CaseAnalysis
[2018] 3 MLJ 749

Karun Klasik Sdn Bhd v Tenaga Nasional Bhd [2018] 3 MLJ 749

Malayan Law Journal Reports · 35 pages

COURT OF APPEAL (PUTRAJAYA)

ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA

CIVIL APPEAL NO W-02(NCC)(W)-636-04 OF 2015

27 October 2017

Case Summary

Civil Procedure — Pleadings — Failure to plead — Statutory provision — Tenaga Nasional Bhd ('TNB') sued customer to recover monies owed in respect of 'stolen' electricity — High Court dismissed TNB's claim on the ground its failure to plead ss 37 and 38 of the Electricity Supply Act 1990 ('the ESA') was fatal — Whether decision to dismiss was wrong — Whether TNB's claim was based on contract and not the ESA — Whether contract provided for recovery of monies owed for electricity supplied and for disconnection of supply — Whether unnecessary for TNB to plead ss 37 and 38 of the ESA as those provisions dealt with offences and penalties and did not provide a basis to found a cause of action — Whether TNB fully pleaded all material facts to support its claim such that the party sued was not prejudiced or taken by surprise by the pleadings — Whether TNB could not be granted extension of time to file a notice of appeal against the dismissal of its claim as its solicitor's mistake in not filing a notice of appeal within time was not a good reason for allowing the extension of time

Public Utilities — Electricity — Disconnection of electricity supply — Tenaga Nasional Bhd ('TNB') disconnected electricity supply to appellant one month after tampered meters at appellant's premises which recorded that less electricity was used than was actually the case were replaced/rectified — Whether TNB could not disconnect supply under s 38(1) of the Electricity Supply Act 1990 ('the ESA') once the meter tampering had ceased — Whether removal/repair of the tampered meters did not in itself mean the offences under s 37 of the ESA ceased — Whether a s 37 offence of, inter alia, theft of electricity continued even after a tampered meter had been replaced so long as the electricity that had been 'stolen' had not been paid for — Whether disconnection of supply could be done within a 'reasonable time' after discovery that a s 37 of the ESA offence had been committed — Whether what was a 'reasonable time' depended on the facts in each case — Whether decisions of the High Court in the cases of Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd [2015] 3 CLJ 825, Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad [2015] MLJU 276 and Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd [2016] 10 MLJ 788 that TNB could not disconnect supply under s 38(1) of the ESA once tampered meters had been replaced/rectified were no longer good law

The respondent ('TNB') sued the appellant to recover RM1,632,564.29 for electricity the latter had used but had not paid for under an electricity supply contract. The claimed amount was determined after TNB's employees conducted a surprise check and found that the electricity meter at the appellant's premises had been tampered with to record a lesser consumption of electricity than was actually the case. About two months after that inspection, TNB carried out a second inspection at which time it changed/repaired the appellant's electricity meters. A month later, TNB gave notice and disconnected electricity supply to the appellant's premises. The appellant denied the sum claimed by TNB as well as the allegation that it had tampered with the electricity meter and counterclaimed for damages caused by the disconnection of supply to its factory. The High Court dismissed both TNB's claim and the appellant's counterclaim. TNB's claim was dismissed on the ground its failure to plead ss 37 and 38 of the

Electricity Supply Act 1990 ('the ESA') was fatal even though, on the merits, the amount it had claimed for was justified. The counterclaim was dismissed on the ground TNB was entitled to disconnect supply when it discovered that the meter at the respondent's premises had been tampered with. From the evidence, the trial court found as a fact that the meter at the appellant's premises had been tampered with when the first inspection was carried out but the tampering had ceased by the time the second inspection was carried out. In the instant appeal against the dismissal of its counterclaim, the appellant argued that TNB could not disconnect electricity supply under s 38(1) of the ESA after the tampering had ceased to exist as was held in the decisions of the High Court in *Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad* [2015] MLJU 276 ('Mayaria'), *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825 ('Modernria') and *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788 ('Xin Guan'). TNB applied for an extension of time to file a notice of appeal against the dismissal of its claim but the appellant opposed the application saying the mistake of TNB's then solicitor in failing to file a notice of appeal within time was not a good reason for granting the application. TNB had filed a cross-appeal in respect of its claim but the same was struck out by the Court of Appeal when it was found that the issues raised in the cross-appeal had no bearing to, and did not emanate from, the matters raised in the appellant's appeal.

Held, dismissing the appeal and also TNB's application for extension of time to file a notice of appeal:

(1) The trial judge did not err in concluding that TNB was entitled to and did no wrong in disconnecting the electricity supply to the respondent's premises after removing the tampered meter and issuing the requisite notice under s 38(1) of the ESA. It followed that the respondent was not entitled to make a claim for any of its losses against TNB (see para 108). [*751]

(2) An informed interpretation of the ESA as a whole, as well as Part IX of that Act, more particularly ss 37 and 38(1), raised no real doubt that applying the plain-meaning rule of construction, the intention to be ascribed to the rational legislator was that TNB was entitled to disconnect electricity supply even after the tampered meter had been removed or the theft of electricity appeared to have ceased at the close of the inspection (see para 79).

(3) The power to disconnect electricity supply was an incidental, ancillary and necessary adjunct to the power to halt and penalise offences under s 37. To allow TNB the discretion or power to disconnect electricity supply after the commission of the offences was to allow it to exercise such power that was essentially incidental to the power of inspection, which served the purpose of detecting and precluding the theft of electricity. TNB had to have sufficient powers to address and remedy the mischief of the theft of electricity. Section 38(1) and Part IX of the ESA had to be considered in the light of that mischief for which Parliament had legislated to prevent. Section 38(1) did not state that the removal of the tampering meter was a bar to the disconnection of electricity supply; neither did it provide that the power to disconnect was contingent upon the continuation or perpetuation of the offence under s 37. It did not necessarily follow that because the tampered meters had been remedied or removed, the offences under s 37 had come to an end. It was a question of fact in any given case and could not be imputed or determined definitively simply because the tampered meter had been removed. Until the consumer had repaid the arrears or back-charges for the electricity that had been stolen or unlawfully abstracted and used, it could not be said that the act of unlawful abstraction or consumption had ceased to subsist. Until the back-charges had been paid, the electricity effectively remained consumed but unpaid for and therefore continued to remain an unlawful act or offence under s 37. Only when the back-charges were fully paid did it follow that there was no continuing offence of the unlawful abstraction or theft of electricity (see paras 78, 86, 88-90, & 93-95).

(4) The literal and grammatical meaning of s 38(1) was clear. The heart of the provision was that electricity supply could be disconnected after an employee of TNB formed the view that an offence under s 37 had been committed. The word 'after' did not necessarily mean immediately upon discovery of the offence. The word 'after' had to be accorded a reasonable and rational meaning. It could not mean in perpetuity because that would lead to absurdity. Neither could it mean literally 'immediately' upon the rectification of the impugned meter after the inspection because that would be circumscribing the powers accorded to TNB under the statute unduly. The word 'after' was to be construed as referring to a reasonable length of time. The term 'reasonable', in turn, should be [*752]

construed in the context of the particular facts of a case. No intention to prescribe a short or immediate period of time after replacing or rectifying a tampered meter could be ascribed to the use of the word 'after' (see paras 71, 73 & 80).

(5) This court could not concur with the decisions in *Modernria*, *Mayaria* and *Xin Guan*, that the power to disconnect electricity under s 38(1) could not be exercised when the tampering had been rectified and there was only an amount due and outstanding by the consumer to TNB. Such a construction was to read a limitation into the plain words of s 38(1) and afforded a strained construction to that section which was not consonant with the intention and purpose of the legislation. Such a construction also did not satisfy the purposive rule of construction. The commission of the offence did not necessarily cease upon the removal of the offending meter. Once the inspection was over, the offence could be repeated either in some other or similar manner. It was not tenable to envisage TNB having to maintain continual or perpetual supervision on the offending consumer to ascertain this for a fact and then to take remedial measures repeatedly. The construction prescribed by the three cases appeared to import into s 38(1) the need for TNB to choose between either removing the offending meter and thereby losing the power to disconnect supply or allowing the tampered meter to continue operating but electing to disconnect electricity supply with notice. To impose such a choice upon TNB was to effectively stultify TNB's powers to stop the theft of electricity (see paras 81-84 & 91).

(6) There was insufficient basis to warrant the grant of an extension of time for TNB to lodge an appeal against the trial court's decision. Substantively, there were no reasonable grounds which explained why TNB failed to file a separate notice of appeal save for the error of its then solicitor. Even TNB's cross-appeal was filed only after, and in response to, the appellant's appeal by which time the period for lodging an appeal had lapsed. The hearing of the appeal had also been delayed for 1 1/2 years (see paras 13-14).

Obiter:

(1) TNB's failure to plead ss 37 and 38 of the ESA in its statement of claim ought not to have caused the dismissal of its claim which was premised on contract rather than on those two sections. Those sections and Part IX of the ESA dealt with offences and penalties and did not in themselves afford a statutory basis on which to found a cause of action between TNB and its consumer. The ESA dealt with the electricity supply industry as a whole and did not purport to regulate the private law relationship between the parties. It was the contract between the parties that determined the primary rights and obligations between them. It was not necessary to expressly plead ss 37 and 38 in the course of a recovery action [*753]

where there had been tampering, particularly where the contractual terms between the parties allowed for recovery of arrears and for disconnection (see paras 99-103).

(2) A court should be slow to strike out a claim for simply failing to set out a specific provision of a statute when the material facts that allowed the claimant to fall within its ambit were sufficiently clear. (This, of course, would not apply to matters which were required to be specifically pleaded as set out in O 18 r 8 of the Rules of Court 2012 or where the cause of action arose solely from a statute). In the instant case, TNB had pleaded a full and properly particularised claim premised on contract. Although reference was not made specifically to ss 37 and 38, the material facts were fully evident from the claim and it did not appear that any prejudice at all was occasioned to the respondent as the trial proceeded fully on the basis of, inter alia, those statutory provisions. Also, if it was concluded that TNB's failure to plead a relevant statutory provision was fatal to its claim, then it should not have been necessary to proceed to deal with the merits of such a fatally defective claim (see paras 104 & 106-107).

Pihak responden ('TNB') telah menyaman perayu bagi mendapatkan semula RM1,632,564.29 bagi penggunaan elektrik oleh perayu namun masih belum dibayar menurut suatu kontrak pembekalan elektrik. Tuntutan itu telah ditentukan setelah pekerja TNB menjalankan pemeriksaan mengejut dan mendapati bahawa meter elektrik di premis perayu telah diusik bagi merekodkan penggunaan yang lebih sedikit daripada penggunaan elektrik yang sebenar. Selepas lebih kurang dua bulan selepas pemeriksaan, pihak TNB telah menjalankan pemeriksaan kedua dan pada masa itu mereka telah menggantikan/membaiki meter elektrik perayu. Sebulan kemudian, pihak TNB telah memberi notis dan memutuskan bekalan elektrik ke premis perayu. Pihak perayu menafikan jumlah yang dituntut oleh TNB dan pertuduhan bahawa perayu telah mengacau ganggu meter elektrik dan membuat tuntutan balas untuk ganti rugi yang disebabkan oleh pemotongan bekalan elektrik ke kilang mereka. Mahkamah Tinggi telah mengenepikan kedua-dua tuntutan oleh TNB dan tuntutan balas oleh perayu. Tuntutan TNB diketepikan atas alasan kegagalan TNB untuk memplid ss 37 dan 38 Akta Bekalan Elektrik 1990 ('ABE') adalah *fatal* meskipun, atas

merit, jumlah yang dituntut itu adalah berjustifikasi. Tuntutan balas pula diketepikan atas alasan pihak TNB berhak untuk memutuskan bekalan apabila TNB mendapati bahawa meter di premis responden telah diusik. Daripada keterangan, mahkamah bicara mendapati bahawa meter di premis perayu telah diusik semasa pemeriksaan pertama dibuat tetapi gangguan telah berkurangan pada ketika pemeriksaan kedua dijalankan. Dalam rayuan terhadap penepian tuntutan balas oleh perayu ini, pihak perayu menghujahkan bahawa TNB tidak boleh memutuskan bekalan elektrik di bawah s 38(1) ABE selepas gangguan telah tidak wujud lagi [*754]
sebagaimana yang diputuskan oleh Mahkamah Tinggi dalam kes *Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad* [2015] MLJU 276 ('Mayaria'), *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825 ('Modernria') dan *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788 ('Xin Guan'). Pihak TNB telah memohon suatu perlanjutan masa untuk memfailkan notis rayuan terhadap penepian tuntutannya tetapi pihak perayu menentang permohonan itu dengan menyatakan bahawa kesilapan oleh pihak peguamcara TNB pada ketika itu memfailkan notis rayuan dalam tempoh masa bukanlah suatu alasan yang munasabah untuk membenarkan permohonan. Pihak TNB telah memfailkan rayuan balas berkenaan dengan tuntutannya tetapi hal yang sama telah dibatalkan oleh Mahkamah Rayuan apabila didapti bahawa isu yang dibangkitkan dalam rayuan balas tidak mempunyai asas dan tidak berbangkit daripada hal perkara yang dibangkitkan dalam rayuan perayu.

Diputuskan, mengenepikan rayuan dan juga permohonan TNB bagi perlanjutan masa untuk memfailkan notis rayuan:

(1) Mahkamah bicara tidak terkhilaf apabila memutuskan bahawa pihak TNB berhak dan tidak membuat kesilapan apabila memutuskan bekalan elektrik di premis responden setelah mengalihkan meter yang diusik dan mengeluarkan notis yang dikehendaki di bawah s 38(1) ABE. Oleh yang demikian, pihak responden tidak mempunyai hak untuk membuat tuntutan bagi apa-apa kerugiannya terhadap TNB (lihat perenggan 108).

(2) Tafsiran ABE secara keseluruhan, termasuklah Bahagian IX Akta, secara tepatnya ss 37 dan 38(1), tidak menimbulkan keraguan yang jelas bahawa dengan menggunakan kaedah pembentukan makna yang jelas, niat yang hendaklah dikaitkan kepada penggubal undang-undang yang rasional adalah bahawa TNB berhak memutuskan bekalan elektrik walaupun setelah meter yang diusik itu telah dialihkan atau kecurian bekalan elektrik kelihatan telah tidak berlaku lagi semasa penutup pemeriksaan itu (lihat perenggan 79).

(3) Kuasa untuk memutuskan bekalan elektrik merupakan suatu tambahan yang bersampingan dan perlu kepada kuasa untuk memberhentikan dan menghukum kesalahan di bawah s 37. Untuk memberikan TNB budi bicara atau kuasa untuk memutuskan bekalan elektrik selepas kesalahan berlaku adalah untuk membenarkannya menggunakan kuasa tersebut yang merupakan kuasa penting berbangkit daripada kuasa untuk memeriksa, yang memenuhi tujuan untuk mengesan dan menghalang kecurian elektrik daripada berlaku. Pihak TNB perlu mempunyai kuasa yang secukupnya untuk mengatasi dan meremedi kecurian elektrik. Seksyen 38(1) dan Bahagian IX ABE hendaklah diberikan pertimbangan akibat daripada pengkhianatan itu yang mana Parlimen telah meluluskannya dengan tujuan untuk mencegah. Seksyen 38(1) tidak [*755]

menyatakan bahawa pengalihan meter yang yang diusik itu merupakan suatu halangan kepada memutuskan bekalan elektrik; tidak juga ia memperuntukkan bahawa kuasa untuk memutuskan bekalan adalah sangat penting apabila kesalahan di bawah s 37 berulang atau kekal. Apabila meter yang diusik telah diremedi atau dialihkan, tidak bermakna kesalahan di bawah s 37 telah berakhir. Ia merupakan suatu persoalan fakta dalam mana-mana kes dan tidak boleh ditafsirkan atau ditentukan secara tepat semata-mata kerana meter yang diusik itu telah dialihkan. Ia tidak boleh dikatakan bahawa tindakan pengambilan atau penggunaan yang tidak sah telah tidak berlaku sehinggalah pihak pengguna telah membayar tunggakan atau caj lewat bayar bagi elektrik yang telah dicuri atau diambil secara tidak sah dan digunakan. Sehinggalah bayaran tunggakan telah dibayar, elektrik yang digunakan terus digunakan tanpa dibayar dan oleh itu akan terus dianggap sebagai tindakan tidak sah atau kesalahan di bawah s 37. Hanya setelah caj lewat bayar telah dibayar sepenuhnya barulah dikatakan tiada kesalahan berterusan tentang pengambilan atau kecurian elektrik (lihat perenggan 78, 86, 88-90, & 93-95).

(4) Makna dari segi harfiah dan tatabahasa s 38(1) adalah jelas. Maksud peruntukan itu ialah bekalan elektrik boleh diputuskan selepas seseorang pekerja TNB berpandangan bahawa suatu kesalahan di bawah s 37 telah dilakukan. Perkataan 'selepas' tidak semestinya bermaksud serta-merta apabila kesalahan didapati berlaku. Perkataan 'selepas' hendaklah diberikan maksud yang munasabah dan rasional. Ia tidak mungkin membawa maksud pengekalan kerana ia akan membawa kepada suatu yang mengarut. Tidak mungkin

juga ia membawa maksud secara harfiah ‘serta-merta’ apabila meter yang diusik itu dibetulkan selepas pemeriksaan kerana itu akan menyekat kuasa yang diberikan kepada TNB di bawah statut. Perkataan ‘selepas’ hendaklah ditafsirkan sebagai merujuk kepada suatu jangka masa yang munasabah. Perkataan ‘munasabah’, sebaliknya, hendaklah ditafsirkan mengikut konteks fakta tertentu dalam sesuatu kes. Ketiadaan niat untuk menetapkan suatu tempoh yang pendek atau serta-merta selepas menggantikan atau membetulkan meter yang diusik boleh dikaitkan kepada penggunaan perkataan ‘selepas’ (lihat perenggan 71, 73 & 80).

(5) Mahkamah ini tidak bersetuju dengan keputusan dalam kes *Modernria*, *Mayaria* dan *Xin Guan*, bahawa kuasa untuk memutuskan bekalan elektrik di bawah s 38(1) tidak boleh dilaksanakan apabila gangguan telah dibetulkan dan yang tinggal hanyalah suatu amaun kena dibayar dan belum dijelaskan oleh pengguna kepada TNB. Pentafsiran sedemikian telah meletakkan had dalam perkataan yang nyata dalam s 38(1) dan memberikan pentafsiran yang jumud kepada seksyen itu yang tidak selari dengan niat dan tujuan undang-undang. Pentafsiran sedemikian juga tidak memenuhi kaedah pentafsiran bertujuan. [*756]

Perlakuan suatu kesalahan tidak semestinya hilang apabila meter yang diusik itu dialihkan. Sebaik sahaja pemeriksaan selesai, kesalahan masih boleh berulang sama ada melalui cara lain atau cara yang sama. Adalah tidak masuk akal untuk menjangkakan TNB perlu membuat penyenggaraan yang berterusan atau mengawal selia secara kekal terhadap pengguna yang melakukan kesalahan bagi menentukan sesuatu fakta dan kemudian mengambil langkah-langkah pembetulan yang berulang. Pentafsiran yang ditetapkan dalam ketiga-tiga kes itu kelihatan seolah-olah memasukkan ke dalam s 38(1) keperluan bagi TNB untuk memilih sama ada mengalihkan meter yang salah itu yang kemudiannya kehilangan kuasa untuk memutuskan bekalan elektrik atau membenarkan meter yang diusik itu terus beroperasi tetapi memlih untuk memutuskan bekalan elektrik dengan notis. Untuk mengenakan pilihan sedemikian ke atas TNB telah membantutkan kuasa TNB secara efektif bagi menghentikan kecurian elektrik (lihat perenggan 81-84 & 91).

(6) Tidak terdapat asas yang kukuh untuk memberikan suatu perlanjutan masa kepada TNB untuk memfailkan rayuan terhadap keputusan mahkamah. Secara substantifnya, tidak terdapat alasan yang munasabah yang menjelaskan kegagalan TNB untuk memfailkan notis rayuan yang berasingan melainkan ia merupakan kesilapan oleh peguam caranya pada masa itu. Rayuan tambahan TNB juga hanya difailkan selepas, dan sebagai balasan kepada, rayuan perayu yang pada masa itu tempoh pemfailan rayuan telah luput. Pendengaran rayuan juga telah tertangguh selama satu setengah tahun (lihat perenggan 13-14).

Obiter:

(1) Kegagalan TNB untuk memplid s 37 dan 38 ABE dalam penyataan tuntutan tidak sepatutnya menyebabkan tuntutannya yang dibuat berdasarkan kontrak dan bukan berdasarkan kedua-dua seksyen itu diketepikan. Kedua-dua seksyen itu dan Bahagian IX ABE adalah berkenaan dengan kesalahan dan penalti dan tidak memperuntukkan suatu asas statutori untuk suatu kausa tindakan antara TNB dengan pengguna. ABE adalah berkenaan dengan industri membekalkan elektrik secara keseluruhannya dan bukanlah dibuat untuk mengawal selia undang-undang hubungan peribadi antara pihak. Kontrak antara pihak yang menentukan hak dan tanggungjawab asasi antara mereka. Tiada keperluan untuk memplid ss 37 dan 38 dengan jelas dalam tindakan untuk mendapatkan semula apabila terdapat suatu gangguan, khususnya apabila terma kontrak antara pihak membenarkan untuk mendapatkan semula tunggakan dan pemutusan bekalan (lihat perenggan 99-103).

(2) Mahkamah hendaklah menahan diri daripada mengenepikan suatu tuntutan semata-mata kerana kegagalan menyatakan suatu peruntukan [*757]

yang spesifik apabila fakta material yang membenarkan penuntut membuat tuntutan sudah cukup jelas. (Perkara ini, sudah semestinya, tidak terpakai kepada hal perkara yang dikehendaki untuk diplidkan sebagaimana yang dinyatakan dalam A 18 k 8 Kaedah-Kaedah Mahkamah 2012 atau apabila kausa tindakan berbangkit secara khusus daripada statut). Dalam kes ini, pihak TNB telah memplid suatu tuntutan yang lengkap dan dinyatakan secara teratur berdasarkan kepada kontrak. Walaupun rujukan kepada ss 37 dan 28 tidak dinyatakan secara spesifik, fakta yang material telah diterangkan dengan lengkap daripada tuntutan yang dibuat dan tidak terdapat bukti yang menunjukkan responden telah diprejudiskan memandangkan perbicaraan telah berjalan dengan sempurna berdasarkan kepada peruntukan statutori itu. Tambahan lagi, jika diputuskan bahawa kegagalan TNB untuk memplid peruntukan statutori yang relevan

adalah penting dalam tuntutannya, maka tidak wajar untuk meneruskan perbicaraan berdasarkan merit tuntutan yang cacat seperti itu (lihat perenggan 104 & 106-107).]

Notes

For cases on disconnection of electricity supply, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2413-2415.

For cases on failure to plead, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7482-7490.

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd *[2007] 1 MLJ 217*, CA (refd)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors *[2016] 5 MLJ 557*, FC (refd)

Karupasamy a/l Silliah dan lain-lain lwn Tenaga Nasional Bhd *[2006] 3 MLJ 347*, HC (refd)

Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad *[2015] MLJU 276*; [2015] 6 CLJ 788, HC (not folld)

Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd [2015] 3 CLJ 825, HC (not folld)

Moyna v Secretary of State for Work and Pensions [2003] UKHL 44; *[2003] 4 All ER 162*, HL (refd)

Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor *[2016] 3 MLJ 365*; [2015] 8 CLJ 367, CA (refd)

Tenaga Nasional Berhad v Ichi-Ban Plastic (M) Sdn Bhd [2013] 1 LNS 217, HC (refd)

Tenaga Nasional Berhad v Wong Kwi Fong (Appeal No W-02-2901 of 2010) (unreported), CA

Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor *[1984] 1 MLJ 118*; [1984] 1 CLJ 154; [1984] 1 CLJ Rep 398, FC (refd)

[*758]

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad & Anor Appeal [2011] 4 CLJ 838, CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd *[2012] 4 MLJ 296*; [2012] 4 CLJ 478, FC (refd)

Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd *[2016] 10 MLJ 788*; [2016] 1 CLJ 318, HC (refd)

Yu-Ai Food Industries Sdn Bhd v Tenaga Nasional Berhad (Suit No 22NCvC-783 of 2011) (unreported), HC

Legislation referred to

Civil Law Act 1956

Courts of Judicature Act 1964 s 67(1)

Electricity Supply Act 1990 ss 24, 37, 37(1), (2), (3), (14), 38, 38(1), (2), (3), 39, Part IX

Factories and Machinery Act 1967

Licensee Supply Regulations 1990 reg 11(2)

Rules of Court 2012 O 14A, O 18 rr 7, 8

Rules of the Court of Appeal 1994 rr 5, 8, 8(1), Chapter 2, Part I, Part II

Appeal from: Suit No 22NCC-730-05 of 2012 (High Court, Kuala Lumpur)

Jack Yow (Vincy Wong with him) (Rahmat Lim & Partners) for the appellant.
Balvinder Singh Kenth (Gurmel Singh and Nur Zalika Mohd Asri with him) (Kenth Partnership) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1]This appeal arises from the dismissal of both the plaintiff's and the defendant's claims in the High Court of Malaya at Kuala Lumpur, after a full trial.

[2]The defendant is the appellant and the plaintiff the respondent in this appeal.

[3]In the course of hearing this appeal, we were constrained to deal substantively with the appeal lodged by the defendant, ie the appellant, relating to the dismissal of its counterclaim in the court below, notwithstanding that the substance of the trial in the High Court dealt with the respondent's, ie the plaintiff's claim for monies owed to it as a consequence of the unlawful consumption or abstraction of electricity.

[4]The appellant will be referred to as the defendant and the respondent as the plaintiff in this appeal.

[*759]

[5]After the decision of the High Court had been handed down on 16 March 2015, the defendant filed an appeal challenging the decision to dismiss its counterclaim, within the requisite one month period, ie on or by 15 April 2015.

[6]The defendant's appeal dealt with the losses and loss of profits stated to be suffered by it as a consequence of the cutting off of its electricity supply by the plaintiff.

[7]The plaintiff, who also sought to challenge substantively the dismissal of its claim, did not however lodge a separate notice of appeal on or by 15 April 2015. Instead, the plaintiff lodged a cross-appeal in respect of its claim for monies owed to it. Moreover this cross-appeal was filed on 19 June 2015, ten days after the memorandum of appeal of the defendant was served on it.

[8]Pursuant to the decision of the Federal Court in *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* *[2016] 5 MLJ 557* ('Leisure Farm'), the cross-appeal was struck out by this court on 7 November 2016, prior to the hearing of the full appeal, on the application of the defendant. This was because the cross-appeal did not raise issues emanating from the primary appeal lodged by the defendant, but instead sought to raise separate substantive issues relating to the liability of the defendant for unpaid monies due to the consumption of electricity supplied by it. The cross-appeal as stated above, was premised on the plaintiff's claim of monies for the unpaid abstraction or consumption of electricity. It could not be said that the cross-appeal arose out of issues raised in the appeal (see also *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How*

& Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367 (CA) ('See Chee How')).

[9]In *Leisure Farm*, it was determined, inter alia, as follows:

(a) the Federal Court agreed with the Court of Appeal's finding that r 5 of the Rules of the Court of Appeal 1994 ('the RCA 1994') provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. The word 're-hearing' used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, the party aggrieved should file a proper notice of appeal;

(b) the Federal Court held that the litigant in that case ought to have filed an independent notice of appeal as a notice of cross-appeal does not provide for a complaint to be re-heard. Under r 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the [*760]

High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing;

(c) the Federal Court also noted by way of comparison that the RCA 1994 clearly provides that a notice of appeal under *Part I Chapter 2* on civil appeals is distinct and distinguishable from a notice of cross-appeal under *Part II* of the same Chapter 2 of the RCA 1994; and

(d) the Federal Court considered that the operative words 'to contend' and 'decision of the High Court should be varied' under r 8(1) of the RCA 1994 clearly limits the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It was incumbent on a party to independently file a notice of appeal under r 5 of the RCA 1994 to rehear the issues that were not decided in its favour. A notice of cross-appeal does not provide for a complaint to be re-heard. An independent appeal ought to be filed under s 67(1) of the Courts of Judicature Act 1964 ('the CJA').

[10]Coming back to the instant case, on the date fixed for the hearing of the appeal proper, namely 6 December 2016, the plaintiff sought to move a motion for an extension of time to file a notice of appeal. The primary ground for doing so was premised on the fact that as the cross-appeal had been struck out, this court should regard the application for an extension of time to lodge an appeal favourably in order to enable the plaintiff to ventilate its case.

[11]The plaintiff further submitted that it had not filed its motion earlier because it was awaiting the outcome of its motion to amend the notice of cross-appeal.

[12]The defendant opposed the application for an extension of time to lodge an appeal. Apart from reliance on the cases of *Leisure Farm* and *See Chee How*, it was submitted that the failure to file an appeal within time was attributable to an error on the part of the solicitor who had charge of the matter in the High Court (the advocates who argued the appeal were from a different firm of advocates and solicitors). Learned counsel went on to cite *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118; [1984] 1 CLJ 154; [1984] 1 CLJ Rep 398 for the trite position that generally, the mistake of a solicitor is an insufficient ground in itself to justify the court exercising its discretion in favour of the plaintiff.

[13]Having heard counsel for the parties at some length, we decided that there was insufficient basis to warrant the grant of such an extension of time for the plaintiff to lodge an appeal. Substantively there were no reasonable grounds [*761]
which explained why the plaintiff had failed to file a separate notice of appeal save for the error of its then solicitor. Even the cross-appeal had been filed only after, and in response to, the defendant's appeal. By this date, the time

period for the lodging of an appeal had lapsed. In this context, learned counsel for the plaintiff candidly conceded that even at the stage of the filing of the cross-appeal, any appeal sought to have been lodged by the plaintiff would have been out of time, and required an application for an extension of time.

[14]Finally, this appeal had already been delayed by one and a half years. This in turn was due to the parties' agreement that the plaintiff's application to strike out the cross-appeal and the defendant's application to amend the cross-appeal ought to be postponed pending a decision of the Federal Court on the issue of whether issues not relating to the subject matter or arising out of the subject matter of an appeal could be validly disposed of by way of a cross-appeal. This was the subject matter of *Leisure Farm* (above).

[15]In the entirety of these circumstances, we disallowed the motion for an extension of time for the plaintiff to file an appeal. Consequently, the merits of the plaintiff's appeal were not adjudicated upon here. The appeal was confined to the counterclaim of the appellant/defendant.

[16]After hearing submissions and perusing the cause papers, we dismissed the appeal and append the reasons for our decision below.

[17]In order to appreciate the reasons for our decision it is necessary to examine the relevant particulars of the claim, the counterclaim, the judgment of the High Court, as well as the chronology of facts. Although these matters touch to a considerable extent on the plaintiff's claim, this is necessary in order to comprehend the basis for the defendant's counterclaim for losses and loss of profits.

THE PLEADINGS

[18]The claim was instituted by Tenaga Nasional Bhd, who was the plaintiff in the High Court, and is the respondent in this appeal. The claim was brought against one Karun Klasik Sdn Bhd, the defendant in the court below. The defendant is a customer of the plaintiff as the latter supplies electricity to the former pursuant to a contract for the supply of electricity and the *Electricity Supply Act 1990* ('the ESA 1990').

[19]Vide its claim, the plaintiff sought to recover monies stated to be due to it for the supply and use of electricity by the defendant. However such usage had not been recorded by the instrument measuring the electricity supplied, [*762]
namely the electricity recording meter ('the meter'). This in turn, was alleged to be due to the tampering of the meter.

[20]The plaintiff consequently issued bills or invoices for the cost of the electricity that it gauged had been actually utilised and remained unpaid for, commonly referred to as 'backbilling'. Such assessment was made after specific tests and analyses had been undertaken by the plaintiff. The quantum sought to be recovered was two-fold:

(a) in respect of the first period namely from 3 May 2007-26 January 2011, the sum of RM1,579,981.35;

(b) for the second period, namely from 26 January-16 March 2011, the sum of RM52,582.94; and

(c) the total sum claimed amounted to RM1,632,564.29

[21]The defendant denied owing the sums claimed, albeit in part or in its entirety. It maintained that it had not, either through its employees or principals, tampered with the meter. The defendant further contended by way of its

defence and counterclaim, inter alia, that the inspection/s carried out by the plaintiff were unlawful and disclosed no wrongdoing or tampering on the defendant's part. The basis for such allegations are set out in the defence and counterclaim in full and will be considered further on in the judgment. The defendant consequently refused to pay for electricity which it maintained had not been supplied to it. It further maintained that the basis for calculation of the amounts due was arbitrary and excessive. The electricity bills of the defendant after the removal of instruments allegedly utilised to tamper with the meter disclosed that the quantum of billing remained the same as that prior to such removal.

[22]In its counterclaim, the defendant sought damages for losses accruing to its business as a consequence of the wrongful disconnection of the electricity supply to its factory on 24 April 2011. In this context, the defendant operated a factory in Kolam Udang, Kg Assam Jawa in Kuala Selangor. The nature of its business was the processing and packaging of prawns. The processed frozen prawns were stored in a cold room pending export and sale.

[23]It therefore claimed damages for the loss of stock that had been stored in its coldroom, loss of income and profits, loss of reputation, customers and orders, as the factory had to be closed down. The defendant claimed the sum of RM5,382,139.56 and USD85,000.

[*763]
THE CHRONOLOGY OF FACTS

[24]The plaintiff's case is that on 26 January 2011, its representatives inspected the meter installation at the plaintiff's premises in the presence of the defendant's representative ('the first inspection'). The plaintiff maintains that it discovered signs indicative of meter tampering.

[25]This is disputed by the defendant. The defendant denied receiving any notification of the first inspection. Further, the defendant pointed out that the said premises were closed at the time of the inspection which was around 4.30-6am. The defendant alleged that the plaintiff's representatives trespassed and broke into the said premises, damaging the gate and lock to the meter room in the process, leaving the defendant's premises unsafe and unsecured. The defendant lodged a police report to that effect on the following day, 27 January 2011.

[26]The plaintiff's reply to that was that the first inspection was part of 'Ops Mancing' where the plaintiff's team was accompanied by auxiliary police. The plaintiff admitted conducting the first inspection outside of office hours but justified it by stating that the trend was to steal electricity outside of office hours, and that it was legally entitled to conduct the inspection. Further, the plaintiff claimed that the defendant's gate was already broken at the material time and that the meter room was not locked, but only latched. Therefore, the uniformed team did not have to break the gate and lock to enter the said premises.

[27]In any event, the plaintiff's representative's recorded findings included the following:

(a) the power readings on the display of the main meter and the check meter differed from the actual readings of power consumption for all three phases of the said meter;

(b) a copper clamp was fixed on the bottom of the test terminal block (TTB);

(c) the said copper clamp was used to reduce the reading of the power usage into the meter; and

(d) a piece of plastic and some tissue were used to avoid contact of the said copper claim with the meter panel (to avoid scratch marks on the TNB meter installation).

[28]The first inspection revealed that the percentage of error at the main meter was -90.657% (negative ninety point six hundred and fifty seven percent) while for the check meter, it was -90.663% (negative ninety point six hundred and sixty three percent). The plaintiff maintained that this meant that [*764]
the defendant had been underbilled by RM1,579,981.35 for the period from 3 May 2007 to 26 January 2011.

[29]On 16 March 2011, the plaintiff's representative carried out another inspection ('the second inspection') and made the following findings:

(a) there was a mark on the TNB sticker, suggestive of tampering;

(b) the power reading on the red phase of the main meter was 0 amp while the power readings for the yellow and blue phases were in reverse;

(c) the current readings for all three phases of the check meter was 0 amp;

(d) the voltage reading for the yellow phase was 0 volts; and

(e) the neon fuse of the yellow phase had blown.

[30]The second inspection showed that the percentage of error for both the main and the check meter was -100% (negative one hundred percent). In monetary terms, the plaintiff found that the sum of RM52,582.94 had not been billed for the period from 26 January 2011 to 16 March 2011.

[31]From its findings pursuant to the first and second inspections, the plaintiff concluded that the meter did not record an accurate reading of electricity utilised by the defendant at the said premises.

[32]It is the defendant's contention however that the problem with the meter at the second inspection was an inherent problem and could not possibly constitute evidence of any 'tampering' on its part.

[33]The plaintiff sent the defendant several notices regarding the total outstanding back charges but the defendant refused to pay.

[34]On 20 April 2011, the plaintiff sent the defendant a letter and a notice under *s 38(1)* of the *ESA*. Both documents make reference to the second inspection conducted on 16 March 2011.

[35]The letter made a demand from the defendant of the sum of RM1,579,981.35 being the arrears of monies owed to the plaintiff for electricity which it computed had been consumed by the defendant but which had not been paid for. In the event the defendant failed to pay this sum on or by 4 May 2011 the electricity supply would be cut.

[36]Vide a notice under *s 38(1)* of the *ESA* the plaintiff stipulated that pursuant to the inspection conducted on 16 March 2011, the electricity supply to the premises would be disconnected on 21 April 2011 at 2.30pm.

[*765]

[37]The defendant's representatives met with the plaintiff's representatives on the morning of 24 April 2011 to assert that they did not tamper with the meter. In that meeting, they gave the plaintiff notice that if the plaintiff proceeded to disconnect the electricity supply, the defendant would hold the plaintiff responsible for the losses suffered as a result of the disconnection.

[38]The plaintiff proceeded to disconnect the electricity supply on the afternoon of 24 April 2011. The defendant claimed that this was contrary to another notice issued by the plaintiff, also dated 20 April 2011, that the plaintiff would only disconnect the defendant's electricity supply after 4 May 2011 if the sum of RM1,579,981.35 was not paid (this notice was not in the record of appeal).

[39]The defendant's representatives met the plaintiff's representatives immediately after the disconnection to request for a restoration of the electricity supply. However, the plaintiff only reconnected the electricity supply 12 days later, on 3 May 2011.

[40]The plaintiff lodged police reports on 28 January 2011 and 11 May 2011, claiming that the reason for the inaccurate reading was due to the tampering of the meter on the said premises.

[41]The plaintiff then filed this action, claiming that the defendant had, in breach of the terms of the electricity supply contract and of the relevant laws, tampered with the meter resulting in the failure of the meter to record an accurate reading. The plaintiff claimed back charges amounting to RM1,632,564.29.

[42]The defendant denied tampering with the meter on the said premises and alleged that the amount claimed by the plaintiff as back charges is exorbitant, arbitrary and unreasonable. In its defence, the defendant further claimed that its usage of electricity fluctuates from time to time because it is dependent on several factors, such as the quantity of raw ingredients being processed and the country to which the prawns were being exported.

[43]The defendant also filed a counterclaim for the trespass and damage caused by the plaintiff to the said premises, and for the loss of business profits which it suffered as a result of the plaintiff cutting the electricity supply to the said premises. The defendant claimed special damages in the sum of RM5,382,139.56 and US$85,000 with interest, general damages, and costs on a solicitor-client basis.

[44]The defendant maintained that despite taking steps to mitigate its losses, it ultimately failed to revive its business. The defendant closed its factory [*766]
and ceased its business around December 2011 or January 2012.

THE DECISION OF THE HIGH COURT

[45]The High Court dismissed both the plaintiff's claim and the defendant's counterclaim. The primary issues before the High Court were whether:

(a) the plaintiff had lawfully 'backbilled' the defendant for the supply and usage of electricity;

(b) the subsequent disconnection of the supply of electricity, by reason of non-payment of such bills, was lawful; and

(c) the defendant was entitled to damages under the counterclaim for damages, loss of profits etc.

[46]The grounds of judgment are, with respect, wholly comprehensive and we do not propose to paraphrase the same here. In summary, the reasons set out by the learned trial judge are, inter alia, as follows:

(a) pursuant to a preliminary objection raised by the defendant, the learned judge held that the plaintiff's pleadings were, in effect, fatally defective, in that it had failed to specifically plead the relevant sections of the ESA 1990, upon which its claim was based. The claim, it was held, was premised on *s 38* of the *Act*, and in failing to plead this specific section, the claim was deficient. The learned trial judge was of the view that on this ground alone, the plaintiff's claim ought to be dismissed. Notwithstanding this Her Ladyship went on to consider the full merits of the claim;

(b) two inspections were carried out by the plaintiff and the learned trial judge examined the validity of these inspections. Her Ladyship concluded that the first inspection was unlawful, while the second was lawful. However the evidence obtained from both inspections was held to be admissible. Upon an examination of such evidence Her Ladyship made the following findings of fact:

(i) the meter installation in the defendant's premises had been tampered with at the time of the first (albeit unlawful) inspection; and

(ii) the meter had not been tampered with at the time of the second inspection, on a balance of probabilities. The meter was faulty;

(c) the trial judge found that the determination of the period of claim as well as the recalculated sum of RM1,632,564.29 was accurate, correct and reasonable. Her Ladyship rejected the defendant's contention that any claim by the plaintiff by way of 'backbilling' was restricted to three [*767]

months under sub-reg 11(2) of the Licensee Supply Regulations 1990 ('the LSR'), as the said regulation is not applicable to a case of meter tampering ie an offence under *s 37(3)* of the *ESA 1990* (see *Tenaga Nasional Berhad v Wong Kwi Fong* (Appeal No W-02-2901 of 2010) (unreported));

(d) however as the plaintiff's claim had been found to be fatally defective for failure to properly plead the statutory basis for its claim, the plaintiff was not entitled to recover these monies from the defendant;

(e) the learned trial judge also held that pursuant to the second inspection in respect of which she had found no tampering, the plaintiff was entitled to recover monies due to it, but only under reg 11(2) of the LSR 1990. As the second limb of the plaintiff's claim was for the period prior to the three months stipulated in the regulations, it was not recoverable (there appears to be an error in relation to the quantum claimed. The plaintiff's claim under the first inspection was in the sum of RM1,579,981.35 and not RM1,632,564.29 as erroneously stated in the judgment. The former sum under the first inspection was found to be valid and payable. The sum due under the second inspection was RM52,582-94. This was found not to be due as stated above); and

(f) the learned judge dismissed the counterclaim on the basis that the plaintiff was entitled to disconnect the electricity supply in the face of the finding of tampering by the defendant.

THE APPEAL

[47]In dealing with the defendant's appeal in relation to the counterclaim, the primary issue we had to deliberate on related to whether the plaintiff had a right to, or had lawfully exercised its power under *s 38(1)* of the *ESA* to disconnect the defendant's electricity supply to its premises on 21 April 2011.

THE DEFENDANT'S SUBMISSIONS

[48]Learned counsel for the defendant, Mr Jack Yow in both his oral and written submissions argued forcefully that the disconnection of electricity supply to the defendant's premises was both wrong and unlawful.

[49]In summary he contended that:

(a) it was the plaintiff's duty and obligation to supply electricity to the defendant's premises premised on the written contract between the parties. Further such an obligation was also statutorily based pursuant to *s 24* of the *ESA*. By disconnecting the defendant's electricity supply on 21 April 2011, the plaintiff, it was contended, had breached not only its contract with the defendant, but also its statutory duty, thereby giving [*768]

rise to remedies to the defendant in both contract and tort, in damages;

(b) there had been no urgency nor circumstances warranting a disconnection of the electricity supply on 21 April 2011, particularly in light of the tampered meters having been replaced, and the defendant having been accorded further time to pay the sum claimed;

(c) the plaintiff had exercised its powers wrongfully under s 38(1) because in reality the disconnection was due to the defendant's failure to pay the sums demanded by the plaintiff, rather than any tampering of the main and check meters (as evident from the plaintiff's pleaded case at para 29 where it had stipulated that the defendant was aware that its supply would be disconnected in the event of a failure to pay the sums due). The plaintiff was only entitled to disconnect the electricity supply pursuant to s 38(1) of the ESA if a consumer was found to have tampered with the meters;

(d) there was nothing found in the second inspection on 16 March 2011 which suggested that an offence under *s 37* of the *ESA* had been committed. The evidence, through PW3, it was submitted, showed that rather than tampering, the problem appeared to be an inherent defect of the meter. As such it could not be the case that an offence relating to meter tampering had been committed. In the absence of tampering with the meter there could be no lawful disconnection of the electricity supply to the defendant; and

(e) more significantly it was argued that the power given by s 38(1) of the ESA to the plaintiff is a discretionary power that is not absolute. This was evident from the use of the word 'may' in the section. As such, the plaintiff did not have an unfettered right as a licensee under the ESA 1990 to disconnect electricity supply based on an opinion formed subjectively, without having regard to the serious repercussions such a disconnection may have on its consumers.

[50]The thrust of the defendant's appeal was that a purposive interpretation of the provision of s 38(1) of the ESA discloses that the discretionary power to disconnect electricity is to prevent an offence of meter tampering from continuing. The following cases were cited in support of this proposition:

(a) *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* *[2007] 1 MLJ 217* at p 223H ('Claybricks') where this court held, inter alia, that the purpose of the section was to give power to the plaintiff to halt an ongoing offence instantly or speedily;

(b) *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* *[2016] 10 MLJ 788*; [2016] 1 CLJ 318 at p 331D where it was held that Tenaga Nasional Bhd could only lawfully disconnect the electricity supply to a consumer's [*769]

premises 'when the offence is still continuing and conversely cannot if it has since ceased'; and

(c) *Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad* *[2015] MLJU 276*; [2015] 6 CLJ 788 at pp 811I-812A and *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825 at p 836D, where it was held that once the impugned meter had been replaced and the offence under s 37 of the Act was no longer continuing, then there was no power to issue the notice to disconnect as the act of replacing the impugned meter with a new meter had brought the nefarious conduct or activity to an end, and there was no longer a basis or justification for disconnection of electricity as a statutorily prescribed response to an offence under s 37 of the Act.

[51]It therefore followed, it was submitted, that once the meters were changed or had been repaired (as was the case here on 16 March 2011), the purported offence had ceased and there was no longer any offence in respect of which the plaintiff could exercise its powers under the section to disconnect the electricity supply. The learned judge had made a finding of fact that there was no tampering of the meters at the time of the second inspection.

Accordingly it was argued for the defendant that the plaintiff's powers under s 38(1) had been wrongly exercised.

THE PLAINTIFF'S SUBMISSIONS

[52]For the plaintiff, learned counsel Mr Balvinder Singh Kenth maintained that the learned judge had not erred. He submitted in summary that:

(a) the plaintiff is entitled under s 38(1) of the ESA as well as cll 10 and 21 of its supply contract with the defendant to disconnect the electricity supply:

(Clauses 10 and 21 provide respectively as follows:

> Clause 10. NO INTERFERENCE OF SUPPLY TO OTHER CONSUMERS. To use electiricty supply so as not to interfere with the supply of electricity to any other Consumers and TNB may disconnect the supply if such interference occurs.
>
> Clause 21. DISCONNECTION OF SUPPLY. TNB shall have the right to disconnect the supply of the Consumer without giving any notice in any situations mentioned below:
>
> (a) the Consumer fails to pay monthly bill as mentioned under clause 17(a); (b) any default by the Consumer under clause 23 and such default are are not remedied within the stipulated period; (c) By Court Order/Judgment; (d) If in the opinion of TNB that the continuation of the supply will jeopardize the safety, reliability or security of TNB's system or presents an imminent [*770]
>
> physical threat or endangers the safety, life or health of any person; (e) Any right to disconnect the supply without notice as provided under the Electricity Act 1990.);

(b) although the court had concluded that tampering was not made out on the second inspection, the plaintiff was, at the material time ie after the second inspection, of the opinion that tampering had occurred;

(c) pursuant to s 38(1), the plaintiff's officer, PW3, had formed an opinion that an offence under s 37 had in fact been committed. Once he was of such opinion, s 38(1) empowered him to disconnect the supply with 24 hours notice;

(d) the trial judge found that on the basis of what was perceived to be tampering, the officer had sufficient justification to form the opinion that an offence under s 37 of the ESA had been committed; and

(e) s 38(1), as statutorily construed, allowed the plaintiff to exercise its powers to disconnect the electricity supply when its officer had formed an opinion that an offence had been committed. Accordingly the disconnection was lawful.

[53]In support of such a construction, reference was made to:

(a) *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad & Anor Appeal* [2011] 4 CLJ 838 ('WRP Asia Pacific') where this court held that the section provided specifically for the preservation of Tenaga Nasional Bhd's interests and empowered it to act expeditiously to prevent misuse, such as the theft of electricity supplied by it. No offence needed to be proved in court before the power under the section could be invoked. This was in order to ensure swift action could be taken to immediately avoid the further illegal usage by the perpetrator (this decision was upheld by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* *[2012] 4 MLJ 296*; [2012] 4 CLJ 478);

(b) *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* *[2007] 1 MLJ 217* ('Claybricks') which, like the case above, dealt with the issue of whether a conviction has to be procured in a court of law before electricity

supply may be cut off by Tenaga Nasional Bhd. In the judgment of the court, Zulkefli JCA (now FCJ and PCA) held, inter alia, that *s 38(1) was specifically provided to safeguard the interest of the respondent and to enable it to act expediently to prevent abuse such as stealing the electricity supplied by the respondent*. (Emphasis added.) Although the primary issue in the case was whether the offence had to be proven, prior to an exercise of the power granted under s 38(1), the general purpose of the section was explained;

(c) this approach is also explained in *Tenaga Nasional Berhad v Ichi-Ban Plastic (M) Sdn Bhd [*771]*

[2013] 1 LNS 217 which made reference to *Claybricks*. See also *Yu-Ai Food Industries Sdn Bhd v Tenaga Nasional Berhad* (Suit No 22NCvC-783 of 2011) (unreported) and *Karupasamy a/l Silliah dan lain-lain lwn Tenaga Nasional Bhd* [*[2006] 3 MLJ 347*]. These cases were concerned with the issue of whether an offence had to be proven in court before disconnection could be effected, but in the course of determining that there was no such necessity, the purpose and construction to be accorded to s 38(1) was considered; and

(d) in conclusion learned counsel Mr Balvinder Singh Kenth submitted that in view of the plaintiff's representative's opinion that tampering had occurred and an offence thereby committed, the plaintiff had exercised its powers rightfully and well within the ambit of the section. The learned judge had not therefore erred in arriving at her decision.

OUR ANALYSIS OF S 38 OF THE ESA 1990

[54]The issue for consideration in this appeal relates to the power accorded to the licensee, namely the plaintiff, to disconnect the electricty supply of a consumer under s 38(1) of the ESA.

[55]While there is no case-law directly on point in relation to this issue, the purpose of, and construction to be accorded to s 37 has been considered by this court in our case-law, notably, *WRP Asia Pacific* and *Claybricks* (see above).

[56]In some of the recent decisions handed down by the High Court, which were referred to us in the course of submissions, the position has been taken that the power to disconnect the electricity supply to a consumer's premises, notwithstanding that an employee of the licensee is of the view that an offence has been committed under s 37, is circumscribed. These cases held that once the tampering or unlawful abstraction or consumption of electricity has been halted by the licensee's employees after their inspection, the power to disconnect the electricity supply also ceases. The rationale for such an interpretation is that once the illegal or unlawful abstraction of electricity has been stopped, (by the removal of the tampering device or otherwise) then there is no basis to justify the additional burden of disconnecting the electricity supply of the consumer. This somewhat stark and simplistic abridgement of these decisions does not do justice to the studied and comprehensive analysis undertaken in those cases, which should be perused in full. The reasoning in these decisions are considered below.

[57]In *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825 ('Modernria'), further to an inspection at the consumer's premises, Tenaga Nasional Bhd ('TNB') discovered that the meter had been tampered with, resulting in a reduced recording of electricity actually supplied. [*772]
The tampered meter was replaced with a new meter. Two and a half months later TNB issued a notice under s 38(1) to the effect that the electricity supply to the premises would be disconnected on the basis that the consumer had committed an offence under s 37(1) of the Act. The consumer sought an injunction to restrain TNB from disconnecting the electricity supply. It was contended by the consumer, inter alia, that the issuance of the notice of disconnection some two and a half months after the initial discovery of tampering showed that there was no urgency to disconnect the electricity supply. In opposing the injunction TNB relied on the provisions of s 38(1), which it contended did not set out a time frame for it to enforce its statutory right to disconnect electricity supply. Further it maintained that it had the right to disconnect electricity supply with 24 hours notice, regardless of the fact that a new meter had been installed and irrespective of the fact that there was no further theft of electricity by the consumer.

[58]The learned High Court judge allowed the application for an injunction holding that the power to disconnect the electricity supply is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. Section 38(1) was not to be read as allowing future disonnection of electricity at any time as TNB might choose where the offence under s 37(1) was in the past and was not being perpetuated. Any such reading would, it was held, amount to a strain on the language of the section.

[59]If however the offence was continuing, then quite clearly the power under s 38(1) could be invoked. On the facts of the case before him, the learned judge held that as there was no longer any continuation or perpetuation of any offence which entitled TNB to exercise its powers under s 38(1) to disconnect, any such exercise of the power would be an unlawful use of statutory power. Having balanced the interests of the parties, as it was injunctive relief that was being sought, the learned judge restrained TNB from exercising such power.

[60]The learned judge held, inter alia, at para 32 of the judgment thus:

> The purpose of s 38(1) of the Act has already been lucidly explained by the Court of Appeal and Federal Court in the *Claybricks* and *WRP Asia Pacific* cases respectively and it is clear that it is a statutory power given to TNB to swiftly disconnect after discovery of an offence, but at that pont in time when the supply of electricity is being disconnected, the offence must still be continuing. I am not convinced that s 38(1) of the Act can be utilised in circumstances where the offence is no longer continuing as there is no illegal consumption or usage of electricity which has to be severed.

[61]His Lordship also pointed out, most pertinently, that this issue needed to be settled decisively by the appellate courts so as to ensure certainty and clarity with regards to the utilisation of this power to disconnect electricity by [*773]
TNB when an offence is believed to have occurred under s 37 of the ESA.

[62]The learned judge applied the same reasoning in the case of *Mayaria Sdn Bhd & Anor v Tenaga Nasional Berhad* *[2015] MLJU 276*; [2015] 6 CLJ 788 ('Mayaria'). Similarly in that case, upon the discovery of tampering with the meter, the impugned meter was replaced with a new one. After TNB had computed the loss of revenue it had suffered, it issued a notice requiring payment of the full sum due, stipulating that unless the said sum was paid within 24 hours, the supply of electricity would be disconnected. Apart from this a further notice under s 38(1) was also issued stating that the electricity supply would be disconnected the following day. Mayaria paid the sum demanded under protest and on a without prejudice basis. It then commenced a suit claiming for a refund of the sum it had paid out. TNB counterclaimed for a declaration that the sum paid represented the loss of revenue it had suffered and which it was entitled to claim under *s 38(3)* of the ESA. On the disposal of the matter by way of O 14A of the Rules of Court 2012 ('the RC') the learned judge held similarly that once an impugned meter had been replaced and the offence under s 37 was no longer continuing, then there was no power to issue a notice to disconnect as the act of replacing the impugned meter had brought the 'nefarious conduct' to an end. There was therefore no basis or justification for disconnection of the electricity as prescribed in response to an offence under s 37 of the Act.

[63]Similarly in the High Court decision of *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* *[2016] 10 MLJ 788*; [2016] 1 CLJ 318 ('Xin Guan'), the learned High Court judge in essence concurred with the decisions in *Modernria* and *Mayaria*. *Xin Guan* also dealt with the grant of an interim injunction to restrain TNB from disconnecting the electricity supply to its premises. The facts too are similar, namely that interference and tampering of the meter had been discovered after an inspection and TNB had removed and replaced the tampered meter with a new one. Three months later it issued a notice to disconnect the electricity supply under s 38(1) of the ESA. In this case TNB

had not made a demand for arrears of charges due to it. In the course of granting the interim injunction, the learned judge held, inter alia, that:

(a) there is doubt and ambiguity in the plain reading of s 38(1) because an interpretation disregarding the prupose of s 38(1) as stipulated in *Claybricks* and *WRP Asia Pacific* could lead to the situation that despite rectification of the meter that had been tampered with, TNB could still invoke its power to disconnect electricity supply to the offending consumer long after the inspection which resulted in the discovery and subsequent rectification. This could continue for years;

(b) the scheme does not envisage that the right to claim loss of revenue under s 38(3) or the power to disconnect under s 38(1) are not *sine qua non* of [*774]

one another. As such TNB may choose to disconnect the supply even without claiming back charges for the loss of revenue. Equally it might also effect disconnection even after payment has been made in full of backcharges;

(c) the power to disconnect electricity supply was not enacted with a view to punishing for meter tampering or electricity theft because such a course of action should only be pursued in accordance with the provisions of the ESA on criminal proceedings; and

(d) the provisions of s 38(1) are clear that the power to disconnect supply to the premises of consumers in cases such as meter tampering is both immediate and interim in nature. Any such disconnection is also intended to be temporary as sub-s *(2)* provides that disconnection should not exceed three months.

[64]The learned judge then went on to consider possible scenarios that could arise in the event s 38(1) is construed as according to TNB it has the discretion to disconnect electricity even after the 'rectification' of the offence believed or viewed to have been committed under s 37. His Lordship went on to state as follows:

(e) The purposive approach ought to be utilised in construing section 38(1) of the ESA;

(f) Reference was made to the provisions in the United Kingdom Electricity Act 1989 which expressly provides that the supplier of electricity may discontinue such supply 'until the matter has been remedied and remove the meter in respect of the offence was committed'.

[65]Premised on the foregoing the learned judge, adopting and agreeing with the approach in *Modernria* and *Mayaria* held that disconnection could only be effected until such time as the tampered meter has been remedied or removed. Once the impugned meter has been remedied and further losses halted, the statutory power accorded to TNB can no longer be lawfully exercised.

[66]Having examined the relevant case-law submitted to us and considered the same we turn to consider s 38, more particularly the construction to be accorded to the power to disconnect accorded to a licensee under s 38(1) of the ESA.

[67]For ease of reference, s 38 provides as follows:

38 Disconnection of supply of electricity

(1) *Where* any person employed by a licensee finds upon any premises *evidence* which *in his opinion* proves that *an offence has been committed under subsection [*775]*
37(1),(3) or (14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, *cause the supply of electricity to be disconnected from the said premises*.

(1A) …

(2) If the supply of electricity has been disconnected under subsection(1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:

Provided that the period of disconnection shall not exceed three months.

(3) *The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsection 37(1),(3) and (14)* and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) …

(5) …

[68]The offences referred to in s 38 deal with:

(a) tampering or the adjustment of installations which might cause danger to human life — *s 37(1)*;

(b) *the dishonest abstraction, consumption or use of electricity or the alteration of any meter or other instrument or the prevention of such meter or instrument from recording the consumption of electricity — s 37(3)*;

(c) *causing damage to any meter or installation utilised in the recording of the output or consumption of electricity*. (Emphasis added.)

[69]Section 38(1) provides for the disconnection of the supply of electricty to a consumer's premises:

(a) by the licensee or a person duly authorised by the licensee (the plaintiff);

(b) after giving notice of not less than 24 hours;

(c) when an employee of the licensee finds on the consumer's premises, evidence which in his opinion; and

(d) proves that an offence has been committed under s 37(1), (3) or (14).

[70]Turning now to the construction, the question for us is what is the meaning to be ascribed to the intention of the notional legislator in drafting or using the words in s 38(1), which amounts to a statement of law? (see *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 4 All ER 162 at para 24). In undertaking this exercise, we seek to ascertain the legal meaning to be accorded to the section rather than the literal or grammatical meaning of [*776]
the words utilised. In the course of doing so, it is both prudent and necessary to consider first the 'plain meaning rule' of construction to ascertain whether the grammatical or literal meaning coincides with that intended by the legislator. The rule applies where the section of the statute under consideration is capable of one meaning only, and an informed interpretation of the statute and section gives rise to no real doubt that the grammatical meaning is the one intended by the legislator. In such an instance the legal meaning of the enactment is said to correspond to the grammatical meaning (see section 195 *Part XI of Bennion on Statutory Interpretation, Fifth Edition, published by*

Lexis Nexis.)

[71]We have sought to identify the elements of s 38(1) above and the literal and grammatical meaning to be accorded to it is clear. The heart of the provision is that such disconnection may be effected after an employee of the licensee forms the view that an offence under s 37 has been committed. The section makes no mention of the removal of the offending meter or rectification or replacement of the same. Neither does it state that the power to disconnect is circumscribed by such a rectification or replacement of the tampered meter.

[72]What perhaps is less than clear and forms an important core of the reasoning in *Modernria*, *Mayaria* and *Xin Guan* is that:

(a) the word 'after' in s 38(1), read in the context of the commissions of an offence under s 37, cannot mean in perpetuity after discovery of the 'offence'.

Following from *Claybricks* and *WRP Asia*, it was held in these cases, that the word 'after' must mean at a relatively short time after or immediately after the discovery of the commission of the offence; and

(b) apart from this however, these cases also go on to construe the section such that upon remedying the act of tampering, the offence is effectively halted and thereafter the power to disconnect ceases to subsist.

[73]With respect to the construction that 'after' cannot mean in perpetuity, we would concur. Notwithstanding this, the word 'after' is a relative term and does not necessarily only mean immediately upon discovery of the offence. The section does not circumscribe, albeit expressly or impliedly, that disconnection is to be undertaken immediately upon discovery of an offence.

[74]The word 'after' ought to be given a reasonable, judicious and rational construction which will depend to a large extent on the particular facts of a case. It would be futile to prescribe a specified period as amounting to the outer limits of time accorded to the licensee, save to state that the section clearly does not envisage a period that is too long in the context of a particular case, and far less, perpetuity.

[*777]

[75]The interpretation accorded in the triad of cases namely *Modernria*, *Mayaria* and *Xin Guan* have also read into s 38(1) the additional condition that the power to disconnect ceases upon removal of the impugned matter on the rationale that the 'commission' of the offence under s 37 has ceased. Such an interpretation is not consonant with the literal meaning of the section. It is however argued in the foregoing cases that such a meaning is in accord with the legislative intent if the purposive approach to statutory construction is adopted.

[76]The plain meaning rule it will be recalled, requires the interpreter to consider on an informed interpretation of the statute and the section in question, whether there is any real doubt that the grammatical or literal meaning is the one intended by the legislator. This in itself requires deliberation on the purpose and intent of the ESA, more particularly Part IX which deals with offences and penalties and contains s 38(1).

[77]The ESA 1990 is an Act to consolidate the laws relating to, inter alia the generation, transmission, distribution,

trading and the use of electricity, to ensure supply of electricity to consumers nationwide in all areas, the rationalisation of electricity tariffs and to promote the development of the electricity supply industry. These multiple objectives which are key to the needs of our citizens, as well as the efficient working and economy of our nation, are undertaken by the commission. The commission strives to promote and facilitate the transmission of electrical supply economically and efficiently, so that all consumers and all parts of the nation enjoy electricity supply and that tariffs are reasonable. The unauthorised theft and use of electricity is untenable to the development of the industry or in meeting the objectives set out above. In point of fact, the theft of electricity is a scourge that is sought to be brought down to a minimum, if not eliminated. It detracts from the economical and efficient utilisation of electricity.

[78]For that reason Part IX subsists to set out in full the offences and penalties attracted by such unlawful or unauthorised activities in relation to electricity supply. Part IX specifically creates an offence where there is unlawful abstraction or theft of electricity. This is clearly spelt out, particularly in ss 37(3) and (14), which are relevant to the facts of the instant case. The power to disconnect electricity supply appears to us to clearly follow as an incidental, ancillary and necessary adjunct to the power to halt and penalise offences under s 37. Section 38 is in itself circumscribed as the power to disconnect is restricted to circumstances specifically when theft is found, in the opinion of the licensee's employee, to have been perpetrated. Moreover such disconnection must be effected with notice. It is pertinent to note that it does not state that the offence has to be continuing in order for the power to disconnect to be exercised. A reading of ss 38(1) and 37 accords with such a purposive [*778]
construction or legislative intent, namely that it serves to preclude or halt the continued unlawful abstraction or theft of electricity when, after an inspection the consumer is found to have committed such an offence by pilfering electricity.

[79]Having deliberated on the matter carefully, we are of the view that an informed interpretation of the ESA as a whole, as well as Part IX, more particularly ss 37 and 38(1), raises no real doubt that applying the plain meaning rule of construction, the intention to be ascribed to the rational legislator is that the plaintiff is entitled to disconnect the electricity supply even after the tampered meter had been removed or the theft of electricity appears to have ceased at the close of the inspection.

[80]In so concluding we reiterate that the word 'after' as stated above, ought to be accorded a reasonable and rational meaning. It cannot mean in perpetuity because that would lead to absurdity. Neither can it mean literally 'immediately' upon the rectification of the impugned meter after the inspection because that would be circumscribing the powers accorded to the licensee under the statute unduly. There is no qualification to the word 'after' such as 'immediately' or 'shortly'. As such the word 'after' is to be construed as referring to a reasonable length of time. The term 'reasonable' in turn, should be construed in the context of the particular facts of a case. No intention to prescribe a short or immediate period of time after replacing or rectifying a tampered meter can, in our view, be ascribed by the use of the word 'after'.

[81]In relation to the contention in the triad of cases that the power to disconnect ceases upon the tampering being rectified or removed, as the case may be, we are unable to concur with the reasoning there. Firstly as stated above, to read into the plain words of s 38, such a limitation, would be to afford the section a strained construction which does not appear to be in keeping with the intention and purpose of the legislation.

[82]Secondly, construing s 38(1) in the manner proposed in the triad of High Court cases, does not, with respect, satisfy the purposive rule of construction. Such a construction envisages that upon removal of the offending meter, the commission of the offence ceases. That is not necessarily the case. Once the inspection is over, the offence may be repeated, either in some other or a similar manner. It would not be tenable to envisage the licensee having to maintain continual or perpetual supervision on the offending consumer to ascertain this for a fact, and then take remedial measures repeatedly.

[83]More pertinently, such a construction appears to import into s 38(1) the need for the plaintiff to make a choice between either rectifying the [*779]
unlawful consumption of electricity by removing the offending meter or staying its hand and electing to disconnect the electricity supply with notice. This follows from the rationale in the trio of cases above that once the tampered meter is removed, there is no further power to disconnect. This necessarily means that the licensee, ie the plaintiff, on inspection, is accorded two mutually exclusive choices. The licensee either:

(a) notes the tampering and theft of electricity but leaves the tampered meter to continue to operate, and then gives the consumer 24 hours' notice of its intention to disconnect; or

(b) halts the tampering by removing the offending meter, and then loses the power to disconnect the electricity supply to the offending consumer's premises.

[84]Following the reasoning in *Modernria*, *Mayaria* and *Xin Guan*, it would not be possible to undertake both courses of action. To our minds this gives rise to a somewhat unsatisfactory result in terms of construction. It effectively stultifies the powers accorded to the licensee to halt or stop electricity theft. Such a construction is rendered less edifying by the fact that the removal of the tampering device is not mentioned in s 38 and such removal is not stated to be a bar to the disconnection of the electricity supply.

[85]Neither does s 38(1) provide that the power to disconnect is contingent upon the continuation or perpetuation of the offence under s 37. On the contrary the words used are '… an offence has been committed …'. An interpretation importing such a construction would require the inclusion, by implication, of the words 'and continues to be committed'. Such a phrase would, to our minds, have been expressly included if such indeed was the legislative intent.

[86]In any event, it does not necessarily follow, as stated above, that because the tampered meters were remedied or removed, the offence under s 37 has come to an end. This must be a question of fact in any given case, and cannot be imputed or determined definitively simply because the tampered meter has been removed.

[87]Even if it is assumed that the consumer does not attempt to pilfer or steal any more electricity, the fact of the matter is that the consumer was found to have stolen electricity at the time of the inspection in the subjective opinion of the licensee's employee. This in turn means that electricity was unlawfully utilised and not paid for. When electricity is utilised, electricity being an intangible form of energy, the licensee recoups money by way of consideration for that usage. Where there is theft, such money remains unrecouped, giving rise to the arrears or backcharges billed to the consumer.

[*780]

[88]In other words the monies claimed are representative of the electricity stolen or unlawfully abstracted by the consumer and utilised for his own benefit. After all, the stolen electricity cannot be returned to the licensee, as would be the case with regard to the theft of tangible property. Here the stolen electricity is 'recovered' as it were, in terms of the backcharges.

[89]Until that consumer has repaid the arrears or backcharges for the electricity that has been stolen or unlawfully abstracted and utilised, it cannot be said that the act of unlawful abstraction or consumption ceases to subsist. This is because the stolen electricity, now represented by the backcharges, remains unpaid. That in turn represents the electricity stolen.

[90]Until the backcharges are paid, the electricity effectively remains consumed but unpaid for and therefore remains an unlawful act or offence under s 37. Once the backcharges are paid, the consumer remedies the fact of consumption of electricity without payment, meaning that all electricity consumed is then paid for. Only then does it follow that there is no continuing offence of the unlawful abstraction or theft of electricity. In short, the removal of the impugned meter or rectification of the same does not in itself remedy the offence of unlawful abstraction. So the failure to make good the monies due as a consequence of the pilfering, which represents the stolen electricity, warrants the construction that the offence was committed and remains unremedied.

[91]We are therefore unable to concur with the decisions in *Modernria* and *Mayaria* that the power to disconnect electricity under s 38(1) cannot be utilised when tampering has been rectified and there is only an amount due and outstanding by the consumer to the licensee.

[92]This is further borne out by the fact that even for consumers who have not stolen electricity, the failure to pay their electricity bills within stipulated time periods, can lawfully be utilised as a basis to disconnect electricity supply under the terms of the contract between the plaintiff and the defendant. What more when there has been theft or pilferage of electricity.

[93]Finally s 38(1) and Part IX ought to be considered in the light of the mischief for which Parliament actually legislated. That mischief is clear, namely to stop the theft or illegal and unlawful abstraction and consumption of electricity. Can it be said that the mischief is remedied once a tampered meter is removed after an inspection? In our considered view that cannot be the case, because:

(a) the fact of tampering has not been dealt with; and [*781]

(b) the consequences of such tampering, namely the failure to pay for such stolen electricity remains outstanding (unless the consumer pays in full for such theft, which is rarely the case).

[94]By allowing the licensee the discretion or power to disconnect the electricity supply after the commission of the offence, the licensee is empowered by statute, as circumscribed, to exercise such power that is essentially incidental to the power of inspection, which serves the purpose of detecting and precluding the theft of electricity. The disconnection cannot be in perpetuity as sub-s (2) prescribes a maximum statutory period of three months.

[95]Such an interpretation is also in accord with *Claybricks* and *WRP Asia* as it recognises the need for the licensee, the plaintiff here, to have sufficient powers to address and remedy the mischief of the theft of electricity. This construction also accords with the purposive construction approach as explained earlier.

FOOTNOTE

[96]We were unable to address the subject matter of the plaintiff's appeal by reason of our earlier determination that the plaintiff erred in failing to file an independent notice of appeal, and because the cross-appeal it subsequently filed, did not allow it to raise matters which did not arise out of, or as a consequence of, the defendant's appeal.

[97]The plaintiff's appeal related to the issue of whether the learned High Court judge was correct in allowing the preliminary objection raised by the defendant, namely that the plaintiff's failure to plead ss 37 and 38 of the ESA

1990 was fatal to its claim. In other words, the plaintiff's claim stood effectively dismissed for a failure to plead specific statutory provisions in its claim.

[98]However, the learned judge went on to consider the merits of the plaintiff's claim in full, and concluded that the plaintiff had proved its claim. But by reason of its defective pleadings, the plaintiff's claim was dismissed.

[99]We feel bound to make the following limited comments on this aspect of the case as it is of general significance in relation to the practice of drafting pleadings. A perusal of the plaintiff's statement of claim discloses that it is premised on contract, rather than on ss 37 and 38 of the ESA. It is moot whether those sections found a cause of action, unlike for example a claim for damages for personal injury arising from non-compliance with the *Factories and Machinery Act 1967* or a claim under the *Civil Law Act 1956*.

[*782]

[100]The preamble to the ESA describes it, inter alia, as an act to provide for the regulation of the electricity supply industry, the supply of electricity at reasonable prices to a variety of consumers, the licensing of any electrical installation, the control of any electrical installation, plant and equipment with respect to matters relating to the safety of persons and the efficient use of electricity and for purposes connected therewith.

[101]As such the ESA deals with the electricity supply industry as a whole. It does not purport to regulate the private law relationship between a licensee and its consumer. Such a relationship, as is the case here between the plaintiff and the defendant, is governed by contract.

[102]Sections 37 and 38 of Part IX of the ESA deal with offences and penalties. Section 37 deals with a catenation of offences while s 38 is concerned primarily with the power accorded to a licensee to disconnect electricity supply when an offence has been committed.

[103]As such, these sections of the ESA do not appear to afford in themselves, a statutory basis on which to found a cause of action between the licensee and a consumer. And that was not the manner in which the claim in this appeal was brought, as is evident from a perusal of the pleadings. Here, the contract between the parties determines the primary rights and obligations between them. Sections 37 and *39* comprise the statutory provisions according the licensee the power to disconnect the supply of electricity and to take consequential action to recover revenue lost. It would not appear to be necessary to expressly plead these sections in the course of a recovery action where there has been tampering, particularly where the contractual terms between the parties allow for recovery of arrears and disconnection. In this context, ss 37 and 38 provide the statutory basis for the licensee to disconnect a consumer's electricity supply and to that extent, do not in themselves found the cause of action in the instant case. Therefore, the failure to plead the precise statutory provisions, namely ss 37 and 38 ought not to result in a dismissal of the claim.

[104]Even if the pleading of these statutory provisions is thought to be essential, it ought to be borne in mind that O 18 r 7 requires that all material facts necessary to support a claim are to be pleaded. If a party's case is premised on a statue, then it is incumbent upon that party to plead all material facts necessary to bring itself within the ambit of that particular statute (see *Malaysian Civil Procedure* 2015, Vol 1 published by Sweet & Maxwell). Conversely, it would be entirely inadequate for such a party to plead a particular statute but not then plead the necessary facts to fall within its ambit. As such a court should be slow to strike out a claim for simply failing to set out a specific provision of a statute when the material facts allowing the claimant to [*783]

fall within the ambit are sufficiently clear (this does not apply to matters which are required to be specifically pleaded as set out in O 18 r 8 and which deals with pleadings subsequent to a statement of claim for example limitation, fraud, performance and release etc. Nor would it be the case when the cause of action arises solely from a statute).

[105]The function of pleadings is to ensure that neither party in the adversarial system is taken by surprise or unfairly prejudiced by one party suddenly relying on a claim which had not been envisaged, thereby occasioning such adversary an unfair advantage.

[106]It is pertinent in the instant case that the plaintiff had pleaded a full and properly particularised claim premised on contract. Although reference was not made specifically to ss 37 and 38, the material facts were fully evident from the claim. It does not appear, in the instant case that any prejudice at all was occasioned to the defendant, as the trial proceeded fully on the basis of, inter alia, those statutory provisions. In point of fact, the requirement to plead s 38, if at all, lay more properly on the defendant, whose entire counterclaim was premised on an unlawful disconnection of electricity supply.

[107]Finally, if it is concluded that a failure to plead a relevant statutory provision is fatal to a claim, it should not be necessary to proceed to deal with the merits of such a fatally defective claim.

CONCLUSION

[108]On the appeal before us, we are satisfied that the learned judge did not err in concluding that the plaintiff as licensee was entitled to, and did no wrong in disconnecting the electricity supply after removing the tampered meter and having issued the requisite notice under s 38(1). It follows that the defendant is not entitled to make claim for any of its losses from the plaintiff. We therefore upheld the learned trial judge's decision. The appeal of the defendant was therefore dismissed. We further ordered costs of RM10,000 to be paid by the defendant to the plaintiff, subject to payment of allocatur. The deposit is refunded to the defendant.

Appeal dismissed.

Reported by Ashok Kumar