

~~P.S.~~
~~1966.2~~

Judgment
28, 1966

i.

IN THE PRIVY COUNCIL

No.31 of 1965

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA.

B E T W E E N:

THE COMMISSIONER OF INCOME TAX

Appellant

- and -

HANOVER AGENCIES LIMITED

Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
<u>INCOME TAX APPEAL BOARD</u>			
1.	Notice of decision of Commissioner of Income Tax	5th January 1962	1
2.	Notice of Appeal	24th January 1962	2
3.	Decision	1st May 1963	3
<u>IN THE SUPREME COURT OF JAMAICA</u>			
4.	Summons to Judge in Chambers	30th May 1963	6
5.	Notice and Grounds of Appeal	May 1963	7
6.	Statement of Facts and Determination of Income Tax Appeal Board	18th June 1963	13
7.	Judgment	18th October 1963	16

64 T.C. 2

87100

ii.

No.	Description of Document	Date	Page
	<u>IN THE COURT OF APPEAL JAMAICA</u>		
8.	Notice of Appeal	11th November 1963	17
9.	Judgment	18th December 1964	
	(a) Waddington, J.A.		18
	(b) Duffus, P.		29
	(c) Henriques, J.A.		44
10.	Order	19th December 1964	47
11.	Order Granting Final Leave to Appeal to Her Majesty in Council	23rd July 1965	48

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

24 APR 1967

25 RUSSELL SQUARE
LONDON, W.C.1.

E X H I B I T

Exhibit Mark	Description of Document	Date	Page
1.	Memorandum of Association	3rd October 1947	50

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL
BUT NOT REPRODUCED

Description of Document	Date
<u>INCOME TAX APPEAL BOARD</u>	
Proceedings	6th & 20th February 1963
<u>IN THE SUPREME COURT OF JAMAICA</u>	
Judges Notes	18th October 1963
<u>IN THE COURT OF APPEAL JAMAICA</u>	
Affidavit of Service of Notice of Appeal	11th November 1963

Description of Document	Date
Affidavit in Support of Application for Leave to Appeal to Her Majesty in Council	7 January 1965
Application for Leave to Appeal to Her Majesty in Council	8th January 1965
Order Granting Conditional Leave to Appeal to Her Majesty in Council	8th February 1965
Registrars Certificate of Compliance	10th August 1965

DOCUMENT NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Document	Date
Exhibit 2 - Articles of Association of Hanover Agencies Limited	-

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
24 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

87100

IN THE PRIVY COUNCIL

No. 31 of 1965

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA.

B E T W E E N:

THE COMMISSIONER OF INCOME TAX

Appellant

- and -

HANOVER AGENCIES LIMITED

Respondent

RECORD OF PROCEEDINGS

No. 1

Income Tax
Appeal Board

No.1

NOTICE OF DECISION
OF COMMISSIONER OF INCOME TAX.

Notice of
Decision of
Commissioner
of Income Tax
5th Jan.1962.

10

Registered Post

File 2803

5th January 1962.

NOTICE OF DECISION

Sir,

Income Tax Objection Year of
Assessment 1960 Hanover
Agencies Limited

20

Pursuant to the provisions of Section 50(6) of the Income Tax Law, Law 59 of 1954, I hereby give you notice of my decision in respect of your objection as follows :-

"that the Assessment No.12087/A14/142 made on your Company for Year of Assessment 1960 is hereby varied to a Chargeable Income of £836.

2.

Income Tax
Appeal Board

No.1

Notice of
Decision of
Commissioner
of Income Tax
5th Jan. 1962.
(Cont.)

I have the honour to be,
Sir,
Your obedient Servant,

Commissioner of Income Tax

The Secretary,
Hanover Agencies Limited,
Lucea P.O.

c.c. Messrs. Heron, Thorburn & Co.,
7 West Avenue,
Kingston Gardens,
Kingston.

10

N.B. Please see the attached for your
guidance.

No.2

Notice of
Appeal.
24th Jan. 1962

No.2

NOTICE OF APPEAL

H.3-T/DP99

24th January 1962

The Clerk to the Income Tax Appeal Board,
40 Duke Street,
KINGSTON.

20

Dear Sir,

re Hanover Agencies Ltd. Year of
Assessment 1960 Assessment
No. 12087/A14/142

On behalf of our client, we hereby appeal
against the decision of the Commissioner of
Income Tax as contained in his letter of 5th
January 1962, which reached us on the 9th
January, 1962.

Yours faithfully,

30

(sgd) Heron, Thorburn & Co.

3.

The original of this document was left with me at 40 Duke Street, Kingston, on the day of January, 1962, at

Income Tax
Appeal Board

No.2

Clerk to the Income Tax
Appeal Board

Notice of
Appeal.
24th Jan. 1962.
(Cont.)

A copy of this document was left with me at the Income Tax Office on the 25th day of January, 1962 at 12.30p.m.

(sgnd) F.N.

for Commissioner of
Income Tax.

10

No.3

No.3

DECISION OF THE INCOME TAX APPEAL BOARD

Decision

Meeting of the Income Tax Appeal Board

1st May 1963.

Held on the 1st May, 1963.

Present were:

Sir Alfred Rennie Chairman

Mr. A.K. Butler

Mr. H.F. Barry

20

Mr. Ramon Albergga

Mr. D.W. Marsh For the Commr. of
Income Tax.

Mr. E.C. Ashenheim For the Appellant

Mr. F.S. Barrows - do -

Mr. R.G. Butler Clerk to the Board

Appeal: Hanover Agencies Ltd.

v.

Commissioner of Income Tax

Clerk: The appeal of Hanover Agencies Ltd.

Income Tax
Appeal Board

No. 3

Decision
1st May 1963.
(Cont.)

for judgment.

Mr. Ashenheim: Mr. Chairman and Gentlemen,
I apologise for the absence of Mr.
Richard Ashenheim. Unfortunately he
has acquired one of these childish
diseases, measles, which even his
children have outgrown already.

Chairman: This appeal is in respect of
premises in Lucea and it is in respect
of a claim for wear and tear in relation 10
to those premises. The appellants are
the owners of the premises which they
have rented to the bank and the first
question we have to decide is whether
or not the appellants carry on the
business of letting premises. We have
heard the evidence and the evidence
indicated that they bought out the
business of Kirkconnell Bros. and that 20
Kirkconnell Bros. carried out, or
rather, I should say rented certain
premises which they sold, first to a
partnership of which the appellants were
members; that partnership was eventually
formed into a company and it is the claim
of the company with which we are concerned.
The appellants own many premises and they
are engaged in many activities. They run
a moving picture theatre, they own and 30
operate wharves they sell merchandise and
they rent premises. The memorandum, in
our view, contains as one of its objects
the renting of premises and the renting
was not merely, or rather the provision in
the memorandum was not merely an enabling
provision. It was, in our view, one of
the objects of the company. Whether or not
the appellants were carrying on business is
a question of fact, and after considering 40
all the evidence we are - we have
unanimously come to the conclusion that
the company was engaged in carrying on a
business of letting premises. The other
matter for decision is whether the premises
were used for earning the income to enable
them to obtain wear and tear for these
premises. In the course of the hearing
the case of Hendriks and the Commissioner
of Income Tax was cited and the judgment
of the Chief Justice Furness was referred 50

to. In that case the Court held that Mr. Hendriks who succeeded to certain premises did not carry on a business and that he did not use the premises for acquiring the income.

Income Tax
Appeal Board

No.3

Decision
1st May 1963

(Cont.)

10 Mr. Ashenheim contended that the Court having decided that the premises were not - rather, that Mr. Hendriks did not carry on a business, the second part of the decision, namely, that he did not use it to acquire the income was obiter, and it's open to us to decide in the instant case that the appellants used the premises for acquiring the income. We have considered that submission and we have gone into the matter with some care and we do not agree with Mr. Ashenheim's submission that the decision is obiter - or rather, that portion of the decision is obiter dictum.

20

In coming to that - to the view we have taken, we have considered a passage, paragraph 1682 of the 22nd volume of Simon's edition of Halsbury and it is stated 'if more reasons than one are given by a tribunal for a judgment all are taken as forming the ratio decidendi'; and there is the judgment of Justice Talbot in Flower v. EbbwVale Steel, Iron & Company, 1934 2 Kings Bench 1932 but the passage that is of importance is at page 154 and there Mr. Justice Talbot made it clear that even though he did not agree with the decision he was bound by it, and it was not obiter because two reasons were given for the decision. But there is still a stronger decision, that of Lord Simon in Jacobs v. the London County Council, 1950 Appeal Cases, 361.

30 At 369 Lord Simon said, "But, however this may be there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing".

40

50

Income Tax
Appeal Board

No.3

Decision
1st May 1963
(Cont.)

But the Hendriks case is even stronger than the propositions with which I have so far dealt, because in the Hendriks case the Court was concerned with a case stated with three questions submitted to the Court. The first question was whether the appellant was carrying on business; the second, did the appellant use the premises for the purpose of acquiring the income. The Court dealt with those two questions and answered both those questions and it cannot therefore be said that the answer to the second question is obiter dictum. The appeal is accordingly dismissed.

10

In the Supreme
Court of Jamaica

No.4

Summons to
Judge in
Chambers
30th May 1963

No.4

SUMMONS TO JUDGE IN CHAMBERS

SUMMONS

Suit No. 1175 of 1963.

In the Supreme Court of Judicature of Jamaica
In the High Court of Justice.

20

BETWEEN HANOVER AGENCIES LTD. APPELLANT
AND THE COMMISSIONER OF
INCOME TAX RESPONDENT

LET ALL PARTIES CONCERNED attend the Judge in Chambers on Thursday the 25th day of July, 1963 at 10 o'clock in the forenoon on the hearing of an Appeal by the Appellant against a decision made on the 1st day of May, 1963 and dated the 8th day of May 1963 of the Appeal Board constituted under the Income Tax Law, 1954 (Law 59 of 1954).

30

DATED the 30th day of May One thousand Nine Hundred and Sixty-three.

TO: The Clerk of the Income Tax Appeal Board,
40 Duke Street,
Kingston

AND

TO: The Commissioner of Income Tax,
Income Tax Office,
Tower Street,
Kingston.

In the Supreme
Court of Jamaica

No.4

Summons to
Judge in
Chambers
30th May 1963
(Contd.)

THIS SUMMONS is taken out by MILHOLLAND,
ASHENHEIM & STONE of No.5 Port Royal Street,
Kingston, Solicitors for the abovenamed
Appellant whose address for service is that
of its said Solicitors.

10

No.5

NOTICE AND GROUNDS OF APPEAL

INCOME TAX APPEAL

Suit No. 1175 of 1963.

No.5

Notice and
Grounds of
Appeal
May 1963 (Cont.)

In the Supreme Court of Judicature of Jamaica
In the High Court of Justice.

BETWEEN HANOVER AGENCIES LTD. APPELLANT
AND THE COMMISSIONER OF INCOME TAX RESPONDENT

20

FACTS

This is an Appeal against a decision of
the Income Tax Appeal Board made on the 1st
day of May, 1963 and dated the 8th day of
May, 1963 affirming a previous decision of
the Respondent disallowing a claim by the
Appellant for an allowance representing wear
and tear on buildings at premises known as
"The Bank Building" in Hanover rented by the
Appellant to tenants.

30

The Appellant owns a number of buildings
in the Parish of Hanover which from time to
time it rents to various tenants.

In 1944 Messrs. Stanley DeLisser,
William DeLisser, Clifford DeLisser and

In the Supreme
Court of Jamaica

No. 5

Notice and
Grounds of
Appeal

May 1963 (Cont.)

Oscar DeLisser purchased a business being carried on in Lucea in the Parish of Hanover under the name of Kirkconnell Bros. and carried on the said business under the name of Kirkconnell Bros. Successors. At that time Kirkconnell Bros. was engaged in business in Hardware, Lumber, Wharves and the renting of premises. After the acquisition as aforesaid Kirkconnell Bros. Successors engaged in the said lines of business and expanded the lines of business engaging in dry goods, a cinema, building blocks, wholesale provisions, insurance agencies.

10

In or about 1945 Kirkconnell Bros. Successors acquired the said premises known as "The Bank Building" in Hanover from the said William DeLisser. At that time there were buildings on the said premises. Firstly, there was an old building of little value which was taken down and a cinema was constructed in its place. A second building was rented by the said Kirkconnell Bros. Successors to one Moseley. The third building was rented to various tenants by one room at a time. Subsequently, the aforesaid second building was rented by Kirkconnell Bros. Successors to Barclays Bank D.C.O. Prior to the rental by Barclays Bank D.C.O. alterations were made to the said building at the Bank's request by Kirkconnell Bros. Successors. Subsequently the said building was pulled down and a new building was erected by Kirkconnell Bros. Successors in accordance with designs and plans submitted by Barclays Bank D.C.O. who agreed to rent the building after completion. The said building was erected specially for the said Bank and when the building was constructed the said Bank leased it.

20

30

In 1947 a Company named Hanover Agencies Ltd., was incorporated under the Companies Law for the purpose (inter alia) of acquiring and taking over as a going concern the business carried on in partnership by the said Clifford DeLisser, Oscar DeLisser, Stanley DeLisser and William DeLisser under the style of Kirkconnell Bros. Successors.

40

Barclays Bank D.C.O. at all times subsequently has continued to rent the

aforesaid building from the appellant. The building referred to above at all times has been rented by the appellant to various tenants. The said Cinema has continued to be operated by the appellant.

From time to time the appellant has acquired other premises as follows :-

In the Supreme
Court of Jamaica

No.5

Notice and
Grounds of
Appeal

May 1963 (Cont.)

- 10 (a) In or about 1947 the appellant acquired a building known as the Producers Building, Hayward Wharf (now known as 15A, Main Street) in Lucea aforesaid. At the time of the said acquisition the building was rented to the Jamaica Banana Producers Association and after the said acquisition the said Jamaica Banana Producers Association remained in occupation as the tenant of the appellant. About four or five years ago the said Jamaica Banana Producers Association ceased their banana interest in Lucea and gave up its tenancy of the said premises since when the building has been occupied by the Appellant.
- 20
- (b) In or about 1947 the Appellant acquired a shop building at Hayward Wharf (now known as 22, Main Street) which at the time was rented to one Wong Sue. After the purchase by the Appellant Wong Sue continued to occupy the building as tenant of the Appellant. Since the acquisition by the Appellant as aforesaid the premises have always been rented by the Appellant and is at present rented by the Appellant to one William Campbell.
- 30
- (c) At the time of acquisition of Kirkconnell Bros., by the partnership the said partnership acquired as part of the acquisition premises known as a bar upstairs the present dry goods and Jubilee Wharf (now known as 3A Main Street). At the time the premises were rented and Kirkconnell Bros. Successors continued to rent the premises. The premises have at all times subsequently
- 40

In the Supreme
Court of Jamaica

No.5

Notice and
Grounds of
Appeal

May 1963 (Cont.)

- been rented either by Kirkconnell Bros. Successors or since 1947 by the Appellant. The premises are at present used as a dwelling house which is rented by the Appellant to one Findlayson.
- (d) 3B, Main Street which is the downstairs of the building referred to in (c) above was acquired at the same time as the building referred to in (c). It was rented by the Appellant in 1949 to one R. Jackson but has been occupied by the Appellant for the past four or five years. 10
- (e) The Appellant purchased 29 Main Street in 1947. At the time the premises were rented to one Alfred Watt who continued as the tenant of the Appellant. The premises are at present rented by the Appellant to one Mrs. Bauldie.
- (f) At the time of the acquisition from Kirkconnell Bros. the partnership acquired 2A, Main Street. In 1953 the premises were rented by the Appellant to one Palmer. For the past two years the premises have been occupied by the Appellant. 20
- (g) The Appellant purchased 31, Main Street in 1953. At the time the premises were rented to one Jackson and subsequently were rented by the Appellant to a lady named Hogg and is at present rented by the Appellant to one Miss Johnson. 30
- (h) The Appellant purchased 30A, Main Street in 1954. At the time the premises were rented to one Scarlett and is at present rented by the Appellant to one Mrs. Bauldie.
- (i) The Appellant purchased 28, Main Street in 1957. The building was rented to Mrs. Bauldie who is at present the tenant of the building, from the Appellant. 40

At the hearing before the Appeal Board the Appellant contended that it was engaged in the business of renting premises from which it derived income and that consequently it was using the premises for earning the said income

and consequently was entitled to wear and tear in respect of the premises rented.

In the Supreme Court of Jamaica

No.5

Notice and
Grounds of
Appeal
May 1963 (Cont.)

10 The Appeal Board held that it was a question of fact whether the Appellant was carrying on the business of renting premises and that the Appellant was on the facts carrying on such a business, but that in view of the interpretation placed upon the word 'used' by the Court of Appeal in Hendriks vs. Assessment Committee 4 J.L.R.60 a landlord who let premises which he did not occupy was not entitled to an allowance for wear and tear in respect of such premises. The Board further held that it was bound by the decision in Hendriks vs. Assessment Committee. The Appeal Board accordingly dismissed the Appellant's appeal.

GROUND OF APPEAL

20 TAKE NOTICE that the following are, inter alia, the Grounds of Appeal on which the Appellant will rely at the hearing of the Appeal :-

- (1) That the Appeal Board was wrong in holding that the landlord who is carrying on the business of renting premises is not entitled to a wear and tear allowance in respect of those premises.
- 30 (2) That the interpretation placed upon the word 'used' by Section 8 (c) of the Income Tax Law by the Appeal Board is too narrow and is incorrect.
- (3) That in Law, a person who carried on the business of renting premises is using the said premises for the purpose of acquiring their income.
- (4) That the Appeal Board was wrong in holding that the word 'used' meant 'occupied'.
- 40 (5) That the Appeal Board was wrong in holding that it was bound by the dictum used by the Court of Appeal in the case of Hendriks vs. Assessment Committee. That the said dictum did not bind the Appeal Board but was either obiter dictum or alternatively, was per incuriam and was not a part of the ratio

In the Supreme
Court of Jamaica

No.5

Notice and
Grounds of
Appeal
May 1963 (Cont.)

decidendi of the case. In the further alternative, the said dictum was based upon the language of Section 9 (3) of the Income Tax Law, Cap. 201 of the Revised Laws of Jamaica, 1938 Edition and the Appeal Board was wrong in applying the said dictum to the language of the Income Tax Law, 1954.

RELIEF SOUGHT

- (1) THAT the decision of the Appeal Board made on the 1st day of May, 1963 and dated the 8th day of May, 1963 referred to above be set aside. 10
- (2) THAT the Appellant be allowed a wear and tear allowance in respect of the premises claimed.
- (3) THAT the Respondent do pay to the Appellant the costs of and incident to the hearing of the appeal to this Honourable Court. 20
- (4) Such further or other relief as this Honourable Court may deem just.

DATED this day of MAY 1963.

Solicitors for the Appellant

TO: The Clerk to the Income Tax Appeal Board,
40 Duke Street,
Kingston.

AND

TO: The Commissioner of Income Tax,
Income Tax Office,
Tower Street,
Kingston. 30

FILED by MILHOLLAND, ASHENHEIM & STONE of No.5
Port Royal Street, Kingston, Solicitor for the
abovenamed Appellant.

STATEMENT OF FACTS AND DETERMINATION OF
INCOME TAX APPEAL BOARD

STATEMENT SETTING FORTH THE FACTS AND THE
DETERMINATION OF THE INCOME TAX APPEAL
BOARD

Statement of
Facts and
Determination
of Income Tax
Appeal Board
18th June 1963
(Cont.)

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

Suit No. M.17A of 1963

10 BETWEEN: Hanover Agencies Limited Appellants
AND The Commissioner of Income Tax Respondent

On the 24th day of January, 1962, the Appellants gave notice of appeal to the Income Tax Appeal Board against the decision of the Respondent dated the 5th day of January, 1962, in connection with assessment No. 12087/A14/142.

20 2. The matter came on for hearing before the Appeal Board on the 6th and 20th days of February, 1963, the Board being comprised of Sir Alfred Rennie (Chairman), Messrs. H.F. Barry, R.D. Alberga and A.K. Butler. The Appellants were represented by Mr. R.Ashenheim and the Respondent by Mr. D.W. Marsh of Counsel.

3. Upon the conclusion of the arguments the Board reserved its judgment.

30 4. The facts of the case in so far as they relate to the quantum of the Appellants' income were not in dispute. There was, however, a dispute as to whether the Appellants carried on a business of letting premises. Oral evidence was given by one witness and two exhibits tendered by the Appellants and lodged herewith were received in evidence.

5. On the 1st day of May, 1963, the Appeal Board gave its decision. The decision was unanimous.

In the Supreme 6. The Appeal Board found the following
Court of Jamaica facts:-

No.6
 Statement of
 Facts and
 Determination
 of Income Tax
 Appeal Board
 18th June 1963
 (Cont.)

