

Between:

THE COMMISSIONER OF INLAND REVENUE Appellant.

and

FREDERICK ANTHONY WELLER Respondent

M.J. Scott for the Appellant
R.W. Mitchell for the Respondent

Date of Hearing: 22nd November 1982

Delivery of Judgment: 26th Nov. 1982

JUDGMENT OF THE COURT

Speight J.A.

Respondent was assessed by the appellant Commissioner as being liable to pay income tax in respect of a capital gain which he made on the sale of a house in Fiji in 1980, on the basis that it formed part of his total income - Section 11 Income Tax Act (Cap. 201). Respondent objected to the assessment; his objection was disallowed by the Commissioner; he appealed pursuant to Section 62(6) to the Court of Review - currently Mr. K.A. Stuart.

Mr. Stuart upheld the appeal. The Commissioner appealed to the Supreme Court pursuant to Section 69 and on 4th November 1981 Mr. Justice Kermodé dismissed the Commissioner's appeal. From that decision the Commissioner now further appeals to this Court under Section 12(1)(c) of the Court of Appeal Act (Cap. 12) i.e. on grounds of appeal on question of law. Mention will

be made of these grounds later.

In the Supreme Court no further evidence was produced by either party, and the learned Judge did not differ from any of the narrative which had been recorded by the Court of Review, so a recital taken from that judgment of the brief history and certain findings of fact will suffice:-

" Frederick Anthony Weller first came to Fiji in 1973. He came because he had bought some land at Pacific Harbour, Deuba and instructed the developers to build a villa upon it. He expected that villa would be ready for occupation, and since he had retired from service with the Hong Kong Government, he and his wife came to occupy their villa. They had secured permits to enter and reside in Fiji. The villa was not ready and the developers put Mr and Mrs Weller up at the Beachcomber Hotel. After a month the villa seemed unlikely to be ready for occupation in the foreseeable future, so the Wellers returned to Hong Kong where Mr. Weller took up a new contract with the Hong Kong Government. By the end of 1979 his contract had expired and he essayed to come to Fiji to occupy his villa. He tried to re-activate his permit to reside in Fiji, but found that could not be done, so he and his wife secured new permits. They arrived in Fiji on 31st January 1980. By 15th February Mrs Weller had made up her mind not to stay in Fiji. They sold their villa for \$135,000 and left Fiji in April 1980. Mr Weller made a return of income for the period from 1st January to 31st March 1980 disclosing income of \$372.56. He disclosed also that he had made a profit of \$48,811 on the sale of his land at Pacific Harbour but contended that this was a capital appreciation. The Commissioner demurred and assessed him for tax on his profit claiming payment of \$18,181.60. Mr Weller appealed, and I shall hereinafter refer to him as the appellant. Mr Scott told the Court that the claim arose under section 11(e) of the Income Tax Act 1974.

Mr and Mrs Weller both gave evidence for the appellant as well as Mr D.H.P. Ragg of Fiji Property Centre who acted as Mr Weller's agent. From the whole of the evidence I am fully satisfied that Mr and Mrs Weller came to Fiji in January 1980 intending to settle, but they found living in their own villa at Pacific

Harbour quite different from living at the Beachcomber Hotel, and Mrs Weller made up her mind and that of her husband not to stay in Fiji. The appellant stated that after he decided to leave Fiji he wanted to rent out the villa, but Mr Ragg asked him if he wanted to sell and he sold at a price of \$135,000.

I reject the Commissioner's submission that the appellant came to Fiji with the object of selling his property at Pacific Harbour. Mr Scott pointed to their short stay as evidence in support of his submission, but my view is that they intended to settle here. Matters turned out unsatisfactorily - the climate was more humid than they expected, Mrs Weller was lonely and found it difficult to find anyone with whom to make friends as the population of Pacific Harbour always seemed to be on the move, she found the midges voracious - and when Mr Ragg brought them a satisfactory buyer they jumped at the opportunity of selling. It is true that Mr Ragg and the appellant had discussed the sale of the villa by letter before the latter decided to live in Fiji and that the appellant had rejected offers of \$100,000 and \$120,000 in 1977 and 1979. The appellant had not made up his mind in 1977 whether he would retire to Fiji, but by 1979 it would appear that he had decided to come to Fiji to settle. At any rate the last mentioned offer does not seem to have attracted him.

Section 11 of the Income Tax Act 1974 is a very wide definition of total income, and it starts off

'For the purpose of this Act total income means the aggregate of all sources of income including the annual net profit or gain or gratuity....'

Then there is a proviso reading

'Provided that, without in any way affecting the generality of this section, total income for the purpose of this Act shall include' -

and there are twenty two matters which the section includes of which (e) reads:-

' in the case of a person, residing or having his head office or principal place of business outside Fiji, but carrying on

business in Fiji, either directly or through or in the name of any other person, the net profit or gain arising from the business of such person in Fiji.

Provided that any person normally-residing outside Fiji who engages in the sale or other disposition either directly or by the sale of options to purchase or by any other means whatsoever of any land in Fiji or any estate or interest in any such land shall be deemed to be carrying on business in Fiji, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme connected with the disposition either directly or indirectly of any land in Fiji or any estate or interest in any such land, including schemes involving the interposition of a company, entered into or devised for the purpose of making a profit shall be deemed to be total income for the purpose of this Act.'

The first matter for consideration is whether the appellant can properly be said to be normally resident outside Fiji. It is my view that when the Wellers came to Fiji intending to stay permanently they established a domicile of choice in Fiji. But that is not the whole story, for when the appellant sold his property, he abandoned his domicile of choice, and since he was born in Hong Kong, he doubtless reverted to his Hong Kong domicile unless he had established a new domicile of choice. "

Mr. Stuart then discussed two cases concerning "residing" and "resident" - Levene v. IRC (1928) A.C. 217 and IRC v. Lysaght (1928) A.C. 234 and concluded:-

" Here the appellant was not a Fiji citizen, nor had he up to the time he arrived in 1980, ever had his home here. For a short period in 1973 he intended to become a resident in Fiji but the intention never came to fruition. Hence he would appear to come within the scope of Section 11(e) of the Act as normally residing outside Fiji. "

Neither counsel has since challenged that finding, nor the findings that the house was originally bought as a

residence and not for the purpose of sale, nor that the change of mind occurred after the Wellers took up residence in 1980 and found conditions at Pacific Harbour not to their liking, because of the climate, and other factors. The argument on behalf of the Commissioner, both in the Court of Review and on appeal to the Supreme Court has been that the gain on sale is included in total income by virtue of the initial paragraph in Section 11 (referred to by Mr. Stuart in the passage above) taken together with the provision in sub para. 11(e) whereby a non resident who does not carry on business in Fiji can be deemed to do so if he engages in the sale of land in Fiji.

The Court of Review rejected this submission. At page 6 of the decision (p.108 of the Case) it was held that there was no trace of any undertaking or scheme in the way provided in the later part of the proviso. No submission is made to the contrary by the Commissioner. But liability was and is claimed to arise from the "carrying on business" provision. In considering whether a person who had sold land was one who "engages in the sale of land" the Court of Review said that it would only construe subsection (e) as enlarged by the proviso if the non resident engaged in an undertaking or scheme for profit. This interpretation of engaging in a scheme as an ingredient of the proviso is challenged by Mr. Scott.

The Court of Review acknowledged that the argument advanced on behalf of the Commissioner was that the proviso was in two independent limbs and the carrying on of an undertaking or scheme is only mentioned in the second. Mr. Stuart then went on to say:-

"Even if it were, the words 'engages in' suggest something more than a single sale is required to bring a person within the taxing net.....it seems to me that there has to be something more than a single sale. "

We shall return to and discuss this viewpoint later, but it is necessary to continue with the course

that the appeal followed thereafter. Based primarily on this construction of the words "engages in" and with some assistance from the historical background of Section 11(a) and 11(e) the Court of Review upheld the taxpayer's objection.

On appeal in the Supreme Court Kermode J dismissed the Commissioner's appeal, but his reasoning followed a different path from the earlier decision. At page 7 of his judgment (page 13 of the case) he appears (and perhaps for arguments sake) to have accepted Mr. Scott's submission that the taxpayer was "deemed" to be carrying on business in Fiji because of the sale of the villa. We have some reservations as to whether the learned Judge was accepting this as unequivocally as the passage quoted would at first sight suggest, for earlier on the same page Kermode J had expressed the matter somewhat ambivalently.

However he did assume that the "deeming" provision applied, but went on to hold against the Commissioner by applying an exception found in Section 11(a).

Section 11(a) deals with persons (whether resident or not) who derive profit or gain from the sale of property if (a) the taxpayer's business is dealing in property, or (b) the property was acquired for sale, or (c) was part of an undertaking or scheme - but an exception to 11(a) excludes purchase and sale which comprise a single transaction.

For the reasons advanced by Mr. Scott we are of the view that the exception only relates to persons who fall within the ambit of Section 11(a) - and does not apply to a person who is "deemed" to carry on business in the context of Section 11(e). But that is by no means the end of the matter for the heart of this case is the meaning of the phrase "engages in".

Although Mr. Scott has persuaded us that Kermode J's use of the exception to clause 11(a) was erroneous, that does not mean that we accept the interpretation given to the crucial phrase by the learned Judge, to which reference has already been made.

If the conclusion that respondent engaged in sale of land because of the single transaction under discussion is a finding of fact, nevertheless this Court can interfere if it is a view which could not reasonably be entertained - Edwards v. Bairstow (1956) A.C.14 and a fortiori of course if it is a misconception of law.

Mr. Scott in his initial argument before us submitted that as no cross notice had been given, it must be taken that Kermode J's finding as to the meaning of the phrase was not challenged by the respondent. We think it fair to say that the members of the Court were not entirely happy with that position, and it became apparent from Mr. Mitchell's submissions that he was not conceding that Kermode J had unequivocally made such a finding. He made submissions to the contrary based on an examination of the page in the judgment already mentioned.

The position needed clarifying. Rule 19 of the Court of Appeal Rules - Cap. 12. Subsidiary Legislation - reads as follows:-

"19.(1) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court shall be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court of Appeal to make, or to make in that event, as the case may be.

(2) A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than

those relied upon by that Court shall give notice to that effect specifying the grounds of that contention.

(3) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of the appeal to contend that the decision of the Court below should be varied upon grounds not specified in a notice given under this rule to apply for any relief not so specified or to support the decision of the Court below upon any grounds not relied upon by that Court or specified in such a notice.

(4)

(5) "

Accordingly we indicated that we would allow Mr. Mitchell to support the decision of the Supreme Court on grounds different from those in the judgment - viz on the reasoning which found favour in the Court of Review. Mr. Scott was then given the opportunity, which he took, of re-enunciating the argument which he had apparently earlier advanced in the Supreme Court.

The foregoing has been a lengthy digression on the course the case has taken so far, and we now return, as promised to the question of whether the "deeming" provision in clause 11(e) on the facts of this case brings the respondent within the concept of carrying on business in Fiji.

It is a simple question to which the answer in our view is equally simple. It does not.

In the course of his submission Mr. Scott quite frankly acknowledged that the Commissioner's case was that "a non-resident who sells a plot of land, thereby and without more, is deemed to be carrying on business in Fiji because he thereby engages in the sale of land" - and to repeat, for the sake of absolute clarity - he agreed that his contention was put forward even though the original purchase had been for the purpose of residence, and the subsequent sale had been occasioned

by a bona fide change of mind.

Having, we hope, clarified the crucial question, we turn our attention to the meaning of the governing phrase in the proviso to Section 11(e).

The Shorter Oxford Dictionary says that to engage (in) is "to occupy"; "to mix up in".

Webster's Third International Dictionary (1971) dealing with the verb, lists "to involve or entangle in some affair or enterprise"; "to begin and carry on an enterprise"; "to employ or involve oneself".

The ordinary understanding which we take is that the word engage connotes occupation in some activity for a period of time - not whole time occupation, but certainly more than a brief moment of decision making in one's affairs.

With his usual industry Mr. Scott provided us with some case references - none particularly decisive, but certainly none which supported his content on that a person who indulged in one effective action was a person who engaged in an activity. Indeed, if anything, we think the inferences are the other way.

Watts v. Smith (1890) 62 L.T. 453 dealt with a restraint of trade clause - "not to engage in a similar business".

Kekewich J said -

" It is obviously a word of flexible meaning. Servants are engaged when a bargain is made between themselves and their employers and they are engaged for a particular purpose. Solicitors certainly, and I also think counsel, may be said to be engaged in a case; and.....all persons in all classes are frequently engaged without meaning more than they are much occupied. "

Bantine v. Hume (1943) V.L.R. 123 is authority we believe for saying that a man is not engaged if he occasionally performs some function - intermittent employment does not make a person "engaged".

In Commonwealth Taxation Board of Review Case 77 25 CTBR (NS) 585:

" 'engaged' has a considerable number of various meanings but the most appropriate to the situation (wholly engaged as a housekeeper) is from the Shorter Oxford Dictionary and seems to be 'occupied' or 'employed' - but it has a wider meaning than employed. "

Similarly in R. v. Savvas (1955) 1 S.A.L.R. 452: "engage in a trade" was wider than being fully occupied and could relate to part time participation.

These are peripheral decisions, but they emphasise the dictionary concepts that a person does not engage in an activity unless he devotes a period of his time to it - not full time, but more than a brief encounter.

As has been so often said a word must be construed in the context in which it is used. To engage in the selling of land means more than to decide to sell and thereafter complete the transaction in a straight forward way. It could mean devoting some substantial time to achieving and perfecting a sale. Even without the association of the words with following provisions contained in the proviso to Section 11(e) which the Court of Review took into account we are of the view that what the respondent did here did not amount to engaging himself in the sale of land.

He had previously been given some idea of the value of his property. He had declined offers. He came to Fiji to live on the property. Persuasive forces determined otherwise and he decided he must sell and doubtless issued the appropriate instructions to his

agent to take the necessary steps to conclude a sale. One can only speculate how little time may have been involved in putting the decision into action, but it could easily have been of the briefest duration. Such documents as are on file indicate a prompt transaction. In these circumstances it would be contrary to the meaning we have discussed to say he engaged himself in the sale of land.

We do not wish however to be taken as saying that the phrase necessarily involves a plurality of dealings. One transaction may be quite complicated. It may require the vendor to devote himself and his energies to the transaction for such period of time as to lead one to say that he was so much occupied as to be engaged.

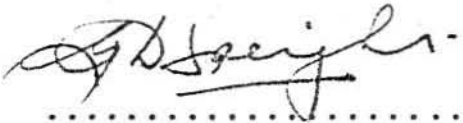
But there is no justification for so holding in the present circumstances. The appeal is dismissed with costs to the respondent.



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VICE PRESIDENT



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JUDGE OF APPEAL



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JUDGE OF APPEAL