

**IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No GYCV2023/004
GY Civil Appeal No 39 of 2017**

BETWEEN

**CHE JAIN PING AND XIAO GUANG ZHAO
(trading under the name and style of
NEW THRIVING RESTAURANT and
NEW THRIVING FAST FOOD)**

APPELLANTS

AND

**GUYANA POWER & LIGHT INC
(a Company incorporated under the Companies Act
No 29/1991 with its registered office at 40 Main
Street, Georgetown)**

RESPONDENT

Before: **Mr Justice Saunders, President
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Burgess**

Date of Judgment: **9 April 2024**

Appearances

Mr Stephen Fraser SC and Mrs Shantel Scott-Lall for the Appellants

Mr Timothy M Jonas SC and Ms Krystal Abrams for the Respondent

Contract – Electricity supply contract – Contractual relationships with statutory underpinnings – Statutory debt – Discretionary recourse to alternative proceedings under statute – Power of electrical service provider in applying billing methods – Entitlement of electrical service provider to back bill consumers – Electricity Sector Reform Act, Cap 56:01 – Public Electricity Supply (Amendment) Regulations 2010.

SUMMARY

The appellants are individuals doing business in Guyana trading under the names, 'New Thriving Restaurant' and 'New Thriving Fast Food'. The respondent, Guyana Power and Light Inc ('GPL') is a public utility company incorporated under the Companies Act, Cap 89:01 and holding a licence under the Electricity Sector Reform Act, Cap 56:01 ('ESRA') to supply electricity to the public. The instant matter concerns a dispute between the parties in respect of arrears accrued by virtue of consumption by the appellants of electricity supplied by GPL.

The electricity was supplied by GPL to the appellants via Account No 13-003-346-11 registered in the name of New Thriving Restaurant between January 2002 and July 2009. During this period the appellants were billed monthly based on their meter reading, together with statutory monthly charges. At the end of the period, arrears on the appellants' account exceeded payments credited to the account by the sum of GYD13,768,937.

On 29 October 2010, GPL commenced an action in the Commercial Division of the High Court against the appellants to recover the sum of GYD13,768,937 as arrears of payments for electricity supplied by GPL. In the High Court, the main defence relied upon by the appellants was that the computer-generated printout for Account No 13-003-346-11 showed a 'current balance' of zero. The court accepted evidence that GPL had transferred the accrued amount of GYD13,768,937 to another account held by the same individuals, as is allowed under reg 23 of the Public Electricity Supply Regulations ('PESR'), hence the zero balance on the computer-generated printout. The High Court held that the appellants were liable to pay to GPL the sum of GYD13,768,937 as arrears for electricity supplied and not paid for by them. On appeal from this decision to the Court of Appeal, the decision of the first instance court was upheld.

By virtue of notice of appeal filed on 12 May 2023, the decision of the Court of Appeal was appealed to this Court. The Court began by settling the question of the nature of the relationship between GPL and the appellants. In this regard, the Court explained that s23

of the ESRA expressly creates a statutory contract between the consumer and the public supplier, for the supply of electricity.

The Court then went on to explain the effect of GPL's right under reg 31(2) of the PESR to recover debt by civil action, 'without prejudice', to their rights to so recover under other law. The Court reasoned that the effect of the expression 'without prejudice' in reg 31(2) of the PESR is that GPL is not restricted to enforcing its debt as a statutory claim but retains all other means of access to the court, and in particular, by an action for breach of the electrical supply contract.

Next, the Court turned to the question of GPL's ability to back bill the appellants beyond a 12-month period. The Court was of the view that there are provisions in GPL's Standard Terms and Conditions for Electric Services which set out billing periods, as is required by PESR reg 31(2) to empower GPL to back bill beyond 12 months. According to the Court, the evidence demonstrated that GPL billed the appellants in line with such billing periods under its Standard Terms and Conditions, and the appellants were now liable for these sums pursuant to clause 7.5(a) of the Standard Terms and Conditions. The Court thus concluded that GPL was entitled to back bill the appellants for a period beyond 12 months pursuant to PESR reg 31(2).

In all the circumstances the appeal was dismissed, and the orders of the Court of Appeal were affirmed.

Cases referred to:

A-G v Ramanoop (2005) 66 WIR 334 (TT PC); *Barraclough v Brown* [1897] AC 615; *Doe v Bridges* (1831) 1 B & AD 847, 109 ER 1001; *Groves v Wimborne (Lord)* [1898] 2 QB 402; *Morris & Bastert Ltd v Loughborough Corp* [1908] 1 KB 205; *Norweb Plc v Dixon* [1995] 1 WLR 636; *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387; *R v IRC ex p Rossminster* [1980] AC 952; *Raymond v Honey* [1983] 1 AC 1; *Wandsworth London Borough Council v Winder* [1985] AC 461; *Wilkinson v Barking Corp* [1948] 1 KB 721.

Legislation referred to:

Guyana - Companies Act, Cap 89:01, Electricity Sector Reform Act, Cap 56:01, Public Electricity Supply (Amendment) Regulations 2010, Public Utilities Commission Act, Cap 57:01; **Trinidad and Tobago** – Constitution of the Republic of Trinidad and Tobago Act, Chap 1:01; **United Kingdom** - Electricity Act 1989.

Other Sources referred to:

Garner B A, *Black's Law Dictionary* (11th edn, Thomson Reuters 2019); Greenberg D, *Stroud's Judicial Dictionary of Words and Phrases* (11th edn, Sweet & Maxwell 2023); *Halsbury's Laws of England* (3rd edn) vol 8.

JUDGMENT

Burgess J (Saunders P, Anderson, Rajnauth-Lee and Barrow JJ concurring)

BURGESS J:

Introduction

[1] The protean nature of the issues canvassed in this case in the courts below and before this Court makes it more difficult to follow the case than to dance on a moving carpet! The one thing that is constant, however, is that the appeal before us concerns an appeal against a decision of the Court of Appeal of Guyana, in which that court, dismissing the appellants' appeal, upheld the decision of the first instance court that the appellants were liable to pay to the respondent arrears of charges for electricity supplied to the appellants by the respondent. During the course and conduct of the appeal, issues of fact and law not raised before the trial judge were raised by the appellants before the Court of Appeal and some not raised before the Court of Appeal have arisen in this Court. In the end, we discern that the appellants are seeking an order of this Court setting aside the decision and orders handed down by the Court of Appeal on five grounds.

Factual Background

- [2] The appellants are individuals doing business in Guyana trading under the names 'New Thriving Restaurant' and 'New Thriving Fast Food'. The respondent, Guyana Power and Light Inc ('GPL') is a public utility company incorporated under the Companies Act, Cap 89:01 and holding a licence under the Electricity Sector Reform Act, Cap 56:01 ('ESRA'). As already intimated, the instant matter concerns a dispute between the parties in respect of arrears accrued by virtue of consumption by the appellants of electricity supplied by GPL.
- [3] The electricity was supplied by GPL to the appellants via Account No 13-003-346-11 registered in the name of New Thriving Restaurant between January 2002 and July 2009. During this period the appellants were billed monthly based on their meter reading, together with statutory monthly charges. At the end of the period, arrears on the appellants' account exceeded payments credited to the account by the sum of GYD 13,768,937.
- [4] By virtue of what GPL describes as an accounting error, the sums owing on Account No 13-003-346-11 were transferred to Account No 10-999-250-34. The holder of the latter account was New Thriving Restaurant Inc. It is to be noted that the application forms submitted to GPL to register the latter account were signed by the appellants, the same individuals who are the owners of New Thriving Restaurant.
- [5] On 17 March 2010, New Thriving Restaurant Inc filed an application with the Public Utilities Commission ('PUC') seeking, inter alia, an order quashing GPL 'unilaterally' billing them the sum of GYD13,768,937. By way of giving context to the application by the appellants, the PUC is established under the Public Utilities Commission Act, Cap 57:01 and is given investigatory enforcement powers under s 21(1) of that Act. New Thriving Restaurant Inc's application was under s 21(2) which conferred power on the PUC 'to give effect to, the provisions of the... [ESRA]'.

- [6] On 29 December 2011, PUC handed down its decision on the application. The PUC found that the meter reading of New Thriving Restaurant Inc was accurate and accordingly ruled that New Thriving Restaurant Inc was liable for payment of the charges set out in GPL's billing process. At the PUC hearing, GPL made representations to the PUC that they intended to rectify the accounting error resulting in the sum of GYD13,768,937 appearing on the billing for Account No 10-999-250-34 and the resulting zero charge appearing on the billing for Account No 13-003-346-11. They also indicated that they intended to proceed against the individuals trading as New Thriving Restaurant for the sum owed as arrears at the High Court.
- [7] On 29 October 2010, GPL commenced an action in the Commercial Division of the High Court against the appellants to recover the sum of GYD13,768,937 as arrears of payments for electricity supplied by GPL. The claim was brought in the Commercial Division of the High Court on the footing that the non-payment by the appellants constituted a breach of an electricity supply contract between the parties.
- [8] The High Court ruled against the appellants. That court held that they were liable to pay GPL the sum of GYD13,768,937 as arrears for electricity supplied and not paid for by them. On appeal from this decision to the Court of Appeal, the decision of the first instance court was upheld.

Litigation History

- [9] Considering the shifting arguments of the appellants before the courts, it may be advisable to address the litigation history of this case in some detail.

High Court

- [10] In the High Court, the main defence relied upon by the appellants was that the appellants were not liable as the computer-generated printout for Account No 13-003-346-11 showed a 'current balance' of zero. The evidence before the court given

by GPL's Deputy Chief Executive Officer, Mr Ash Deonarine, was that GPL transferred the accrued amount of GYD13,768,937 to another account held by the same individuals, as is allowed under reg 23 of the Public Electricity Supply Regulations ('PESR'), hence the zero balance. The court noted that this evidence was unchallenged and opined that this rendered the contentions of the appellants 'baseless and misconceived'. Not without justification, the court described the appellants' zero-balance defence as 'much ado about nothing'.

- [11] The court found that the evidence led in the matter by the appellants demonstrated that the sums claimed remained unpaid. On the contrary, the court was of the view that the evidence of the appellants was wholly unhelpful and did not assist the court regarding any aspect of the claim, defence, or counterclaim. Accordingly, the court held that it had little difficulty in granting judgment to GPL in the sum claimed, being GYD 13,862,440, and in dismissing the appellants' counterclaim.

Court of Appeal

- [12] The appellants appealed the decision of the High Court to the Court of Appeal. In their appeal before the Court of Appeal, after amendment of their notice of appeal, the appellants set out eleven grounds of appeal which included some issues of fact and law not canvassed before the trial judge. Notwithstanding, the Court of Appeal distilled three legal issues from the appellant's grounds of appeal for its consideration. In the words of the Court of Appeal these were: (i) whether the relationship between the parties was contractual or statutory; (ii) whether the trial judge ought to have considered that based on the terms of the ESRA that no private cause of action arose, and (iii) whether the zero-balance reflected on the account for the appellants impacted any finding of liability.
- [13] The Court of Appeal considered that the facts and law concerning the matter clearly evidenced a contractual relationship between the parties 'which had a statutory underpinning'. The court explained that this was so since GPL, as a licensee under

the ESRA, was statutorily bound to supply electricity to the owner or occupier of any premises who requested electricity. The Court of Appeal reasoned that electricity was a commodity or a resource which the State of Guyana has sought to regulate by the ESRA, whose long title states that it is an ‘Act to provide for the regular, efficient, coordinated and economical supply of electricity and for matters incidental thereto ...’.

[14] The court pointed to reg 31 of the PESR which provides that the penalties and liabilities which GPL as an electrical supplier is entitled to impose on consumers is ‘without prejudice’ to any other right or remedy available to GPL. The court opined that the effect of the expression ‘without prejudice’ in that regulation is that rights or remedies for recovery of arrears, other than those specified in the regulation which may be available to GPL in different causes of action, are not precluded from operation or being utilised by GPL.

[15] The court explained that reg 31 of the PESR goes on to state that any penalties for violations of the regulations, if not catered for, or specifically provided for in the regulations itself, may be imposed or recovered under the Summary Jurisdiction Acts. The court expressed the view that this further shows that alternative methods of recovery and imposition of penalties in seeking to recover arrears are not excluded by that regulation. The court drew attention to the use of the word ‘may’ in the regulation and expressed the view that this meant that the regulation is not mandatory but instead creates a discretionary right in respect of choice of method in recovering arrears. The court emphasised that, since the provision is not couched in mandatory but discretionary language, it was not therefore mandatory that the Summary Jurisdiction Acts should be invoked, as had been argued by the appellants, with recourse available only at the Magistrates’ Court.

[16] Having regard to the provisions of the legislation and in particular reg 7 of the PESR, the court was of the view that the claim could have been brought either under statute for the enforcement of a statutory debt or for breach of contract pursuant to

the supply contract between the appellants and GPL. The court rejected the contention by the appellants that the trial judge should have found that the claim was subject to back-billing of only 12 months. According to the Court of Appeal, GPL's case having been presented to the trial court within the law of contract, and the trial judge having had the jurisdiction to adjudicate on same, the contention that the case was purely statutory must be deemed as flawed.

[17] The Court of Appeal expressed the opinion that the fact is that there is a debt which is due and unpaid and therefore a breach of the contract in that regard can be claimed in any court of law. According to the Court of Appeal, the basic elements of contract law are applicable notwithstanding there existed a statutory underpinning. For these reasons, the court found that the trial judge was correct in entertaining and approaching the case in the way he did.

[18] Concerning the zero-balance reading on the computer-generated printout for Account No 13-003-346-11 and attempts to cause the reversal of findings of fact made by the trial judge in relation to same, the court made it clear that its view of the instant proceedings is limited to 'cold black and white print'. Against this backdrop, the court declined to interfere with any of the findings of the trial judge concerning the zero-balance reading.

Written Submissions of the Parties Before this Court

Written Submissions of the Appellants

[19] In their written submissions in support of the appeal to this Court, the appellants concede that GPL is entitled to bill and recover payment in respect of electricity supplied under the supply contract subsisting between the parties. The appellants maintain, however, that there are limits and restrictions which the law imposes, on the circumstances in which GPL can recover payment for electricity supplied. As regards this, the appellants contend that these limits are primarily set out under ESRA, regs 31(2), and (3) of the PESR and clauses 6.3 and 6.4 of the Public

Supplier's Standard Terms and Conditions. The appellants aver that, in all the circumstances, the legislative framework does not allow GPL to back bill them beyond 12 months, whereas the sum claimed as arrears reflects billing for a period of seven years.

