IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 51 of 1982

Between:

MARINE MANAGEMENT Appellant

- and -

DEPUTY COMMISSIONER INLAND REVENUE Respondent

K.R. Handley Q.C. and G.M.J. Johnson
for Appellant
Grace H. Fong for Respondent

Date of Hearing : 12th, 13th July, 1983
Delivery of Judgment : 28.7.83

JUDGMENT OF THE COURT

O'Regan, J.A.

This is an appeal from a judgment of the Supreme Court allowing an appeal from a decision of the Court of Review against the disallowance by the Commissioner of Inland Revenue of an objection by the appellant to an assessment of income tax payable for the year ending 31st May 1980.

The findings of fact made by the Court of Review were adopted by the Supreme Court and are accepted by Counsel. It is on the basis of such that we consider the questions of law which fall for decision.

Those findings, as recorded in the judgment of the Court of Review are as follows :

> " Blue Lagoon Cruises Ltd. is a company operating out of Lautoka and conducts tours throughout the Yasawa Islands off Western Viti Levu. It is a public company, but 53.3% of its shares are held by a company called Fairmile Enterprises Ltd. (which I shall hereafter refer to as "Fairmile"). That was a company wholly owned by Claude Ivan Millar who had founded Blue Lagoon Cruises Ltd. (which I shall call "Blue Lagoon") and his family, who thus controlled Blue Lagoon. In 1978 Millar wanted to retire and David Neale Wilson and Stanley Harold Quigg became interested in buying his interest in Blue Lagoon. Wilson was a tour and marketing agent and was interested in two companies already operating in Fiji, New Zealand Pacific Marketing Ltd. and Tapa Tours Ltd., and Quigg was an engineer, at that time managing Air Pacific Ltd. on secondment from Qantas, but about to leave Air Pacific and return to Qantas. The two of them negotiated with Millar and eventually they agreed to buy Fairmile for $800,000, which would thus give them control of Blue Lagoon. To enable them to finance this arrangement, they formed a company called Marine Management Ltd. with a capital of $500,000 in $1 shares, of which 210,000 were issued, one each to Wilson and Quigg, 125,999 to New Zealand Pacific Marketing Ltd. in which Wilson held all but one of the issued shares, and $3,999 to a concern called Cantabrian Trust which was controlled by Quigg. They arranged for Marine Management Ltd. to borrow $600,000 from the Bank of New South Wales, which sum together with $200,000 put up by the shareholders of Marine Management Ltd. enabled that company to complete the purchase of Fairmile. It should perhaps be said that both Wilson and Quigg realised that the talents of both of them would be fully utilised for some time in the management of Blue Lagoon, and they intended that Blue Lagoon shoud pay a substantial management fee to Marine Management Ltd. Accordingly when, with the

acquisition of Fairmile, Wilson and Quigg came into a position where they became directors of Blue Lagoon, and the former chairman, one of the first actions of the directors was to engage Marine Management Ltd. to manage Blue Lagoon and to pay that company a fee of 7½% of the gross receipts of Blue Lagoon, with a ceiling of $130,000. That sum has now been paid for two years, although for the first year, since Blue Lagoon's financial year goes from 1st June to 31st May, and the management fee became payable only from 9th August 1978, only that proportion from 9th August to 31st May, 1979 was paid.

When Marine Management Ltd. caused its accounts to be prepared, it showed among its expenses a sum of $57,778 which had been paid as interest to the Bank of New South Wales in respect of the loan of $600,000, to which I have previously referred. The Commissioner of Inland Revenue disallowed the deduction. Marine Management Ltd. objected, and the Commissioner disallowed the objection. Marine Management Ltd..... thereupon appealed to this Court."

We note in passing that the total of the four parcels of shares said to have been issued is 80,000 less than the total said to have been issued. Nothing, however, turns on that.

In its notice of appeal to the Court of Review the appellant put its appeal on the grounds that the deduction of the interest paid was not excluded as a deduction "by S. 19(f) (or any other provision) of the Income Tax Act 1974." It's original letter of objection had stated that the ground of objection that the interest was "not excluded by S. 19(f) of the Act or any other paragraph under S.19." By subsection 6 of S.61 of the Income Tax 1974 it was (unless leave to the contrary was obtained) limited to the grounds stated in the objection. In the event, the issues on the appeal to the Court of Review were whether or not there was authority for the disallowance of the deduction under paragraphs (b), (f) and (h) of S. 19.

The relevant parts of S. 19 read :

"19. In determining total income, no deductions shall be allowed in respect of .....