(i) The Appellants are a Limited Liability Company having as one of its objects the acquiring of freehold property and also having as an object the leasing of all or part of the Company's property;

(ii) The Company was incorporated in 1947 to take over and carry on a business which was then carried on and known as Kirkconnell Brothers Successors. This Business which up to 1944 was carried on and known as Kirkconnell Brothers was purchased in that year by the principal shareholders of the Appellant Company;

10

(iii) Kirkconnell Brothers' business included that of merchants dealing in hardware and lumber, that of operating a wharf and of letting premises to tenants;

(iv) Their successors increased the range of the business by adding to it that of drygoods merchants, picture house proprietors, building blocks, manufacturers, wholesale provision merchants and insurance sub-agency;

20

(v) In 1945 Kirkconnell Brothers Successors purchased three buildings, one of which was taken down and a picture theatre built in its place; a second was tenanted, later altered and tenanted and subsequently pulled down, rebuilt and tenanted to Barclays Bank; the third was tenanted to a number of tenants;

30

(vi) Since 1947 the Appellants have purchased and tenanted the following premises in the town of Lucea:-

(a) Producers Building purchased in 1947

(b) 22 Main Street purchased in 1947

(c) 29 Main Street purchased in 1947

(d) 30A Main Street purchased in 1954

(e) 31 Main Street purchased in 1956

(f) 28 Main Street purchased in 1957

7. The Appellants submitted that the evidence established that they were carrying on a business of letting premises and that the premises were used by the Appellants for the purpose of acquiring the income within the meaning of Section 8 (o) of the Income Tax Law, 1954 (Law 59 of 1954). They submitted further that the construction of the word 'used' by the Court in Hendriks and The Assessment Committee, 4 J.L.R. 60, is obiter dictum since the Court had already decided that Hendriks was not carrying on a business of letting premises.

10

8. The Respondent relied on the decision in Hendriks v. The Assessment Committee.

9. The Appeal Board came to the conclusion that the Appellants carried on the business of letting premises but felt themselves bound by the decision in the Hendriks case and construed the word 'used' as it was construed in that case with the result that the appeal failed.

20

Certified that the foregoing contains a statement of the facts and determination of the Income Tax Appeal Board herein.

Dated this 18th day of June, 1963.

Clerk to the Income Tax Appeal Board.

TO: The Registrar of the Supreme Court, Kingston

30

and

Messrs. Milholland, Ashenheim & Stone,
5 Port Royal Street, Kingston

and

The Commissioner of Income Tax, Kingston.

Filed by the Clerk to the Income Tax Appeal Board, 40 Duke Street, Kingston.

In the Supreme Court of Jamaica

No.6

Statement of Facts and Determination of Income Tax Appeal Board
18th June 1963
(Cont.)

In the Supreme
Court of Jamaica

No.7
Judgment
18th Oct. 1963.

16.

No.7
JUDGMENT

INCOME TAX APPEAL

FORMAL JUDGMENT

Suit No. 1175 of 1963

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

Appeal from a Decision of the Income Tax
Appeal Board issued on the 8th day of May, 1963.

BETWEEN: HANOVER AGENCIES LTD. APPELLANT 10
AND THE COMMISSIONER OF
INCOME TAX RESPONDENT

On this Appeal coming before His Honour
Mr. Justice Shelley on the 18th October 1963,
in the presence of Mr. David Coore, Q.C. for
the Appellant, and Mr. Dermot Marsh of Counsel
for the Respondent, it was ordered that the
Appeal be dismissed. No Order as to Costs.

DATED this day of 1964.

TO: The Registrar of the Supreme Court, 20
Public Buildings (East)
Kingston.

AND

TO: Messrs. Milholland, Ashenheim & Stone,
5 Port Royal Street,
Kingston.

FILED by THE LEGAL OFFICER to the INCOME TAX
DEPARTMENT, Tower Street, Kingston.

No.8

In the Court of
Appeal Jamaica

NOTICE OF APPEAL

No.8

Suit No.1175 of 1963 C/A 37

Notice of Appeal
11th Nov. 1963.

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

BETWEEN: HANOVER AGENCIES LTD. APPELLANT

AND THE COMMISSIONER OF
INCOME TAX RESPONDENT

10 TAKE NOTICE THAT the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Appellant on Appeal from the Order herein of the Honourable Mr. Justice Shelley made at the hearing of this Appeal from the Income Tax Appeal Board on the 18th day of October 1963 whereby it was ordered that the said Appeal be dismissed. For an order

(i) That the decision of the Appeal Board made on the 1st day of May 1963 be set aside.

20 (ii) That the Appellant be allowed a wear and tear allowance in respect of the premises which were the subject of the said Appeal.

(iii) ~~That~~ there be such further or other relief as may be just.

AND FURTHER TAKE NOTICE that the Grounds of this Appeal are :-

30 1. The Appeal Board having found as a fact that the Appellant was carrying on the business of renting premises the Appellant was in law entitled to a wear and tear allowance in respect of such rented premises.

2. On the proper construction of Section 8(o) of the Income Tax Law - Law 59 of 1954 the said premises were used by the owner thereof for the "purpose of acquiring the income" from a business carried on by such owner, to wit the Appellant.

In the Court of
Appeal Jamaica

18.

No.8
Notice of Appeal
11th Nov. 1963.
(Cont.)

3. In so far as the case of Hendriks v. Assessment Committee 4 J.L.R. 60. purports to decide contrary to the Appellant's contention herein the said decision is wrong in Law and should not be followed.

DATED this Eleventh day of November 1963

Milholland, Ashenheim & Stone
Solicitors for the abovenamed Appellant

TO: The Clerk of the Income Tax Appeal Board,
40 Duke Street,
Kingston.

10

AND

TO: The Commissioner of Income Tax
Income Tax Office,
Tower Street,
Kingston.

SETTLED:
David Coore Q.C.
8/11/63

FILED by MILHOLLAND, ASHENHEIM & STONE of No.5
Port Royal Street, Kingston, Solicitors for the
Appellant.

20

No.9

NO.9

Judgment
18th Dec. 1964.
(a) Waddington
J.A.

JUDGMENT

In the Court of Appeal

Supreme Court Civil Appeal

No. 37 of 1963

BEFORE: The Hon. The President
The Hon. Mr. Justice Henriques
The Hon. Mr. Justice Waddington

BETWEEN: HANOVER AGENCIES LIMITED APPELLANTS

AND COMMISSIONER OF INCOME TAX RESPONDENT

30

10th, 11th, 12th, 15th, 19th
22nd, 23rd June and 18th December,
1964.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(a)Waddington JA.
(Cont.)

WADDINGTON, J.A.:

10 The appellants claim to be entitled to an allowance for wear and tear under Section 8(o) of the Income Tax Law, Law 59 of 1954 in respect of a building known as the "Bank Building" situate at Lucea in the parish of Hanover, owned and rented out by them, for the year of assessment 1961.

20 The appellant-company was incorporated as a limited liability company in the year 1947 for the purpose of acquiring and taking over as a going concern, a business carried on in partnership by Clifford DeLisser, Oscar DeLisser and Stanley DeLisser, under the name or style of Kirkconnell Brothers Successors. The objects of the company as stated in its memorandum of association included the acquisition of freehold property and the leasing of all or part of the company's property.

30 At that, Kirkconnell Brothers Successors carried on a business in hardware, lumber, wharves, renting of premises, dry goods, a cinema, building blocks, wholesale provisions and insurance agencies. They owned several premises in Lucea which were rented to various tenants, including the "Bank Building", which had been specially erected in accordance with designs and plans submitted by Barclays Bank D.C.O. to whom the building was leased and who still occupied the building as tenants of the appellants.

40 After the acquisition of the business of Kirkconnell Brothers Successors, the appellant-company continued to rent the various premises acquired from Kirkconnell Brothers Successors and acquired several additional premises which they also rented out.

In these circumstances, the appellants claimed that for the purpose of ascertaining their chargeable income for the year of assessment 1961 there should be deducted a reasonable amount for exhaustion, wear and tear

In the Court
of Appeal
Jamaica

No.9

Judgment
18th Dec.1964
(a)Waddington
J.A.
(continued)

in respect of the "Bank Building" in accordance with Section ' (o) of the Income Tax Law, Law 59 of 1954, Section 8 (o) reads as follows :-

"8 - For the purpose of ascertaining the chargeable income of any person there shall be deducted all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income.....
and such disbursements and expenses may include.....

10

(o) a reasonable amount for exhaustion, wear and tear of any building or structure used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him:.....

The appellants' claim was rejected by the respondent, and on an appeal to the Income Tax Appeal Board, the Board held as a question of fact that the appellants were carrying on a business of letting premises but, following the decision of the former Court of Appeal in Hendriks v. (Income Tax) Assessment Committee /1941/ 4 J.L.R.60, held that the premises were not used for the purpose of acquiring the income. The appellants appealed to a Judge in Chambers from the decision of the Income Tax Appeal Board that the premises were not used for the purpose of acquiring an income, and, by agreement between the parties, that appeal was dismissed without a hearing on the merits with a view to the matter being argued at length before this court.

20

30

In this court, it was contended on behalf of the appellants that on the proper construction of section 8 (o) of the Income Tax Law the premises were used by the appellants for the purpose of acquiring the income, and the Appeal Board having found as a fact that the appellants were carrying on a business of letting premises, they were in law entitled to a wear and tear allowance in respect of these premises. It was contended that the decision in the case of Hendriks v. (Income Tax) Assessment Committee, supra, was wrong in law and should not be followed.

40

In pursuance of an undertaking given by counsel for the appellants on the hearing of the appeal before the Judge in Chambers, counsel for the respondent was permitted to argue that the finding of the Appeal Board that the appellants were carrying on a business of letting premises, was wrong in law.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964
(a)Waddington
J.A. (Cont.)

Two questions fall for consideration in this case, namely:-

10 (1) Was the Appeal Board wrong in law in finding, on the facts before it, that the appellants were carrying on a business of letting premises.

(2) If the answer to the above question is in the negative, was the "Bank Building" used by the appellants for the purpose of acquiring the income from the business carried on by them.

20 Dealing with the first question, it was contended on behalf of the respondent that the negotiation of leases and the collection of rents did not constitute the carrying on of a trade or business. Reliance for this contention was placed on the Hendriks case, supra, and on Fry v. Salisbury House Estate Ltd. [1930] A.C.432.