- [20] The appellants claim that there is no computer record, print out or other documentary evidence, proving that the sum claimed by GPL was ever debited to Account No 13 003-346-11 at any time after the commencement of the action and that no such debit appears in the document headed 'Financial History Inquiry', contrary to remarks made by GPL during the PUC proceedings.
- [21] The appellants further claim that no document or record produced by GPL establishes that they are indebted to GPL in the sum of GYD13,862,440 or at all. They assert that the sum reflected on Account No 13-003-346-11 remains zero to date, and the sum claimed as arrears by GPL cannot therefore be considered as a debt incurred in the normal course of the billing cycle. Accordingly, the appellants maintain, 'the sum claimed at its highest is a supply of electricity used but not paid for'. In this regard, the appellants contend further that the trial judge failed to consider important questions such as: whether GPL had any statutory basis for the imposition of the miscellaneous charges, how the sums claimed to be due were arrived at by GPL, and the sufficiency of the evidence adduced to prove the 'debt' claimed.
- [22] Another argument made by the appellants is that a significant portion of the overall sum claimed as arrears represents 'miscellaneous' charges billed to them by GPL. As to this, the appellants insist that no evidence was ever adduced of the basis of the miscellaneous charges sought to be imposed upon them, or of the calculation of the said charges.
- [23] Finally, the appellants argue that the Court of Appeal failed to note that the trial judge's characterisation of evidence which supports GPL's case as 'unchallenged'

was flawed, as GPL's witnesses were subjected to cross-examination. Consequently, the findings of the trial judge are perverse, and it was the duty of the Court of Appeal as an appellate court to reconsider and reassess the evidence in such circumstances.

Written Submissions of the Respondent

- [24] According to GPL, case law makes it clear that the statutory obligation imposed on customers to pay arrears for supply of electricity amounts to a statutory debt irrespective of whether the relationship between GPL and customers is strictly speaking contractual. GPL points out that, in any event, the effect of s 23 of ESRA is that the relationship of a public supplier of electricity and customer is contractual in nature. GPL reasons that, consequently, a cause of action vests in them against the appellants as a customer who defaults on payment of a bill both as a statutory debt, and under the contract subsisting between them, as supplier, and the appellants as customer.
- [25] GPL maintains that the legislation affords them varied powers in billing customers. As an example, GPL points to its power as a public supplier to estimate power consumption for periods where the meter cannot be relied upon, such as where it has been compromised or damaged. GPL asserts that the appellants, not cognisant of such powers, were erroneously of the view that the sum of GYD13,768,937 represents miscellaneous charges. GPL points out that in fact the financial history of Account No 13-003-346-11 reveals monthly bills issued based on actual meter readings for a period of several years, with arrears of payments accruing and ultimately totalling the sum claimed. According to GPL, the only miscellaneous charge imposed on the said account is GYD 318,446, estimated for a billing period where a tampered meter was removed, and a new meter installed.
- [26] GPL maintains that its cause of action was both under contract and under the statutory debt created when the bill was issued to the appellants under its license,

calculated during a seven-year period based on actual meter readings taken monthly in accordance with clause 7.1 of GPL's Standard Terms and Conditions for Electrical Services, and marginally including miscellaneous charges. GPL contends that the appellants were, therefore, both contractually and statutorily obligated to pay the bill as a debt for all electricity consumed or estimated to have been consumed on their premises, the bill to be paid within 21 days of its issue. GPL posits that when the appellants failed to pay their bill, a cause of action arose in favour of GPL for a contractual debt, which they were entitled to pursue in the High Court but could have opted to pursue elsewhere or as a public law cause.

[27] GPL asserts that the fact of an accounting error on their part, cannot translate to payment by the appellants of their electricity bill or forgiveness by GPL of that bill, or vitiation of the cause of action by GPL against the appellants for payment of that unpaid bill.

[28] GPL argues that, in all the circumstances, the trial judge acted properly in his assessment of the evidence in respect of GPL's claim, and of the appellants' counterclaim, and his conclusion was inevitable. GPL posits that there is no indication that the trial judge was 'plainly wrong', but that he always acted correctly, and thus the appeal should be dismissed.

Analysis and Conclusion

Issues Before this Court

[29] To begin with, it is quite apparent that the submissions filed by the appellants in this matter involve an attempt to relitigate grounds relied upon and ventilated before the Court of Appeal, but which are not cited as grounds for the appeal before this Court. Indeed, the notice of appeal filed by the appellants in this Court set out five grounds as follows:

- a. The Court of Appeal erred in law when it failed to find that its findings that the contract between the parties had a statutory underpinning, the Respondent's claim was subject to the provisions of Regulation 31 (2) of the Third Schedule of the Electricity Sector Reform Act as amended by Public Electricity Supply (Amended) Regulations No. 3 of 2010 to back billing for a period of no more than 12 months or as provided in the Standard Terms and Conditions for the provision of Electricity.
- b. The Court of Appeal erred in law when it failed to find that there was no statutory basis for a claim to miscellaneous charges which said charges amounted to \$9,854,952 (nine million eight hundred and fifty-four thousand nine hundred and fifty-two dollars) by the Respondent against the Appellants.
- c. The Court of Appeal erred in law when it failed to find that the imposition of miscellaneous charges upon the Respondent was arbitrary and ultra vires the Electricity Sector Reform Act 1999 and Regulations thereunder and the Standard Terms and Conditions for Electric Services October 1, 1999, as amended.
- d. The Court of Appeal erred in law when it failed to find that no reasonable judge would have come to a finding of fact or law on the basis of the evidence that Respondent was entitled to recover the sum of \$9,854,952 (nine million eight hundred and fifty-four thousand nine hundred and fifty-two dollars) in miscellaneous charges.
- e. Such other grounds shall appear when the written decision of the Court of Appeal becomes available.

