

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Iskandar Hashim, JCA; Suraya Othman, JCA; Yeoh Wee Siam, JCA

Tenaga Nasional Berhad v WRP Asia Pacific Sdn Bhd

Citation: [2018] MYCA 283 **Suit Number:** Civil Appeal No. W-02(NCVC)(W)-1884-10/2016

Date of Judgment: 21 August 2018

Consumer law – Meaning and intent of the proviso to regulation 11(2) of the Licensee Supply Regulations 1990 – Whether a licensee may recover from a consumer any charges due to the licensee in respect of the supply of electricity under regulation 3(1) of the Licensee Supply Regulations 1990

JUDGMENT**FACTS OF THE CASE:**

[1] Pursuant to two inspections which were purportedly carried out at WRP Asia Pacific Sdn Bhd (“the Plaintiff”)’s factory on 16 November 2011 and 1 March 2012, Tenaga Nasional Berhad (“TNB”), had issued a notice to the Plaintiff for the arrears in the Plaintiff’s electricity bill amounting to RM2,754,623.60.

[2] The charges were regularised by TNB when TNB found that there was an inconsistency at the substation metre. TNB claimed that, because of the inconsistency, the metre did not record the correct use of electricity by the Plaintiff.

[3] Despite several requests by the Plaintiff, including in a meeting held on 24 June 2015 and vide letter dated 8 July 2015, TNB refused and/or failed to avail the Plaintiff with the particulars as to how the computations were done and how the sum of RM2,754,263.60 was arrived at.

[4] In this action, the Plaintiff sought for:

- i. satu deklarası bahawa “Notis Pemotongan Bekalan Elektrik” bertarikh 15-6-2015 adalah tidak sah dan terbatal;
- ii. satu deklarası bahawa kaedah pelarasan kebelakang dan penglraan tuntutan RM2,754,263-60

dalam “Notis Pemotongan Bekalan Elektrik” bertarikh 15-6-2015 adalah tidak sah dan terbatal;

iii. satu injunksi menghalang defendan sama ada meiaiui diri mereka sendiri dan/atau agen-agen mereka dan/atau wakil-wakil mereka dan/atau pekerja-pekerja mereka ataupun sebaliknya dalam apa carapun daripada memotong dan/atau memberhentikan dan/atau mengganggu bekalan elektrik kepada kilang kedua plaintiff di Lot 5751-5753, Jalan Salak Tinggi, 43900 Sepang, Selangor Darul Ehsan, berasaskan kepada pemeriksaan yang kononnya telah dijalankan oleh Defendant pada 16.11.2011 dan 1.3.2012 dan menurut notis pemotongan defendan bertarikh 15-6-2015;

iv. gantirugi untuk ditaksirkan;

v. kos atas dasar indemnity;

vi. faedah atas gantirugi;

vii. relif-relif selanjut dan lain-lain yang dianggap wajar dan suaimanfaat oleh Mahkamah yang mulia ini.

FINDING OF LEARNED HIGH COURT JUDGE

[5] The learned High Court Judge had allowed most of the prayers sought for by the Plaintiff with costs of RM20,000.00.

[6] Dissatisfied with the decision, TNB had filed this appeal to the Court of Appeal. We noted that there was no cross-appeal by the Plaintiff.

The Appeal

[7] Before us, two issues were raised by learned counsel for TNB namely (i) the meaning and intent of the *proviso* to regulation 11(2) of the **Licensee Supply Regulations 1990**; and (ii) whether a licensee may recover from a consumer any charges due to the licensee (TNB) in respect of the supply of electricity under regulation 3(1) of the said Regulation 1990.

[8] On the first issue regarding the true construction to be given to the meaning and intent of the *proviso* to regulation 11(2) of the **Licensee Supply Regulations 1990**, this proviso had come into the limelight because TNB had claimed for back billing, thus a retrospective adjustment of the Plaintiff’s electric consumption charges had become necessary.

[9] The Plaintiff’s position on this issue, in particular the said proviso, has been that TNB is only entitled to charge the consumer for “the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged”. The contentious issue about this proviso has been what is meant by the phrase ‘from the date the consumer has been informed about being undercharged or overcharged’.

[10] It has been the Plaintiff's position that the said phrase meant that the three months relate to the date from which the consumer had been informed about being undercharged, namely when the consumer, as in this case, received the letters of demand from TNB which contained the charges that the consumer needed to pay TNB. In such a scenario, the three months would operate to take effect backwards from the date of the letters of demand.

[11] TNB's position on the proviso to regulation 11(2) is markedly different. That position can be clearly seen in the written submissions by learned counsel for TNB at page 10, paragraph 28 therein, where it was stated:

“(2) limits any retrospective undercharges to 3 months from the date the consumer is informed of the circumstances which necessitated the adjustments of the consumer's account. The determinative date here is when the consumer is made aware (“informed”) of the circumstances stipulated under Regulation 11(2) (i.e. when TNB discovered that its meter was not correctly reading the consumer's electricity consumption).”

[12] As it had come to pass, the learned High Court Judge agreed with the interpretation to the said proviso as was assigned to it by the Plaintiff. At paragraph 18 of his Grounds of Judgment, the learned Judge said:

“Saya dapati Peraturan 11(2) tersebut hanya membenarkan tempoh bil kebelakang tersebut hanya boleh dikenakan tidak lebih dari 3 bulan 'setelah pengguna dimaklumkan tentang dia dikenakan bil yang berkurang’.”

[13] Premised upon that critical finding, the learned Judge allowed most of the Plaintiff's prayers.

[14] On this issue, we agree with the learned High Court Judge that the back billing for the undercharge of the Plaintiff consumer account under the proviso to regulation 11(2) of the **Licensee Supply Regulation 1990** is limited to a retrospective adjustment not exceeding three months from the date that the consumer has been informed about being undercharged, namely from the date of being informed through the three (3) notices of demand issued by TNB; i.e.:

(1) on 27 June 2012 for RM1,271,137.44	}	RM2,754,263.60.
(2) on 10 August 2012 for RM540,875.96		
(3) on 10 September 2012 for RM489,988.76		

[15] As such with respect, we are not able to accede to the submission by learned counsel for TNB that the phrase “from the date the consumer has been being undercharged, appearing in proviso to regulation 11(2) should be interpreted to relate to the date when the inspection took place and the consumer being informed of the defect”.

[16] To our minds, the language employed in the said proviso is clear and unambiguous. It refers to the date the consumer has been informed about being undercharged or overcharged. In this case, that was done through the three Notices of Demand of TNB.

[17] Our view is fortified by reference to the proviso to regulation 11(5) of the same regulation, which specifically employs the phrase “the consumer has been informed of the discovery or changes”. Had it been the intention of the legislature to provide that the cut-off date for retrospective billing in the proviso to regulation 11(2), means the date of inspection or discovery, then they would have employed the same phrase as contained in the proviso to regulation 11(5).

[18] We are also aware of the decision of the Court of Appeal in the case of **TNB v Kamarstone Sdn Bhd** [2014] 1 MLJ 391 which affirmed the view expressed in the High Court case of **TNB v Calsonic Compressor (M) Sdn Bhd** [2009] 8 MLJ 793 that the effective date was “the date that the Defendant had been informed about being undercharged”. We find no reason to depart from that decision by the Court of Appeal in the **Kamarstone** case [supra].

[19] Now, we deal with the second issue which is concerned with regulation 3(1) of the said Regulation 1990 where a licensee may recover from a consumer any charges due to the licensee [TNB] in respect of the supply of electricity. This is the 2nd part of TNB’s claim pursuant to the Notice of Disconnection. This means that TNB has the right to recover any charges due from the consumer after the respective dates of the letters of demand i.e. 27 June 2012, 10 August 2012 and 10 September 2012. So in effect, the correct positions are as follows:

- a. In respect of the Notice of Demand dated 27 June 2012, TNB is entitled to claim retrospective billing 3 months from 27 March 2012 till 27 June 2012.
- b. In respect of the Notice of Demand dated 10 August 2012, TNB is entitled to claim retrospective billing three months from 10 May 2012 till 10 August 2012.
- c. In respect of the Notice of Demand dated 10 September 2012, TNB is entitled to claim retrospective billing three months from 10 June 2012 till 10 September 2012.

[20] Therefore, any claim after those three cut-off dates of the three letters of demand under regulation 3(1) of the said 1990 Regulations are claims which the TNB is statutorily entitled to claim thereunder.

[21] Now, adverting to the Notice of Disconnection from TNB to the Plaintiff amounting to RM2,754,263.60, we find that the Notice is not entirely bad. It is only bad to the extent where it involves sums claimed by TNB based on the two dates of inspection i.e. 16 November 2011 and 01 March 2012. However, in relation to sums claimed by TNB from the three cut-off dates of the letters of demand to the dates of Notice of Disconnection, that part of the Notice of Disconnection is good.

[22] Premised on the above, we are unanimous in our decision that this appeal be allowed in part. We set aside the orders (a) and (b) by the High Court dated 2 September 2016 and we substitute it with

our order as stated above by us in paragraphs 19, 20, and 21. We further order that the injunction which was allowed in paragraph (c) of the High Court Order be set aside. We order parties to bear their own costs. Deposit is refunded.

Dated: 21 August 2018

Sgd.

ABANG ISKANDAR BIN ABANG HASHIM

Judge

Court of Appeal, Malaysia

COUNSEL

For the Appellant/ Defendant: Mr. Hadi Mukhlis, Messrs Steven Thiru & Sudhar Partnership

For the Respondent/ Plaintiff: Mr. Kumar & Mr. Moses Susayan, Messrs Raja Badrol, Ramli & Azizi

LEGISLATION REFERRED TO:

Licensee Supply Regulations 1990, Regulations 3(1), 11(2), 11(5)

JUDGMENTS REFERRED TO:

TNB v Calsonic Compressor (M) Sdn Bhd [2009] 8 MLJ 793

TNB v Kamarstone Sdn Bhd [2014] 1 MLJ 391

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