

Landlord's Liability to The Power Provider for Loss of Revenue through Tampering of Electricity Meter by The Tenant

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ABSTRACT

Occasionally, if not often than not, the Landlord will by hook or by crook discover that his tenant is guilty of meter tampering to evade paying the prescribed rate amount of his electricity usage to the power provider (licensee). Though meter tampering is an offence, as far as the tenancy agreement is concerned, the tenant may have breached the condition, of if not the warranty of his tenancy agreement with the landlord which may prompt the landlord to terminate the tenancy with the tenant. The question remains whether the Landlord is liable to the licensee for the unaccounted amount of bill which has been evaded due to the tampering of the electricity meter by the tenant. This article intends to address this issue through analysis of relevant statutory laws and recently decided cases.

INTRODUCTION

A licensed power provider is licensed to statutorily supply electricity to its customers or consumers without fail as required under the Electricity Supply Act 1990 (ESA 1990) for which it is entitled to be paid at the determined rate. To ensure that it is paid its due rate, the licensee (the licensed power provider) must ensure that the meters it installed at the registered consumers' premises are not damaged or being tampered with. However, occasionally, if not often than not, the consumers are the

tenants who are not registered consumers. The question then is whether the landlord or owner of the premises who are the registered consumers with the licensees are liable for the unaccounted payment or bill to the power provider for the meter tampering by the tenant? Can the power provider through a civil suit, recover from the landlord or owner being the registered consumer, for the loss of the revenue arising from the tampering of the meter by his tenant? Can the owner or landlord of the premises as the registered consumer absolve himself for the loss of revenue since he was not, as alleged, the consumer of the electricity?

ELECTRICITY SUPPLY ACT 1990

Meter tampering, dishonest consumption of electricity, and damaging any meter are offences under sections 37(1), (3) and (14) respectively under ESA 1990, but these are not the issue of discussion. The discussion is on the recovery for the loss of revenue by the licensed power provider from the registered consumers who are usually the owner or landlord of the premises due to tampering of the meter by the tenants of their rented premises. A licensee's right to commence a civil action against its registered customers for losses due the above said offences is provided under sections 38(3) to (5) of the ESA 1990 where the licensee may require the consumer to pay him the loss of revenue due to the offence committed under section 37(1), (3) and (14) and any expenses incurred by the licensee including expenses incurred in respect of reconnection of the electricity supply.

Section 38(4)(a) and 38(4)(b) ESA 1990 further provides that a written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying the amount of loss of revenue or the expenses incurred by the licensee; and the person liable for the payment thereof shall be *prima facie* evidence of the

payment that has to be made by the consumer under subsection 38(3) of ESA 1990. Section 38(5) of ESA 1990 then states that the amount stated in the said written statement shall within the period specified in the statement be due and payable to the licensee, and in default of payment, such amount shall be recoverable by civil action in court.

BILLING OF ELECTRICITY

Billing is provided under Regulation 4 of Licensee Supply Regulations 1990 as amended under 2002: P.U.(A) 384/90. A person whose name is printed on the bill is the licensee's registered customer at the premises and he is obliged to pay for the monthly electricity bill within 30 days from the issue of the bill. If he fails to pay, the amount becomes outstanding and due upon him in the next month's bill. By that time, the outstanding amount will be imposed with 1% surcharge delayed payment penalty under section 26A of ESA 1990.

DECIDED COURT CASES

In a decided Court of Appeal (Putrajaya) case of *Thomas Thomas@Mohan a/l K Thomas v Tenaga Nasional Berhad & Ors* [2017] MLJU 70, the appellant *Thomas* appealed against the decision of the High Court (Kuala Lumpur) which affirmed the decision of the Session Court that favoured the respondent *Tenaga Nasional Berhad (TNB)* in its claim against the appellant for loss of revenue as a result of meter tampering discovered at the appellant's premises. The facts of the case were that respondent *TNB* had discovered that its meter had been tampered with when it conducted an inspection on 16th January 2008 on the appellant's premises. Its loss of revenue as a result of the tampering was calculated to be RM77, 318, 67 covering the period between 22.9.2004 and 21.12.2007. Two notices of demand were issued by the respondent to the appellant but no avail.

In respondent's civil action for recovery of its loss of revenue against the appellant, it was argued by the appellant that it was the tenant, not him (appellant) who occupied the premises. Moreover, the appellant bought the premises, it was already being rented out to the very same tenant by the previous owner. The appellant never occupied the premises he had bought and had nothing to do with the tampering of the meter. The appellant contended that though he was the registered consumer, he could not be made liable for something he was not responsible for since he was not the consumer of the electricity.

