IN THE COURT OF APPEAL

TURKS & CAICOS ISLANDS

CIVIL **CL-AP 4/2017**

Between

FORTIS TCI LTD **Appellant**

AND

ATRIUM MANAGEMENT LIMITED **Respondent**

Before:

The Hon Mr Justice Mottley, President

The Hon Mr Justice Forte, Justice of Appeal

The Hon Mr Justice Adderley, Justice of Appeal

Appearances:

Mr Guy Chapman of Savory & Co for the Appellant

Mr Gordon Kerr of Misick & Stanbrook for the Respondent

HEARD ON: 13 June, 2017, 31 August 2018

REASONS FOR DECISION

1. **Adderley, JA**. At the conclusion of the hearing of this case on 13 June 2017 we gave our decision. We dismissed the appeal, allowed the Respondent's Notice in part and awarded costs on the standard basis both here and below. We promised to give our reasons in writing now do so.

2. The issue in this appeal was what is the definition of "hotel licence" as it appears in the Electricity Rates and Charges (Providenciales, North Caicos and Middle Caicos) Regulations 2012 ("the Regulations") for the purpose of obtaining preferential rates for electricity supplied under the Electricity Ordinance CAP.14.04.

3. The Learned Chief Justice held that by virtue of the respondent holding the applicable hotel licence it qualified as a recipient of the preferential rate and was due a rebate of US$49,257.60 from the appellant. This was the amount claimed in the statement of claim along with continuing losses to be assessed which run from 1 July, 2015 by way of restitution of monies owed by the [Appellant] to the [respondent] in excess of that which the [appellant] is entitled to charge the [respondent], and a declaration that the [respondent] was deemed a "medium hotel" in accordance with the provisions of the Regulation 2 of the Regulations, interest. and costs

4. "Hotel Licence" is not defined in the Regulations. Fortis TCI Ltd ("Fortis"), the appellant, argued that the applicable definition is found under the Liquor Licensing Ordinance CAP 19.11 ("LLO"); Atrium Management Ltd ("Atrium") says that it is under the Business Licencing Ordinance ("BLO"). The learned Chief Justice found that the definition was not found in either the LLO or the BLO and based her decision on a definition in the Tourist Accomodation (Licensing) Ordinance (1978) ("TALO") which neither party had propounded.

5. The appellant appeals the Learned Chief Justice's Judgment on that ground and another stated as follows:

> "**ON THE GROUNDS** that the judgment of Her ladyship the Chief Justice is wrong in law and defective procedurally and substantively, in that**:**
>
> (1)The expression "hotel licence" in the definition of "hotel" in the Regulations, means , and can only mean, a 'hotel licence" under the LLO, and cannot therefore mean a business licence under the BLO (as

the respondent argued at trial),or an accommodation licence as her ladyship held in her judgment under appeal);"

6. The other ground of appeal was that:

> "(2) Her Ladyship erred, as an important matter of basic fairness to counsel and the parties represented, in not sharing with counsel her discovery of TALO, uncovered when conducting research on her own, and here intention to base her judgment and decision solely or primarily on TALO, thus failing to afford Counsel and the parties, through their counsel, an opportunity to present submissions and argument as to why TALO had, and has, no relevance to the issue before the Court (TALO forming no part of the Respondents' case at trial, that being the case which the appellant had had to meet."

7. Special rates are fixed for hotels of varying sizes and other businesses. A hotel is defined in the Regulations as any building or series of buildings containing more than three bedrooms for accommodation of guests for reward and in respect of which a "hotel licence" is held.

8. The Tariff of rates set out in the Schedule to the regulations sets a rate in cents per unit depending on the description of the premises. At the material time the rate per unit for commercial premises was 27 cents, that for a medium hotel 25 cents, that for a large hotel 21.5 cents.

9. It was common ground that the respondent satisfied the requirement of a "medium hotel" as claimed in its declaration. The issue was whether it held a "hotel licence"

10. Taking the second ground first, if the facts had been as the appellant claimed this would have been a ground for a successful appeal. However, there is evidence in the Record at pages 183-186 of an exchange of emails that the parties were given an opportunity to be heard after the end of the hearing and before the Chief Justice perfected her draft judgment. This was by way of her invitation at page 175 for counsel to comment on the draft judgment which was made available, and expressly left open the accommodation for a further hearing. The appellant did not avail itself of this opportunity to be heard further. However, the appellant was of the view that they ought to have been given an opportunity to make further written submissions. In our opinion the Chief Justice cannot be faulted for this approach which gave the parties an opportunity to be heard. Furthermore, having regard to the Chief Justice's

finding at paragraph17 of her judgment submissions on TALO would not have advanced its case.

11. Both counsel agreed that the definition of "hotel licence" was not to be found in TALO, but while agreeing that the conclusion in the Judgment should not be disturbed in so far as it concluded that the appellant had erred by not giving the respondent the preferential rate, the respondent joined issue with the Chief Justice's decision on her reasons. Accordingly it sought in this appeal a variation of her Order by Notice filed 23 May 2017 ("the Respondent's Notice") to reflect that "hotel licence" means a licence pursuant to the BLO, and like the appellant contended that the Judge erred in law in finding that "hotel licence" meant a licence issued under TALO.

The Appellant's Argument

12. The appellant's contention that "hotel licence" mentioned in the Regulations refers to a license under the LLO is because Part II of the Act which deals with "Licences and Permitted hours" in defining "Types of liquor licences" defines "Hotel Licence". In context it reads as follows:

> "**Types of liquor licences**
>
> **15.** Liquor licences issued under this Ordinance shall be in the forms respectively prescribed therefor and shall be of the following kinds-
>
> (a)*Hotel Licence*, permitting the sale on the licensed premisis of liquor-..
>
> …
>
> (b) Guest House Licence
>
> …
>
> (c) Bar Licence
>
> and so on to (k) Night Club Licence.."

13. It is evident that these all refer to the grant of liquor licences based on the use made of various types of premises (licensed premises as defined in the LLO) and has nothing to do whatsoever with the use of the premises in relation to the consumption of electricity.

14. The definition section of the LLO makes this clear because “hotel" is defined with a lower case “h” to refer to the buildings while reference to the category of liquor licence is italicized and capitalized wherever it appears namely in sections15, 16(g) and 19. As a matter of construction a reasonable inference is that this distinction drawn by Parliament was deliberate. The respondent referred to Bennion on Statutory Interpretation 5th Ed. Lexis Nexis 2008 at page 414 which cites Lord Hewart CJ in Spillers Ltd v Cardiff Assessment Committee[1]:“*It ought to be the rule and we are glad to say it is the rule that words are used in an Act of parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily*”. Whether one used the ‘Literal Rule’, the ‘Mischief Rule’ or the ‘Golden Rule’ of construction they all yield the same result that ‘Hotel Licence’ in the LLO is not the same as ‘hotel licence’ referred to in the Regulation.

The Respondent’s counter Argument

15. The respondent contended amoung other things that the first ground of appeal is contrary to the rules of statutory interpretation. The appellant in a letter before action to the respondent dated 5 August 2015 had contended that “hotel licence” was a term of art, that is to say, a technical term given a specialized, legal meaning by statute or at common law and when that term is borrowed from one statute (normally the one in which it is first defined and used) and used in another statute or subordinate legislation that is *in para materia* with that first use, it will bear the same meaning as the original use. He relied on section 367 of Bennion which states:

> “If a word or phrase has a technical meaning in relation to a certain area of trade, business, technology, or other non-legal expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning, unless the contrary intention appears.” (6th Ed, Lexis Nexis 2013)

16. In our judgment the learned Chief Justice after a careful analysis was right to reject that submission where she stated at paragraph 17:

[1] [1931] ALL ER 524 at 528-529

> "17. It follows that I do not accept Mr. Chapman's submission that the term 'hotel licence' is a term of art nor his submission that it is defined in the Liquor Licencing Ordinance. The Liquor Licencing Ordinance defines 'hotel' as 'buildings for the accommodation of guests for reward' and defines 'licence' as a 'liquor licence'. It does not define 'hotel licence' at all. The term 'Hotel Licence' appears for the first time in the Liquor Licencing Ordinance as part III under the heading **Types of Liquor License** and is capitalized and is plainly the label given to that licence [liquor licence] which is granted by the licencing authority to a hotel" (square brackets added)

17. The principle expressed in Binnion was illustrated in the Privy Council case of **Lennon v Gibson & Howes Ltd** [1919] AC 709 on which the appellant had relied, but the learned Chief Justice correctly distinguish the instant case from **Lennon** on the very ground that 'hotel licence' had not been defined before the LLO.

18. We observe also that in any event the Acts were not *in para materia* because on a true reading of the long titles of the respective Acts the LLO deals with "… *the sale of intoxicating liquor and the control of public music and dancing and for other matters connected therewith*", and the BLO 2012 is "An Ordinance to repeal and re-enact the Business Licensing Ordinance; *to provide for the licensing of all businesses in the Turks and Caicos Islands; to establish a procedure to facilitate through the use of business licenses and the orderly development of business investment in the Islands..*"

19. The Chief Justice in paragraph 15 of her judgment agreed with the respondent that the Hotel Licence granted under the LLO does not authorize the entity which is engaged in the business of offering accommodation for reward to operate a hotel "*which is the essential characteristic of a licence in a regulatory context*".

20. She opted for the TALO which speaks expressly in section 4 of that Ordinance about the Board granting hotel licences.

21. Her view (paragraph 21 of the judgment) was that the BLO imposes a fee on the entity which operates as a hotel for the privilege of operating its business in the same way

as it charges a fee to all entities carrying on a trade or business in the Turks and Caicos Islands.

22. Where the Learned Chief Justice slipped into error in taking this view, as pointed out by the Respondent, was that she overlooked that without a business licence no business, including one licenced under TALO, can operate legally and so any business intending to operate as a hotel must obtain a licence to do so as a fundamental precondition of doing business. Before applying for a business licence to operate as a hotel the prospective business must meet the necessary qualification set out in the BLO.

23. In relation to the provision of hotel accommodation, Schedule 2 to the Business Licencing Ordinance 2004 (the Regulation in force when the BLO 2012 was passed, due to the saving provisions of section 25 of the 2012 Ordinance, provided as follows:

> "Provision of hotel accommodation where the hotel concerned has-
>
> (a) At least 5 but no more than 19 bedrooms
> $675.00
> (b) At least 20 but no more than 99 bedrooms
> $2,700.00
> (c) 100 bedrooms or more
> $13,500.00
>
> "Provision of tourist accommodations (other than hotel accommodation)
> $300.00"

24. This superseded the previous licence fees set out in Schedule 2 of the 2009 Regulations which provided

> "Provision of hotel accommodation, where the hotel concerned has-
>
> (a) at least 5 but not more than 19 bedrooms $500
> (b) at least 20 but not more than 99 bedrooms $2,000
> (c) 100 bedrooms or more
> $10,000
>
> Provision of tourist accommodation (other than hotel accomodation) $150

25. The respondent's position at the court below, set out in its written submissions dated 7 June 2017, was that the requirement in the Regulation to hold a "hotel licence" was to address the distinction made in the BLO between hotels and other types of tourist accommodations such as guest houses, villas, and hybrid resorts where the main focus was on long term residents with only a few units being available for tourist accommodation.

26. The Learned Judge did record a finding on these submissions. Because of the considerable time which has elapsed since her Judgment, rather than remitting them for her to do so, we choose the option of making a finding ourselves. We find the submissions and supporting evidence convincing and we accept them as valid for concluding, as we do, that the 'hotel licence' referred to in the Regulation refers to a hotel licence under the BLO.

The Respondent's Notice

27. The Respondent's Notice sought variation of the learned Chief Justice's judgment dated 27 April 2017 on the grounds following.

    (1) The respondent's submissions set out that the learned Chief Justice failed to take into account the chronology of the passing of the relevant Ordinances namely TALO on the one hand and BLO on the other and in so doing misdirected herself as to the relevance of each to the issue before her.
    (2) That TALO was brought into force prior to the BLO and according to the respondent at the time when the licensing of businesses in the Turks and Caicos Islands was on an ad hoc basis. The BLO then came into force and brought in a properly regulated regime for licencing businesses which completely usurped that function of the TALO. Accordingly the TALO is effectively subordinated to the BLO and is now a vehicle used solely to monitor quality control and health and safety at premises operating with a hotel licence.

28. We already stated our reasons for concluding that the 'hotel licence' referred to in the Regulations refer to that under the BLO.

29. As to the second reason for the variation of the Chief Justice's judgment namely that the costs should have been awarded on an indemnity basis, the respondent states that the appellant is a monopoly and had made

an offer of a preferential rate but had retracted it. In answer he appellant stated the offer was retracted when it discovered that the respondent did not have a hotel licence under the LLO which they though was necessary. There is no evidence of impropriety and the appellant seems to have been laboring under a *bone fide* although mistaken belief that the respondent need a hotel licence under the LLO. It was reasonably open to the Judge to exercise her discretion to award costs on the regular basis and we will not intefer with that decision.

30. It is for the above reasons that we dismissed the appeal and allowed the Respondent's Notice except as it relates to indemnity costs.

31 August 2018

Adderley, JA

Mottley, JA

Forte,JA