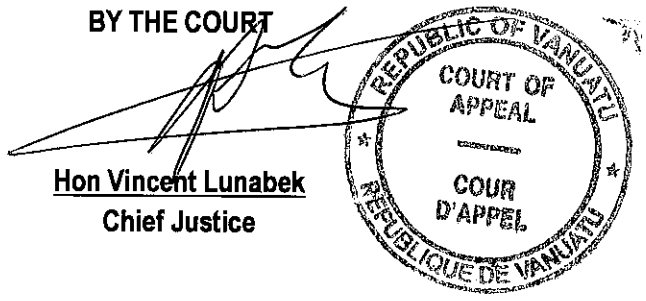
35. In our view, it is appropriate in the circumstances to give Switi the opportunity to adduce that evidence. There is no reason why the matter should not be sent back to the primary judge for the final fixing of the damages. That will involve the two stage process of determining the losses to the date of the judgment in the manner adopted by the primary judge, but brought up to date, and secondly of fixing the future losses to be paid as a lump sum also in the manner referred to. As to the first step, Switi may adduce further evidence of the same character as we received, but to the time of the further hearing. As to the second, no doubt Switi will secure evidence from an appropriate expert (in the course of the submissions it was noted that may be a bank source or an actuary) as to the net present value of the future monthly losses for the balance of the 20 year term, and the primary judge may allow some further reduction in that amount to cater for the sort of contingencies we have referred.

ORDERS

36. In the circumstances we set aside the judgment of the primary judge of 24 January 2022 and remit the matter to the primary judge to re-assess the damages to which Switi is entitled in accordance with these reasons for judgment. Switi will also be entitled to interest on the judgment to be fixed by the primary judge. Switi is also entitled to costs of the appeal to be taxed and to be payable by ERMA.

Dated at Port Vila this 19th day of August 2022

BY THE COURT



Hon Vincent Lunabek
Chief Justice