(b) any disbursement or expense not being money wholly and exclusively laid out or expended for the purpose of the trade, business, profession, employment or vocation of the taxpayer; .....
.....

(f) any expense incurred in respect of -

(i) .....

(ii) any investment or property the income arising from which will not be included in total income or, if so included, will be exempted under section 16 or 17 of this Act, or will not be included in chargeable income under any of the provisions of this Act;
.....
.....

(h) interest, other than interest actually incurred in the production of income."

The Court of Review held that the deduction was not barred by paragraphs (b) and (h) of S. 19. And on a consideration of paragraph (f) it held that the interest (the "expense incurred") related to both the management fee received from Blue Lagoon, (which inevitably would be included in the total income of the appellant and not exempted) and dividends (to which the exemption provided by S. 17(37) applied).

It went on to hold that the paragraph operated as a partial bar to the deduction on the basis that part of the amount claimed could be allowed as a deduction as referable to non-exempt income ("the management fee") and the other part, referable to exempt income, (the dividends) and not allowed. And in the end, it made an apportionment of 50% to each category and allowed a deduction of half the amount claimed.

The company's income for the fiscal years ending on 31st May of both 1979 and 1980 are shown in the profit and loss statement for the latter year :

Income	1980	1979
	$	$
Interest	312	144
Management fee	130,000	108,333
Dividend		60,000
	130,312	168,477

The first item, interest, is of no present relevance. But it is apparent that whereas the appellant received both the management fee and the dividend in the 1979 year, it received only the management fee in the fiscal year ending 31st May 1980. The case has to do with the latter year. Accordingly, whilst the approach the Court of Review made to the matter and the considerations to which it addressed itself would not have been inappropriate if it had been considering the 1979 year, the question of apportionment of the interest could not possibly arise in the 1980 year, when the only income however arising in respect of which

the interest could possibly be claimed to be an "expense incurred" were the management fees which, as we have already remarked, clearly would have to be included in the total income.

Extraordinary as it may seem, this factor and its effect were overlooked by Counsel in both the Courts below and by the Judge in the Supreme Court and by the Court of Review. Mr. Handley, in the course of his review of the judgment of the Court of Review during his submissions on the issue of apportionment, alluded to the fact and submitted that, subject only to the question whether apportionment is legally open, the reasoning of the Court of Review on the topic was correct.

In his appeal to the Supreme Court the respondent submitted that the Court of Review erred in law in holding that the appellant's claim to the deduction was not barred in its entirety by both paragraphs (b) and (f) (ii) of Section 19 and barred as to seven-twelfths thereof by paragraph (h) of Section 19. He submitted also that the Court of Review erred in law in holding that apportionment was (i) legally permissible and (ii) factually justifiable. In his judgment Kermode J. held that the claim to the deduction was not barred by S.19(b) but was barred in toto by S. 19(f) (ii); and that because it was totally barred by that sub-paragraph (and not partly, as held by the Court of Review) the question of apportionment did not arise. He said, however, that question of apportionment had arisen he would have agreed with the Court of Review. In the circumstances there was no occasion for his giving reasons for that view and, in the event, he gave none.

As to the ground of appeal bearing on the provisions of S. 19(h), we find the easiest way to record the learned Judge's views on the matter is to quote the relevant passage from his judgment. He said :

> "I am unable to appreciate why Mr. Scott argues in the alternative that the Court should have apportioned the deduction because Section 19(h) was deleted from the Act with effect from 1st January, 1980. I do appreciate that the Section was only in force for 7 months so far as the Company's 1980 return was concerned. It appears to me that Section 19(h) only has to be considered if the interest was "not actually incurred in the production of income". Such interest was already excluded from Section 19(h) because on the facts it was interest incurred in production of income and deletion of Section 19(h) in the circumstances made no difference - - - - - -."

It is now common ground that the learned Judge misconceived the real significance of the reference to seven-twelfths in this submission. If the claim was barred at all by S. 19(h), the bar operated for only 7 months of the fiscal year, that is until 1st January 1980 at which date the repeal of that paragraph took effect. And it seems to us that it was implicit in the respondent's submission that he allowed that, if its contention that paragraph (h) was a bar was upheld, then it applied only to seven-twelfths of the amount.

The ground for the appeal to this Court is that the Supreme Court "erred in fact and law, or proceeded on a wrong principle in finding that interest paid on the loan was independent of income derived from management fees and thus not an expenditure incurred in the course of the production of that income and accordingly that the appellant's claim for a deduction was barred in its entirety by Section 19(f) (ii) of the Income Tax Act 1974".