[30] It will be noticed that these grounds do not include any appeal against the lack of documentary evidence proving the sum claimed by GPL. Nor is there any ground of appeal that the outstanding arrears on Account No 10-003-346-11 is zero. Grounds, such as these, raised before the Court of Appeal, but which were not brought before this Court in the notice of appeal, are to be considered abandoned. This Court will therefore proceed with this appeal considering only the issues raised in the grounds set out in the notice of appeal as is its practice.

Ground a: Whether the Respondent's Claim was Subject to Back-Billing for a Period of More Than 12 Months

[31] The foundation on which this ground rests is the appellants' contention that there was no contractual relationship between the appellants and GPL and that their legal relationship was based purely on statute. In approaching this contention, we propose to consider first the contractual relationship between the appellants and GPL and then their statutory relationship. In our judgment, determination of these issues is a crucial step in the interpretation of reg 31(2) which, as the appellants claim, is the legal provision that governs the period for which GPL can claim back-billing.

(i) *Whether there was a Contractual Relationship between Appellant and GPL*

[32] In our judgment, ss 21 to 23 of the ESRA are especially important in determining the legal relationship between the appellants and GPL. These sections define the relationship between a consumer and a public supplier for the supply of electricity by a public supplier to a consumer. Section 21 reads as follows:

Subject to the provisions of this Act and any regulations made thereunder, a public supplier shall, upon being requested to do so by the owner or occupier of any premises (hereinafter referred to as a "consumer") within such public supplier's authorised area –

- (a) provide a new or increased supply of electricity to those premises; and
- (b) provide electric lines, meters and other apparatus as are necessary to supply electricity to the point of entry to those premises.

[33] On its plain words, this section mandates a public supplier of electricity to supply electricity to a consumer on a request by the consumer. It is manifest, then, that under this section, a public supplier has no choice but is under a duty to supply

electricity on a consumer request. This may be regarded as the statutory bedrock on which rests the relationship between the consumer and a public supplier like GPL.

[34] By s 22, such a consumer request must be made by a notice in writing specifying certain statutory requirements. That section reads:

Where any consumer requires a supply of electricity as provided in section 21, he shall give to the public supplier a notice in writing specifying –

- (a) the premises for which the supply is required;
- (b) the day on which the supply is required to commence;
- (c) the maximum power which may be required at any time; and
- (d) the minimum period for which the supply is required to be given.

It is to be noted that the consumer's notice in writing does not create any obligations one way or the other and so amounts in classical contract theory to an invitation to treat.

[35] Section 23 is of crucial importance. It provides:

Where a public supplier receives a notice from a consumer under section 22, the public supplier shall give to that consumer a notice that –

- (a) states the extent to which the proposals specified in the consumer's notice are acceptable to the public supplier and specifies any counter proposals made by the public supplier;
- (b) states whether the rates to be charged by the public supplier will be determined under sections 26 to 28, inclusive, or by a special agreement between the public supplier and the consumer under section 29, and specifies the rates to be charged or the proposed terms of the agreement;
- (c) specifies any payment which that consumer will be required to make for the public supplier's provision of electric lines, meters or other apparatus as permitted under section 26 (4);
- (d) specifies any security deposit which the consumer will be required to give under section 28;

- (e) specifies any other terms which that consumer will be required to accept under section 25 and the Third Schedule; and
- (f) states the procedures for the resolution of any disputes between the public supplier and the consumer as provided for in Part X of the Public Utilities Commission Act,

and the written acceptance of such notice by the consumer requiring a supply of electricity and the public supplier's supply of electricity pursuant thereto shall constitute a contract between such consumer and the public supplier for the supply of electricity in accordance with this Act and any regulations made thereunder.

[36] By this section, the public supplier must then send a notice to the consumer setting out certain statutory prescribed terms on which the electricity will be supplied. In effect, the public supplier must make an offer to the consumer. Very importantly, s 23 expressly decrees that the written acceptance of the public supplier's notice by the consumer constitutes a contract between such consumer and the public supplier for the supply of electricity in accordance with the Act and any regulations made thereunder. Put differently, s 23 creates a statutory contract between the consumer and the public supplier for the supply of electricity. Counsel for GPL describes this provision as a deeming provision. In our view, it is much more than that. Section 23, on its plain, unadorned language creates a statutory contract in the circumstances outlined in that section.

