IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 6 of 1985

Between:

THE COMMISSIONER OF INLAND REVENUE — Appellant

and

THE FLOUR MILLS OF FIJI LIMITED — Respondent

M.J. Scott for the Appellant
J.R. Reddy and V. Kalyan for the Respondent

Dates of Hearing: 26th, 27th June, 1985
Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

Introduction

The appellant issued assessments for income tax liability of the respondent in respect of the latter part of the year 1978 and for 1979. In these assessments he disallowed certain deductions which had been claimed by the respondent. In particular -

(1) he disallowed legal costs which had been paid by the respondent for the defence of certain criminal charges issued -

(a) against the respondent company itself and its managing director, Mr. Shardha Nand; and

(b) against Messrs Fane and Gibbons, two directors of the company; and

(c) against two security guards employed by the respondent who had been convicted of obstructing police officers in the execution of their duty;

(2) he disagreed with the mode of computing taxable income for part of the year 1978 in respect of which the company had been granted exemption from the payment of tax. This calculation affected the income and therefore tax liability for the latter part of the year;

(3) he also declined to allow losses incurred by the company in an earlier year (1973) from being carried into the tax calculations for the years 1978 and 1979.

The respondent company objected to the assessments based on these decisions and appealed to the Court of Review (Mr. K.A. Stuart). In a judgment delivered on the 29th April, 1983 the Court of Review :

(1) disallowed claims for deduction of legal fees in respect of all the various matters referred to in paragraph 1 above;

(2) upheld the contention of the Commissioner as to the mode of computing profits for the tax exempt period, viz., the earlier part of 1978;

(3) upheld the company's appeal and allowed 1973 losses to be carried forward into the tax calculations for years expiring on the 31st December of both 1978 and 1979.

The respondent appealed against the findings in (1) and (2) above and the Commissioner cross-appealed against the finding in (3). These appeals were heard in the Supreme Court on the 24th of February, 1984 before Kearsley J. who delivered judgment on the 12th October, 1984. In summary, the outcome of the appeal was that the learned Judge :

(1) (a) upheld the decisions of the Court of Review that the cost paid in respect of Fane and Gibbons and in respect of the security guards were not deductible;

(b) reversed the Court of Review and held costs in respect of the respondent itself and of Shardha Nand were deductible;

(2) reversed the Court of Review in respect of the mode of calculation of company's taxable profit for the part year in 1978;

(3) reversed the Court of Review and held that the tax losses could not be carried forward into the latter part of 1978 or into 1979.

The Commissioner appealed to this Court against the allowance of the deductions of legal costs in respect of the company and Shardha Nand (paragraph 1(b) above) and against the mode of assessment of the company's taxable profits (paragraph 2 above). The company has cross-appealed against the disallowance of the costs in respect of Fane and Gibbons and in respect of the security guards (paragraph 1(a) above) and against the disallowance of the carrying forward of losses (paragraph 3).

Before we proceed to consider the various grounds of appeal we think it desirable to set out the history of the matters which give rise to the issues which arise.

In 1971 the Government of Fiji entered into negotiations with Wallace Flour Mills Company Limited of Bombay for the formation of a flour milling enterprise in Fiji. In order to provide incentives, certain concessions were made, particularly, by the provision of tax and other revenue exemptions for the company during its establishment period and by the granting of a ten-year monopoly in the processing and sale of flour. In return, certain restrictions were placed on the new enterprise, particularly in relation to cost structure and the price at which flour would be sold to the public. In due time the respondent company was incorporated and it proceeded with the construction of the flour mill in accordance with the arrangements made. It commenced business on the 10th of September, 1973. In 1976 the agreement was varied to provide that the price at which the flour was to be sold would thereafter be calculated on the basis of a formula known as the Australian formula.

One of the major inducements for the setting up of the enterprise was the grant of relief from income tax for a period of five years from the commencement of business, viz., from 10th September, 1973 to 9th September, 1978 - hence the relevance under item (2) discussed above of the mode of calculation of income during the first part of 1978 (prior to 10th September of that year).

Relief from the payment of tax was authorised by section 11(1)(b)(i) of the Income Tax (Amendment) Act (No.2) (Ordinance No. 46) 1968 to which reference will be made again later.

In 1977 the respondent's auditors became unhappy concerning figures supplied to them by the company in respect of the financial operations of the company during the year ending 31st December, 1976. And, they withdrew their audit opinion on the accounts for that year stating that, in their opinion, there had been a deliberate understatement of wheat stock to a very substantial

degree and other improper practices resorted to which resulted in an understatement of the profits. As a result of this, the Government appointed a chartered accountant to carry out a special audit, the report on which was produced on the 28th October, 1977. To some extent it bore out what had been alleged.

The special auditor, in his report, stated that freight charges incurred by the respondent company in bringing wheat to Fiji had in the years prior to 1976 been falsely overstated by sums totalling more than $800,000 with the consequence that a falsely high sale price would be established by the Australian formula. Messrs Fane and Gibbons were each directors of companies which executed freight contracts with the respondent. On the 12th of May, 1978 criminal informations were issued against Gibbons and Fane under the Companies Act for failing to disclose their interests in the freight contract between the respondent company and the shipping company. On the 28th August, 1978 charges were preferred against Shardha Nand for criminal conspiracy to over-state the wheat stocks. And later the same year identical charges were preferred against the company itself. Also on the 12th of May, 1978, the Minister of Finance gazetted flour as a commodity to be subject to price control under the Counter-Inflation Act, the effect of which was to lower the price that, under the previous agreement, the respondent company was entitled to charge in the market. The minutes of a directors' meeting held on 19th June, 1978 record that it was resolved that civil proceedings be commenced against the Government alleging breach of the agreement and authorising the instructing of solicitors and briefing of counsel. A writ was issued against the Government and other parties in which it was alleged that the Government was in breach of its agreement insofar as pricing was concerned and praying various forms of relief, including declarations that the Government, in seeking to have the price control removed from flour, was in breach of the agreement and supplementary agreement. The Government brought a

counterclaim reciting the alleged malfeasances of the directors and by way of relief, sought a declaration that the agreement was no longer binding on the Government. If such relief were to be granted, the result would, of course, have been catastrophic to the entire enterprise of the respondent.

