IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS

Action No: CL 31/07

BETWEEN

THE PALMS RESORT LIMITED

Plaintiff

AND

P.P.C. LIMITED

Defendant

C Griffiths for Plaintiff
G Chapman for defendant

Hearing: 18 April 2008
Decision: 28 April 2008

Decision

1.The plaintiff seeks the determination of a question of law under Order 14A namely:

> "Whether the definition "Large Hotel" as defined in Schedule 2 of the Electricity Rates and Charges Regulations (Providenciales) as amended by the Electricity Rates and Charges (Amendment) Regulations (Providenciales) applies:
> (a) to any hotel with a consumption of, or in excess of, 3,200,000 kWh ("the threshold") per annum for each complete year during which that hotel's consumption passes the threshold; or
> (b) to any hotel with consumption of, or in excess of, the threshold but only after the threshold is passed.

Alternatively there is an application for summary judgment under Order 14.

2. Both attorneys agree that the question is one of statutory interpretation and the answer should determine the action except for assessment of damages.

3. The plaintiff is a company operating a hotel on Grace Bay and the defendant is the public supplier of electricity for the island of Providenciales under a licence granted under the Electricity Ordinance, Cap 114. There is no dispute about the background facts of the case.

4. The hotel technically opened to guests in February 2005 although some occupants moved in during the previous month. There had also been what is described as a "soft opening" before that during which time part of the hotel was occupied. Also, during January 2005, electricity was consumed in order to test the systems in the hotel.

5. The electricity consumption of the hotel for the month of February 2005 was 266,606 kWh. The monthly consumption throughout 2005 varied but generally showed an overall upward trend with one

marked dip in September, the result of necessary work on the hotel. During November 2005, the total consumption for the twelve months December 2004 to November 2005 exceeded 3,200,000 kWh.

6. Section 32 of the Electricity Ordinance provides, so far as is relevant to this case, that a public supplier may charge for electricity supplied by it to a consumer in accordance with a tariff of rates prescribed by the Governor by regulations, section 32(1); that those regulations may prescribe different rates for different classes of cases including different purposes for which the electricity is supplied and the extent to which the supply is taken up, section 32(2); and that, when prescribing the rates, the Governor shall have regard to the need to ensure the public supplier derives sufficient income, inter alia, to cover operating expenses, section 32(3)(a); and to obtain a reasonable margin of profit, section 32(3)(c).

7. The tariff is set out in the Schedule to the Regulations. Paragraph 1 defines the terms used and paragraph 2(1) sets out the tariff in respect of the maximum rates for the supply of electricity to the various defined premises. The Amendment Regulations, 2000, altered some definitions and added others to paragraph 1 and set out different rates in a new paragraph 2.

8. The relevant definitions are:

"small commercial premises" means premises whose consumption of electricity is less than 240,000 kWh per annum;

"medium hotel" means a hotel whose consumption is or exceeds 240,000 kWh but is less than 3,200,000 kWh per annum;

"large hotel" means a hotel whose consumption is or exceeds 3,200,000 kWh per annum.

The rates for each, in cents per unit, are:

Small commercial premises	29.00 (Changed again in 2004 to 27.00.)
Medium hotel	25.00
Large hotel	17.00

In 2005,the Palms Resort was charged 27 cents per unit for the months of January and February, 25 Cents per unit for the months of March to November, and 17 cents per unit for December.

9. The plaintiff's submission is that a public supplier is prohibited from charging at anything but the rates prescribed in the Schedule. A hotel is a "large hotel" if its yearly consumption is or exceeds 3,200,000 units and it is therefore entitled to be charged 17.00 cents per unit for the whole of the year it is a large hotel. There is nothing in the Regulations, Mr Griffiths submits, that authorises the supplier to charge a large hotel a higher rate for the first 3,200,000 kWh and at a lower rate thereafter, as effectively happened in this case.

10. The issue is particularly important where a new hotel opens, as is the case here. If it takes the whole first year to consume 3,200,000 kWh, it will pay for all those units at a higher rate even though its total consumption for the year is that of a large hotel. If it continues to consume electricity at the same rate throughout the next year, it will be charged a lower rate for the same total consumption. The effect would be to impose a differential rate for two consecutive years in each of which the total consumption was the same. Mr Griffiths submits that, once the hotel's consumption passes the threshold based on its annual consumption, the monthly payments for the year during which its consumption exceeded the threshold should be adjusted to ensure that consumption is charged at the lower rate.

11. Mr Chapman, for the defendant, points out that there is no mandate for any such retrospective adjustment or rate backdating. The test is whether the relevant annual consumption threshold has been passed. Only then will the premises qualify for the lower rate even though the payments are made

monthly. He also points out that the same interpretation will apply whether the premises are moving into a lower or a higher rate.

12. He counters the suggestion that the effect of the present system is to impose differential rates by the contention that, although billing is monthly as is required by the terms of the producer's licence, the qualifying consumption is annual and so the previous twelve months are a qualifying period only. The consumer would have to cross that threshold before it has "earned" the right to be charged at the lower rate for a large hotel and, therefore, will only then start to pay the lower rate it has earned over that period. His approach is that it is only at the point that is crosses the threshold that the hotel is in the large hotel category and until it crosses that threshold, it is not a large hotel.

13. He also stresses the difficulties of operating a system such as that advocated by the plaintiff with its need for refunds, where the move is into a higher category, and demand for additional payments, where the move is in the opposite direction. I accept the difficulties but the plaintiff counters that, what the defendant has done to avoid any such difficulties, is to interpret the Ordinance and Regulations to its own advantage. Practical difficulties do not give the defendant the right to interpret the law simply for its own, or any other, accounting convenience.

14. Mr Chapman sums up his submissions by pointing out, in respect of the plaintiff's submission, "there is simply no warrant in the regulations for such retrospective rate alchemy. There can only be one rate at a time, for ... charging is monthly, and once the rate is applied correctly, month by month, it cannot be "disapplied" later. The regulations would have to be very clear as to this if monthly charges could be overridden and adjusted up to a year later, in the manner the plaintiff inventively suggests." The Regulations "work effectively on the footing that a customer's monthly charge, on the then applicable rate, based on annual consumption assessed monthly, is a final charge and not subject to any readjustment twelve months later."

15. There can be no doubt that the defendant's method of assessing the appropriate category is practical to administer. However, as counsel have agreed, this is a matter where the Court must look at the legislation to see if and where any mandate is given. The submission that there is no mandate for retrospective assessment of rates is correct but, equally, there is no mandate for saying that, as the billing is monthly whilst the qualification is annual, the assessment has to be monthly or for the corollary that the lower rate will not apply over the period of twelve months during which the hotel is earning the right to the lower rate. Provision could have been made in accordance with either system advocated by the parties but it has not been done. The submission of each party effectively asks the Court to confirm its own suggestions of a fair and/or a convenient manner to administer the system in the absence of specific guidance.

16. The answer can only be based on what the legislation allows and any manner in which it is to be implemented, whether administratively convenient or not, will depend on that. If the rights and powers are clear, there is no room to suggest ambiguity; neither does it allow a purely pragmatic interpretation.

17. The law makes it clear that the defendant is under an obligation to ensure a supply of electricity for Providenciales. The manner in which that is done depends on the Ordinance and on the terms of its licence. Comment was made of the fact that the consumers were not party to the licence as it is solely between the Governor and the defendant and so the requirement in the licence to bill monthly does not bind them. I do not consider that is relevant to the present case. The supplier is bound by the licence to bill monthly and has applied that to its practice. Each consumer enters an agreement to buy electricity from the defendant and that agreement is clearly based on a standard system of monthly retrospective billing for consumption measured by monthly meter readings. The requirement in the licence for such frequent billing is clearly included for the financial convenience of both supplier and consumer.

18. Section 32(1) provides that, with some exceptions which are not relevant here:

> "...the charges made by a public supplier for electricity supplied by him to a consumer shall be in accordance with such tariff of rates as the Governor shall prescribe by regulations." *[my emphasis]*

There is no ambiguity in those words and so they must be given their ordinary meaning. They state that the charges must be in accordance with the tariff for electricity supplied. That is re-stated in the regulations. Regulation 2 provides:

> "2. The rates and charges for electricity supplied by a public supplier to a consumer shall be those specified it the Schedule." *[my emphasis]*

Paragraph 2(1) of the Schedule provides, subject to matters not relevant here, that:

> "... the maximum rates for electricity supplies by a public supplier to premises of any description is set out in the first column of the Table opposite the reference to premises of that description." *[my emphasis]*

It then sets out the various premises including small commercial premises, medium hotel and large hotel.

19. Those provisions show that the rates are for electricity which has been supplied. They also mandate a maximum charge for electricity consumed by premises which fall into the various descriptions in the Table.

20. Any hotel which consumes in excess of 3,200,000 kWh in a year, is a large hotel. Clearly, until it has exceeded that figure, it is not possible to say that it has done or will do so but it must, at that point, be a large hotel because it has consumed 3,200,000 kWh or more per annum. It cannot be read as a future right earned by past performance. The definition is clear and does not allow such an application. Once it consumes 3,200,000 kWh in a year, it is a large hotel for the year in which that was the consumption. As the Regulations refer to a maximum charge for electricity supplies to premises of that description, it cannot be charged above that rate for electricity consumed in the year during which it was a large hotel.

21. Nowhere have I been shown any provision in the relevant law for a different rate during the time the threshold is being reached. Once the consumption has crossed the threshold of the annual consumption, the hotel is in that category and is shown, by its consumption, to have been for the year preceding its crossing of the threshold.

22. The defendant's submission is that the rule applies both ways (to a higher or to a lower rate), so that, if a hotel consumed 3,200,000 kWh in one year and then its consumption dropped into the medium hotel category for the following year, it would benefit by continuing to pay the lower, large hotel, rate for that year. However, if that is suggested as a means of achieving a just settlement in such a case, it does not provide a remedy for a situation such as the present where it is accepted the hotel has continuously, since November 2005, exceeded 3,200,000 kWh per annum or, indeed, for any large hotel during the starting up period. The difficulty is illustrated if a hotel consumes 3,200,000 kWh over a period of just one year and then closes down. Although its total consumption for that year was as a large hotel, it would, on the present system, never receive electricity at the large hotel rate and would have paid for it all at a rate above the maximum allowed by the Regulations.

23. I answer the question of law in accordance with paragraph (a) of the question set out in the summons namely that the definition "large hotel" applies to any hotel with a consumption of or in excess of

3,200,000 kWh per annum for each complete year during which that hotel's consumption is or exceeds 3,200,000 kWh per annum.

Order

I therefore give judgment under Order 14A, rule 1(2), to the plaintiff with damages to be assessed with costs.

28 April 2008

Gordon Ward
Chief Justice