Despite the wording of the notice, an appeal lies on a point of law only.

The respondent gave notice of his desire to contend on the appeal that the learned Judge in the Supreme Court erred in holding that Section 19(b) did not wholly debar and S. 19(h) did not partially debar the deduction sought.

In opening the case for the appellant, Mr. Handley informed us that the appellant now accepts that paragraph (h) of S. 19, while it remained in force, operated to disallow the claim for deduction and that accordingly the appellant no longer disputed that part of the respondent's notice of contention. And he submitted, paragraph (h) having been repealed with effect from 1st January 1980, that for the remaining five months of the 1980 fiscal year it was only paragraphs (b) and (f) which posed any threat to the success of the claim for deduction. The concession now made, narrows the ambit of the appeal. It now relates only to the period from 1st January to 31st May 1980, in respect of which the appellant seeks a restoration of the decision of the Court of Review that the claim to deduction was partially barred by paragraph (f) (ii) and confirmation by this Court of the decision of the Court of Review, approved as it was by the Supreme Court, that the amount of the interest could be apportioned and that one half of the claim should be allowed. And if those submissions are upheld the practical effect will be that the appellant will be allowed a deduction of $12,037 being five-twelfths of half the total amount of the original claim of $57,778, and, of course, will be allowed the deduction in the same basis in future years.

In the two judgments delivered in the Courts below references were made to a great many cases dealing, in some instances, with statutory provisions in other jurisdictions similar to those which are of present concern and in other cases with kindred provisions markedly dissimilar from such. No doubt, those factors, to some extent at least, influenced if not dictated, the course of events in this Court. In the result, we, too, were referred to a great number of cases of the kinds just referred to and learned Counsel for the respondent submitted to us a comparative table of the relevant statutory provisions in various parts of the Commonwealth and South Africa and an excursus on the comparative law on the relevant topics.

We acknowledge that it was the fruit of great industry and while we found it helpful in our consideration of the case we did not overlook to remind ourselves that before availing ourselves of the aids of such material and such cases, our first duty was to construe that statutory provisions in accordance with the primary canons of construction. As Richardson J. recently put it, in Lowe v. Commissioner of Inland Revenue (1981) 1 N.Z.L.R. 326, at p. 342:

> "..... interpretation .....
> ..... must turn on the scheme and language of the statutory provision giving the words their ordinary meaning in their context."

And we have recalled with profit the classic statement of Rowlatt J. (so frequently acknowledged by Judges of great name and high station as a Judge with outstanding knowledge of this subject) in the Cape Brandy Syndicate v. The Commissioners of Inland Revenue (1921) 1 K.B. 64, at p. 71:

> ".....in a taxing statute you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax: there is no presumption as to a tax: you read nothing in: you imply nothing, but you look fairly at what is said and what is said clearly and that is the tax."

and earlier in the same page, in referring to a maxim which had been referred to an argument:

> "It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts."

And so we proceed. We find it convenient to deal with the issues arising on the appeal and on the respondent's notice pursuant to Rule 19 of the Court of Appeal Rules in the order in which they find source in Section 19 of the Act.

Should the deduction of interest be disallowed by virtue of paragraph (b) of Section 19?

Section 19(b) so far as it is applicable, reads:

> "In determining total income no deduction shall be allowed in respect of .....
>
> (a) .....
>
> (b) any disbursement or expense not being money wholly or exclusively laid out or expended for the purpose of the business ..... of the taxpayer."

Construing those words, in their ordinary meaning we hold them to mean that the interest, "the disbursement of expense" - will not be disallowed if it is expended

solely for the purpose of the appellant's business. The Shorter Oxford Dictionary - 1972 Revised Edition, gives the words "wholly" and "exclusively" as synonyms; "Wholly" to mean "entirely so as to exclude everything else; hence practically = exclusively, solely only"; and "exclusively" to mean "in an exclusive sense or manner, solely".

In our view therefore paragraph (b) means that interest paid will not be disallowed as a deduction if it is paid solely for business purposes. The interest was paid to service the mortgage, to keep it current and thereby to give the appellant continued use of the capital sum it had borrowed for the purpose of purchasing its holding in Fairmile Enterprises Limited. Those moneys remained so invested during the fiscal year in question. The purchase of the shares was the lynch pin to all enterprises upon which the company wished to embark and did embark. All in all, we think it beyond peradventure that the interest on the mortgage was an expense "wholly and exclusively expended for the purpose of the appellant's business" and that both the learned Judge in the Court below and the Court of Review reached the correct conclusion on the question.

Should the deduction of interest be disallowed by virtue of paragraph f(ii) of Section 19?

Section 19 (f)(ii), so far as it is presently relevant, reads:

> "In determining total income, no deduction shall be allowed in respect of .....
> .....
>
> (f) any expense incurred in respect of -
>
> (i) .....

(ii) any investment or property the income arising from which will not be included in the total income or, if so included will be exempted under Section 16 or 17 of this Act or will not be included in the chargeable income under any of the provisions of this Act."

We have already adverted to the fact that consideration of this provision in both Courts below proceeded on the basis that "the investment or property" had produced by way of income in the fiscal year in question, both the management fee paid by Blue Lagoon Cruises Limited and dividends from Fairmile Enterprises Limited. But, as we have seen, there were no dividends received by the appellant in that year.

In our view, paragraph (f) does not admit of the same approach in the construing of it as does paragraph (b). In the latter, the focus placed on "purpose" gave room for consideration of all the facts found by the Court of Review as to the motives and intentions of the founders of the Company and, indeed, the inferences to be drawn from such facts - see Usher's Wiltshire Brewery Limited v. Bruce (1915) A.C. 443 per Lord Summer at 466 and Ure v. Federal Commissioner of Taxation (1981) 11 A.T.R. 484 per Deane and Sheppard JJ at p. 495. In paragraph (f)(ii), however, the key words are "investment or property" which do not admit of such a wide inquiry. First must be identified the investment or property of the company with which we are to concern ourselves if the paragraph is to be of application. And when we address ourselves to this question we find that the only possible investment by the appellant in respect of which the interest was incurred is the investment in the capital of Fairmile Enterprises and the only possible property is the parcel of shares in that company. And, indeed the respondent in both the Courts below and in this Court has so allowed. He has allowed also that the expense

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incurred by the appellant in the form of interest accruing on the loan obtained to buy the shares was in respect of an "investment" or "property".

The crucial question is whether the management fee was "income arising from" such investment or property.

The Court of Review did not address itself to the question in that form but it is clear from its finding that in its opinion the answer was in the affirmative. And indeed that is implicit from the following passage in which it linked the expenditure of interest with the management fee. The passage reads :

> "In my view the expense on the expenditure of interest is related to the production of two matters of income, the management fee and the dividends, in the sense that if there had been no loan and consequently no expenditure for interest, there would have been no management fee and no dividends. "

And that passage indicates also that the Court of Review considered there was sufficient nexus between the investment made with the loan moneys and the management fee to enable it to conclude that the fee had arisen from the investment.

Kermode J. in the Supreme Court took a narrower view of the matter. His view was that the investment played no direct or relevant part on earning the management fee and that the fee was solely derived from the management activities of the company.

We think that the learned Judge was right. In our view the question is concluded by the decisions of the Court of Appeal in Lawrence v. Accident Insurance 7 Q.B.D. 216 in which the Court followed Winspear v. Accident Insurance 6 Q.B.D. 42. Both cases have to do with the construction of the words "arising from" in exceptions in policies of insurance but we are of the opinion that the construction placed upon the words is of general rather than particular application. In the Lawrence case the phrase for consideration was "in case of death arising from fits" and the facts were that the insured had fallen from a railway platform on to the rails whilst in a fit and whilst lying there was accidentally run over by a train and killed. The insurer submitted that it was a case of death arising from a fit. That submission was rejected and in rejecting it Watkin Williams J. prayed in aid the maxim in jure non remota causa sed proxima spectatur and cited Lord Bacon's translation and paraphrase of it with these words :

> "It seems to me that the well known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable in this case. Lord Bacon's language in his maxims of the law, Reg. 1 runs thus :-
>
> 'It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause.'

And he went on :

> Therefore I say according to the true principle of law, we must look at only the immediate and proximate cause of death and it seems to me to be impracticable to go back to cause upon cause which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened - - - - - - - - - - - - - - - - - - It is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and

> immediate cause - - - - - - - - - -
> and it is not the less so because
> you can show another cause intervened
> and assisted in the causation."

Denman L.J. held that the fact that the words "arising from" had already received identical judicial construction in the case of Winspear v. Accident Insurance Co. (supra) was conclusive.

We hold, therefore, the management fee did not arise from "the investment or property" and that the claim for deduction is thus totally barred by virtue of paragraph 19(f)(ii). And, as we have already noted, the question of apportionment, on the facts, does not arise.

The remaining question in the appeal was whether the deduction was barred by paragraph (h) of Section 19. Because, however, of the concession made by Mr. Handley during the argument, that question no longer arises.

The appeal is dismissed with costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal