IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(i)-28-07/2020 (A)

BETWEEN

TENAGA NASIONAL BERHAD … APPELLANT
(COMPANY NO. 200866-W)

AND

1. **CHEW THAI KAY**
   (I/C NO. 680607-08-5269)

2. **KIAN KUANG COLDSTORAGE TRADING SDN BHD**
   (COMPANY NO. 616340-U)
   (FORMERLY KNOWN AS WAN HUAT COLDSTORAGE SDN BHD) … RESPONDENTS

[In The Matter of Court of Appeal of Malaysia
(Appellate Jurisdiction)
Civil Appeal No. A-02(IM)(NCVC)-521-03/2019

Between

Tenaga Nasional Berhad
(Company No. 200866-W) … Appellant

And

1. **Chew Thai Kay**
   (I/C No. 680607-08-5269)

2. **Kian Kuan Coldstorage Trading Sdn Bhd**
   (Company No. 616340-U)
   (Formerly known as Wan Huat Coldstorage Sdn Bhd) … Respondents]

[In the Matter of High Court of Malaya at Ipoh
Civil Suit No: AA-22NCVC-81-06/2018

Between

1. Chew Thai Kay
   (I/C No. 680607-08-5269)

2. Kian Kuang Coldstorage Trading Sdn Bhd
   (Company No. 616340-U)
   (Formerly known as Wan Huat
   Coldstorage Trading Sdn Bhd) … Plaintiffs

And

Tenaga Nasional Berhad
(Company No. 200866-W) … Defendant]

Coram: Azahar Mohamed, CJM
Mohd Zawawi Salleh, FCJ
Vernon Ong Lam Kiat, FCJ
Zaleha Yusof, FCJ
Rhodzariah Bujang, FCJ

JUDGMENT OF THE COURT

Introduction

[1] This appeal primarily relates to the statutory power of Tenaga Nasional Berhad **("TNB)** to disconnect the supply of electricity to a consumer pursuant to section 38(1) of the Electrical Supply Act 1990 **("the ESA")**. In essence, we are asked to decide the scope and limitations of TNB's power under the ESA to lawfully terminate the

supply of electricity to a customer's premises following the discovery of meter tampering which was subsequently remedied. The most important question in this appeal is whether the statutory power to discontinue electricity supply can be invoked by TNB in the absence of a continuing offence under section 37 of the ESA or when the said offence is no longer extant. That is the question this judgment sets out to address.

[2] This appeal by TNB is brought from a judgment of the Court of Appeal, where leave to appeal had been granted by this Court on 22nd June 2020. By its judgment, the Court of Appeal dismissed an appeal by TNB against a judgment of the High Court which had allowed the Respondents' injunction application restraining TNB from disconnecting the electricity supply to the Respondents' premises.

The parties

[3] TNB is a limited company incorporated under the Companies Act 1965. TNB is the sole licensee for the delivery and distribution of electricity under the ESA in Peninsular Malaysia. TNB's main business is the distribution and transmission of electrical power for domestic or industrial consumption. TNB is the sole provider of electricity in Peninsular Malaysia.

[4] The 1st Respondent is the registered user of electricity supply at No. 1541, Lorong Kerapu, Taman Sejahtera, 36400 Hutan Melintang, Perak **("the premises")**, who had applied for and obtained the supply of electricity from TNB. The 1st Respondent is a registered customer of TNB.

[5] At all material times, the 2nd Respondent is a commercial enterprise and carries out the business of seafood processing, freezing and cold storage at the premises. The 2nd Respondent purchased the premises from the 1st Respondent in 2009. Nevertheless, the supply of electricity continued under the name of the 1st Respondent, who remained the registered consumer with TNB.

Factual background

[6] The factual background leading to this appeal is quite simple and straightforward. We will only highlight very briefly the pertinent facts in so far they are relevant to the issues which arise for our decision in this instant appeal. Not much was disputed although there was considerable disagreement flowing from the opposing contentions of the parties with regards to the implication of a particular undisputed fact, which is, that on 7th June 2018, TNB carried out an inspection on its meter installation at the premises and discovered that there had been a tampering of the meter. The meter

tampering, according to TNB, meant that the impugned meter could not and therefore did not during the material times correctly record the actual utilisation of electricity by the 2nd Respondent as supplied by TNB. The meter was then rectified by TNB. As we shall see later, this is an important point that should be kept in mind as it has a far reaching implication. After replacing the impugned meter and continued to supply electricity to the premises, TNB issued a Notice of Disconnection, intending to disconnect electricity on 3rd July 2018. In the meantime, by way of a letter dated 8th June 2018, TNB informed the Energy Commission of its findings at the premises that that an offence has been committed under section 37(1), (3) or (14) of the ESA. This was done in compliance with TNB's obligation under section 38(1).

The High Court proceedings

[7] Electricity is a basic necessity and the lifeblood of businesses. Consequently, concerned by the upcoming disconnection which would severely impact the 2nd Respondent's business activities, the Respondents as Plaintiffs expeditiously on 27th June 2018 commenced an action in the High Court against TNB, *inter alia*, for the following relief:

1. A Declaration that the Respondents did not tamper or adjust the meter in respect of the inspection of the meter on 7th June 2018 at the premises;
2. A Declaration that the Disconnection Notice based on the inspection of the meter on 7th June 2018 to disconnect the supply of electricity at the 2nd Respondent's premises was unlawful;
3. An injunction where TNB be restrained from carrying out the disconnection of electricity supply at the said premises based on the inspection of the meter on 7th June 2018; and
4. If the electricity supply had been disconnected, the Respondents pray for a Mandatory Injunction for the reconnection of electricity supply to the 2nd Respondent's premises with immediate effect once the order is served on TNB.

[8] The following day, on 28th June 2018, the Respondents filed an application for an *interim* injunction to restrain TNB from disconnecting supply of electricity to the 2nd Respondent's premises pending disposal of the main action. On 29th June 2018, the Respondents were granted an *ex parte interim* injunction order

restraining TNB from disconnecting the electricity supply to the premises pending disposal of the *inter partes* hearing.

Decision of the High Court which is the subject of this appeal

[9] At the *inter partes* hearing of the injunction on 28th February 2019, the High Court allowed the Respondents' injunction application until the disposal of the Respondents' main action against TNB, and it is this decision which is the subject matter of the present appeal before us. In giving judgment in favour of the Respondents, the High Court relied on a number of High Court decisions, namely **Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 ("Modernria")**, **Xin Guan Premier Sdn Bhd v. Tenaga Nasional Berhad [2016] 10 MLJ 788 ("Xin Guan Premier")** and **Mayaria Sdn Bhd & Anor v. Tenaga Nasional Berhad [2015] 6 CLJ 788 ("Mayaria HC")** which all held, *inter alia*, that once a tampered meter had been rectified by TNB and the offence of meter tampering was no longer continuing, TNB had no power to issue the Notice of Disconnection under section 38(1) of the ESA.

Decision of the Court of Appeal

[10] On 6th December 2019, on appeal, the Court of Appeal agreed with the High Court and dismissed TNB's appeal. In dismissing the appeal by TNB, the Court of Appeal applied the principle of law as

decided by the Court of Appeal in **Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor [2019] 2 MLJ 801 ("Mayaria CA")** (which was subsequently affirmed by the Federal Court on 4th September 2019) whereby it was held that TNB cannot disconnect electricity supply after the impugned meter has been rectified. More importantly, as we shall see, in the context of the present appeal, the Court of Appeal further held that the position of law does not change despite the amendment to section 38(1) of the ESA. In the words of the Court of Appeal at para 33:

> *"[33]…… However, upon perusal of the amended section 38 of the Act, particularly subsection [4], we are unable to find the provision that enable the appellant as a provider of the electricity supply to disconnect the supply after the offending meter has been rectified or remedied and further loss of revenue has ceased. Therefore, in our view, the amendment has not altered the position as determined by the Federal Court in affirming this Court's decision in Mayaria."*

Questions of law raised in this appeal

[11] TNB then sought leave to appeal to the Federal Court. On 22nd June 2020, leave to appeal was granted. Ordinarily, leave will not be granted in any interlocutory appeal unless, as it was shown in the present case, the matter involves questions of importance upon

which further argument and a judgment of this Court would be to public advantage (see **Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; FC**). For the benefit of the business or industry and large segment of the customers concerned, TNB was given leave to appeal to the Federal Court on three (3) questions of law as follows:

1. "Whether the statutory power conferred on TNB under the amended section 38(1) of the ESA to disconnect the supply of electricity can be prohibited by implied limitations on the exercise of power, namely that the power must be exercised immediately upon discovery of meter tampering and/or in any event, before the tampered meter is rectified".
2. "Whether TNB's exercise of the statutory power to disconnect the supply of electricity under the amended section 38(1) of the ESA can be precluded or prevented without express prohibitions in the ESA on the exercise of such power".
3. "Whether under the amended section 38(4) of the ESA, it is a prerequisite for TNB to disconnect electricity supply before it is able to issue the statutory written statement to

its consumer and rely upon the same as *prima facie* evidence of the payment that has to be made by the consumer under section 38(3) of the ESA".

Question 1 and 2

[12] Questions 1 and 2 essentially relate to the same issue as to whether under the amended section 38(1) of the ESA, TNB is prohibited from disconnecting electrical supply to the consumer after it discovers meter tempering and rectifies the meter. The questions arise in the context of the irrefutable facts that TNB had inspected its meter at the premises of the 2nd Respondent and discovered meter tampering. The meter was rectified by TNB and subsequently, TNB issued a Notice of Disconnection of supply to the 2nd Respondent's premises.

TNB's arguments

[13] At the hearing before us, the arguments of learned counsel for TNB in relation to Questions 1 and 2 can be summarised as follows. On the pre and post amendment of section 38(1) of the ESA issue, he argued that the amended section 38(1) already expressly imposes further and additional prohibitions and limitation. Those are:

i. A further condition namely a prohibition where TNB or person duly authorized by TNB shall within three (3) working days from the date of such finding inform the Energy Commission in writing;

ii. A modification to existing condition namely a prohibition was the issuance of notice of not less than 48 hours' notice to disconnect shall be made where previously it was 24-hour notification; and

iii. Further limitation in existing limitation under section 38(2) where the Energy Commission can order TNB to reconnect the disconnected supply. This was provided under sub (1B). Existing limitation is that the disconnection can only be for a maximum period of three (3) months.

[14] The next argument by learned counsel is that analogous to the reading of the amended section 38(1), no implied prohibition or limitation may be read into except the existing express prohibition and limitation provided. It is therefore clear that if Parliament intended to prohibit or limit TNB's powers, it must expressly legislate so through an amendment. It was argued that the Federal Court decision in **Tenaga Nasional Berhad v Mayaria Sdn Bhd Civil Appeal No. 02**

(f)-28-05-03/2017(W) ("Mayaria FC") did not apply to the present case as that case was decided prior to the amendment to section 38(1).

[15] It is the thrust of his submission that this appeal should be allowed because TNB had fulfilled all the express conditions stipulated under section 38(1) to lawfully disconnect the electricity supply. He supported this submission with a number of points as follows. In the face of a clear statutory scheme of express conditions for the exercise of the power to disconnect and the express limitations on the exercise the power, it cannot be implied that the exercise of the power is prohibited/lost once the meter is rectified. This would be an attempt to "fill the gap" in the legislation, which is impermissible. In construing a statute, the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. He submitted that the court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself citing **Union of India v Deoki Nandan Aggarwal AIR 1992 SC 96, SC**; **Union of India v Kanahaya Lai Sham Lai AIR 1957 P H 117, HC**; **Butool Begum v The State AIR 1956 Hyderabad 26, HC**; **Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC**; **The Registrar, University of Madras v The Union of India (1995)**

2 MJ 367; **Dwarika Prosad v Dr. B.K Roy Choudhary AIR 1950 Cal 349**.

Respondents' arguments

[16] The Respondents' counsel put forward an argument as follows. In a careful analysis of the law, he submitted that there is no difference in consequences arising from the pre and post amendment of section 38(1) of the ESA. Hence, he argued that both the questions had been determined by the Federal Court in **Mayaria FC (supra)** on 4th September 2019. According to learned counsel, it is an undeniable fact that the Federal Court had affirmed the Court of Appeal's decision and dismissed the TNB's appeal based on the similar issue that whether TNB can invoke section 38(1) the ESA to disconnect electricity once the impugned meter had been rectified and/or replaced. It was further submitted that the Federal Court had decided on 4th September 2019 that once the impugned meter had been rectified and/or replaced, TNB can no longer invoke section 38(1) of the ESA to disconnect electricity supply to a customer's premises. The Federal Court's decision in **Mayaria FC (supra)**, it was submitted, remains a potent law and ought to be followed. It was therefore contended that the Notice of Disconnection by TNB issued under section 38(1) was unlawful and void.

Our determination

[17] As a starting point in our analysis, we need to say something about the scheme of the ESA. TNB is a licensee and it has vast and extensive powers to take action in the event of offences committed under the legislation. The ESA criminalizes theft or pilferage of electricity and any form of interference with TNB's installation or meters (see subsections 37(1), (3) and (14) of the ESA). Under the ESA, upon inspection and discovery of such unlawful acts or offences, TNB has the power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice (see **Tenaga Nasional Bhd (TNB) v Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 5 MLJ 937; FC ("TNB v Evergrowth")**).

[18] The main focus of the two questions concerns TNB's statutory powers to disconnect the supply of electricity under the amended section 38(1). But it is important we first set out the former section 38(1) of the ESA. This will give context to the present appeal. Prior to 1st February 2016, the provision read:

> *"38(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 37(1), (3) or (14), the licensee*

or any person duly authorized 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."

[19] We would observe at this point that a number of High Court cases that were brought to our attention by learned counsel for the Respondents had decided that once a tampered meter had been rectified by TNB and the offence of meter tampering was no longer continuing, TNB had no power to issue the notice to disconnect under the pre amended section 38(1). In **Modernria (supra)**, it was held that once the impugned meter had been replaced, 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 to an end. In **Mayaria HC (supra)**, it was held that TNB loses its statutory power to disconnect electricity supply under section 38(1) once the tampered meter had been replaced and the offence under section 37 was no longer continuing and if the loss of revenue is to be recovered, then it can be done by way of a civil action under section 38(5). Disconnection of electricity in the event of non-payment was bad in law. In **Xin Guan Premier (supra)**, it was held that TNB could only lawfully disconnect electricity supply when the offence is still continuing and conversely barred if it has since ceased.

In **Big Man Management Sdn Bhd v Tenaga Nasional Berhad [2020] 11 MLJ 472; HC**, it was held that since TNB had rectified the impugned meter and/or installed a new meter, the purpose i.e. to halt and prevent further losses to TNB had been achieved. As there was no longer any urgency, TNB had no authority to disconnect electricity supply to the consumer's premise. All these decisions of the High Court do assist us in our deliberation and determination.

[20] The same issue which has arisen in this appeal has also been the subject matter of several appeals before the Court of Appeal. The decision of the Court of Appeal in **Mayaria CA (supra)** is consistent with the High Court decisions discussed earlier. We should point out once more that **Mayaria CA (supra)**, however, was decided prior to the amendment. The Court of Appeal in **Mayaria CA (supra)** held that at the time of the disconnection, the tampering of the meter had been rectified, and there was no basis of any further loss. As such, the Court of Appeal decided that TNB had neither basis nor authority to disconnect the electricity supply. The Court of Appeal explained at paras 32-34:

> *"[32]……..A reading of both ss 38(1) and 38(3) demonstrate that the power given to TNB by s 38(1) is to limit any loss suffered by TNB by an underbilling of electricity consumption. In the present case, there was no issue of further losses as TNB had already*

replaced the alleged tampered meter three months prior to the issuance of the statutory notice of disconnection and the notice of demand.

[33]……

[34]……. Thus, the defendant has no authority to disconnect electricity supply or to terminate electricity supply in the event payment of RM1,000,350.98 is not made within 24 hours of the issuance of notice. Sections 38(1) and 38(3) of the Act does not authorise TNB to do so."

[21] Our attention was then drawn to the case of **Karun Klasik Sdn Bhd v Tenaga Nasional Bhd [2018] 3 MLJ 749 ("Karun Klasik")** where the Court of Appeal took a different approach and held at para 91:

"[91] We are therefore unable to concur with the decisions in Modemria 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."

[22] These conflicting decisions of the two Court of Appeals in **Mayaria CA (supra)** and **Karun Klasik (supra)** were later resolved by this Court when the two cases were heard together on appeal. As we have indicated earlier, on 4th September 2019 this Court upheld

the decision of the Court of Appeal in **Mayaria CA (supra)** and reversed the Court of Appeal's decision in **Karun Klasik (supra)**. Unfortunately, the Federal Court has not provided the written ground for these decisions. We would observe at this juncture, that it was not open to the Court of Appeal in **Karun Klasik (supra)** to depart from its earlier decision in **Mayaria CA (supra)**, which was decided earlier as the rule of legal precedence must be followed in the interest of certainty (see **Young v Bristol Aeroplane [1944] K.B. 718, Hendry v De Cruz [1949] supp MLJ 25**, **Davis V Johnson [1978] 1 All ER 1132** and **Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong [2021] 5 CLJ 1; CA ("Kejuruteraan Bintai Kindenko")**. We will say more about the importance of obedience of judicial precedence in the later part of our judgment. Even though the Federal Court has not provided the written grounds, the extract of the brief reasons provided by the Federal Court in **Mayaria FC (supra)** as recorded on the CMS system reads, *inter alia,* as follows: "*We agree with the COA's interpretation of section 38(1) in case no. 9 - **Mayaria** case that the power of disconnection is lost once the tempered meter is rectified.*" It is therefore clear as to what was decided earlier by this Court on this matter.

[23] Up to this point, we have been mainly considering the position of the law in respect of the pre-amended section 38(1) of the ESA. As decided by this Court in **Mayaria FC (supra)**, TNB cannot lawfully disconnect the supply of electricity to a customer's premises pursuant to section 38(1) after the impugned meter has been rectified and replaced with a new meter. This is the position of the law prior to the amended section 38(1). The law is settled in cases of this genre.

[24] It is against the above background, it was strenuously argued before us by learned counsel for TNB that our decision in **Mayaria FC (supra)** did not apply to the current case because it was decided prior to the amendments made to the ESA; while in the present case, since TNB's inspection and discovery of the meter tempering was made on 7th June 2016, the current section 38(1) applied. This is his main argument. The Court of Appeal as it was contended, failed to identify any prohibition against the exercise of the statutory power to disconnect after rectification of the meter, under the amended section 38(1). This main argument by learned counsel for TNB was never really new. This was substantially the argument raised by TNB before this Court in **Mayaria FC (supra)**, even though as we have earlier noted that **Mayaria FC (supra)** was decided on the basis of section

38(1) before its amendment. However the new thing about the argument before us is its tone, manner and emphasis.

[25] To address the arguments of learned counsel, from this point on, we shall deal with section 38(1) after its amendment which now reads:

> *"38(1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises."*

[26] The said amendment came into effect on 1st January 2016. It is common ground that the present case before us falls to be decided in accordance with section 38(1) after its amendment. Given the circumstances, the central question which we must therefore ask here is whether the amendment to section 38(1) had altered the position of law as decided by this Court in **Mayaria FC (supra)**. The question must be approached on the basis of the wordings of the amendment. We note three (3) things about the amendment. First,

the phrase "*in his opinion"* were replaced with "*gives reasonable grounds for him to believe"*. Secondly, the words *"twenty-four hours' notice"* were substituted with *"forty-eight hours' notice"*. Thirdly, an additional statutory requirement is imposed on TNB to "*within three working days from the date of such finding inform the Commission in writing".* We agree with the submissions of learned counsel for the Respondents that when Parliament replaced the word "*in his opinion"* with the expression "*reasonable grounds for him to believe"*, it was intended that TNB is subjected to a higher standard of proof, which is a higher evidential threshold. It is also clear to us that that the legislative intention behind the amendment to increase the period of notice to be given to consumers from 24 hours to 48 hours is to give further protection to the consumers by giving the consumers longer time to prepare for the disconnection. The additional statutory requirement to include the involvement of the Electricity Commission serves to inform the commission of TNB's finding and allow the Electricity Commission to intervene and verify TNB's finding as to whether an offence has indeed been committed. Viewed in this way, the amended section 38(1), is an enhancement on the protection to the consumers. As a matter of fact, the amended section 38(1) renders it more onerous and stringent for TNB to disconnect electricity supply.

[27] In our opinion, there is no substantive distinction between the pre and post amendment of section 38(1). All the differences that we have noted above are neither significant nor relevant in the context of the issues that we have to decide in the instant appeal. More significant still, the operative words *"finds"* and *"cause the supply to be disconnected from the said premised"* appear in both the former and current provisions. In the later part of our judgment we discuss the significance of these words. Regardless of the amendment made to section 38(1) and having regard that the amendment is intended to enhance the protection to TNB's consumers, in our judgment, the current section 38(1) has not altered the position of law in **Mayaria FC (supra)**. In this connection, Evrol Mariette Peters JC in **Endau Marine Products Sdn Bhd v Tenaga Nasional Berhad [2021] 7 MLJ 79, HC** is correct to decide in that respect.

[28] In those circumstances, we find ourselves in agreement with the Court of Appeal in the present case that the amendment had not altered the position as determined by this Court in affirming the Court of Appeal's decision in **Mayaria FC (supra)**. It is clear to us that in substance, the issue in Question 1 and 2 in the present appeal is the same issue that came up before the Federal Court in **Mayaria FC (supra)**. The relevant question of law that was considered by this

Court in **Mayaria FC (supra)** reads: *"Whether the statutory power conferred on Tenaga Nasional Berhad ("TNB") to disconnect electricity supply under Section 38(1) of the Electricity Supply Act 1990 ("the Act") in cases of meter tampering is subject to the implied condition that it must be exercised immediately upon discovery and/or in any event before the meter has been rectified?".* This Court had affirmed the Court of Appeal's decision in **Mayaria CA (supra)** and dismissed the TNB's appeal, based on the relevant issue whether TNB can invoke section 38(1) to disconnect electricity once the impugned meter had been rectified and/or replaced. As such in our judgment, the position of the law now, as then, is that once the impugned meter had been rectified and/or replaced with a new meter and TNB no longer suffers losses, TNB cannot lawfully invoke the amended section 38(1) to disconnect electricity to the consumer's premises.

[29] As can be seen, our discussion thus far is sufficient to dispose of Questions 1 and 2. Nonetheless, as an alternative argument, learned counsel for TNB made a bold submission. He cited the case of **Merck Sharp & Dohme Corp & Anor v. Hovid Bhd [2019] 12 MLJ 66; FC** where it was observed that the Federal Court may depart from its previous ruling when the previous decision is *"wrong,*

uncertain, unjust, outmoded or obsolete". It was much pressed in argument by learned counsel that we should revisit our decision in **Mayaria FC (supra)** implying that our judgment in **Mayaria FC (supra)** was wrong. There is much that is unacceptable in his arguments.

[30] We will say at once that overturning our own precedent is a serious matter. This Court must always respect its own precedents. The rule of legal precedence must be followed in the interest of certainty. Great sanctity must be attached to the finality of our judgment. This is not to say that this Court should never depart from an earlier decision. We do not blindly honour *stare decisis.* While it is true that we can overturn our own precedent in exceptional cases where it is really necessary, as an apex Court, we need to be cautious about departing from our own earlier decision especially in a case that concerns the interpretation of a legislative provision, lest we lose the trust of public by persistent shifts of laws. The law is about stability, predictability and certainty that allow the public and the business community to plan and organize their lives based on the previous precedent. A degree of certainty, consistency and predictability in the law is one of the foundations upon which our justice system operates. Therefore, we remind ourselves that it is of

utmost importance this Court adheres to its past rulings. In **Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 CLJ 577; FC**, Ariffin Zakaria CJ in delivering the judgment of this court reminded us at para 35:

> *"[35]…….It is of supreme importance that people may know with certainty what the law is, and this can be attained by a loyal adherence to the doctrine of stare decisis. Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before."*

[31] In the later part of his judgment His Lordship added at para 50:

> *"[50]……I would think that this court must follow its own proclamation of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country."*

[32] Which brings us to the recent decision of this Court in **Asia Pacific Higher Learning Sdn Bhd v Perubatan Malaysia & Anor [2020] 2 MLJ; FC** where we said at para 17:

> *"[17] Indeed, the doctrine of stare decisis dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are exception circumstances that allow them to depart from the earlier decision, but such power must be used sparingly."*

[33] In another part of the judgment we further said at para 13:

> *"[13]…Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty by departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case. It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts."*

[34] While still on the subject of the importance of obedience of judicial precedence, the point is aptly put by Darryl Goon JCA, to which we respectfully agree, in delivering the latest judgment of the Court of Appeal on this subject matter in the case of **Kejuruteraan Bintai Kindenko (supra)** as follows at para 72:

> *"[72]…. While judges may no doubt sincerely have differences in views, there is also public interest to consider. It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because of a confusing melee of conflicting legal decisions by the courts*."

[35] There is another point raised by learned counsel that we must now address when he argued that we should depart from **Mayaria FC (supra)**. He urged us to adopt the analysis and approach taken by the Court of Appeal in **Karun Klasik (supra)** in support of the exercise of the power. To this, we want to say that the decision by this Court in **Mayaria FC (supra)** to reverse the Court of Appeal's decision in **Karun Klasik (supra)** is, with the greatest of respect, correct as the decision of the Court of Appeal is flawed for the following four (4) reasons. First, the Court of Appeal in **Karun Klasik (supra)** held that it was unable to concur with the reasoning in **Modernria (supra)**, **Mayaria HC (supra)** and **Xin Guan Premier (supra)** and held that TNB is entitled to disconnect the electricity supply even after the tempered meter has been removed or where the theft appears to have ceased. However, the Court of Appeal, nevertheless, on numerous occasions, referred to the existence of an offence and/or a continuing offence in support of its decision. Secondly, the Court of Appeal appears to have read into section 38(1) an additional category of offence that would enable TNB to invoke the said section i.e. failure to pay the backcharges for the stolen electricity (loss of revenue). Thirdly, the Court of Appeal held that TNB should also be allowed to invoke section 38(1) for non-payment since TNB also has the power to disconnect electricity

supply to consumers who have failed to pay their electricity bill. However, the Court of Appeal failed to appreciate the fact that unlike the present case, Regulation 4 of the Licensee Supply Regulations 1990 **("LSR 1990")** expressly allows TNB to disconnect the supply of electricity under such circumstances. Fourthly, the Court of Appeal had gone into lengths to give interpretation to the word 'after' in section 38(1). At paragraph 72 of the judgment, the Court said *"What perhaps is less than clear and forms an important core of the reasoning in Modernria, Mayaria and Xin Guan is that: 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'*. At paragraph 74 the Court added "*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".* The point we want to make is this. As can be seen from the provisions of section 38(1), the word *'after'* does not exist in the section at all neither before nor after its amendment. The Court of Appeal had erred by putting much emphasis on the

construction of a word which does not even exist in the statute under examination.

[36] Learned counsel for TNB also referred to the case of **Adil Juta Sdn Bhd v Tenaga Nasional Berhad [2015] 9 MLJ 379; HC** to support his contention that it could not be the intention of Parliament that a meter tamperer could deprive TNB of its statutory power to disconnect under the new section 38(1) simply by rectifying the tampering. Such an interpretation, it was argued, would lead to practical difficulties for TNB's operations. In that case TNB discovered tampering but could not undertake corrective action because none of the plaintiff's employees were around at the particular time. When TNB's inspection team returned the next day, they were refused entry by the plaintiff's workers and were asked to come back four days later. When they did return four days later, the inspection team discovered that the plaintiff had rectified the tampering. We think TNB is overstating its case. There does not seem to us the difficulties which learned counsel suggested. In the first place the entry and inspection exercise for the purpose of section 38(1) is less stringent as we have already decided in **TNB v Evergrowth (supra)** that there is no requirement to comply with sections 5 and 6 of the ESA out of the independency of sections 37

and 38. TNB is permitted by virtue of Regulation 7 of the LSR to make an entry and inspection. What is pertinent, is the finding of evidence of meter tampering to enable TNB to be empowered for an electricity disconnection. It is true that rectified tampered meter is no evidence for the purpose of disconnection. But in the event TNB cannot lawfully disconnect the supply of electricity after the impugned meter has been rectified, TNB is not left without remedy. By way of a civil action, TNB can recover any loss of revenue incurred as a result of the meter tempering. In this regard, photograph evidence of tempering of the impugned meter obtained prior to rectification during an entry and inspection and any evidence therefrom, is among others, constitute sufficient evidence to support TNB's civil action. Moreover, in circumstances where repeated offending consumers pilfering electricity either by repeating the offence or by surreptitious and devious play of rectification, section 37 provides a recourse namely, a criminal prosecution in accordance with the requirement of the ESA for the purpose of punishing the offending consumers.

[37] To return to the point concerning the rule of judicial precedence, it is indeed a bad policy for us at the apex court in this case to leave the law in a state of uncertainty by departing from our recent decision in the case of **Mayaria FC (supra)** on this very same issue. What's

more, with respect, the decision in **Mayaria FC (supra)** is correct and would govern the present appeal. We are not at all persuaded by TNB's submission that our decision in **Mayaria FC (supra)** is wrong and ought no longer to be applied. We find no valid reason to depart from the views that we had held in **Mayaria FC (supra)**. The matter before us is purely a legal one involving legislative interpretation of section 38(1). TNB's case must stand and fall on the basis of this specific provision. The primary issue for our consideration is the interpretation of the powers of TNB to disconnect the supply of electricity pursuant to section 38(1). Our task is to give full effect to the provisions that the legislature had enacted (see **Mesuma Sports Sdn Bhd v Majlis Sukan Negara Malaysia (Pendaftar Cap Dagangan Malaysia-Interested Party) [2015] 6 AMR 314; FC** and **Tebin Mostapa v Hulba-Danyal Balia & Anor [2020] 4 MLJ 72; FC**). We are bound to construe a provision in a legislation according to the plain meaning of the language used. We begin our task of interpretation by carefully considered the language used. It is necessary to read the wordings and purport of the provision with great care. The first important point to note is that from the reading of section 38(1) before and after its amendment, one can unmistakably note that the operative word, *"finds"*, remains the same before and after its amendment. It is to be noted that the operative

word is in its present tense, i.e. "*finds*" and not in its past tense, *"found".* The choice of words *"[w]here any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed… "* is very clear to indicate that the requirement of finding of meter tempering is the singular factor to trigger powers of disconnection. This is the basic condition that must be fulfilled to invoke the power of disconnection. The evidence requirement constitutes the pillar of the scheme of the statutory power for TNB as the licensee to disconnect electricity upon finding of an offence under subsections 37(1), (3) and (14) of the ESA. The other conditions or requirements only becomes relevant if this basic condition is satisfied. Not the other way round. As we have observed in **TNB v Evergrowth (supra)** "*under the scheme of the provisions of section 38, an important point to note is that the licensee such as the TNB, or by anyone it employed once they enter inspect and make finding of any evidence of the consumer committing any offence under subsections 37(1), (3) and (14) shall inform the EC within a prescribed time to cause the disconnection of the electrical supply in the consumer's premise*". It is clear and plain that only by a finding of evidence of meter tampering, TNB is empowered for disconnection, subject to subsequent limitation and prohibition expressly provided. If there is

no evidence of meter tampering, there is no offence committed and there is no lawful power for disconnection. This clearly shows that Parliament intends for the subsequent action to be taken presently, urgently and expeditiously (i.e. immediately upon discovery of any tampering) and not in the future (i.e. long after discovery of any tampering, much less after the tampered meter has been rectified and/or replaced). When one carefully looks at the provisions, what stands out is that section 38(1) forms on one specific time frame and process. It begins from the finding of evidence of offence, fulfilling prescribed requirements and completed by the cause of disconnection. One single sentence of the provision, forms the complete processes which TNB had to follow in achieving the power of disconnection. The grammatical construction of *"an offence has been committed"* to negate the continuing and existing offence as suggested by the Court of Appeal in **Karun Klasik (supra)**, in our opinion, is far less persuasive because the contextual plain meaning forms the specific processes leading to *"cause the supply of electricity to be disconnected from the premises".* It is in this aspect that there must be a continuing offence to invoke the power disconnection. It must necessarily follow, where there is a further discovery of meter tampering after rectification is done of the previous tampering, TNB can immediately utilise the power of disconnection

under section 38(1) provided that it takes no step to all over again rectify the subsequent tampering. That was never the case here.

[38] In the present case, as far as the evidence goes, all that the evidence shows is that when TNB issued the Notice of Disconnection there was no longer any issue of meter tampering at the Respondents' premises as the alleged unlawful activity had already ended due the rectification and replacement of the impugned meter with a new meter, and electricity was continued to be supplied after that. The tempered meter was remedied on the same day of inspection and discovery by TNB. The unauthorised interference of the meter at the Respondents' premises had been discontinued and thus any further presumed loss of electricity ceased to be an issue. When the Notice of Disconnection was served on the Respondents, there was no longer any defective meter or offending device to facilitate the continuation of offence under section 37(1) as rectification work was carried out and completed by TNB. The facts of the present case shows that the alleged offence under section 37(1) is a past offence. It bears repeated emphasis that after rectification and replacement on 7th June 2008, there was no issue of any offence being committed since the supply of electricity to the premises was properly and accurately recorded. The language of section 38(1) does not allow

for future disconnection of electricity in circumstances where the offence under section 37(1) was in the past and is no longer being continued. Flowing from the provisions, we should emphasise that for the Notice of Disconnection issued by TNB against the Respondents to be good in law under section 38(1) the offence under section 37(1) must still be on-going or continuing. In this regard, we agree with the observation made by Nantha Balan JC (as he then was) in **Modernria (supra)** as follows:

> *"[25] Thus, if counsel for TNB is right, then the consumer whose meter has been replaced, is at risk at any time after the event of discovery of the offence, of having the supply of electricity disconnected. This is a curious position for TNB to take because it means than even though they have replaced the tampered meter with a new meter and the usage of electricity consumption is being properly recorded, TNB could at any time thereafter (ie, weeks and months or years later) invoke s. 38(1) of the Act and predicate it on a previous offence which is no longer being perpetuated."*

[39] Therefore, once the impugned meter has been replaced and the offence under section 37(1) is no longer extant, TNB does not have the valid power to issue the Notice of Disconnection under section 38(1). If the loss of revenue is to be recovered, then it can be done by way of a civil action under section 38(5). Section 38(1)

was enacted to give TNB effective powers to instantly prevent any offence that may be committed and not to be left unattended or unabated. It empowered TNB to act expeditiously to prevent misuse such as electricity theft and to give TNB the power to act swiftly to prevent further loses (see **Claybricks v TNB [2006] 4 CLJ 892; CA** and **WRP Asia Pacific v TNB [2012] 4 CLJ 478; FC**). We agree with the observation made by Mohd Nazlan JC (as he then was) in **Xin Guan Premier (supra)** that TNB's power to disconnect electricity pursuant to section 38(1) is both immediate and interim in nature. On the facts of the present case, there is no longer any continuation of meter tampering and there was no subsisting offence under section 37(1) which authorises TNB to use its disconnection power of electricity under section 38(1) to the Respondents' premises.

[40] Ultimately, it is a question of balancing competing interests. The evidence finding factor holds neither the TNB the untrammelled powers in exercising their powers to disconnect electricity to the consumers, nor the consumers have the opportunity to connive and be exonerated from the offence of meter tampering. For TNB, evidence *"which gives reasonable grounds for him to believe that an offence has been committed"* is contingent upon its *"subjective finding"* for "*finding of metal clamp affixed is sufficient*" according to

TNB v Evergrowth (supra) to warrant for the disconnection of electricity supply. TNB is still accorded the right to recover the loss of revenue by way of a civil action under section 38(5) or by pursuing criminal prosecution against errant consumers who surreptitiously and deviously rectified the tampered meter. In our judgment, this is the balance of the competing interest which the scheme of the ESA seeks to uphold. In exercising its statutory power, TNB is not imposed to make as what **Karun Klasik (supra)** held, that TNB *"is accorded two mutually exclusive choices either to note the tampering but leaves the metered tampered or halts tampering but loses power to disconnect"* because the only "statutory choice" in section 38(1) exists, is indeed the "first option". There is no express prohibition for rectification to be taken place nor there is requirement for TNB to act so for the purpose of disconnection of electricity. As discussed earlier the power to disconnect operates on a specific time frame and processes under section 38(1). To diminish the basic requirement of section 38(1) is to cease the said provision from operating. What is expressly provided is no more ambiguous. Section 38(1) of the ESA, as we have seen, requires evidence of meter tempering to justify disconnection, that is to say, once the impugned meter has been rectified there is no longer any issue of meter tempering and thus the offence under section 37(1) is no longer extant. Nowhere in the ESA

is it stated that TNB may proceed under section 38(1) to compel payment for the loss of revenue. The only recourse available to TNB in such a situation is provided for under section 38(5) where it allows TNB to file a civil action for the recovery of loss revenue. TNB cannot have the best of both worlds and a second bite of the cherry fruiting from their deliberate course of action. Where a statute creates a right and, in plain language, gives a specific remedy for its enforcement, a party seeking to enforce the right must resort to that remedy and not to others (see **Manggai v Government of Sarawak & Anor [1970] 1 LNS 80; FC** and **Wilkinson v Barking Corp [1948] 1 KB 721**).

[41] In consequence and in light of all the above, our answers to the legal issues posed under Questions 1 and 2 are as follows. TNB has no lawful power to disconnect a consumer electricity supply pursuant to the current section 38(1) of the ESA once the impugned meter has been rectified and replaced, and the offence under section 37 is no longer subsisting and cease to exist at the material time when the Notice of Disconnection is issued to the customer.

[42] We come then to Question 3, which raises a different point.

Question 3

[43] The point here is a very short one. This question relates to the issue as to whether TNB must disconnect the supply of electricity

under the amended section 38(1) of the ESA before it can rely on the written statement in section 38(4), which provides:

> *(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying -*
>
> *(a) The amount of loss of revenue or the reasonable expenses incurred by the licensee;*
>
> *(aa) The manner of calculation of the loss of revenue and items of expenses; and*
>
> *(b) 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 (3) and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection.*

[44] Under the amended section 38(4), the words *"after the disconnection"* appears to impose a disconnection before the written statement is prepared and provided to the consumer. This requirement is not found in the pre-amended section 38(4) which provides:

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying -

(a) The amount of loss of revenue or the expenses incurred by the licensee; and

(b) 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 (3).

Our determination

[45] We can deal with Question 3 more briefly as both sides have submitted that the question posed should be answered in the negative.

[46] The first point to note is that the written statement under section 38(4) is for the purposes of TNB's civil action for recovery of loss of revenue under section 38(5). It stands as the *prima facie* evidence of the payment that must be made by the consumer under section 38(3). Parliament had intended to give TNB an evidential advantage *via* the written statement (see **Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd [2018] 3 MLJ 141; FC**). The amount stated in

it is *prima facie* evidence of the loss of revenue that the consumer must pay for meter tampering.

[47] As we have seen earlier, the amended section 38(1) provides that *"the licensee… may upon giving not less than forty eight hours' notice… cause the supply of electricity to be disconnected from the said premises"*. Clearly, TNB has the discretion to choose whether to exercise the power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice. Viewed in this way, this requirement in the amended section 38(4) appears incongruous with the amended section 38(1), which retains TNB's discretion to disconnect. This would lead to an unworkable situation where TNB would need to disconnect in every circumstance that it wishes to rely on the written statement as *prima facie* evidence under section 38(4) when bringing a civil claim under section 38(5), or wishes to at least have the option to do so.

[48] In our view, the amended section 38(4) operates in this manner. In the event of disconnection, should TNB comply with the requirement under section 38(4) in issuing the written statement within 14 days after disconnection, TNB will enjoy *prima facie* advantage accorded to them. It is clear to us that the provision sought to impose a time limit on TNB to issue a written statement to its

consumers only in the event of disconnection, but no restriction is imposed on TNB if there is no disconnection. Hence, in the event of no disconnection, TNB can still issue the written statement for loss of revenue under section 38(4) and claim for such loss in civil court. No time limit or restriction is imposed on TNB to issue the written statement in event of no disconnection and TNB retains the benefit of *prima facie* advantage under section 38(4). We agree with the submissions of learned counsel for TNB that it would be absurd to require TNB to disconnect supply for the sake of relying on the written statement. It would also be contrary to the intention of Parliament in amending section 38(1) that there can only be disconnection in clear and proven cases of electricity theft under the ESA.

[49] Based on the above, Question 3 should be answered in the negative.

Conclusion

[50] In all those circumstances, we reach the conclusion that this appeal must fail. We would therefore dismiss this appeal with costs.

Dated this day, 4 January 2022.

-sgd-
(AZAHAR BIN MOHAMED)
Chief Judge of Malaya

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