

-9 OCT 1956

No. 55 of 1946. INSTITUTE OF ADVANCED  
LEGAL STUDIES

44437

In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA.

A BETWEEN  
BERESFORD W. BOYD . . . . . *Appellant*,  
AND  
THE ASSESSMENT COMMITTEE, EXCESS PROFITS  
TAX . . . . . *Respondent*.

B **CASE FOR THE APPELLANT.**

RECORD.

1. This is an appeal from a Judgment dated the 3rd September, 1945, given by the Court of Appeal (Hearn, C.J., Savary and Tracey Watts, J.J.) in answer to a question raised upon a Case Stated by Mr. Justice Carberry (an acting judge of the Supreme Court), and which  
C dismissed, pursuant to such answer, an appeal of the Appellant against two Assessments to Excess Profits Tax made upon him by the Respondent (under Section 23 of the Excess Profits Tax Law 65 of 1941) in respect of (i) the sum of £83 for the chargeable accounting period ending the  
31st December, 1940, and  
D (ii) the sum of £1,118 for the chargeable accounting period ending the 31st December, 1941.

2. The question for decision in this appeal is as to whether in assessing the Appellant to Excess Profits Tax, the remuneration derived by the Appellant (who is resident in Jamaica and (*inter alia*) carries on there  
E the business of an insurance broker) from his activities in relation to the World Marine and General Insurance Co. Ltd. of Cornhill, London (hereinafter called "the Company"), falls to be included (as the Respondent contends) in computing the receipts of such business of an insurance broker for the purposes of Excess Profits Tax, or as to whether in relation  
F to the Company the Appellant (as he contends) in fact occupied during the accounting periods in question the position of an agent or underwriting manager appointed for the purpose of carrying on the business of the Company in Jamaica with the result that such remuneration was

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not a receipt or profit of any trade or business carried on by the Appellant and was therefore not liable to be included in any return made by the Appellant of his profits for the purpose of Excess Profits Tax. No question of figures arises in the case.

3. The Appellant does not dispute that in respect of his activities, A other than those connected with the Company, he carries on a trade or business and that such trade or business falls within the charge to Excess Profits Tax.

4. The following provisions of the Excess Profits Tax Law 65 of 1941 are relevant to this appeal :— B

“ 3.—(1) This Law shall apply to all trades or businesses of  
“ any description carried on in the Island, or carried on whether  
“ personally or through an agent by persons ordinarily resident  
“ in the Island.

“ (2) All trades or businesses to which this Section applies C  
“ carried on by the same person shall be treated as one trade or  
“ business for the purposes of this Law.

“ (3) For the purposes of this Section :—

“ (a) The carrying on of a profession by an individual  
“ or by individuals in partnership shall not be deemed to be D  
“ the carrying on of a trade or business if the profits of the  
“ profession are dependent wholly or mainly on his or their  
“ personal qualifications :

“ Provided that for the purpose of this sub-section the  
“ expression ‘ profession ’ does not include any trade or E  
“ business consisting wholly or mainly in the making of  
“ contracts on behalf of other persons or the giving to other  
“ persons of advice of a commercial nature in connection  
“ with the making of contracts.

“ (b) . . . . .

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“ 4.—Where the profits arising in any chargeable accounting  
“ period from any trade or business exceed the standard profits,  
“ there shall, subject to the provisions of this Law, be charged  
“ on the excess a tax (to be called ‘ the excess profits tax ’) equal  
“ to one-third of the excess. G

. . . . .

“ 6.—(1) The profits arising from a trade or business in the  
 “ standard period or in any chargeable accounting period shall,  
 “ subject to the provisions of this Section, be computed on income  
 “ tax principles adapted in such manner as may be prescribed.

RECORD.  
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“ 14.—(1) The excess profits tax payable in respect of any  
 “ chargeable accounting period shall be assessed on the person  
 “ carrying on the trade or business in that period.

“ (2) . . . . .