At a board meeting held on 19th June, 1978 it was noted that Messrs Fane and Gibbons had engaged a Mr. Jonathan Cole to act for them, but, different legal advisers - Mr. T.F. Hughes, Q.C., Dr. Sahu Khan and Messrs Grahame & Co. were instructed in the civil proceedings.

On 17th January, 1979 further charges were laid against the company alleging various conspiracies concerning the 1976 accounts.

There is no copy in the record before this Court of any minute specifically authorising payment of the costs of Mr. Shardha Nand, although there are a number of references concerning "legal proceedings" in respect of which there were authorizations of Mr. Hughes and Dr. Sahu Khan. There is no dispute, but, that Mr. Hughes and Dr. Sahu Khan were instructed to defend the informations preferred against the company relating to the charges preferred in 1978. Mr. Shardha Nand, in evidence before the Court of Review, said that he had been arrested and charged on two counts on that date; that later the company was also charged with the same offences; that he was represented by the same counsel as was the company in respect of those charges and that the board had authorised the payment of their costs.

Mr. C.R. Narsey, a director of the company, also gave evidence. He said that "under the articles company had to defend charges against managing director and had to protect the monopoly agreement. If it did not defend and convictions entered, shareholders'

investment would be jeopardised. Appellant had income tax concessions for five years expiring in 1978 and if we had been convicted it might have lost that. If breach made of the agreement monopoly would have gone".

In the event, Fane and Gibbons were cleared and the charges against the company which related to the freight over-charges were withdrawn. Shardha Nand and the company were convicted in the Supreme Court in respect of the alleged falsification of stock figures. An appeal to the Court of Appeal was successful. A re-trial was ordered, but, ultimately a stay of proceedings was entered. Discussions took place between the Government and the company on various matters arising from the changes of circumstances and the effect of these on the original agreement and supplementary agreement. Tax liability was the principal concern. Clause 12.5 of the original agreement had provided that the provisions of the Fifth Schedule of the Income Tax Ordinance would be imported into the agreement, but, in fact the company was never gazetted as one to which the Fifth Schedule was to apply, as required by section 11 of the Act.

From 1978 onwards Mr. Ram Vilash, a chartered accountant, acted as auditor of the company. He had discussions with the Commissioner as to the proper method to calculate profits so as to establish the quantum of the tax relief for the earlier part of 1978. On 12th September, 1978 he wrote to the Commissioner as follows :

> "We thank you for making time available this morning to discuss the most appropriate method of apportioning the company's profits for the year ending 31st December, 1978 between the period up to 10th September, 1978 and the period from 11th September, 1978, in order to establish the company's chargeable income for the latter period.
>
> We now summarise below our understanding of the agreement reached, between yourself and Mr. S. Sharma for the Inland Revenue Department and

our Mr. R. Foster-Brown and Mr. M. Mills, which is as follows :

> The company will be able to apportion its profits for the year ending 31st December, 1978 on the basis of actual sales and expenses related thereto.
>
> In this regard sales will be specifically identified and cost of the raw materials (wheat) will be calculated by specific identification on a FIFO basis.
>
> Other expenses for the first six months of the year will be based on the company's audited accounts to 30th June, 1978 and expenses for the six months ending 31st December, 1978 will be apportioned on the basis of the company's monthly management accounts, with September expenses being apportioned on a time basis.
>
> Please advise us if you do not completely agree with our understanding as summarised above. "

The Commissioner replied the following month as follows :

> "I refer to your letter of 12 September, 1978, and am in general agreement with your observations although I must mention that the accounts will of course require certain adjustments to correctly ascertain the income for tax purposes."

The arrangements embodied in these letters were superseded by a deed of settlement made on the 29th January, 1981, paragraph 4 of which provided that, consequent upon withdrawal and dismissal of civil proceedings, the Minister of Finance in exercise of the power conferred on him by section 16(2)(b) of the Income Tax Act, 1974 would instruct the Commissioner of Inland Revenue to specify the company as an approved enterprise for tax relief for a period of five years from the 10th September, 1973. The 1974 Act, which replaced the 1968 Amendment of the Income Tax Ordinance, provided similar but not identical benefits to those previously contained in the Fifth Schedule. And it provided that the benefit would accrue

merely upon the Minister giving a written direction to the Commissioner. Gazetting was no longer a pre-requisite.

The deed of 29th of January, 1981 was, in its turn, cancelled and replaced by deed of 6th January, 1982 the main purposes of which were to terminate the civil litigation and ensure the continuation of the monopoly for the balance of the ten-year period. There is no reference in that deed to relief from income tax, but that matter was secured by a letter of the following day from the Minister of Finance to the respondent company in the following terms :

"The Managing Director,
Flour Mills of Fiji Limited,
Leonidas Street,
Walu Bay,
SUVA.

Dear Sir,

SETTLEMENT OF DISPUTES AND ISSUES
RELATING TO INCOME TAX

During 1980, with my knowledge and concurrence, representatives of the Government and your company were engaged in intensive negotiations in an effort to resolve all areas of disagreement which had developed over the years and were then still outstanding. The most important feature of those negotiations, I believe, concerned a dispute between Government and the company over the question of the tax obligations of the company for the period of five years between 10 September, 1973 and 9 September, 1978.

I am aware that those negotiations culminated in the execution by the parties of a Deed of Settlement on 29 January, 1981. The item of dispute concerning the tax obligations of the company for the period referred to above was covered under Clause 4 of that Deed of Settlement. It is with regard to this item of dispute on income tax that I now write to you in my capacity as Minister responsible for the administration of the Income Tax Act.

I have been advised by the Government negotiating team that no satisfactory agreement on or solution to this item has so far been reached between the parties. I am further

advised that it is this failure to reach agreement and settlement on this item which has continued to hamper the continuing efforts of the parties to finalise all other matters arising out of and required to be done under the Deed of Settlement. I am, therefore, fully conscious of the desire of both parties to reach a final and satisfactory solution to this item as soon as possible.

After carefully re-examining all the facts and circumstances which gave rise to and which now surround this particular item of dispute and after carefully considering all the advice which I have received thereon from the Government negotiating team and other Government sources, I have come to the firm conclusion that it would be just and proper now for the Government to return to and stand by the undertaking it had made to the company under Clause 12.5 of the principal Agreement executed between the Fiji Government and your company on 14th October, 1971. For easy reference I quote hereunder the wording of that Clause and promise :-

> 'The Government agrees that it will, during the period of five years from the notified date grant to the operating company the benefit of the tax free provisions contained in the Fifth Schedule to the Income Tax Ordinance. '

As you are aware, because of the failure to comply with certain procedural statutory requirements under the Income Tax Act, no concession was in law and in fact made available to your company for that five-year period in terms of this undertaking. Consequently, the income tax obligations of your company for that period, which has been jointly estimated by both parties to have been in the region of $1.2 million, have since continued to remain due and owing to Government.

Now, therefore, having satisfied myself that it is proper and just so to do, I have in exercise of the powers vested in me under section 61(a) of the new Finance Act, decided and I hereby declare that the recovery of all income tax which might have been due and owing to the Government from the Flour Mills of Fiji Limited between the period 10 September, 1973 and 9 September, 1978 inclusive shall be and are hereby abandoned by Government. Accordingly, your company is not obliged in law or otherwise to meet any demand for tax on its income derived from its operation in Fiji during this period. You are hereby notified accordingly and my decision is by copy

of this letter also being conveyed to the Department of Inland Revenue.

I must, of course, make it clear that the decision and declaration I have made above is not intended to and shall not in any way affect the tax position and obligations of your company in respect of any period subsequent to 9 September, 1978. This understanding is, of course, also endorsed by your company in Clause 3(b) of the 1981 Deed of Settlement referred to in paragraph 2 above.

I understand that the Deed of Settlement of 1981 is being suitably amended by the parties in order to reflect this new turn of events on the issue of tax and I trust that the foregoing will greatly assist the representatives of both parties in their efforts to achieve full and final settlement on all outstanding matters as are set out in the Deed of Settlement.

Yours faithfully,

(C. WALKER)
MINISTER OF FINANCE "

Clause 3 of the deed of 6th January, 1982 provided as follows :

" For the consideration aforesaid the Company for itself its successors and assigns hereby acknowledges, declares and agrees that notwithstanding anything to the contrary in the 1971 Agreement or in the Supplementary Agreement or anything done thereunder by or on behalf of the parties thereto the company has been, is and shall continue to be subject to the provisions of -

(a) the Counter-Inflation Act, 1973, as amended or re-enacted from time to time and any orders made thereunder by the Prices and Incomes Board in relation to the prices for milled wheat products produced by the company and all other merchandise whatsoever produced, sold or distributed by the company in the course of its business; and

(b) the Income Tax Acts as amended or re-enacted from time to time in relation to all assessments to tax made thereunder on the income of the company. "

In this appeal the Court has to decide whether the decisions of the learned Judge as to the following questions were correct :

(a) Legal costs

Should the company have been allowed to deduct as expenditure the legal costs paid in respect of its own costs and in respect of Messrs Shardha Nand, Fane and Gibbons and the security guards, as being money wholly and exclusively laid out or expended for the purpose of the trade, business, profession, employment or vocation of the taxpayer? (Section 19(b) of the Income Tax Act).

(b) Exemption from payment of tax in respect of the period from 1st January, 1978 to 9th of September 1978

Should the amount of exemption for this period have been established by an apportionment of the whole year's profits on a time basis, or as the company contended, by a calculation of profits accrued to that date as if it were a specified period for the calculation of derived income (c.f. section 49(2) of the Income Tax Act)?

(c) 1973 losses

Should the losses sustained in 1973 have been allowed to be carried forward for the purposes of tax calculation to the periods of trading and accounting subsequent to the 10th of September, 1978 as would have been the case under the carry-forward and set-off provisions in Clause 4 of the Fifth Schedule of the 1968 Amendment.

We now proceed to consider these matters.

The deductibility of legal costs

Although the Court of Review and the Supreme Court were referred to a plethora of cases on this topic many of which were also referred to in this Court, there was substantial agreement between the parties as to the legal issues involved.

In this country, for claims of expenditure of any amounts claimed as deductions in determining total income to succeed, they must fall outside the prohibitions contained in paragraph (b) or (c) of section 19 of the Income Tax Act (Cap. 201). The relevant portions of section 19 read :

> " In determining total income, no deductions shall be allowed in respect of :
>
> (a) .....
>
> (b) any disbursement or expense not being wholly and exclusively laid out or expended for the purpose of the trade, business, profession, employment or vocation of the taxpayer;
>
> (c) any loss not connected with or arising out of the trade, profession, business, employment or vocation of the taxpayer. "

The current English provision is for all practical and present purposes identical. It is section 130 of the Income and Corporation Taxes Act, 1970. That section so far as it is presently relevant, reads :

> " Subject to the provisions of the Tax Acts in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D no sum shall be deducted in respect of :
>
> (a) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation;

(b) .....

(c) .....

(d) .....

(e) any loss not connected with or arising out of the trade, profession or vocation."

The English provision was as recently as July 1983 considered anew by the House of Lords in Mallalieu v. Drummond (Inspector of Taxes) (1983) 2 All E.R. 1096; (1983) 3 W.L.R. 409 - a decision which, in our opinion, when applied to the facts relevant to this part of the case, concludes it. However, before we pass to consider that case and its applicability to the matter under consideration, we think it timely to iterate the status of the House of Lords in the hierachy of courts in the realms of precedent. It must, of course, be accepted that the Judicial Committee of the Privy Council is the supreme appellate authority as far as Fiji is concerned. Both in Australia and New Zealand the decisions of the House of Lords are treated "with all respect that is rightly due to decisions of ultimate appellate tribunal in England" - see Skelton v. Collins 115 C.L.R. 94 per Owen J. at page 138 and in New Zealand Corbett v. Social Security Commission (1962) N.Z.L.R. 878 per Gresson P and per North J. at page 901. The principal reason ascribed is the desirability of maintaining consistency throughout the Commonwealth in the development of the broad principles of English law.

In the present case we are not faced with the questions which could arise if this Court was to be faced with conflicting decisions of courts of other Commonwealth jurisdiction on the same tier in the hierarchieal structure of precedent or between the House of Lords and such courts. Here the statutory provision under consideration is the same as the provision obtaining in England. And the latter has obtained in England in various Income Tax Acts in identical terms at least since 1842 (we have not researched the position back past that year) and the House of Lords has over the long years, in a series of judgments,

adjudicated upon the construction of the provision. It is, of course, trite to say that the construction of a statutory provision is a question of law but we say it to emphasise that the law involved in the construction of the equivalent of section 19 of the Fiji Act has been settled since Strong & Co. of Ramsey Ltd. v. Woodifield was decided in 1906 (1906 A.C. 448) and affirmed anew on many occasions culminating in the Mallalieu case (supra) three quarters of a century later. All these matters render the present case a classic instance for treating Mallalieu as a very great persuasive authority.

We make no doubt that due deference to the high authority of decisions of the Appellate Committee of the House of Lords has been paid by the courts in Fiji at all levels but we have deemed it timely that its unique status in the hierachy of authority be highlighted because in this case, and indeed in some others which have been considered by this Court in recent times, it has not been accorded its proper place.

The Mallalieu case had to do with a claim by a woman barrister that the cost of cleaning and renewing a set of apparel which she had purchased for wear in Court was outside the prohibitions in section 130 of the Income and Corporation Taxes Act, 1970 the text of which we have earlier recorded. The clothes in question were purchased to conform with a prescription given by the Bar Council and assented to by the Lord Chief Justice of England in which it was provided as follows :

> "1. The dress of barristers appearing in court should be unobtrusive and compatible with the wearing of robes.
>
> 2. Suits and dresses should be of dark colour. Dresses or blouses should be long sleeved and high to the neck. .... Shirts and blouses should be predominantly white or other unemphatic appearance. Collars should be white and shoes black. "

Dealing with the history of the case as it proceeded through the legal process, Lord Brightman said :

> " .... Slade J. felt driven to answer the question in favour of the taxpayer because he constrained by the commissioner's finding that, in effect, the only object present in the mind of the taxpayer was the requirements of her profession. The conscious motive of the taxpayer was decisive. The reasoning of the Court of Appeal was the same. What was present in the taxpayer's mind at the time of the expenditure concluded the case. "

The majority of their Lordships did not subscribe to that view. They accepted that Miss Mallalieu thought only of the requirements of her profession when she made the initial purchases but found it inescapable that she had a further object namely the provision of the clothing she needed as a human being. Lord Brightman, whose judgment was concurred in by all the Lords of Appeal except Lord Elwyn Jones, put it thus :

> " But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist. In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion. "

It is clear from the very first paragraph of his consideration of the Mallalieu judgment that Kearsley J. misconceived its import. He introduced those considerations by reference to a passage from the judgment of Romer L.J. to Bentley, Stokes and Lawless v. Beeson (1952) 2 All E.R.

82 which reads :

> "The sole question is whether the expenditure in question was 'exclusively' laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? "

And went on to say :

> " That seems to support the view that the word 'exclusively' implies a purely subjective test. But that view was not adopted by the House of Lords in Mallalieu v. Drummond (1983) 3 W.L.R. 409, in which case the question was whether expenses incurred by a female barrister in the replacement and cleaning of items of clothing which she wore in court and in chambers and on her way there, in compliance with the notes for guidance on dress in court issued by the Bar Council, were deductible ..... "

It is not the word "exclusively" either as used by Romer L.J. in the passage quoted or as it is used in section 19(b) which imports the necessity for a subjective test. The adverb so used in section 19(b) qualifies the phrase "laid out or expended for the purposes of trade" and in no manner touches the question as to whether a subjective test or an objective test should be applied in ascertaining the taxpayer's intentions. As Lord Brightman put it in Mallalieu (op. cit. p. 1099 g) - a passage which, we note, was later cited by Kearsley J -

> " The effect of the word 'exclusively' is to preclude a deduction if it appears that the expenditure was not only to serve the purposes of the trade .... of the taxpayer but also to serve some other purposes. ..... "

Rather it is the word for in the phrase which imports the subjective test. It turns the inquiry to the taxpayer's reason or reasons for making the expenditure and leads to the necessity to explore the taxpayer's mind to discover his intention or intentions up to the point of time when

the expenditure was made.

The Judge was also incorrect when he said the requirement of a purely subjective test was not adopted by the House of Lords in Mallalieu. At page 1099 h - again, in a passage which the Judge cited later in his judgment - he said :

> " To ascertain whether the money was expended to serve the purposes of the taxpayer's business it is necessary to discover the taxpayer's 'object' in making the expenditure: see Morgan v. Tate & Lyle Ltd. (1955) A.C. 21, 37, 47. As the taxpayer's 'object' in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of section 130 except as a reflection of the taxpayer's state of mind at the time of the expenditure. "

The emphasis is ours. It was made to highlight the point which assumed importance in that case namely that determining a state of mind can well be a matter of inference.

In fact, the General Commissioners drew the inference that, in addition to her stated motive to meet the requirements of her profession, it was also her objective in making the expenditure to satisfy the human need to be clothed during the time she was on her way to chambers and court and whilst she was engaged in her professional activity. There was no appeal from their decision on any question of fact. Accordingly, the ultimate question for decision by the courts was, as Slade J. put it, in a passage cited in the judgment of Lord Brightman at page 1101 j "whether having regard to their (the Commissioners') primary findings of fact .... there was evidence to support the inference ultimately drawn by the Commissioners that the expenditure was incurred by the taxpayer with dual purposes in mind".

Both Slade J. and the Court of Appeal answered that question in the negative but the House of Lords upheld the decision of the General Commissioners.

With that background, we turn to consider the individual claims.

1. The legal costs relating to the defence of two security guards charged with obstructing the police

Both the Court of Review and the Supreme Court dismissed this part of the taxpayer's appeal in short order and before us Mr. Reddy allowed that there was "very little evidence" to support it. We content ourselves in saying that we think the Court of Review and Kearsley J. were clearly right.

2. The costs relating to the defence of Messrs Fane and Gibbons, directors of the company

On 12th May, 1978 Fane and Gibbons were each charged with the offence of failing to disclose their interest in contracts contrary to sections 150(1) and 150(4) of the Companies Act (Cap. 216). The contracts were alleged to be between the taxpayer company and Ocean Timber Transportation Limited, a company which (for a commission) supervised the wheat shipments made to the taxpayer from Australia. Gibbons was acquitted on both counts in the Magistrate's Court. Fane was convicted on one of the charges but his appeal to the Supreme Court was allowed and the conviction quashed.

The minutes of the meeting of the Committee of Directors held on 19th June, 1978 record that "the directors noted that Messrs Fane and Gibbons had engaged Mr. Jonathan Cole to act for them". In the agreed statement of facts, however, it is stated the directors concerned were represented by Mr. Jonathan Cole of London, Mr. Douglas Newman, Q.C. of Australia and Messrs

Parmanandam, Ali & Co. who, no doubt, were the instructing solicitors, the fees of all of whom were borne by the appellant.

On 30th August, 1978 the Government of Fiji in a counterclaim to an action brought by the respondent alleged that the latter had, in breach of a formal agreement, paid to shippers at least $US860,800 "more than it should and could" for freight on imported wheat. This allegation had to do with the same matters as gave rise to the criminal proceedings against Fane and Gibbons.

At a meeting of the Board of Directors of the respondent company held in London on 4th September, 1978 it was resolved that :

> " The legal cost be paid in accordance with Article 222 of the company, e.g. -
>
> (i) Full cost to be paid by the company in respect of Mr. J.B. Gibbons,
>
> (ii) three-fourths of the cost be paid by the company in respect of Mr. V.J.A. Fane, and
>
> (iii) if Mr. V.J.A. Fane is further acquitted on appeal then the balance of the cost be also paid by the company. "

This resolution is the first record of any intent on the respondent's part to incur expense for the legal costs of these two directors. And it is to be observed that it was expressed to be made pursuant to Article 222 of the respondent's articles. And it was made after the hearing in the Magistrate's Court - but before Fane's appeal had been heard.

In the oral evidence given before the Court of Review by Shardha Nand, erstwhile Managing Director, and Mr. C.R. Narsey, a Director, of the respondent, there was but little reference to the cases of the two Directors in question. Mr. Narsey said that the respondent resolved

to defend the charges against Fane and Gibbons and to engage counsel. However, the minute of 19th June, 1978 is to the contrary effect at least as far as the briefing of Mr. Jonathan Cole is concerned and there is no earlier record of the company having agreed to pay the costs of Messrs Parmanandam, Ali & Co. (including Mr. Newman's fees) in respect of these matters.

Mr. Shardha Nand deposed that if the freight charges were proved, the respondent might have to refund $860,000. This evidence seems to have been accepted at its face value by both the Court of Review and Kearsley J. but a study of the relevant documents leads us to conclude that it is not true. First there were no criminal charges against the two directors concerned relating to non compliance with the agreement as to freight charges. There were, of course, the civil proceedings but there was no claim in them made for a refund of $860,000 and there is no evidence whatsoever to suggest that the respondent had in its hands $860,000 or indeed any other sum, which it might possibly have to pay to another by way of refund or because of legal obligation.

The assumption of responsibility for the legal costs was made after the hearings in the Magistrate's Court had concluded and there is no evidence which goes to establish that the directors turned their minds to the necessity of engaging competent counsel to protect the company from any attendant adverse publicity damaging to its future operations. The charges preferred against the two men did not presage any reflection upon the company itself; rather they indicated that it and its shareholders had been wronged by the non-disclosure. And, finally, the payments were expressly stated to be made pursuant to Article 222. As the legal effect of that article on the issue under consideration was also advanced in respect of the Shardha Nand matter, we shall consider it separately. But for the present, we hold that unless it be established that the deduction should be allowed because the expenditure

was authorised by the article, we are of the opinion that the appeal on this head cannot be sustained.

3. The effect of Article 222 on the claims in respect of Shardha Nand's costs and the Fane and Gibbons' costs

Article 222 reads as follows :

"222. (a) Subject to the provisions of the Act, every Director, Manager, Secretary and other Officer or employee of the Company shall be indemnified by the Company against and it shall be the duty of Directors, out of the funds of the Company, to pay all costs, losses and expenses (including travelling expenses) which any such Director, Manager, Secretary, Officer or employee may incur or become liable to by reason of any contract entered into or act or deed done by him as such Director, Manager, Secretary, Officer or employee or in any way in the discharge of his duties.

(b) Subject as aforesaid every Director, Manager, Secretary or other Officer or employee of the Company shall be indemnified against any liability incurred by them or him in defending any proceedings whether civil or criminal in which judgment is given in their or his favour in which he is acquitted or discharged or in connection with any application under section 349 and provisions of the Act in which relief is given to him by the Court. "

Mr. Reddy referred us to Bendex Consolidated Industries Ltd. v. F.C.T. 13 A.T.R. 553 in which a claim similar to that here made was successfully advanced by the company. The article was in terms substantially the same as Article 222 above. The allegation made was that, in effect, a Director of the appellant company had abused his office when purporting to perform his duties as a director of the company. The judgment is very brief. In essence it was held that the criminal proceedings having arisen out of his conduct as a director, the facts of the case met, in all respects, the prescription of the article and accordingly the deduction sought was allowable. That might well have sufficed if the claim was a civil claim by

the Director against the company on the indemnity contained in the article. The Judge gave no consideration to the question as to whether the facts found brought the case beyond the prescription of the relevant statutory provision and accordingly we find ourselves unable to regard the decision in any way persuasive and we are not disposed to follow it. And assuming without deciding that in each case the respondent was under liability to Messrs Fane, Gibbons and Shardha Nand by reason of the provisions of the article, we do not think any expenditure made pursuant to such liability falls outside the prohibitions contained in either paragraph (b) or paragraph (c) of section 19.

That disposes of the appeals in respect of the payments made in respect of Messrs Fane and Gibbons.

4. Claim for deduction in respect of costs paid for the defence of the Company and Shardha Nand

The charges preferred against Shardha Nand were five in number. The first alleged that he concurred in making a false entry on the balance sheet of the company and the second that he concurred in circulating a false balance for the year ending 31st December, 1976 knowing it to be false in a material particular, namely that the wheat stocks were understated by approximately 576 metric tons valued at approximately F$102,448 and thereby reducing the profit for the year with intent to deceive shareholders. The other three charges were each of conspiracy to defraud contrary to section 422(a) of the Penal Code. Each had to do with the alleged understatement of the wheat stocks but they alleged intent to defraud either different persons or for different purposes.

As we earlier stated, Shardha Nand gave evidence before the Court of Review and it was on his evidence that Mr. Stuart based his findings as to the intention of the company both when it took its decision to pay Shardha Nand's defence costs and, of course, when it disbursed the moneys

in payment of such costs. We do not find it necessary to refer to any more than a few short extracts from that evidence. The relevant passages are, as follows :

> " On 4.9.78 a board meeting held in London. That meeting authorised payment of legal costs. I produce copy of minutes of meeting and a copy of board paper 30/78. On that date Board directed its mind to criminal charges laid against company and against me. .....
>
> .... Minutes of 19.1.79 (7) Ex. 8E authorise payment of legal expenses for criminal proceedings. I agree that all it does is to authorise directors to pay proper costs. Board did not direct its mind to me and company being separate persons. ..... "

And later :

> " My own interests and those of the company were inextricably intertwined. ... The purpose of the expenditure was partly to save me and partly to save the company. "

The emphasis is ours.

In his judgment, Mr. Stuart referred to the passages we have emphasised, in a manner and in terms which leaves us with no doubt but that he accepted them. And we make no doubt that he was entitled to do so, in the circumstances, for who, better than the Managing Director of the company to depose as to the object or objects of the company when it took its decisions to incur the expenditure and subsequently to lay out the moneys in accordance with that decision? And in the end Mr. Stuart said :

> " So far as the prosecution against the appellant and Shardha Nand is concerned, the appellant did not expend the money wholly and exclusively for its own purpose because first the purpose was not solely its own but a joint purpose, and secondly was not a trading purpose at all but to enable the appellant and its managing director to be delivered from punishment. "

In the Supreme Court, Kearsley J. was critical of Mr. Stuart's review of the evidence. He said :

> " It is, I think, unfortunate that the Court of Review was not more specific, that it did not distinguish conscious object or purpose from purpose in the statutory sense of the word and that it did not describe any of its findings as findings of fact or as findings of law. However, having read and reread those passages, it seems to me that it may fairly be said, without offence to the judgment, that the conscious objects of the board of directors were -
>
> (a) as to the defence of the company against the first set of charges, to preserve the business status of the company and to avoid payment of fines (by obtaining the company's acquittal);
>
> (b) as to the defence of the company against the second set of charges, to preserve the business status of the company and to avoid payment of fines and the $860,000.00 which the company might have had to refund, according to the evidence of Mr. Shardha Nand which the court apparently accepted, if the charges were proved (by obtaining the company's acquittal) and
>
> (c) as to the defence of the managing director, to preserve the business status of the company and to retain his highly valued services (by obtaining his acquittal). "

The $860,000 we have already considered and put out of consideration. The other objects stated do not sit comfortably with the evidence of Mr. Shardha Nand that the purpose of the expenditure was partly to save himself and partly to save the company.

And there was no need to at all of the Court of Review to distinguish conscious object or purpose from "purpose in the statutory sense of the word". Mr. Stuart was clearly dealing with the first of those two matters and as he was reviewing evidence there was no occasion for him to describe his findings as findings of fact.

The distinction between the word "purpose" as used "in the statutory sense" as the Judge has put it and "purpose" as a synonym for "object" or "intention" was dealt with by Lord Brightman in the Mallalieu case in which he said, at page 1099 e :

> " The words in the paragraph 'expended for the purposes of the trade, profession or vocation' mean in my opinion 'expended to serve the purposes of the trade, profession or vocation' or as elaborated by Lord Davey in Strong & Co. of Ramsey Ltd. v. Woodifield (Surveyor of Taxes) (1906) A.C. 448 at 453 ..... 'for the purpose of enabling a person to carry on and earn profits in the trade etc.'.
>
> The particular words emphasised do not refer to 'the purposes' of the taxpayer as some of the cases appear to suggest. They refer to 'the purposes' of the business which is a different concept although the 'purpose' (i.e. the intentions or objects) of the taxpayer are fundamental to the application of the paragraph. "

Kearsley J. had obviously fallen into the same error as the Judges in "some of the cases" referred to by Lord Brightman.

And when he came to consider the findings made by the Court of Review, (which we have earlier quoted) Kearsley J. had this to say :

> " I must confess that I do not completely understand that sentence. It seems, however, to be clear enough that the Court of Review reached the conclusion of law that the expenditure of money on the defence of the company and its managing director, charged jointly, did not satisfy the statutory test of being wholly and exclusively for the 'purpose' (in the statutory sense of that word) of the company's trade. I shall have to decide whether or not that was a correct conclusion of law.
>
> If that sentence also expresses a finding of fact that a conscious reason or object of the board of directors was to serve the private

> interests of the managing director, that was, I have already decided, a finding not reasonably justified by the evidence. "

The primary view of the learned Judge as disclosed in that passage is that in reaching his conclusion Mr. Stuart made a finding of law but that view was made subject to the reservation that it may also encompass a finding of fact. The ultimate finding of the Court of Review was a finding of fact and not a finding of law. The learned Judge's view that a finding of law was involved and the necessity he saw of having to decide whether it was a correct conclusion of law impelled him to embark on a long inquiry into matters of law which was thus a sleeveless exercise.

That the question was one of fact is beyond peradventure. The Court of Review had directed itself correctly as to the legal principles involved when it construed the section - without the aid, we add, of the Mallalieu decision which had yet to be delivered. And it had made its findings of fact. The remaining question was whether on applying the law to the facts as found, the taxpayer had brought itself outside the prohibitions in the statutory provision. That, too, was a question of fact. If authority be needed for what we regard as a basic matter it is to be found in the judgment of Romer L.J. in Bentley, Stokes & Lowless v. Beeson (1952) 2 All E.R. 82. In delivering the judgment of the Court of Appeal His Lordship said :

> " The sole question is whether the expenditure in question was 'exclusively' laid out for business purposes that is: What was the motive or object on the minds of the two individuals responsible for the activities in question? It is well established that the question is one of fact. "

And later :

> " It is, as we have said, a question of fact."

All in all, we think that the Court of Review was right in concluding that the taxpayer had dual purposes when it expended money on the legal costs of Shardha Nand and we are of the opinion that its object insofar as it affected Shardha Nand was not for business purposes. And, in our view, the result that was achieved by the expenditure, namely the relieving of Shardha Nand from the necessity of meeting the costs himself cannot be classified as a mere incidental or consequential effect of the execution of the company's purpose.

Kearsley J. reached a contrary conclusion. He has said that in doing so he has derived great assistance from the decisions of the Australian Courts and it is manifest from his judgment that he placed particular reliance upon the judgment of the Federal Court in Magna Alloys and Research Pty Ltd. v. Federal Commissioner of Taxation (1980) 11 A.T.R. 276. But the Australian cases all had to do with a statutory provision different from the nearest comparable provisions in the laws of Fiji and England. And they were decided by courts inferior - as far as Fiji is concerned - in the hierachy of judicial authority, to the House of Lords which had authoritatively pronounced on a statutory provision which, for all practical purposes, was identical with that of Fiji.

The Magna Alloys decision was, as the learned Judge rightly noted at page 8 of his judgment, "based on the Court's construction of section 51(1) of the Australian Income Tax Assessment Act, 1936 the words of which differ from those of its English and Fijian counterparts".

Brennan J. in his judgment in the Magna Alloys case (op. cit. at page 289) after referring to Warnes & Co. (1919) 2 K.B. 444; I.R.C. v. Von Glehn (1920) 2 K.B. 553 and Spofforth & Bruce v. Golder (1945) A.E.R. 363 - all cases mentioned by Kearsley J. - and referring to an Australian case, went on to say :

> " ... accordingly the English cases provide no authority to determine the deductibility of legal costs under the second limb of section 51(1). "

The second limb refers to "all losses and outgoings ..... necessarily incurred in carrying on a business for the purpose of gaining or producing such income".

The observations of Brennan J., so it seems to us, also apply to the first limb which refers to "all losses and outgoings ..... incurred in gaining assessable income".

We agree with the observations of Brennan J. and are of the opinion that the corollary applies and that the Australian cases provide no authority to determine the deductibility of legal costs under the English counterpart of section 51(1) and likewise the latter's counterpart in Fiji - section 19(b). And we note that the observation of Brennan J. and its import did not escape the notice of the Court of Review and that it played a decisive part in the decision it ultimately took.

All in all, we hold that the respondent's cross-appeal on this ground should be allowed.

The other questions - paragraphs (b) and (c)

It is convenient to consider the remaining grounds of appeal and cross appeal together because the fate of one depends to some extent on the fate of the other. The appellant claims that Kearsley J. erred in law in holding that the profits of the respondent company for the period 11th September, 1978 to 31st December, 1978 could not properly be assessed upon a "time basis"; and the respondent alleges that the learned Judge erred in holding that the respondent was not entitled to carry forward losses incurred in the period 1973 to 1978

against profits derived subsequently.

The starting point in a consideration of these issues is Clause 12.5 of the 1971 agreement which reads:

> "12.5 The Government agrees that it will during the period of FIVE (5) years from the notified date grant to the operating company the benefit of the tax free provisions contained in the Fifth Schedule to the Income Tax Ordinance. "

It is common ground that the "notified date" in terms of that clause was the 10th September, 1973 being the date on which the respondent commenced commercial production. The Income Tax Ordinance referred to in Clause 12.5 was Cap. 176 of the Laws of Fiji 1967 edition, as amended by Ordinance No.46 of 1968. Section 11(1)(b)(i) of the principal Ordinance following the 1968 amendment reads :

> "Subject to the provisions of the next succeeding paragraph, the Governor, where he is satisfied that it is expedient for the economic development of Fiji, may, by notice in the Gazette, specify any company engaged in an approved enterprise as being one to which the tax-free provisions contained in the Fifth Schedule to this Ordinance shall apply and such company shall accordingly enjoy such concession;" (the next succeeding paragraph is not relevant).

It is unnecessary to set out the terms of the Fifth Schedule in detail. It provided for a "tax-free" period of five years from the date of commencement of production; and it is common ground that by its express terms the profit for the period 11th September to 31st December, 1978, being the balance of the accounting period beyond the "tax-free" period, was required to be assessed on a "time basis"; and that losses incurred during the "tax-free" period could be carried forward into the period of tax liability.

For some reason, and we do not know whether it was by accident or design, no notice pursuant to section 11(1)(b)(i) was ever gazetted with the result that no part of the Fifth Schedule was ever made to apply to the respondent's business.

Following the many problems which arose between the Government of Fiji and the respondent, as earlier referred to, attempts were made to resolve them by deed, the first of which was made on the 29th January, 1981. By its terms the respondent acknowledged that it had been and would continue to be subject to the provisions of "the Income Tax Acts as amended or re-enacted from time to time in relation to all assessments to tax made thereunder on the income of the company".

For its part the Government undertook to "procure that the Minister of Finance -

> (a) exercises his power under section 16(2)(b) of the Income Tax Act, 1974, to issue a written instruction to the Commissioner of Inland Revenue specifying the company as a company engaged in an approved enterprise in the Third Schedule to the said Act shall apply in respect of the period of five years from the 10th September, 1973; "

The Third Schedule to the 1974 Act contains provisions for a "tax-free" period, "time basis" assessment, and the carrying forward of losses but on less favourable terms than those contained in the Fifth Schedule.

Unfortunately, further problems arose after the execution of the deed of 29th January, 1981 and it was subsequently cancelled by a new deed. The only purpose in mentioning it at all is that Mr. Kalyan made something of the fact that on the 10th July, 1981 the appellant actually issued a notice of assessment for the period 11th September to 31st December, 1978 which gave credit

for "losses brought forward", which was contrary to his present stand that such losses cannot properly be taken into account. It seems apparent that that assessment was based on the provisions of the deed of the 29th January, 1981 which was subsequently cancelled.

The new deed was executed on 6th January, 1982. It is in similar terms to the earlier deed. In it the respondent again acknowledged itself to be bound by the Income Tax Acts in relation to all assessments to tax made thereunder, but the deed contains no reference to the granting of concessions under the Third Schedule.

On the day following the execution of the deed of the 6th January the Minister of Finance wrote the letter of 7th January, 1982 the text of which we have printed earlier in this judgment.

With that background we turn to consider the first issue, namely whether the Commissioner erred in law in assessing the respondent's liability for tax for the balance of the 1978 year on a time basis. What the Commissioner did in effect was to calculate the respondent's profit for the period from the 11th September to 31st December, 1978 (112 days) as $\frac{112}{365}$ of the total profit for the 1978 year. It appears that there is a difference of some thousands of dollars in tax to the respondent's disadvantage by assessing the profit for the period by that means, rather than on actual profit for the period insofar as it can be ascertained.

In the Court of Review Mr. K.A. Stuart took the view that the parties were bound by the provisions of Clause 12.5 of the 1971 agreement, either by estoppel or contractually, with effect that the "time basis" method of calculation, as provided for in the Fifth Schedule, prevailed. For the same reasons he concluded that the respondent was entitled to the benefit of the earlier losses.

Kearsley J. rejected the estoppel approach, and concluded that as the Fifth Schedule had never applied, because there had been a failure to gazette, it was simply a matter of determining the correct accounting principles upon which the profit for the 112 days should be calculated. This is what he said :

> " I can think of no better way of answering that question than to refer to the sworn testimony of the auditor, Mr. Ram Vilash. He was presumably, an independent and conscientious auditor, mindful of the duty he owed to the public as well as to the company's shareholders. He was a qualified accountant, a partner in the well known firm of Peat Marwick and Mitchell and he had practised for 12 years. He swore that the appellant company's calculation of its profits for the remainder of the year was in accordance with correct accounting principles. His evidence was not contradicted. "

Furthermore it is relevant that in correspondence in September 1978 the Commissioner expressed himself as being in "general agreement" with Mr. Vilash's method of calculation of the profit for the 112 days, which was based on actual sales and expenses, the method of determination of which was explained in some detail in Mr. Vilash's letter of the 12th September.

There is another reason why we are satisfied that assessment on a time basis is inappropriate. In his letter of the 7th January, 1982 the Minister in exercise of the powers vested in him abandoned recovery "of all income tax ... due and owing between the period 10th September, 1973 and 9th September, 1978" while making it clear in a later passage that his decision in no way affected the tax position in respect of any period subsequent to the 9th September. What the Minister was abandoning was a sum certain which could not be arrived at on a time basis calculation. To arrive at the sum to be abandoned and the sum in respect of which no relief was available required a splitting of the financial year with a proper accounting at the end of each period.

There is nothing more that can usefully be said on this ground of appeal which is accordingly dismissed.

We turn now to the respondent's cross appeal concerning the carrying forward of losses which would have been permitted if the Fifth Schedule, or indeed the Third Schedule, had applied.

The respondent's submission on this issue as presented by Mr. Kalyan was that the Crown, and therefore the Commissioner, was contractually bound to apply the provisions of the Fifth Schedule (long since repealed); or, in the alternative, was estopped from acting inconsistently with its promise to grant the respondent the tax benefits of the Fifth Schedule. Although presented in the alternative the arguments appear to amount to the same thing. The Fifth Schedule applied only to companies specified by notice in the Gazette by the Minister of Finance who had a statutory discretion to so specify where he was satisfied that it would be beneficial to the economic development of Fiji. The question is whether Clause 12.5 of the 1971 agreement could fetter that discretion, which was one to be exercised in the public interest.

In the Court of Review Mr. Stuart relied on Robertson v. Minister of Pensions [1948] 2 All E.R. 767 as authority for the proposition that estoppel operates against the Crown, and should so operate in the present circumstances. In Robertson, Denning J. as he then was, invoked two doctrines of his own creation, namely that assurances intended to be acted upon and in fact acted upon were binding; and that where a government department wrongly assumes authority to perform some legal act the citizen is entitled to assume that it has that authority. The proposition about wrongfully assumed authority was emphatically repudiated by the House of Lords in a later case, Howell v. Falmouth Board Construction Co. Ltd. [1951]

A.C. 837, in which Denning L.J. had again advanced it. Wades Administrative Law (5th Ed.) offers this comment on Howell at page 343 :

> " ... it would seem necessary to reject the whole notion of estoppel of a public authority by wrongful assumption of statutory authority. For it clearly conflicts with the basic rule that no estoppel can give the authority power which it does not possess. "

Kearsley J. rejected the estoppel argument on the authority of two cases and we see no reason to go beyond them. The first was Maritime Electric Co. Ltd. v. General Dairies Ltd. [1937] A.C. 61D. In that case the appellant, a public utility company, was under this statutory duty in charging for electricity: "No public utility shall charge demand collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand collect or receive any rates tolls or charges not specified in such schedules". Over a considerable period sums less than the statutory charges were obtained from the respondent through the appellant's consistent misreading of a meter. An estoppel was sought to be raised against the appellant and at page 620 Lord Maugham said :

> " In the view of their Lordships the answer to this question in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships do not propose to express any opinion as to statutes which are not within this category - where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to

release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect, to approach the problem from the wrong direction; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision. "

The second case was Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. [1962] 1 Q.B. 416 where Lord Parker C.J., after referring to the above comments of Lord Maugham in Maritime Electric, said at page 423 :

" As I have said, I can see no logical distinction between a case such as that of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion. "

We therefore conclude that the losses benefit of the Fifth Schedule is not available to the respondent on the basis of estoppel or otherwise.

To hold otherwise it would be necessary to attribute to the Minister the exercise of a statutory discretion in the public good which he had not in fact

exercised, and fetter the Commissioner in the exercise of his statutory duties.

Mr. Kalyan raised an alternative argument on this issue which was to the effect that if the benefit was not conferred on the basis of estoppel or contract then it was conferred by the Minister's letter of the 7th January, 1982. In that letter the Minister said ".... it would be just and proper now for the Government to return to and stand by the undertaking it had made to the company under Clause 12.5". Mr. Kalyan submitted that the clear intention of the letter was to grant to the respondent the full package of Fifth Schedule benefits, an interpretation which he claimed was supported by the Minister's reference to the respondent's tax obligation being "in the region of $1.2 million", which happens to be the respondent's approximate tax saving if the respondent received the full benefit of the Fifth Schedule.

We cannot accept Mr. Kalyan's submissions on this issue. When the letter is read as a whole it is clear that the Minister was granting no more than the five year tax-free period by abandoning recovery of the tax due over that period pursuant to section 61(a) of the Finance Act. He was certainly not purporting to act pursuant to the Fifth Schedule, which had been long repealed and we attach no significance to his passing reference to $1.2 million.

The appeal insofar as it relates to the deduction of legal costs paid in respect of the company and Shardha Nand is allowed. Insofar as it relates to the mode of computation of profits for the part year 1978 it is dismissed.

In the result the cross appeal insofar as it relates to the deduction of legal costs paid in respect

of Messrs Fane and Gibbons and the security guards is dismissed. Insofar as it relates to the carrying forward of the 1973 losses it is also dismissed.

We invite submissions as to costs.

.....
Vice President

.....
Judge of Appeal

.....
Judge of Appeal