[2010] UKPC 30
Privy Council Appeal No 0016 of 2010

JUDGMENT

The Palms Resort Limited *v* P.P.C. Limited

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Phillips
Lord Brown
Lord Kerr
Sir John Dyson SCJ
Sir Stephen Sedley

JUDGMENT DELIVERED BY Lord Phillips ON

13 December 2010

Heard on 13 October 2010

Appellant	*Respondent*
Lawrence West QC	Vincent Nelson QC
	Guy Chapman
(Instructed by Sharpe Pritchard)	(Instructed by White & Case LLP)

LORD PHILLIPS

1. This appeal raises a nice conundrum as to the manner in which the respondent ("the Supplier"), a public supplier of electricity, was entitled to charge the appellant ("the Resort"), for electricity supplied to their hotel at Grace Bay in Providenciales ("the Hotel") in the first year of its operation. This depends upon the true construction of the Electricity Rates and Charges Regulations (Providenciales) as amended by the Electricity Rates and Charges (Amendment) Regulations (Providenciales) 2000 ("the Regulations").

The Electricity Ordinance and the Regulations

2. Providenciales is one of the Turks and Caicos Islands. Electricity is supplied to those Islands under the Electricity Ordinance ("the Ordinance"). Section 3 of the Ordinance provides that electricity must be supplied in accordance with the terms of a licence granted by the Governor under section 4. Section 4 empowers the Governor to grant to an applicant a public or a private supplier's licence. Section 20 requires (subject to exceptions) that the consumption of electricity supplied to a consumer by a public supplier is to be determined by a meter. Section 32 provides (subject to exceptions) that charges made by a public supplier for the electricity supplied to a consumer shall be in accordance with such tariff of rates as the Governor shall prescribe by regulations.

3. The Governor granted the Supplier a licence to supply electricity in Providenciales. The Board was informed that the only material provision of this licence was:

> "13. PPC shall bill all consumers for electricity supplied by it at monthly intervals".

4. The Regulations made the following provisions as to the rates which the Supplier was entitled to charge to consumers:

> *"1. In this Schedule*
>
> > *'large hotel' means a hotel whose consumption of electricity is or exceeds 3,200,000 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…

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

2. (1)… 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:

Description of Premises	*Rate cents per unit*
2. Small commercial premises	*29.00*
5.Medium hotel	*25.00*
9.Large hotel	*17.00"*

The facts

5. The Hotel began to consume small quantities of electricity in December 2004. These substantially increased when the Hotel opened for business in February 2005. There was in the submissions made to the Board a degree of confusion as to the precise details of the basis on which the Resort was charged for electricity supplied to the Hotel, but the picture is quite clearly set out in the affidavit of Mr Hamill sworn on 7 April 2008 on behalf of the Supplier and Exhibit 1 to that affidavit.

6. In the course of February 2005 the total of the electricity consumed by the Hotel exceeded 240,000 KWH. In the monthly account rendered at the beginning of March the charge for February was levied at the rate for small commercial premises, but the charge for subsequent months was levied at the rate for a medium hotel. In the course of November the total of the electricity consumed by the Hotel exceeded 3,200,000 KWH. After an adjustment the charge for November was levied at the rate for a medium hotel, but thereafter the charge for subsequent months was levied at the rate for a large hotel.

The Supplier's case

7. The Supplier contends that the correct method of charging is to base charges on the consumption of the Hotel, viewed retrospectively. The rate charged for each month falls to be determined according to the amount of electricity consumed by the Hotel over the period of 12 months that preceded that month. It was appropriate to adopt this approach during the first months of the Hotel's operation, so that it was only in the course of February 2005 that the Hotel qualified as a medium hotel, thereby determining the rate to be applied in succeeding months, and only in November 2005 that it qualified as a large hotel, with the same prospective effect.

The Resort's case

8. The Resort contends that the rate that it should have been charged in the first twelve months of its existence depended upon the amount consumed by the Hotel during that 12 month period. This could not be determined during the early months. Thus the charges made during those months should have been adjusted retrospectively by rebates, first when consumption put the Hotel into the medium hotel category and again when the Hotel achieved the large hotel category.

Findings of the Courts below

9. In a judgment of the Supreme Court delivered on 28 April 2008, Gordon Ward CJ found in favour of the Hotel. His reasoning appears in the following paragraphs:

> "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. "

10. The Court of Appeal, Zacca P and Mottley and Ground JJA, reversed this decision. The Court's reasoning appears in the following paragraphs:

> "11. It is common ground that that expression establishes a 12 month qualifying period, but that is all that it is. It is not a billing period. A hotel becomes a large hotel at the point when it passes the threshold during any given period of 12 months, but that does not constitute it a large hotel retrospectively for the whole of that period. It is not a large hotel at any point until it reaches the threshold, and to hold otherwise is to strain at the literal meaning of the definition.
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> 12. On the other hand, it seems to us that once the threshold is reached in any twelve month period, irrespective at what point in the billing cycle, PPC is thereafter obliged to charge for each subsequent unit at the discounted rate. It cannot wait until the next billing period to apply that rate."

Conclusions

11. It is not clear to the Board whether the Court of Appeal accepted the Supplier's case that charges fall to be assessed on a rolling basis with a fresh assessment of the status of the Hotel at the end of each calendar month. Mr West QC for the Resort did not, however, challenge the adoption of such a method in the case of a hotel that has been consuming electricity for at least 12 months. He argued that a different approach had to be adopted for the first 12 months of a hotel's consumption, as charging had to be done on the basis of consumption over a year.

12. The Supplier's approach has the merit of simplicity and consistency – charges from day one are calculated retrospectively, so that the same approach is adopted at the end of the first month as is adopted at the end of every succeeding month. Those, in the opinion of the Board, are however its only merits.

13. The licence requirement for monthly billing inevitably impacts on the calculation of the payments to be made. The meter is read once a month and the rate of annual consumption must be calculated by reference to periods of 12 calendar months. The Board would not dissent from the approach of rolling assessment looking back over the period of the previous 12 months on the occasion of each meter reading. We heard no argument as to whether it is appropriate to adjust the rate for the month during which a change of category occurs or, as is the practice of the Supplier, for the following month. The effect of either approach can cut both ways.

14. The Board is, however, satisfied that it does not accord with the Regulations to adopt this approach during the first 12 months that a hotel is a customer of the Supplier. This is because it is plainly implicit in the requirement to assess the status of a consumer by reference to the consumer's annual consumption that the calculation must be done by reference to a year during which the consumer is a customer of the Supplier. This means that it is impossible to adopt the retrospective approach during the first year. Billing must necessarily be done on a provisional basis with an adjustment once it is established that consumption in the first year has placed the consumer into a larger category.

15. It follows that the judgment of the Court of Appeal must be set aside and the judgment of the Chief Justice restored. Accordingly the Board will humbly advise Her Majesty that this appeal should be allowed.

16. Unless written submissions are made within 28 days, the Resort's costs before the Board and below should be paid by the Supplier.