B

“ (3) . . . . .

“ (4) Where any person liable to assessment under the  
 “ provisions of this Law in respect of the profits arising from a  
 “ trade or business in any chargeable accounting period is not  
 “ resident in the Island, an assessment may be made upon any  
 “ agent, manager, or factor, resident in the Island through whom  
 “ the trade or business was carried on in that period.”

C

5. The Appellant, feeling himself to be aggrieved by the above-mentioned Assessments, which had been made by the Assessment Committee, appealed against the Assessments to the Judge in Chambers pursuant to Section 23 of the Excess Profits Tax law before mentioned. The appeal was heard by Mr. Justice Carberry in Chambers on the 1st and 5th July, 1943, and on the 31st July, 1943, the learned Judge, having heard evidence, gave a written judgment dismissing the appeal with costs fixed at 12 guineas. A copy of the Judgment is printed in the Record.
6. On the 6th August, 1943, the Appellant applied for the Statement of a Case, pursuant to Section 23, subsection (8), of the Excess Profits Tax Law 65 of 1941, for the opinion of the Court of Appeal, and, on the 23rd November, 1944, Mr. Justice Carberry duly stated a case to which a copy of his judgment was attached. A copy of the Case Stated is printed in the Appendix.

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7. The facts, stated by Mr. Justice Carberry as having been proved before him, are set out in paragraphs 6 (1) to (13) of the Case Stated, and are as follows :—

(1) The Appellant for several years prior to 1925 was an Insurance Agent. In relation to his activities as such he held a Power of Attorney as the Local Attorney and Agent of the Company.

G

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p. 8.

(2) Prior to 1925 the Appellant was Attorney and Agent for three other Insurance Companies but in the year 1925 he ceased to hold these offices and as no real relationship was subsequently entered into with any of them these facts do not affect the question involved.

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p. 8.

(3) In the year 1925 the Appellant became seriously embarrassed financially and the Company and the other three Companies mentioned above cancelled their Powers of Attorney and determined his Agency.

(4) Thereafter arrangements were made for the continuance B of the business of the Company in Jamaica.

p. 18.

(5) On the 27th October, 1925, the Company appointed J. S. Webster & Son (hereinafter referred to as Webster's) their local Attorneys.

(6) On the 31st day of October, 1925, Webster's addressed a C letter to the Company relating to the appointment of the Appellant as Underwriter for the Company. The letter is as follows :—

“ October 31st, 1925.

p. 9.

“ THE UNDERWRITER,

“ THE WORLD MARINE & GENERAL INSURANCE Co., LTD., D

“ 50, CORNHILL,

“ LONDON, E.C. 2.

“ DEAR SIRs,

“ MARINE AGENCY.

“ In connection with our appointment as the Marine Agent E of Your Company in Jamaica we agree to engage B. W. Boyd as the Underwriter in connection with the Agency business and to pay him the balance of Agency Commission and Office allowance received month by month, after retaining a sum of £15 13s. 4d. per month for our services. It is understood that profit commis- F sions, if any, will be payable to B. W. Boyd. The appointment of B. W. Boyd will not be cancelled or the terms of his appointment (as set out above) varied without reference to you.

“ Yours faithfully,

(Sgd.) “ J. S. WEBSTER & SONS.” G

(7) On the 14th of September, 1926, the Company and Webster's reduced the Agency Agreement into writing. RECORD.  
p. 21.

A (8) From the year 1925 the Appellant had in fact continued in the position of "Underwriter" created in the circumstances above set out and for at least the past twenty-five years the principal source of the Income of the Appellant had been commissions paid to him by the Company. p. 9.

B (9) In 1940 and 1941 the Appellant's income derived from the Company was £1,510 and £3,879 respectively. During the said years his income from other insurance work as hereinafter explained was £181 and £229. p. 9.

(10) The Appellant's activities throughout the whole period consisted :—

C (A) of work done as a result of the arrangements between himself and the Company above set out ;

(B) of work done in placing Insurance risks through Brokers and other Companies,

both of which activities are hereafter more particularly described.

D (11) The Appellant's relations between himself, the Company and Webster's and the manner in which the work is performed were and are as follows :

E (A) In the years 1940 and 1941 the Company held a Licence under the Stamp Duty Law to do Insurance business in Jamaica and the Appellant held a similar Licence in his own name. pp. 24, 26, 27.

F (B) At the commencement of the Agreement and up to the year 1936 Webster's provided the Appellant with an office. Webster's then received and still continue to receive £200 as their remuneration, a payment described in one letter as "rent," by which the Appellant explained, was meant rent of the name of Webster's. This amount was at one time reduced to £120 per annum. p. 10.

G (C) Since the year 1936 the Appellant has provided his own office and appointed and paid his own staff. In the relevant period he rented an office at 17A, Duke Street, at an annual rental of £64 10s., and his office staff cost him in p. 10.

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1940 £185 11s. and in 1941 £347 17s. 6d. The Company pays the Appellant a sum of £150 per annum towards his office expenses, and this sum was paid to the Appellant even during the period when Webster's, without charge, furnished the Appellant with office space. A.

(D) The Appellant is supplied by the Company with Stationery Forms and books of Account to enable him to do the Company's business. The Appellant in fact did keep separate accounts for that business. He is also supplied with Insurance Certificates for the Company and Forms of Policies. A space is provided in the Certificates and in these forms for the Appellant's signature and he is described in the Certificate as the Local Underwriter. Specimens of the Forms and of the Letter-heads are attached as a part of this Case and together numbered 6. B C

pp. 30, 31, 32.

(E) All Commissions earned by the Agency are payable to the Appellant less a sum of £200 per annum which is payable to Webster's as their remuneration. Webster's keep a separate account for the Company and the Appellant pays all premium receipts to this Account and cheques in payment of claims are paid out of the said accounts. D

(F) Nearly all the actual business of the Company is transacted by the Appellant. Webster's have the power to supervise his actions and are expected to maintain financial control. Persons desiring Insurance apply to the Appellant, and if the risk is one which the Company accepts the Appellant prepares and signs a Policy and collects the premium. The Appellant submits to Webster's for their signature the Insurances thus negotiated for the Company which they actually complete by signing. They have never refused to complete a contract negotiated by the Appellant. The Appellant in the regular course of his activities adjusts claims and arrives at settlements in respect thereof. If the matter requires to be referred to the Company the Appellant communicates directly with them and abides by their instructions. G

When the final amount to be paid has been determined the Appellant draws a cheque for signature by Webster's and forwards it with the necessary supporting vouchers and they complete the cheque and payment is made.

p. 10.

A (g) Where the risk was of a kind usually accepted by the Company the Appellant would always deal with the matter by writing up the Policy of Insurance, countersigning it as Local Underwriter and forwarding it to Webster's, who signed it as Attorney for the Company. Expenses for cables and correspondence with the Company in connection with this work are refunded by the Company to the Appellant.

(12) The Appellant's other Insurance activities arise in the following manner :—

B (A) Where a risk applied for is not one which the Company would accept the Appellant offers it to another office. This he does by issuing a cover note on behalf of a London broker, when the risk is of a type that the Broker is always able to place. If the Appellant is in doubt whether one of the  
C London Brokers with whom he is in touch would be able to place the risk he communicates with the Broker by cable and when the matter is arranged he issues a cover note under the name of the Broker with whom he is dealing including if he knows it the name of the Insurance Company with whom  
D the risk has been placed. The Appellant also effects similar business with Local Insurance Companies.

(B) The Policy covering the risk placed with the London Broker is forwarded to the Appellant by the Broker to be delivered to the person who is insured. The Appellant had  
E no authority to adjust claims in connection with these Insurances.

(c) The Appellant's remuneration from work of this sort is derived by sharing the commissions with the Broker through whom he arranged the matter.

F (13) The Appellant used his office and his staff for all his activities. Neither the Company nor Webster's had control of the office or the staff or the hours of work of the Appellant. The Appellant was not entitled to leave nor was he a pensionable  
G officer of the Company. The Appellant in fact stated " I am my own master."

8. At the hearing before Mr. Justice Carberry it was contended on p. 11. behalf of the Appellant :—

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(A) That there was a distinction between the work done for the Company and the other work of the Appellant.

p. 6.

(B) That the Appellant was an employee or agent of the Company and that he was carrying on in respect of those activities not his own business, but the business of the Company and that the Company was in fact liable to tax as carrying on business in Jamaica. A

(C) That the Brokerage business carried on by the Appellant and his employment with the Company are so distinct and different that they cannot be said to be "a trade or business." B

(D) That the method of payment, i.e. by commissions, does not exclude the possibility of the Appellant being a servant.

p. 11.

9. It was contended on behalf of the Respondent :—

(A) That the evidence does not show that the Appellant was strictly a servant of the Company since— C

(1) his activities on behalf of the Company are inconsistent with those of a mere servant or agent ; and

(2) his remuneration depended solely upon the amount of business which he did ; and

(3) he was not subject to the direction and control of the Company ; and D

(4) he maintained his own office and employed his own staff.

(B) That there was no internal division of his activities and that the activities on behalf of the Company were not severable from his other activities, that in fact they were all activities of the same nature and constituted a single business which was the Appellant's business. E

p. 12.

10. The decision of Mr. Justice Carberry and the question for the opinion of the Court of Appeal are set out in Paragraph 16 and 17 of the Case Stated, and are expressed as follows :— F

" (16) I came to the conclusion :—

(A) That the Appellant was not an employee or Agent of the Company.



A (B) That there was no substantial difference between what the Appellant did with regard to the Company and what he did with regard to the London Brokers. In both cases the Appellant placed Insurance risks through an agent with an Insurance office. In the case of the Company he placed the risk through Webster's, the agent of the Company, and in the case of other risks through the London Brokers who act as his agent in placing the risks.

B (c) That the Appellant carried on a single trade or business of an Insurance Broker."

C " (17) ' The question for the opinion of Court is whether upon the facts found as set out by me I was justified in coming to the conclusion that the Appellant carried on the trade or business of an Insurance Broker so as to be liable to Excess Profits Tax under the provision of Sections 3 and 4 of Law 65 of 1941 in respect of all his activities.' "

11. The appeal by way of Case Stated came on for hearing before the Court of Appeal on the 10th, 11th, and 27th July, 1945, and on the last mentioned day the Court of Appeal delivered a combined judgment pp. 12-16. D dismissing the appeal.

12. By a formal entry of judgment dated the 3rd September, 1945, the Court of Appeal ordered and adjudged :—

" (1) That the question contained in the paragraph numbered p. 16. " 17 of the said Case Stated be answered in the affirmative.

E " (2) That the Appellant pay the taxed costs of the Respondent of the Appeal."

13. The Court of Appeal, after referring to the provisions of Section 3 of the Excess Profits Tax Law 65 of 1941, was of opinion that it was clear that to be assessable to tax the trade or business must be carried F on by the person on his own account. They held that there could be no doubt that the Company knew that the Appellant was doing the actual work in connection with its business in Jamaica, but that there was nothing to indicate the extent, if any, to which the Company considered it was entitled to his services, exclusive or otherwise, in connection G with marine insurances. The Court was of opinion that the reason for the change made by the Company was clear enough, and that after the

RECORD. Appellant got into difficulties the Company determined to put a responsible firm, Webster's, in control of the funds collected locally, the Appellant continuing the actual work of the agency. They held, however, that while the course of dealing of the Appellant was to hand over to the Company all insurance risks likely to be accepted by it, this was done as a matter of business for his own benefit and not by reason of any obligation he owed to the Company. Reliance was placed on the statement made by the Appellant in his evidence when he said "I am my own master." The Court further held that the question was largely one of fact, that Mr. Justice Carberry was correct on the facts before him in drawing an inference adverse to the Appellant, and that the Appellant in respect of all his activities was carrying on the business of an insurance agent on his own account.

14. It is respectfully submitted that the decisions of the Court of Appeal and of Mr. Justice Carberry that the Appellant, in respect of all his activities, was carrying on the business of an insurance agent on his own account, and that he was not a person appointed on behalf of the Company to carry on its business of marine insurance in Jamaica, are against the weight of the evidence, and erroneous in law.

15. The conclusion of Mr. Justice Carberry that the Appellant was not an agent of the Company was erroneous in the light of the evidence before him. The Appellant had been engaged or appointed as the Company's underwriter in connection with its agency business by Webster's who had power to appoint the Appellant under the Power of Attorney given to them by the Company; alternatively, the Appellant was appointed by Webster's with the approval of the Company.

Likewise, the learned Judge erred in holding that there was no substantial difference between the activities of the Appellant in and about the Company's business and his activities in relation to the business of the other persons for whom he acted. It is submitted that the extent of the powers and the nature of the activities and duties of the Appellant in relation to these two classes of activity and their consequences in law were not noticed or distinguished, whereas they show that substantial differences existed which involve a conclusion on the case different from that as expressed by the learned Judge in paragraph 16 (c) of the Case Stated.

16. The view expressed by the Court of Appeal, that it was necessary for the Appellant's success to find that in fact or in law he was under

an obligation (1) to give his exclusive services to the Company, and (2) to hand over to it all marine risks offered, and that he was under no such obligation is, it is submitted, erroneous. The fact that the Appellant was not a whole time employee of the Company does not lead to the conclusion that he could not therefore be carrying on the Company's business as their agent or sub-agent. And the evidence shows that it was the invariable practice of the Appellant at all relevant times both to accept marine risks for the Company where the risks were such as the Company was in the habit of accepting, and to offer to another insurer only such marine risks as the Company did not usually accept or did not in fact accept. All the business done by the Company was marine Insurance. The business done by the Appellant through English brokers included marine, fire and lightning risks.

From a date several years prior to 1925 down to the year 1944, the Appellant had been in business relationship with the Company as to its marine insurance business in the course of which, it is submitted, he would have become well aware of the kind of marine risk that the Company accepted as a matter of course on the Appellant's underwriting without reference to the Company. And it is submitted that the inference may properly be drawn, and should have been drawn, that the Company in 1925 would not have agreed to the Appellant resuming his activities as its own underwriter, save on the footing that he was underwriting for the Company all such risks as he knew were acceptable to it, and that he would only offer to other offices risks which in fact he knew, or found, that the Company would not accept.

17. It is further submitted that the written agreement between Webster's and the Company (dated nearly one year after the letter of 31st October, 1925) and the evidence as to what was done by Webster's thereunder show that the activities of Webster's were (1) (as is stated in the judgment of the Court of Appeal) limited to a general control of the funds of the Company collected locally, and (2) were limited to the formal signature by Webster's, as agents of the Company, of the documents relating to the business of the Company, submitted to them by the Appellant as its underwriter for that purpose (for which activities Webster's were to receive a small fixed remuneration of £200 per annum). Moreover, the evidence shows that the actual business of the Company, in relation to the type of marine insurance risks which the Company was prepared to accept, was to be, and was, managed and carried on by the Appellant on behalf of the Company as theretofore, he having presumably

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the necessary experience in the complicated and specialized field of marine insurance—a subject matter in which, so far as the evidence goes, Webster's had no specialized knowledge at all.

18. It is further submitted that the Appellant was not (as was found by the learned Judge—approved by the Court of Appeal) in the position of a “broker” in relation to the business of the Company, but that in relation to such business he was the agent of the Company alone, *vis-à-vis* the assured, as is evidenced (*inter alia*) by the “Certificate of Insurance” supplied by and issued on behalf of the Company, the printed heading of which Certificate shows the Appellant as “Local Underwriter,” and such Certificate also shows that it was required to be countersigned by the Appellant as “Local Underwriter.” Further, every policy issued by the Company in relation to its Jamaican business was required to be subscribed as having been examined by the Appellant as “Local Underwriter.” Also, all premiums and other monies relating to the business of the Company were paid by the Appellant into Webster's special bank account to the credit of the Company, and the Company paid to the Appellant all remuneration due to him by way of commission and also a proportion of his office expenses. Further, the Appellant in the regular course of his activities on behalf of the Company adjusted claims and arrived at settlements. It is submitted that the activities of the Appellant, as agent or manager, in relation to the Company, whose actual business he was in fact carrying on in Jamaica, fall to be distinguished from his other minor activities in relation to such marine insurance risks as were not acceptable to the Company and to the fire and lightning risks (being risks outside the scope of the business of the Company) which the Appellant effected as “broker” in the manner set out in paragraph 6 (12) of the Case Stated, and which admittedly constitute a business carried on by the Appellant on his own account.

19. It is further submitted that the statement made by the Appellant, and referred to by the Court of Appeal, namely, “I am my own master,” ought to be taken in its context, i.e. that it was made in relation to his hours of work and holidays, and that such freedom from control is sufficiently explained by the practical necessity of allowing the Appellant to use his own judgment in these respects, since the head office of the Company was in London.

20. On the 17th September, 1945, the Appellant obtained leave from the Court of Appeal to appeal from the said Judgment and Order of the Court of Appeal to His Majesty in Council.

21. The Appellant humbly submits that the Order of the Court of Appeal should be reversed and the Assessments discharged for the following among other

RECORD.

## REASONS.

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|---|---|
| A | 1. Because the learned Judge was wrong in drawing from the evidence before him an inference adverse to the Appellant, and the learned Judges in the Court of Appeal were wrong in agreeing with the inference so drawn. There was no evidence upon which such inference could properly be drawn; alternatively  |
| B | the inference drawn was against the weight of the evidence.   |
|   | 2. Because a valid assessment, under Section 3 (1) and (2) of the Excess Profits Tax Law 65 of 1941 can only be made in relation to a trade or business or to trades or businesses carried on, on his own account, by a person ordinarily resident in the Island.   |
| C | 3. Because in managing and carrying on the business of the Company in Jamaica, the Appellant was not carrying on a trade or business on his own account.  |
|   | 4. Because the liability (if any) of the Appellant to Excess Profits Tax could only arise in respect of the profits arising from his other (and minor) activities as a "Broker," that being the only  |
| D | trade or business carried on by him on his own account.   |
|   | 5. Because where, as here, the activities of the taxpayer include activities, and the accounts of the taxpayer comprise items, not attributable to any trade or business carried on by him on   |
| E | his own account, and where, as here, the accounts are easily capable of dissection, such accounts should be adjusted so as to exclude any items not referable to the taxpayer's trade or business. (Cf. <i>C.I.R. v. Maxse</i> (1919) 1 K.B. 64 C.A.: 12 Tax Cases 41 in relation to U.K. Excess Profits Duty.) |
| F | 6. Because the judgments of the Court of Appeal and of Mr. Justice Carberry are wrong and ought to be reversed.   |

CYRIL L. KING.

J. H. BOWE.

**In the Privy Council.**

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**ON APPEAL**

FROM

**THE COURT OF APPEAL OF JAMAICA**

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BETWEEN

BERESFORD W. BOYD,

*Appellant*

AND

**THE ASSESSMENT COMMITTEE, EXCESS  
PROFITS TAX,**

*Respondent*

---

**CASE FOR THE APPELLANT.**

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