30 In the Hendriks case, the appellant made a claim for an allowance in respect of exhaustion, wear and tear, similar in every respect to the claim in the instant case, in respect of four premises which he had inherited from his father and which were rented out to tenants. Furness, C.J. said, at page 64 :-

40 "In what sense can the appellant be said to be carrying on a business? He inherited four properties from his father in 1937, namely: 72 Princess Street bought by his father in 1923, 121 Water Lane bought in 1929, 120 Harbour Street bought in 1933 and 85. King Street bought in 1936. We are told that 72 Princess Street was leased to A.L. Darrell deceased during 1937 and then to the Standard Liquor Store under a monthly tenancy in 1938. We are also told that 72 Princess Street was equipped by the landlord with the usual fixtures of

In the Court
of Appeal
Jamaica.

No.9

Judgment
18th Dec.1964
(a)Waddington
J.A.(Contd.)

shelves and counters and necessary
sanitary conveniences and was used as a
mineral water factory and liquor store.
Rent was paid monthly by the tenants;
rates, taxes and insurance were paid by
the landlord and, in 1938, the landlord
spent £3.5s.0d. on painting and repairing
the roof. If the appellant's father had
only bought and owned 72 Princess Street,
it would, to my mind, be absurd to contend 10
that the letting and management of this
property in the manner described first by
the appellant's father and then by the
appellant amounted to the carrying on of
a business. So to hold would be to hold
that every owner of a house let to a tenant
was carrying on a business in respect of
that house though he only performed the
ordinary functions of a landlord. Maybe,
if a Company had been genuinely formed for 20
the express purpose of acquiring and letting
72 Princess Street the Company could be
said to be carrying on business for, in that
case, the Company would be formed and
organised for that very purpose. That was
not the position of the appellant and his
father. The appellant's father, no doubt,
bought 72 Princess Street as a way of putting
out some of his money. Thereafter he collected
the rent and paid the rates, taxes and 30
insurance. This went on for six years before
the appellant's father bought any other
property and, so it appears to me, amounted
to no more than looking after an investment.
The three other properties were bought and
held in the same way and, in my view, the
position was not affected by the fixtures
provided in some of the premises nor by the
sub-division of the King Street property on
which stress has been laid. No doubt the 40
management of these properties has involved
repetitive acts, some book-keeping and other
activities but so does looking after most
forms of investment. Section 5 (c) of Law
55 of 1939 speaks of carrying on a trade,
business, profession or vocation. 'Business'
in this collocation of words must mean more
than looking after investments and I am
satisfied that Savary J. was right in holding
that the appellant was not carrying on a 50
business."

The decision on this aspect of Hendriks' case was based on the particular facts of that case and I do not think that the case decides that in no circumstances can the letting of premises ever constitute the carrying on of a business; moreover, the passage quoted above appears to recognise that a company genuinely formed for the express purpose of acquiring and letting premises could be said to be carrying on a business. In the instant case, the Appeal Board had this to say of the appellant's business :-

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964
(a)Waddington
J.A. (Cont.)

"The memorandum, in our view, contains as one of its objects the renting of premises and the renting was not merely, or rather the provision in the memorandum was nor merely an enabling provision.

It was, in our view, one of the objects of the company. Whether or not the appellants were carrying on business is a question of fact, and considering all the evidence we are - we have unanimously come to the conclusion that the company was engaged in carrying on a business of letting premises."

In Fry v. Salisbury House Estate Ltd., the respondent - company, which was formed to acquire, manage and deal with a block of buildings, let out the rooms as unfurnished offices to tenants. They were assessed under Schedule "A" of the Income Tax Act 1918 to income tax on the gross value of the building. The crown also claimed to make an assessment under Schedule "D" to include the rents of the offices as part of the receipts of the trade, making allowance for the tax assessed under Schedule "A". It was held that the rents were profits arising from the ownership of land in respect of which the assessment under Schedule "A" was exhaustive, and therefore could not be included in the assessment under Schedule "D" as trade receipts of the company.

It is true that Lord Warrington based his judgment on his opinion that on the particular facts of the case the company was not carrying on a trade within the meaning of Schedule "D". Viscount Dunedin, Lord Atkin, Lord Tomlin and Lord MacMillan all based their judgments on their

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964
(a)Waddington
J.A.(Cont.)

opinion that the assessment under Schedule "A" was exhaustive and did not permit of any further assessment under Schedule "D". Lord Tomlin and Lord MacMillan however, also expressed the view that the company was not carrying on a trade. With this opinion Viscount Dunedin and Lord Atkin were apparently not in agreement. Viscount Dunedin said this, at pp.446-447 :-

"..... and that the company is carrying on a business I do not doubt. The memorandum of association shows that it is."

10

Lord Atkin said at p. 458 :-

"My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under Schedule "A" cannot be said in respect of his income from land to be earning profits from 'trade'. This view appears to commend itself to some of your Lordships, I do not dissent from it, but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purpose of their trade, such as breweries in respect of their tied tenants and collieries, and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading. Personally I prefer to say that, even if they do trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Schedule "A" and not Schedule "D".

20

30

The opinions expressed by Lord Warrington, Lord Tomlin and Lord MacMillan must be viewed in the context of the comparable provisions of Schedule "A" and Schedule "D". It seems to me that what these learned Judges were saying was, that having regard to the provisions of Schedule "A", a mere receipt of rent by the company simpliciter could not thereby take the case out of Schedule "A", which undoubtedly applied, and bring it within Schedule "D", as the mere receipt of rent could not in the circumstances constitute the carrying on of a trade within the meaning of Schedule "D". It seems to me that different

40

considerations would apply if the question was merely whether a person who habitually acquires and lets property could be said to be carrying on a trade or business of letting property. In deed, in his judgment in the Court of Appeal, Slessor L.J., said [1930] 1 K.B. 304 at 331 :

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964
(a) Waddington
J.A. (Cont.)

10 "Now it is argued by the Attorney-General, as I understand his contention, that because that limited purpose of carrying on a trade is in some way necessarily connected with a pre-existing tenancy, therefore the whole undertaking of the company is in the nature of a trade. I am unable to accept that view. In so far there is a trade of lighting and heating, and cleaning, it is a separate matter; it need not be done at all. And we come back to

20 the position that when the matter is properly examined in all its aspects, we have here the ordinary relation of landlord and tenant. Therefore, so far as the facts of the tenancies are concerned, there is the normal liability to pay tax under Schedule "A". But then it is said, as I understand it, that the Company is carrying on the business of letting property. I cannot understand that contention. As

30 it seems to me, every landlord who lets out habitually more than one house or part of a house, may be said to be carrying on a business, and I would rely upon what Lord Loreburn said in *Smith v. Lion Brewery Co.* (1) in a passage which stands, whatever disagreement there may have been among their Lordships as to the general conclusion in that case: 'you cannot by saying that a man carries on the business of owning house property, shift the method of assessing that property for income tax from Schedule

40 "A" to Schedule "D".

I do not think therefore, that this case is an authority for the respondent's contention that the negotiation of leases and collection of rents do not constitute the carrying on of a trade or business. In my view, the first question posed above, must be answered in the negative.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(a)Waddington
J.A. (Cont.)

I pass now to the second question posed above.

In the Hendriks case, supra, Furness, C.J. said, at p. 65. :-

"If it could be said that the appellant was carrying on a business, then the business would consist in the letting, taking care of and managing the various premises. That business would be carried on - not on the premises in question but elsewhere, - at the appellant's office or home. It would be the appellant's office or home that would be used for the purpose of acquiring the income from the business, - not the premises themselves. The premises were used by the various tenants. The appellant, having parted with possession of them, could no longer be said to be using them within the meaning of s. 5(c) though it is true, as Mr. Manley urged, that they in fact produced the income."

10

20

It would appear from this passage that the learned Chief Justice was here equating the meaning of the word 'use' with a physical user or occupancy of the premises by the owner. To do this would, in my view, be to restrict the ordinary meaning of the word, which most dictionaries define as "the employment or application of something to a purpose".

In *Stephens v. Cuckfield Rural District Council* [1960] 2 All E.R. 716, where the question was whether land was "open land" within the meaning of the words "any garden, vacant site or other open land" in the Town and Country Planning Act 1947, S. 33(1), Upjohn, L.J., said at p. 719 :-

30

"It is the duty of the Court to interpret the language in which Parliament has thought fit to enact statutes and in particular to resolve verbal obscurities, ambiguities or grammatical difficulties and to explain the meaning of words and phrases. Authorities on rather similar words in other acts passed for entirely different purposes (such, for example, as Part 5, para. 2 of Schedule 1 to the Law of Property Act, 1925) do not assist us. In this case, however, there are no relevant

40

obscurities, ambiguities or grammatical difficulties. The sole difficulty lies in the meaning of the phrase "open land" when used in conjunction with the words "garden" and "vacant site". When Parliament uses ordinary words such as these, which are in common and general use in the English language, it seems inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context requires that some special or particular meaning should be placed on such words."

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(a)Waddington
J.A. (Cont.)

10

The learned Judge then cited with approval the observations of Somervell, L.J., in Bath v. British Transport Commission /1954/ 2 All E.R. 542, at p. 543 (a case on the interpretation of Section 25(3) of the Factories Act 1937):

20

"Where words are, as the words of Section 25(3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case".

and continued, at p. 720, *ibid* :-

30

" In our judgment, whether a piece of land is properly described as a "garden" or "vacant site" or "open land" for the purpose of the section is a question to be determined in the circumstances of each case, and the Court whose duty it is to decide it must exercise its common sense on the matter".

40

I respectfully adopt these observations. It is my view that an owner of premises who leases them is making use of these premises by employing or applying them for the purpose of letting, and it follows therefore, that if he carries on a business of letting premises then he is using the premises for the purpose of acquiring any income which he may derive therefrom. It is with regret therefore that I find myself in respectful disagreement with the decision, on this aspect of the case, of the learned judges in the Hendriks case, and I would accordingly answer the second question posed above in the affirmative.

In the Court of
Appeal Jamaica

No.9

Judgment

18th Dec. 1964.

(a)Waddington
J.A.(Cont.)

The question arises however, as to whether this court is bound by the decision in the Hendriks case. I am satisfied that this court is not bound by the decisions of the former Court of Appeal. This court was established by Section 103 of the Constitution of Jamaica as a superior court of record, and although by Section 8 of the Judicature (Appellate Jurisdiction) Law, 1962, the jurisdiction and powers of the former Court of Appeal were vested in this court, the court is separate and distinct from the former Court of Appeal, which ceased to exist on the coming into operation of the Judicature (Appellate Jurisdiction) Law, 1962. If it was possible for the two courts to exist together they would be courts of co-ordinate jurisdiction and whilst as a matter of judicial comity one court would ordinarily follow the decisions of the other neither would in law be bound by the decisions of the other. This court however, will always regard the decisions of the former Court of Appeal with the greatest of respect and as being of strong persuasive authority and will follow them unless of opinion that they are clearly wrong and that in refusing to follow them the principle of stare decisis will not be offended. Although the decision in the Hendriks case has stood for over 23 years no other case has been cited to this court, nor have I been able to find any, in which this case was followed or affirmed. In my judgment therefore, there is no uniform current of authority which would be disturbed if this court refused to follow the decision in that case and I am of the opinion that in refusing to follow that decision the principle of stare decisis would not be offended.

For the reasons stated above, I would allow this appeal. I agree with the order proposed in the judgment about to be read by the learned President.

(Sgd.) G.E. WADDINGTON

JUDGE OF APPEAL.

DUFFUS, P.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964.

(b) Duffus P.
(Cont.)

10 This appeal is from the order by Shelley, J. made on the 18th October 1963, dismissing an appeal from the decision by the Income Tax Appeal Board upholding an assessment by the Commissioner of Income Tax, whereby the Commissioner of Income Tax refused to allow to the appellant-company as a deduction the amount claimed for wear and tear in respect of a building known as "The Bank Building" situate at Lucea in the parish of Hanover, which was leased by the appellant-company to Barclays Bank Ltd. The relevant facts are set out fully in the Judgment of my learned brother Waddington, J.A. which I have read.

The appellant-company claimed the allowance for wear and tear under Section 8 (o) of the Income Tax Law, 1954, Law 59 of 1954 which provides as follows:

20 "8 - For the purpose of ascertaining the chargeable income of any person, there shall be deducted all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income
(i)
(ii)

and such disbursements and expenses may include

30 (o) a reasonable amount for exhaustion, wear and tear of any building, or structure used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him:"

40 The Appeal Board held that it was entirely a question of fact as to whether or not the appellant-company was carrying on a business by letting premises and found in favour of the Company. This finding of the Board is challenged by the Commissioner as being wrong in law. Another issue which had to be decided by the Board was whether the premises were used for the purpose of acquiring the income and on this issue the Board found in favour of the Commissioner following the decision of the former Court of Appeal in Hendriks v. (Income Tax) Assessment Committee

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

(1941) 4 J.L.R. 60 where the court held that a person performing the ordinary functions of a landlord in respect of premises owned by him is not carrying on a business in respect of those premises so as to be entitled to a deduction for wear and tear under the then Income Tax Law, Section 9(3) of Cap. 201, as amended by Section 5(c) of Law 55 of 1939, nor is he using those premises within the meaning of the Law.

Two questions arose therefore for our consideration.

10

These are -

- (1) Did the negotiation of leases and the collection of rent by the appellant-company amount to the carrying on of a trade or business by the company within the meaning of the Income Tax Law, and
- (2) If the answer to this first question was in the affirmative, can it be said that "The Bank Building" was being used by the Company for the purpose of acquiring the income from such business within the meaning of the relevant section of the Income Tax Law?

20

It is my view that in the circumstances of the instant case the decision of the Appeal Board, that the Company was carrying on a business in respect of the negotiation of leases and the collection of rents from the tenants of its various holdings, was the correct decision. What amounts to the carrying on of a business is essentially a question of fact depending on the circumstances of each particular case. I have read the careful analysis of the decision of the former Jamaican Court of Appeal in the Hendriks case and of the opinions expressed by their Lordships in the House of Lords in Fry v. Salisbury House Estate Ltd. (1930) A.C.432, which are contained in the judgment of my learned brother Waddington and it is sufficient for me to say that I concur.

30

40

There is nothing that I can usefully add to this analysis without repetition. Several other cases concerned with the interpretation of the words "business" and "trade" in various English Acts were referred to in the course of the arguments.

In The Commissioners of Inland Revenue
v. The Westleigh Estates Company, Ltd. et al
(1923) 12 T.C. 657 at p. 692, Warrington, L.J.
said :-

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

"The question is whether the Commissioners and the learned Judge were right in the conclusion at which they respectively arrive, that the Company was not carrying on any trade or business or any undertaking of a similar character.

10

.....Amongst the objects of the Company as set forth in the Memorandum of Association are those mentioned in Paragraph 3 of the Special Case Perhaps the most important is the general one which is as follows :-

'to sell, improve, repair, manage, develop, exchange, lease, mortgage, farm or work as market gardens, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the Company'.

20

In my opinion the doing of any of the things so described would certainly be the carrying on of a business. In fact the Company has acquired the property, the acquisition of which was its immediate object, and has not acquired any other. The land is coal-bearing land the bulk of it is in leases to various lessees who pay the Company rents and royalties. There are also surface leases from which rents are derived. I think the facts found by the Commissioners result in this: The Company was formed with certain objects. They have done various things in pursuit of one or other of those objects and they have thereby derived profits. I have already said that in my opinion the description of the objects is the description of a trade or business. It follows that in my judgment the company have been and are carrying on a trade or business."

30

40

There is great similarity between the object in the Memorandum of Association of The Westleigh Estates Company Limited and the object in the Memorandum of Association of Hanover Agencies Limited which is referred to at page 15 of the

In the Court of record, and reads thus :-
Appeal Jamaica

No.9

Judgment
 18th Dec.1964.
 (b) Duffus P.
 (Cont.)

"to improve, manage, cultivate, develop, exchange, let or lease or otherwise mortgage, charge, sell, dispose of, turn to account, grant rights and privileges in respect of or otherwise deal with all or any part of the property and rights of the Company".

The report of the Hendriks case (supra) does not indicate whether The Westleigh Estates case was cited to the former Court of Appeal but Warrington, L.J.'s opinion certainly gives strong support to the view expressed by Furness, C.J. when he said at page 65 -

10

"Maybe if the company had been genuinely formed for the express purpose of acquiring and letting 72 Princess Street the Company could be said to be carrying on a business for, in that case, the Company would be formed and organized for that very purpose." 20

In its finding the Appeal Board used the word "business" and not "trade". During the hearing of this appeal there was considerable argument as to the meaning of these words "trade" and "business" appearing in Section 8(o) of The Income Tax Law. It was the contention of counsel for the appellant that "business" had a wider connotation than "trade" whereas counsel for the respondent argued that the words were synonymous and if there was a difference that "trade" embraced a wider field than "business". Trade is defined in Section 2 of The Income Tax Law thus -

30

" 'trade' includes every trade, manufacture, adventure or concern in the nature of trade".

"Business" is not defined.

It is my view that the words "trade" and "business" used in Section 8(o) are not synonymous, for if they were then one or the other would be mere surplusage. I believe that the Legislature used both words for the reason that they do not necessarily mean the same thing and that the word "business" has a wider

40

connotation. I find support for this view from the judgment of Lord Wright, M.R. in *In re a Debtor, ex parte Debtor* (1936) 1 Ch. 237 which was cited by learned counsel for the appellant. This case concerned the interpretation of the words "trade or business" used in Section 125 Subsection 1 of the English Bankruptcy Act 1914 which provided -

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964.
(b) Duffus P.
(Cont.)

10 "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy Laws as if she were a femme sole."

The debtor, a married woman, had a series of speculative Stock Exchange transactions with the petitioning creditors. She disputed the petition on the ground that she was not carrying on a trade or business within the meaning of Section 125 of the Act of 1914. The Registrar held that the transactions constituted the carrying on by her of a business within the meaning of Section 125 and made a Receiving order,

Lord Wright, M.R. at p. 239, said -

30 "I think the Registrar was right in holding that these dealings constituted a business carried on by the Debtor. There is no definition of business in the Bankruptcy Acts; it is a word of wider import than "trade" which in the earlier Act was the only word used. The word business was added in order to widen the scope of the section. In this sense Scrutton, J. said in *In re a Debtor* (1927) 1 Ch. 97, 105: 'I cannot agree with the Registrar that the two words "trade" and "business" mean the same thing. The word "trade" is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with by any general definition. "Business" is a much wider term than "trade".' "

40

Learned counsel for the respondent placed

In the Court of
Appeal Jamaica

No.9

Judgment

18th Dec. 1964

(b) Duffus P.

(Contd.)

great reliance on the case of Union Cold Storage Company, Limited v. Jones, 8 T.C.725. I have read this case carefully but am unable to say that he derives any help from it as both the facts and the law in that case are distinguishable from those in the instant appeal. In the Union Cold Storage case the court was concerned with deductions claimed under the English income tax rules for insurance premiums and for wear and tear of machinery and plant which had been handed over to an American Company and which were used in foreign countries for the purpose of the American Company's trade. The Union Cold Storage Company formerly carried on business in England and abroad as dealing in cold storage but anticipating trading and financial difficulties in the great war of 1914-18 the Company gave up its foreign business and handed over that business in its entirety to the American Company. Union Cold Storage, while retaining ownership of the foreign machinery and plant, ceased to trade in the foreign countries. Pollack, M.R. in his judgment said, at p.741:

10

20

"The two items that they seek to deduct may have been wisely expended; it may have been prudent that as owners they should keep the premises insured, but what they secured by it is not a further market for their business, not an increased sale of their commodities, not an enlarged use of their services which they are prepared to render; what they have secured is an indirect result perhaps useful to, but not directly necessary to their own trade.I do not think that you can go to the remoter or indirect results for which it may be possibly useful to lay out money."

30

40

In the instant case the appellant-company owned the premises for the purpose of its business of acquiring an income from rents. This was its direct purpose. Letting of the Bank Building was in pursuance of the Company's direct business. Wear and tear of that

building was the direct result of this business. There could be nothing remote or indirect about it.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

10 For these reasons I think the decision of the Appeal Board that the Company was carrying on a business in respect of the negotiation of leases and the collection of rents was in law correct and is amply supported by the facts. Whether what was being done by the Company falls within the category of a trade or the category of a business is immaterial for the purposes of Section 8(o) but if a choice had to be made I would say that it was a business rather than a trade.

20 I turn now to the second question to enquire whether the Appeal Board was wrong in restricting the meaning of the words "used by the owner thereof for the purpose of acquiring the income from a ...business... carried on by him" to actual physical user or occupancy of the building by the owner, which was the meaning placed on those words by the former Court of Appeal in the Hendriks case. Sir Alfred Rennie, Kt. the Chairman of the Appeal Board in the course of delivering the judgment of the Board stated that he did not agree with the decision in the Hendriks case but as it was binding on the Board it had to be followed. It was strongly argued by learned counsel for the Commissioner of Income Tax that not only was the decision in the Hendriks case good law but that this Court was likewise bound thereby. As I take a different view on both points it is desirable that my reasons should be adequately stated.

30

40 Learned counsel for the appellant-company submitted that the decision of the former Court of Appeal in the Hendriks case was wrong and ought not to be followed by this Court. He summarized his arguments thus -

- (1) The ordinary dictionary meaning of the words in Section 8(o) indicated that the owner of the buildings was entitled to a deduction for wear and tear.
- (2) The history of the Jamaican Income Tax Laws showed that the original wording of the 'wear

In the Court of
Appeal Jamaica

No.9

Judgment

18th Dec.1964.

(b) Duffus P.

(Cont.)

and tear section' had been altered in a manner which indicated that the Legislature intended to give a different meaning to the section than it originally bore, and

(3) That the Privy Council had decided that the meaning of the words, "used for the purposes of" in a Taxing Statute was the ordinary dictionary meaning and not the narrow meaning of actual physical user by the owner (Newcastle City Council v. Royal Newcastle Hospital, 1959, 1 All E.R. 734) and that this Court ought to follow the Privy Council rather than the former Jamaican Court of Appeal, the decision of which, he submitted, was not binding on this Court.

10

Many cases were cited to us pro and con by both counsel but it would seem there is no case directly on the interpretation of the section which learned counsel for the respondent informed us was peculiar to the Jamaican Income Tax Law, his researches having failed to disclose similar provisions in the Income Tax Laws of any other country.

20

1. On the first submission of learned counsel for the appellant-company it appears that the dictionary meaning of the word 'use' is "The Act of using a thing for any (especially a profitable) purpose; utilization or employment for or with some aim or purpose". (Shorter Oxford English Dictionary Third Edition, p. 2325). It is my view that the owner of buildings who lets those buildings for a rent is using, utilizing or employing them for the purpose of acquiring the income to be derived therefrom, and it would be wrong to limit the natural and ordinary interpretation of the words "used for the purpose of" etc. to the actual physical occupation and user by the owner himself. If it was intended to limit the ordinary and literal meaning surely it would have been easy to indicate this.

30

40

Examination of Section 8 as a whole and certain of the subsections therein convinces me that this view must be the correct one. The section commences as follows :-

"8 - For the purpose of ascertaining the

chargeable income of any person, there shall be deducted all disbursements and expenses wholly and exclusively incurred by such persons in acquiring the income ..

In the Court of
Appeal Jamaica

No.9

Judgment
 18th Dec.1964.
 (b) Duffus P.
 (Cont.)

10 "Chargeable income" means the aggregate amount of income of any person from all sources remaining after allowing the appropriate deductions and exemptions under the Law" (Sec.2). Under Section 5(b) (ii) rents are specifically mentioned as a source of income. As rents are taken into account in arriving at a taxpayer's chargeable income the taxpayer is entitled therefore to deduct the permitted disbursements and expenses exclusively incurred in acquiring the income from such rents.

20 Section 8 then lists disbursements and expenses which may be included, some of which are dealt with in subsections, others of which are dealt with in a Schedule to the Law. Under subsection 8(c) the taxpayer may deduct "any sum expended for repair of buildings employed in acquiring the income". Learned counsel for the respondent informed us that the Commissioner of Income Tax permits an owner of buildings from which rent is derived, which are not physically occupied by him, to make a deduction for repairs of those
 30 buildings and has in fact done so in the instant case. The Commissioner likewise, we were told, permits as a deduction under Subsection 8(g) insurance premiums paid on buildings "used in acquiring the income" from rents although they are not physically occupied by the owner. These Subsections 8(c) and (g) are in pari materia with Subsection 8(o), and this being so I can see no logical reason why a different
 40 meaning should be given to the word "use" in Section 8(o) and to the words "employ" in 8(c) and "use" in 8(g).

2. I turn now to an examination of the earlier legislation. The earlier Income Tax Law, (Cap. 201 of the 1938 Revised Edition of the Laws of Jamaica, Section 9) provided -

"9. No deduction in respect of income shall

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964.
(b) Duffus P.
(Cont.)

be allowed in respect of
.....

(f) any sum expended for repairs
of premises,
employed in acquiring the
income upon which income tax
is payable beyond the sum
usually expended for the purpose
according to an average of seven
years preceding the year of
assessment.

10

Provided that a deduction in respect
of income shall be allowed -
.....

"(3)For a reasonable amount for the
exhaustion, wear and tear of
property during the preceding
year arising out of the use or
employment of such property in the
business or trade".

20

These words are very different to the words
appearing in the present Law which are quoted
earlier in this judgment. Sec. 9(f) of Cap.
201 was repealed by the Income Tax (Amendment)
(No.2) Law, 55 of 1939 and a new Section (f)
substituted therefor. Paragraph (3) of the
proviso to Section 9 was also repealed and the
following paragraph substituted :-

"(3) For a reasonable amount for
exhaustion, wear and tear of any
propertyused by the owner
thereof for the purpose of acquiring
the income from a trade, business,
profession or vocation carried on by
him during the year immediately
preceding the year of assessment".

30

In 1954, Cap. 201 and the various amending
Laws were repealed and a new Income Tax Law,
Law 59 of 1954 enacted. The 1954 Law contains
a number of provisions which were not in the
earlier Laws but in so far as it concerns the
questions raised in this appeal the new "wear
and tear" section is substantially the same as
it was after the 1939 amendment (supra). The
major change in the 'wear and tear' provisions
had been made by Law 55 of 1939. The
amendment of paragraph (3) of the proviso to

40

Section 9 had the effect of placing on the taxpayer the burden of showing that the amount claimed for wear and tear was for wear and tear of property used by the owner for the purpose of acquiring the income. Prior to the amendment the taxpayer had only to show that the amount claimed was for wear and tear of property arising out of the use or employment of such property in the business or trade.

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

The amendment also had the effect of equating wear and tear with repairs, in that the taxpayer now had to show in both cases that the amounts claimed as deductions were directly concerned with property used for the purpose of "acquiring of the income" from the property and were not merely property used in the business or trade. That this is a real distinction was shown in the case of Strong and Company of Romsey, Limited v. Woodifield, 5 T.C. 215 at p. 219 where Lord Loreburn, L.C. said,

"In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with it in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation, or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accident in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case, I think that the loss sustained by the Appellants was not

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964.
(b) Duffus P.
(Cont.)

really incidental to their trade as innkeepers, and fell upon them in their character not of traders but of householders. Accordingly, I think that this appeal must be dismissed."

The Legislature is presumed not to do anything in vain and the amendment of the section and the proviso in paragraph (3) thereof must have been intended to accomplish some change in the Law which on the face of it has been done.

10

It does not appear from the report of the Hendriks case that the earlier Income Tax legislation was enquired into or brought to the Court's attention. It is observed that only a short paragraph in the judgment was devoted to the question of use and this aspect of the matter may have been overshadowed by the finding of fact that Mr. Hendriks was not carrying on a business.

20

3. Learned counsel for the appellant-company cited to us the case of Newcastle City Council v. Royal Newcastle Hospital (1959) 1 All E.R. 734, as authority for his proposition that in a taxing statute, use of land by the owner thereof for the purpose of acquiring income ought not to be restricted to actual physical user by the owner. Learned counsel for the respondent submitted that this case was limited in its application to the particular Australian Local Government Rating Statute with which it was concerned and was of no value in interpreting the Jamaican Income Tax Law. I do not agree that it is so limited. The facts of that case are set out in the head note thus -

30

"The respondent hospital, which was a public hospital and which received patients suffering from tuberculosis, owned 291 acres of land just outside the hospital grounds. The land was still in its virgin state and was traversed by ridges and gullies, which were heavily timbered, with a good deal of underwood. The gullies were

40

steep and rough, and some of them were so steep that they were impassable. There was very little flat land. The land was vacant land and there was no evidence sufficient to establish that it was used by patients or by the nursing staff. The land had been acquired by the hospital in a series of parcels between 1926 and 1946 and it was found that the land was acquired and owned for the purposes of the hospital, i.e., to keep the atmosphere clear and unpolluted, to prevent building on the land and so act as a barrier against the approach of factories and houses, to provide quiet and serene surroundings for the patients, and to give room to expand the activities of the hospital. The appellant city council claimed that the hospital was liable to pay rates on this land. The hospital claimed exemption under the New South Wales Local Government Act, 1919, s.132 (1)(d), which exempted land belonging to, inter alia, any public hospital and which was used or occupied by the hospital for the purposes thereof."

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

It was held that -

"The hospital was not liable to pay rates on the land since it was 'used' by the hospital for the purposes of the hospital within the meaning of s.132 (1)(d), because the hospital purposely got fresh air, peace and quiet by virtue of its ownership of the land."

In delivering the judgment of the Board, Lord Denning at pp. 735-6 said -

"According to the evidence, these purposes were to keep the atmosphere clear and unpolluted; to prevent building on the land and so act as a barrier against the approach of factories and houses; to provide quiet and serene surroundings for the patients; and to give room to expand the activities of the hospital. The land was undoubtedly acquired and owned for those purposes. But was it used or occupied for those purposes? That is the question.

In the Court of
Appeal Jamaica

No.9

Judgment

18th Dec.1964.

(b) Duffus P.
(Cont.)

Their Lordships are of opinion that it was used for those purposes. Counsel for the city council submitted that an owner of land could not be said to use land by leaving it unused; and that was all that had been done here. There Lordships cannot accept this view. An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he has acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh air, peace and quiet, which are no mean advantages to it and its patients. True it is that the hospital would get the same advantages if the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous, or at any rate outside the control of the hospital. Here they are intended, and that makes all the difference."

This case illustrates that use of land by its owner depends on the purpose for which he owns it and does not necessarily entail actual physical use thereof. It also explains the meaning of the words "used for the purposes thereof" which are almost the same as the words "used for the purpose of" in Sec. 8(o). This case was decided by the Privy Council some fourteen years after the Hendriks case and in my view the two cases cannot be reconciled. The Privy Council is the final Court of Appeal for Jamaica and the Jamaican courts must follow its decisions unless they can be clearly distinguished.

This brings me to the matter of stare decisis - Is this Court bound to follow the decision of the former Court of Appeal, even

IN THE PRIVY COUNCIL

No. 31 of 1965.

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA.

B E T W E E N:

THE COMMISSIONER OF INCOME TAX

Appellant

- and -

HANOVER AGENCIES LIMITED

Respondent

R E C O R D O F P R O C E E D I N G S

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
London, W.C.2.

Solicitors for the Appellant.

LINKLATERS & PAINES,
Barrington House,
59-67 Gresham Street,
London, E.C.2.

Solicitors for the
Respondent.

though it is satisfied that that decision was clearly wrong? The former Court of Appeal of Jamaica was a part of the Supreme Court of Judicature (vide Cap. 178 Sec 3(1) and the judges who constituted the Court of Appeal were any three judges of the Supreme Court sitting together (Cap. 178 Sec.4(1). The jurisdiction of the former Court of Appeal was considerably reduced when its jurisdiction to hear appeals from the Supreme Court was transferred to the Federal Supreme Court of the Federation of The West Indies which was established by the West Indies (Federation) Order in Council 1957.

In the Court of Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(b) Duffus P.
(Cont.)

The Federation of the West Indies was dissolved by The West Indies (Dissolution and Interim Commissioner) Order in Council 1962 and the jurisdiction previously vested in the Federal Supreme Court was vested for a short period of transition in the British Caribbean Court of Appeal.

The Federal Supreme Court and the British Caribbean Court of Appeal were therefore the immediate predecessors of this Court.

The present Court of Appeal was constituted by The Constitution of Jamaica made by Her Majesty on the 23rd July 1962, who, in the same instrument revoked the appointment of the British Caribbean Court of Appeal as a Court of Appeal for Jamaica. By Law 15 of 1962 which came into operation on the 5th day of August 1962 the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day were vested in this Court, and the Court was also given all the powers, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958.

The present Court of Appeal is a completely new Court of Appeal for independent Jamaica and is not part of The Supreme Court or any other Court. It derives its jurisdiction and powers initially from the Constitution. Its judges are not the judges of the Supreme Court.

This Court of Appeal does not consider itself bound by a decision of these earlier Courts of Appeal which existed when Jamaica was

In the Court of
Appeal Jamaica

No.9

Judgment

18th Dec.1964.

(b) Duffus P.

(Cont.)

a colony and had not yet attained the status of an independent nation. It will however regard the decision of those Courts with the utmost respect and will only depart therefrom if it is satisfied that such decisions were clearly wrong.

In the instant case all three members of this Court are satisfied that the decision in the Hendriks case was wrong and ought not to be followed. Following the language used by the Privy Council in *Chisholm v. Hall* (1959) 7 J.L.R. 164 at p. 178, there has not been in our judgment any such uniform current of authority as would be required to justify us in departing from our own views on the true meaning and interpretation of Sec. 8(o) of The Income Tax Law, 1954, in deference to the principle of stare decisis which in our judgment has no application here.

10

20

I would therefore allow this appeal and order:

- (i) That the decision of the Appeal Board made on the 1st day of May 1963 be set aside.
- (ii) That the appellant-company be allowed a wear and tear allowance under Sec. 8(o) of the Income Tax Law, 1954, in respect of the premises the subject of the appeal, and
- (iii) That the appellant-company have the costs of this appeal and the costs in the court below.

30

(Sgd) H.G.H. Duffus.

PRESIDENT

(c) Henriques, HENRIQUES, J.A.
J.A.

I am grateful to learned counsel for the appellant and for the respondent for the manner in which they have presented their arguments to the court. We have had the advantage of a full and able argument on both sides. Though

40

the argument has lasted a considerable time, there are, in fact, only three questions which the court is being asked to determine -

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec. 1964.
(c)Henriques,
J.A. (Cont.)

1. Was the finding of the Income Tax Appeal Board that the appellant was carrying on a business whilst engaged in the letting of premises wrong in law?
- 10 2. Assuming that that finding was correct, were the premises used for the purpose of acquiring the income from the business carried on by them?
3. Is this court bound by a decision of a former Court of Appeal?

20 In order to support this contention under the first question the respondent relied on the case of Hendriks v. Income Tax Assessment Committee, 4 J.L.R. 60, and the decision in the House of Lords in England in Fry v. Salisbury House Estate Ltd. 1930 A.C.432. It was held in the Hendriks' case that a person performing the ordinary functions of a landlord in respect of premises owned by him was not carrying on a business in respect of those premises so as to be entitled to a deduction of wear and tear under S.9(3) of Cap. 201 as amended by S.5(c) of Law 55 of 1939, (now paragraph (o) of S.8 of Law 59 of 1954) nor is he using those premises within the meaning of that Section. It is important to remember that Hendriks' case was decided on the particular facts then before the Court, and it seems to me that that case does not go so far as to lay down that in no circumstances can the letting of premises constitute the carrying on of a business. There is support for this view in the judgment, and indeed it is stated that a company genuinely formed for the express purpose of the acquisition and lease of premises may be said to be carrying on a business.

40 In Fry v. Salisbury House Estate Ltd. 1930 A.C. 432 the learned Law Lords were divided in their opinions on the question whether the company could be said to have been carrying on a business. The majority view was that having regard to the provisions of Schedule A, the mere receipt of rent by itself did not remove the case from Schedule A and place it under Schedule D, as the

In the Court of
Appeal Jamaica

No.9

Judgment
18th Dec.1964.
(c) Henriques,
J.A. (Cont.)

mere receipt of rent could not in the circumstances constitute the carrying on a trade within Schedule D. I am satisfied that that case, though useful in some respects, is not applicable to the situation which confronts us in the instant case. There may very well be circumstances in which a person, who habitually engages in the acquisition and lease of premises may be said to be carrying on the trade or business of letting property. In my view therefore, the Income Tax Appeal Board were correct in their conclusion that the appellant was carrying on the business of letting premises.

10

So far as the second question is concerned, it seems to me that the judgment of the learned Chief Justice in the Hendriks' case has placed an unnecessary restriction on the ordinary meaning of the word "use" when confining it to mere physical user. In my view, the owner who leases is in fact making use of his premises by employing them for the purpose of letting, and if he engages as a consequence in the business of letting those premises, then he may be said to be using those premises for the purpose of acquiring any income which he may derive therefrom. I find myself unable with some reluctance, to agree with the judgment of the former Court of Appeal in Hendriks v. Income Tax Assessment Committee on this aspect of the case and it is my considered opinion that the premises in the instant case, were used by the appellants for the purpose of acquiring the income from the business carried on by them.

20

30

The question which now arises is as to whether this Court is bound by the decision of the former Court of Appeal in the Hendriks' case. After listening to the arguments so ably presented on both sides I am of the view that this Court which was set up on Independence by Section 103 of the Jamaica (Constitution) Order in Council 1962 is not bound by any decision of any former Court of Appeal. It is free to follow it or not at will. I am aware that this is the policy in other Commonwealth Courts, and I am reinforced in this view by the provisions of Section 14 (i) of the Jamaica (Constitution) Order in Council which are as follows :-

40

"14 - (i) Any proceedings pending immediately before the commencement of this Order on appeal may be continued after the commencement of this Order before the Court of Appeal established by the Constitution."

In the Court of Appeal Jamaica

No.9

Judgment
18th Dec.1964.
(c) Henriques,
J.A. (Cont.)

10

The appeal should in my view be allowed.
I agree with the order proposed by the learned President.

(Sgd) C.G.X.Henriques
JUDGE OF APPEAL

No.10

No.10

J A M A I C A

Order.
19th Dec.1964.

CIVIL FORM 9

Rule 38

IN THE COURT OF APPEAL

CERTIFICATE OF THE ORDER OF THE COURT

Civil Appeal No.37 of 1963

20

Appeal from the judgment of the Supreme Court
.....dated the 18th day of October, 1963.

.....Motion

.....37/63...Appeal No.

Between

Hanover Agencies Limited

Appellant

and

The Commissioner of Income Tax

Respondent

30

This appeal coming on for hearing on the 18th day of December, 1964 before The President, The Hon. Mr. Justice Henriques, The Hon. Mr. Justice Waddington in the presence of Mr. David Coore Q.C. for the Appellant

In the Court of
Appeal Jamaica

and Mr. D.W. Marsh of Counsel for the
Respondent.

No.10

Order.
19th Dec. 1964.
(Cont.)

I HEREBY CERTIFY that an Order was
made as follows :-

"18th December, 1964.

Appeal allowed with costs to appellants
both here and in the court below.
Decision of the court affirming order
of the Appeal Board set aside
Appellants to be allowed a wear and
tear allowance under Sec. 8(o) of
the Income Tax Law, 1954, in respect
of premises the subject of the appeal."

10

Given under my hand and the Seal of
the Court this 19th day of December, 1964.

(Sgd) Boyd Carey
Deputy Registrar

To: Commissioner of Income Tax,
Kingston.

To: Messrs. Milholland, Ashenheim & Stone,
5 Port Royal Street,
Kingston.

20

No.11

Order Granting
Final Leave to
Appeal to Her
Majesty in
Council.
23rd July 1965.

No.11

ORDER GRANTING FINAL LEAVE TO APPEAL

TO HER MAJESTY IN COUNCIL.

IN THE COURT OF APPEAL

SUPREME COURT APPEAL C.A. NO. 37/63

THE COMMISSIONER OF INCOME TAX
Appellant

vs.

HANOVER AGENCIES LIMITED
Respondent

30

MOTION.

Application for Extension of Time
within which to file Record of
Appeal and case for Appellant.

In the Court of
Appeal Jamaica

No. 11

Application for an Order granting
final leave to appeal to Her Majesty
in Council.

Order Granting
Final Leave to
Appeal to Her
Majesty in
Council.
23rd July 1965.
(Cont.)

On the 23rd July, 1965.

Before: The Hon. President
The Hon. Justice Henriques
The Hon. Mr. Justice Swaby
(Ag.)

10

Mr. D. Marsh for the Appellant

Mr. D. Coore, Q.C. for the Respondent

1. Order made for the extension of time within which to file the Record of Appeal and case for the Applicant until today.
2. Order made granting final leave to appeal to Her Majesty in Council, upon Counsel for the Applicant undertaking to file forthwith a Certificate from the Deputy Registrar stating that the conditions imposed by the Court have been complied with.
3. On application of Counsel for the Respondent with the consent of Counsel for the Applicant, it is ordered that the Applicant do pay to the Respondent such costs (to be taxed or agreed) as the Respondent may be entitled to under the order of the Court of Appeal on the Respondent entering into good and sufficient security in the sum at which such costs are taxed or agreed with two sureties to be approved by the Registrar for the due performance of such order as to costs as Her Majesty in Council shall think fit to make herein.

20

30

In the Court of 4. Costs of these applications to be costs
Appeal Jamaica in the cause.

No.11 5. Liberty to apply.

Order Granting
 Final Leave to
 Appeal to Her
 Majesty in
 Council.
 23rd July 1965.
 (Cont.)

PRESIDENT

Exhibit

Exhibit 1
 (Memorandum
 of Associat-
 ion) 3rd
 October 1947.

E X H I B I T

EXHIBIT 1 - (MEMORANDUM OF ASSOCIATION)

ISLAND RECORD OFFICE, JAMAICA

LNS. 637 Folio 12
 Entered 14th October 1947 1.00 p.m.
 £100. 0. 0. 6..10.47

10

7867
 1947-8

"The Companies Law (Chapter 260)"
 Company Limited by Shares
 Memorandum of Association of
 Hanover Agencies Limited

1. The name of the Company is "Hanover Agencies Limited."
2. The Registered Office of the Company will be situate at Lucea in the parish of Hanover or such other place as the Directors may from time to time decide. 20
3. The objects for which the Company is established are :-
 - (A) To acquire and take over as a going concern and carry on the business of general wholesale and Retail Merchants Wharf Owners Banana Agents and Cinema Theatre Operators now carried on in partnership by Clifford D. DeLisser, Oscar L. DeLisser, Stanley H. DeLisser 30

and William H. DeLisser under the style of Kirkconnell Brothers Successors at Lucea and Green Island in the parish of Hanover together with all or any of the real and personal property and assets of the proprietors of that business used in connection therewith or belonging thereto

Exhibit

Exhibit 1
(Memorandum of Association)
3rd October 1947.
(Contd.)

- 10 (B) To carry on either in connection with the business aforesaid or as a distinct and separate business the business or businesses of general wholesale or retail merchants traders importers exporters cinema theatre operators wharf owners banana agents and dealers in goods stores and produce of all kinds wholesale and retail.
- 20 (C) To carry on any other business (whether manufacturing or otherwise) which may seem to the Company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of or render more profitable any of the Company's property.
- 30 (D) To purchase or by some other means acquire any freehold leasehold or other property for any estate or interest whatever and any rights privileges or easements over or in respect of any property and any buildings offices factories mills works wharves roads railways tramways machinery engines rolling stock plant live and dead stock barges vessels or things and any real or personal property or rights whatsoever which may be necessary for or may be conveniently used with or may enhance the value of any other property of the Company.
- 40 (E) To build construct maintain alter enlarge pull down and remove or replace any buildings offices factories mills works wharves road railways tramways machinery engines walls fences banks dams sluices or watercourses and to clear sites for the same or to join with any person firm or company in doing any of the things aforesaid and to work manage and control the same or join with others in so doing.
- (F) To apply for purchase or by other means acquire and protest prolong and renew whether in the

Exhibit

Exhibit 1
(Memorandum of
Association)

3rd October

1947,
(Cont.)

- Island of Jamaica or elsewhere any patents patent rights brevets d'invention licences protections concessions and Trade marks which may appear likely to be advantageous or useful to the Company and to use and turn to account and to manufacture under or grant licences or privileges in respect of the same and to expend money in experimenting upon and testing and in improving or seeking to improve any patents inventions or rights which the Company may acquire or propose to acquire 10
- (G) To acquire and undertake the whole or any part of the business goodwill and assets of any person firm or company carrying on or proposing to carry on any of the businesses which this Company is authorised to carry on and as part of the consideration for such acquisition to undertake all or any of the liabilities of such person firm or company or to acquire an interest in amalgamate with or enter into any arrangement for sharing profits or for co-operation or for limiting competition or for mutual assistance with any such person firm or company and to give or accept by way of consideration for any of the acts or things aforesaid or property acquired any Shares Debentures Debenture Stock or securities that may be agreed upon and to hold and retain or sell mortgage and deal with any Shares debentures debenture stock or securities so received. 20
- (H) To improve manage cultivate develop exchange let or lease or otherwise mortgage charge sell dispose of turn to account grant rights and privileges in respect of or otherwise deal with all of any part of the property and rights of the Company. 30
- (I) To invest and deal with the moneys of the Company not immediately required in such shares or upon such securities and in such manner as may from time to time 40

be determined.

Exhibit

Exhibit 1
(Memorandum of
Association)
3rd October,
1947.
(Cont.)

(J) To lend or advance money or give credit to such persons firms or companies and on such terms as may seem expedient and in particular to customers and others having dealings with the Company and to give guarantees or become security for any such persons firms or companies.

10 (K) To borrow or raise money in such manner as the Company shall think fit and in particular by the issue of Debentures or Debenture Stock (perpetual or otherwise) and to secure the repayment of any money borrowed raised or owing by mortgage charge or lien upon the whole or any part of the Company's property or assets (whether present or future) including its uncalled Capital and also by a similar mortgage charge or lien to secure and
20 guarantee the performance by the Company of any obligation or liability it may undertake.

(L) To draw make accept endorse discount execute and issue promissory notes bills of exchange bills of lading warrants debentures and other negotiable or transferable instruments.

30 (M) To give credit or to guarantee or become Security for the performance of any contract by any person firm company or association which may seem desirable in the interests of the Company.

40 (N) To apply for promote and obtain any Law Order Licence or Permit of any Authority for enabling the Company to carry any of its objects into effect or for effecting any modification of the Company's constitution or for any other purpose which may seem expedient and to oppose any proceedings or applications which may seem calculated directly or indirectly to prejudice the Company's interests.

(O) To enter any arrangements with any Governments or authorities (supreme municipal local or otherwise) or any corporations companies or persons that may seem conducive to the attainment of the

Exhibit
 Exhibit 1
 (Memorandum of
 Association)
 3rd October,
 1947.
 (Cont.)

Company's objects or any of them and to obtain from any such Government authority corporation company or person any charters contracts decrees rights privileges and concessions which the Company may think desirable and to carry out exercise and comply with any such charters contracts decrees rights privileges and concessions

- (P) To subscribe for take purchase or otherwise acquire and hold shares or other interest in or securities of any other company having objects altogether or in part similar to those of this Company or carrying on any business capable of being carried on so as directly or indirectly to benefit this Company. 10
- (Q) To act as agents or brokers and as trustees for any person firm or company and to undertake and perform sub-contracts and also to act in any of the businesses of the Company through or by means of agents brokers sub-contractors or others. 20
- (R) To remunerate any person firm or company rendering services to this Company either by cash payment or by the allotment to him or them of shares or securities of the Company credited as paid up in full or in part or otherwise as may be thought expedient. 30
- (S) To insure the life of any person who may in the opinion of the Company be of value to the Company as having or holding for the Company interests goodwill or influence or other benefits and to pay the premiums on such insurance.
- (T) To pay all or any expenses incurred in connection with the promotion formation and incorporation of the Company or to contract with any person firm or company to pay the same and to pay commissions to brokers and others for underwriting placing selling or guaranteeing the subscription of any Shares Debentures - Debenture Stock or securities of this Company. 40

- (U) To support and subscribe to any charitable or public object and any institution society or club which may be for the benefit of the Company or its employees or may be connected with any town or place where the Company carries on business to give pensions gratuities or charitable aid to any person or persons who may have served the Company or to the wives children or other relatives of such persons to make payments towards insurance and to form and contribute to provident and benefit funds for the benefit of any persons employed by the Company.
- (V) To make donations to such persons and in such cases and either of cash or of other assets as the company may think directly or indirectly conducive to any of its objects or otherwise expedient.
- (W) To promote any other company for the purpose of acquiring the whole or any part of the business or property and undertaking any of the liabilities of this company or of undertaking any business or operations which may appear likely to assist or benefit this company and to place or guarantee the placing of underwrite subscribe for or otherwise acquire all or any part of the shares or securities of any such company as aforesaid.
- (X) To sell or otherwise dispose of the whole or any part of the business or property of the Company either together or in portions for such consideration as the company may think fit and in particular for shares debentures or securities of any company purchasing the same.
- (Y) To distribute among the members of the Company in kind any property of the company and in particular any shares debentures or securities of other companies belonging to this Company or of which this Company may have the power of disposing.
- (Z) To procure the Company to be registered or recognised in any British Colony Dominion or Dependence and in any Foreign Country or Place.

Exhibit
 Exhibit 1
 (Memorandum of
 Association)
 3rd October,
 1947.
 (Cont.)

Exhibit
 Exhibit 1
 (Memorandum of
 Association)
 3rd October,
 1947.
 (Cont.)

(AA) To do all such other things as may be deemed incidental or conducive to the attainment of the above object or any of them.

It is hereby expressly declared that each sub-clause of this clause shall be construed independently of the other sub-clauses hereof and that none of the objects mentioned in any sub-clause shall be deemed to be merely subsidiary to the objects mentioned in any other sub-clause.

10

4. The Liability of the members is Limited.

5. The Share Capital of the Company is £20,000 divided into 20,000 Ordinary Shares of £1 each with power to increase and divide the Shares into several classes and attach thereto any preferential or special rights privileges or conditions in accordance with the regulations of the Company.

20

We the several persons whose names addresses and descriptions are subscribed are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names Addresses and
 Descriptions of
 Subscribers

Number of
 Shares taken
 by each
 Subscriber

30

C.D. De Lisser	Montego Bay Merchant	one Share
Marguerite De Lisser	Montego Bay Housewife	one Share
Stanley De Lisser	Montego Bay Merchant	one Share
Ann S. de Lisser	Montego Bay Housewife	one Share
O.L. de Lisser	Montego Bay Merchant	one Share
Ida W. de Lisser	Sandy Bay Housewife	one Share
Wm. H. de Lisser	Sandy Bay Planter	one Share
L.N.M. Young	Montego Bay Clerk	one Share

40

Dated the 3rd day of October 1947.

Witness to the above signatures:

I.S. Heron

(Sgd.) Joyce M. Lamb
 Examiner of the Records.

ISLAND RECORD OFFICE, JAMAICAExhibit

I, Joyce Merlene Lamb an officer specially appointed by His Excellency the Governor under the provisions of Section 30(2) of Chapter 335, The Record Office Law for the purpose of examining and certifying records made in the Register Books of the Record Office DO HEREBY CERTIFY that I have examined the foregoing with the Record of which it is a copy and that it is a True Copy thereof.

Exhibit 1
(Memorandum of Association)
3rd October,
1947.
(Cont.)

10

for Testimony whereof I have hereunto set my hand and affixed the Seal of the Record Office at Spanish Town, Jamaica W.I. this day of July 1961.

L.S.

(Sgd.) Joyce M. Lamb
Examiner of the Records.

IN THE PRIVY COUNCIL

No.31 of 1965.

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA.

B E T W E E N:

THE COMMISSIONER OF INCOME TAX

Appellant

- and -

HANOVER AGENCIES LIMITED

Respondent

R E C O R D O F P R O C E E D I N G S

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
London, W.C.2.

Solicitors for the Appellant.

LINKLATERS & PAINES,
Barrington House,
59-67 Gresham Street,
London, E.C.2.

Solicitors for the
Respondent.