[37] Our conclusion is not attenuated in any way by Mr Fraser SC's suggestion that the English case of *Norweb Plc v Dixon*¹ is authority that there is no contractual relationship between a public electricity supplier and a consumer where the public electricity supplier is under a statutory duty to supply electricity to consumers where certain statutory criteria are met and has no discretion as to whether to supply. In our judgment, *Norweb* does not avail in this case. *Norweb* was based on an interpretation of the UK Electricity Act 1989 which did not contain any similar provisions to those in ss 22 and 23 of ESRA. In any event, the express provision in

¹ [1995] 1 WLR 636.

s 23 that written acceptance of the public supplier's notice by the consumer constitutes a contract between such consumer and the public supplier must be treated as overruling any suggestion in *Norweb* to the contrary. This conclusion is buttressed by s 5(b) of the ESRA which provides that a licence granted to the public supplier to supply electricity to consumers may include the 'Standard Terms and Conditions forming and governing the contractual relationship between consumers and the public supplier'.

- [38] Given the foregoing, it cannot be disputed that GPL, and the appellants were in a contractual relationship for the supply of electricity. This is so for two interrelated reasons. The first is that GPL is unquestionably a public supplier. Section 2 (q) of the ESRA defines a 'public supplier' as 'any person who supplies electricity for public purposes, which includes an independent power producer' who sent a notice to the appellants in accordance with s 23. GPL is the holder of a licence to supply electricity for public purposes and as such fall squarely within the statutory definition of a public supplier.
- [39] The second is that 'consumer' is defined under s 2 (f) of ESRA as 'any owner or occupier of premises to which a public supplier supplies, or has been requested to supply, electricity, or whose premises are connected, directly or indirectly, with any electric line or other electrical apparatus or installation of a public supplier through which electricity is, or is capable of being, supplied'. The appellants were at the material times the owners or occupiers of premises to which GPL supplied electricity and were therefore consumers as defined in the ESRA. Further, the uncontradicted evidence is that they accepted in writing GPL's notice in accordance with s 23.
- [40] The Court of Appeal described the relationship between the appellants and GPL as contractual with a statutory underpinning. We understand this to mean that the s23 contract between the parties is mandated under s 21 and is subject to terms and conditions imposed by the ESRA and the PESR. As is this case with all contracts,

the s 23 contract between the parties created an independent cause of action for breach of contract enforceable by GPL in this case.

(ii) *The Statutory Relationship between GPL and the Appellants*

[41] Regulations 7(1) and 31 of the PESR contained in Schedule 3 of the ESRA are also important in determining the legal relationship between the appellants and GPL.

[42] First, reg 7(1) of the PESR. This provides as follows:

Subject to subparagraphs (2) and (3) and paragraphs (8), a public supplier may recover from a consumer any charges due to it in respect of the supply of electricity, or in respect of the provision of any electricity meter, electric line, or other electrical apparatus.

[43] The unmistakable implication of this regulation is that the consumer is under an obligation to pay the public supplier charges due in respect of electricity supplied by the public supplier to them. According to Halsbury²:

Where an Act of Parliament creates an obligation ... to pay a sum of money to any person, the amount due can be recovered as a debt by action where no other remedy is provided and where no provision to the contrary is contained in the Act.

It is clear from this that reg 7(1) creates a statutory debtor/creditor relationship between the appellants, as consumers, and GPL, as a public supplier.

[44] Turning next to reg 31 of the PESR. Read, especially considering the proviso to reg 31(2), this regulation makes provision for the calculation of electricity used but not paid for by a non-residential consumer. Regulation 31, in so far as is relevant, reads as follows:

² *Halsbury's Laws of England* (3rd edn) vol 8, para 448.

(2) Without prejudice to a public supplier's rights under any other provision of the Act, these Regulations, any other law or legal principle, a public supplier may recover, in a civil action, from any person over the age of eighteen years occupying premises at which electricity is or has been abstracted, diverted, stolen, wasted, consumed, improperly registered, or otherwise used but not paid for, the value of any such electricity, calculated in accordance with subparagraph (3) and *for such period as may be prescribed by the public supplier's Standard Terms and Conditions* or, if not provided for therein, for a back-billing period of twelve months. (emphasis added)

Provided that, where there is a supply agreement in effect between the public supplier and a person with regard to residential premises for which electricity is or has been abstracted, diverted, stolen, wasted, consumed, improperly registered or otherwise used but not paid for, and such person was occupying the premises at the time of such abstraction, diversion, theft, waste, consumption, improper registration or other use, such person shall be the sole person liable to be proceeded against in a civil action under this subparagraph;

...

(3) In any civil action based upon subparagraph (2), any other law or legal principle, or in the instances provided for in regulation 24(a), the value of electricity abstracted, diverted, stolen, wasted, consumed, improperly registered or otherwise used in any way, but not paid for, shall be calculated by, and ordered by the court on the basis of, a public supplier's –

- (i) audit of the appliances and other electric devices in and on the relevant premises, performed by the relevant public supplier;
- (ii) measurement of the differences in electricity consumption between the main lead to the relevant premises and at the premises itself; or
- (iii) calculation based upon any other means provided for in the public supplier's Standard Terms and Conditions:

Provided that a person held liable in a civil action based upon subparagraph (2), shall have a right to prove that the amount of electricity abstracted, diverted, stolen, wasted, consumed, improperly registered or otherwise used was 6 subparagraph (3).

[45] It is undisputed that the appellants are non-residential consumers. Thus, the material circumstances in this case fall within the ambit of PESR reg 31(2). In our judgment, the fundamental question therefore becomes whether the GPL reg 31(2) claim can

be enforced in an action for breach of contract or whether GPL is restricted to enforcement under that regulation.

(iii) *Whether GPL can Claim in Contract or Only Under Regulation 31(2)*

[46] In approaching this question, it is important to recall that reg 31(2) stipulates as follows: ‘Without prejudice to a public supplier's rights under any other provision of the Act, these Regulations, any other law or legal principle, a public supplier may recover, in a civil action...’ The legal import of the expression ‘without prejudice to’ in this regulation is significant.

[47] In the Privy Council in *Attorney General for Trinidad and Tobago v Ramanoop*³ the expression ‘without prejudice’ which occurred in s 14 of the Constitution of Trinidad and Tobago was considered. Section 14(1) reads as follows:

(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

[48] Lord Nicholls of Birkenhead noted that Chapter 1 of the Constitution makes provision for the recognition and protection of fundamental human rights and freedoms and that s14 is directed at the enforcement of these entrenched rights and freedoms. Of that section, Lord Nicholls said:

Their lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of Chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection which Chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of State power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the

³ (2005) 66 WIR 334 (TT PC).

wronged citizen effective relief in respect of the State's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court.

[49] It is clear from this statement, with which we agree, that the words 'without prejudice' operate to leave available all other remedial jurisdiction of the court in the matter. Stroud's Judicial Dictionary of Words and Phrases⁴ is to the same effect. It defines 'without prejudice' to mean without affecting the context of litigation, and 'without giving up the right to seek redress through the courts'. Similarly, Black's Law Dictionary⁵ defines 'without prejudice' as 'Without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party.'

[50] We agree with the appellants that the general principle is that where an Act, as the ESRA does here, creates an obligation and enforces its performance in a specified manner, as is done in reg 31(2), the general rule is that performance cannot be enforced in any other manner: see *Pasmore v Oswaldtwistle Urban District Council*⁶; *Doe v Bridges*⁷; *Wilkinson v Barking Corp*⁸ and *Barraclough v Brown*⁹. However, where Parliament indicates a clear intention that the general principle is not to apply, effect must be given to the intention of Parliament: *Groves v Wimborne (Lord)*¹⁰; *Morris & Bastert Ltd v Loughborough Corp*¹¹.

[51] In the matter before us, by using the expression 'without prejudice' Parliament's clear intention was to disapply the general principle. This is even more so as the regulation expressly preserves a cause of action which is 'separate from and additional to' any remedy which is provided for in that regulation.

⁴ Daniel Greenberg (ed), *Stroud's Judicial Dictionary of Words and Phrases* (11th edn, Sweet & Maxwell 2023).

⁵ Bryan A Garner (ed), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019) 1919.

⁶ [1898] AC 387 at 394 (Lord Halsbury).

⁷ (1831) 1 B & AD 847, 109 ER 1001 (Lord Tenterden).

⁸ [1948] 1 KB 721.

⁹ [1897] AC 615.

¹⁰ [1898] 2 QB 402.

¹¹ [1908] 1 KB 205.

- [52] It is manifest, then, that the effect of the wording of reg 31(2) is that GPL is not restricted to enforcing its debt as a statutory claim. Under reg 31(2), GPL retains all other means of access to the court, and in this case, by an action for the appellants' breach of GPL's supply contract with them and breach of statutory duty. In fact, GPL's claim has always been for payment due under a supply contract between itself and the appellants and breach of statutory duty.
- [53] Regulation 31 appears to be aimed at a circumstance where a public supplier, like GPL, in the course of its operations discovers a person occupying premises where electricity has been abstracted, diverted, stolen, wasted, consumed, improperly registered or otherwise used but not paid for. In such a case it is almost impossible for the public supplier to know how much electricity has been consumed and for what period of time consumption has taken place. Regulation 31 is intended to provide the public supplier with the option of calculating the value of the electricity by auditing the electrical appliances on the premises and to claim that value for a period of 12 months from the person in possession. Without this provision it would be nigh impossible to quantify the loss to the public supplier from the theft of the electricity by the person in possession. Regulation 31 therefore has nothing to do with a consumers' liability for unpaid bills under the standard terms and conditions in a contract for the supply of electricity.
- [54] GPL's Standard Terms and Conditions for Electric Services form part of the terms of its supply contract with the appellants. Section 7 of those terms and conditions comprehensively set out a range of billing regimes to which GPL may resort in different circumstances. Under ss 7.1 and 7.2 respectively, a clear billing regime is set out for monthly periodic billing for electrical consumption, and for billing by estimate where a meter has not been read for a period of time. Section 7.5(a) imposes liability on consumers in arrears of payments to GPL, thereby empowering the commencement of proceedings to recover billing carried on in accordance with the Standard Terms and Conditions.

- [55] The evidence in the case is clear and well reflected in documentary form showing that the appellants were billed each month, in accordance with the powers afforded to GPL to so do under s 7.1 of the Standard Terms and Conditions for Electric Services. Furthermore, the documentary evidence adduced in the matter demonstrate that miscellaneous charges were only applied for a defined period when there was meter interference and GPL was required to estimate billing, in line with its powers under s 7.2. Accordingly, not only is it the case that the Standard Terms and Conditions contain provisions which deal with billing periods as is required by PESR reg 31(2), but the evidence demonstrates that GPL billed the appellants in line with such billing periods and the appellants are now liable for these sums pursuant to section 7.5(a) of the Standard Terms and Conditions.
- [56] In the circumstances, the 12-month back-billing provision under reg 31(2) is not relevant in the instant case. GPL is thus entitled to recover for the full period claimed.

Ground b: Whether ‘There was No Statutory Basis for a Claim to Miscellaneous Charges, Which Charges Amounted to \$9,854,952, by the Respondent Against the Appellants’.

- [57] The appellants have consistently insisted that GPL’s claim was for ‘miscellaneous charges’. GPL denies that its claim was for ‘miscellaneous charges’. GPL asserts that the elements of its claim of 29 October 2010 are: (i) Electricity contract between the parties vide Account No 13-003-346-11 to Brickdam; (ii) Electricity supplied by GPL to the Appellants via that account between January 2002 and July 2009; (iii) Bill issued to the appellants in the sum of GYD13,768,937 and not paid; and (iv) ESRA and GPL’s licence stipulate that the customer is liable to pay for electricity consumed and billed. According to GPL, the only miscellaneous charges appearing on the appellants’ account were for periods where it was forced to estimate billing, owing to meter interference as it was entitled to do under its Standard Terms and Conditions.

[58] The documentary evidence adduced in the case supports GPL's claim that, save for GYD318,446 for periods where GPL was required to estimate billing, the sums for which the appellants were billed by GPL were not 'miscellaneous charges'. The sums were for electricity supplied to the appellants under the parties' supply contract. In our judgment, for this reason this ground lacks merit.

Grounds c. Whether the Imposition of 'Miscellaneous' Charges Upon the Respondent was Arbitrary and Ultra Vires

[59] Our finding that the charges claimed by GPL were not 'miscellaneous' is enough to dismiss this ground. There is, however, another reason why this ground must fail.

[60] The appellants seek to rely on the House of Lords decision in *Wandsworth London Borough Council v Winder*¹² as authority that they are entitled to raise as a defence the ancillary challenge to the public law exercise of discretion by GPL in issuing the bill which founded the cause of action. In *Wandsworth*, Lord Fraser of Tullybelton, delivering the judgment of the House, acknowledged that to permit such a defence could possibly allow the defendant to evade the guardrails concomitant with judicial review. Nevertheless, he concluded that the defence may be permissible in certain circumstances.

[61] GPL accepts the appellants' contention that they are entitled to put forward the public law challenges of arbitrariness and ultra vires as a defence in the present proceedings. However, the authorities are very clear that the appellants as defendants at first instance bore the burden of proving an unlawful act of arbitrariness or ultra vires by GPL in terms of the appellants' counterclaim: see *R v IRC ex p Rossminster*¹³; *Raymond v Honey*¹⁴. The trial judge did not find any evidence led by the appellants proving any unlawful act of arbitrariness or ultra

¹² [1985] AC 461.

¹³ [1980] AC 952 at 1026 (Lord Scarman).

¹⁴ [1983] 1 AC 1.

vires by GPL. Indeed, the trial judge found that: ‘Evidence led in defence wholly unsatisfactory. No credible evidence led in Counterclaim’.

[62] The decision of the trial judge on the evidence led by the appellants is in our view fatal to this ground. The appellants failed to discharge the burden of proof of arbitrary and ultra vires acts by GPL in imposing charges on the appellants. For this reason, also, this ground must fail.

Ground d. Whether Court of Appeal Erred in Upholding the Finding of Fact or Law on the Basis of the Evidence that the Respondent was Entitled to Recover the Sum of \$9,854,952 in ‘Miscellaneous’ Charges

[63] Considering our finding that the charges claimed by GPL were not ‘miscellaneous’, this ground must also be dismissed. In any event, the Court of Appeal acted on good principles and authorities in refusing to interfere with the findings of the trial judge.

Ground e. Such Other Grounds Shall Appear When the Written Decision of the Court of Appeal Becomes Available

[64] No other grounds appeared after the written decision of the Court of Appeal. Accordingly, there is nothing in this ground for our consideration.

Disposition

[65] For all the foregoing reasons, the appeal is dismissed, and the orders of the Court of Appeal are affirmed. The appellants shall pay costs in this Court to the respondent to be assessed if not agreed.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess