EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0027 formerly SLUHCV 2018/0326

BETWEEN:

VIBE ELECTRIC LIMITED

Claimant

and

ST. LUCIA ELECTRICITY SERVICES LIMITED
(doing business as **LUCELEC)**

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Mr. Peter Foster KC with Ms Ann-Alicia Fagan, Mr Mikel King and Ms Tiannah Foster for the Claimant
Mr. Deale Lee, for the Defendant

2021: September 27; 28;
2022: February 28;
May 10;
December 29.

JUDGMENT

[1] ST ROSE-ALBERTINI, J. [Ag]: This is a claim for damages for the tort of wrongful interference with economic interests, commonly known as causing loss by unlawful means. The claimant, Vibe Electric Limited ("VEL") alleges that the defendant, St. Lucia Electricity

Services Limited ("LUCELEC"), wrongfully interfered with its economic interests by incorrectly interpretating various sections of the Electricity Supply Act[1] ("ESA") and the Electricity Supply (Amendment) Act[2] ("ESAA"), consequently providing incorrect advice to VEL's customers, thereby causing then to lose interest in doing business with VEL.

[2] Further, LUCELEC implemented a pilot project for renewable energy, which restricted the kilowatt ("kW") of energy generated from solar Photovoltaic ("PV") systems to 25kW for commercial customers, and 5kW for residential customers, in order to remain interconnected to LUCELEC's national distribution network/ grid ("the distribution grid" or "the grid"). Then in May 2015 LUCELEC verbally informed VEL that VEL's customers who self-generated above those limits would be disconnected from the distribution grid. VEL seeks various declarations, general and special damages, interest, and costs.

[3] LUCELEC denies the claim in entirety and avers that while all customers are free to purchase and install solar PV systems of any size for self-generating electricity, it is lawfully entitled to set the parameters for interconnection of these solar systems to the distribution grid, and a customer must first obtain a licence from the National Utilities Regulatory Commission ("NURC") in order to connect to the grid. Further, the pilot project, which began in 2009, was designed to permit interconnection of solar PV systems to the grid, and such interconnection would permit both residential and commercial customers to continue to receive a back-up supply of electricity from the grid while feeding excess power generated from their solar PV systems into the distribution grid. Interconnection also facilitated 'net metering' which allowed the customer to offset the number of kilowatt hours fed into the grid against, the number of kilowatt hours supplied from the grid. LUCELEC avers that it has correctly interpreted both the ESA and the ESAA, and merely informed persons seeking to interconnect their solar PV systems, that they must first comply with the NURC procedures.

[1] Cap 9.02 of the Revised Laws of Saint Lucia
[2] No. 2 of 2016

[4] Thus, at the heart of this claim is the question whether LUCELEC acted unlawfully, in its interpretation of the ESA as amended by the ESAA, and by adopting the limits set under its pilot project whereby a person who self-generates electricity in excess of 5kW for residential use, and in excess of 25kW for commercial use, would not be permitted to interconnect such system to the distribution grid, thereby causing loss of economic interest to VEL.

The Issues

[5] The following issues arise for determination:

1. Whether VEL has established the elements of the tort of unlawful interference with its economic interest by demonstrating that (i) LUCELEC acted by unlawful means; (ii) LUCELEC intended to cause VEL harm; and (iii) that VEL suffered harm as a result of LUCELEC's unlawful acts.
2. If that burden is discharged, whether VEL is entitled to general damages, and what is the quantum?
3. Whether VEL has established its entitlement to special damages in the amount claimed?

Background and Pleadings

[6] VEL is a company which promotes green energy by supplying, selling, installing, and maintaining solar PV systems, which allows customers to self-generate electricity for their own consumption and use. VEL says from its incorporation in 2013 it gained numerous customers, and others who expressed an interest in doing business with it.

[7] LUCELEC is a utility company duly incorporated under the laws of Saint Lucia, having the exclusive right to generate, transmit, distribute, and sell electricity in Saint Lucia, by virtue of the ESA. This exclusive right is subject to one exception, being the right of a person to generate and transmit electricity for his or her own consumption and use. Following the enactment of the ESAA in 2016, LUCELEC became the sole company with the exclusive right to supply and sell electricity from fossil fuels only.

VEL's Case

[8] VEL's alleges that in 2013, LUCELEC implemented a pilot project for renewable energy, which limited the capacity for self-generation of electricity from solar PV systems to 25kW for commercial premises, and 5kW for residential premises. In May 2015, VEL was verbally informed by LUCELEC that VEL's customers who self-generated in excess of these limits would be disconnected from the grid. The parties exchanged correspondence and LUCELEC maintained the position that its pilot project limited the kilowatt of power generated, for interconnection to its grid, and that the project was conducted at its discretion, as there was no legislative framework for such connections. VEL asserts that it is not illegal to generate electricity for private consumption; nor is it illegal to self-generate above the limits set by LUCELEC, and remain connected to the grid.

[9] VEL says that between 2015 and 2016, LUCELEC repeatedly told VEL's customers that (i) there would be an amendment to the ESA and they should await such amended, and (ii) that if they self-generated above the limits set by the pilot project, they would be disconnected from the grid. After the ESAA was passed in 2016 and the NURC was formed, LUCELEC persisted in telling VEL's customers that they needed to obtain a licence from the NURC to self-generate electricity for private consumption and use. Consequently, VEL customers who were interested in buying solar PV systems to generate electricity for private consumption and use, refused to do business with VEL.

[10] VEL contends that the information LUCELEC gave to its customers is wrong, and does not accord with the ESA, which does not restrict the sale of solar PV systems, or self-generation of electricity in an unlimited quantity for private consumption and use. Thus, LUCELEC's actions in disseminating this information interfered with the freedom of VEL's customer's to self-generate an unlimited amount of electricity, and by extension VEL's freedom to supply, sell, install, and maintain solar PV systems, in which it has an economic interest. As a foreseeable result of LUCELEC's actions, VEL's customers and other potential customers refused to do business with VEL and the company lost its expected economic benefit from agreements with customers. Thus, VEL alleges in that way, LUCELEC committed the tort of causing loss by unlawful means.

[11] VEL further alleges that LUCELEC intended to damage its business and cause loss, and that such intention is to be inferred from the following circumstances:

(i) LUCELEC deliberately and wrongfully provided misleading information to VEL's customers;

(ii) It was foreseeable that VEL would be deprived of the benefit of its customers' business;

(iii) VEL's loss of customers was the necessary consequence of LUCELEC wrongful acts, geared towards retaining a monopoly on the supply of electricity by fossil fuel in Saint Lucia; and

(iv) If VEL's business was successful, LUCELEC would have lost revenue as many of its customers would have bought the systems sold by VEL, thereby reducing their consumption of electricity supplied by LUCELEC.

[12] VEL alleges the following particulars of loss:-

(i) loss of all its customers and potential customers;

(ii) being forced to shut down its business and terminate staff; and

(iii) loss of revenue.

[13] VEL avers that its business was capable of servicing 3,100 - 3,150 persons and it could have obtained that number of clients during the period 2013-2018 and had projected its profits at approximately $6.4 million annually with a capacity to increase to $100 million annually. VEL sets out particulars of specially damages which comprised of the cost of setting up its business and other associated expenses, and seeks following relief: (i) a declaration that LUCELEC incorrectly interpreted the ESA and ESAA and advised customers that they could not self-generate more than 25 kW of electrical power from renewable resources for their own use and consumption and remain connected to the grid; (ii) a declaration that LUCELEC incorrectly interpreted section 5 of the ESAA that a person who wishes to self-generate electricity from a renewable source must first obtain a license from the NURC; (iii) a declaration that LUCELEC incorrectly interpreted section 10 of the ESAA that it forbids self-generation of electricity from a renewable source for one's own use and consumption without a license from the NURC; (iv) a declaration that VEL's

business of selling, supplying, installing, and maintaining solar PV equipment to persons for self-generation of electrical power for a person's own use and consumption is not illegal in Saint Lucia; (v) general damages for causing loss by unlawful means; (vi) special damages in the sum of EC$13,207,500.00 and continuing to the date of judgment; (vii) interest; and (viii) costs.

LUCELEC's Defence

[14] LUCELEC's case is that its pilot project, which began in 2009, was designed to permit interconnection of solar PV systems with its distribution grid, for persons who were self-generating electricity from renewable resources. Interconnection permitted both residential and commercial customers to continue to receive a back-up supply of electricity from LUCELEC, while feeding excess power generated by their systems into the grid. Interconnection also facilitated 'net metering' which allowed the customer to offset the number of kilowatt hours fed into the grid against the number of kilowatt hours supplied to them by LUCELEC.

[15] LUCELEC avers that prior to the ESAA, it had the exclusive right to generate, sell and distribute electricity in Saint Lucia from any source, and there was no legislative framework to govern self-generation and distribution of electricity from private solar PV systems. Interconnection of solar PV systems to the grid meant that each system connected to the grid would no longer be generating power solely for private consumption and use, but could potentially generate electricity for supplying the distribution grid, and by extension for sale to the public. This was an inevitable upshot of interconnection. To ensure the safety and viability of the grid and to reduce the risk of loss or damage to its customers, LUCELEC determined that the appropriate levels of self-generation for interconnection with the grid should be 5kW for residential customers and 25kW for commercial customers. The pilot project was well-known and persons seeking to connect solar PV systems to the grid, complied with all the conditions.

[16] LUCELEC denies that it made any verbal threat to disconnect any of VEL's customers who self-generated more than 25kW of electricity, from the grid, and admits that persons are entitled to generate as much electricity as they wish for personal consumption and use. However, it is entitled to establish the parameters for interconnection to its distribution grid, which is private property. As there was no legislative framework to determine the parameters of this undertaking, the pilot project operated at LUCELEC's discretion. When it was expected that legislation would be passed to govern generation and transmission of electricity from solar PV systems, LUCELEC decided to halt the pilot project, so as not to fall afoul of the regulatory framework to be enacted.

[17] LUCELEC emphatically denies that it conveyed to anyone that it was illegal to self-generate, in excess of the limits set under its pilot project, for private consumption and use, and has never had a disconnection policy for persons seeking to install solar PV systems, as alleged, or at all. It merely stated the terms for connecting to its distribution grid, which was the result of a contractual arrangement between the individual customer and LUCELEC, under its interconnection agreement.

[18] LUCELEC asserts that following the enactment of the **National Utilities Regulatory Commission Act**[3] ("NURCA") and the ESAA, it stopped processing applications for interconnection because section 5 of the ESAA provided that the NURC is responsible for the licensing and regulation of the generation of electricity from renewable energy sources. In keeping with this function, the NURC published its application procedure for solar PV generation in November 2016, which required, inter alia, that a person wishing to connect to the distribution grid to provide solar generated electricity, *("not exceeding 5kWp for residential usage and not exceeding 25kWp for commercial usage")* shall not purchase and/or install any equipment prior to receiving approval from the NURC. Thus, LUCELEC says it only informed persons seeking interconnection, of the need to comply with the NURC's application procedure, prior to interconnection.

[3] Act No. 3 of 2016.

[19] LUCELEC further denies the alleged effects of the information which VEL alleges was provided to customers, and states that up to May 2018, it had connected 14 residential and commercial solar PV systems which were supplied and installed by VEL. There were two applications pending for VEL customers at the time that VEL ceased operations, of which one was subsequently interconnected, and the other was approved but the system has not been installed. Prior to the establishment of the NURC, LUCELEC connected 57 residential and commercial solar PV systems to the grid and since the establishment of the NURC, it has connected a further 29 systems. Further, VEL had successfully installed approximately 16% of all solar PV systems in Saint Lucia up to May 2018, and there continues to be interest in solar PV systems, with several companies currently offering the supply and installation of such systems on the island. Therefore, LUCELEC says, if customers refused to do business with VEL (which is denied), it is not as a result of any act or omission on its part.

[20] LUCELEC denies the particulars of intention, loss, and damage averred by VEL, and states that it is a private entity entitled to conduct its affairs in a manner which protects its private property. The pilot project has been superseded by the guidelines established by the NURC for interconnection with the distribution grid, and it has acted within the confines of the applicable laws and guidelines from the NURC. Further it has not intentionally caused any loss to VEL, and the particulars of loss and damage claimed by VEL are speculative at best, as by VEL's own admission it operated for at least five years, yet it is seeking to recover the expenses incurred in starting the business, which are all too remote. LUCELEC puts VEL to strict proof of the sums claimed, denies that VEL is entitled to any of the remedies sought, and prays that the claim be dismissed with costs.

VEL's Reply

[21] In its reply VEL asserts that LUCELEC has no right to control access to the supply of electricity for its customers, and has no right to own and hold private property, or to control access to and use of such property. The pilot project was a commercial decision which was not supported by any law or lawful regulation, and did not accommodate customers who wish to self-generate only, and not interconnect to the grid. VEL disagrees that prior to

the ESAA there was no legislative framework to govern the generation of electricity from solar PV systems, and avers that the laws permitted a person to self-generate electricity from renewable resources at an unlimited quantity for private use, and did not prohibit such a person from also being connected to LUCELEC's grid without interconnection. There are internationally accepted methods to prevent or limit the electricity produced by a PV system from being fed into the grid. The systems that it sold could produce as much power as was needed by its customers without feeding back the grid, and LUCELEC was informed of this. VEL therefore denies that LUCELEC is entitled to establish any limits or rules which interfere with a person's right to self-generate electricity from renewable resources, for private consumption and use.

[22] VEL further asserts that neither the NURCA nor the ESA as amended provides that a person who wishes to self-generate electricity from renewable resources must obtain a license from the NURC. The NURCA was passed to regulate the supply of utilities to the public, and does not apply to VEL or its customers, as they are not in the business of supplying electricity to the public. Nonetheless, to reduce the loss to its business, it applied to LUCELEC to install solar PV systems under the pilot project, but LUCELEC, working with the NURC, delayed, blocked and/or refused the applications, and subsequently halted the project. Further, the barriers to installation and operation of the PV systems sold by VEL were imposed by LUCELEC, to prevent VEL's customers from entering into agreements and carrying on business with VEL. VEL admits that 14 of its residential solar PV systems were installed through the pilot project, but states that this percentage was minuscule, compared to what it could have supplied, installed, and maintained had LUCELEC not unlawfully interfered with its business, thereby causing loss and damage, by forcing it to close its business, all of which was foreseeable.

Issue 1 : Has VEL established the elements of the tort of unlaw interference with its economic interest?

The Law

[23] In **OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young**[4], the House of Lords conducted a thorough analysis of the tort of causing loss by unlawful means and agreed the elements of the tort, which Lord Hoffman stated in the following terms:-

> *"[47] The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the Claimant has an economic interest and (b) an intention thereby to cause loss to the Claimant..."*

[24] *Acting by unlawful means:* Lord Hoffman defined the element of unlawful means, as acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. The act against the third party must be actionable by the third party, subject only to the qualification that such act will nonetheless constitute unlawful means if the only reason it is not actionable is because the third party has suffered no loss. If the third party submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead.[5] His Lordship further stated, that it does not include acts which may be unlawful against a third party, but which do not affect his freedom to deal with the claimant.[6]

[25] His Lordship helpfully discussed several cases which demonstrate what will properly constitute unlawful means. In **Lonrho plc v Fayed**[7] the plaintiff said that the defendant had intentionally caused loss to it by making fraudulent statements to the directors of the company which owned Harrods, and to the Secretary of State for Trade and Industry, which induced the directors to accept the defendant's bid for Harrods, and the Secretary of State to refrain from referring the bid to the Monopolies Commission. The defendant was thereby able to gain control of Harrods to the detriment of the plaintiff, who wanted to buy it instead. His Lordship noted that the Court of Appeal correctly rejected an argument that the means used to cause loss to the plaintiff could not be unlawful because neither the

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[4] [2007] UKHL 21
[5] OBG Ltd at paragraph 49
[6] OBG Ltd at paragraph 51
[7] [1990] 2 QB 479 (Court of Appeal) and [1992] 1 AC 448 (House of Lords)

directors nor the Secretary of State had suffered any loss. The allegations were of fraudulent representations made to third parties, which would have been actionable by them if they had suffered loss, but which were intended to induce the third parties to act in a way which caused loss to the plaintiff.[8]

[26] In **RCA Corporation v Pollard**[9], the plaintiff had the exclusive right to exploit records made by Elvis Presley. The defendant was selling bootleg records made at Elvis Presley concerts without his consent. This was an infringement of section 1 of the Dramatic and Musical Performers' Protection Act 1958, which made bootlegging a criminal offence and being enacted for the protection of performers, would have given Elvis Presley a cause of action. However, the Court of Appeal held that the infringement of the Act did not give **RCA** a cause of action. The defendant was not interfering with the liberty of the Presley estate to perform the exclusive recording contract which, as Oliver LJ noted, was "no more than an undertaking that he will not give consent to a recording by anyone else". Nor did it prevent the Presley estate from doing any other act affecting the plaintiffs. The bootlegger's conduct, said Oliver LJ, "merely potentially reduces the profits which [the plaintiffs] make as the result of the performance by Mr Presley's executors of their contractual obligations." However, the wrongful act did not interfere with the estate's liberty of action in relation to the plaintiff.[10]

[27] His Lordship noted that **Lonrho Ltd v Shell Petroleum Co Ltd (No 2)**[11] was an attempt to found a cause of action simply on the fact that the conduct alleged to have caused loss was contrary to law. The defendant's conduct was alleged to be a criminal offence but not actionable by anyone. Lonrho owned and operated a refinery in Rhodesia supplied by a pipeline from the port of Beira. When Rhodesia declared independence in 1965, the UK imposed sanctions which made it unlawful for anyone to supply the country with oil. As a result, the refinery and pipeline stood idle until the independence regime came to an end. Lonrho alleged that Shell had prolonged the regime by unlawfully supplying Rhodesia with

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[8] OBG Ltd at paragraph 50
[9] [1983] Ch 135
[10] OBG Ltd at paragraph 52-53
[11] [1982] AC 173

oil through other routes and thereby caused loss to it. The House of Lords decided that the alleged illegality gave rise to no cause of action on which Lonrho could rely. Shell did not interfere with any third party's dealings with Lonrho and even if it had done so, its acts were not wrongful in the sense of being actionable by such third party.[12]

[28] Lord Hoffman also stated that it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law. In this regard, he noted that the common law has traditionally been reluctant to become involved in devising rules of fair competition, which has been left to Parliament, and warned that the courts should be similarly cautious in extending the tort, which was designed only to enforce basic standards of civilized behavior in economic competition between traders, or between employers and labour, and risking the danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain, if he chooses to do so[13].

[29] Counsel for LUCELEC Mr. Deale Lee, in written submissions cited the case of **Al Enterprises v Bram Enterprises**[14] from the Supreme Court of Canada and submitted that in determining what constitutes unlawful conduct for the purpose of establishing liability under the tort of causing loss by unlawful means, that court stated that the term "*unlawful*" is to be given a narrow construction, and said the following:-

> *"... the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue from harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offenses and breaches of statute would not be per se actionable under the unlawful means tort, but the tort would be available if, under the common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort. This approach avoids "tortifying" the criminal and regulatory law by imposing civil liability where there would not*

[12] OBG Ltd at paragraph 55
[13] OBG Ltd at paragraphs 56 - 57
[14] [2014] 1 R.C.S. 177

otherwise be any: see OBG, at paragraphs 57 and 266. ***The two core components of the unlawful means tort are thus that the defendant must use unlawful means in the narrow sense and that the defendant must intend to harm the plaintiff through the use of the unlawful means.***" (my emphasis)

[30] Lord Hoffman in **OBG Ltd.** also confirmed that the old cases of interference with potential customers also clearly fell within this description of unlawful means. For example, where a defendant was held liable because he drove away customers of a quarry by threatening them with mayhem and vexatious suits[15], and where the master of a ship was held liable in tort for depriving a rival ship of trade, by using his cannon to drive away a canoe which was approaching from the shore[16]. He also referred to cases concerning the obstruction of actors on a stage by preconcerted hissing[17], the disturbance of wild fowl in decoys by the firing of guns[18], and the inducing of persons under personal contracts to break their contracts[19]. His Lordship also made mention of cases concerning wrongful threats or actions against employers with the intention of causing loss to an employee where the defendants conspired to threaten the employer that unless the employee was dismissed, there would be an unlawful strike [20], and where a union committed the tort of inducing breaches of the contracts of the employees of barge hirers to prevent them from hiring the plaintiff's barges such that the intention was to cause loss by unlawful means to another employer[21].

[31] Applying these principles, this Court must therefore determine whether the following alleged acts, if proven, constitute unlawful means:-

(i) Whether LUCELEC incorrectly interpreted sections 3 and 25 of the ESA and wrongly informed VEL's customers that they could not self-generate more than 5 kW and 25kW of electricity for residential and commercial installations respectively, from renewable sources, for their own consumption and use, and remain connected to the grid?

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[15] Garret v Taylor (1620) Cro Jac 567, 2 Roll Rep 162
[16] Tarleton v M'Gawley (1790) 1 Peake NPC 270
[17] Clifford v Brandon 2 Camp 358 and Gregory v Brunswick 6 Man & G 205
[18] Carrington v Taylor 1 East 571 and Keeble v Hickeringill 11 East 574n
[19] Bowen v Hall 6 QBD 333 and **Lumley v Gye** 2 E & B 216
[20] Rookes v Barnard [1964] AC 1129
[21] J T Stratford & Son Ltd v Lindley [1965] AC 269

(ii) Whether LUCELEC incorrectly interpreted section 5 of the ESAA to mean that a person who wishes to self-generate electricity from a renewable source must first obtain a licence from the NURC.

(iii) Whether LUCELEC incorrectly interpreted section 10 of the ESAA as forbidding self-generation of electricity from a renewable source for one's own consumption and use, without a licence from the NURC?

[32] Each will be discussed in turn.

(i) Did LUCELEC incorrectly interpret sections 3 and 25 of the ESA and wrongly inform VEL's customers that they could not self-generate more than 5kW and 25kW of electricity for residential and commercial installations respectively, from renewable sources for their own use and consumption, and remain connected to the national grid?

[33] Counsel for VEL, Mr. Peter Foster KC, submits that under section 3 of the ESA, LUCELEC had the exclusive to generate, transmit, distribute, and sell electricity, from any source, in Saint Lucia. Section 25 of the ESA provided that during the subsistence of the licence, no one could generate, transmit, distribute, or sell electricity in Saint Lucia, except that a person could generate electricity from any source for his or her own consumption and use. Following the enactment of the ESAA in January 2016, section 3 of the ESA was amended to restrict exclusivity to the generation and sale of electricity from fossil fuel only. The ESAA also amended section 25 of the ESA by deleting that section and providing that a person may generate and transmit electricity from fossil fuels for his or her own consumption and use. Counsel submits therefore, that self-generation from renewable or any other resource, including fossil fuels, for private consumption and use was always legal, and was permitted under the ESA, and continued subsequent to the ESAA. Thus, rights of consumers did not change, and self-generation was not illegal in Saint Lucia. Mr Foster says the ESA as amended does not contain any provision forbidding the generation of electricity from renewable resources, and does not limit the quantity of electricity that can be self-generated for personal consumption and use, from any source.

[34] Mr. Lee agrees that prior to January 2016, LUCELEC had the sole and exclusive licence to generate, transmit, distribute, and sell electricity in Saint Lucia, from any source, by virtue of section 3 of the ESA. He concurs that 25 of that Act provided that the exclusive license was subject to an exception for persons generating and transmitting electricity for their own consumption and use. However, he says when the ESAA amended section 3 of the ESA to make LUCELEC's licence applicable to generation of electricity from fossil fuels only, LUCELEC retained the right to generate, distribute and sell electricity from any other source. As a result of this amendment other persons were also permitted to generate electricity from renewable sources, but would first have to obtain a licence from the NURC, in order to do so.

Analysis

[35] Prior to the ESAA, section 3(1) of the ESA, provided that LUCELEC *"shall have a sole and exclusive licence to generate, transmit, distribute and sell electricity in Saint Lucia for a period of 80 years with effect from 1 July 1965."* Section 25(1) of the ESA qualified this right by providing inter alia, that *"during the continuance of the licence, a person except the Company [LUCELEC] shall not generate, transmit (save for his or her own consumption and use), distribute or sell electricity within Saint Lucia."* That section was amended by section 4 of the ESAA, which provides that *"from the date of commencement of this subsection, the exclusive licence to generate electricity shall be for the generation of electricity from fossil fuel only."* Section 25(1) of the ESA was also amended by section 10 of the ESAA which deleted same and substituted it with the following, *".....during the continuance of the licence, a person except the Company [LUCELEC] shall not generate from fossil fuels, transmit (save for his or her own consumption and use), distribute or sell electricity within Saint Lucia."*

[36] I agree that on the plain meaning of the words in section 3(1) and 25(1) of the ESA, prior to January 2016, LUCELEC had the exclusive right to distribute and sell electricity, generated from any source, while other persons had the right to generate and transmit electricity from any source, for personal use and consumption only. Such other persons were prohibited

from distributing and selling self-generated electricity to the public. When the ESAA came into effect on 4th January 2016, and LUCELEC's exclusive licence was curtailed to electricity generated from fossil fuel only, the exception to the licence remained, with other persons retaining the right to generate and transmit electricity from fossil fuels, for personal consumption only. Having preserved LUCELEC's exclusive right to distribute and sell electricity from fossil fuels, this meant that it was now open to other persons to generate and transmit electricity from renewable resources, not only for personal consumption and use, but to also to distribute and sell such electricity to the public.

[37] The sections could have been drafted with greater clarity, however this is the only logical interpretation to be given, having regard to the totality of the ESA, as amended. Section 25 must be read in tandem with section 3, which is intended to limit LUCELEC's exclusive licence to generation, transmission, distribution, and sale of electricity from fossil fuels, while the exception which allowed for generation and transmission for personal consumption remains. In my view the ESAA did not remove the right which the public always had to self-generate, but rather confirms it. Having limited LUCELEC's exclusive licence to fossil fuels, and the right of other persons to self-generate from fossil fuels for personal consumption only, this left the door open to LUCELEC to generate transmit distribute and sell electricity from renewable resources, as well as to other persons to self-generate and transmit electricity from renewable resources, for personal consumption and use, and also for distribution and sale.

[38] If the sections are to be interpreted as Mr. Lee suggests, that other persons had the right to generate and transmit electricity from renewable resources, as long as it was for their own consumption and use, but could not distribute or sell such electricity, there would have been no need to amend section 25 of the ESA. The amendment would have provided exactly as the original section did, which was the right of generation and transmission for private consumption and use only, across the board, and would therefore be otiose.

[39] The ESAA states that it is *"An Act to amend the Electricity Supply Act, Cap 9.02, to provide for the regulation of electricity supply service by the National Utilities Regulatory Commission"*. Section 4 of the ESA as amended provides for the licensing and regulation

of electricity from renewable resources. Section 4, so far as relevant states: *"Subject to section 64, the Commission shall, in addition to any other functions specified in this Act or the National Utilities Regulatory Commission Act, No. of 2015, be responsible for the licensing and regulation of the generation of electricity from renewable resources."* Prior to the ESAA, individuals could have generated electricity from renewable resources for personal consumption only, and without regulation. However, the need for regulation has arisen as other persons can now generate and transmit electricity from renewable resources, not only for personal consumption and use, but also for distribution and sale.

[40] Without this change, the justification for regulating the longstanding activity of self-generation for personal consumption, would seemingly have remained absent. These new regulatory provisions would have spawned directly from the ability of others to now generate, transmit, distribute and sell electricity from renewable resources. I therefore agree with Mr Foster that subsequent to the ESAA there is no restriction on self-generation of electricity from renewable or any other resources and this has always been permissible by law. However, the dispute is not whether other persons may self-generate electricity, as the law is pellucid on this; rather it concerns whether a person who engages in generating and transmitting electricity for personal consumption from solar PV systems may do so while connected and/or interconnected to LUCELEC's distribution grid. It appears that this turns on the definition and use of the terms 'connect' and 'interconnect.'

Can a person generating and transmitting electricity for personal consumption do so while connected and/or interconnected to LUCELEC's grid?

[41] Mr. Foster submits that VEL sold solar PV systems to persons who were already connected to the grid but wished to self-generate electricity for personal consumption. In keeping with the pilot project, VEL's customers were wrongly informed by LUCELEC that they could not self-generate above the limits set by LUCELEC, from renewable resources, and remain connected to the distribution grid.

[42] Counsel submits that LUCELEC's notion that prior to the ESAA there was no legislative framework governing the generation and distribution of electricity from private solar PV

systems is false, as section 25(1) of the ESA provides an exception allowing persons to self-generate electricity for their own consumption and use from any source. He says when VEL commenced operations in 2013, it could legally carry on its purpose of selling solar PV systems to customers wishing to self-generate electricity and these customers were legally entitled to purchase such systems under section 25 (1) of the ESA. There is nothing within that section which limits the amount of electricity that a person can self-generate. Therefore, LUCELEC unlawfully infringed on the right of VEL's customers to self-generate an unlimited supply of electricity, when it imposed the caveat that it would only approve systems within the preset maximum capacity, to interconnect to the grid, and to sell excess electricity back to LUCELEC.

[43] Mr. Foster argued that there is no restriction in law which prohibits a customer from being connected to two power sources. Neither is there any law which allows LUCELEC to disconnect a customer for doing so. Once approval has been given to a customer by the relevant authority, for connection to the grid, any limits imposed by LUCELEC would be arbitrary and artificial. Thus, Counsel says, LUCELEC illegally refused to allow customers with solar PV systems which generated in excess of the limits by the pilot project, to be connected to the grid.

[44] Mr. Foster objected to LUCELEC's position that interconnection means that solar energy must be fed back into its distribution grid and that the limits were imposed to maintain the integrity and safety of the grid and to prevent overloading, as there was a very real risk of the energy generated from these systems feeding back into the grid, once connected to it. He submits that LUCELEC's definition of interconnection is inaccurate, as VEL has maintained throughout that there is existing technology such as SMA inverters and metering systems which can be programmed to allow no electricity to be fed back to the grid, thereby preventing any risk of overload, by feeding electricity to the grid. Counsel says both experts accepted that SMA systems can be programmed to prevent the export of electricity to the grid. There was never an issue of VEL's customers generating electricity for sale to the public through LUCELEC's grid, and VEL has always maintained that it was not interested in the pilot project and the sale of electricity, but rather providing its customers with the ability to self-generate any amount of electricity they wished.

[45] Mr. Foster further submits that given the type of systems that VEL sold, some had to connect to LUCELEC's grid as a means of backup supply, and others could operate without being interconnected to the grid, but it was far more efficient for these systems to be interconnected and LUCELEC was aware of this. He noted that no report was produced on the outcome of the pilot project, regarding safety and the size of the systems, and suggested that the financial implications of self-generation were a consideration in determining the limits set by LUCELEC for its pilot project. He therefore argues that LUCELEC's claims about safety amount to preventing what is permissible by law, by imposing technical and artificial barriers. By dint of this LUCELEC created an environment that if a consumer wished to install a solar PV system and remain connected to the grid, he or she had to apply under the pilot project and submit to a 5kW or 25kW limit for self-generation. As a result, VEL was unable to sell, supply or maintain customers with solar PV systems to self-generate above these limits.

[46] Mr. Lee submitted on behalf of LUCELEC that the two acts that VEL complains of, as being unlawful are: (i) that LUCELEC set a limit on the capacity of the systems that could interconnect with its distribution grid and (ii) that it threatened to disconnect customers who installed systems which exceeded the set limits. He states that the alleged unlawfulness of these actions must be considered against the legislative framework, as generation of electricity is a regulated undertaking. Prior to 2016, whilst other persons could self-generate, there was no provision for sale of electricity or feeding electricity into the distribution grid. The pilot project, which was implemented in 2009, was geared towards testing the mechanisms for interconnection and the sale of electricity to LUCELEC by individual producers, and was a voluntary undertaking. The project was underpinned by an interconnection agreement between LUCELEC and the owner of the system, whereby the owner would be allowed to export power to the grid and receive credit for the power supplied against power received from LUCELEC, through a system called net metering.

[47] Mr. Lee says, VEL argument that interconnection only arose when there was export of power to the grid, and that once there was no export the customer would only be engaged in self generation, is not supported by the expert testimony. He submits that VEL's expert testified that interconnection is the ability of the inverter to be connected to the grid and the

purpose of interconnection is to enable power to be fed into the grid, or received from the grid. LUCELEC's expert testified that interconnection occurs once a PV system is connected to any system that has power supplied by LUCELEC. He submits that the experts agreed that interconnection had nothing to do with whether electricity was in fact being exported to the grid, and the essential factor was that the solar PV system was connected to an energized part of the grid. Thus, Counsel submits that self-generation does not require interconnection, and would arise where a customer is generating electricity without resort or connection to LUCELEC's grid. Counsel further says that VEL's witnesses all testified that it was possible for solar PV systems to work without interconnection, with the use of backup battery storage for excess electricity produced by the system. However VEL did not supply systems with battery backup and therefore did not supply systems that did not require interconnection.

[48] Mr Lee further contends that section 26 of the ESA establishes quality standards for electricity, which is generated and distributed by LUCELEC, and the interconnection of solar PV systems could have a serious impact on the quality of electricity being distributed over the network. Further, it is trite that LUCELEC is permitted to take reasonable steps to safeguard its property and that of others. Counsel submits that the experts agreed that it was within LUCELEC's power, as the owner of the distribution network, to set conditions or limits for interconnection. They agreed that it is not uncommon for the utility company to set grid codes which determine what equipment can be interconnected, the size of the PV system and any limitation on the amount of electricity which can be exported to the grid. The experts also agreed that safety is an important consideration in setting the size limit on PV systems, as they can cause the grid to be overloaded, or unstable, and changes in voltage and frequency can cause damage to equipment. LUCELEC's expert witness testified that the limits on sizes for residential and commercial PV systems adopted by LUCELEC conforms to the wiring standards applicable to Saint Lucia, which permits the operation of PV systems within the safety parameters set by the wiring regulations.

[49] Counsel referred to the evidence of LUCELEC's witness Mr. Garth George, that the pilot project sought to limit the size of the systems rather than the amount of electricity fed back to the grid, because the size of the system would have an impact on the grid, even when the PV system is not exporting electricity back to the grid. Mr. George reiterated that LUCELEC's pilot project imposed limits which applied to persons seeking interconnection, and LUCELEC did not seek to regulate in any way, persons seeking to self-generate solely for their own consumption and use. He further says that after the ESAA and NURCA were enacted, regulation and licensing of the generation of electricity from renewable resources fell within the purview of the NURC.

[50] Mr. Lee submitted that LUCELEC commenced the pilot project on its own initiative to accommodate interconnection, and was only concerned with interconnection, and in no way sought to regulate self-generation of electricity. As a limited liability company which is entitled to the ownership and control of its assets LUCELEC had no obligation to facilitate VEL's business and it remained open to VEL's customers to disconnect from LUCELEC's distribution grid and install any size system they desired. Additionally, none of the actions complained of by VEL constitutes a breach of LUCELEC's obligations under the ESA.

The Evidence

[51] The evidence from VEL's ordinary witnesses who were employees and consultants of VEL is that LUCELEC gave the public the impression that they could not self-generate electricity for their own consumption, above the limits set under its pilot project, and remain connected to its distribution grid. Thus, LUCELEC created an environment where all owners of solar PV system who wished to self-generate but remain connected to the grid would have to sign an interconnection agreement with LUCELEC, which limited the quantity of electricity self-generated for residential and commercial premises, even if the customer wanted to generate more electricity, and did not wish to feed back into LUCELEC's grid, or could limit the electricity fed into the grid.

[52] VEL says its customers wished to utilize solar PV systems as their primary source of electricity, but remain connected to LUCELEC's grid for backup power and shortfalls during cloud cover. It is said that VEL's systems utilized SMA inverters which can prevent electricity from being fed into LUCELEC's distribution grid, or limit the electricity fed into the grid to a predetermined amount or timeframe. Further, SMA inverters also provide the option for the owner of the system and/or the utility company to have real-time web-based monitoring and control of the process. It allows larger kilowatt solar PV systems to be installed without affecting LUCELEC's grid. VEL's witnesses contend that it is not the case that the systems sold by VEL and connected to the grid would feed power into the grid, and would no longer be generating power for the owner's personal consumption only, but for the public as well. It is also not the case that there would be harm to LUCELEC's distribution grid. There was therefore no legitimate reason to limit the kilowatt of electricity produced by these systems, when inverters can function to prevent or limit the quantity of power entering the grid.

[53] Mr. Michael Brigham, in particular testified on behalf of VEL that there is an important difference between a property that is connected to the grid and the solar array of the PV system on the roof, which may or may not be connected to the grid. He says to assume that a property cannot receive power from two different sources that are unconnected is wrong. The grid is connected to the property and the solar system is also connected to the property, but this does not mean that the solar system needs to be connected to the grid. The distinction is made by the inverter chosen and the manner in which the software is set. Whilst most persons would not install an off-grid system on a property that is already connected to the grid, when there is a limit on the amount of electricity which can be fed back to the grid, it presents the perfect solution. This is what limited feedback inverters do, they limit or completely prevent any power from the system, from flowing back to LUCELEC's meter or grid, effectively rendering the system an off-grid system. Mr Brigham also says that he spoke to LUCELEC's Distribution Planning Engineer Mr George, who informed him that all solar power flows through the grid, therefore LUCELEC needed to approve all solar PV systems, and the only path available was through the pilot project. However, this did not apply to properties that were not connected to LUCELEC's grid and

complete disconnection from the grid was the only avenue for exceeding 25kW, for any property on the island.

[54] In the same vain, in cross examination, Mr. Brigham stated that there is a difference between interconnection and exporting electricity, as a system can be interconnect to a grid and never feed electricity into it. Just because a person is lining up data to match the grid does not mean that one is sending power to it. He stated that interconnection involves an interaction between the inverter and the grid at the point of the meter on the customer's property, and that VEL never went onto LUCELEC's property. He also indicated that the systems which VEL sold had to be synchronized with the grid to be able to function.

[55] Mr. Brigham also made the following, seemingly contradictory statements in response to questions from Mr. Lee:

> *"MR. LEE: So let me just understand how that works then Mr. Brigham. When you quote a 100-watt system as 4 25-watt systems, does that mean each system operates independently of each other or do they work as a whole?*
>
> *WITNESS: It means that every, as in Ferrands Ice Cream, every 12 kilowatts has its own inverter. The inverters connect together, and all feed the building. But they're individual inverters ...* ***by doing them in segments like this, it allowed us break out 25 specifically from the 100 as in Ferrands. We wanna connect one inverter to the system to LUCELEC to feedback but not the other three. It was an easy way to prove without even using a limiter that only 25 kilowatts was feeding back.*** *It obviously did not get approved by LUCELEC so, I thought it was a good idea, but in any rate, solar systems are always built. You would never put 100 kilowatts on one inverter. The, the logical way was to break it down.* ***I used the number 25 kilowatts each because of that pilot program. Figuring let them use some, let them feed some of it back and not the rest.*** *You, you can see right in here under the list of parts, the second thing says, hybrid inverter.* ***We buy what are called SMA solar island inverters and they're specifically built to have to have no interaction with the grid. Not even synchronization. It literally is a standalone system that still allow you buy power when you need it, but has no relationship to the grid or anything, if you tell it not to..."*** *(my emphasis)*

[56] Similarly, he made the following remarks in response to questions from the Court in seeking clarification:

> *"THE COURT: And what was the third kind?*
>
> *THE WITNESS:* ***The third is a hybrid system and a hybrid system is one where either you, get what's called a SMA Sunny Island inverter that requires ... no interconnection whatsoever to LUCELEC in order to synchronize and you can make electricity.***
>
> *THE COURT: When you say in order to synchronize what do you mean?*
>
> *THE WITNESS:* ***We were told earlier by one of the expert witnesses that even in an off-grid system, even a system that was going to make its own electricity for its own use still had this requirement that it had to in some way connect to the grid just to read what the grid was doing and match it. That's not correct. We have inverters call Sunny Island inverters that don't need to do that. They can make the electricity as much as you need and still allow the house to receive electricity when you not making enough and so that is the third type.***
>
> ...
>
> *THE COURT: In this type, where does the electricity come from when the house is not receiving enough or making?*
>
> *THE WITNESS: LUCELEC*
>
> *THE COURT:* ***So this type is still interconnected?***
>
> *THE WITNESS:* ***The house is connected to LUCELEC, and the house is connected to the solar system. But the solar system and LUCELEC are not connected... You can use from either one, but they don't interact at all ...***
>
> *THE COURT: So that inverter, on the third type of system, what does it do?*
>
> *THE WITNESS:* ***It basically makes electricity feeds it to the house and then it senses when the house is calling for more and allows the more to come from an external source. Whether it be a battery or a generator or a utility company.***
>
> ...
>
> *THE WITNESS:* ***It's a standalone system. It doesn't care where, when it's not making enough, it notifies something, and you go and you pull from somewhere else. Often people use them... for off-grid systems, but there is no reason that it can't be used and have the utility be the backup.***
>
> ....

THE WITNESS: In Ferrands Ice Cream we did a hybrid. We did the island system so that none could leak out, but that it had the ability. These also have the ability to feed back if you ask them to. So we broke it into four pieces, so that if we were given the permission, the permit, we could take one of them and let one of them feed back. ***We have a permit for a 25- kilowatt system for Ferrands. One of them to feed back and island the other three. Disassociate the other three from the grid completely.*** *Currently all four are disassociated." (my emphasis)*

[57] *Again, on another occasion Mr. Brigham stated:*

"...So, the full kilowatt would be a 52-kilowatt system, and I was doing it in two parts just like Ferrands. ***I did one that was 25 kilowatt and one that was 27. This would allow me to feed one back and for the other one to self-generate with what we call a Sunny Island inverter that does not require any interconnection to the grid at all, at all. My professional witness was wrong. The Sunny Island does not require any interconnection at all.*** *I broke into two pieces, because I thought that was the best way to handle it. LUCELEC approved the 25, so I do the 25 system separately. Same at Ferrands, Cul-de-Sac." (my emphasis)*

[58] Mr. Garth George is LUCELEC's Distribution Planning Engineer, responsible for determining and planning the expansion of LUCELEC's distribution network. He testified that expansion of the network is driven internally through load and demand forecasts and externally through requests from customers. He states that LUCELEC is incorporated under the laws of Saint Lucia and registered on the Eastern Caribbean Securities Exchange. Its shares are held by corporate entities, state agencies, and private individuals. Prior to the ESAA, LUCELEC was the only entity authorized to generate and distribute power, irrespective of the source. To meet its obligations to supply electricity under the ESA, LUCELEC invested heavily in generation equipment, including development of transmission lines, distribution lines, support structures, and transformers. The plant and equipment are owned and operated by LUCELEC. The amendments to the ESA have now permitted other persons to generate electricity from renewable resources.

[59] Mr. George stated that solar PV systems can either be stand-alone systems or interconnected/ grid tied/ grid interactive. Stand-alone systems are independent of the distribution grid and normally include a bank of batteries to store power supply to be used when solar energy is not available. An interconnected system by contrast supplements the power supplied from the grid with the power produced from the solar PV system. In a grid interconnected system, the power source produced by the PV system must be synchronized with the power source from the grid and without the grid's supply, grid interconnected PV systems will fail to function. The voltage and frequency at which the two power sources will synchronize is determined by the utility company and if the synchronized voltage and frequency should go outside of the specified range, the PV system will automatically disconnect from the grid and cease to operate. Where demand from the consumer exceeds the output of their solar PV system, additional power is obtained from the grid and when there is surplus power produced by the solar PV system, this surplus is fed into the grid. Because PV systems are always physically connected and interacting with the grid, certain important safety features are required.

[60] Mr George stated further that under LUCELEC's PV systems pilot project, customers were credited for excess power fed into the grid under a net metering billing mechanism which offsets the energy delivered to the grid from a PV system against energy received from the grid. This is facilitated by use of bidirectional meters which register energy flow in both directions. The customer is then charged or credited at the standard tariff set by the ESA. He also explained that interconnection between the grid and a solar PV system occurs at the customer's main panel, commonly called the breaker panel. The main panel is located within a building on the customer's premises and is subject to the customer's exclusive control. LUCELEC's role ends at the meter and the interconnection of a solar PV system to the grid does not change this. In such a case LUCELEC would have no knowledge of the amount of power being fed into its distribution grid, or from what location, or of the total electricity being distributed through its network. This poses a danger as it makes planning on the distribution grid difficult, because system design parameters are influenced by power flow. Thus, the PV system interconnection approval procedures established by LUCELEC initially, and then subsequently by the NURC, allowed for adequate evaluation

of the distribution grid and assessment of its ability to accept a PV system at the proposed location. This ensured a safe connection to the grid.

[61] Mr. George reiterated that LUCELEC's pilot project started before any legislative or regulatory framework was established to facilitate interconnection. The purpose was to enable LUCELEC to study the effects of interconnection on its distribution grid and to evaluate the impacts and viability of the net metering tariff mechanism, which was established to credit customers with PV systems, for excess energy exported to the grid. He stated that LUCELEC's distribution system is designed to accommodate only a certain capacity at specific locations along the grid and the capacity is not the same throughout.

[62] Therefore, interconnecting solar PV systems which are too large can overload sections of the grid, thereby causing damage. Limiting the size of solar PV systems connected to the grid would enable LUCELEC to better plan for and accommodate the supply of electricity from these systems, into the grid. Distribution studies would determine the impact of high PV penetration or the introduction of large PV systems on any section of the distribution grid and would allow LUCELEC to reinforce the network where necessary or limit the size of the PV system to be installed. Limiting the size of solar PV systems also means that more systems can be connected to the grid, without requiring significant changes to the distribution network and would make these systems more widespread, as small systems are more affordable.

[63] On the other hand, facilitating large PV systems under the net metering tariff mechanism presents a significant economic concern for LUCELEC as the excess electricity produced by interconnected PV systems is exported to the grid and offset against electricity supplied by the customer at the tariff rate under the ESA, which is 1:1. This rate is based on LUCELEC's cost of generation which includes all transmission and distribution costs as well as administrative, overhead, and other operational costs which would not be incurred by the owner of a solar PV system. Therefore, giving the customer full credit for electricity exported to the grid from their PV system, at the tariff rate established by the ESA means that other customers who do not own/operate solar PV systems are subsidizing the cost of electricity supplied by the PV system owner. Allowing the installation of unlimited PV

system capacity would magnify this subsidy, therefore a different tariff structure would be more appropriate where the PV system customer will be compensated either the avoided cost of electricity, or the actual cost of generating electricity from the PV system, by introducing separate buying and selling rates.

[64] The pilot project was suspended in March 2016, as the ESAA provided that the NURC was responsible for the licensing and regulation of electricity from renewable resources, and was resumed following publication of the NURC's application procedure, in November 2016. Mr. George stated that the systems which VEL sold were grid-tied or interconnected systems and therefore required interconnection with the grid, in order to operate. VEL initially complied with the conditions established under the pilot project, for interconnection. However, issues arose when VEL started to install systems which exceeded the limits set by LUCELEC and the NURC. LUCELEC never sought to impede or in any way impact VEL's business, and its policies were well established and applied equally to all companies and persons seeking to install solar PV systems for interconnection to its distribution grid. PV systems can be imported and installed by anyone so long as the NURC's procedure is complied with. There are currently 10 companies supplying such systems in Saint Lucia. Further, LUCELEC has never threatened to disconnect any customer for installing a solar PV system. Interconnection is made at the customer's main panel within the customer's property and as such would be inaccessible to LUCELEC without the customer's permission. Disconnection could only take place at the meter and once the customer's account is in good standing there would be no basis for disconnection, which would expose LUCELEC to liability.

[65] Regarding Ferrand's Dairy, Mr. George says LUCELEC merely wrote to the customer explaining that it had reason to believe that the system had been interconnected to the grid without approval, and informed that this was a contravention of the guidelines established by the NURC. The customer was advised to regularize the installation and disconnect from the grid until this was done. The customer was not threatened with disconnection, and LUCELEC only relayed factual information. Since then, LUCELEC has installed a bidirectional meter which confirmed that the Ferrand's Diary installation is in fact exporting

electricity to the grid. The limits established under the pilot project were to ensure safety and reliability of the distribution grid. The project was initiated by LUCELEC voluntarily, and it was not compelled to do so under the ESA. Since the passage of the ESAA, LUCELEC has complied with the procedure established by the NURC and has not acted unlawfully or targeted VEL or its customers and continues to facilitate interconnection for solar PV systems which are approved by the NURC.

[66] In cross examination, Mr. George agreed that any person can self-generate all their electricity needs using either generators with fossil fuels or alternative energy sources. He reiterated that the limits imposed by LUCELEC pertained to systems that are interconnected to the distribution grid, regardless of whether electricity is fed back, because the system is still interconnected to, or relies on the grid. Once the system is connected to the grid, it interacts with the grid and impacts it. Therefore, considerations for the grid must be taken into account, because these PV systems are not standalone systems. They are systems that require a power supply from the grid, to operate. He confirmed that the only interconnected systems LUCELEC allowed were within the pilot project, even if the customer was not interested in feeding electricity to the grid.

[67] Mr. George agreed that no report has been published by LUCELEC on the outcome of the pilot project. He agreed that if all the hotels in Saint Lucia converted their energy needs to renewable energy that would create a significant impact on LUCELEC's bottom line. He agreed that, given that LUCELEC's monopoly is now in relation to fossil fuels only, energy suppliers from alternative sources could be considered as competitors in this market, although he stated that at the end of the day there is one utility company, and in terms of distribution and sales, this would still be facilitated through LUCELEC.

Expert Testimony

[68] VEL's expert witness Mr Jerry Franklin is a Professional Engineer, having 25 years of experience in the energy sector in Barbados, with a focus on renewable energy systems in the last 7 years. He is the President of the Board of the Barbados Renewable Energy Association. In summary his expert report concluded that a consumer utilizing a solar PV

system for personal consumption and use, whilst connected to the grid can safely utilize both systems without feeding electricity into the grid, or can do so by feeding electricity into the grid in a measured and/or limited manner, or may utilize the solar PV system without any connection to the gird.

[69] He stated that a grid-tied system which does not feed into the grid is possible because of the zero-export feature of some inverters, such as SMA inverters, which essentially limits production of solar energy by the PV system to the amount consumed by the home or business, hence there is no excess to be fed into the grid. Limited grid feeding is also possible with all inverters with a zero-export system, and instead of matching consumption, the system exceeds consumption by a specified amount, and that excess is exported to the grid. With export limitation, a customer could install a PV system while ensuring that it does not feed more than the agreed export limit into the grid. He agreed that an off-grid system is also possible, without any connection to the grid, whilst the customer's home or business is connected separately to LUCELEC's grid

[70] In cross examination Mr Franklin agreed that a system which utilizes a limited export inverter would require a grid connection for the inverter to operate, and it would still be necessary to follow international standards governing the installation of grid interactive inverters. In response to the question whether one would still have to follow the procedures for PV systems interconnected to the grid, as set by the grid operator and the regulator, he stated that if no power is being exported from the PV system, that system is no different to an off-grid system and therefore the interconnection rules and regulations of the grid operator should not apply. He stated that it was not necessary that the grid be designed with the required capacity to take the full load of an installation, even when it has limited export functionality, because the inverter will not be sending energy to the grid.

[71] Concerning whether the grid will be shielded from the impact of intermittent cloud cover, if connected to a PV system which has limited export functionality, he stated that during cloud cover the electricity which is not being produced by the solar PV system will be supplied to the customer from the grid, however, these would be customers already being supplied by the grid, therefore no modifications would be required to meet that demand.

[72] Regarding the scenario of too much solar energy causing the grid to be unstable, Mr Franklin explained that in every grid transmission and distribution network there are feeders which are designed for a specific capacity. If a customer is exporting electricity to the grid, which exceeds that capacity, this can cause the feeder to shut down. Further, a high level of solar power on a specific feed which matches the peak load during the weekday when a business is functioning, can cause instability during the weekend when the load is significantly reduced. Transformers would be stretched to adjust and maintain the correct voltage level in the serving area. All these issues can be fixed by the utility company, but would require modification of the distribution grid to support the high levels of solar power. The zero-export functionality was created as a solution, which allows the customer to exclude the export of electricity to the grid, or to export up to the limit agreed with the grid operator, thereby reducing or preventing the risk of great instability. Mr. Franklin stated that the export limitation or zero-export inverters' output is set by the installer and is not typically within the parameter that the customer can access, or change.

[73] Mr Franklin explained "interconnection" as the ability for the inverter to be connected into the distribution grid. The purpose is to either consume from the grid, or feed electricity into the grid. It is not unusual for the grid operator to set limits or conditions for interconnection, which follows the grid code, and are intended to protect the grid. There are different criteria for connecting to the grid, such as voltage levels and frequency levels, which are designed for safety. He agreed that the utility company would normally establish the grid codes, and in this case, it would be LUCELEC. It is not unusual to have limits on the amount of power that can be exported to the grid. Whilst uniformed sizes are not necessary, the grid owner would need to know what sizes are being connected. He stated that in respect of certain standards such as the size of the inverter, there would normally be local standards which specify what a person may or may not install. The Caribbean islands may not have their own standards and follow either the North American or European standard. The utility company and or the government determines which standard is followed.

[74] He said it is common for customers with PV systems to export electricity to the grid unless it is a battery system, which can operate with, or be isolated from the grid. He agreed that a PV system which does not have a battery backup, must connect to the grid because that is how it functions, and it is designed to work along with the grid. If the inverter is disconnected from the grid, it will not produce energy. There is the option on most inverters called islanding that specifically causes the inverter to disconnect if the grid drops, but this can be turned off and the inverter may exist independently. Most grid codes require that it be turned on, so it is a feature that is never turned off by installers, however there are currently many hybrid inverters which can operate in both spaces.

[75] Mr Franklin explained that the zero-export function is also available on all inverters with which he has worked. The function is programmed or set by the installer, and in his experience has never failed. He agreed that in relation to geographical distribution, a large concentration of solar PV systems in one location, may affect the operation of the distribution grid, by causing it to become overloaded. He agreed that in such a case the grid operator would have to make changes to accommodate the energy being feed into the grid, at the particular location. In order to do so, the operator would need to have knowledge of the exact quantity of energy being feed into the grid at any given time. He stated that the effect of a sudden drop in energy produced by a large PV system is that the grid will have to supply the extra energy required, but most grids are designed to respond to that. The only time a grid will have difficulty is if the grid itself is overloaded, but the grid is designed to respond to this, as for example, it could be a factory turning on a large piece of equipment, which happens every day on the grid.

[76] LUCELEC's expert Mr Clive Antoine is a licenced Electrical Engineer. He stated that the laws of Saint Lucia allow for an electrical installation to be connected to two or more power sources by virtue of section 25(1) and 5 of the ESA as amended, and the IET Wiring Regulations BS7671 adopted by section 4 of the Saint Lucia Electricity Regulations[22] and the Saint Lucia Bureau of Standards as a national standard. The technical requirements are contained in the IET Wiring Regulation 551.1(iii). Under sections 5 and 25(1) of the

[22] Cap 9.02, December 2008

ESA, one can only interconnect renewable energy sources to the existing electricity supply network. Apart from the prescribed requirements to inform the electrical inspector who must inspect and certify the installation, one would also need to seek permission from the distributor and the regulator as per the Regulations and the NURCA. The NURC application procedure is for grid-tied systems only. Thus, the NURC reviews the application and forwards a copy to LUCELEC for consideration and review. Mr Antoine highlighted several Regulations which require that the operator of the distribution grid be consulted, and its authorization received in relation to any external source of energy. He then states that once approval is given by the NURC on the advice of the grid operator, along with DCA approval where necessary, then notification of intention for a new installation is required under sections 6 and 7 of the Saint Lucia Electricity Regulations. Thereafter the customer may commence installation of the solar PV system.

[77] Mr. Antoine explained that the restrictions which guide the electrical inspectorate on the size of systems which can be connected to LUCELEC's distribution network are set by the NURC in their application procedure for connecting to the grid. The inspector is only mandated to ensure that electrical installations are safe in design, selection, erection, inspection, and maintenance, and will only inspect installation of PV systems for which proper documentation has been provided. This includes the NURC approval letter, and installation will not be certified above the quota or limit for which the NURC approval is granted. He also explained that utility companies have standard procedures, guidelines, and agreements for interconnecting PV systems to their distribution grid, in order to remove time and cost barriers; to help establish coordinated operation of all distribution equipment; to set best practices for transmission and distribution system planning and operation; to improve methods and agreements for siting, permitting, and inspection; and for confirming safety measures to ensure that minimum technical requirements are met by the utility company and PV system owners who supply electricity to the grid.

[78] Mr Antoine further explained that it is not necessary to connect solar PV systems to the grid. Generally, they can be connected in two ways, which are either grid connected or stand-alone. In the grid connected system, the PV system is interconnected in parallel with

the utility network and the electricity produced is transferred to the grid. Either all the electricity is transferred, and the producer consumes electricity from the grid, or surplus electricity only is transferred to the grid. In the stand-alone system the PV system is not connected to the grid, and the electricity produced is used to power an installation on the spot. Stand-alone systems are built with or without electrical storage. Whilst solar panels do not necessarily have to be interconnected to the grid, this is usually how they are installed. They operate on the customer side of the meter, and are generally considered as conservation measures which simply reduce individual customers electricity bill and serving on-site electricity needs.

[79] In cross examination, Mr. Antoine admitted that he is not involved in the sale or installation of PV systems, and does not have hands-on experience with PV systems. He stated that interconnection occurs if the PV system is connected to any point in an installation that has LUCELEC's power. If it is separate, then there is no interconnection. He agreed that there is equipment which can limit the amount of electricity that is fed back to the grid. He agreed that the risks of interconnecting with the grid can be minimized by the technical requirements imposed by the Electrical Department, Communications and Works Department and LUCELEC, and the failsafe systems that are normally put in place. He agreed further, that in accordance with the statements in his report, modern inverters are designed with technologies that assist in mitigating the risk of damage.

Analysis

[80] The starting point for resolving this issue is that LUCELEC is the company which owns and operates the national distribution grid. Thus, the grid is LUCELEC's private property. As the owner, it has the right to determine how and by whom its property is used, and what conditions should be attached to such use. It is the case that prior to 2016, LUCELEC had an exclusive licence in respect of generation, transmission, distribution, and sale of electricity from any source. Since 2016, the exclusive licence is in respect of the generation, transmission, distribution, and sale of electricity from fossil fuels. As such, the ESA specifies the technical criteria to be met by customers, for their property to be

connected to and supplied with electricity from LUCELEC's grid,[23] as well as the conditions for disconnection, which are default with respect to a payment due to LUCELEC for electricity supplied,[24] or if an installation does not comply with the regulations in force as determined by the Chief Electrical Inspector.[25]

[81] The ESA does not require LUCELEC to permit, or make provisions for customers to connect personal equipment to the grid, to facilitate generation of electricity, whether for self-generation or for distribution and sale. Counsel for VEL has not cited any provision in any legislation that mandates this. The amendments to the ESA, although allowing generation, transmission, distribution, and sale of electricity from renewable resources, does not stipulate that this must be facilitated through LUCELEC's grid, and presumably, any person who wishes to do so must seek the permission and cooperation of LUCELEC to use its facilities. Otherwise a person must invest in, and develop his or her own facilities. In the absence of any express stipulation granting such a right, it cannot be inferred that the Act intends to legislate how LUCELEC's private property is to be dealt with. Thus, VEL does not have a right to demand connection to, and the use of LUCELEC's grid, or to challenge any conditions that LUCELEC may attach to the use of its grid.

[82] Despite the contention over the meaning of the hotly contested term 'interconnection,' the parties and their experts all seem to agree that the systems sold by VEL required interconnection to LUCELEC's grid. Both Mr Brigham and his expert Mr Franklin testified to this. If the systems in question required interconnection to the grid, then it is trite that VEL and its customers would have to abide by the conditions stipulated by LUCELEC, in respect of its distribution grid, regardless of how reasonable or progressive same may be. Both experts testified that it is not unusual for conditions for interconnection to be imposed by the grid owner. Mr Brigham agreed, and further posited that this was the reason zero-export inverters were invented. However, the fact of their existence, unfortunately does not oblige LUCELEC to accept them for interconnection to the grid. All the witnesses testified that the conditions attached to interconnection of the PV systems to the grid does not

[23] ESA section 42; Electricity Regulations, regulations 5, 8, and 9
[24] ESA section 45
[25] Electricity Regulations, regulation 12

preclude self-generation, as these systems are not the only systems that facilitate self-generation. There are stand-alone PV systems that do not require any connection to the grid, which allows a person to generate as much electricity as desired, without limitation.

[83] It was stated on behalf of VEL that the systems it sold, which required connection to the grid, are cheaper and more efficient and LUCELEC was aware of this. It is surprising that VEL has unabashedly taken the stance that LUCELEC is not entitled to consider the technical and financial implications of "interconnection" to itself, but demands that LUCELEC consider and act in the interest of the financial implications for VEL and its customers. Again, convenience to VEL and its customers does not compel LUCELEC to accede to their requests. As the pilot project was a voluntary undertaking in respect of its private property (the distribution grid), LUCELEC was entitled to consider any technical and financial implications, and had no obligation to publish any report on the outcome of the project, and was also entitled to discontinue the project at will.

[84] In summing up, it cannot be said that by attaching conditions for interconnection to the distribution grid, LUCELEC has precluded or impeded self-generation of electricity from renewable resources. The evidence reveals that LUCELEC's considerations for setting the limits for its pilot project were based on the capacity of the grid, safety of the grid and all users, the average needs of Saint Lucian households and businesses, and the present tariff structure (financial implications), none of which are unreasonable, and all of which LUCELEC would be entitled to take into account, when dealing with the use of its grid.

[85] Mr Brigham's testified that VEL also sold systems that did not require connection to the grid, which were denied approval by LUCELEC. If that evidence is to be accepted, LUCELEC would certainly not be entitled to approve or disapprove any systems which do not affect, interact with, or touch and concern its property, the grid. That would be interfering with VEL's customers' private property and their right to self-generate electricity from renewable resources pursuant to the ESA. However, VEL centered its case on PV systems with zero-export function, and neglected to deal with these hybrid systems that allegedly required no connection with the grid to operate, and were in effect stand-alone systems. LUCELEC's witnesses stated repeatedly that it did not regulate stand-alone

systems for self-generation of electricity for private consumption and use, which did not interact with its distribution grid.

[86] In that regard much was said of the Ferrand's Dairy installation as a hybrid system, but the evidence reveals that approval was given for the installation of a 25kW system on Ferrand's premises. However a 100kW system, comprising of four 25kW systems was in fact installed. Mr Brigham stated that it was a hybrid system with an inverter, which had the ability to feed back to the grid if activated to do so, and that the inverter was set for zero-export. However, LUCELEC took issue with that installation, which far exceeded the approved limit, and confirmed that the system was feeding back to the grid, despite the zero-export inverter, when a bi-directional meter was installed by LUCELEC.

[87] Mr Brigham is the only witness for VEL who mentioned these hybrid systems, and he contradicted himself when he also testified that VEL sold systems which required connection with the grid to operate, albeit without export. He says that his expert was wrong when he made statements to the same effect. Although Mr Franklin did mention the existence of hybrid systems, in passing, he did not explain in any detail how they operate and how they featured in this case, if at all. Moreover, LUCELEC's witnesses were never cross examined on this issue, and it was simply glossed over. I am therefore unable to find, on a balance of probabilities, that hybrid systems were denied approval by LUCELEC. The evidence in this regard is simply insufficient. Moreover, no explanation was given on why approval was even required for these systems, if they were not intended to be connected to the grid, in any way.

[88] In the circumstances, I am constrained to find that LUCELEC did not erroneously interpret sections 3 and 25 of the ESA. Any misunderstanding of the sections had to do with distribution and sale through the process of interconnection, and not with self-generation independently of the distribution grid. I am also unable to conclude that LUCELEC wrongly informed VEL's customers that they could not self-generate more than 5kW and 25kW of electricity for residential and commercial installations respectively, from renewable resources for their own consumption and use, and remain connected to LUCELEC's

distribution grid, as the imposition of conditions for connection to its grid was properly and entirely within its purview.

[89] The circumstances of this case seem more akin to the case of **RCA v Pollard** cited by Lord Hoffman in **OBG Ltd.** Even if it could be said that LUCELEC's actions under its pilot project had the effect of potentially reducing VEL's profit because the conditions imposed by LUCELEC had the effect of making VEL's systems less attractive to customers, it cannot be said that disallowing interconnection of PV systems which did not meet LUCELEC's specifications prevented VEL's customers as third parties, from dealing and having contractual relations with VEL. The pilot project was initiated before VEL commenced operation, and nothing in the evidence establishes that LUCELEC interfered with any third party dealings with VEL. Even if it had done so, similarly to **Lornho v Shell**, the actions of LUCELEC which VEL complains of would not be wrongful in the sense of being actionable by VEL's customers, as the third parties. To find otherwise would be to descend into a cause of action out of a regulatory statute, which parliament did not intend to be actionable by private law, and which Lord Hoffman warned against, in **OBG Ltd**.

(ii) Did LUCELEC incorrectly interpret section 5 of the ESAA to mean that a person who wishes to self-generate electricity from a renewable source must first obtain a licence from the NURC; and
(iii) Did LUCELEC incorrectly interpret section 10 of the ESAA as forbidding self-generation of electricity from a renewable source for one's own consumption, without a licence from the NURC?

[90] Mr Foster submitted that section 5 of the ESAA states that subject to section 64, the NURC is responsible for the licensing and generation of energy from renewable resources. Section 64, as amended states that the Minister may (after consulting the Commission) make regulations for, among other things, the licensing and regulation of the generation of electricity from renewable energy resources. Counsel says that no regulations have been made by the Minister for the licensing and regulation of generation of electricity from renewable resources. The preamble of the NURCA clearly states that it is "*An Act to provide for the establishment of the National Utilities Regulatory Commission for the*

regulation of utility supply services and for related matters." Section 2 defines 'utility supply services' as "the supplying of a utility to the public." In accordance with section 5 the NURC is a body established for the purpose of licensing and regulating utility supply services, which is the supplying of utility to the public, and is not applicable to self-generation of electricity for one's own consumption and use. There is no clause in the ESA or the ESAA which states that a person who wishes to self-generate must obtain a license from the NURC to do so, and there is no such clause in the NURCA. Therefore, Mr. Foster submits that LUCELEC has erroneously or deliberately misconstrued section 5 of the ESAA, and the application procedure published by the NURC is ultra vires, void and of no effect in law, as it is purported to be made pursuant to section 5 of the ESAA but that section does not grant such powers the Chairman of the NURC.

[91] Mr Foster submits that, likewise, section 10 of the ESAA does not restrict or prohibit self-generation for personal consumption and use. Neither does it state that a license from the NURC is required for this. The section contains the amendment to section 25 of the ESA and provides that during the licence granted to LUCELEC, no one shall generate, transmit, distribute, or sell electricity from fossil fuels (except generation and transmission for one's own consumption and use). There is no provision in the ESA, ESAA, the NURCA or in regulations requiring a licence from the NURC to self-generate electricity from renewable resources. Therefore, LUCELEC erroneously interpreted the section.

[92] Mr. Foster notes that although LUCELEC has argued that it is independent from the NURC, it has wrongly interpreted section 5 and 10 of the ESAA by asserting that VEL's customers required licenses from the NURC. He submits that on one hand LUCELEC influenced or induced the NURC to adopt and/or be guided by its wrongful actions, without the requisite authority, and the NURC proceeded to publish a notification in the Gazette regarding the application procedure for licensing and operations of PV systems, which incorporated LUCELEC's pilot project. On the other hand LUCELEC wrongly cited and adopted NURC's unlawful position in preventing VEL's customers from connecting to the grid while also generating electricity from their PV systems, unless they were granted licenses from the NURC.

[93] In response Mr. Lee submitted that after the ESAA and the NURCA were enacted, regulation and licensing of the generation of electricity from renewable resources fell within the purview of the NURC. Section 5 of the ESA was amended, and if VEL has an issue with the interpretation of that section, this should be addressed to the NURC and not LUCELEC.

[94] Counsel says there is no evidence that LUCELEC interpreted or sought to communicate its interpretation of the ESAA to anyone, and merely referred to the wording of section 5, which is unambiguous, and to the guidelines set by the NURC. Section 5 of the ESAA did not create or carve out an exception for self-generation and section 64, as amended makes provision for the Minister to issue regulations to govern the generation of electricity from renewable resources. The NURC's Notice No. 1 of 2016 sets out the application procedure for solar PV generation. It states that *"a person wishing to connect to LUCELEC's grid to provide solar PV generation (not exceeding 5kWp for residential usage and not exceeding 25kWp for commercial usage) shall not purchase and/or install any equipment prior to receiving approval from the NURC."*

[95] Mr. Lee submits that the starting point in the interpretation of the statues is to examine and interpret the words in their natural and ordinary sense. Therefore it is unnecessary to engage in the semantic exercise urged by VEL to determine the meaning of the unambiguous provisions of the ESAA.

Analysis

Section 5 of the ESAA

[96] Section 5 of the ESAA amends the ESA by deleting section 4 and substituting the following provision:

> *"Licensing and Regulation of Electricity from Renewable Resources*
> *4. Subject to section 64, the Commission shall, in addition to any other functions specified in this Act or the National Utilities Regulatory Commission Act No. of 2015, be responsible for the licensing and regulation of the generation of electricity from renewable energy resources."*

[97] Section 64 of the ESA as amended by section 20 of the ESAA, provides in subsection (2)(d):

> *"(2) The Minister may, after consultation with the Commission [the NURC], make regulations –*
>
> *...*
>
> *(d) for the licensing and regulation of the generation of electricity from renewable energy resources."*

[98] Section 64(3) provides:

> *(3) Without prejudice to the generality of paragraph (2) (d), Regulations made pursuant to that paragraph may –*
> *(a) make provision for –*
> *(i) the procedure for making and determining applications for licences for the generation of electricity from renewable resources;*
> *(ii) the tariffs to be applied in relation to electricity generated from renewable energy resources;*
> *(iii) the fees payable for licences for the generation of electricity from renewable energy resources;*
> *(b) create offences for breach of any provision of the Regulations, subject to the imposition of a maximum penalty of imprisonment for a term of six months and a fine of $5000; and*
> *(c) make any other provision for the purpose of carrying out the functions of the Commission referred to in section 4."*

[99] Section 4 of the ESA as amended makes the NURC responsible for the licensing and regulation of the generation of electricity from renewable energy resources. The section is broadly drafted and does not distinguish between generation for personal consumption or for public supply. The section is subject to section 64, which provides that the Minister may make regulations for the licensing and regulation of the generation of electricity from renewable energy resources. It is common ground that the Minister has not passed any regulations pursuant to section 64 of the ESA as amended. Thus, the question which arises is whether, in the absence of such regulations there is any means or basis upon which the NURC can fulfill its responsibility under section 4 of the ESA.

[100] In the case of **In the Matter of Applications on behalf of Wendy Hilda Carter nee Marsden and Michelle Amanda McCree for Declarations of Status**[26] the Court of Appeal made the following observation:

> *"[9] The Minister has made no regulations under the Act, despite the passage of some 20 years since the Act was passed into law. This is a grievous omission that causes the court to have to fall back on general principles of construction and interpretation, which may in certain instances have the unfortunate consequence of being viewed by some as not carrying into effect the undoubted enlightened intention of the Legislature in passing this Act. It is high time that the Minister corrected this omission."*

[101] In that case the court went on to consider the Maintenance Act, the Status of Children Act and the Rules of the Supreme Court to determine the just and appropriate procedure to bring an application to determine paternity under the Status of Children Act, in the absence of regulations made pursuant to that Act. I would adopt the same posture, and implore the Minister to pass such regulations as are necessary to give effect to the ESA and NURCA.

[102] Section 4 of the ESA states that the NURC's responsibility for the licensing and regulation of the generation of electricity from renewable energy resources is in addition to any other functions granted to the NURC under the ESA or the NURCA. I have examined both Acts, and the NURCA is the Act that establishes the NURC and grants its powers and functions, as set out in section 6, which includes the following:

> *"(e) to be responsible for the technical regulation of utility supply services and the setting of technical standards having regard to the international standards and best practice relating to utility supply services;*
> *(f) to receive, consider, and determine applications for service licenses to provide utility supply services pursuant [to] the Regulatory Acts;*
> *(g) to establish, approve, monitor, and review tariff schemes and tariffs in accordance with the Regulatory Act;*
> *(h) to monitor and ensure that service licensees comply with the conditions attached to their service licenses;*
> *...*
> *(r) to perform such other functions specified in this Act, any other Regulatory Acts, or the Regulations."*

[26] Civil Suit No 43 of 2000 (Saint Vincent and the Grenadines)

[103] Based on the above, I accept that the NURCA imposes similar functions on the NURC as contained in the ESA. It requires the NURC to be responsible for the licensing and regulation of utility supply services under the Regulatory Acts, which would include the generation and supply of electricity from renewable and other resources under the ESA. Additionally, section 6(2) of the NURCA provides that *"In addition to any other powers specified in this Act, the Commission* ***shall have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions****."* Then section 7 provides that *"Subject to the remaining provisions of this Act and the Regulations,* ***the Commission shall regulate its own procedures and may make rules to regulate its own procedures."***

[104] Although the Minister has not passed regulations, in the light of the overlapping functions granted to the NURC under the NURCA, for which the mechanism to carry out those functions is provided, in that the NURC is mandated to regulate its own procedure and create rules to do so, I am constrained to find that the NURC has authority to create the application procedure for obtaining a licence for the generation of electricity from solar PV systems as contained in its Notice No. 1 of 2016. I am inclined to adopt this view, considering that section 64 of the ESA utilizes 'may' in respect of the passing of regulations by the Minister and sections 6(2) and 7 of the NURCA utilize the mandatory 'shall' in respect of the NURC regulating its own procedure in performance of its functions. Both Acts came into effect on the same date, for the regulation of related matters and must therefore be read together. It is appropriate to construe both statutes constructively. To find otherwise would be to cause the ESA as amended and the NURCA to remain in abeyance and ineffective until such time as the Minister passes regulations. I do not believe this was the intention of this suite of legislation.

[105] On the question whether section 4 of the ESA as amended intends to grant the NURC responsibility to licence and regulate self-generation of electricity from renewable resources for personal consumption, again, I have examined both Acts and observe that nothing in the remainder of the ESAA nor in the NURCA gives the NURC any equal, wider, or greater functions than section 4 with respect to the licensing and regulation of

generation of electricity from renewable resources. In fact, under the NURCA, the purpose and function of the NURC is limited to the licensing and regulation of generation of electricity from renewable energy resources for supply to the public. It does not purport to extend to the licensing and regulation of self-generation of electricity for personal consumption and use. This is evident from a proper construction of the NURCA and in this regard, I have highlighted some of the sections which lead to this conclusion.

[106] Indeed, as counsel for VEL points out, the preamble of the NURCA states that it is an *"Act to provide for the establishment of the National Utilities Regulatory Commission for the regulation of utility supply services and for related matters."* Section 2 defines utility supply service to mean *"the supplying of a utility to the public."* Section 3, which deals with the application of the Act, states that *"This Act applies to the utility supply services specified in Schedule 1."* The utility supply services specified in Schedule 1 are water supply service, sewage service, and electricity supply service. The latter is defined as *"the generation, transmission, distribution, and supply of electricity."* Further, section 6(1) sets out the functions and powers of the NURC, which are 18 in total, all of which expressly relate to utility supply services and exclude self-generation for self-consumption. The only type of licence to which the NURCA refers is a service licence for the supply of utility to the public. Section 46 of the NURCA also repeals the Public Utilities Commission Act.

[107] It is clear from the foregoing that the NURC as established is intended to regulate the generation, transmission, distribution, and supply of electricity to the public and not self-generation for personal consumption. I do not believe that it is appropriate to infer from the general wording of section 4 that it is intended to extend to self-generation for self-consumption. Self-generation of electricity from fossil fuels for personal consumption, has always been and remains permissible under the ESAA, and continues to be an unregulated activity. Self-generation of electricity from renewable resources for personal consumption which was also always permissible under the ESA was an unregulated activity prior to the ESAA. I can find no basis for inferring that it is now subject to regulation.

[108] To conclude, the NURC is entitled to create and publish its Notice setting out the application procedure for obtaining a licence to generate and supply electricity from renewable resources, which includes generation from solar PV systems. This, however, is limited to electricity generated for supply to the public and not self-generation for personal consumption and use. As it presently stands, the means of generation and supply of electricity from renewable resources to the public is through connection and export from solar PV systems to LUCELEC's grid. As mentioned before, LUCELEC is the owner of the grid, which is private property, and LUCELEC is entitled to control the manner in which the grid is utilized. Therefore, it is completely acceptable that the procedure established by the NURC involves consultation with and authorization from LUCELEC, and that LUCELEC has established conditions for connection and export, which are incorporated in the NURC's approval conditions.

[109] Although VEL has argued that the application procedure applies to systems that are connected to the grid but do not export electricity, and therefore are not for public supply, the connected systems have the ability to export to the grid. Therefore, it is not unreasonable that these systems would be captured under the NURC licensing procedure. It would otherwise be unwieldly to manage the licensing process and monitor export to the grid if the NURC was required to make this distinction. Once the means to facilitate export is instituted, it is reasonable for the NURC to licence and regulate such system regardless of whether a customer chooses to export at any given time. This would all be subject to a determination by LUCELEC, on whether it would permit such a connection in any event, as discussed above. A stand-alone system which does not connect to LUCELEC's grid at all would not properly be the subject of licensing and regulation by the NURC.

[110] *Section 10 of the ESAA:* Section 10 of the ESAA, as discussed amends section 25 of the ESA by substituting the following provision:

> ***"Exclusive Rights to Generate Electricity from Fossil Fuels***
> *25. (1) During the continuance of the licence a person except the Company [LUCELEC] shall not generate from fossil fuels, transmit (save for his or her own consumption and use) distribute or sell electricity within Saint Lucia.*
> *(2) ..."*

[111] Subsection (2) in summary provides the penalties for contravention of subsection (1). The section makes no mention of any requirement to obtain a licence from the NURC to generate electricity from any source, whether for one's own consumption and use or otherwise. The only mention of the NURC is as the body authorized to disassemble equipment installed by a person other than LUCELEC to generate and transmit electricity from fossil fuels other than for one's own consumption and use.

[112] I therefore conclude that LUCLEC was and is entitled to impose conditions for connection/ interconnection to its distribution grid. Consequently, it was not unlawful to inform VEL or its customers that they could not generate, or connect a system with a capacity the preset limits, whether for personal consumption, and remain connected to the grid. I also conclude that the NURC is entitled to set its own procedure for licensing and regulation of the generation of electricity from renewable resources, for public supply, in the absence of regulations passed by the Minister. In this regard, such licensing and regulation may properly extend to systems that are connected to the public supply (LUCELEC's grid), even when the system is not exporting. Thus, it cannot be said that LUCELEC has acted unlawfully and on this basis alone VEL's case must fail.

[113] Additionally, VEL has failed to show that any misinterpretation by LUCELEC in that regard would have been a wrong actionable by its customers, Misinterpretation of a section of the statute is not actionable per se in the manner which would entitle VEL to damages for the tort of causing loss by unlawful means, as signaled in the **OBG Ltd.** and **AI Enterprises** cases. I also agree with Mr Lee that VEL must show that LUCELEC has committed an act which constitutes an established tort against third parties, and on the evidence VEL has not identified anyone whose activities have been specifically affected by LUCELEC's actions, and consequently cannot point to a specific tort committed by LUCELEC.

Issue 1 (ii): Has VEL established that LUCELEC intended to cause harm to VEL?

[114] In relation to this element of the tort, Lord Hoffman in **OBG Ltd.** explained that the intention required is intent to cause loss. His Lordship stated that it is necessary to distinguish between the ends, means and consequences and pointed out that:

"One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

[115] By way of example, his Lordship referred to two cases. The first is **Tarleton v M'Gawley**[27], in which the master of the vessel Othello was held liable for depriving a rival British ship of trade by using his cannon to drive away a canoe approaching from the shore, Lord Hoffman noted that the master may have had nothing against the other trader and simply wanted a monopoly of the local trade for himself. His Lordship remarked however, that he nevertheless intended to cause loss. On the other hand, in the case of **Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants**[28], his Lordship agreed that a strike by civil servants in the Ministry of Agriculture in support of a pay claim was not intended to cause damage to an abattoir which was unable to obtain the certificates necessary for exporting meat and claiming subsidies. The damage to the abattoir was neither the purpose of the strike nor the means of achieving that purpose, which was to put pressure on the government.

[116] Based on the evidence and reasoning outlined above, I am of the view that, VEL has not established that LUCELEC had the requisite intent to cause loss to VEL. It has not been proven on a balance of probabilities that LUCELEC intended to divert customers away from VEL's business with a view to retaining those customers. The evidence reveals that the pilot project, with set conditions, had been in place some 4 years before VEL was incorporated and commenced its operations. LUCELEC's policies were well established and applied equally to all persons seeking to install solar PV systems for interconnection to its distribution network, and was not targeted at VEL or its customers. LUCELEC explained that the purpose of the pilot project was to study the impact of interconnection on its distribution grid, and the considerations for imposing the limits were based on the capacity of the grid, safety of the grid and all users, the average needs of Saint Lucian households and businesses, and the present tariff structure, which are not unreasonable. If any loss

[27] Supra note 16
[28] [1987] IRLR 3, [1988] NLJR 357

has been caused to VEL or its customers, it would simply be the consequence of LUCELEC's lawful actions in controlling and protecting its private property (the distribution grid), as it saw fit.

Conclusion

[117] Based on all the foregoing, I conclude that VEL has failed to prove the two primary elements of the tort of causing loss by unlawful means as established by Lord Hoffman in **OBG Ltd.,** namely, acting by unlawful means against a person with the intention to cause another person harm. There is therefore no basis for considering the remaining issues concerning loss suffered, and damages.

[118] I therefore make the following orders:-

1. The claim is dismissed.
2. Cost is awarded to the defendant to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar