

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. AP 80/2024

BETWEEN:

JAH LIMITED

Claimant

AND

REGISTRAR OF HOTELS AND TOURIST ACCOMMODATION

Defendant

AND

SEABIRD LUXURY DWELLINGS LIMITED

Interested Party

Appearances:

Mr. Rene Montero for the claimant

Mr. Jose Alpuche for the defendant

Ms. Naima Barrow for the interested party

Written submissions:

Claimant's closing submissions filed on 16 August 2024

Defendant's closing submissions filed on 16 August 2024

Claimant's reply submissions filed on 30 August 2024

2024: July 18;

November 14

JUDGMENT

Certiorari - irrelevant consideration – Hotels and Tourist Accommodation Act

[1] **GOONETILLEKE, J.:** The claim is an application for judicial review. The claimant prays for an order of certiorari to quash a decision of the defendant dated 12th December 2023, by which he refused to issue a hotel and tourist accommodation licence to the claimant. Further, the claimant also seeks a declaration that the said decision is contrary to the claimant's constitutional rights stated in section 13 of the Constitution and also seeks damages for the breach thereof.

[2] Having considered the material before court and the submissions of parties, for the reasons set out below, I grant the claimant an order of certiorari quashing the decision of the defendant dated 12th December 2023.

Background and relevant facts

[3] The claimant company which is incorporated in Belize is the owner of a parcel of land identified as Parcel No. 4019 Block 36 in the Placentia North Registration section, on which a villa is situated. The block of land is part of a development named 'Seabird Development' which is a residential gated community developed by Beeline Belize Limited (not a party to this Application). The gated community has common areas which are maintained by the developer. The owners of the individual lots within the gated community entered into a 'restrictive agreement' whereby they agreed to several terms including the payment of expenses incurred to maintain the common areas.

[4] The claimant and Beeline Belize Limited (**BBL**) entered into such a restrictive agreement on 1st of January 2023. An important term in that restrictive agreement as regards the instant matter is section 4, titled "*Leasing/Renting of Units*". Section 4.1 of that agreement reads as follows;

1.1 If an owner is going to rent or lease out their property, it is the responsibility of the owner to assure that all the laws of Belize and the Belize Tourism Board are followed.

1.2 All owners are required to use Seabird Belize appointed JAC Property Management Company to rent their home.

*1.3 All owners of rental units **must annually provide** Seabird Belize with **proof of their Belize Tourism Board Licence** [Emphasis added].*

[5] JAC Property Management (**JAC**) had been appointed by BBL to manage the 'Seabird' development, and the claimant used the services of JAC to rent its villa. JAC had been issued with a Belize Tourism

Board (BTB) Licence by the defendant (**Registrar**). However, in or about 18th July 2023, the Registrar wrote to the JAC informing that Seabird Luxury Dwellings Limited (**SBDL**) had informed him that JAC was no longer authorized to manage the property. The Registrar by that same letter informed JAC that its licence would be cancelled if he did not hear from them within seven (7) days. There was no representation made by JAC and in consequence, JAC's Hotel and Tourist Accommodation licence was cancelled on or about 18th August 2023.

- [6] The claimant company then applied for its own Hotel and Tourist Accommodation licence (**BTB licence**), by application dated 24th August 2023. On or about the 1st of November 2023, the Registrar wrote to the claimant stating that it intended to deny the application for a licence on the basis of the restrictive agreement that the claimant had entered into with BBL. The letter referred to the restrictive agreement which required all properties to be rented through a property manager appointed by the developer. The letter also stated that the previous licence issued to JAC had been cancelled and that a fresh licence had been issued to Sea Bird Luxury Dwellings Limited which is the current property manager. It was further informed to the claimant that since a licence has already been issued to SBDL, the Registrar does not intend to issue another license for any other property located on the development.
- [7] This letter of the Registrar was responded to on 13th November 2023, by the Attorney at law of the claimant, citing section 7 and 8 of the **Hotels and Tourist Accommodation Act¹ (Act)** and further requesting that the licence be issued.
- [8] In response, the Registrar replied by letter dated **12th December 2023**, stating that BTB has a policy in place since 2017 not to issue more than once licence for strata properties and that though Seabird development is not registered under the **Strata Titles Registration Act² (Strata Act)** it is similar to a strata property due to the effect of the restrictive agreements governing the development. The letter also informed that multiple licences issued to the development would increase the administrative burden on the office of the Registrar in relation to compliance, auditing and tax collection. The Registrar also stated in the letter that in terms of the Hotels and Tourism Development Act he was under a duty to comply with the general directions of the BTB and therefore in accordance with BTB policy, for the

¹ Chapter 285, Revised Edition 2020.

² Chapter 196, Revised Edition 2020.

reasons given, he was not prepared to give a BTB licence to the claimant. It is this decision contained in the letter of 12th December 2023 that is impugned by the claimant.

- [9] The claimant again wrote to the Registrar through its Attorney at law, by letter dated 13th December 2023, stating that legal action would be taken if the licence was not granted. This letter was replied by the Registrar by letter dated 15th December 2023, stating that he maintains his previous position.

Issues

- [10] The following issues arise for determination from the facts narrated above;
- a) Is the Registrar's decision not to issue a Hotel or Tourist Accommodation Licence, arbitrary, irrational, unreasonable, and/or ultra vires the Hotels and Tourist Accommodation Act?
 - b) Whether the basis of the decision of the Registrar to not issue a Hotel or Tourist Accommodation Licence is in breach of the claimant's right to freedom of association set out in section 13 of the Constitution of Belize?
 - c) Is the claimant entitled to loss of opportunity by the denial of the BTB licence by the Registrar? If so in what quantum?

Analysis and Discussion

First issue: is the Registrar's decision to not issue a Hotel or Tourist Accommodation Licence, arbitrary, irrational, unreasonable, and/or ultra vires the Hotels and Tourist Accommodation Act?

- [11] It is first necessary to examine the relevant provisions in the Hotels and Tourist Accommodation Act. The first section of interest is section 5 (1) which reads as follows;

*"5.-(1) No person shall– (a) advertise in any form any premises; (b) use any premises; (c) hold out any premises, for the purposes of **the business** of a hotel or tourist accommodation unless such **premises** and the **proprietor of such business** are registered annually under this Act and a licence is **obtained by the proprietor** from the Registrar in that behalf."* [Emphasis added]

According to this section a 'premises' used for the 'business' of a hotel or as a 'tourist accommodation' requires an annual BTB licence to be obtained by the proprietor of the business.

[12] The claimant's premises is not a hotel, however it has been used as a tourist accommodation and the purpose of the licence applied for, is to have it used as such. It now becomes necessary to look at the Act for guidance as to how a tourist accommodation is defined. The interpretation section, **section 2** defines 'tourist accommodation' as follows;

*““tourist accommodation” means any– (a) apartment / apartment studio; (b) condominium; (c) guest house; (d) resort; (e) motel; (f) bed and breakfast; (g) lodge; (h) **vacation home / room rental**; (i) hostel; (j) homestay; (k) live-aboard vessel; (l) camping ground; (m) religious, educational, research or community based facility; (n) cabin/cabanas; or (o) any other establishment, other than a hotel, consisting of one or more units for the accommodation of guests for reward, situated within the same complex or precincts;” [Emphasis added].*

[13] The application of the claimant for the BTB licence, states in the cage “*type of category or accommodation*” the words, “*vacation home/ room rental*”. This falls within the definition of tourist accommodation as defined in the Act. It is now further necessary to examine the Act as to how a vacation home/room rental is defined. Section 2 defines the term as follows;

““Vacation home/room rental” means one or more detached units or part of a detached unit that does not exceed three floors and– (a) has an independent or common entrance to each unit; and (b) private or shared bathroom in each unit.”

From the documents filed in this matter, the claimant's property would satisfy this definition; it has an independent entrance and private or shared bathrooms which may be considered a unit or the entire property being considered as one unit.

[14] In this context it would be of interest to read the restrictive agreement, as to the nature of the claimant's property. Section 2.1 of that agreement reads as follows; “*All lots are zoned for residential use only. The property shall be used for vacation and temporary rental only. All guest will be the sole responsibility of the owner and must strictly comply with all covenants and restrictions. In no event will the property be used for business, manufacturing, or commercial enterprise, nor shall the same be used or occupied injuriously to affect the use of value of the adjoining or adjacent premises for recreational purposes”.*

[15] The restrictive agreement clearly states that the property is a vacation home and it is implied that it is suitable for temporary rental. Further, that guests are the sole responsibility of the owner.

[16] Further down, at section 4.1.1 of the restrictive agreement, it is stated that; “*If the owner is going to rent or lease out their property, it is the responsibility of the owner to assure that all laws of Belize and the Belize Tourism Board are followed*”. Section 4.1.1 of the restrictive agreement implies therefore that it is the owner who should apply for a Belize Tourism Board licence. The entirety of Section 4.1 of the restrictive agreement is reproduced below for convenience to ascertain its purport;

“1 If an owner is going to rent or lease out their property, it is the responsibility of the owner to assure that all the laws of Belize and the Belize Tourism Board are followed.

2. All owners are required to use Seabird Belize appointed JAC Property Management Company to rent their home.

*3. All owners of rental units **must annually provide** Seabird Belize with **proof** of their **Belize Tourism Board Licence**” [Emphasis added]*

[17] The purport of section 4.1 of the restrictive agreement is that the owner of the premises must apply for the BTB licence; it must provide proof of that annual licence to Seabird Belize and it must use the property management company appointed by Seabird Belize to rent the owner’s home. There is no indication in that agreement that it is the property management company that is to obtain the BTB licence. To the contrary, the responsibility of obtaining the BTB licence is squarely put on the owner and not on the property management company.

[18] In the face of this analysis, it would be necessary to check if section 4.1 of the restrictive agreement is in accord with or contrary to section 5(1) of the Act. That section is reproduced below again for convenience;

*“5.-(1) No person shall– (a) advertise in any form any premises; (b) use any premises; (c) hold out any premises, for the purposes of the **business** of a hotel or tourist accommodation unless such **premises** and the **proprietor of such business** are registered annually under this Act and a licence is **obtained by the proprietor** from the Registrar in that behalf.” [Emphasis added]*

It becomes clear now that “no person” and this would include the property management company appointed by Seabird Belize, can advertise any premises as a tourist accommodation unless the proprietor of the business of a hotel or tourist accommodation, has a BTB licence. The words “proprietor of such business” in section 5(1) of the Act, does not refer to the person advertising or holding out the premises for rent but is a reference to the owner of the hotel or tourist accommodation.

[19] In view of the analysis above, there is no conflict between the restrictive agreement and the Act. The owner of the premises, in this case the claimant must obtain the BTB licence, and must in terms of the restrictive agreement, rent the property through the property management company appointed by Seabird Belize.

[20] Mr. Villar, the then Registrar was asked in cross examination and by court about the process of approval of an application for a BTB Hotel and Accommodation Licence. He stated that upon receiving an application under section 6 of the Act, a report in terms of section 7 of the Act is caused to be made. Section of 7 of the Act is as follows;

“7. Where an application made in accordance with the provisions of section 6 is received by the Registrar, the Registrar shall verify the particulars contained in that application and cause a report or reports to be made as to whether adequate arrangements are available for the compliance with the requirements of minimum standards of service, health and accommodation, prescribed for hotels and tourist accommodation by the Minister.”

What is required in terms of section 7, is that the Registrar causes a report to be made to ensure that the minimum standards of service, health and accommodation prescribed by the Minister are met. If the standards are met, in terms of Section 8, the Registrar is obliged to approve the application. Section 8 reads as follows;

*“8.-(1) Where the Registrar is **satisfied with the report or reports made under section 7, he shall make an Order allowing the application and shall register such premises in the register and shall register the applicant in the register as the proprietor thereof** and enter such other particulars as he may think necessary.*

(2) The Registrar may direct any applicant for registration to furnish to him, within such period as may be specified in the direction, such information or documents as may be mentioned therein to

enable him to dispose of the application. If the applicant fails to comply with such direction, the Registrar may refuse the application, and where the Registrar refuses the application he shall inform the applicant of his reasons accordingly.

(3) Where the Registrar is not satisfied that the provisions of section 7 are complied with, he shall notify the applicant in writing of the grounds which prevent him from registering the premises as a hotel or tourist accommodation and state that unless the deficiencies mentioned in the notification are rectified within the time mentioned therein the application would be disallowed.

(4) If, upon receipt of a notice under sub-section (3) the applicant rectifies the deficiencies and otherwise complies with the requirements to the satisfaction of the Registrar, the Registrar shall register the premises as a hotel or tourist accommodation and the applicant as the proprietor of that business. If the applicant fails to so rectify the deficiencies or otherwise comply with the requirements as prescribed therein, the application shall be disallowed, and the Registrar shall inform the applicant accordingly.

(5) Any person who advertises, or holds out, or uses for the purposes of business, any premises as a hotel or tourist accommodation when the Registrar has refused to issue a licence to the applicant, or when such premises are not registered in the Register of Hotels and Tourist Accommodation, commits an offence.” [Emphasis added]

[21] On a plain reading of section 8 (1), it is apparent that if there is no adverse finding in the report made under section 7 of the Act, the Registrar is obliged in law by the use of the word “*shall*” emphasised in the section, to grant the licence. The word “*shall*” used in legislation is given a mandatory meaning.³ The Registrar was asked by court when he gave *viva voce* evidence whether according to the Report made under section 7, the property passed the inspection (for the criteria set out in section 7). The Registrar, responded that it did.

[22] The court then asked the Registrar that if not for the restrictive agreement, whether there was any reason not to grant the applicant a licence, and his answer was “No”. The registrar stated further that there had been no previous instances where, when appraising properties, that restrictive agreements

³ Section 58 of the Interpretation Act. The mandatory nature of the word “shall” has also been given judicial recognition - In *the Matter of the Representation of the People Ordinance*, Supreme Court Action No. 390 of 1983, *Judgment* delivered 22nd December 1983, per Moe CJ.

were looked at. It is entirely possible for the Registrar to do so under section 8(2) of the Act, however his answer was that this was not done before. It was also his answer that there was no ground for not granting the licence if not for the restrictive agreement.

[23] The basis of the refusal of the Registrar to issue a licence is that the property is akin to a strata property and that according to BTB policy, a strata property can only be given one licence and that he is obliged in law to follow the policy of the BTB.

[24] In his first affidavit, at paragraph 10, the Registrar states that there are docking facilities, a swimming pool and security which are part of the common amenities and services provided by persons responsible for the management of the property. At paragraph 11 of this affidavit the Registrar cites section 4 of the restrictive agreement which was reproduced above and states that “*my office took the view that the property owners in this development were therefore restricted from renting out their homes themselves*”.

[25] He then goes on to state at paragraph 12 of his first affidavit that his office was informed that JAC property management was no longer authorized to manage rentals and that there was a new property manager appointed and that “*After reviewing its application, my office concluded that this new entity was authorised property manager and was therefore the proprietor of the development for the purposes of section 5 of the Hotels and Tourist Accommodations Act*” [Emphasis added].

[26] The above conclusion at paragraph 12 of the Registrar’s first affidavit, is the reason given by the Registrar for not granting the claimant a licence. That decision is based on an erroneous interpretation of the Act and the restrictive agreement, and an erroneous conclusion reached by the Registrar. As shown in the analysis at paragraphs [16] to [18] above; the words “*proprietor of such business*” in section 5(1) of the Act refers to the owner of the premises or the owner of the business of the premises and not the advertiser or person holding out the premises for rent. Even in terms of the restrictive agreement, it is not the property management company, but the owner of the premises that needs to have a BTB licence. I therefore find that the Registrar has reached a wrong and unsustainable conclusion on the basis of his interpretation of Section 5(1) of the Act read with the restrictive agreement.

[27] I next turn to consider the strata policy of the BTB which is at annex 5 of the defendant's submissions filed on the 9th of July 2024. That policy states that;

"...Management companies tasked with the rental of strata properties must adhere to the following policy in order to satisfy the requirements of a licence. For administrative reasons such as compliance with Hotels and Tourist Accommodation Minimum Standard Regulations, audit and tax collection, the BTB maintains that only ONE licence will be issued per person/management company/proprietor in relation to a strata lot operating under any selected name. This means that the BTB views the entire strata as one property and will only issue ONE licence to the said property".

The policy document of the BTB only relates to strata properties. Strata properties are regulated by law in terms of the Strata Titles Registration Act. Section 2 of that Act defines "strata" and "strata lot" as follows;

*"strata" has reference to titles to the ownership of not less than two self- contained units for residential or business purposes being either detached buildings or divisions or subdivisions of one or more buildings, which units may be divided horizontally or vertically from, **and may have a common roof and common foundations with, one or more other such units and may share the use of service buildings and other facilities in common, the whole being located on a single parcel of land and under the management of a Corporation established under this Act;***

"Strata lot" means a self-contained unit comprised in a strata plan, and shown in that plan as a strata lot;"

The key to understanding "strata" is that it usually refers to units that have a common roof or common foundation with common facilities managed by a corporation under the Strata Tiles Registration Act. The claimant's property does not have a common roof or common foundation as apparent from the documents filed. It is an independent unit. However, while there are some common areas managed by a corporation/company the management corporation/company is not registered under the Strata Tiles Registration Act. The claimant's property is therefore not a Strata Property and would not attract the BTB policy. I do not therefore have to venture to decide if the policy of the BTB in regard to issuing ONE licence per strata property is reasonable.

[28] I do however, have to decide if the Registrar was reasonable in considering the claimant's property as being akin to a strata property or whether that was an irrelevant consideration. There is no policy document or requirement in the law that any property akin to a strata property should only obtain one BTB licence. The decision to consider the claimant's property akin to a strata property is entirely the Registrar's or that of his office.

[29] The additional submission filed on behalf of the defendant dated 16th August 2024, states that it is open to the Registrar to restrict licences in relation to developments which are analogous to strata properties because the same administrative burden would exist in those developments. Therefore, the decision to consider the property akin to Strat property, as submitted, is due to administrative burdens on the Registrar. That decision and position is not supported by Section 7 and 8 of the Act which uses mandatory language as discussed above. Administrative convenience or discretion cannot override the mandatory duties set out in the legislation.

[30] In fact, the Registrar himself stated *viva voce* that if not for the restrictive agreement there was no reason why a licence should not have been issued. In terms of the Registrar's affidavit, the issue with the restrictive agreement was that rentals could only be done through the property management company. Hence, the reason stated to court for not granting the licence to the claimant had nothing to do with administrative burden, but had to do with the interpretation by the Registrar; that due to the restrictive agreement, it was the management company that qualified under Section 5(1) of the Act to obtain a licence. This reasoning is irrational as demonstrated above.

[31] As stated above, administrative convenience ought not to run counter to the purpose of the Act, which is to provide a Hotel or Tourist Accommodation licence to those that qualify for such licence. There is a duty imposed on the Registrar in terms of section 7 and 8 of the Act to grant a licence if the conditions required of the Act are met by the applicant. Wade⁴ states as regards irrelevant considerations that;

*"[T]he courts will intervene in two situations. The first is where the authority has acted on grounds which the statute never intended to allow...The second is where the authority has failed to take proper account of something that the statute expressly or impliedly required it to consider".*⁵

⁴ Wade and Forsyth, Administrative Law, 8th ed.

⁵ Ibid, p. 378.

I therefore hold that considering the claimants property akin to a strata property, unsupported by the Act or any specific policy by the BTB, for the mere sake of administrative convenience, is an irrelevant consideration by the Registrar. A lack of resources or administrative convenience cannot be a ground to disregard a statutory duty.⁶

[32] I therefore hold that the Registrar's decision to not issue to the claimant a Hotel or Tourist Accommodation licence, is arbitrary, irrational, unreasonable, and ultra vires the Hotels and Tourist Accommodation Act.

Second Issue; Whether the basis of the decision of the Registrar to not issue a Hotel or Tourist Accommodation Licence is in breach of the claimant's right to freedom of association set out in section 13 of the Constitution of Belize?

[33] The claimant by means of its fixed date claim form for judicial review dated 9th April 2024 supported by the third affidavit of its director Jennifer Vandiver, seeks a declaration that the decision of the Registrar to not issue a Hotel or Tourist Accommodation Licence is in breach of the claimant's right to freedom of association set out in section 13 of the Constitution of Belize. There were no extensive submissions on this point by either counsel.

[34] The licence, if granted would enable the claimant to lawfully, advertise, hold out and use its property for the purpose of tourist accommodation. It is to be presumed that the property would be made available to tourists for a fee. In other words, it is a commercial or business relationship of providing a service; in this instance lodging for a limited period of time. The presumed argument being (no argument was made on the point hence the presumption) that due to the lack of a licence, the claimant (which happens to be a body corporate) would not be able to freely associate with those it wishes to.

[35] It would be necessary therefore to examine the scope of this right. Section 13 of the constitution which grants this right reads as follows;

*"13.-(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons **and in particular** to form or belong to trade unions or other associations for the protection*

⁶ R. v. Sussex County Court ex p. Tandy [1998] AC 714.

of his interests or to form or belong to political parties or other political associations". [Emphasis added]

[36] The scope of this section has been recently interpreted by the Court of Appeal of Belize, in **Controller of Supplies and Others v. Gas Tomaz Ltd. and others**.⁷ The court held that this freedom related to collective purposes and does not to cover personal relationships and those existing in business and commerce.

[37] The Court of Appeal cited the case of **Collymore v. AG**⁸ and the dicta of Wooding CJ as follows;

"...freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the association or group. The objects may be of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."

The court then went on to compare this right with that stated in the European Convention on human rights and came to the conclusion that individual business rights were not covered by this right. In the words of the Court of Appeal;

"However, the relationship or subject matter must involve a group or collective rights. Relatedly, to come within the protection of article 11 of the European Convention on Human Rights – one of the precursors to the Commonwealth Caribbean bill of rights, including Belize's – which guarantees freedom of assembly and association, an association must be established formally under an organization or institutional structure to which a person can belong or with which he can affiliate. This means that purely social gatherings – or, in this case, one-on-one relationships of a private business nature – do not come with the scope of this right."⁹ [Emphasis added].

⁷ Civil Appeal 12 and 13 of 2024, Judgement delivered April 30, 2024

⁸ (1967) 12 WIR 5 (CA Trinidad and Tobago) per Wooding CJ at p. 15

⁹ Civil Appeal 12 and 13 of 2024, Judgement delivered April 30, 2024, para [121]

[38] The Court of Appeal also disapproved of the decision in **AG v. Smith**¹⁰ and stated the essence and scope of the right of association in section 13 of the constitution as follows;

“It follows from this that Williams J in AG v. Smith erred in his interpretation of this right as including the freedom of individuals to choose with whom they wish to have social and business relationships, such as spouses, business partners and employees. That was not only an unsupportable extension of the right, but a distortion – if not trivialisation – of its purpose. Freedom of association evolved to confer protection upon collectives to pursue their common (or ‘public’) goals, including goals of an economic nature such as higher wages. However, it does not cover personal relationships such as those existing within marriage, as confirmed in a recent Caribbean case,¹¹ or, I would add, those existing in business and commerce. This does not mean that such relationships are devoid of protection, as the bill of rights contain other rights that may be relevant such as, for example, protection of the family or protection of the opportunity to work. However, it is clear that freedom of association does not confer protection on private relationships between individuals.”¹² [Emphasis added].

[39] From the above dicta, it becomes clear that infringement claimed by the claimant for failure to obtain a hotel or tourist accommodation licence and being deprived of entering into business relations with tourists for accommodation would be a matter of private business, and not within the scope of section 13 of the constitution.

[40] I am also persuaded by the authority of **Lucas v Chief Education Officer**¹³ that not every violation of a right entitles a person to claim a constitutional violation but that the courts will entertain a constitutional action only if the circumstances disclose some “special feature” that justifies going beyond private law remedies, to invoke the constitution.¹⁴

[41] For these reasons, I answer the second issue in the negative and hold that there has been no breach of the claimant’s right to freedom of association set out in section 13 of the Constitution of Belize.

¹⁰ *Trinidad Island-wide Cane Farmers Association Inc, and AG v. Seereeram* (1975) 27 WIR 329 (CA TT)

¹¹ *Centre for Justice v AG & Minister of Legal Affairs* (2016) 88 WIR 227 (SC Ber) Per Kawaley CJ at para [63]

¹² Civil Appeal 12 and 13 of 2024, Judgement delivered April 30, 2024, para [123]

¹³ [2015] CCJ 6 (AJ)

¹⁴ *ibid*

Third issue; is the claimant entitled to loss of opportunity for the denial of the BTB licence by the Registrar? If so in what quantum?

- [42] The claimant also seeks compensation for economic loss caused by the refusal of the Registrar to issue a licence on the basis that there had been several bookings for the claimant's property that did not materialise as the claimant did not have a licence. The claimant led evidence to demonstrate the bookings that it had.
- [43] Before going into assess the factual issue of bookings, it would be necessary to consider whether the claimant could have advertised the property without a licence and therefore could have legitimately had bookings.
- [44] In terms of the interpretation given above to section 5(1) of the Act, it is not the property manager but the owner of the premises or business in the premises that must have the BTB licence, if the property is to be used for tourist accommodation. Hence, in terms of the law, JAC nor the new property manager nor anyone else could have advertised the claimant's property without the claimant first having a BTB licence, nor could the property owner (the claimant in this instance) rent out the property without having a licence in its name.
- [45] JAC's BTB licence was cancelled about the 18th of August 2024 and the claimant applied for its licence on or about the 24th of August 2024. The letter denying the claimant a licence was issued on 12th December 2023. The 4th Affidavit of Jennifer Vandiver sworn to on the 23rd of May 2024, in response to the first affidavit of Denmar Villar, states at paragraph 14 that the bookings to the claimant's property that were lost were those made prior to the termination of the licence by held by JAC. She then sets out a table in her affidavit listing all the booking allegedly lost. These bookings range from the 21st January to 23rd to 23rd August 2023. Jennifer Vandiver also alleges at paragraph 17 of her affidavit dated 18th June 2024 in response to the affidavit of the interested party, that the booking reflected as 23rd August 2023, was actually made on 11th August 2023 and therefore the date 23rd August 2023 was a mistake and she asserts that all booking were made when JAC had a licence.
- [46] Therefore, on the claimant's own admission all these bookings were made prior to the claimant making an application for a BTB licence and prior to the defendant denying the claimant a licence. The claimant's property could not have been legally advertised or held out for renting either by the claimant

or JAC or anyone else, for the reason that in terms of section 5(1) of the Act, the claimant as proprietor did not have a BTB licence for the property at the time the booking were made. In terms of the law, JAC could not have had a BTB licence for the claimant's property as it was not the proprietor of the claimant's villa (the property to be rented) as required by section 5(1) of the Act. I am therefore not inclined to consider compensation or damages for the claimant on the basis of lost business, as in terms of the well-known legal principle, "*ex turpi causa non oritur actio*" which in Latin means that the court will not lend its hand to enforce an illegality, the court cannot aid an illegal action.

[47] For these reasons I answer the third issue in the negative and decline to award compensation or damages to the claimant.

Costs

[48] The claimant has succeeded in its primary claim in which it sought an order to quash the decision of the Registrar to not award a hotel and tourist accommodation licence to the claimant. Much of the pleadings and submissions were centred on this issue.

[49] The claimant has however, not succeeded in its claim for constitutional relief. No lengthy pleadings nor submission were made on this issue, though the defendant did file brief written submissions on the matter which were helpful to court.

[50] The claimant has also not succeeded in its claim for damages or compensation for lost bookings. The claim reflect this issue which necessitated a response and time was spent on this issue in cross examination in court.

[51] Considering these factors it would be just and equitable to award the claimant two third (2/3rd) of its costs in this claim to be paid by the defendant whose decision was impugned.

[52] The interested party would have to bear its own costs.

IT IS HEREBY ORDERED AND DECLARED THAT

- (1) The decision of the defendant contained in the letter dated 12th December 2023 refusing to issue a hotel or tourist accommodation licence to the claimant, is quashed;
- (2) The claimant is granted a declaration that the decision of the defendant to deny the claimant a hotel or tourist accommodation licence was done contrary to the provisions of the Hotels and Tourist Accommodation Act;
- (3) An order of mandamus is issued to the defendant to forthwith issue to the claimant a hotel or tourist accommodation licence valid from the date of this judgement; based on the application submitted by the claimant and in compliance with the terms of sections 8, 9 and 12 of the Hotels and Tourist Accommodation Act;
- (4) The defendant shall pay to the claimant two thirds (2/3rd) of its costs, to be agreed or assessed;
- (5) The interested party will bear its own costs.

Rajiv Goonetilleke
High Court Judge