

IN THE SUPREME COURT OF THE  
TURKS AND CAICOS ISLANDS

BETWEEN

ATRIUM MANAGEMENT LTD.

Plaintiff

AND

FORTIS TCI LTD.

Defendant

Mr. Gordon Kerr of Misick & Stanbrook for the Plaintiff

Mr. Guy Chapman of Savory & Co. for the Defendant

The Court considered the written submissions of the parties dated 8 and 9 May 2017.

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RULING ON COSTS

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1. The proceedings in this action having been determined in the Plaintiff's favour on 27 April 2017, the Court received written submissions on costs from the parties.
2. Mr. Kerr for the Plaintiff unsurprisingly submits that costs should follow the event. Mr. Chapman's submits, however, that as the Court rejected the Plaintiff's case that the term "hotel licence" in the **Electricity Ordinance** was a reference to a licence issued under the **Business Licensing Ordinance**, the Plaintiff should not have its costs. The thrust of his submissions is that it was no part of the Plaintiff's pleaded case that the relevant licence, as determined by the Court, was the licence issued to hotels under the **Tourist Accommodation (Licensing) Ordinance (TALO)**, and, in the circumstances where the question of the 'hotel licence' being a licence issued under the TALO was not an issue the Defendant had to meet nor an issue on which the Plaintiff prevailed, each party should bear its own costs.
3. While the Court did not agree with the Plaintiff's proposition at trial that the term "hotel licence" was a reference to that license issued to hotels under the **Business Licensing Ordinance**, it rejected in its entirety the Defendant's position, as set out in its letter of 4 August 2015 and its Defence and agreed with the Plaintiff that the term "hotel licence" in the Regulations was not a reference to a "Hotel Licence" granted pursuant to the provisions of the **Liquor Licensing Ordinance** nor a term of art as argued by the Defendant at trial.
4. As the Plaintiff has a licence under the **Tourist Accommodation (Licensing) Ordinance**, the effect of my decision is that they are entitled to all of the relief claimed in its statement of claim. Mr.

Chapman did not make submissions on the draft judgment which was circulated as he was entitled to do or challenge the Court's right to determine the action on the basis of a provision in an Ordinance to which neither party adverted. Rather, the parties have agreed a Draft Order pursuant to which the Plaintiff is entitled to payment from the Defendant.

5. The Plaintiff has plainly succeeded and the principle is that the successful party to an action should not be deprived of his costs unless he has acted improperly or unreasonably: *Re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207 which the Plaintiff plainly has not.
6. The fact of the matter is that had it not been for the position taken by the Defendant in correspondence, when it changed its position and refused to apply the appropriate rate on the ground that a liquor license was required for the Plaintiff to benefit from the medium hotel rate for electricity supply, the Plaintiff would not have had to resort to proceedings to have the issue of their entitlement clarified. This they have done successfully and they are entitled to have their costs.

#### Indemnity Costs

7. Mr. Kerr submits that the Plaintiff should have its costs on an indemnity basis for the reason that this matter involved circumstances which are '*outside the norm*,' a reference to the decision of Lord Chief Justice Woolf in *Excelsior Commercial & Industrial Holdings Ltd. v Salisbury Hammer Aspden & Johnson and Others* [2002] CPLR 693; [2002] EWCA Civ 879 which I consider below.
8. The circumstances Mr. Kerr relies on in support of this proposition are that the Defendant (i) occupies a unique and privileged position as the sole provider of electricity and as a monopoly provider of electricity has a duty to ensure it understands and applies the Regulations governing the way it does business (ii) failed to take steps to properly inform itself of the meaning of the Regulations by, *inter alia*, seeking the advice of the draughtsman who prepared the Regulations and (iii) advanced a case that was unreasonable to a high degree, not merely wrong or misguided hindsight.
9. Mr. Kerr also submits that Plaintiff's case is a test case of significant public interest, as the Defendant's failure to understand and apply the Regulations may have caused other medium sized hotels to be deprived of a benefit to which they are statutorily entitled. As such, he contends that the Plaintiff has been "*drawn into expensive litigation, despite having no other interest than the issue which gave rise to this action.*"
10. Mr. Chapman in response submits that there is no basis for indemnity costs to be awarded as the Defendant did not behave unreasonably in the way it conducted the litigation.
11. I agree.

12. In the *Excelsior Commercial* case relied on by Mr. Kerr, the Lord Chief Justice gave examples of cases 'outside the norm' in which an indemnity costs order may be appropriate:

*"31. ... where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case has been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again this conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate."*

13. The Lord Chief Justice allowed in paragraph 32 that there are an "infinite variety of situations" which may justify an indemnity costs order.

14. In Cook on Costs 2017 Lexis Nexis UK the learned authors helpfully canvas and categorise the cases in which indemnity costs have been ordered. They note at paragraph 24.9 that, "Traditionally costs on the indemnity basis have only been awarded where there has been some culpability or abuse of process such as

- *deceit or underhandedness by a party;*
- *abuse of the court's procedure;*
- *failure to come to court with open hands;*
- *the making of tenuous or hopeless claims;*
- *reliance on utterly unjustified defences;*
- *the introduction and reliance upon voluminous and unnecessary evidence; or*
- *extraneous motives for the litigation (an example of which is the use of litigation for an ulterior commercial purpose)"*

15. The Plaintiff's complaint, that the conduct of the Defence was highly unreasonable or, in the language of Cook on Costs, that the defence was utterly unjustified, cannot be sustained. The threshold is not met where a defendant merely advances an unsuccessful defence.

16. The authorities establish that the threshold for awarding indemnity costs is met where a party is guilty of moral turpitude i.e. has acted with a lack of moral probity or has behaved disgracefully. Instances where indemnity costs have been awarded include where the losing party persisted in its defence to an "extent which was totally and utterly unreasonable [and] where large parts of the defence have been totally unrealistic from the start,"<sup>1</sup> or where the "defendant made an allegation of fraud which had failed in its entirety"<sup>2</sup>

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<sup>1</sup> *Bank Of Baroda v. Panessar and Others* [1987] Ch. 335

<sup>2</sup> *Cooper v P & O Stena Line Ltd.* (1999) Times Law Report 8 February

17. There can be no suggestion that the Defendant has acted otherwise than in the honest though mistaken belief that only 'full-service' hotels, as Mr. Chapman referred to hotels that serve alcohol/hold liquor licences, were entitled to the special rate.
18. As for it being a test case into which the Plaintiff could be said to have been drawn, while this might well be a case that settles an issue which affects other medium sized hotels, it is not the sort of case the Lord Chief Justice had in mind. I understand His Lordship to be speaking of those cases where one party joins with others - becomes a concurrent party - in litigation which seeks to resolve a question of common interest.
19. Even if it were possible to describe the Plaintiff as having been "drawn in to litigation", the conduct of this litigation was not merely proportional, it was admirably economical, with all the facts agreed and the resolution of the matter turning on a question of law identified by the parties well in advance of a trial which took a morning to conclude. In my judgment, nothing in the way the matter was conducted could justify an award of indemnity costs.
20. The Defendant shall pay the Plaintiff's costs on a standard basis, such costs to be taxed if not agreed, save for the costs incurred in the costs application itself in respect of which each party will bear its own costs.

DATED 31 MAY 2017

