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

Civil Appeal
Case No. 20/2969 CoA/CIVA

BETWEEN: **Union Electrique Du Vanuatu Limited t/as Unelco Engie**
Appellant

AND: **Christian Brunet**
Respondent

Date of Hearing:	***16th day of November, 2020 at 1:30 PM***
Before:	***Chief Justice V Lunabek*** ***Justice R Young*** ***Justice J Mansfield*** ***Justice GA Andrée Wiltens*** ***Justice V Trief***
Appearances:	***Mr M Hurley for the Appellant*** ***Mr N Morrison for the Respondent***
Date of JUDGMENT:	***20th day of November, 2020 at 2:00 PM***

JUDGMENT

Introduction

1. The Appellant Union Electrique Du Vanuatu T/As Unelco Engle (Unelco) sued Christiane Brunet T/As Tana Russet Plaza (Ms Brunet) for VT 19,464,806 in the Supreme Court for monies said to be for the supply of electricity by Unelco to Ms Brunet in respect of the Tana Russet Plaza (TRP) under the terms of the Customer Agreement between them of 21 November 2014 between November 2014 and May 2017.

2. The facts as alleged were not really in dispute. The agreement related to the supply of electricity was for the newly opened TRP. At the time of the commissioning of the electricity supply, by error, the connection of the power transformer to the meter was not correct. There were two problems: a 'shunt terminal block' had not been removed, and there was a wiring error. That meant that, until the errors were brought to light, the electricity usage at TRP was greatly under recorded by the meter. The invoicing for electricity supplied was based upon the meter recording, so the invoices issued regularly were for amounts considerably less than they would have been if the meter was properly connected. Ms Brunet routinely paid the amounts invoiced. That situation persisted until the errors were detected by Unelco in May 2017.

3. After it was detected, Unelco estimated the amount which it had undercharged for the supply of electricity to TRP between May 2014 and June 2017. That amount became the amount of its claim. As Ms Brunet was not prepared to pay that sum, as she said she was liable under the Agreement only for the underpayment for the month of May 2017, the claim was pursued.

4. The matter was heard by Saksak J and judgment was given on 28 September 2020. The claim was dismissed with costs.

5. This is an appeal by Unelco from that judgment.

6. For the reasons which appear below, we consider that the appeal should be dismissed with costs. We agree with the orders made by the primary judge.

The Undisputed Facts and Findings

7. The Agreement, formally called the Customer Agreement High Voltage Owned Transformer N.21-150130, critically contained Clause XI (11) entitled 'Measuring and Monitoring Energy and Power'. The essence of the dispute between the parties turns on the proper construction of the Clause in the Agreement.

8. Clause XI (11) of the Agreement provides:

> *"Clause XI Measuring and Monitoring Energy and Power*
>
> *The energy and power delivered to the CUSTOMER shall be measured by means of the following devices:*
>
> - *Current and potential reducers, if need be*
> - *An active energy meter, possibly fitted with a peak demand indicator*
> - *A reactive energy meter.*
>
> *The active and reactive energy meters may be replaced by a single electronic meter combining all measurements.*
>
> *The CONCESSIONAIRE may supply the meters or require that they be provided by the CUSTOMER, they shall be installed by the CONCESSIONAIRE agents, set, sealed and inspected from time to time by such agents.*
>
> *The CONCESSIONAIRE shall be responsible for checking and maintaining them on a regular basis.*
>
> *The CUSTOMER shall always be entitled to request that the measuring and monitoring devices for energy and power be checked either by the CONCESSIONAIRE or by an expert appointed by mutual consent.*

The cost of any such checks shall be borne by the CUSTOMER where the device checked at his request is found to be true within the standard range of tolerance. Conversely, where it is not found to be the case, the CONCESSIONAIRE shall bear the costs.

There shall be no adjustments made to any accounts other than those pertaining to the month immediately preceding that of the check or request for a check by the CUSTOMER.

In the event of a change in the subscribed power, the measuring and monitoring devices for energy and power shall, as where necessary, be altered or substituted by devices of appropriate calibre and model at the CUSTOMER's expense.

In the case of break-down or malfunction of such devices, or where the CONCESSIONAIRE is unable to have access to the equipment because of the CUSTOMER the level of consumption for that period will be assessed on the basis of the average recorded in the corresponding billing period in the previous years, unless more specific information is available to establish the cost in another manner. The adjustment shall be applied to the howl period for which the energy consumption has not been recorded, or for which the system has not been operating."

9. In about May 2017, the Commercial Director of Unelco, Mr Perocevic, detected what appeared as apparently very low invoicing fees for the supply of electricity to TRP. He requested that a check of the metering system be carried out. It was then that the errors referred to were detected. From that time, the invoice issued have reflected the actual usage of electricity at TRP, and they have been paid. The Supreme Court case, and this appeal, related to the attempt by Unelco to adjust its charging for the past supply of electricity between May 2014 and May 2017 to reflect the actual usage of electricity at TRP over that period. By way of illustration, the monthly difference between the electricity charged for and the electricity used in May 2017 before the meter was corrected was 617 kwh and in June 2017 after the meter was corrected was 17,174 kwh. It is no surprise that Mr Perecevic, when he came to think about it, considered that there was something wrong with the process. Indeed it is surprising that no one from Unelco noticed that matter much earlier.

10. As the primary judge recorded, Clause XI (11) of the Agreement required Unelco to install the meters and permitted Unelco to inspect them from time to time after they had been set and sealed by Unelco. In fact, after the electricity meter was commissioned by Unelco on 24 November 2014, whilst the TRP was still under construction, the only check carried out by Unelco before the errors were detected in June 2017 was on 4 May 2015. The errors were not detected at that time.

11. Despite attempts by Unelco and Ms Brunet to reach an accord about payment for what Unelco claimed as unpaid electricity usage for the previous period, no agreement was reached.

The Respective Positions of the Parties

12. Both at the trial and on appeal, the primary position of Unelco was that there had been a 'breakdown or malfunction' of the metering devices, so that the final paragraph of Clause XI (11) should be applied – that is assessing as best as could be done the actual level of consumption for the period November 2014 to May 2017 by reference to the corresponding billing records in subsequent usage. That is the way that Unelco quantified its claim. There was an alternative claim by Unelco that as Ms Brunet had had the benefit of extensive uncharged electricity over that period, Unelco was entitled to restitution or compensation on a quantum meruit basis.

13. Ms Brunet contended that the first provisions of Clause XI (11) should be applied, so that – following the check of the meter system in early June 2017 – there should be adjustments to her electricity accounts for TRP only for May 2017, that is for the month immediately preceding the month of the check. She contended that the Agreement was clear, and so there was no scope for any quantum meruit claim to be made.

14. There was in addition some dispute about the calculations made by Unelco to quantify its claim, as the immediate workings based on prior records failed to recognise the irregularity of electricity of usage at TRP by reason of the progressive building program, the impact of Cyclone Pam during 2015 and other matters. That aspect of the dispute did not need to be addressed by the primary judge, and, if the appeal were otherwise to have been successful, it would have been appropriate to remit the matter to the Supreme Court to determine it.

15. The primary judge accepted the contention of Ms Brunet.

Consideration

16. It is common ground that the resolution of this appeal depends on the proper construction and application of Clause XI (11) of the Agreement.

17. Counsel for Unelco pointed out that the Agreement is in the French language. The version of that clause of the Agreement set out above is the English translation of the French version. In particular, it was pointed out that the words: "In the case of break-down or malfunction..." in the opening words of the final paragraph are a translation of: "*En cas d'arrêt ou de fonctionnement défectueux ...*". It was argued that the words, in either language, include "improper performance" or "faulty operation".

18. Such a meaning is obviously open if those words are taken in isolation from the balance of Clause XI (11). And it would be easy to say that "faulty operation" of the metering system was detected in June 2017, and so entitled Unelco to invoke that last paragraph of that clause to support its claim.

19. However, Clause XI (11) has to be read in its entirety. So counsel for Ms Brunet said that the earlier part of the Clause provides for the present circumstances, and the final paragraph only operates when there is no meter reading which can be made for a particular period.

20. It is important to bear in mind the now commonly accepted principles for the construction of contracts. The intention is to ascertain the intention of the parties. Broadly speaking, that means assessing the meaning that would be conveyed to a reasonable person with all the background knowledge that would have been available to the parties (except for their previous negotiations of the parties and their expressions of their subjective intent). Meaning is therefore discerned not simply by their ordinary or dictionary meaning, although that will commonly be the case. The meaning may depart from that ordinary usage if the relevant background or common sense or commercial practicality dictates otherwise. Previous negotiations and expressions of intent are excluded except where there is an application to rectify the contract, as those matters do not really assist in interpreting the objective intention of the parties in the context. See generally Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 2 WLR 896 at 912-913. There are many cases where similar views are expressed.

21. It is a useful starting point to recognise that the parties must have intended that all the wording of Clause XI (11) was to have a relevant operation. They chose to include all the wording, and not just to include the wording of the final paragraph. So much was accepted by both parties.

22. It is also accepted by them that the record from the metering devices will be the basis upon which the charging for the electricity supplied to TRP will be calculated and invoiced.

23. The structure of Clause XI of the Agreement indicates also that the parties contemplated that, for whatever reason, the metering device or devices might not produce, or continually produce, a reliable and accurate reading. The Clause ensures that Unelco will install and set and seal the meters. It also provided for Unelco to inspect the meters from time to time. The checking by Unelco necessarily involves the possibility that the meters may not consistently be accurate and reliable. Otherwise there would be no point in the checks. It makes sense that (as the Clause provides) Unelco may inspect the meters from time to time without specific restriction. It is obviously implicit that, in the event that a meter requires adjusting to secure accuracy and reliability, that the adjustment will then be made.

24. It is also important that the Clause then expressly says that Unelco is responsible for checking and maintaining the meters on a regular basis.

25. The possibility of Ms Brunet being concerned about the accuracy and reliability of the meters is also accommodated. She may request a check either by Unelco or an expert. Provision is made for her to pay the cost of such a check she requests, if the meter is found to be 'true within the standard range of tolerance'.

26. To this point, there is clearly contemplated a regime under the control of, and the responsibility of, Unelco, to ensure the accuracy and reliability of the meters.

27. The next paragraph provides:

> *'There shall be no adjustments made to any accounts other than those pertaining to the month immediately preceding that of the check or request for a check by the Customer'*

28. Counsel for Unelco agreed that that provision applied to checks made by Unelco of its own initiative as well as those requested by Ms Brunet. That is clearly right. Otherwise, it would mean that an error found at the request of Ms Brunet could only lead to an adjustment of the preceding month's invoice, no matter how long the error had existed, but that Unelco could make an adjustment for any period over which the error had existed. That is why Unelco chose to rely on the final paragraph of the Clause. And it had to justify why the just quoted part of the Clause did not apply.

29. So, to this point in the Clause, there is recognition that the meters may not provide, or continually provide, accurate and reliable readings of the electrical usage at TRB. And a system under the control and responsibility of Unelco. And a prescription which applies to both Unelco and to Ms Brunet as to how much of an adjustment may be made when and if the meter is found, on checking, not to be 'true within the standard range of tolerance'.

30. To step back objectively, one might ask what omissions are there in that agreed scheme. In particular, as counsel for Unelco used the expressions 'improper performance' and 'faulty operation' to describe the character of the errors referred to, one might ask rhetorically why those descriptions do not fit the circumstances of that scheme. The answer is not immediately apparent.

31. The next paragraph of the Clause deals with a different topic: in the event of a change in the subscribed power to TRP, it provides that necessary alterations to or substitutions for the measuring and monitoring devices for energy and power shall as necessary be paid by Ms Brunet as the customer.

32. The fact that the separate topic is there introduced suggest that what next follows will be part of that new topic or yet a further new topic.

33. It is at this final point that the paragraph appears upon which Unelco relies. Due to the earlier structure of the Clause, it is unlikely to be dealing with the same topics as already dealt with.

34. It can be seen above. As noted, Unelco says that the expression 'malfunction' means or includes improper performance and/or faulty operation. We consider that the word must mean something other than he circumstances to which the first part of the Clause applies. Otherwise there would be two inconsistent schemes within the same clause.

35. There are two contexts identified in which the paragraph operates: first 'break-down or malfunction' of the metering devices; and second where Unelco is unable to access the meters due to Ms Brunet's actions. The second is a circumstance where the meter cannot be read. It is sensible to treat the composite phrase 'break-down or malfunction' as applying to the same sort of circumstance, namely where the meter cannot be read to produce a measurement of electricity usage.

36. It has been argued for Unelco that the word 'malfunction' should be given a separate meaning. As a matter of grammar, for what it is worth, if that were to have been intended, there should have been a comma after 'breakdown', as there is before the second context is expressed. And then it is necessary to give a meaning to the word 'malfunction' which is different from the circumstances to which the first part of the Clause operates on, and is otherwise sensible. As we have observed, it is difficult to identify such a meaning, or at least such a meaning which would bring the present circumstances of Unelco's claim within it.

37. The balance of that final paragraph is also consistent with the sense in which we have read the word 'malfunction'. It provides for the estimate of the level of electricity consumption during the period of no measurement by reference to comparative electricity consumption over an earlier period. There is no mention of offsetting/giving credit for actual and charged or recorded consumption during the period. Finally, the last sentence provides that the adjustment which is to be made is to be applied 'to the whole period for which the energy consumption has not been recorded, or for which the system has not been operating'. It does not say, as it would if Unelco's contention is correct, that it applies for the period for which the energy consumption has not been accurately recorded.

38. For those reasons we do not accept the contentions of Unelco on the primary ground of its appeal. We agree with the primary judge.

39. There is one other circumstance which was the subject of submissions and which we should note. There was some suggestion that the present circumstances fell outside the scope of operation or application of the scheme established by the first part of Clause XI

(11) by reason of the magnitude of the claim of Unelco. It is probably fair to say that, given the entitlement of Unelco to check the metering devices at its choice, and that it was responsible for the checking and maintenance of the metering devices, it did not anticipate such an error or errors as occurred would remain undetected by such a long time or to such a degree. But that is not a factor which should affect the proper construction of the Agreement. It is equally fair to say that, given its responsibilities, it is regrettable that Ms Brunet might have been liable for such a large claim without any anticipation of it. Indeed, if Unelco's construction of the Agreement were correct, her liability could extend over the amount 'owing' for a number of years, without the opportunity to anticipate and allow for such indebtedness. The one month retrospective adjustment has mutual benefits and common disadvantages, depending on which side of the actual electrical consumption line the metering error falls.

40. We also do not see merit in the other grounds of appeal argued on behalf of Unelco.

41. The fact that the Agreement was expressed in the French language has not been shown to have been likely to produce a different result at first instance or on this appeal. While counsel made the point about the original language of the Agreement, there was nothing put forward beyond what we have noted to give special significance to that original language. Reference was made to Articles 1135 and 1156 of the French Civil Code (as provided to the Court by counsel). Article 1135 states that agreements should be understood by their words and having regard to the consequences of such obligations. Article 1156 states that, in construing a contract, it is important to seek the common intention of the parties, rather than stop at the literal meaning of the words. In a general sense, and so far as significant to this appeal, those Articles would reflect the sort of approach which we have undertaken.

42. The approach we have taken does not seek to attribute significance to 'human errors' on the part of staff of Unelco. But it does have regard to the terms of Clause XI (11) and the responsibilities it imposes on the parties to the Agreement respectively. We do not consider that the primary judge, in his reasoning, construed the Agreement inconsistently with that approach.

43. Given the conclusion we have reached as to the meaning of the contract, there is no room for any claim for quantum meruit.

44. Finally, the submission was made that Ms Brunet should not get the benefit of the Agreement (as we have concluded that it operates), because she must have known that over a period of some two and a half years she was receiving electricity from Unelco at a very significantly lower price that it should have been. In her evidence, as was pointed out, she acknowledged that from about March 2017 it must have been obvious to her, by comparison with her account from Unelco in respect of another enterprise, that something was wrong with the TRP invoices. We do not consider that such an acknowledgment entitles Unelco to relief against the application of the Agreement in the

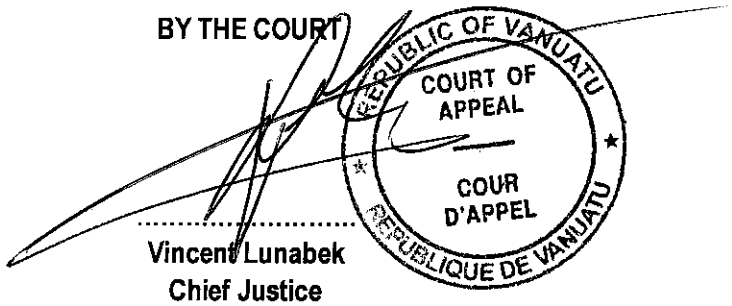
present appeal. It might readily also be said that, within Unelco, the same must have been obvious to any officer of Unelco who thought about it from at least early 2015 in the way that Mr Perecevic did in about May 2017. But those are matters of fact that do not inform the proper construction and application of the Agreement.

Orders

45. For those reasons, the appeal is dismissed. The appellant Unelco should pay to the respondent Ms Brunet costs of the appeal fixed at VT 100 000.

DATED at Port Vila this 20th day of November, 2020

BY THE COURT



Vincent Lunabek
Chief Justice