The Court of Appeal referred to a high court case of *TNB v Empayar Canggih Sdn Bhd [2015] 8 MLJ 280*, a case that was not referred to by the appellate high court judge or the session court trial judge. The Court of Appeal affirmed and followed the decision in *TNB v Empayar Canggih Sdn Bhd*, which held that the defendant being the registered consumer was responsible as information in TNB's system, the power supply agreement and the bill too was all in the defendant's name, and they were all still valid and subsisting. There was no evidence that the defendant had requested or managed to get the tenant to supply for a new meter or account with the Plaintiff. The Defendant being the owner of the premises was liable to Plaintiff in its claim for loss of revenue. That it was rented out to another legal entity was not relevant to absolve the defendant's liability to the plaintiff for its loss of revenue.

CAUSE OF ACTION AGAINST REGISTERED CONSUMERS

The Court of Appeal in *Thomas* case had indirectly expounded the principle that estoppel being a principle of equity, it cannot thus override express statutory provisions. The licensee's right to commence a civil action against its registered consumers for losses due to the commission of offences under section 37(1), (3) and (14) of the ESA 1990 is covered

by section 38(3) to (5). For the purpose of the claim, it was not necessary for the licensee to prove the identity of the person who damaged or tampered with its meter. The licensee's cause of action arose when its meter was tampered and had caused it to lose revenue. There is no requirement under the ESA 1990 in its civil claim for loss of revenue that the licensee must first prove that it was the registered consumer who damaged or tampered with the meter before it could succeed in its claim against the consumer under section 38(3) to (5). That the meter had been damaged or tampered with without the registered consumer knowledge is not relevant. Meter tampering, causing damage to the meter or dishonest consumption of electricity is strictly criminal matters which cannot affect the licensee's right to recover loss of revenue by way of civil proceedings pursuant to section 38(3) to (5) of ESA 1990. Section 38(1) speaks of 'an offence has been committed' and not 'an offence has been committed by the registered consumer'.

The Court of Appeal was also of the view that to require the offence of tampering was committed by the registered owner before it could succeed in its claim for loss of revenue would lead to an absolute absurdity whereby the registered consumer will escape liability if he is 'ingenious' enough to engage a third party to damage or tamper with the meter in preparation for his refusal to pay for any loss of revenue suffered by the licensee resulting from the tampered or damaged meter.

The Court of Appeal also clarified that in a civil action by the licensee to a civil claim for recovery of loss of revenue, a registered consumer cannot avail himself of such defence for the simple reason that it will result in unjustified enrichment to the consumer. The registered consumer only can be absolved of liability if he can show that no electricity was consumed at the premises during the period that the meter was tampered with.

In this case, the Court of Appeal also held that it is not open to the registered consumer to say that he did not 'benefit' from the consumption of electricity on the ground that the premises had been '*continuously occupied by an unbroken chain of tenants*'. The registered consumer cannot run away from the fact that the agreement for the supply of electricity to the premises was between him and the licensee not with the third party. The fact disclosed that the electricity had been consumed during the period between 22.9.2004 and 21.12.2007. Who actually consumed it is irrelevant. The responsibility was that of the licensee's registered consumer to ensure that the meter at the premises was not damaged or tampered with throughout the agreement with the licensee. Though the registered consumer cum owner of the premises being the landlord may in the tenancy agreement assigned such responsibility to the tenant, still it will not bind the licensee who is not privy to it. By agreement with the licensee, the registered consumer is bound to make good the loss suffered by the licensee for any damage to the meter or loss of revenue due to tampering of its meter. The loss of revenue due to tampering of the meter cannot be placed on the licensee but the registered consumer as he had agreed to pay for the electricity charges.

The Court of Appeal in dismissing the appellant's appeal held that the respondent TNB had established on a balance of probability that it is a licensee under the ESA 1990, The appellant was the respondent registered consumer of electricity supplied to the premises, its meter at the premises had been tampered with, making it impossible to record the correct amount of electricity supplied to the premises for the period from 22.9.2004 to 21.12.2007, and the tampering caused it to suffer for the same said the period.

ESTOPPEL AGAINST STATUTORY AUTHORITIES OR EXPRESS LAWS

There is an issue whether the landlord can avail of the principle of *estoppel* to estop the TNB from claiming for the unaccounted bill. *Estoppel* originated from the French word '*estoupail*' which means to stop. If a man whatever his real meaning may be so conduct himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation of facts, and that the latter was intended to act upon it in a particular way, and upon such belief, he acted upon it to his detriment, the person who represented to him such facts is estopped from denying that facts [*W. Malcom Mc Kay Co. v British American Company* 1923 SCR 335]. In *Industrial & Commercial Realty & Co. v Merchant Credit Pte Ltd* [1980] 1 MLJ 208, where it was said that *estoppel* is a principle of justice and equity i.e. when a man by his words or conduct has led another to believe in a particular state of affairs, he cannot be allowed to go back on it. Peh Chew Sin J. In the case of *Syarikat Batu Sinar Sdn Bhd v UMBC Finance Berhad* [1990] 3 MLJ highlighted that there are 3 types of *estoppel* in Evidence Act 1950, i.e. *estoppel* by record (ss 40-44), *estoppel* by representation/conduct (s 115) and *estoppel* by deed (s 116).

There are, however, certain limitations to the use of *estoppel*. One of the limitations is that *estoppel* being a rule of evidence cannot be used to prevent statutory bodies or statutory authorities from exercising their statutory duties or against the express provisions of laws. In *Public Textile Berhad v LLN* [1976] 2 MLJ 58, the respondent State Electricity Board had contracted to supply electricity to the appellants. By mistake, it had considerably undercharged the appellants and subsequently claimed the amount of \$84,624.01 from the appellants. The High court gave judgment in favour of the State Electricity Board holding that the State Electricity Board was not estopped from

claiming the amount although the appellants had utilised its yearly accounts in the light of those billings. The Federal Court in dismissing the appeal held that the plea of *estoppel* by representation cannot be pleaded against the public corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public. To allow the plea of *estoppel* would tantamount to nullifying the statutory provisions of the Electricity Act.

In *Raul Fabrizio Cassserini v. George Fischer Sdn Bhd* [2017] 3 ILR, the employer proceeded to purchase the repatriation ticket to China and bank in the one month salary into employee's bank account. The employee denied agreeing to any package or had signed to any settlement or any mutual separation agreement. The employee confirmed he received the *ex gratia* payment but did not return it on the advice of the lawyer. The employee claimed unfair dismissal. The Industrial Court held that it is well settled that *estoppel*, limitation & laches have no place in Industrial jurisprudence. In *Kumpulan Perangsang Selangor Bhd v Zaid Mohd Noh* [1997] 2 CLJ 11, it was held that the Industrial court must act according to equity, good conscience & the substantial merits of the case without regard to technicalities and legal form.

THIRD-PARTY PROCEEDINGS

In *Thomas* case, it was for the registered consumer to bring a third party proceeding against his tenant under Order 16 Rules of Court 2012, but that course of action would not relieve the registered consumers' liability to pay all outstanding charges or for recovery of losses by the licensee. Janab's key to Civil Procedure (Fifth Edition) explained that a defendant on having entered an appearance may initiate a third party proceeding being distinct and separate from the main action. The nature of third party proceedings is to seek indemnity or contribution from a third party who is or may be liable to the defendant

for all or part of the plaintiff's claim against the defendant. In third party proceedings, the defendant will be treated as the plaintiff against the third party will be treated as the defendant. This will enable the questions between the defendant and the third party to be decided henceforth after the decision between the plaintiff and the defendant in the main suit.

In *Tetangga Akrab Sdn Bhd v. Tuan Jawie & Ors* [2005] 7 CLJ 531, the High Court of Sarawak at Kuching held that since the applicants/defendants had entered appearance and proceedings had commenced, the defendants had acted correctly in seeking summons for leave to issue third party notice.

In the Court of Appeal case of *Syarikat Bekalan Air Selangor Sdn Bhd (SYABAS) v Kerajaan Negeri Selangor* [2014] 4 MLJ 147, the appellant SYABAS had a concession agreement with the State Government of Selangor arising from a Concession Agreement to supply water to residents in Selangor. To supply, SYABAS procured treated water from *Konsortium Abass Sdn Bhd ('Abass')*. SYABAS, however, failed to pay Abbas. Abbas sued SYABAS for payment which caused SYABAS to bring a third party proceeding against the State Government of Selangor. The third-party proceedings against the respondent State government failed because there was already a similar suit in 2011 made by SYABAS against the respondent. Hence, the court held that it was an abuse of the process of the court to allow the application by *Syabas* for third party proceedings against the Respondent State Government.

FEDERAL COURT DECISION

In the recently decided Federal Court case of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] MLJU 194 - 30 January 2018, six appeals were heard together by the Federal Court on the issue among others whether a consumer must

first be convicted for meter tampering before TNB could recover the loss of revenue under sections 38(3) and (4) of the Electricity Supply Act 1990 [the Act]: The Prior Conviction Point. The cause of action is not a claim in contract or tort. This is a civil claim claiming money under the statute for loss of revenue, where the claim is made independently of a wrong in tort or breach of contract.

The differences of judicial opinion among the judges of the High Court was basically because they construed the words "offence committed" in section 38 of the Act differently giving rise to the issue whether a conviction is a precondition precedent to a civil claim for loss of revenue by the licensee i.e. TNB. The word used in section 38 is "committed" not "convicted" hence it was the view held by the Federal Court that there is no reasonable basis whatsoever to contend that there must first be a conviction of an offence under sections 37(1), (3) or (14) of the Act before TNB can pursue its claim under section 38(3) of the Act for loss of revenue. It was explained that a consumer may have committed the offence under sections 37(1), (3) or (14) of the Act but he is not yet convicted until found guilty by the court. Section 38(3) is drafted in plain language. The cardinal rule of interpretation is that when the language used in a statute is clear, the effect must be given to it. Moreover, the Federal Court also held that it is clear from sections 38(1) and section 38(3) that the person who decides whether an offence has been committed under sections 37(1), (3) or (14) of the Act is the "person employed by a licensee". The licensee is TNB. The finding whether an offence has been committed or not is based purely on the subjective finding of the employee.

By virtue of section 38(4) of the Act, it would be sufficient for TNB to require the consumer to pay for the loss of revenue by issuing a written statement by its employee and duly certified by it or any person authorised by it. The written statement

constitutes *prima facie* evidence that payment is due and payable. If the consumer refuses to pay, TNB can invoke section 38(5) of the Act by filing a civil action in court to recover the loss of revenue. Sections 37 and 38 are two district sections. Section 37 is a penal provision which makes it an offence for any person who commits any act referred to in that section, for which, if found guilty he may be punished with imprisonment or fine or both. Section 38 is a provision which enables TNB to recover its loss of revenue expeditiously without having to wait for the consumer to be prosecuted and convicted. To construe section 38(3) as requiring a conviction as a precondition would lead to absurdity as prosecuting is a power vested in the Public Prosecutor, not TNB. There is also no guarantee the prosecution would lead to a conviction. If it results in an acquittal, the consumer having benefitted from the electricity consumption would be unjustifiably enriched at the expense of TNB. Thus, it cannot be the intention of the legislature.

The Federal Court also adopted the decision of this court in *Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58*, held that the defence of estoppel cannot be raised against TNB in a claim instituted under section 38 of the Act as that would tantamount to hindering TNB from the performance of its statutory duty under the Act.

CONCLUSION

If the premises are rented out, the landlord or owner of the premises is advised to execute a change of tenancy with the licensee whereby the tenant then becomes the registered consumer whose name appears on the bill. If the landlord does not execute a change and his name remains on the bill, then the landlord or the owner of the premises being the registered consumer will be liable for any non-payment of a bill or to the recovery of losses arising from offences committed by the tenant. Though the landlord being the registered consumer

may not be guilty of the offences, the licensee power provider has a cause of action to institute civil recovery for any loss of revenue against the registered consumer.

The registered consumer too cannot be estopped the licensee power provider from the payment due to it. It is not open to the registered consumer to say that he did not 'benefit' from the consumption of electricity on the ground that the premises had been 'continuously occupied by an unbroken chain of tenants'. The registered consumer cannot run away from the fact that the agreement for the supply of electricity to the premises was between him and the licensee not with the third party. Licensee such as TNB is statutorily required to supply electricity to registered consumer and it cannot be estopped from claiming what is due to it under the agreement as estoppel cannot operate against an express statutory provision which gives the licensee the right to commence civil legal action to recover for loss of revenue.

The proper recourse for the aggrieved Landlord (defendant) to the suit against him by the licensee power provider (plaintiff) is to apply for 3rd party proceedings against the Tenant for indemnity or contribution for whatever the defendant is liable to the Plaintiff. This is because, the registered consumer cum owner of the premises being the landlord, though he may in the tenancy agreement assigned such responsibility to the tenant, still it will not bind the licensee who is not privy to it hence the need to make the tenant as a party to the licensee civil claim through 3rd party proceeding. However, the third-party proceeding is between the defendant and the third party, not between the plaintiff and the third party.

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